

Docket Number 21-801

Supreme Court, U.S.
FILED

NOV 26 2021

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

Barry McCabe,
Petitioner,
v.
Fairfax County,
Fairfax County Animal Shelter,
Fairfax County Board of Supervisors,
David Rohrer,
Ed Roessler,
Anthony Matos,
Barbara Hutcherson,
Amanda Novotny,
John Doe(s), individually and in their professional
capacities,
Respondents.

On Petition for Writ of Certiorari To The
Supreme Court of Virginia

PETITION FOR A WRIT OF CERTIORARI

Barry McCabe
9470 Canonbury Square
Fairfax Virginia 22031
Phone: 703-598-0064
bm.mccabe@gmail.com
pro se petitioner

QUESTIONS PRESENTED

1. Do animal “adoption” laws conflict with the Constitution’s Contract Clause and the general principles of contracting?
2. Did the court flout this Court’s standard in Iqbal/Twombly when they dismissed several of McCabe’s claims?
3. Did the court misapply statutory procedures that are reserved for county procurement contract claims, to prevent McCabe from asserting contract claims against Fairfax County?
4. This Court has ruled that counties, when acting as arms of the state, are not entitled to absolute immunity (“sovereign immunity”) from tort claims when engaged in proprietary and commercial functions. The commercial importation and resale of a violent pit bull is not a protected government function. Did the Virginia courts violate this Court’s precedent when they dismissed all tort claims against Fairfax County?
5. The Fairfax County Animal Shelter (“FCAS”), who sold a violent pit bull dog, is an instrumentality of Fairfax County. The court asserted that FCAS was a non *sui juris* entity and thus, was not capable of being sued, and dismissed all contract and tort claims against FCAS. Did the courts violate the general principles of contracting and the Uniform Commercial

Code (“UCC”) when they dismissed all claims against FCAS?

6. This Court has ruled that legislative immunity is not applicable to activities pertaining to employee hiring, disciplining and firing. Did the Virginia courts violate this Court’s precedent and flout statutory law when they dismissed the gross negligence claim against the Fairfax County Board of Supervisors (“BOS”)?

7. Did the Virginia courts flout state law and create friction between the states when they dismissed all UCC claims against all respondents?

8. This Court has defined specific standards needed to assert a “failure to warn” product liability claim. Virginia has no statutory product liability laws. Did the court abuse its discretion when it dismissed the product liability claim based on a theory McCabe did not allege?

PARTIES TO THE PROCEEDING

The party to the judgment from which review is sought is Petitioner Barry McCabe. He was a party in all proceedings below:

Petitioner

Barry McCabe, pro se, Plaintiff-Appellant below

Respondents ^{1 2 3}

Fairfax County, Virginia, a political subdivision, Defendant-Appellee below

Fairfax County Animal Shelter, an instrumentality, Defendant-Appellee below

Fairfax County Board of Supervisors, Defendant-Appellee below

Barbara Hutcherson, Defendant-Appellee below

Amanda Novotny, Defendant-Appellee below

¹ Respondent is Fairfax County, Virginia on behalf of all respondent parties.

² Fairfax County is listed on the court of appeals docket as defendants, but it is representative of all parties.

³ Fairfax County Animal Shelter was the listed defendant in the original filings in Eastern District of Virginia (“EDVA”), prior to it being transferred to Virginia state court.

Ed Roessler, Defendant-Appellee below

David Rohrer, Defendant-Appellee below

Anthony Matos, Defendant-Appellee below

John Doe(s), Defendant-Appellee below

There are no corporations involved in this proceeding.

RELATED CASES

Supreme Court of Virginia, Record No. 201283, Barry McCabe v. Fairfax County, et al, Order Denying Review (Demurrer), judgement entered May 14, 2021.

Supreme Court of Virginia, Record No. 201134, Barry McCabe v. Fairfax County, et al., Order Denying Review (Plea in Bar) judgement entered May 14, 2021.

Fairfax County Circuit Court, No. CL-2019-8951, Barry McCabe v. Fairfax County, et al, Order (Plea in Bar), entered February 7, 2020.

Fairfax County Circuit Court, No. CL-2019-0008951, Barry McCabe v. Fairfax County, et al, initial Plea In Bar hearing, judgement entered February 7, 2020.

Fourth Circuit Court of Appeals No. 19-CV-1583, Barry McCabe v. Fairfax County Animal Shelter, Judgement entered March 31, 2020. (Appeal of §1983

action)

Fourth Circuit Court of Appeals No. 19-CV-1583,
Barry McCabe v. Fairfax County Animal Shelter,
Unpublished Opinion, entered March 31, 2020.
(Appeal of §1983 action).

U.S. District Court for the Eastern District of
Virginia, No. 1:19-VC-00053-CMH-TCB, Barry
McCabe v. Fairfax County Animal Shelter, Order
entered March 20, 2019.

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	iii
RELATED CASES	iv
TABLE OF CONTENTS	vi
TABLE OF AUTHORITIES	xiii
FEDERAL CASES	xiii
STATE CASES	xv
California	xv
Connecticut	xv
Indiana	xv
Mississippi	xvi
Missouri	xvi
New York	xvi
Oregon	xvii
Pennsylvania	xvii
Vermont	xxiii
Virginia	xxiii
Washington, DC	xix
STATUTORY CODE	xx
US Code	xx
Virginia	xx
CONSTITUTIONAL PROVISIONS	xxiii
US Constitution	xxiii
OTHER AUTHORITIES	xxiii
Supreme Court Rules	xxiii
Outside Sources	xxiii
PETITION FOR A WRIT OF CERTIORARI ..	1
OPINIONS BELOW	1
JURISDICTION	5

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE	5
US Constitution.	5
Virginia Code	5
STATE CUSTOMS INVOLVED	8
STATEMENT OF THE CASE.	8
I - Factual Background	9
II - Procedural History.	13
REASONS FOR GRANTING THE WRIT	15
I. The Court's Decision To Not Recognize The Sale Of A Dog To Be A Purchase Violates The Constitution's Contract Clause, This Court's Precedents And Departs From The Accepted Rationale Of American Jurisprudence.	16
A. Animal "adoption" laws violate the Constitution's Contract Clause.	17
B. Animals do not have any legal status beyond property.	19
C. The respondents sold property, not performed a service.	20
D. Amending property "sales" laws to be "adoptions" gives legislatures a way to give industries absolute immunity.	21
II. The Courts Flouted This Court's Precedent, Set Forth In <i>Iqbal-Twombly</i> , When It Dismissed Several Of McCabe's Claims	23
A. During the plea in bar, the court disregarded <i>Iqbal/Twombly</i> standards and multiple Virginia Code statutes that tolled several of McCabe's statute of limitations.	24

