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THE DOCTRINE OF CHARITABLE IMMUNITY: ALIVE AND WELL IN VIRGINIA

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I. INTRODUCTION

Until recent years, the doctrine of charitable immunity was believed by many Virginia practitioners to be an archaic defense limited to charitable hospitals. This belief likely arose out of the fact that until 1988 every Supreme Court of Virginia case addressing the doctrine involved its application to hospitals.[1] The Court of Appeals for the Fourth Circuit, applying Virginia law, broadened the doctrine over the years by extending charitable immunity to a nonprofit college,[2] a confederate memorial association,[3] and an historical church.[4] However, the scope of charitable immunity remained virtually untested in the Supreme Court of Virginia until the recent cases of *J. v. Victory Tabernacle Baptist Church*,[5] *Thrasher v. Winand*[6] and *Infant C. v. Boy Scouts of America*.[7] In

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1. *See* Purcell v. Mary Washington Hosp., 217 Va. 776, 232 S.E.2d 902 (1977); Whitfield v. Whitaker Memorial Hosp., 210 Va. 176, 169 S.E.2d 563 (1969); Roanoke Hosp. Ass'n v. Hayes, 204 Va. 703, 133 S.E.2d 559 (1963); Hill v. Leigh Memorial Hosp., 204 Va. 501, 132 S.E.2d 411 (1963); Memorial Hosp. v. Oakes, 200 Va. 878, 109 S.E.2d 388 (1959); Danville Community Hosp. v. Thompson, 186 Va. 746, 43 S.E.2d 882 (1947); Norfolk Protestant Hosp. v. Plunkett, 162 Va. 151, 173 S.E. 363 (1934); Weston's Adm'x v. Hospital of St. Vincent of Paul, 131 Va. 587, 101 S.E. 785 (1921).

2. Ettlinger v. Trustees of Randolph-Macon College, 31 F.2d 869 (4th Cir. 1929). *But see* Radosevic v. Virginia Intermont College, 633 F. Supp. 1084 (W.D. Va. 1986) (charitable immunity denied to educational institution where charter fails to set forth charitable purpose and where it consistently operated at a profit).

3. Bodenheimer v. Confederate Memorial Ass'n, 68 F.2d 507 (4th Cir.), *cert. denied*, 292 U.S. 629 (1934).

4. Egerton v. R.E. Lee Memorial Church, 273 F. Supp. 834 (W.D. Va. 1967), *aff'd*, 395 F.2d 381 (4th Cir. 1968).

5. 236 Va. 206, 372 S.E.2d 391 (1988) (holding that church is eligible for charitable immunity status, but remanding case for new trial on issue of negligent hiring, which operates as an exception to the charitable immunity of religious institutions).

6. 239 Va. 338, 389 S.E.2d 699 (1990) (holding that nonprofit civic organization qualifies for charitable immunity but reversing trial court's finding that plaintiff was beneficiary of organization's charitable purpose).

7. 239 Va. 572, 391 S.E.2d 322 (1990) (plaintiff boy scout had a cause of action against the

these cases, the court affirmed that while the elements of the doctrine are to be strictly construed, charitable immunity extends to a broad range of charitable organizations.

II. Elements of a "Charitable Organization"

The doctrine of charitable immunity, as applied in Virginia common law, states that beneficiaries of charitable or eleemosynary organizations cannot bring actions for negligence against such organizations absent specific allegations of negligence in hiring of employees.[8] The doctrine arose out of the public policy that a charity, "founded and fostered . . . through the highest motivations of public spirit, would be thwarted in its work if laid open to unrestricted litigation."[9]

The common law defense of charitable immunity pertaining to hospitals has been restricted and modified by statute.[10] Pursuant to section 8.01-38 of the Code of Virginia, a hospital is not eligible for charitable immunity unless the hospital renders exclusively charitable medical services at no charge, or the party alleging negligence was accepted as a patient free of charge under an express written agreement executed by the hospital and delivered at the time of admission to the patient or the person admitting the patient.[11]

The statute provides further that where a hospital is exempt from taxation pursuant to 26 U.S.C. § 501(c), it is not liable for damage in excess of the limits of its insurance, provided that the hospital carries insurance coverage in an amount not less than $500,000 for each occurrence.[12]

The common law elements of charitable immunity as they pertain to charitable organizations other than hospitals remain un-

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Boy Scouts of America, a charitable organization, for negligent hiring and retention of a volunteer scoutmaster who allegedly molested plaintiff).

