B R I E F

TO: Charles L. Green, Esquire

FROM: National Legal Research Group, Inc.
John M. Stone, Senior Attorney

RE: Virginia/Local And State Government/Tort Liability/
Mental Patient—Immunity For Execution Of Court
Order

FILE: 36-97189-015 April 23, 1993

YOUR
FILE: No. 2-92-0619

IN THE

SUPREME COURT OF VIRGINIA

AT RICHMOND

GEORGE E. Blumberg,

Appellant,

v.

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

Appellees.

PETITION FOR APPEAL

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I. NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

This action was brought by the plaintiff as administrator of the estate of Sarah Blumberg. The action alleges that the carelessness and negligence of the defendants caused the death of the decedent while she was a patient at the Southwestern Virginia Mental Health Institute. By Final Order entered on February 30, 1993, the Circuit Court of Smyth County, Judge Charles H. Smith Jr. presiding, sustained the defendants' demurrer and ordered that the plaintiff's action be dismissed with prejudice. The demurrer was based on the argument that the defendants are immune from liability pursuant to Va. Code Ann. § 8.01-195.3(4) (Michie 1992). That statute exempts from the Tort Claims Act "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."

Plaintiff filed a timely Notice of Appeal with the circuit court on March 16, 1993.

II. 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 V.C.A. § 8.01-195.3(4) (Michie 1992).

III. QUESTION PRESENTED

Did the circuit court err in ruling that the appellees are immune from liability in this action pursuant to V.C.A. § 8.01-195.3(4) (Michie 1992)?

IV. STATEMENT OF FACTS

Plaintiff is the administrator of the estate of the decedent, Sarah Blumberg. The decedent was hospitalized in defendant Southwestern Virginia Mental Health Institute pursuant to a general district court's temporary detention order, dated April 29, 1991. The plaintiff alleges that after the decedent was admitted at approximately 6 p.m. on April 29 she was housed in isolation in a holding cell in the facility (Plaintiff's Motion for Judgment ¶¶ II-V). She became agitated to the point that she was placed in a 4-6 point restraint at about 11:55 p.m. on April 29. At or about 1 a.m., April 30, the decedent was found dead. The plaintiff alleges that carelessness and negligence of the defendants caused the decedent's death in that the defendants failed to provide adequate patient care; to get an adequate history of the patient; to order proper testing; to properly diagnose the decedent's condition; to properly resuscitate the patient; to sedate the patient when she was agitated; to communicate the patient's condition and her requests and complaints to her physician; to give assistance to the patient and monitor her condition; to call a competent physician once the patient became agitated; to prevent decedent's death; and to exercise the care and skill required of nurses, aides, orderlies, and physicians (Plaintiff's Motion for Judgment ¶ VI).

As required by Va. Code Ann. § 8.01-581.2 (Michie 1992), the plaintiff gave prior notice of his intention to file this action and waited for the necessary period of time before filing suit.

V. ARGUMENT

THE CIRCUIT COURT ERRED IN SUSTAINING THE APPELLEES' DEMURRER ON THE GROUNDS THAT THE APPELLEES ARE IMMUNE UNDER VA. CODE ANN. § 8.01-195.3(4).

Subject to certain restrictions and exceptions contained in its various provisions, the Virginia Tort Claims Act provides that the Commonwealth shall be liable for damages caused by the negligent or wrongful acts or omissions of its employees. Va. Code Ann. § 8.01-195.3 (Michie 1992). The Act excludes from this general rule of liability various types of claims, including "[a]ny 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." *Id.* § 8.01-195.3(4). The Appellees based their demurrer on this statute, and the circuit court sustained that demurrer. There is very little Virginia law on this type of immunity, but the relevant authorities indicate that it was error to apply § 8.01-195.3(4) to this case.