B. During the <i>demurrer</i> , the court disregarded <i>Iqbal/Twombly</i> standards when it dismissed the UCC and product liability claims.	26
III. The Courts Violated The Constitution's Contract Clause And Disregarded Traditional Contracting Principles When They Dismissed All Contract Claims Against Fairfax County.	27
A. § 1246 applies only to government procurement contract claims, not to common law contracts.	28
B. Animal sales fall under common law sales contracts, not government procurement contracts.	29
C. § 1246 effectively inhibits an aggrieved party's right to a court action, thus violating the Contract Clause and due process.	29
D. § 1246 does not apply to tort claims made against Virginia counties.	31
IV. Based Upon This Court's Precedent, Fairfax County Is Not Entitled To "Sovereign Immunity" Protections From Tort Claims Since It Was Not Performing A Government Function When It Imported And Resold A Violent Pit Bull.	32
A. This Court has ruled that counties cannot claim sovereign immunity when not performing government functions.	32
B. Fairfax County was not performing a government function.	33

C. The lower court's ruling creates a double standard.	34
V. The Virginia Court's Decision Conflicts With This Court's Precedent, Traditional Contracting Principles And The UCC When It Sustained FCAS's "Non Sui Juris" Defense.	34
A. This Court has ruled that the US Government is subject to contracting law.	35
B. FCAS was given the legal capacity to enter in to contracts.	35
C. The Virginia UCC expressly waives FCAS's non sui juris status.	36
VI. When The Court Dismissed The Gross Negligence Claims Against The Fairfax County Board of Supervisors ("BOS"), It Extended Legislative Immunity Beyond The Limits Of What This Court Has Established.	36
A. Legislative immunity applies only to legislative activities.	37
B. This Court has ruled that the disciplining and firing of government employees is not a protected legislative function.	38
C. The respondents never established how legislative immunity protected their actions.	38
D. It was not the role of the court to decide if the BOS was entitled to legislative immunity.	39
VII. The Court Decision To Dismiss Every UCC Claim Has Created Friction Between Other States Who Have Identical UCC Laws.	39

1. McCabe properly pleaded his UCC's claims.	40
2. The court blatantly disregarded UCC's codified standards.	41
3. The court disregarded standards in both Iqbal/Twombly and Virginia Code when it used evidence, obtained from outside of the filings, to dismiss the UCC claims.	42
4. 16 cases in 5 different states have sustained the UCC's application to animals in sales transactions. With the exception of Virginia's anti-privity statute, the applicable UCC statutes are identical to Virginia.	43
5. The court's actions set a dangerous precedent.	47
VIII. The Court Disregarded This Court's Precedent And McCabe's Pleadings When They Dismissed His Product Liability Claims.	47
1. This Court has laid out a "duty to warn" standard.	47
2. The court disregarded McCabe's "failure to warn" theory.	48
3. The court misapplied a criminal procedure statute and conflated UCC statutes to dismiss the product liability claim.	49
4. Virginia has no product liability laws.	49
5. Three other states have ruled that animals are subject to product liability laws.	50
CONCLUSION.	51

APPENDIX	1a
Supreme Court of Virginia - Order Denying Petition for Rehearing (Demurrer) - Record No. 201283 (June 30, 2021).	1a
Supreme Court of Virginia - Order Denying Petition for Rehearing (Plea in Bar) - Record No. 201134 (June 30, 2021)	2a
Virginia Supreme Court - Order Denying Review (Demurrer) - Record No. 201283 (May 14, 2021)	3a
Supreme Court of Virginia - Order Denying Review (Plea in Bar) - Record No. 201134 (May 14, 2021).	4a
Fairfax County Circuit Court – Denial of Reconsideration (Plea in Bar) - CL-2019-8951 (June 23, 2020).	5a
Fairfax County Circuit Court – Denial of Plaintiff's Motion For Reconsideration (Demurrer) - CL-2019-8951 (May 4, 2020).	6a
Fairfax County Circuit Court – Opinion (Demurrer) – CL-2019-8951 (April 13, 2020) .	10a
Fairfax County Circuit Court – Opinion (Plea in Bar) - CL-2019-8951 (February 7, 2020)	18a
Fourth Circuit Court of Appeals – Judgement - No. 19-1583 (March 31, 2020).	20a
Fourth Circuit Court of Appeals – Opinion - Unpublished - No. 19-1583 (March 31, 2020) .	21a
US District Court for the Eastern District of Virginia – Order-1:19-CV-53 (Mar. 20, 2019) .	26a
US District Court for the Eastern District of Virginia – Order - Notice of Voluntary Dismissal in 1:18-CV-572 (July 18, 2018)	27a

Applicable Virginia Code Statutes	29a
---	-----

TABLE OF AUTHORITIES**FEDERAL CASES**

<i>Air & Liquid Sys. Corp. v. DeVries</i> 139 S. Ct. 986 (2019)	47
<i>Allied Structural Steel Co. v. Spannaus</i> 438 U.S. 234 (1978)	21, 35
<i>Bogan v. Scott-Harris</i> 523 U.S. 44 (1998)	38
<i>Cetacean Community v. Bush</i> 386 F.3d 1169 (9th Cir. 2004)	19
<i>Forrester v. White</i> 484 U.S. 227 (1988)	38
<i>Gravel v. United States</i> 408 U.S. 606 (1972)	38
<i>Hughes v. Oklahoma</i> , 441 U.S. 322 (1979)	19
<i>Hutchinson v. Proxmire</i> 443 U.S. 111 (1979)	37
<i>Lingle v. Chevron U.S.A. Inc.</i> 544 U.S. 528 (2005)	31