8. *See* Purcell v. Mary Washington Hosp., 217 Va. 776, 232 S.E.2d 902 (1977); Whitfield v. Whitaker Memorial Hosp., 210 Va. 176, 169 S.E.2d 563 (1969); Roanoke Hosp. Ass'n v. Hayes, 204 Va. 703, 133 S.E.2d 559 (1963); Hill v. Leigh Memorial Hosp., 204 Va. 501, 132 S.E.2d 411 (1963); Memorial Hosp. v. Oakes, 200 Va. 878, 109 S.E.2d 388 (1959); Danville Community Hosp. v. Thompson, 186 Va. 746, 43 S.E.2d 882 (1947); Norfolk Protestant Hosp. v. Plunkett, 162 Va. 151, 173 S.E. 363 (1934); Weston's Adm'x v. Hospital of St. Vincent of Paul, 131 Va. 587, 101 S.E. 785 (1921).

9. *Hill*, 204 Va. at 503, 132 S.E.2d 413.

10. Va. Code Ann. § 8.01-38 (1950 & Cum. Supp. 1990).

11. *Id.*

12. *Id.*; *see* 26 U.S.C. § 501(c) (1988).

changed. To qualify for charitable immunity status, an organization has the burden of proving by a preponderance of the evidence that: (1) it is founded and maintained as a charity, and (2) the party alleging negligence was a beneficiary of the bounty of, and not a stranger to, the organization's charitable purposes at the time of the alleged injury.[13]

The charitable nature of an organization is determined by the powers and purposes defined in its charter or articles of incorporation and the manner in which the organization is conducted.[14] The Supreme Court of Virginia has stated that the general test for determining charitable status is "whether the organization is maintained for gain, profit or advantage."[15] Thus, if the organization is formed for the purpose of deriving a profit, it is not charitable in nature. While "charitable purpose" has not been precisely defined in Virginia, the Supreme Court of Virginia apparently has adopted a rather broad definition of the term. Charitable purposes have been held to include religious purposes,[16] promotion of community health and welfare,[17] promotion of civic welfare,[18] and relief of poverty.[19] The circuit courts have extended the definition of "charitable purpose" to include educational purposes,[20] governmental or municipal purposes,[21] and promotion of social welfare and spiritual

13. *See Oakes*, 200 Va. at 885, 108 S.E.2d at 392-93; *Danville Community Hosp.*, 186 Va. at 753, 43 S.E.2d at 884.

14. *Id.*

15. *Danville Community Hosp.*, 186 Va. at 753, 43 S.E.2d at 884.

16. *See* J. v. Victory Tabernacle Baptist Church, 236 Va. 206, 372 S.E.2d 391 (1988); *Weston's Adm'x*, 131 Va. at 587, 107 S.E. at 785.

17. *See* cases cited *supra* note 1.

18. *See* Thrasher v. Winand, 239 Va. 338, 389 S.E.2d 699, (1990); Infant C. v. Boy Scouts of America, 239 Va. 572, 391 S.E.2d 322 (1990).

19. *See Thrasher*, 239 Va. at 338, 389 S.E.2d at 699.

20. *See* Langston v. American Red Cross, 18 Va. Cir. 451 (Virginia Beach 1990) (Red Cross immune from suit for negligence filed by participant in CPR class who slipped and fell in a parking lot outside the building where the class was held); Boan v. Peninsula YMCA, 18 Va. Cir. 145 (Newport News 1989) (YMCA immune from suit for negligence filed by father of boy who fell from tree during nature study program at YMCA's summer day camp); *see also* Morgan v. Marymount Univ., 18 Va. Cir. 428 (Arlington County 1990) (charitable immunity defense denied to educational institution whose charter does not indicate that it is a charity and which consistently makes a profit).

