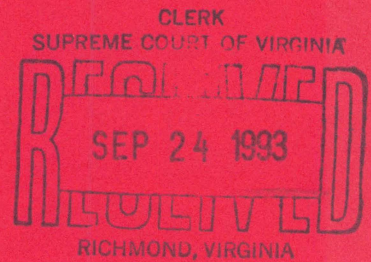


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IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

GEORGE E. BAUMGARDNER,
Appellant,

v.

SOUTHWESTERN VIRGINIA MENTAL
HEALTH INSTITUTE,
STATE MENTAL HEALTH AND
MENTAL RETARDATION BOARD,
and COMMONWEALTH OF VIRGINIA,

Appellees.

Record No. 930625

APPENDIX

Charles L. Bledsoe
McAfee, Bledsoe, Lovell & Lee
1033 Virginia Avenue
Post Office Box 656
Norton, Virginia 24273-0656
(703) 679-6633

Counsel for Appellant

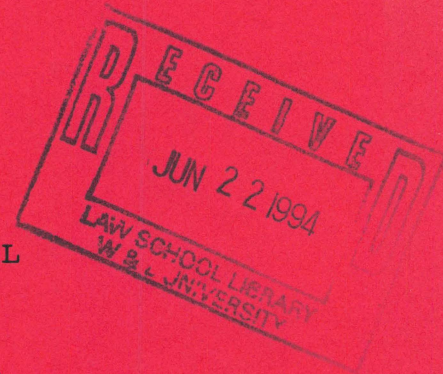


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VIRGINIA:

IN THE CIRCUIT COURT OF SMYTH COUNTY

GEORGE E. BAUMGARDNER,
Administrator of the Estate
of NON THI BAUMGARDNER,
Deceased,

Plaintiff,

vs.

AT LAW

SOUTHWESTERN VIRGINIA MENTAL
HEALTH INSTITUTE,
STATE MENTAL HEALTH AND
MENTAL RETARDATION BOARD,
and COMMONWEALTH OF VIRGINIA,

Defendants.

NOTICE OF FILING

TO: CHARLES L. BLEDSOE, ESQ.
McAfee, Bledsoe & Lovell
P.O. Box 656
Norton, VA 24273
Counsel for Plaintiff

You are hereby notified that defendants are herewith filing a certified copy of the Civil Mental Temporary Detention Order regarding Non Thi Baumgardner entered by the General District Court of Lee County, Virginia on April 29, 1991.


Defendants ask that the court take judicial notice of such Order.

SOUTHWESTERN VIRGINIA MENTAL HEALTH
INSTITUTE, STATE MENTAL HEALTH AND
MENTAL RETARDATION BOARD and
COMMONWEALTH OF VIRGINIA

By Counsel

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PENN, STUART, ESKRIDGE & JONES
P.O. Box 2288
Abingdon, VA 24210

By 
WM. W. ESKRIDGE
VSB No. 3635
Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that I have mailed a copy of the foregoing document to Charles L. Bledsoe, Esq., counsel for plaintiff, this 10th day of July, 1992.


WM. W. ESKRIDGE

CIVIL MENTAL TEMPORARY DETENTION ORDER

Case No. GM91-16

VA CODE § 37.1-57.1

Lee
☒ General District Court
☐ Juvenile and Domestic Relations District Court
Mon. Thi Baumgardner Rt 2 P Hop VA
 NAME OF PATIENT ADDRESS OF PATIENT

TO ANY AUTHORIZED OFFICER:

It is alleged or reliably reported that the patient is mentally ill and in need of hospitalization as supported by:
☒ A sworn petition of George Baumgardner, a responsible person
☐ On the motion of the undersigned supported by probable cause,

☒ (To be completed if heard by a Magistrate) And, based upon advice by Tatisha Taylor, a person skilled in diagnosis or treatment of mental illness.