<i>Lynch v. United States</i> 292 U.S. 571 (1934)	35
<i>Menendez v. United States</i> 137 S. Ct. 1332 (2017)	37
<i>Morgan v. Commonwealth of Virginia</i> 328 U.S. 373 (1946)	30
<i>Naruto v. Slater</i> 888 F.3d 418 (9th Cir. 2018)	19
<i>Nicchia v. People of State of New York</i> 254 U.S. 228 (1920)	19
<i>Powell v. Diehl Woodworking Mach. Inc.</i> 198 F. Supp. 3d 628 (E.D Va. 2016)	47
<i>Ross v. Franklin Cry. Dcp't of Soc. Servs.</i> 186 F. Supp. 3d 526 (W.D. Va. 2016)	36
<i>Sentell v. New Orleans & C.R. Co.</i> 166 U.S. 698 (1897)	19
<i>Sirak v. Aiken</i> No. 3:19CV179, 2019 WL 6689912 (E.D. Va. Dec. 6, 2019)	24
<i>Sveen v. Melin</i> 138 S. Ct. 1815 (2018)	17

<i>Supreme Court of Va. v. Consumers Union of U.S.</i> 446 U.S. 719 (1980)	38
<i>U.S. Treasury Co. of New York v. New Jersey</i> 431 U.S. 1 (1977)	21
<i>Whitecap Inv. Corp. v. Putnam Lumber & Exp. Co.</i> No. 2010-139 (D.V.I. Feb. 19, 2013)	40

STATE CASES

California

<i>Clifton Cattle Co. v. Thompson</i> 43 Cal. App. 3d 11 (Ct. App. 1974)	43
---	----

Connecticut

<i>State v. Maximus, Inc.</i> No. X06CV075011488S (Conn. Super. Ct. Apr. 1, 2009)	20
---	----

<i>Worrell v. Sachs</i> 563 A.2d 1387 (Conn. Super. 1989)	50
--	----

Indiana

<i>Brown v. Southside Animal Shelter, Inc.</i> 158 N.E.3d 401 (Ind. Ct. App. 2020)	15
---	----

Mississippi

Wang v. Miss Ark Fisheries
1996 U.S. Dist. No. 4:93CV325-D (N.D. Miss.
Oct. 11, 1996) 24

Missouri

O'Brien v. Wade
540 S.W.2d 603 (Mo. App. 1976) 43

New York

Appell v. Rodriguez
836 N.Y.S.2d 483 (App. Term 2007) 45

Bazzini v. Garrant
455 N.Y.S.2d 77 (NY Misc. 2d 1982) 50

Beyer v. Aquarium Supply Co.
404 N.Y.S.2d 778 (N.Y. Misc. 2d 1977) 50

Budd v. Quinlan
860 N.Y.S.2d 802 (App. Term 2008) 45

Cocuzza v. Love My Dawg
110 N.Y.S.3d 866 (App. Term. 2018) 16

Dempsey v. Rosenthal
468 N.Y.S.2d 441 (NY Misc. 2d 1983) 44

<i>Gebbia v. Schulder</i> 939 N.Y.S.2d 740 (App. Term 2011)	46
<i>Hardenbergh v. Schulder</i> 906 N.Y.S.2d 772 (App. Term 2009)	45
<i>Lombardo v. Empire Puppies</i> 36 N.Y.S.3d 48 (App. Term 2016)	46
<i>O'Rourke v. Am. Kennels</i> 801 N.Y.S.2d 237 (NY Civ. 2005)	45
<i>Rizzo v. Puppy Boutique</i> 911 N.Y.S.2d 695 (NY Civ. 2010)	45
<i>Saxton v. Pets Warehouse, Inc.</i> 691 N.Y.S.2d 872 (App. Term 1999)	44
<i>Smith v. A World of Pups, Inc.</i> 910 N.Y.S.2d 765 (NY Civ. 2010)	45

Oregon

<i>Sease v. Taylor's Pets, Inc.</i> 700 P.2d 1054 (Or. App. 1985)	50
--	----

Pennsylvania

<i>Gall v. Allegheny County Health Dep't</i> 521 Pa. 68 (1989)	41
---	----

Vermont

Alpert v. Thomas
643 F. Supp. 1406 (D. Vt. 1986) 44

Virginia

Boy Blue, Inc. v. Brown
74 Va. Cir. 4 (Essex Feb. 13, 2007) 26

BOS v. Catlett's Ex'rs
86 Va. 158 (1889) 28

Hartwell v. County of Fairfax
83 Va. Cir. 105 (2011) 31

Isle of Wight County v. Nogiec
281 Va. 140 (2011) 38

Lodal v. Verizon Va., Inc.
74 Va. Cir. 110 (Fairfax Aug. 22, 2007) 26

Morgen Indus. Inc. v. Vaughan
252 Va. 60 (1996) 47

Schmidt v. Household Finance Corporation of Va.
276 Va. 108 (2008) 25

Stamie E. Lyttle Co., Inc. v. Hanover County
231 Va. 21 (1986) 30

Viking Enter., Inc. v. Cty. of Chesterfield
277 Va. 104 (2009) 28

Washington, DC

Daughtry v. Arlington County, Virginia
490 F. Supp. 307 (D.D.C. 1980) 34

STATUTORY CODE

US Code

7 USC § 2148 - Importation of live dogs	16
10 USC § 2410r - Contract working dogs: requirement to transfer animals to 341st Training Squadron after service life	16
10 USC § 2583 - Military animals: transfer and adoption	16
28 USC § 1257 - State courts; certiorari	5

Virginia

§ 3.2-6500 - Comprehensive Animal Care - General Definitions	5, 18, 33
§ 3.2-6585 - Dogs and cats deemed personal property; rights relating thereto	5, 49
§ 8.01-229 - Suspension or tolling of statute of limitations	5, 24
§ 8.01-249 - When cause of action shall be deemed to accrue in certain personal actions	6, 25
§ 8.01-273 - Demurrer; form; grounds to be stated	6, 42

§ 8.1A-103 - Construction of Uniform Commercial Code to promote its purposes and policies; applicability of supplemental principles of law	40
§ 8.1A-201 - UCC General definitions	6, 36, 41
§ 8.2-104 - UCC Definitions: "Merchant"	6, 41, 45
§ 8.2-105 - UCC Definitions: "goods"	6, 41, 45
§ 8.2-302 - Unconscionable contract or clause	42
§ 8.2-313 - Express warranties by affirmation, promise, description, sample	6, 40
§ 8.2-314 - Implied warranty: Merchantability; usage of trade	6, 40
§ 8.2-315 - Implied warranty: Fitness for particular purpose	6, 40
§ 8.2-316 - Exclusion or modification of warranties	6, 42
§ 8.2-318 - When lack of privity no defense in action against manufacturer or seller of goods	7, 17, 42, 43
§ 15.2-1243 - Governing body to receive, audit and approve claims warrants	28

