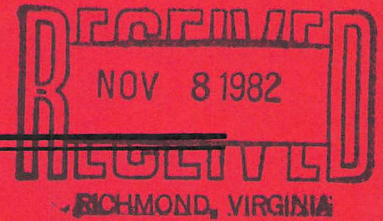


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JAN 2 1985

LEONARD ARMSTRONG,
Appellant

v.

DENNIS R. JOHNSON,
Appellee

APPENDIX

Blair D. Howard
HOWARD & HOWARD, P.C.
128 N. Pitt Street
Alexandria, Va. 22314

Charles G. Flinn
acting county atty.
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Arlington, Va. 22201

Counsel for Appellant

Counsel for Appellee

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MOTION FOR JUDGMENT

COMES NOW the plaintiff, LEONARD ARMSTRONG, by counsel, Blair D. Howard, and moves this Court for judgment and award of execution against the defendant, DENNIS R. JOHNSON, in the amount of Twenty-five Thousand Dollars (\$25,000.00) in damages plus costs and interest and in support thereof, plaintiff alleges as follows:

1. On or about the 4th day of May, 1978, plaintiff, a pedestrian, was proceeding along the roadway on South Eads Street in Arlington County, Virginia, near the intersection of South Eads Street and Glebe Road.

2. At the time and place aforesaid, there was a manhole cover on South Eads Street along the pathway which the plaintiff was travelling, which said manhole cover was being maintained, serviced and repaired by the defendant herein, DENNIS R. JOHNSON, in his capacity as Chief of the Operations Division of the Department of Public Works in Arlington County, Virginia.

3. It was the duty of the defendant, DENNIS R. JOHNSON, as Chief of the Operations Division of the Department of Public Works for Arlington County to maintain the aforesaid manhole cover free of defect, to insure that the manhole cover was properly inspected, from time to time in view of the defendant's prior knowledge that another pedestrian on a previous occasion had fallen into the same manhole cover, and to warn the public of any defect or hazard existing at the site of the manhole cover on South Eads Street near its intersection with West Glebe Road. It was further the duty of the defendant, DENNIS R. JOHNSON, to maintain and repair the manhole cover so as to prevent injury to pedestrians using the walkway adjacent to South Eads Street and, more particularly, the plaintiff herein, LEONARD ARMSTRONG.

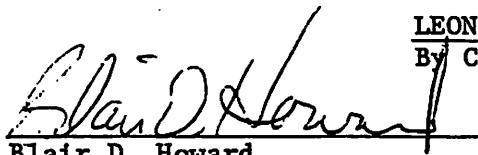
4. Notwithstanding the aforesaid duties and the prior knowledge of the defendant, DENNIS R. JOHNSON, that the manhole cover on South Eads Street constituted a hazard to the public; the defendant, DENNIS R. JOHNSON, did negligently fail to inspect, maintain and keep in proper repair the manhole cover on South Eads Street, thus allowing the aforesaid manhole cover to become a hazard to pedestrians using the walkway along South Eads Street. In addition to the foregoing, the defendant, DENNIS R. JOHNSON, did fail to warn the public of any hazard or defect existing at the site of the manhole cover in issue.

5. As a direct and proximate result of the aforesaid negligence of the defendant, DENNIS R. JOHNSON, the plaintiff, LEONARD ARMSTRONG, while walking along the pathway of South Eads Street, did step on the aforesaid manhole cover and, because of its defective condition, the plaintiff fell into the manhole causing him to sustain numerous injuries to his person and requiring him to spend large and divers sums of money for hospital care, medical care and further causing him to lose time from his employment in the past and in the future. That as a further direct and proximate result of the aforesaid negligent acts of the defendant, DENNIS R. JOHNSON, the plaintiff sustained mental pain, anguish, embarrassment, both in the past and in the future.

WHEREFORE, plaintiff moves this Court for judgment and award of execution against the defendant, DENNIS R. JOHNSON, in the amount of \$25,000.00 plus interest and costs.

LEONARD ARMSTRONG

By Counsel



Blair D. Howard
Counsel for Defendant

SPECIAL PLEA OF IMMUNITY AND AMENDED DEMURRER
OF DENNIS JOHNSON.

The defendant, Dennis Johnson, by counsel, demurrs to the Motion For Judgment (Motion) and states that it is insufficient in law. The grounds for this demurrer are as follows:

1. The pleading fails to allege any duty of care recognized in law which was owed to the plaintiff and there is no such duty.

2. Dennis Johnson is an employee of Arlington County, a political subdivision and integral component of the Commonwealth, and he was at all times acting in a supervisory and policy making capacity within the scope of his authority and thus, he shares the sovereign immunity of the Commonwealth of Virginia in the alternative, he was at all times performing the duties required of him. He was also pursuing a governmental function.

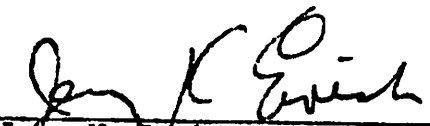
3. Dennis Johnson cannot be sued on a theory of respondeat superior or some other vicarious liability theory which attempts to sue him for the actions or inactions of subordinates because such theories have no application to public officers who act in the performance of their public duties.

4. Dennis Johnson is entitled to official immunity, at all times he acted in good faith in the performance of his duties.

Accordingly, the motion should be dismissed.