21. *See* Stayton v. American Legion, 18 Va. Cir. 387 (Henrico County 1990) (plaintiff who slipped and fell while working as volunteer at carnival sponsored by American Legion forestalled from bringing negligence action against the organization); Straley v. Town of Urbanna, No. 1763 (Middlesex County Cir. Ct. 1990) (Chamber of Commerce and individual member of Chamber immune from suit for negligence filed by participant of Urbanna Oyster Festival who was injured when struck by piece of candy thrown during Festival parade); Philpotts v. City of Norfolk and Norfolk Festevents, Ltd., 18 Va. Cir. 19 (Norfolk 1989)

growth.[22]

Once it is established that the defendant organization is formed for a charitable purpose, the organization must prove that it *operates* in a charitable manner. In making this determination, the supreme court has considered the following factors: (1) whether the officers and directors receive compensation; (2) whether any individual, firm or corporation receives any profit from the operation (3) whether surplus funds are devoted to benevolent and charitable work, and (4) whether the organization enjoys tax exempt status as a charitable organization by the state and federal governments.[23] An organization seeking charitable immunity status may generate revenues as long as it can be shown that the revenues are used to promote the organization's charitable work.

III. Beneficiaries of the Charitable Purpose: *Thrasher v. Winand*

Once an organization establishes that it is formed for charitable purposes and operates in a charitable manner, the organization must prove that the plaintiff was a beneficiary of, and not a stranger to, the organization's charitable purpose at the time he or she allegedly was injured.[24]

Prior to *Thrasher v. Winand*,[25] the circuit courts had established

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(nonprofit civic organization immune from suit filed by plaintiff who fell while attending community event known as Harborfest, sponsored by the organization); Mayne v. City of Norfolk and Norfolk Festevents, Ltd., No. L87-1242 (Norfolk Cir. Ct. 1989) (same civic organization immune from suit filed by plaintiff who was assaulted while attending Harborfest); *see also* Eldridge v. City of Richmond, 8 Va. Cir. 317 (Richmond 1987) (holding civic organizations such as Maymont Park Foundation eligible for charitable immunity if foundation could carry burden of proving that it is entitled to the defense).

22. *See, e.g.*, *Boan*, 18 Va. Cir. at 145 (YMCA immune from suit for negligence filed by father of boy who fell from tree during nature study program at YMCA's summer day camp); Smith v. Peninsula YMCA, 18 Va. Cir. 145 (Newport News 1989) (YMCA granted charitable immunity defense in suit brought by plaintiff injured while playing basketball on YMCA premises); Calle v. Holy Trinity Catholic Church, No. L89-225 (Norfolk Cir. Ct. 1989) (cheerleader for Catholic elementary school forestalled from bringing negligence action against church, school and basketball league).

23. *Purcell*, 217 Va. at 780, 232 S.E.2d at 904-05; *Oakes*, 200 Va. at 883-84, 108 S.E.2d at 392.

24. Roanoke Hosp. Ass'n v. Hayes, 204 Va. 703, 707, 133 S.E.2d 559, 562 (holding that plaintiff who is not a patient, but an invitee or a stranger having no beneficial relation to the charitable hospital may recover for tort if negligence is proved); *see also* Egerton v. R.E. Lee Memorial Church, 273 F. Supp. 834 (W.D. Va. 1967), *aff'd*, 395 F.2d 381 (4th Cir. 1968); Hospital of St. Vincent v. Thompson, 116 Va. 101, 81 S.E. 13 (1914).

25. 239 Va. 338, 389 S.E.2d 699 (1990).

a trend toward broad construction of the term "beneficiary." For instance, in *Taylor v. American National Red Cross*,[26] the plaintiff sustained injuries while donating blood to the Red Cross. The court held that by donating blood, the plaintiff was a beneficiary of the charity's bounty, because "as a *blood donor* [she] was eligible to so receive any needed blood and blood products as were her family members."[27] Similarly, in *Stayton v. American Legion*,[28] the plaintiff was injured when she slipped and fell while working as a volunteer at the defendant's Labor Day carnival. Even though the plaintiff was a volunteer worker and a paying member of the organization at the time she was injured, she was held to be a beneficiary of the American Legion's charitable purpose because she was "free to enjoy all the benefits associated with that Labor Day function as well as the benefits associated with the American Legion Post generally."[29]