§ 15.2-1244 - Limitations on issuance of warrants	28
§ 15.2-1245 - Procedure for allowance of claims ..	28
§ 15.2-1246 - Appeal from disallowance of claim	7, 27, 28, 29, 30, 31
§ 15.2-1247 - When disallowance of claim final; exception; when no execution to be issued	28
§ 15.2-1248 - No action against county until claim presented to governing body	28
§ 15.2-1405 - Immunity of members of local governmental entities; exception	7

CONSTITUTIONAL PROVISIONS

US Constitution

Article I, Sec. 10, Cl. 1 *passim*

OTHER AUTHORITIES

Supreme Court Rules

Sup. Ct. R. 12.4 1

Outside Sources

Black's Law Dictionary, 11th ed. 2019 20

PETITION FOR A WRIT OF CERTIORARI

Barry McCabe respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Virginia in two cases, decided on the same day, that “involve identical or closely related questions.” Sup. Ct. R. 12.4.

OPINIONS BELOW

Supreme Court of Virginia, Record No. 201283, Barry McCabe v. Fairfax County, et al, Motion For Reconsideration Denial (Demurrer), judgement entered June 30, 2021.

The opinion is not published. (Pet. App. 1a)

Supreme Court of Virginia, Record No. 201134, Barry McCabe v. Fairfax County, et al, Motion For Reconsideration Denial (Plea in Bar), judgement entered June 30, 2021.

The opinion is not published. (Pet. App. 2a)

Supreme Court of Virginia, Record No. 201283, Barry McCabe v. Fairfax County, et al, Order Denying Review (Demurrer), judgement entered May 14, 2021.

The opinion is not published. (Pet. App. 3a)

Supreme Court of Virginia, Record No. 201134, Barry McCabe v. Fairfax County, et al., Order Denying Review (Plea in Bar) judgement entered May 14, 2021.

The opinion is not published. (Pet. App. 4a)

Fairfax County Circuit Court, No. CL-2019-8951, Barry McCabe v. Fairfax County, et al, Order - Denial of Motion For Reconsideration (Plea In Bar), judgement entered June 23, 2020.

The opinion is not published. (Pet. App. 5a)

Fairfax County Circuit Court, No. CL-2019-8951, Barry McCabe v. Fairfax County, et al, Memorandum Opinion And Order Addressing Plaintiff's Request For Reconsideration (Demurrer), judgement entered May 4, 2020.

The opinion is not published. (Pet. App. 6a-8a)

Fairfax County Circuit Court, No. CL-2019-8951, Barry McCabe v. Fairfax County, et al, Memorandum and Final Order (Demurrer), entered April 13, 2020.

The opinion is not published. (Pet. App. 9a-14a)

Fairfax County Circuit Court, No. CL-2019-8951, Barry McCabe v. Fairfax County, et al, Order (Plea in Bar), entered February 7, 2020.

The opinion is not published. (Pet. App. 15a-16a)

Fairfax County Circuit Court, No. CL-2019-0008951,
Barry McCabe v. Fairfax County, et al, initial Plea In
Bar hearing, judgement entered February 7, 2020.

The opinion is not published. (Pet. App. 17a)

Fourth Circuit Court of Appeals No. 19-CV-1583,
Barry McCabe v. Fairfax County Animal Shelter,
Judgement entered March 31, 2020. (Appeal of §1983
action).

The court's opinion is available at Westlaw 2019 WL
2615660. (Pet. App. 18a-22a)

Fourth Circuit Court of Appeals No. 19-CV-1583,
Barry McCabe v. Fairfax County Animal Shelter,
Unpublished Opinion, entered March 31, 2020.
(Appeal of §1983 action).

The court's opinion is available at Westlaw 2019 WL
2615660. (Pet. App. 18a-22a)

U.S. District Court for the Eastern District of
Virginia, No. 1:19-VC-00053-CMH-TCB, Barry
McCabe v. Fairfax County Animal Shelter, Order
entered March 20, 2019.

The opinion is not published. (Pet. App. 22a)

U.S. District Court for the Eastern District of Virginia, No. 1:18-cv-00572-TSE-TCB, Barry McCabe v. Fairfax County Animal Shelter, Notice of Voluntary Dismissal, entered July 18, 2018.

The opinion is not published. (Pet. App. 23a)

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

US Constitution

The Contract Clause, Art. I, sec. 10 cl. 1, provides, in pertinent part:

No State shall...pass any....Law impairing the Obligation of Contracts.

Virginia Code

§ 3.2-6500 - Comprehensive Animal Care - Definitions

§ 3.2-6511.1(A) - Pet shops; procurement of dogs

§ 3.2-6585 - Dogs and cats deemed personal property; rights relating thereto

§ 8.01-223 - Lack of privity no defense in certain cases.

§ 8.01-229 - Suspension or tolling of statute of limitations; dismissal, nonsuit or abatement

§ 8.01-249 - When cause of action shall be deemed to accrue in certain personal actions.

§ 8.01-273 - Demurrer; form; grounds to be stated

§ 8.1A-201 - UCC - General definitions.

§ 8.1A-304 - Obligation of good faith

§ 8.2-104 - UCC - Definitions: "Merchant"

§ 8.2-105 - UCC - Definitions; "goods"

§ 8.2-206 - UCC - Offer and acceptance in formation of contract.

§ 8.2-313 - UCC - Express warranties by affirmation, promise, description, sample

§ 8.2-314 - UCC - Implied warranty: Merchantability

§ 8.2-315 - UCC - Implied warranty: Fitness for particular purpose

§ 8.2-316 - UCC - Exclusion or modification of warranties.

§ 8.2-318 - UCC - When lack of privity no defense in action against manufacturer or seller of goods

§ 8.2-707 - UCC - Person in the position of a seller

§ 15.2-209 - Notice to be given to counties, cities, and towns of tort claims for damages.

§ 15.2-1405 - Immunity of members of local governmental entities; exception.

§ 15.2-1246 - Appeal from disallowance of claim.

