Peter

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

Barry S. Strickland,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CA 90-00098-R
	)	
Emmett Talbert Drewry, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

The plaintiff in this case filed his original complaint on February 21, 1990. In order to correct certain defects in that complaint and to delete one defendant, the plaintiff moved this Court for leave to file an amended complaint on April 13, 1990. The Court granted his motion on May 2, 1990, and gave the plaintiff ten days to file a properly executed copy of the proposed amended complaint he had attached to his motion for leave to amend. For purposes of this ruling, the plaintiff's proposed amended complaint and the defendants' answer thereto are deemed filed based on representations of counsel that they will be filed as previously submitted.

The defendants' current motion is based on their contention that they, as volunteer firefighters, have immunity from this type of suit. They allege two bases for their defense -- sovereign immunity and statutory immunity. Neither of these asserted bases supports dismissal of the plaintiff's case.

I.

Under Virginia common law, some government employees enjoy

sovereign immunity and some do not.[1] In Messina v. Burden, 321 S.E.2d 657, 660 (Va. 1984), the Virginia Supreme Court analyzed "under what circumstances an employee of a governmental body is entitled to the protection of sovereign immunity." Under Messina, the first question a court must answer is whether the defendant works for an immune governmental entity. Id. at 661. Although the plaintiff's complaint does not specify which firefighting organization the defendants worked for, counsel for the defendants has represented to the Court that they worked for the Waverly Volunteer Fire Department. The Court assumes for the sake of this motion that the defendant's proffer is accurate,[2] and that the Town of Waverly and its volunteer fire department would be immune from a suit like this one. See Edwards v. City of Portsmouth, 375 S.E.2d 747 (1989) (city entitled to immunity for "governmental functions," which includes the provision of ambulance services).

Even if the Town and its volunteer fire department have immunity, it does not necessarily follow that their employees are also immune. See, e.g., Yassa v. Moore, 3 V.C.O. 189, 190 (1984). The next question under Messina is whether this is a "proper case" for extending sovereign immunity to the governmental entity's

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[1] Although the defendants here were volunteers and not employees, the Court is not persuaded that this distinction is relevant to determination of their immunity from this type of suit.

[2] For purposes of the defendant's motion to dismiss, the Court of course accepts the allegations of the plaintiff's complaint as true. Nevertheless, because the plaintiff prevails on the defendants' motion even if their proffer is accurate, the Court assumes for purposes of this Opinion that it is.

employees.[3] After reviewing a long line of fact-specific decisions, the Messina Court adopted the following test for determining entitlement to immunity:

> 1. the nature of the function performed by the employee;
> 2. the extent of the state's interest and involvement in the function;
> 3. the degree of control and direction exercised by the state over the employee;
> 4. whether the act complained of involved the use of judgment and discretion.

Id. at 663 (quoting James v. Jane, 267 S.E.2d 108, 113 (Va. 1980)); see also Lentz v. Morris, 372 S.E.2d 608, 610 (Va. 1988).

The Court's review of the cases brought to its attention by counsel indicates that the fourth of these is often the determinative factor in cases like this one. For example, in the Jefferson, v. Howard, Richmond Cir. Ct., June 13, 1989 Letter Op. (Markow, J.), the plaintiff was injured in a car accident that occurred while the defendant police officer was responding to a call to assist in the apprehension of a suspect. In analyzing whether the alleged wrongful act involved the exercise of judgment and discretion, Judge Markow reasoned:

> Few activities in life can be performed without the exercise of some judgment or the use of discretion in the literal meanings attributed to those words. Normally, operation of an automobile would not be considered to require the exercise of judgment and discretion such as to confer sovereign immunity; however, vehicular operation in the context of police work may well require the application of the judgment or discretion of the sovereign such as to confer its immunity upon the officer. To illustrate the distinction,

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[3] The fact that some courts have held volunteer fire departments entitled to sovereign immunity is not on its own persuasive authority for the extension of sovereign immunity to individual firefighters. See Downs v. City of Roanoke, 23rd Jud. Cir. of Va., August 7, 1989 Letter Op. (Strickland, J.); Zern v. Muldoon, 101 Pa. Commw. 258, 516 A.2d 799 (1986).

> contrast the mental exercises involved where a police officer is driving his vehicle from his station to his beat, with that of a police officer involved in using his vehicle to block a suspect from escape.

Id. at 3.

In this case, the plaintiff alleges that he was injured because one of the defendants failed to secure a hose attached to the firetruck he was driving. Although the defendants were in the process of responding to an emergency call when the accident occurred, the alleged cause of the accident was the performance (or non-performance) of ministerial duties that did not require the exercise of judgment by the defendants. The "mental exercises" involved here are more like those of a police officer driving from the station to his beat than those of an officer using his vehicle in the apprehension of a suspect. Id.; see also MFC Partnership v. Foster, 6 V.C.O. 349 (1986) (state police agent not entitled to immunity for negligently disposing of dynamite); Irby v. Gill, 3 V.C.O. 174 (1984) (no immunity for ambulance personnel failing to transport patient to hospital in violation of fire department policy). Cf. Ervin v. Jones, Richmond Cir. Ct., December 5, 1989 Letter Op. (Markow, J.) (transportation of a suspect involved the exercise of discretion and judgment, triggering the protection of sovereign immunity for the defendant officer). Because the alleged negligent acts of the defendants are properly characterized as ministerial and not discretionary, the defendants are not protected by the cloak of sovereign immunity in this case.

Furthermore, the Virginia Supreme Court has found an exception to sovereign immunity when the plaintiff claims gross negligence or intentional misconduct on the part of the defendant(s).

Messina, 321 S.E.2d at 662. The plaintiffs here have alleged gross negligence on the part of the defendants. Although the defendants argue that the plaintiff's complaint is facially inadequate and could not support a finding of gross negligence, that is a factual issue that cannot be decided on a 12(b)(6) motion to dismiss. The plaintiff is entitled to develop his evidence in support of his allegation of gross negligence through the processes of discovery.

II.

The defendants also argue that they have statutory immunity from this type of suit. The primary authority cited for this proposition in their brief is Va. Code § 8.01-220.1:1, which grants immunity to volunteers for their acts as directors and officers of tax exempt organizations. Assuming that the Waverly Volunteer Fire Department was such a tax exempt organization, the defendants are not covered by the immunity granted in §8.01-220.1:1 because they were not, at the time of the accident, officers or directors of that organization. The Court has reviewed the defendants' other asserted bases for statutory immunity, and finds them to be without merit as well.

For these reasons, the defendants' motion to dismiss the plaintiff's amended complaint is DENIED.

It is so ORDERED.

Let the Clerk send a copy of this Order to all counsel of record.

DATE

UNITED STATES DISTRICT JUDGE