In *Thrasher*,[30] the first non-hospital case in which the Supreme Court of Virginia addressed the concept of "beneficiary" as it pertains to charitable immunity, the court curtailed the trend established in the circuit courts by limiting the definition of beneficiary to those who are deriving a direct benefit from the organization's charitable purpose at the time the injury occurs. The defendant in *Thrasher* was a nonprofit corporation called Mountain Magic, Inc., founded for the purpose of sponsoring an annual spring festival, the proceeds of which were donated to local charities.[31] The plaintiff was a member of a social club which operated a food concession booth at the defendant's festival.[32] The plaintiff worked at the booth all day, was injured in an auto accident while driving home, and he alleged that the accident occurred because Mountain Magic failed to maintain proper road closure in the festival area.[33] The trial court dismissed the plaintiff's suit against Mountain Magic on two grounds: (1) the plaintiff, as a member of the social club, was receiving benefit of the organization's charitable activities at the time he was injured,[34] and (2) as a member of the community,

26. 8 Va. Cir. 108 (Norfolk 1984).
27. *Id.* at 109.
28. 18 Va. Cir. 387 (Henrico County 1989).
29. *Id.* at 389.
30. *Thrasher*, 239 Va. at 338, 389 S.E.2d at 699.
31. *Id.* at 339, 389 S.E.2d at 700.
32. *Id.* at 339-40, 389 S.E.2d at 700.
33. *Id.* at 340, 389 S.E.2d at 700.
34. *Id.* at 340, 389 S.E.2d at 701.

plaintiff was eligible to receive Mountain Magic's charitable benefits should he need them in the future.[35]

Reversing the trial court, the Supreme Court of Virginia held that "mere membership in a class eligible to receive future benefits, conditioned upon circumstances which might never occur, is too remote and speculative to be considered."[36] The court added that "[t]he beneficiaries of Mountain Magic's charity were only those to whom its board of directors donated the proceeds of its fund-raising activities, a category to which [the plaintiff] Thrasher did not belong."[37] Accordingly, the court found that the defense of charitable immunity could not be asserted against this plaintiff.[38]

Thrasher simultaneously broadens and restricts the application of the doctrine of charitable immunity. While affirming that charitable immunity extends beyond hospitals and churches to civic organizations sponsoring community events, the case also tightened the reigns on the previously broad interpretation of the concept of "beneficiary" employed by the circuit courts. After *Thrasher*, the soundness of circuit court rulings like *Taylor v. American National Red Cross* and *Stayton v. American Legion* must be questioned. While the doctrine of charitable immunity appears to be as viable as ever in Virginia, future defendants seeking charitable immunity will likely be required to prove a direct, tangible relationship between an organization's charitable purpose and the plaintiff against whom the defense of charitable immunity is asserted.

IV. "Negligent Hiring" Exception

Virginia recognizes one exception to the doctrine of charitable immunity, and that is the independent tort of negligent hiring of employees. "Negligent hiring" was first discussed in *Weston's Administratrix v. Hospital of St. Vincent of Paul*,[39] a suit filed against a hospital and nurse employee. In *Weston's Administratrix*, a newborn baby died in the hospital from burns received when the defendant nurse placed him in a crib with a hot water bottle which was too hot.[40] The court held in that case that the

35. *Id.* at 341-42, 389 S.E.2d at 701.
36. *Id.* at 342, 389 S.E.2d at 701.
37. *Id.*
38. *Id.* at 342, 389 S.E.2d at 701-02.
39. 131 Va. 587, 107 S.E. 785 (1921).
40. *Id.* at 589, 107 S.E. at 785.

hospital was a charitable institution and that the only duty it owed to patients was the exercise of due care in the selection and retention of employees.[41] Since there was no allegation of negligent hiring against the hospital, the suit was dismissed. The court made similar rulings in several cases involving suits against hospitals.[42]