DENNIS JOHNSON

By Counsel



Jerry K. Emrich
Arlington County Attorney

David R. Lasso
David R. Lasso
Assistant County Attorney
1400 N. Courthouse Road, #106
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(703) 558-2705
Counsel for Defendant.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Special Plea Of Immunity and Amended Demurrer of Dennis Johnson, was mailed, postage prepaid, to Blair D. Howard, Counsel for Plaintiff, 128 North Pitt Street, Alexandria, Virginia 22314, on this 27th day of May, 1981.

David R. Lasso

STIPULATION OF FACTS

1. Dennis Johnson was, on May 5, 1978, the Chief of the Operations Division of the Arlington County Department of Public Works.

2. The Public Works Department provides numerous services, including bikeway, street and sidewalk construction and maintenance; traffic engineering; transportation planning; solid waste collection and disposal; storm sewer construction and maintenance; litter control; water main distribution maintenance and billings; sanitary sewer main maintenance and water pollution control.

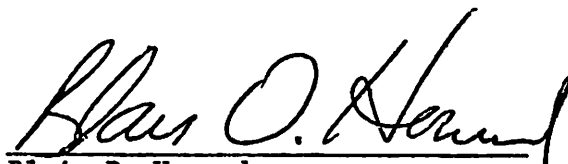
3. The Public Works Department Operations Division is responsible for the direction and coordination of division activities in project construction, inspection and maintenance. There are 11 sections in the Operations Division, with the functional activities as follows: administration, capital construction, inspections, concrete maintenance, storm sewer maintenance (which would include the maintenance of street manhole covers), asphalt maintenance, tree trimming, snow removal, earth recycling, bus shelter maintenance and litter control.

4. The distinguishing features of the Chief of the Operations Division are as follows:

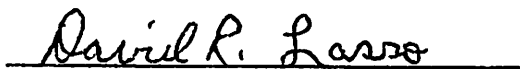
a. This is technical and administrative work supervising all the field construction, maintenance and inspection functions of the Transportation Department.

b. The Chief directs and coordinates activities essential to the provision of streets, sidewalks, curb and gutter and storm sewers, and other transportation related facilities. Work involves the application of professional engineering knowledge and skills to solve problems in highway construction and maintenance. The employee has wide latitude in exercising

independent judgment, subject only to administrative review by the Director of the Department of Transportation.

A handwritten signature in dark ink, appearing to read "Blair D. Howard", written over a horizontal line.

Blair D. Howard
Counsel for Plaintiff

A handwritten signature in dark ink, appearing to read "David R. Lasso", written over a horizontal line.

David R. Lasso
Counsel for Defendant

MEMORANDUM IN SUPPORT OF JOHNSON'S
DEMURRER AND PLEA OF IMMUNITY

I. FACTS

This case concerns personal injuries suffered by the plaintiff when he fell (partially) into a manhole which was covering an Arlington County storm sewer catch basin. The sole defendant is Dennis Johnson. Johnson is Chief of the Operations Division of the Arlington County Department of Public Works. The department and operations division are administrative parts of the County government, they have no separate legal existence. See the accompanying "Stipulation of Facts."

In the motion for judgment, it is alleged that Johnson failed to "inspect, maintain and keep in proper repair the manhole" mentioned above, and that he failed to warn pedestrians of any defect at the site. Operations is one of several divisions of the Department of Public Works, and its functions include capital construction of streets, curbs and gutters, storm sewer, concrete and asphalt, maintenance and inspections, tree trimming, snow removal and litter control. The Chief of this division supervises all of these functions, and uses independent judgment requiring administrative and engineering knowledge subject only to administrative review by the Director of the Department of Transportation.

II. ISSUES

A. Is the chief executive officer of the Operations Division of the County's Public Works Department entitled to the sovereign immunity of the Commonwealth in a case alleging simple negligence in his administration of the Division?

B. Is the same officer protected by the separate doctrine of official immunity as to non-malicious acts performed in the course of his employment?

C. Assuming that neither sovereign immunity nor official immunity apply to the Chief of a Division of the County's Public Works Department, is there, in any event, a duty of care recognized by the law as being owed to the plaintiff apart from a duty owed to the general public?

III. ARGUMENT

A. THE CHIEF OF THE OPERATIONS DIVISION OF ARLINGTON COUNTY'S PUBLIC WORKS DEPARTMENT IS ENTITLED TO SOVEREIGN IMMUNITY.

There is no doubt that the County of Arlington shares the sovereign immunity of the State of Virginia and cannot be sued in tort for a negligent act of a County officer or employee. Mann v. County Board of Arlington, 199 Va. 169, 98 S.E.2d 515 (1957). The question presented by this case is whether Dennis Johnson, the Chief Executive of the Operations Division of the County Public Works Department, is entitled to share that sovereign immunity. Other questions which are quite apart from that of sovereign immunity are whether Johnson is entitled to official immunity, and whether there existed a duty of care recognized by the law which was owed to the plaintiff.