STATE CUSTOMS INVOLVED

- A. Virginia has no statutory laws about the application of non sui juris status. Under the unwritten state doctrine, Virginia governments can assert absolute immunity from any and all contract and tort claims.
- B. Virginia has no statutory laws about the application of sovereign immunity. Under the unwritten state doctrine, Virginia counties can assert absolute immunity from any and all tort claims. Sovereign immunity does not apply to contract claims.
- C. Virginia has no statutory product liability laws. Product liability claims are based on case law.

STATEMENT OF THE CASE

Certiorari is sought because the Supreme Court of Virginia has rendered a decision in conflict with the US Constitution's Contract Clause, this Court's precedents, traditional contracting principles and civil procedure.

The instant case is about the application of third party liability within supply chains, the sale and distribution of dangerous commerce and grossly negligent misconduct.

This case has forced the state courts to examine the role of their own county governments pertaining to the sale of violent animals, third party liability, and the application of governmental and proprietary functions within a government sanctioned commercial enterprise.

American jurisprudence has always recognized animals as property and their sales as purchase transactions. However, for the first time in American jurisprudence, a court has recognized animals as having a legal status beyond being property. To absolve the respondents of all liability, the district court opined that the sale of a violent pit bull was an "adoption" and that the "money paid was administrative fees to get the dog adopted..."

I - Factual Background

1. This case arises from damages that Petitioner, Barry McCabe ("McCabe"), suffered from an unprovoked 70-pound pit bull dog attack on June 30, 2016 in Fairfax County, Virginia. McCabe's neighbor, the pit bull's fourth known owner ("Owner #4), was training it off leash when it saw McCabe and his dog, a 2-year-old 17-pound Cavalier King Charles Spaniel named "Kaiser". The pit bull killed Kaiser and then attacked McCabe, who suffered critical self-defense injuries and permanent spinal damage.

2. The respondents are Fairfax County, its animal shelter - Fairfax County Animal Shelter (“FCAS”), the elected County Board of Supervisors (“BOS”), and the other employees listed as respondents. All are in the business of selling pets to consumers.

3. The pit bull dog had originally been found abandoned in Augusta County, Virginia and taken to its local shelter, Shenandoah Valley Animal Services Center (“SVASC”). SVASC posted the animal for sale and Owner #1 purchased it the next day. 20 minutes after bringing it home, the pit bull killed Owner #1’s 15-year-old cat “shaking it to death like a toy” according to internal records. He returned it the next day.

4. The following day, SVASC staff contacted the respondents at FCAS about transferring the pit bull because they did not want to euthanize it. Despite SVASC disclosing to the respondents that the animal had killed a cat, they still chose to import and resell it.

5. When the pit bull was back in the respondents’ possession at FCAS, and with the intent to ensure the pit bull’s resale, the respondents committed close to a dozen felonies, including the destruction and forging of public records. The respondents also intentionally misrepresented the pit bull’s breed to deceive consumers, claiming it was 4 separate dog breeds. The respondents’ internal

records noted that the pit bull had failed every behavioral evaluation and that it kept attacking other animals. However, all documentation posted publicly and provided to Owner #2, #3 and #4 indicated that the pit bull was perfectly safe and had no violent history.

To further launder the pit bull's violent history from the public, the employee respondents conspired and used a private Facebook group to secretly disseminate critical information about the pit bull's violent history from the public and any Freedom of Information Act ("FOIA") requests.

6. The respondents sold the animal 3 separate times where its violent behavior continued - Owner #2's owned it for several weeks, was forced to return it after it injured her arm and escaped her house 13 separate times.

Owner #3 owned it for a month when it attacked her and sent her to the hospital emergency room. She returned the pit bull to FCAS the following day and stated, "I feared for her life because I thought it was going to kill me" and requested to have it euthanized. The respondents agreed to perform the procedure.

Instead, the respondents feloniously destroyed Owner #3's intake records, which had indicated that it had attacked her, and forged new public records to make it appear safe. Because it attacked Owner #3,

Fairfax County code required that the pit bull be put in a 10-day quarantine period. However, a day after it was put in quarantine, the respondents posted it for sale on social media, specifically noting that the animal was perfectly safe.

7. When the respondents sold the pit bull to Owner #4, they failed to follow any of the dozen separate standard operating procedures ("SOPs"), they failed to disclose that the dog had killed a cat and had attacked 3 people and failed to provide Owner #4 with the required dangerous dog disclosures. The records provided to Owner #4 indicated that the pit bull was perfectly safe and had no violent history. Owner #4 owned the pit bull for slightly over 4 months before it killed Kaiser and attacked McCabe.

8. The respondents made it their personal mission to prevent animal euthanization to achieve a self-imposed statistical goal. Since achieving this goal was not possible, they imported and resold thousands of animals to manipulate performance metrics.

9. Between 2011-2016, the respondents sold dozens of violent animals that attacked people and killed pets. Their conduct got so out of control, that the Fairfax County Police and the BOS conducted multiple internal affairs investigations. The respondents were never disciplined.

II - Procedural History

1. McCabe originally filed his complaint in EDVA, where it was non-suited. (27a-28a) He refiled as a pro se litigant. His state claims were transferred to state court and refiled. (26a) His §1983 action was appealed to the 4th Circuit and denied. (20a - 25a)

2. McCabe sought relief under existing statutory law, primarily the Uniform Commercial Code ("UCC") as well as other common law tort and contract claims.

3. During the plea in bar, the defendants moved to dismiss all claims for statute of limitation expirations, sovereign immunity, failure to comply with state claims procedures, non sui juris status and legislative immunity.

The district court granted the plea in bar. In its ruling, the court flouted multiple statutes that gave McCabe statutory legal protections and misapplications. (18a-19a) McCabe filed motions of reconsideration that showed the court's errors and misapplications but was denied. (5a)

4. During the demurrer, the defendants moved to dismiss all claims for failing to state claims for breach of contract, breach of UCC warranties and product liability.

The court sustained the demurrer. In its ruling, the court disregarded the Constitution's contract clause, state law, this Court's precedents and canon legal concepts. (10a-17a)

The court denied McCabe's motion for reconsideration for the demurrer (6a-9a). The court made several assertions using information that was neither contained within the filings or was derived from information outside the filings. The court refused to state how it arrived at those conclusions.