THE FACTS are as follows:

agitated impaired impulse control bizzare behavior

THEREFORE, you are hereby commanded to take the patient into custody, and

☐ Bring the patient before a judge or (if civil) special justice, OR

☒ If the patient cannot be conveniently brought before a judge or special justice, transport the patient from his present location at:

Lee G Skiff Dept
 PRESENT LOCATION OF PATIENT
Southeastern State
 NAME AND ADDRESS OF INSTITUTION
 to Lee P. Higgins 29 April 91 12:30
 PERSON CONFIRMING BEDSPACE AVAILABILITY DATE AND TIME TELEPHONE NO.

a convenient and willing institution, which is hereby ORDERED to detain said patient for a maximum of 48 hours from time of admission to his/her hearing; provided, however, if said 48-hour period terminates on Saturday, Sunday, or legal holiday, the patient shall be detained a maximum of 72 hours (or 96 hours when such legal holiday occurs on a Monday or Friday) and that a Saturday, Sunday or legal holiday shall be deemed to include the time period up to 8:00 a.m. of the next day which is not a Saturday, Sunday or legal holiday. The defendant may also be transported to such other facility as may be necessary to obtain emergency medical evaluation or treatment prior to placement in the hospital. The institution and examining physician may provide (only emergency) medical and psychiatric services pursuant to this order. The patient may not be released prior to the expiration of such period except by order of court. This ORDER shall be returned to the Court OR special justice prior to the hearing. This order becomes void if not served within ☒ 24 hours ☐ _____ hours after issuance.

29 April 91 1:33 L. Burch 346-7744
 DATE AND TIME OF ISSUANCE JUDGE ☐ SPECIAL JUSTICE ☐ MAGISTRATE TELEPHONE NO.

EXECUTED by delivering the patient as directed by this Order on this day:

3:59 PM 4-29-91 3:59 PM 4-29-91
 DATE AND TIME OF EXECUTION DATE AND TIME OF DELIVERY TO INSTITUTION

Chadwick
 OFFICER TAKING PATIENT INTO CUSTODY
712 LCO 052
 BADGE NO., AGENCY AND JURISDICTION
 for R. Chadwick
 SHERIFF

"I CERTIFY THAT THE DOCUMENT TO WHICH THIS AUTHENTICATION IS AFFIXED IS A TRUE COPY OF A RECORD IN THE LEE COUNTY GENERAL DISTRICT COURT, THAT I HAVE CUSTODY OF THE RECORD, AND THAT I AM THE CUSTODIAN OF THAT RECORD."
 6-29-92 V. H. Pearson
 DATE ☐ CLERK ☒ DEPUTY CLERK

PART I

CIVIL MENTAL TEMPORARY DETENTION ORDER

VIRGINIA:

IN THE CIRCUIT COURT OF LEE COUNTY

GEORGE E. BAUMGARDNER,
ADMINISTRATOR OF THE ESTATE OF
NON THI BAUMGARDNER, deceased

PLAINTIFF

VS.

MOTION FOR JUDGMENT

SOUTHWESTERN VIRGINIA MENTAL HEALTH INSTITUTE
SERVE: GERALD DEANS, DIRECTOR
502 East Main Street
Marion, Virginia 24354

AND

STATE MENTAL HEALTH AND MENTAL RETARDATION BOARD
SERVE: KING E. DAVIS, PHD.
109 Governor Street
Richmond, Virginia 23214

AND

COMMONWEALTH OF VIRGINIA
SERVE: MARY SUE TERRY, ATTORNEY GENERAL
Supreme Court Building
101 North Eighth Street
Richmond, Virginia 23219

DEFENDANTS

TO THE HONORABLE JUDGE OF THE AFORESAID COURT:

I.

Plaintiff, George E. Baumgardner, is a citizen and resident of Lee County, Virginia and qualified as Administrator of the Estate of Non Thi Baumgardner, deceased, on August 12, 1991 in the Circuit Court of Lee County, Virginia. The Defendant, Southwestern Virginia Mental Health Institute, is a mental health facility located in Marion, Virginia. Defendants, State Mental Health and Mental Retardation Board and the Commonwealth of Virginia, are governmental agencies which oversee and are responsible for the Defendant, Southwestern Virginia Mental Health Institute,

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EDSOE &
LOVELL
EYES AT LAW
BOX 656
VIRGINIA 24273

L. MCATHEE
L. BLEDSOE
L. LOVELL

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and are liable for personal injuries caused by the negligence or wrongful acts or omissions of any of their employees while acting in the scope of their employment in accordance to Virginia Code Annotated Section 8.01-195.3.