In its most recent discussion of the applicability of sovereign immunity to public employees, the Virginia Supreme Court stated that there is a "distinction between the sovereign Commonwealth of Virginia and its employees and a governmental agency created by the Commonwealth and its employees." James v. Jane, 221 Va. 4351, 267 S.E.2d 108, 112 (1980). Employees of the latter have no sovereign immunity. Ibid. The Supreme Court's rule that employees of certain governmental agencies are not immune has only been applied to school employees. See id. and Shortt v. Griffitts, 220 Va. 53, 255 S.E.2d 479 (1979) (athletic director and baseball coach/buildings and grounds supervisor of high school could not assert sovereign immunity to claim of negligently maintaining, supervising and inspecting the track).

In Shortt v. Griffitts, the court reconciled two earlier opinions; one involved school employees who were not immune and the other employees of a state hospital who were immune. In Crabbe v. School Board and Albrite, 209 Va. 356, 164 S.E.2d 639 (1968), the court held that a high school shop teacher was not immune from a claim he allowed a student to use a defective power

saw. It was alleged that this was negligence or gross negligence. Although the teacher in Crabbe was not entitled to claim sovereign immunity, the School Board was held to be immune on the grounds it was a "governmental agency" of the state which performed a governmental function; such agencies are immune absent an express waiver of immunity by the legislature. In its decision in Crabbe, the court reaffirmed the principles of immunity of School Boards which were set forth in more detail in Kellam v. School Board of the City of Norfolk, 202 Va. 252, 117 S.E.2d 96 (1960).

In the Kellam case, the court noted that School Boards are statutory creatures whose duties to supervise schools as required by the Virginia Constitution; they are involuntary "public quasi-corporation" with only such limited powers as are necessary to operate schools. A most important point which will be developed below is that the Kellam court treated the School Board in the same way it treats municipal corporations such as cities. For example, the court discussed the distinction between governmental and proprietary acts; in doing the former a municipal corporation has sovereign immunity, in doing the latter it does not. The Kellam court said that the School Board was acting in a governmental capacity in maintaining a school auditorium (the plaintiff had fallen on a slippery spot).

Several years after the Crabbe and Kellam decisions, the court decided Lawhorne v. Harlan, 214 Va. 405, 200 S.E.2d 569 (1973). In Lawhorne, a child died when his head wound was not treated properly by an intern employed by the University of Virginia Hospital in its emergency room. The plaintiff sued the administrator of the hospital who was the hospital's overall supervisor and who was not a physician, the assistant administrator whose duties included the direct administrative supervision of the emergency room, and a recent medical school graduate employed as an intern and not fully licensed to practice medicine. It was claimed that the intern failed to properly diagnose and treat the injury,

and that the administrators did not maintain adequate operational procedures at the hospital. The court said that the hospital was an "organ of the state" and was immune; the hospital was also referred to as a "state agency." The court further held that immunity was available to an "employee of the state or of one of its agencies who performs functions or exercises discretionary judgment within the scope of his employment." The court distinguished Crabbe and said that it concerned a act which was "so negligent as to take him (the school teacher) outside the scope of his employment." Lawhorne, supra at 407. The Lawhorne court then held the administrators to be immune saying they "exercised discretionary powers in performing their duties as administrators of the hospital...and public policy dictates that this should be the rule." Ibid. The intern was also held to be immune, as he too was said to be exercising discretionary and not ministerial duties. Ibid at 408.

The Lawhorne court was careful to note that there was no allegation of anything more than simple negligence. Thus, there was indeed a distinction between Crabbe, where there was an allegation of gross negligence and Lawhorne. However, returning to the 1979 decision of Shortt v. Griffitts involving school employees who arguably had discretionary duties, it is clear that the determinative distinction between Lawhorne and Crabbe was not the degree of negligence, but rather it was the nature of the employer. A School Board was said to be a "local government agency"; the distinction was between the sovereign itself and those agencies "created by the Commonwealth". Shortt, supra, 220 Va. at 5, 255 S.E.2d at 481.

The threshold issue raised in determining whether Johnson has any sovereign immunity is answered by determining whether the County is a "local government agency" created by the Commonwealth within the meaning of that phrase in Shortt v. Griffitts, or is part of the Commonwealth itself. The answer is that counties are part of sovereign itself and are not mere local government agencies. The two cases that make this clear are Mann v. Arlington County

Board, supra and Fry v. County of Albermarle, 86 Va. 195, 9 S.E. 1004 (1890).

In Mann v. Arlington County Board, the Virginia Supreme Court said that Arlington was not like an incorporated city which could be liable for its negligence in its proprietary acts. Thus, the County was held to be completely immune from an action arising out of its maintenance of a sidewalk. The Mann court reaffirmed the following principles set out in 1890 in Fry v. County of Albemarle:

"The rules established by the courts concerning municipal corporations have but slight application to counties organized as ours are. Our counties are parts of the state, political subdivisions of the state, created by the sovereign power for the exercise of the functions of local government.

"As was said by a learned judge in a case not now modern: 'Counties are at most but local organizations, which for the purposes of civil administration are invested with a few functions characteristic of a corporate existence. They are local sub-divisions of a state, created by the sovereign power of the state, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them.' Hamilton County v. Mighels, 7 Ohio St., 109.

"A municipal corporation proper is created mainly for the interest, advantage, and convenience of its locality and its people.

"A county organization is created almost exclusively with a view to the policy of the State at large, for purposes of political organization and civil administration, in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and of transport, and especially for the general administration of justice.

"With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the State, and are in fact but a branch of the general administration of that policy. (Opinion of Bunkenhoff, J., in same case.)" Fry, supra at page 197-98.