5. McCabe appealed his case to the Supreme Court of Virginia. They denied his appeals (3a-4a) and his motions for reconsideration. (1a-2a)

The legal issues are clearly presented. There were no issues of material facts disputed between either side. The Respondents have never admitted to any fault or liability.

REASONS FOR GRANTING THE WRIT

There are “compelling reasons” for the Court to grant review. S. Ct. R. 10.

Until now, no court has ever recognized animals having legal statuses beyond being just property. When the lower circuit court ruled that the pit bull had not been purchased, but was “adopted”, it gave animals a legal status beyond being property.

The English language is full of euphemisms. People referring to themselves as “pet parents” does not mean that their animal’s legal status has transmogrified from property ownership to a legal guardianship. Thousands of state and municipal codes, and even 3 US statutes have been amended to refer to pet acquisitions as “adoptions”. However, legislatures amending legal descriptors to make property and economic transactions more emotionally appealing, but this does not change the transaction’s nature. Failure to overturn the lower court’s decision will have a detrimental impact. Absent this Court’s reversal, Virginia’s ruling opens up Pandora’s box.

Although the court cases involving violent animal sales are sparse, it is practically hornbook that anyone who knowingly sells a good or product that is inherently dangerous has an obligation to disclose it prior to its sale. In *Brown v. Southside Animal Shelter, Inc.*, 158 N.E.3d 401, 407 (Ind. Ct. App. 2020), the Court of Appeals ruled that animal shelters have

a legal duty to inform buyers of a dog's violent history and failing to disclose it is an issue of material fact.

At a minimum, if this Court decides that a de novo standard of review applies, it should vacate the Virginia Courts' judgments and remand with instructions to apply that standard.

I. The Court's Decision To Not Recognize The Sale Of A Dog To Be A Purchase Violates The Constitution's Contract Clause, This Court's Precedents And Departs From The Accepted Rationale Of American Jurisprudence.

Certiorari is urgent because no other court has ruled on this issue.

Although the instant case is a matter of first impression, thousands of other government entities, including federal, state and local, use identical terminology, but none has ever been subjected to judicial scrutiny.¹

This Court has scrutinized statutes to a greater extent when they involved contracts signed by the State or contracts that reflected the influence of special interests. This case is a mix of both. The Virginia courts have created an unconscionable and indefensible standard.

¹ 7 USC § 2148, 10 USC § 2410r and 10 USC § 2583 all refer to animal property transactions as adoptions.

When the court ruled that that the \$125 that Owner #4 paid “was not a product that was sold” (8a) and the money paid was “an administrative fee for getting the dog adopted and sterilized” (9a), it effectively gave animals a right beyond being “property” while giving specific interests absolute immunity from civil liability, which is an untenable legal standard that this Court has never recognized.

This standard will have an adverse impact on commerce, property, and contracts that is so far-reaching as to warrant this Court's review. Thus, the Court should override the lower court's judgment.

A. Animal “adoption” laws violate the Constitution's Contract Clause.

The Constitution's Contract Clause (Art. I, § 10, cl. 1) states “no State shall ... pass any...Law impairing the Obligation of Contracts”). The Virginia court's application of animal “adoption” laws violates the Contract Clause since they absolve Virginia government entities and not-for-profits (“NFPs”) sellers of *all civil liability*. Applying the standards, set forth in *Sveen v. Melin*, 138 S. Ct. 1815, 1817, 201 L. Ed. 2d 180 (2018), such laws interfere with a buyer's or affected party's right of legal recourse.²

² Virginia is an anti-privity state - see § 8.2-318 and § 8.01-223.

§ 3.2-6500 recognizes 3 categories of animal sellers - government, NFP's and commercial sellers (which includes breeders, retailers, and agriculture sellers), who all perform the same transaction: people "adopt" animals from government sellers and NFPs, but "purchase" animals from commercial, retail and agriculture entities. Further, there is no legal difference or distinction between an animal that is someone's companion pet or one that serves an agricultural purpose.

Virginia's impairment basis is how the statute creates a double standard by discriminating against a specific seller types. By calling a purchase an "adoption" at purchases originating from government entities or NFP's, and then applying the Virginia's "no liability rule", the statute discriminates against commercial animal sellers, thus creating a form of state sanctioned protectionism, which serves no public benefit. Had the same transaction occurred at a pet store, as opposed to a government entity, it is almost certain that the court would not have taken the same position.

While the respondents' right and capacity to enter into a commercial sales contract is significant, it cannot operate without immunity.

B. Animals do not have any legal status beyond property.

Until now, adoption laws have only applied to people and guardianships. Conversely, no US court has ever recognized animals having rights beyond being property.

In the last 30 years, thousands of state and local governments, including Virginia, have amended property transactions laws, which previously referred to animal transactions as “purchases”, to be an “adoption” without considering legal implications.

This Court has compulsively ruled that animals are property relating to taxation and criminal matters. See *Sentell v. New Orleans & C.R. Co.*, 166 U.S. 698, 17 S. Ct. 693, 694, 41 L. Ed. 1169 (1897), *Nicchia v. People of State of New York*, 254 U.S. 228, 230–31, 41 S. Ct. 103, 104, 65 L. Ed. 235 (1920), and *Hughes v. Oklahoma*, 441 U.S. 322, 99 S. Ct. 1727, 60 L. Ed. 2d 250 (1979).

Although this Court has never directly stated it, the Ninth Circuit has reiterated animals are subject to basic property laws and have no legal rights in civil matters. *Naruto v. Slater*, 888 F.3d 418, 428 (9th Cir. 2018), citing *Cetacean Community v. Bush*, 386 F.3d 1169 (9th Cir. 2004).

C. The respondents sold property, not performed a service.

The court ruled that the respondents were not actually selling a dog but were performing a service. (8a)

Although this is a matter of first impression, with all due respect, this Court must acknowledge that any property transaction involving any animals (or property) is to be a purchase, no different than purchasing a pizza.

A transaction's intent determines the contract's purpose when determining whether a contract is for a property sales transaction or services rendered. See *State v. Maximus, Inc.*, No. X06CV075011488S, 2009 WL 1142570, at *7–8 (Conn. Super. Ct. Apr. 1, 2009).

Black's Law Dictionary defines "purchase price" as "the amount of money or other consideration asked for or given in exchange for something else; the cost at which something is bought or sold." "Fees" is defined as "a charge or payment for labor or services, esp. professional services".³ Services transaction examples are toll road usage, rentals and legal services rendered. One does not "adopt" or pay an "adoption fee" for a pizza.