II.

Plaintiff's decedent was hospitalized by Court Order to Southwestern Virginia Mental Health Institute at said Defendant's facility in Marion, Virginia on the 29th day of April, 1991 at approximately 6:00 p.m.

III.

That once Plaintiff's decedent was admitted to the Defendant facility, the Plaintiff's decedent was housed within isolation in a holding cell within the facility.

IV.

That Plaintiff's decedent, upon her arrival at the facility, became agitated to a point where she was placed in a 4-6 point restraint at approximately 11:55 p.m.

V.

That on or about 1:00 a.m. on the 30th day of April, 1991, Plaintiff's decedent was found dead in her room.

VI.

Plaintiff's decedent's death was caused by the carelessness and negligence of the Defendant facility, and/or its agents or employees in that:

A. Defendant and/or its agents or employees failed to provide adequate, competent and non-negligent patient care;

B. Defendant and/or its agents or employees failed

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EDSOE &
LOVELL
NEYS AT LAW
D. BOX 656
VIRGINIA 24273

L.E. McAFEE
ES L. BLEDSOE
EN L. LOVELL

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to get an adequate history of patient;

C. Defendant and/or its agents or employees failed to order proper testing;

D. Defendant and/or its agents or employees failed to properly diagnose her condition;

E. Defendant and/or its agents or employees failed to properly resuscitate patient;

F. Defendant and/or its agents or employees failed to sedate agitated patient;

G. Defendant and/or its agents or employees failed to exercise the care and skill required of nursing staff, aides, orderlies and physicians;

H. Defendant and/or its agents or employees failed to communicate patient's condition, her requests and complaints to her physician;

I. Defendant and/or its agents or employees failed to render assistance to Plaintiff's decedent and monitor her condition;

J. Defendant and/or its agents or employees failed to call a competent physician once Plaintiff's decedent became agitated; and,

K. Although the Defendant and/or its agents or employees should have known that Plaintiff's decedent was in an agitated condition, they failed to take the proper measures to prevent Plaintiff's decedent's death.

VII.

As a direct and proximate result of the carelessness

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and negligence of the Defendant and/or its agents or employees, Plaintiff's decedent died at approximately 1:00 a.m. on the 30th day of April, 1991.

VIII.

That Plaintiff, by counsel, has given prior notice of his intention to file this action and having waited the necessary time period, all as required by Section 8.01-581.2 of the Code of Virginia, 1950, as amended, moves for a judgment against the Defendants on the grounds and in the amounts set forth above.

IX.

By reason of the aforementioned negligence of the Defendants, jointly and severally, the Plaintiff's decedent suffered serious injuries resulting in the death of your undersigned Plaintiff's decedent on April 30, 1991. Plaintiff's decedent, Non Thi Baumgardner, died intestate, survived by the following statutory beneficiaries:

1. George E. Baumgardner, Route 2 Box 75, Pennington Gap, Virginia, husband;
2. John T. Baumgardner, Route 2 Box 75, Pennington Gap, Virginia, son; and,
3. Rebecca M. Baumgardner, Route 2 Box 75, Pennington Gap, Virginia, daughter.

WHEREFORE, Plaintiff demands judgment against the Defendants, Southwestern Virginia Mental Health Institute, State Mental Health and Mental Retardation Board and the Commonwealth of Virginia, jointly and severally, in the amount

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EDSOE &
LOVELL
NEYS AT LAW
P. BOX 656
VIRGINIA 24273

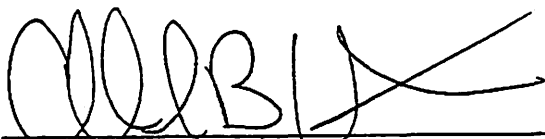
J. B. NEAFFE
ES L. EEDSOE
N L. LOVELL

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of ONE MILLION DOLLARS (\$1,000,000.00) for compensatory damages and an additional amount of ONE MILLION DOLLARS (\$1,000,000.00) for punitive damages and his costs expended in this action.