In *Johnson v. Commonwealth*, 10 Va. Cir. 365 (City of Richmond 1988), the plaintiff sued the state under the Virginia Tort Claims Act for false imprisonment and denial of due process and equal protection. After the plaintiff was convicted of two felonies in the Petersburg Circuit Court, the court deferred his sentencing for 15 years upon good behavior and committed him to Central State Hospital pursuant to statutory authority. The plaintiff remained there until his release about 12 years after the conviction. The gist of the civil suit was that the state never provided any hearings reviewing his continued commitment and that this omission was in violation of V.C.A. §§ 37.1-67.1 et seq. (Michie Supp. 1992) (involuntary detention of mentally ill persons). The plaintiff had filed two previous actions

for essentially the same wrongs, but the court gave res judicata effect to neither. The first was a civil rights action, the dismissal of which by a federal district court had been affirmed by the Fourth Circuit. The second action was an unsuccessful habeas corpus petition in state court.

The court in *Johnson* discussed why it sustained the Commonwealth's demurrer on the basis of V.C.A. § 8.01-195.3(4):

> More fundamentally, the Court finds that plaintiff's claim is of a type exempted from recovery under the VTCA. Section 8.01-195.3(4) exempts "[a]ny 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." In essence, plaintiff claims that the hospital officials maintained his confinement without providing him periodic hearings, in violation of his rights. According to the Fourth Circuit's opinion, *the officials sought and received clarification from the Petersburg Circuit Court of the authority by which plaintiff was confined, and they regularly reported plaintiff's mental status to the court. It appears their action was in compliance with a court order.* The court also finds that the Petersburg Court's order was "lawful" in that the Court was not clearly without jurisdiction to make it. § 8.01-195.3(4) seems intended to preclude a litigant from attacking a court's statutory interpretation in a previous case.

10 Va. Cir. at 368 (emphasis added).

The court in *Johnson* also noted that the federal district court, in holding for the individual defendants in Johnson's previous civil rights action, had "found that the defendants 'acted in good faith with a reasonable reliance on a judicial order.'" *Id.* at 366.

Thus, in *Johnson*, § 8.01-195.3(4) applied because the plaintiff's suit challenged his confinement, which was the very thing previously ordered by a court. Moreover, his continuing confinement was regularly reported to and approved by the court. The defendants clearly had court approval for the specific acts which were later challenged by the plaintiff.

This is in marked contrast with the present case, where the confinement ordered by the general district court is not even an issue in the case. Rather, this case involves acts and omissions concerning hospital conditions and patient care, which were not the subject of the court order which the appellees erroneously wish to use as a shield from liability.

In *Grites v. Clarke County*, 14 Va. Cir. 165 (Clarke County 1988), the owner of some hogs sued an animal control officer, among others, after the officer sold the hogs pursuant to a district court order. The order resulted from a proceeding brought by a county attorney under a statute on offenses involving animals. On an appeal from the district court decision, a circuit court held that the district court lacked jurisdiction because of faulty notice of a hearing to the owner. The plaintiff alleged that the seizure and sale of the hogs was wrongful. The court discussed the immunity of the officer, as follows:

> While some discretion may have been required of the officer in determining when and where and how to conduct the public auction of the hogs, the duty to sell them was a *ministerial* function. *Sale was performed in response to the directive of a competent court having jurisdiction of the subject matter.* The subject matter of the suit was the animals involved and what to do about them. The district court was vested in such circumstances by the express terms of the statute.
>
> A court having jurisdiction of the subject matter, an officer to whom its mandate is issued must carry it out. On appeal the order of the general district court may have been found defective due to failure of the precise notice required by statute, but this does not lessen the responsibility of the officer to have carried out the order as that court had jurisdiction of the subject matter. If officers of the law were at liberty to arrogate the judicial function to themselves and to disregard or refuse to carry out or second guess the judgments of courts, then the courts would be virtually powerless and the administration of justice grievously if not fatally damaged. This principle was recognized more than a century and a half ago in *Yeager v. Carpenter*, 35 Va. (8 Leigh) 454 (1836), speaking through Carr, J. when he said:

> I have always held it among the oldest and best settled principles of law, that a sheriff or other officer, executing the process or carrying into effect the orders of a court was protected from all consequences, however irregular and erroneous was the proceeding; provided only that the court had jurisdiction of the matter.

In the same case Tucker, P. opined:

> The county courts are invested with jurisdiction over the roads of their respective counties, and having that jurisdiction, their officer or minister . . . must obey their order, and it is not entitled to question either the judiciousness or the regularity of the exercise of their power.