³ Black's Law Dictionary (11th ed. 2019)

D. Amending property “sales” laws to be “adoptions” gives legislatures a way to give industries absolute immunity.

Governments passing laws to provide economic protections is nothing new. Amending property transaction laws to be “adoptions” is an easy way for governments to shield such industries of all liability.

In the instant case, Virginia’s animal “adoption” laws only apply to government entities and NFPs who sell animals in Virginia while discriminating against commercial pet and agricultural animal sellers that perform identical transactions.

This Court has stated that “contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.” *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245 (1978). Contractual impairment can be upheld only if “it is both reasonable and necessary to serve an important public purpose”. *U.S. Tr. Co. of New York v. New Jersey*, 431 U.S. 1, 2, 97 S. Ct. 1505, 1507, 52 L. Ed. 2d 92 (1977).

Were other states to apply Virginia’s interpretation of property “adoption” to their state specific industries, it would have a detrimental effect. For example, Florida and Michigan’s largest exports

are oranges and automobiles. Those state laws treat such transactions as purchases. Were those states to amend their laws to state that oranges or automobiles are no longer purchased but are "adopted", an affected party would have no legal recourse.

Despite there being no cases that support this position, this rationality violates everything in American jurisprudence. Failing to grant this certiorari establishes several dangerous precedents: it impairs contractual law and obligations, it will encourage governments to redefine purchase transactions as "adoptions" to escape liability, and it gives animals legal statuses beyond being "property". A finding of ripeness is necessary to prevent lower courts and legislatures from forever escaping judicial review.

II. The Courts Flouted This Court's Precedent, Set Forth In *Iqbal-Twombly*, When It Dismissed Several Of McCabe's Claims.

This court has asserted its basis for a plaintiff pleading any claims. *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

Under *Twombly* and *Iqbal*, it is the plaintiff's burden to allege "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (emphasis added). *Twombly* and *Iqbal* teach that it is not enough simply to recite the various allegations from which a factfinder could infer, as the Virginia courts did here. On the contrary, a complaint that, at first blush, might appear to state a *plausible* claim could nevertheless be found wanting in light of "more likely explanations." *Iqbal*, 556 U.S. at 681.

It is also hornbook that Virginia is a "fact" pleading state, whose purpose is to determine if a petitioner's complaint contained sufficient legal grounds and factual recitations to support or sustain the granting of the relief requested. Nothing in this Court's decisions or the Virginia Rules of Civil Procedures permits a Virginia court to sidestep this obligation, as the courts clearly did, when they dismissed several of McCabe's claims for statute of limitations when there is material controversy about

statutory law, rights given to McCabe under statutory law and the courts misapplication.

A. During the plea in bar, the court disregarded Iqbal/Twombly standards and multiple Virginia Code statutes that tolled several of McCabe's statute of limitations.

The court dismissed several decisions based on the statute of limitations.

There is no dispute that, absent the application of the tolling provision of §8.01-229(E)(3) and E.D. VA's "Good Faith Rule", his Claims 2 and 3 are time barred.

§ 8.01-229(E)(3) allowed McCabe to toll the time period within 6 months from when McCabe's original complaint was voluntarily nonsuited in EDVA and then refiled. (27a-28a) See *Welding, Inc. v. Bland Cty. Serv. Auth.*, 261 Va. 218, 223, 541 S.E.2d 909, 912 (2001). After McCabe refiled his complaint, EDVA transferred it to state court. (26a)

The state court flouted EDVA's "Good Faith Rule" which tolled McCabe's time period to allow him to refile in the correct venue due to his venue miscalculations. "The courts shall apply some good faith expectation measure of the Plaintiff proceeding in the court in which the complaint is filed as essential to tolling the statute of limitations". *Sirak v. Aiken*,

No. 3:19CV179, 2019 WL 6689912 (E.D. Va. Dec. 6, 2019)).

Next, absent the application of the tolling provision of §8.01-249(a), claims 7-10 are time barred. Most significantly, with regard to the statute of limitations accrual, the Court disregarded McCabe's *statutory protections*.

Under Virginia Code §8.01-249(a), since McCabe conducted due diligence by submitting multiple FOIA ("Freedom Of Information Act") requests for a year and a half led, which led to him discovering critical information, this tolled his entire the statute of limitations period. He provided the court 700 pages of research.

To complicate matters, McCabe was completely dependent upon the respondents for his FOIA requests. However, the respondents had complete control over all information and intentionally withheld specific information from McCabe, which prevented him from asserting fraud claims 7-10. The extent of the respondents' conduct was not discovered until over a year later when he re-submitted additional FOIA requests.

Were a plaintiff to produce no evidence as to any exercise of his due diligence, the respondents' plea in bar would be granted. *Schmidt v. Household Finance Corporation* of Va., 276 Va. 108,661 S.E.2d 834 (2008). The court still disregarded McCabe's

legal rights and never offered McCabe an opportunity to have a jury determine the merits of his claims.

McCabe provided the court with a timeline of events, along with 700 pages of obtained documentation that showed the court what he discovered on what dates, and how such claims were not cognizable, and the court still denied him his statutory rights that tolled the statute of limitations.

B. During the *demurrer*, the court disregarded Iqbal/Twombly standards when it dismissed the UCC and product liability claims.

If the court accepts all McCabe says to be true, then the respondent's demurrer should be overruled. However, to sustain the demurrer, describing what the courts did to McCabe is an understatement.

Whether a dog is either a product or a good and if it is unreasonably dangerous, and if the respondents were in breach of contract is for a jury to decide, not for a court to decide upon in a demurrer. "Even a flawed complaint will survive demurrer if it is drafted so that the defendant is on notice of the nature of the claim." *Lodal v. Verizon Va., Inc.*, 74 Va. Cir. 110, 112 (Fairfax Aug. 22, 2007). "In order to withstand demurrer, notice pleading requires only allegations sufficient to inform defendants of the nature and character of the claim being made without the necessity of having to provide details." *Boy Blue, Inc. v. Brown*, 74 Va. Cir. 4, 14 (Essex Feb. 13, 2007).

A finding of ripeness is necessary to prevent lower courts from forever escaping judicial review.