GEORGE E. BAUMGARDNER,
Administrator of the Estate of
NON THI BAUMGARDNER, deceased

BY: C O U N S E L



CHARLES L. BLEDSOE, ESQUIRE
McAFEE, BLEDSOE & LOVELL
1033 Virginia Avenue
P. O. Box 656
Norton, Virginia 24273
(703) 679-6633

McAFEE
BLEDSOE &
LOVELL
ATTORNEYS AT LAW
P. O. BOX 656
NORTON, VIRGINIA 24273

W. E. McAFEE
CHARLES L. BLEDSOE
AND LOVELL

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VIRGINIA:

IN THE CIRCUIT COURT OF LEE COUNTY

GEORGE E. BAUMGARDNER,

Plaintiff,

vs.

SOUTHWESTERN VIRGINIA MENTAL
HEALTH INSTITUTE,
STATE MENTAL HEALTH AND
MENTAL RETARDATION BOARD,
and COMMONWEALTH OF VIRGINIA,

Defendants.

AT LAW

Law No.:

DEMURRER

The defendants, Southwestern Virginia Mental Health Institute, State Mental Health and Mental Retardation Board and Commonwealth of Virginia say that the Motion for Judgment herein is not sufficient in law, and assign the following grounds in support of their Demurrer:

(1) The Motion for Judgment fails to allege facts sufficient to state a cause of action against these defendants or any of them.

(2) Plaintiff's claim against defendants is barred by the doctrine of governmental or sovereign immunity.

(3) The Motion for Judgment fails to state a cause of action for the recovery of punitive damages because

(a) the Motion for Judgment fails to allege facts sufficient to state a cause of action for punitive damages against a private individual, and

(b) as a matter of public policy, punitive damages may not be recovered against the Commonwealth or any agency thereof.

4. The Motion for Judgment fails to state a cause of action for the recovery in excess of \$1,000,000.00 because the claim arises from the alleged negligence of health care providers as defined in Section 8.01-581.1 of the Code of Virginia, the liability of such health care providers is limited by Section 8.01-581.15 of the Code of Virginia to the sum of \$1,000,000.00, and defendants, as alleged employers or principals of the alleged agents, cannot be held liable for an amount greater than that for which the agents could be held liable.

SOUTHWESTERN VIRGINIA MENTAL HEALTH
INSTITUTE, STATE MENTAL HEALTH AND
MENTAL RETARDATION BOARD and
COMMONWEALTH OF VIRGINIA

By Counsel

PENN, STUART, ESKRIDGE & JONES
P.O. Box 2288
Abingdon, VA 24210

By


WM. W. ESKRIDGE

VSB No. 3635

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that I have mailed a copy of the foregoing document to Charles L. Bledsoe, Esq., counsel for plaintiff, this 13th day of April, 1992.


WM. W. ESKRIDGE

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VIRGINIA:

IN THE CIRCUIT COURT OF SMYTH COUNTY

GEORGE E. BAUMGARDNER,
Administrator of the Estate
of NON THI BAUMGARDNER,
Deceased,

Plaintiff,

vs.

AT LAW

Law No.:

SOUTHWESTERN VIRGINIA MENTAL
HEALTH INSTITUTE,
STATE MENTAL HEALTH AND
MENTAL RETARDATION BOARD,
and COMMONWEALTH OF VIRGINIA,

Defendants.

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS'
MOTION TO DISMISS AND DEMURRER

STATEMENT OF THE CASE

In this action, plaintiff, George E. Baumgardner, Administrator of the Estate of Non Thi Baumgardner, deceased, seeks damages from Southwestern Virginia Mental Health Institute ("Hospital"), the State Mental Health and Mental Retardation Board ("Board") and the Commonwealth of Virginia ("Commonwealth"). Plaintiff alleges that on April 29, 1991, pursuant to a temporary detention order issued by the General District Court of Lee County, the Hospital admitted plaintiff's decedent. Approximately seven hours after admission, the decedent died.

