

**To: VML Member Localities and Legislative Liaisons**

**From: Michelle Gowdy, Executive Director**

**Date: October 16, 2020**

**Re: Sovereign Immunity**

As most of you know, the Sovereign Immunity Bill (HB5013) by Delegate Bourne failed in the 2020 General Assembly Special after many efforts to keep it alive. VML fully expects that this concept in some manner will be back in the 2021 General Assembly session. Below is an explanation of qualified immunity and VML's position on the issue; attached to this email are some examples of cases in which qualified immunity played a part, as well as a draft resolution for your consideration. If your locality decides to pass a resolution, please forward a copy to VML.

### **WHITE PAPER**

VML understands that there may be legislation proposed dealing with sovereign immunity and there will be presentations at the legislative committee related to such. This is a brief summary of where Virginia stands today, the bill that Colorado passed with support from localities and law enforcement and the public statements that have been made by some of the political groups in Virginia.

#### **Sovereign Immunity in Virginia**

Sovereign immunity is a legal doctrine that offers government and its employees protection against some lawsuits. In particular sovereign immunity offers some protection from tort liability, which is when someone unfairly causes another to suffer loss or harm. The case of *Messina v. Burden*, 228 Va. 301, 321 SE 2d 657 (1984) summarizes the doctrine of sovereign immunity as "rule of social policy, which protects the state from burdensome interference with the performance of its governmental functions and preserves its control over state funds, property, and instrumentalities." The case goes on to say that sovereign immunity protects the public purse, protects against vexatious lawsuits, encourages citizens to assume important governmental positions by alleviating employees' fear of being sued, and promotes the orderly administration of government.

#### **Counties**

Counties are "political subdivisions" of the Commonwealth and therefore most county attorneys argue that these jurisdictions are entitled to the same level of immunity as the Commonwealth. As such, counties have a higher degree of immunity than cities and towns. "Counties are not liable for tortious injuries caused by negligence of their officers, servants and employees." *Mann v. Arlington Cnty. Bd.*, 199 Va. 169, 173-174, 98 SE 2d 515, 518 (1957). It is

worth noting that the courts have said that county boards act in two capacities: legislative and administrative. In the administrative capacity, there is only qualified immunity.

## Cities and towns

Cities and towns have two functions, one governmental and the other proprietary. While cities and towns have some degree of sovereign immunity for actions related to governmental activities, they do not have immunity for actions related to proprietary functions. “A municipality is immune from liability for failure to exercise or for negligence in the exercise of its governmental functions.” *City of Chesapeake v. Cunningham*, 268 Va. 624, 604 SC 2d 420 (2004).

Unfortunately, there is no bright line that demarcates which functions of a city or town are governmental and which are proprietary; determining which is which requires looking at the characteristics of the function. Further, always keep in mind that gross negligence – the conscious and voluntary disregard of reasonable care – negates sovereign immunity options.

Oddly, snow removal offers a great example of the differences between a governmental function and a proprietary function since it can fall into either category depending on the conditions under which the service is performed. Emergency snow removal has been found to be a governmental function because the government was “responding to emergency weather conditions in opening streets to vital public services.” *Bialk v. City of Hampton*, 242 Va. 54, 405 SE 2d 619 (1991). However, other cases suggest that there is a time when the emergency no longer exists, and it becomes a proprietary function. See *Woods v. Town of Marion*, 245 Va. 44, 425 SE 2d 487 (1993).

Immunity for officers and employees are discussed in case law and numerous code sections; it is recommended that if you are sued in that capacity you immediately discuss with your attorney whether you as an individual, need separate representation from the locality. Also, please conduct VA Code Section 15.2-1405 entitled “Immunity of members of local governmental entities; exception.

Case law has solidified the fact that county, city and town employees, as well as school board employees may be immune in some functions of their work. The Virginia Supreme Court has established a four-part test for providing an employee sovereign immunity. *James v. Jane*, 221 Va. 43, 53, 282 SE 2d 864 (1980).

1. What is the nature of the function the employee performs? (Must be a vitally important public function)
2. What is the extent of the governmental entity’s interest and involvement in the function? (The employing governmental entity must have official interest and direct involvement in the function)
3. What is the degree of control and direction exercised over the employee? (The governmental entity must exercise control and direction over the employee.)

4. Did the alleged wrongful act involve the exercise of judgment and discretion? (The act cannot have been only ministerial.)

### **VML's Current Policy Language "Governmental & Municipal Official Liability"**

VML calls upon Virginia's congressional delegation to support legislation to restore suits brought under 42 U.S.C. Section 1983 to traditional civil rights actions, and to preclude the award of damages if the court finds that the government or its officials were acting in good faith.

Expanding liability and eroding immunities at the state level across the nation have had a chilling effect on the actions of local government officials contributing to local government insurance problems, creating immense financial risks (particularly for legal costs), and posing a substantial obstacle to the provision of needed public services.

The Virginia General Assembly should strengthen and must maintain the principles of sovereign immunity for local governments and their officials.

VML strongly opposes bringing local governments under the Virginia Tort Claims Act. This action would seriously erode the sovereign immunity now enjoyed by Virginia local governments and lead to a substantial increase in frivolous suits.

The tort reparations system in the U.S. creates many difficulties in the administration of justice. VML supports efforts at the national and state levels to address tort reform, such as limitations on the tort liability of local governments in areas where local governments do not enjoy sovereign immunity.

The General Assembly should adopt legislation to codify the proposition that real property of local governments shall be exempt from liens created by statute or otherwise. This proposition has already been recognized by the Virginia Supreme Court for mechanics liens. "