

VIRGINIA:

*In the Supreme Court of Virginia held at the Supreme Court Building in the
City of Richmond on* Friday *the* 4th *day of* October, 2013.

Kenneth L. Wagner, II, Appellant,
against Record No. 121869
Circuit Court No. CL08-572
Charles "Skip" H. Land, et al., Appellees.

Upon an appeal from a
judgment rendered by the Circuit
Court of Stafford County.

Upon consideration of the record, briefs, and argument of counsel, the Court is of opinion that there is error in the judgment of the Circuit Court of Stafford County.¹

The circuit court stated in its opinion letter dated June 28, 2012 that it "would have most likely granted a demurrer on the basis of sufficiency." However, the August 1, 2013 order dismissing appellant's complaint was limited expressly to appellees' plea in bar based on sovereign immunity, which the court sustained. A plea of sovereign immunity presents distinct issues of fact that, if proved, create a bar to a party's alleged right of recovery. Whitley v. Commonwealth, 260 Va. 482, 493, 538 S.E.2d 296, 302 (2000). The party advancing the sovereign immunity plea bears the burden of proving those issues of fact. Id.

¹ Appellant did not assign error to the circuit court's finding that the Prince William-Manassas Regional Adult Detention Center is not a legal entity and, thus, is not subject to suit pursuant to Code § 53.1-95.7. Accordingly, that aspect of the court's judgment is not before us.

Where, as in this case, a circuit court considers a plea in bar solely on its review of the facts and legal claims of the complaint without the benefit of stipulations of fact, admissions made during discovery, or evidence received ore tenus, "'[t]he standards of review for a defensive plea in bar and a demurrer are substantially similar.'" Station # 2, LLC v. Lynch, 280 Va. 166, 177, 695 S.E.2d 537, 542 (2010) (quoting Sullivan v. Jones, 42 Va. App. 794, 802, 595 S.E.2d 36, 40 (2004)). That is, just as with a demurrer, in considering a plea in bar the court must accept "as true the facts alleged in the [complaint] and all reasonable inferences to be drawn therefrom." Adkins v. Dixon, 253 Va. 275, 277, 482 S.E. 2d 797, 799 (1997); see also Lee v. City of Norfolk, 281 Va. 423, 427, 706 S.E.2d 330, 331 (2011); Hawthorne v. VanMarter, 279 Va. 566, 577, 692 S.E.2d 226, 233 (2010). Furthermore, "'[w]here no evidence is taken in support of the plea, the trial court, and the appellate court upon review, must rely solely upon the pleadings . . . in resolving the issue presented. The existence of sovereign immunity is a question of law that is reviewed de novo.'" Lee, 281 Va. at 439, 706 S.E.2d at 338 (quoting City of Chesapeake v. Cunningham, 268 Va. 624, 633, 604 S.E.2d 420, 426 (2004)).

Accordingly, the dispositive issue in this appeal is whether, accepting as true the allegations and reasonable inferences of appellant's complaint, the appellees' plea in bar was sufficient as a matter of law to establish that they were entitled

to sovereign immunity.² Virginia's sovereign immunity doctrine protects employees of the Commonwealth and its subdivisions in the discharge of their public duties. Commonwealth v. Burns, 273 Va. 14, 19, 639 S.E.2d 276, 279 (2008). However, an employee may be held liable for committing intentional torts both within and without the scope of his duties. Fox v. Deese, 234 Va. 412, 423-24, 362 S.E.2d 699, 706 (1987). Likewise, "[a] state employee who acts wantonly, or in a culpable or grossly negligent manner, is not protected. And neither is the employee who acts beyond the scope of his employment, who exceeds his authority and discretion, and who acts individually." James v. Jane, 221 Va. 43, 53, 282 S.E.2d 864, 869 (1980).

The allegations of the complaint plainly allege that the jail guards, medical staff, jail supervisors, and the jail board members were all deliberately and intentionally indifferent to the alleged mistreatment of appellant. The complaint further alleges that intentional assaults were committed upon appellant by the guards, and that the medical staff and jail board members acted with actual malice toward appellant in condoning the alleged

² Although the circuit court did not expressly rule on the application of sovereign immunity to the 42 U.S.C. §§ 1983 and 1988 claims included in the complaint, the August 1, 2012 order, which incorporated the court's June 28, 2012 letter opinion, was intended to dispose of the entire case. To the extent that the order can be interpreted as granting sovereign immunity to the individual defendants on these federal claims, the court plainly erred. Martinez v. California 444 U.S. 277, 284 (1980) (holding that "[c]onduct by persons acting under color of state law which is wrongful under 42 U.S.C. § 1983" and other federal civil rights legislation "cannot be immunized by state law").

violations of his civil liberties and due process rights. Because these allegations, and the reasonable inferences that flow from them, must be accepted as true without regard to what the strength of appellant's proof may be at trial, we hold that the circuit court erred in ruling on the plea in bar that the appellees were entitled to sovereign immunity to these claims.

For these reasons, the judgment of the circuit court is reversed and the case remanded for further proceedings consistent with the views expressed in this order.

Justice Millette took no part in the consideration of this appeal.

This order shall be certified to the said circuit court.

A Copy,

Teste:

John L. Hamington

Clerk