In response to the motion for judgment, defendants filed a motion to dismiss and demurrer along with a supporting memorandum. On October 15, 1992, the Court conducted a hearing on

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the motion and demurrer. During the hearing, plaintiff conceded that to the extent plaintiff's claim exceeds \$75,000, defendants' motion to dismiss is valid and should be granted. At the close of the hearing, the Court granted plaintiff leave to file a responsive memorandum addressing defendants' demurrer. This memorandum replies to plaintiff's responsive memorandum.

ARGUMENT

At the time of decedent's death, decedent was confined for treatment at the Hospital pursuant to a Civil Mental Temporary (48 hours) Detention Order of the Lee County General District Court. Through the Virginia Tort Claims Act, the Commonwealth has waived the common law defense of sovereign immunity in certain instances. The Act contains eight exclusions. The exclusion found at § 8.01-195.3(4) ("Exclusion 4") excludes claims based on acts or omissions of state employees in the execution of a lawful order of any court. Defendants' demurrer presents the issue of whether Exclusion 4 applies. If the exclusion applies, plaintiff's claim against defendants is barred by the Doctrine of Sovereign Immunity and defendants' demurrer should be granted.

Plaintiff maintains while decedent was confined at the Hospital, that defendants' employees were negligent while providing medical services to decedent. The Virginia Tort Claims Act provides, "Subject to the provisions of this article" the Commonwealth shall be liable for claims on account of personal injury or death caused by the negligent or wrongful act of any

employee under circumstances where the Commonwealth, if a private person, would be liable. The act further provides:

Any recovery based on the following claims are hereby excluded from the provisions of this article: . . . (4) Any claim based upon an act or omission of an officer, agent or employee of any agency of government in the execution of a lawful order of any court."

Va. Code § 8.01-195.(4).

Plaintiff makes various arguments urging the Court to adopt a very narrow interpretation of Exclusion 4. Specifically, plaintiff argues that Exclusion 4 applies only to claims such as false imprisonment or malicious prosecution. Plaintiff argues that decedent's "confinement" was pursuant to the court order but decedent's "treatment" was not pursuant to the order. Finally, plaintiff argues that defendants' interpretation of Exclusion 4 is erroneous in that prisoners in state penal institutions are all confined pursuant to court order and yet have remedies under the Virginia Tort Claims Act.

As indicated in defendants' opening memorandum, defendants maintain that Exclusion 4 is clear and unambiguous and clearly includes plaintiff's claim. Defendants maintain that since the exclusion is clear, there is no need for the court to apply rules of statutory construction. Since plaintiff's arguments call for a very strict interpretation of Exclusion 4, plaintiff apparently maintains that the exclusion is ambiguous and requires interpretation. To the extent that the Court deems Exclusion 4 ambiguous, it is clear that the exclusion must be interpreted in favor of defendants.

Prior to the adoption of the Tort Claims Act, the Commonwealth and its subdivisions were immune from liability for the negligent acts of their servants, agents and employees. Eriksen v. Anderson, 195 Va. 655, 79 S.E.2d 597 (1954). Through the Act, the Virginia General Assembly altered the common law and waived the defense of sovereign immunity in certain situations. The Virginia General Assembly specifically excluded eight types of claims to which the Act would have no application such that the defense would remain in full force and effect.

Under Virginia law, it well established that a statute written in derogation of the common law is to be strictly construed. As stated by the Virginia Supreme Court in N. & W. R. Co. v. Virginian R. Co., 110 Va. 631, 646 (1910), "[I]t has been frequently decided by this court, and may be taken as established law with us, that the common law is not to be considered as altered or changed by statute unless the legislative intent be plainly manifested . . ." Statutes are not to be deemed to change a common law rule by implication, unless the intention to do so is obvious. A statute written in derogation of the common law is to be strictly construed. The court will not extend the statute beyond its clear meaning. Wilson v. Volkswagen of America, Inc., 445 F.Supp. 1368 (E.D. Va., 1978). The foregoing authorities dictate that the court interpret Exclusion 4 liberally in defendants' favor.

In Messina v. Burden, 228 Va. 301 (1984), the Virginia Supreme Court said as follows:

Contrary to the suggestions of the appellants, the doctrine of Sovereign Immunity is 'alive

and well' in Virginia. Though this Court has, over the years, discussed the doctrine in a variety of contexts and refined it for application to constantly shifting facts and circumstances, we have never seen fit to abolish it. Nor does the General Assembly want the doctrine abolished. In 1981, the General Assembly enacted the Virginia Tort Claims Act. Had it so chosen, the legislature could have used the act as a vehicle to abolish sovereign immunity. It did just the contrary.