Id. at 169-70 (emphasis added).

After it had found that the animal control officer and county attorney had not acted with malice and, in fact, that their motive was irrelevant, the court in *Grites* also said that "the two officials cannot be held responsible for further proceedings resulting in sale of the animals by court order, albeit not founded on the type of service required by the statute, *for that was the action of the court, not of these individuals*." *Id.* at 171 (emphasis added).

Unlike the officer's acts in *Grites*, the acts and omissions of the appellees were not effectively those of the court because the court did not undertake to direct the manner in which the decedent was to be supervised and cared for in the hospital. Had the appellees acted differently by giving adequate and appropriate care to the decedent, there would have been no danger of contradicting the order, which simply required confinement of the patient. Unlike in *Grites*, the challenged conduct here had not been reduced to a ministerial act by virtue of a court order. The appellees retained the full discretion and responsibility to render adequate care and services to the decedent.

A discretionary act or function, in contrast to a ministerial act, is one in which the exercise of judgment and discretion is necessary to the performance of the governmental function itself; the judgment or discretion concerns the proper means of effectuating the governmental purpose. *Heider v. Clemens*, 241 Va. 143, 400 S.E.2d 190 (1991). Thus, in *Heider*, a deputy sheriff's simple operation of an automobile as he left a parking space after serving process involved a ministerial obligation of due care because it did not involve special risks arising from his governmental activities.

Decisions by physicians and other health professionals about the diagnosis and treatment of patients represent a classic example of discretionary, rather than ministerial, activities. The Supreme Court of Virginia recognized this in *James v. Jane*, 221 Va. 43, 282 S.E.2d 864, 866 (1980):

> While all attending physicians are required and encouraged to follow certain guidelines to the end that their professional services constitute "good medical practice," the attending physicians of patients exercise broad discretion in selecting the methods by which they care for them. Although an attending physician may consult with colleagues, the final decisions as to diagnosis and treatment are his or her own.

As with the practice of medicine generally, the provision of services and treatment to patients in mental health facilities is characterized by the exercise of professional judgment and discretion. *See White v. United States*, 244 F. Supp. 127 (E.D. Va. 1965), *aff'd*, 359 F.2d 989 (4th Cir. 1966) (discussing exercise of judgment in decision to grant or withhold privileges for patients); *United States v. Charters*, 863 F.2d 302 (4th Cir. 1988), *cert. denied*, 494 U.S. 1016 (1990). In *Charters*, the Fourth Circuit approved of a lower court order authorizing the forcible administration of antipsychotic medication to an incompetent,

involuntarily committed, mental patient, but the court remanded the case for reevaluation of the decision in light of present conditions. In so holding, the court expressed the standard by which professional judgment in this area is scrutinized:

> The basic principle is that a legally institutionalized mental patient is entitled to the exercise of "professional judgment" by those who have the responsibility for making medical decisions that affect his retained liberty interests. [*Youngberg v.*] *Romeo*, 457 U.S. at 321, 102 S.Ct. at 2461; *Parham* [*v. J.R.*], 442 U.S. at 607-09, 99 S.Ct. at 250-08. This is the process due such a person in this particular circumstance, and its nature dictates both the way in which the decision is to be made by the responsible professionals and how it is to be reviewed if presented to the courts for that purpose.

Id. at 312.

The court in *Charters* also made the following pertinent statements:

> That decision [to administer medication] should of course be now made under the procedures that we have suggested are required to meet the "professional judgment" standard. We observe that under the regime we have approved there is no requirement that, as a matter of due process, every medication decision by responsible medical professionals be submitted by the government for prior judicial approval before proceeding to carry it out. Such prior approval may of course be sought if desired, but under the approved regime such a decision is of a piece with other pre-deprivation governmental decisions such as those leading to job or social benefit terminations, prison transfers, disciplinary sanctions, and the like. *Those decisions are of course routinely acted upon without prior judicial approval.*

Id. at 314 (emphasis added). In this case, no prior judicial approval was given, and none was necessary, for the particular means by which the appellees were to supervise and care for the decedent. This being so, there is no reason or justification for immunizing the appellees from the consequences of their negligence in those areas.