In *J. v. Victory Tabernacle Baptist Church*,[43] the Supreme Court of Virginia, for the first time, held that charitable organizations other than hospitals enjoy immunity from negligence actions. Further, the court held that churches, like hospitals, must exercise due care in the hiring of employees.[44] *Victory Tabernacle* involved a negligence action filed by a plaintiff whose ten-year-old daughter was repeatedly raped and sexually assaulted by an employee of Victory Tabernacle Baptist Church. The plaintiff alleged that the church and its pastor knew, or should have known, that the employee recently had been convicted of aggravated sexual assault of a young girl, that he was on probation for the offense, and that a condition of his probation was that he not be involved with children.[45] Accordingly, the plaintiff asserted that the church was negligent in hiring the employee and entrusting him with duties which brought him in contact with the plaintiff's daughter.[46]

The church demurred to the plaintiff's allegations of negligent hiring, and the trial court sustained the demurrer and dismissed the suit.[47] The Supreme Court of Virginia, reversing the trial court, held that negligent hiring operates as an exception to the charitable immunity of religious institutions just as it does with regard to charitable hospitals.[48]

In the *Victory Tabernacle* opinion, the court offered the following definition of negligent hiring, adopted from a law review article quoted in the opinion: "[N]egligent hiring is a doctrine of primary liability [wherein] the employer is principally liable for negligently placing an unfit person in an employment situation involving an

41. *Id.* at 610, 107 S.E. at 793.
42. *See* Hill v. Leigh Memorial Hosp., 204 Va. 501, 132 S.E.2d 411 (1963); Memorial Hosp. v. Oakes, 200 Va. 878, 108 S.E.2d 388 (1959); Norfolk Protestant Hosp. v. Plunkett, 162 Va. 151, 173 S.E. 363 (1934).
43. 236 Va. 206, 372 S.E.2d 391 (1988).
44. *Id.* at 210, 372 S.E.2d at 394.
45. *Id.* at 207, 372 S.E.2d at 392.
46. *Id.*
47. *Id.* at 208, 372 S.E.2d at 392.
48. *Id.* at 209-10, 372 S.E.2d at 393-94.

unreasonable risk of harm to others."[49] Since negligent hiring is a doctrine of primary liability, independent of the employee's actions, the court reasoned that the church could be liable for negligent hiring even where the employee is charged with a criminal offense.[50] Moreover, the court held that the "negligent hiring" exception applies even though the employee's alleged offense occurred outside of the scope of his employment.[51]

When the suit was remanded for a new trial on the issue of negligent hiring, the church contended that the accused rapist was not a hired employee, but a volunteer.[52] Since the wrongdoer was a volunteer worker, the church argued that it could not be liable under a theory of negligent hiring.[53] The jury discounted the church's position, found that the accused rapist was a hired employee of the church, and entered a verdict for the plaintiff.[54] The case is currently pending on the church's motion for summary judgment and new trial. Should this case once again be appealed, the Supreme Court of Virginia may be asked to determine whether a church can be held liable for the wrongful acts of a volunteer worker.

The liability of a charitable organization for the acts of its volunteers recently was addressed by the Supreme Court of Virginia in the case of *Infant C. v. Boy Scouts of America*,[55] in which a volunteer scoutmaster was accused of molesting a twelve-year-old scout. The plaintiff filed suit against the Boy Scouts of America, alleging negligent hiring and retention of the scoutmaster. The scoutmaster previously had been convicted of child molestation in another state while he was working for the Boy Scouts.[56] The Boy Scouts of America asserted the defense of charitable immunity.[57] Citing *Victory Tabernacle*, the supreme court found that a charitable organization is liable to the beneficiaries of the charity for the negligence of its employees if it fails to exercise ordinary care in selection and

49. *Id.* at 211, 372 S.E.2d at 394 (quoting Note, *Minnesota Developments-Employer Liability for the Criminal Acts of Employees Under Negligent Hiring Theory*: Ponticas v. K.M.S. Investments, 68 MINN. L. REV. 1303, 1306-07 (1984) (footnotes omitted)).

50. *Victory Tabernacle*, 236 Va. at 210, 372 S.E.2d at 394.

51. *Id.* at 210-11, 372 S.E.2d at 394.

52. Johnson v. Victory Tabernacle Church, No. L84-1388 (Norfolk Cir. Ct. 1990).

53. *Id.*

54. *Id.* (verdict entered on May 16, 1990).

55. 239 Va. 572, 391 S.E.2d 322 (1990).