The Virginia Supreme Court has thus made it clear that counties have a very special status, and they are not merely local governmental agencies. Even though an incorporated city and a county appear to share many characteristics, a municipal corporation has a localized nature and function as does a school board. The nature of counties and the functions they perform have long been held to be for the benefit of the state as a whole and not of a local nature. This principle

is the rationale underlying the Mann v. County Board case where the court made it clear that although a municipal corporation might be liable for its negligence in maintaining its sidewalks, a county is not.

It will be recalled that the court in its cases concerning the liability of school boards used an analysis similar to that used with municipal corporations. See the text at p. 3 above and see Kellam v. School Board, supra. That is, there is immunity for governmental acts but not for proprietary ones. Of course, one reason the school boards were held immune was because the activities in question were said to be governmental. Counties on the other hand have never been subjected to this analysis; this is because they are considered as integral and inseparable components of the sovereign Commonwealth.*

One final comment should be made as to the use of the word "agency". Even in the cases where immunity has been afforded to the State hospital and to its employees, the court has referred to the hospital as an "agency of the Commonwealth." See James v. Jane, 221 Va. 4354, 267 S.E.2d 108, 114 (1980). Counties, school boards, municipal corporations and hospitals are in a sense all agencies of the State. However, some, like school boards and municipal corporations which have a local nature whereas, a county or a state hospital do not. Thus, it is important not to be misled by the word agency, and one should not conclude that an agency of the Commonwealth cannot be considered the Commonwealth itself for purposes of immunity analysis.

It is the position of the defendant Johnson that the question of his entitlement to sovereign immunity should be decided with reference to the tests applicable to the Commonwealth of Virginia. It is thus necessary to examine these tests.

*Other states also follow this distinction between counties and municipal corporations. See e.g., Coleman v. McNary, 549 S.W.2d 568 (Mo. App. 1977), sovereign immunity barred recovery as to county and its representatives on claim of tortious interference with a contract.

In James v. Jane, supra, the court said that the kind of immunity, if any, of state employees depends upon the function performed and the manner of performance. Certain employees, the court said, must of necessity be immune because their discretionary acts involves both the determination and implementation of state policy. The court in James outlined the test as follows:

"The difficulty in application comes when a state employee is charged with simple negligence, a failure to use ordinary or reasonable care in the performance of some duty, and then claims the immunity of the state. Under such circumstances we examine the function this employee was performing and the extent of the state's interest and involvement in that function. Whether the act performed involves the use of judgment and discretion is a consideration, but it is not always determinative. Virtually every act performed by a person involves the exercise of some discretion. Of equal importance is the degree of control and direction exercised by the state over the employee whose negligence is involved. In Sayers the control by the employer was absolute, and the discretion by the employees was minimal. In Lawhorne the state's interest and involvement were great, and all defendants were afforded immunity, but for widely divergent reasons. The administrators were executive officers charged with the operation of a vast hospital complex. The state's interest demanded that they exercise wide discretionary powers and be accorded immunity. The intern, although equally as essential to the operation of the hospital as the administrators, was, because of his inexperience, closely controlled, supervised, and directed by his employer. Indeed, an intern is prohibited by statute, code §54-276.7, from rendering medical services except under the supervision of a licensed member of the hospital staff to whom he is responsible and accountable at all times. The state's interest and the circumstances and conditions of the intern's employment required that he be afforded immunity." Id. at 53-54, 267 S.E.2d at 114-115.

In James, the court held that the state's interest was slight in the potential liability of a fully licensed physician arising out of his treatment of a patient. Certainly, the court said the interest was no greater for a treating doctor employed by the state than it was for a doctor employed by a private hospital. Equally slight was the control exercised by the state over the physician in the treatment of a patient. The sole interest was the possible increase in existing malpractice insurance. Id. at 54, 267 S.E.2d at 114.

The precise contours of this approach to immunity are further illuminated by examining the decision of Lawhorne v. Harlan, supra which was reaffirmed and explained in the James case. In its explanation, the James court said that the reason the administrators in Lawhorne were accorded immunity was because they were high level "executive officers" who operated a vast hospital complex, and that the state had a paramount interest in the operation of a good medical school and an efficiently run hospital. (But as noted above, the state's interest, in its sovereign capacity, in treatment of a particular patient is slight.) The intern in Lawhorne was accorded immunity because as an inexperienced and unlicensed doctor his actions were closely controlled, supervised, and directed by the hospital.

Johnson, as Chief Executive Officer of the Division of Public Works has control over an operation which is easily as large and complex as the hospital in the Lawhorne case. Johnson exercises his administrative and engineering judgment to determine the appropriate practices and policies of this large operation. Most importantly, he must determine how to allocate his department's limited public resources. It is this aspect of his function which is unlike that of the private sector; there is no comparable function in the private sector. A county must of necessity provide storm sewers, streets, sidewalks and the like and the state's interest in the construction and maintenance of these public improvements is great. In any other county except Henrico, the streets and roadways would be in the state system. (The manhole in question was in the street right of way.) As it is said in the quote from the Fry case set out above on page 5, a county is created with a view to the policy of the "State at large" which includes such things as "the means of travel and transport." Fry, supra at 198.