Messina, 228 Va. at 307. As indicated previously, plaintiff maintains that Exclusion 4 applies only to claims of false imprisonment or malicious prosecution. Plaintiff's argument is without merit. Exclusion 4 must be interpreted liberally in determining which claims fall within the scope of the exclusion. The Virginia General Assembly could have used the Act to abolish sovereign immunity altogether. The Virginia General Assembly could have used language in Exclusion 4 that would have limited the scope of the exclusion to claims of malicious prosecution and false imprisonment. Instead of adopting a limited exclusion, the General Assembly enacted an exclusion covering "Any claim based upon an act or omission . . . in the execution of a lawful order of any court." (Emphasis added). The court should interpret Exclusion 4 broadly to include plaintiff's claim. The court should sustain defendants' demurrer.

Plaintiff maintains that Exclusion 4 does not apply because plaintiff was "confined" at the Hospital pursuant to the order but was not "treated" at the Hospital pursuant to the order. Plaintiff's argument is simply incorrect. The Civil Mental Temporary Detention Order specifically provides, "The institution

and examining physician may provide (only emergency) medical and psychiatric services pursuant to this order." Plaintiff's argument ignores the fact that the order specifically provides for treatment. Defendants' demurrer should be sustained.

Finally, plaintiff argues that Exclusion 4 does not apply since prisoners in state penal institutions are confined pursuant to court order and yet have remedies under the Virginia Tort Claims Act. Plaintiff directs the Court's attention to Irshad v. Spann, 543 F.Sup. 922 (D.C., E.D. Va. 1982) and Groves v. Cox, 559 F.Sup. 772 (D.C., E.D. Va. 1983). Plaintiff implies that Irshad and Groves indicate that prisoners have remedies which are not barred by the doctrine of sovereign immunity. Plaintiff's reliance on Irshad and Groves is misplaced.

Irshad and Groves involved prisoner claims for damages under 42 U.S.C. § 1983 for negligent deprivation of property. In both cases, the Court held that the prisoners had remedies which satisfied procedural due process in that the prisoner could bring an action for conversion or detainment. In both cases, the Court concluded that the possibility of a sovereign immunity defense did not deprive the plaintiff of due process. As the Court stated in Groves:

Virginia's tort remedies provide plaintiff the opportunity for a fair hearing, notwithstanding the possibility that defendants' invocation of sovereign immunity will preclude plaintiff from securing relief.

Groves, 559 F.Sup. at 777. Neither Irshad nor Groves indicates that sovereign immunity is not a viable defense to actions by

prisoners. More importantly, plaintiff's argument ignores the fact that the seventh exclusion of the Virginia Tort Claims Act ("Exclusion 7") excludes claims by inmates, "Unless the claimant verifies under oath, by affidavit, that he has exhausted his remedies under the adult institutional inmate grievance procedures promigated by the Department of Corrections." Thus, the Act does remove the defense of sovereign immunity with regard to prisoner claims where the prisoner verifies under oath that he has exhausted his remedies under inmate grievance procedures. Plaintiff's comparison of the claim at bar with claims by prisoners is irrelevant since Exclusion 7 ultimately permits prisoner claims whereas Exclusion 4 ultimately bars claims arising from the execution of any court order. Plaintiff's arguments in support of a narrow construction of Exclusion 4 are inconsistent with well established rules of statutory construction and illogical. Defendants' demurrer should be granted.

CONCLUSION

Defendants' demurrer presents the issue of whether Exclusion 4 of the Virginia Tort Claims Act should be interpreted narrowly so as to deprive defendants of the common law defense of sovereign immunity or whether Exclusion 4 should be interpreted broadly in favor of continuing the common law defense of sovereign immunity with regard to the claims referred to in Exclusion 4. Under well established Virginia law, the court should interpret Exclusion 4 liberally in favor of retaining the common law defense of sovereign immunity with regard to plaintiff's claim. The court

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should not limit Exclusion 4 to false imprisonment and malicious prosecution claims. It is clear from the Lee County General District Court's order that decedent's confinement and treatment were pursuant to the order. Plaintiff's claim is a claim based upon the alleged act or omission of an officer, agent or employee of the government in the execution of a lawful order of the Lee County General District Court. Defendants' demurrer should be sustained.