56. *Id.* at 574-75, 391 S.E.2d at 323.

57. *Id.* at 578, 391 S.E.2d at 325.

retention of those employees.[58] The fact that the scoutmaster was a volunteer as opposed to a hired employee did not bear on the court's ruling.

In broadening the "negligent hiring" exception to include volunteer workers, the supreme court, in effect, placed further limitations on the doctrine of charitable immunity as it is applied in Virginia. Yet, the rulings in *Victory Tabernacle* and *Infant C. v. Boy Scouts of America* also indicate the court's willingness to allow the use of the charitable immunity defense by all types of charitable organizations.

V. Employees and Agents: Cloaked with Charitable Immunity?

While it is clear that a charitable organization is immune from a negligence action arising out of the alleged acts of its employees (absent allegations of negligent hiring),[59] it remains unsettled whether the individual employee or agent of a charitable organization is cloaked with the immunity afforded his principal. There are no Supreme Court of Virginia cases which address this issue.

In *Boan v. Peninsula Y.M.C.A.*,[60] a ten-year-old boy was injured when he fell from a tree while participating in a summer camp program. When an action for negligent supervision was brought against the Y.M.C.A. and the individual camp counselors, the suit was dismissed under the charitable immunity doctrine.[61] Likewise, in *Straley v. Town of Urbanna*,[62] the court dismissed a suit for negligence against both the charitable organization and the individual defendant who had been acting as an agent for the organization when the alleged tort occurred.

By contrast, in *Krupnik v. Glaydin School and Camp, Inc.*,[63] the Circuit Court of Loudoun County analogized the doctrine of charitable immunity to that of sovereign immunity and concluded that the individual defendant is not entitled to the charitable immunity enjoyed by his employer. In reaching the conclusion, the circuit court relied on the Supreme Court of Virginia cases *Crabbe v.*

58. *Id.*
59. *See* cases cited *supra* note 1; *Thrasher v. Winand*, 239 Va. 338, 389 S.E.2d 699 (1990).
60. 18 Va. Cir. 145 (Newport News 1989).
61. *Id.* at 149-50.
62. No. 1763 (Middlesex County Cir. Ct. 1990).
63. 3 Va. Cir. 338 (Loudon County 1985).

School Board[64] and *Short v. Griffitts*.[65] In both of those cases, municipal employees acting within the scope of their employment were denied sovereign immunity.[66]

While drawing analogies among the immunity doctrines is one option for resolving this issue, it is important to remember that the various immunity doctrines are established for different reasons. Charitable immunity is created to promote and foster benevolent work. This public policy might be severely undermined if beneficiaries of charitable institutions are prevented from filing suit against the organization itself, but are free to pursue actions against the individuals who comprise the organization and make possible its benevolent work.

VI. A Note on Procedure

The defense of charitable immunity is properly raised in the form of a special plea, as opposed to a demurrer, because the party seeking charitable immunity is required to prove facts which, in most cases, are not contained in the pleadings.[67] Once raised by special plea, the elements of the immunity may be established in an evidentiary hearing.[68] Where a special plea of charitable immunity is sustained, dismissal with prejudice is in order.

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64. 209 Va. 356, 164 S.E.2d 639 (1968) (overruled by Lentz v. Morris, 236 Va. 78, 372 S.E.2d 608 (1988)).

65. 220 Va. 53, 255 S.E.2d 419 (1979) (overruled by Lentz v. Morris, 236 Va. 78, 372 S.E.2d 608 (1988)).

66. In *Crabbe*, a student was injured while being instructed to use a power table saw in a class at a county school, and the teacher instructing him was held liable. *Crabbe*, 209 Va. at 356, 164 S.E.2d at 639. In *Short*, another employee of a county school was held liable for the presence of broken glass on an outdoor track when a student was injured after falling on it. *Short*, 200 Va. at 53, 255 S.E.2d at 479. Interestingly, although in both cases the school employees were held negligent, the school boards enjoyed immunity.

67. *See* T. Boyd, E. Graves & L. Middleditch, Jr., Virginia Civil Procedure § 8.4 (1982).

68. *See, e.g.*, Thrasher v. Winand, 239 Va. 338, 340, 389 S.E.2d 699, 701 (1990).