This interest of the State is also great in seeing to it that the administrators of these operations are free to choose between the various options available for construction and maintenance. It would be especially harmful to the efficient use of public resources if the chief executive officer has to spend time defending his exercise of judgment; his decision-making process will become slowed if each

of his policy decision must include an analysis of the civil liability consequences for a mistake in judgment. While an executive officer exercising policy level discretion may need to be liable for malicious or unauthorized acts, he should not be held liable for simple negligence or mistakes or errors in judgment while exercising that discretion.

It is submitted that Johnson is entitled to sovereign immunity, that his plea of immunity should be sustained and that the action against him should be dismissed.

B. JOHNSON IS ENTITLED TO OFFICIAL IMMUNITY

Assuming the court decides that Johnson is not entitled to sovereign immunity, he is nonetheless not liable for this claim because he is protected by "official" immunity. The two immunities are distinct; the statement most often given as the explanation of the principle underlying sovereign immunity is that of Mr. Justice Holmes, in Kawananakoa v. Polybank, 205 U.S. 349, 353 (1907):

"A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."

Official immunity is a doctrine that applies to all public officials and is distinct from sovereign immunity. See Donahue v. Bowers, 526 P.2d 616, 618 (Or. App. 1974) (immunity applies to department head and personnel director who exercised discretion in dismissing an employee); Gildea v. Ellershaw, 298 N.E.2d 847 (Mass. 1973) (public officers other than judicial officer is immune when he exercises judgment in good faith and without malice). It is a doctrine that the Virginia Supreme Court has not directly considered. In its discussions of immunity of public officials, the court has restricted itself to sovereign immunity and not to the doctrine of official immunity. The foundation of the rule of official immunity is set out best by Chief Judge Hand in the seminal case of Gregoire v. Biddle, 177 F.2d 579 (2nd Cir. 1949):

"[T]o submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread to retaliation. Judged as res nova, we should not hesitate to follow the path laid down in the books." Id. at 581.

Johnson was clearly exercising judgment in this case. As discussed above at page 8 of the memorandum, his office would be impaired if he must be called to court to answer for claims of negligence in the good faith performance of his duties. It is this kind of official immunity that makes the most sense in today's world, and it should be applied to Johnson. The doctrine of official immunity does not mean that every public employee is entitled to its protections. Because the basis of the doctrine is public policy, a case by case analysis of the position and function of the officer must be used. When someone like Johnson holds a high-level administrative position that requires the assessment of facts and the development of a plan of action for a multitude of problems, that public officer must have freedom to act.

C. JOHNSON OWED NO SPECIAL DUTY TO THE PLAINTIFF AND BECAUSE THERE WAS NO DUTY NO CLAIM OF NEGLIGENCE IS MADE OUT IN THE MOTION FOR JUDGMENT.

Apart from any theory of immunity is the principle that there is no tort if there is no duty of care that the public officer owes to the injured party. Equally fundamental is that a duty owing to the general public cannot become the foundation of a negligence action. See the discussion in 18 McQuillin, Municipal Corporations, §53.04b (3d Ed.).

This dichotomy of "public duty"--"special duty" most frequently arises in cases involving the providing of police protection and inspections of property by public officer. For example, in Wong v. City of Miami, 237 So.2d 132 (Fla. 1970), it was held that the police were not liable to shop owners whose property was damaged during 1968 Republican convention, on theory the shop owners requested police protection and it was not provided. In Duran v. City of Tucson, 509 P.2d 1059 (Ariz. 1973), it was held that the fire department was not liable for failing to enforce a fire code where a building burned and killed the plaintiff's decedent. See the cases collected by McQuillin, supra, for other examples.

In the case at bar the claim against Johnson is that he failed to adequately maintain a manhole. Assuming Johnson had a duty to maintain the cover and keep it free from defects, the duty of care is owed to the public as a whole and not to the particular plaintiff. There is no special relationship alleged between Johnson and the plaintiff, such that Johnson would have some affirmative duty running to protect the plaintiff. See for example Rieser v. District of Columbia, 563 F.2d 462 (D.C. Cir. 1979), where liability was imposed on a parole officer because he failed to disclose an inmate's prior history of attacking females to the inmates employer, and the inmate killed a female tenant in the employer's apartment house. This liability was imposed because the parole officer had a special relationship to the female tenants in the building.

The most analogous case found is Boyle v. City of Phoenix, 563 P.2d 905 (Ariz. S.Ct. 1977). In Boyle, the plaintiff was a bicyclist who was struck by a car. The driver of the car claimed he could not see the bicyclist because the city had not properly maintained the intersection and had allowed weeds to grow in the right-of-way in such a way as to obstruct the view. The court held that the highway authority owed no duty to the plaintiff.

Johnson owed no special duty to the plaintiff, and because of this no claim for negligence has been pleaded.

CONCLUSION

The court should sustain the demurrer and plea of immunity, and should dismiss the action against Dennis Johnson.

DENNIS R. JOHNSON

By Counsel

Charles G. Flinn
Deputy County Attorney

David R. Lasso
David R. Lasso
Assistant County Attorney
1400 N. Courthouse Road, #106
Arlington, Virginia 22201
(703) 558-2705
Counsel for Defendant.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Memorandum In Support Of Johnson's Demurrer And Plea Of Immunity, was mailed, postage prepaid, to Blair D. Howard, Counsel for Plaintiff, 128 North Pitt Street, Alexandria, Virginia 22314, on this 9th day of July, 1981.