SOUTHWESTERN VIRGINIA MENTAL
HEALTH INSTITUTE, STATE MENTAL
HEALTH AND MENTAL RETARDATION
BOARD and COMMONWEALTH OF
VIRGINIA

By Counsel

PENN, STUART, ESKRIDGE & JONES
P.O. Box 2288
Abingdon, Virginia 24210

By


Wm. W. Eskridge
Byrum L. Geisler
Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that I have mailed a copy of the foregoing document to Charles L. Bledsoe, Esq., counsel for plaintiff, this 24th day of November, 1992.


Wm. W. Eskridge

VIRGINIA:

Smythe
IN THE CIRCUIT COURT OF ~~LEE~~ COUNTY

GEORGE E. BAUMGARDNER,

Plaintiff,

vs.

AT LAW

SOUTHWESTERN VIRGINIA MENTAL
HEALTH INSTITUTE,
STATE MENTAL HEALTH AND
MENTAL RETARDATION BOARD,
and COMMONWEALTH OF VIRGINIA,

Defendants.

FINAL ORDER

On September 17, 1992, came the parties, by their respective counsel, upon defendant's Demurrer to the Motion for Judgment herein, which Demurrer was argued by counsel for the parties. Thereupon the Court took time to receive and consider briefs and memoranda submitted by counsel for the parties and to consider of its opinion. Thereafter, on January 19, 1993, the Court issued its letter opinion that the defendant's Demurrer should be sustained.

For the reasons stated in the Court's letter opinion of January 19, 1993, it is ORDERED that defendants' Demurrer herein be, and the same is hereby, sustained. It is FURTHER ORDERED that plaintiff's action against defendants be, and it hereby is, dismissed with prejudice and stricken from the docket of the Court.

The Clerk shall send attested copies of this Order to counsel of record.

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Requested:

PENN, STUART, ESKRIDGE & JONES
P.O. Box 2288
Abingdon, VA 24210

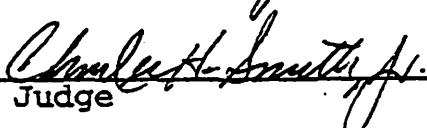
By 
WM. W. ESKRIDGE
Counsel for Defendants

Seen and objected to:

McAFEE, BLEDSOE, LOVELL & LEE
P.O. Box 656
Norton, VA 24273

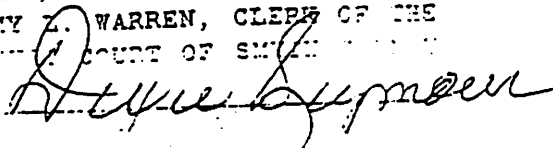
By 
LEWEY K. LEE
Counsel for Plaintiff

ENTER, this 4th day of February, 1993.


Judge

A COPY, TESTE:

JERRY L. WARREN, CLERK OF THE
COURT OF SMITH COUNTY



ASSIGNMENT OF ERROR

Appellant assigns as error the circuit court's sustaining of the appellees' demurrer based on its ruling that the appellees are immune from suit pursuant to Va. Code Ann. § 8.01-195.3(4) (1992).

CERTIFICATE OF SERVICE

I, Charles L. Bledsoe, Counsel for Appellant, certify that I have complied with Rule 5:26(d) of the Rules of the Supreme Court of Virginia by mailing 20 copies of the foregoing Appendix to the Office of the Clerk of the Supreme Court, and three copies to opposing counsel, William W. Eskridge and Byrum L. Geisler, Penn, Stuart, Eskridge & Jones, Post Office Box 2288, Abingdon, Virginia 24210.

Dated: _____

Charles L. Bledsoe
McAfee, Bledsoe, Lovell & Lee
1033 Virginia Avenue
Post Office Box 656
Norton, Virginia 24273

Counsel for Appellant