Decisions from federal courts in which defendants have asserted a common-law version of the same immunity as found in § 8.01-195.3(4) are instructive. They also indicate

that this form of immunity is limited to cases in which the challenged acts or omissions are the same acts or omissions which were dictated by a court's order. *See van Emrik v. Chemung County Department of Social Services*, 911 F.2d 863 (2d Cir. 1990) (social workers were immune from civil rights action for their removal of child from custody of parents suspected of child abuse where social workers consulted their superiors and then obtained and executed a court order authorizing removal of child); *accord Coverdell v. Department of Social Services*, 834 F.2d 758 (9th Cir. 1987); *McCrum v. Elkhart County Department of Public Welfare*, 806 F. Supp. 203 (N.D. Ind. 1992).

As the court in *Coverdell* noted in its discussion of other cases on this issue, courts have held that persons who faithfully execute valid court orders are immune from liability for damages in actions "challenging conduct authorized by the order." 834 F.2d at 764; *see also Valdez v. City & County of Denver*, 878 F.2d 1285, 1290 (10th Cir. 1989) (because "every action" of officers in arresting and incarcerating plaintiff "was taken under the direction of a state court judge," defendants were immune); *Fowler v. Alexander*, 478 F.2d 694 (4th Cir. 1973) (sheriff and jailer who executed court order directing temporary confinement of plaintiff were immune from damages liability arising from such confinement).

The appellees' assertion of immunity under § 8.01-195.3(4) in the instant case would have merit if the appellant's challenge was to the fact of the temporary confinement of the decedent. As a closely analogous case indicates, however, that immunity does not extend to decisions made and acts or omissions which are outside the subject matter of the court order.

The plaintiff in *Cameron v. Montgomery County Child Welfare Service*, 471 F. Supp. 761 (E.D. Pa. 1979), was a child who was separated from his mother for three and one-half years pursuant to court orders following his adjudication as a "deprived child." He sued county officials in an action under 42 U.S.C.A. § 1983 (West 1981), challenging not his separation from his mother, but the alleged failure to provide him with adequate care, treatment, and services which would have enabled him to return home. The defendants asserted that because the plaintiff had been placed in their custody pursuant to court orders they were protected by the common-law immunity recognized for defendants who perform "ministerial" functions under a directive or order from a court. (This common-law immunity is codified in V.C.A. § 8.01-195.3(4).) The court's explanation for rejecting this immunity defense applies with equal force to the instant case:

> Many courts have recognized that *persons in non-judicial positions may be cloaked with immunity when performing ministerial functions under a court directive. See, e.g., Waits v. McGowan*, 516 F.2d 203, 206-07 n.6 (3d Cir. 1975) (collecting cases); *Dunn v. Gazzola*, 216 F.2d 709 (1st Cir. 1954).
>
> Defendants state that they "received custody of the plaintiff, Allen Cameron, pursuant to a Court Order dated July 3, 1974 and subsequent Orders dated September 16, 1974, December 20, 1974 and February 20, 1975 and that therefore [they] are entitled to the same or similar immunities enjoyed by judicial and quasi-judicial officials." . . . If plaintiff's complaint were concerned solely with the fact that defendants maintained custody of him, defendants' position would be analogous to that of the sheriff and jailer in *Fowler v. Alexander*, 478 F.2d 694 (4th Cir. 1973). In that case the sheriff and jailer confined the plaintiff temporarily in conformity with a court order. The Fourth Circuit held that they were therefore absolutely immune from damages. In the instant action, however, plaintiff's complaint goes far beyond the mere fact that he was maintained in custody by the defendants. *Plaintiff's complaint is not restricted to the fact of his confinement, but alleges* that he was confined without "adequate care, treatment, and services to enable him to return home to his mother," . . ., that he was prohibited from visiting with his mother, . . . , that he was advised of neither his right to counsel nor his right to have his