David R. Lasso

RESPONSE TO MEMORANDUM IN SUPPORT OF DEFENDANT
JOHNSON'S DEMURRER AND PLEA OF IMMUNITY

FACTS

As outlined in the plaintiff's Motion for Judgment, defendant, DENNIS R. JOHNSON, is charged in his individual capacity as an employee of a local government agency, namely, The Operations Division, Department of Public Works of Arlington County, Virginia.

The plaintiff's pleadings state that on the 4th of May, 1978, he, as a pedestrian, stepped on a defective manhole cover located at Glebe Road and South Eads Street in Arlington County, Virginia, which resulted in his injuries. It is alleged that at the time of the injury, this manhole cover was being maintained, serviced and repaired by the defendant, DENNIS R. JOHNSON, in his capacity as Chief of the Operations Division of the Department of Public Works of Arlington County. In addition, it is also alleged that the defendant, JOHNSON, acting as Chief, did fail to warn the public of the defective condition of the manhole cover in spite of the fact that he, the defendant, had prior knowledge that another pedestrian on a previous occasion had fallen as a result of the same defective manhole cover.

It is admitted in the Stipulation of Facts that the defendant, JOHNSON, as Chief of the Operations Division of the Department of Public Works, is charged with supervising the maintenance and inspection function of the Transportation Department. In addition, the Chief directs and coordinates activities essential to the provision of streets, sidewalks,

curbs, gutters and storm sewers. This, it is agreed, would include the storm sewer maintenance involving the manhole cover in this case.

ISSUES

1. Is the defendant, JOHNSON, as Chief, Operations Division, Department of Public Works of Arlington County, entitled to sovereign immunity in a case alleging simple negligence?

2. Is the defendant, JOHNSON, protected by a separate doctrine of official immunity as to non-malicious acts performed in the course of his employment?

3. Assuming that neither sovereign immunity nor official immunity apply to a chief of a division of the County's Public Works Department, is there, in any event, a duty of care recognized by the law as being owed to the plaintiff apart from the duty owed to the general public?

ARGUMENT

1. Is the defendant, JOHNSON, as Chief, Operations Division, Department of Public Works of Arlington County, entitled to sovereign immunity in a case alleging simple negligence?

The two most recent cases decided by our Court of Appeals which are applicable to the issues before the Court are James v. Jane, 221 Va. 43, 267 S.E.2d 108 (1980) and Short v. Griffitts, 220 Va. 53, 255 S.E.2d 479 (1979).

In Short, the plaintiff brought an action against the county school board, an athletic director, a baseball coach,

and grounds supervisor of a high school, charging the defendants with acts of both simple and gross negligence allegedly causing plaintiff's injury when he fell on broken glass while engaged in running laps around the school's outdoor track facility. The lower court judge sustained defendant's plea of sovereign immunity and plaintiff appealed. The Supreme Court of Virginia held that the athletic director, baseball coach and grounds supervisor were not entitled to assert the defense of sovereign immunity to plaintiff's claim. This was so even though their employer, Fairfax County School Board, who operated the school, was entitled to claim immunity. The plaintiff, in his pleadings, charged that the defendants, in their capacities as athletic director, baseball coach and grounds supervisor, had failed to maintain, inspect and warn the plaintiff of the dangerous condition of the track. As pointed out by the Court in its opinion,

. . . Whether the supervision, maintenance and inspection of the athletic facilities of the school were among the defendants' responsibilities, whether there has been a negligent violation of any of these duties, and whether such violation was a proximate cause of the injury sustained by Short, are questions of fact. All we decide here is that Griffiths, Lee and Redman are not entitled to assert the defense of governmental immunity to Short's claim, and that their plea should not have been sustained by the court below.

The Court in Short pointed out that all of the defendants were employees of a local government agency, to-wit: The Fairfax County School Board. In concluding its opinion, the Court pointed out that employees of such a local government agency do not enjoy governmental immunity and are answerable

for their own acts of simple negligence. So stating, the Court made a distinction between those employees of a local government agency and employees of the sovereign Commonwealth of Virginia whom the Court had said in the past did enjoy sovereign immunity.

The defendant seems to take the position in his Memorandum that the decision in Short only applies to school employees. Careful examination of that opinion finds no such limiting language but rather the decision seems to be based upon the distinguishment between local government agencies (such as we have with the Department of Public Works of Arlington County) and the sovereign Commonwealth of Virginia and its employees as exemplified by the University of Virginia Hospital and its employees in Lawhorne v. Harlan, 214 Va. 405, 200 S.E.2d 569 (1973).

Counsel, in his Memorandum, also cites the cases of Fry v. County of Albemarle, 86 Va. 195, 9 S.E. 1004, and Mann v. County Board of Arlington, 199 Va. 169, 98 S.E.2d 515, for the proposition under Virginia law that counties enjoy sovereign immunity. These seem to have no applicability to the present case where the defendant, DENNIS JOHNSON, is an individual employee rather than the county itself. Once again, the reasoning of our Court in Short seems to provide the answer that employees of a local government agency do not enjoy the sovereign immunity claimed. Surely there can be no difference between the school board maintained by the County of Fairfax in Short and the Department of Public Works maintained by Arlington County in the present case.

The case of James v. Jane, supra, seems to be an expansion by our Court of Appeals on the old proposition that employees of the Commonwealth of Virginia enjoy a blanket immunity as does the Commonwealth of Virginia itself. This seems to be apparent in the reasoning of the Court as found on at 267 S.E.2d 113,

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

In conclusion, the Court in James held that where it is alleged that a physician failed to exercise reasonable care in the treatment of a patient, he was not entitled to invoke the doctrine of sovereign immunity against allegations of acts of simple negligence. In so holding, the Court cited the case of

(1954) in which the following was said:

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

Surely, if it can be demonstrated at trial as alleged in plaintiff's pleadings that the defendant, DENNIS JOHNSON, had knowledge of a prior fall of another pedestrian in the same manhole in which the plaintiff was involved, it necessarily has to be a question of fact for the jury to determine whether this constituted negligence on the part of Johnson in failing to maintain, inspect and properly warn the public of the existing hazard.

2. Is the defendant, JOHNSON, protected by a separate doctrine of official immunity as to non-malicious acts performed in the course of his employment?

The official immunity argument set forth in defendant's Memorandum has no authority in the Virginia case law nor by statute in Virginia. In addition, no such immunity would excuse an employee who had specific knowledge of an existing danger or hazard from exercising reasonable care in repairing, maintaining and warning the public of such danger, especially if, as in this case, it is the employee's duty to maintain and repair as set forth in the Stipulation of Facts.

3. Assuming that neither sovereign immunity nor official immunity apply to a chief of a division of the County's Public Works Department, is there, in any event, a duty of care recognized by the law as being owed to the plaintiff apart from the duty owed to the general public?

By its Stipulation of Facts, defendant has admitted that the defendant, in his capacity as Chief of Operations, Department of Public Works of Arlington County, has the responsibility of supervising the maintenance and inspection of gutters and storm sewers which include the storm sewer maintenance involving the manhole cover in this case. Once again, if the defendant knew of an existing hazard at the site of a manhole cover which he admittedly was in charge of repairing and maintaining, then certainly, he had a duty to any individual using the streets or sidewalks with keeping the manhole cover in question in proper repair and warning of any defect or hazard. As pointed in Short, this is a question of fact for the jury.

LEONARD ARMSTRONG
By Counsel

Blair D. Howard
Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Response to Memorandum in Support of Defendant Johnson's Demurrer and Plea of Immunity has been mailed/hand-delivered, this _____ day of _____, 1981, to David R. Lasso, Esquire, Assistant County Attorney, 1400 North Courthouse Road, No. 106, Arlington, Virginia 22201.

Blair D. Howard

MEMORANDUM

TO: David R. Lasso, Assistant County Attorney
Blair D. Howard, Counsel for Plaintiff

FROM: Honorable Charles H. Duff, Judge

I. Background

The plaintiff has filed a Motion for Judgment against Dennis R. Johnson, Chief of the Operations Division of the Department of Public Works for Arlington County, seeking damages for personal injuries received when he fell into a manhole on South Eads Street, allegedly the result of a defective manhole cover. Plaintiff charges that his injuries were proximately caused by the failure of the defendant to properly maintain the cover free from defects, by the failure to insure its' proper inspection and by the failure to warn the public of the defect. It is further alleged that defendant had notice of a prior pedestrian injury involving the same cover.

Defendant has filed a Demurrer to the Motion for Judgment and a Special Plea of Immunity. The parties have entered into a Stipulation of Facts covering the details of the Defendant's duties and responsibilities as Chief of the Operations Division of the County's Department of Public Works. Able argument has been heard on the Demurrer and Plea and briefs have been filed which have been carefully examined and which were most helpful in resolving the issue presented. While three grounds have been cited in support of the demurrer, from the view I take of

the law, Sovereign Immunity is dispositive of the issue. It is my judgment that the defendant is entitled to Sovereign Immunity; that the demurrer and plea should be sustained and the Motion for Judgment Dismissed.

II. Issue

The issue presented by the pleadings is whether Johnson as the Chief executive office of the Operations Division of Arlington County's Department of Public Works^{is} entitled to the Sovereign immunity of the Commonwealth in a case alleging simple negligence in the administration of the Division.

III. Basis of Opinion

The Stipulation of Facts outlines the duties of the Public Works Department, the Operations Division thereof and specifically the duties of the Defendant as Chief of that Division. It is clear from the Stipulation that street and sidewalk construction and maintenance as well as storm sewer maintenance (including street manhole covers) are included therein. The chief of the Operations Division provides technical and administrative services and directs and coordinates activities essential to the provision of streets, sidewalks, curb and gutter and storm sewers and other transportation related facilities. He utilizes professional engineering knowledge and exercises a wide latitude of independent judgment in discharging his responsibilities.

There appears to be no doubt that the County of Arlington shares the sovereign immunity of the Commonwealth of Virginia.

As a County it differs from local School Boards and from municipal Corporations. It is an integral part of the Commonwealth and is not a "local government agency" as that term has been used in several of the decisions denying immunity to employees of such agencies.

In Fry v. County of Albemarle, 86 Va. 195 the Court in referring to the nature of Counties in Virginia commented as follows, p. 197, 198:

"Our counties are parts of the State, political sub-divisions of the State, created by the sovereign power for the exercise of the functions of local government.