> placement reviewed by a court, . . ., that defendants failed to confine him in the least restrictive alternative, *id.* ¶ 51, and *that defendants acted wantonly and negligently in disregard of his mental and physical health* . . . .
>
> These acts and omissions that plaintiff has alleged on the part of defendants are not the type of ministerial acts to which a quasi-judicial immunity has been held to attach. *See Waits v. McGowan, supra*, 516 F.2d at 206; *Lockhart v. Hoenstine, supra*, 411 F.2d at 460. They are, rather, more closely analogous to the types of issues that arise in connection with the management of a juvenile detention center. *See Santiago v. City of Philadelphia*, 435 F.Supp. 136, 146-47 (E.D.Pa.1977); *Thompson v. Montemuro*, 383 F.Supp. 1200, 1206-07 (E.D.Pa.1974). In those cases, judicial or quasi-judicial *immunity was denied for discretionary or administrative functions, even though the plaintiffs' custody was pursuant to a court order.*

Cameron v. Montgomery County Child Welfare Service, 471 F. Supp. at 765-66 (emphasis added).

In the instant case, as in *Cameron*, the appellant's allegations go far beyond the fact of the decedent's confinement, and, in fact, do not challenge that confinement. Instead, the motion for judgment, like the complaint in *Cameron*, alleges the negligent failure to safeguard the decedent's mental and physical health (Plaintiff's Motion for Judgment ¶¶ VI, VII). These allegations relate to discretionary functions which were outside the scope of the court's detention order, and not to functions which became ministerial because they were dictated by the court.

The Civil Mental Temporary Detention Order under which the court ordered the decedent's hospitalization very briefly identified the decedent, described her mental state which made her in need of hospitalization, and gave her location at the time and where she should be taken. The only reference to the patient's care after hospitalization is the following language, which was not a particularized instruction given by the court for this case, but was

printed earlier on the standardized form used by the court: "The defendant [patient] *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" (emphasis added). Thus, the court order did not mandate medical or psychiatric services at all, and it certainly did not dictate to the appellees a certain level or kind of treatment or that they should take specific ministerial acts in this regard. In short, the provision of medical and psychiatric services to the decedent was not even the subject of the detention order, and the appellees may not use the existence of that order to shield them from liability for the failures alleged by the appellant.

Finally, the appellant's argument is not in conflict with the language of § 8.01-195.3(4), nor does it require a strained reading of that statute. Rather, his contentions are consistent with the principle that plain and unambiguous language in a statute should be given its ordinary meaning, given the context in which it is used. *See Board of Supervisors v. Machnick*, 242 Va. 452, 410 S.E.2d 607 (1991); *Loyola Federal Savings & Loan v. Herndon Lumber & Millwork, Inc.*, 218 Va. 803, 241 S.E.2d 752 (1978). Section 8.01-195.3(4) immunizes only acts or omissions "in execution of" a lawful court order, and the acts and omissions of these appellees regarding the care and supervision of the decedent were not "in execution of" the detention order. This statute was meant only to codify a form of common-law immunity. If the appellees' argument is accepted, that limited immunity will have been improperly expanded and extended to all manner of negligence and misconduct as long as at some earlier point in time there was a court order placing the injured party in

the state's custody. This cannot be what the General Assembly intended when it enacted § 8.01-195.3(4), and the court should take this opportunity to so hold in this appeal.

VI. CONCLUSION

For the foregoing reasons, the appellant requests this Court to grant his Petition for Appeal and to reverse the circuit court's order sustaining the appellees' Demurrer.

Respectfully submitted,

_____
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CERTIFICATE

I, Charles L. Green, Counsel for Appellant, state as follows:

1. The appellant is George E. Blumberg.

2. The appelSmiths are Southwestern Virginia Mental Health Institute, the State Mental Health and Mental Retardation Board, and the Commonwealth of Virginia.

3. Counsel for the AppelSmiths is William W. Eskridge, Penn, Stuart, Eskridge & Jones, Post Office Box 2288, Abingdon, Virginia 24210, (804) 628-5151.

4. A copy of the Petition for Appeal has this day been mailed, postage prepaid, to opposing counsel.

5. Counsel for the appellant desires to state orally to a panel of this court, by conference telephone call, the reasons why his petition for appeal should be granted.

Dated: _____ _____
Charles L. Green