And in quoting with approval from an early Ohio case, the Fry Court continued:

"A county organization is created almost exclusively with a view to the policy of the State at large for purposes of political organization and civil administration, in matters of finance . . . of the means of travel and of transport . . . (underlining mine).

With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are in fact but a branch of the general administration of that policy."

These basic principles were reaffirmed in Mann v. County Board, 199 Va. 169 where it was held that:

"Arlington County being a political sub-division of the State, its freedom from liability for this tort may be likened to the immunity that is inherent in the State."

As integral parts of the Commonwealth, political subdivisions thereof, and not merely "local government agencies", Virginia Counties enjoy the absolute (unless waived) immunity of the Commonwealth. Whether a state employee, or in this case, an employee of an integral part thereof, is clothed with such immunity depends on the functions he performs and the manner of performance. Admittedly no single all-inclusive rule can be enunciated or applied in determining entitlement to sovereign immunity. An employee, as distinguished from the State, enjoys no absolute immunity. He is liable for a wanton and intentional deviation from his assigned duties (Elder v. Holland, 208 Va. 15) and is also liable for conduct which is so negligent as to take him outside the scope of his employment. (Sayers v. Bullar, 180 Va. 222) The recent decision of James v. Jane, 221 Va. 43 is instructive as to the liability of a State employee. The Court commented as follows:

"The difficulty in application comes when a state employee is charged with simple negligence, a failure to use ordinary or reasonable care in the performance of some duty, and then claims the immunity of the state. Under such circumstances we examine the function this employee was performing and the extent of the state's interest and involvement in that function. Whether the act performed involves the use of judgment and discretion is a consideration, but it is not always determinative. Virtually every act performed by a person involves the exercise of some discretion. Of equal importance is the degree of control and direction exercised by the state over the employee whose negligence is involved. In Sayers the control by the employer was absolute, and the discretion by

the employees was minimal. In Lawhonre the state's interest and involvement were great, and all defendants were afforded immunity, but for widely divergent reasons. The administrators were executive officers charged with the operation of a vast hospital complex. The state's interest demanded that they exercise wide discretionary powers and be accorded immunity. The intern, although equally as essential to the operation of the hospital as the administrators, was, because of his inexperience, closely controlled, supervised, and directed by his employer. Indeed, an intern is prohibited by statute. Code §54-276.7, from rendering medical services except under the supervision of a licensed member of the hospital staff to whom he is responsible and accountable at all times. The state's interest and the circumstances and conditions of the intern's employment required that he be afforded immunity."

The Stipulated Facts show the Defendant to be the Chief executive office of the Operations Division of the Arlington Public Works Department. His duties are professional in nature and involve the application of skill and knowledge in solving problems in highway construction and maintenance among other. His duties are analogous to the "executive officers" in Lawhorne v. Harlan, 214 Va. 405 who were charged with the operation of a vast hospital complex. There the State's interest demanded that they exercise wide discretionary powers and be accorded immunity. The Stipulation of Facts in the case at Bar provides that the defendant "has wide latitude in exercising independent judgment," subject to administrative review by the Director of the Department of Transportation. Neither the large or vital interest of both the County and the State in the successful and

efficient construction and maintenance of the "means of transport" can be seriously questioned.

There is no allegation of gross negligence or of a wanton or intentional tort. The claim is one of simple negligence. For the above reasons it is my opinion that the Demurrer and Plea of Immunity must be sustained.

If Mr. Lasso will prepare an appropriate Order, incorporating this opinion by reference, and forward it to Mr. Howard for approval as to form and the preservation of exceptions as desired; it will be promptly entered.

DATED: *January 5, 1982*

Charles W. Duff
JUDGE

O R D E R

The case is before the court on the Motion of Dennis Johnson to sustain his Demurrer and Plea of Immunity; a Stipulation of Facts, briefs on the issues presented in the Motion, and the oral argument of counsel on November 30, 1981, have been considered by the court; and

IT APPEARS TO THE COURT that although three grounds for the Motion were presented, Sovereign Immunity is dispositive of the Motion; and for the reasons set out in the attached Memorandum of January 5, 1982, which is incorporated as part of this Order by reference, I conclude that Dennis Johnson is entitled to Sovereign Immunity, that the Demurrer and Plea should be sustained and the Motion For Judgment dismissed; therefore,

IT IS ORDERED that the Demurrer and Plea of Immunity of Dennis Johnson is sustained and that the Motion For Judgment is dismissed.

ENTERED: 1-19-82

15/
CHARLES H. DUFF, JUDGE

I ASK FOR THIS:

David R. Lasso
Assistant County Attorney
1400 N. Courthouse Road, #106
Arlington, Virginia 22201
Counsel for Defendant

SEEN AND OBJECTED TO:

Blair D. Howard, Esq.
128 N. Pitt Street
Alexandria, Virginia 22314
Counsel for Plaintiff

*not rec'd by Clerk as
1-26-82*

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no return
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ASSIGNMENT OF ERROR

1. That the trial Court committed error in holding that the defendant, while acting as Chief as of Operations Division of the Department of Public Works of Arlington County was not acting as an employee of a local government agency.

2. That the trial Court committed error in sustaining defendant's Demurrer and plea of sovereign immunity in favor of the defendant, DENNIS R. JOHNSON, Chief of the Operations Division of Arlington County's Department of Public Works.