III. The Courts Violated The Constitution's Contract Clause And Disregarded Traditional Contracting Principles When They Dismissed All Contract Claims Against Fairfax County.

§ 15.2-209 required McCabe to notify respondent Fairfax County about his pit bull attack claims. McCabe did this, and the county denied them.

The court asserted that because McCabe did not follow § 15.2-1246 (“§ 1246”), he has no legal contract and tort claims against respondent Fairfax County. (18a)

§ 1246 is straightforward: it gives a party the *right* to appeal the denial of a previously denied procurement contract claim, made against a Virginia county, within a 30-day period.

McCabe did not appeal the county's denial since it was not a procurement contract, but instead chose to file an action in court.

A. § 1246 applies only to government procurement contract claims, not to common law contracts.

The court intentionally misapplied a code section to dismiss the petitioner's claims.

The Virginia Public Procurement Act ("VPPA") governs Virginia government procurement contracts made between Virginia government entities (counties, cities, towns, etc). Public procurement contracts occur when government entities purchase property or services from private companies (such as computers, school building construction, road construction and snow removal).

§15.2-1243 through § 1248, which includes § 1246, collectively known as the Virginia Claims Procedures Statutes ("VCPS"), govern Virginia county procurement contract claims arising under the VPPA. Specifically, the VCPS only applies when a contractor has a dispute within a procurement contract with a county that is governed by the VPPA.

Virginia courts have ruled that VCPS procedures, including § 1246, apply only to VPPA claims, and a claim's allowance has no more effect than a settlement between individuals. *Bd. of Sup'rs v. Catlett's Ex'rs*, 86 Va. 158, 162, 9 S.E. 999, 1001 (1889) and *Viking Enter., Inc. v. Cty. of Chesterfield*, 277 Va. 104, 113, 670 S.E.2d 741, 746 (2009).

The VCPS does not govern the county's sale of property because the sale of a dog is a common law contract.

B. Animal sales fall under common law sales contracts, not government procurement contracts.

Virginia counties routinely engage in common law contracts. Examples of such transactions include the sale of pets, municipal bonds (financial debt contracts), surplus equipment, utilities (water and power)⁴ and even real estate foreclosure sales. The county's sale of a pet is not a procurement contract, thus it is not subject to the VCPS.

If such a dispute arose between a customer and the county owned utility company, the customer would have a right to court. This instant case is no different. The signed pet sales contract, made between Owner #4 and Fairfax County and FCAS, contains no arbitration clause or any reference to it being subjected to the VPPA or VCPS statutes.

C. § 1246 effectively inhibits an aggrieved party's right to a court action, thus violating the Contract Clause and due process.

The lower court incorrectly sustained that the

⁴ Several Virginia utility companies are instrumentalities of county governments.

basis of § 1246 is to require a harmed party to arbitrarily re-appeal a previously denied claim to the same Virginia county entity that previously denied the claim and that McCabe's failure to comply with § 1246 caused him to lose his right to a court action, effectively preventing him from an action in court.

The Constitution's Contract Clause provides that no state may pass a law impairing the obligation of contracts. A law, in this context, may be a statute or administrative regulation having the force and operation of a statute.

This Court has sustained that states cannot place "unduly burdens" on parties that effectively deprive a party of their protected rights, which includes the right to court. This Court stated that "the state legislation is invalid if it unduly burdens that commerce in matters where uniformity is necessary—necessary in the constitutional sense of being useful in accomplishing a permitted purpose. Where uniformity is essential for the functioning of commerce, a state may not interpose its local regulation." *Morgan v. Commonwealth of Virginia*, 328 U.S. 373, 377, 66 S. Ct. 1050, 1053, 90 L. Ed. 1317 (1946)

Other Virginia courts have also ruled that § 1246 is administrative in nature, that it is not an exclusive remedy, and failing to comply with it *does not* cause a party to lose their right to court. See *Stamie E. Lyttle Co., Inc. v. Hanover County*, 341

S.E.2d 174, 231 Va. 21 (1986) and *Hartwell v. County of Fairfax*, 83 Va. Cir. 105 (2011).

§ 1246 does not advance any legitimate state interest since it only applies to one government entity type. Since it applies only to Virginia counties, but not other Virginia government entities, or private party defendants, the intent is purely discriminatory and protectionist, thus creating an arbitrary and unduly burden on a person's right to court.

Were this statute truly an equitable procedure to achieve justice, § 1246 would require mandatory appeals for any contract claims made against any Virginia government entity. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540, 125 S. Ct. 2074, 2082, 161 L. Ed. 2d 876 (2005)

D. § 1246 does not apply to tort claims made against Virginia counties.

By default, Virginia counties have absolute immunity (under sovereign immunity) from tort claims. § 1246 only applies to *contract* claims made against counties, not *tort* claims.

The court's decision arguably provides a template and incentive for other governments to impose arbitrary procedural burdens on litigants attempting to vindicate any contract or tort claims against a Virginia government entity, whether

brought under state or federal law (including civil rights claims).

IV. Based Upon This Court's Precedent, Fairfax County Is Not Entitled To "Sovereign Immunity" Protections From Tort Claims Since It Was Not Performing A Government Function When It Imported And Resold A Violent Pit Bull.

In the instant case, despite knowing the pit bull had killed Owner #1's cat, the respondents still chose to import, and then resell it 3 separate times. They failed to follow over a dozen different internal procedures and multiple state laws prior its sale to Owner #4.

A. This Court has ruled that counties cannot claim sovereign immunity when not performing government functions.

In *Northern Insurance Co. of New York v. Chatham County* 547 U.S. 189 (2006), this Court has recognized that some counties are considered to be "arms of the state" and can claim "sovereign [absolute] immunity" protections, but not when they are engaged in tortious conduct while performing a commercial (non-government) function. These functions include operations designed to raise revenue (toll bridges, pet sales, etc.), they are performing proprietary functions and thus, are not entitled to sovereign immunity. It does not matter if the entity is operating a profit or a

loss.

B. Fairfax County was not performing a government function.

The Virginia courts violated this standard when they dismissed all tort against Fairfax County (and FCAS). ⁵

The actions that respondent Fairfax County performed are not exclusive to government entities. Thousands of other commercial entities in Virginia, who follow the same statutory code, perform the identical transaction as Fairfax County and FCAS - specifically the importation and resale of animals.

§ 3.2-6500 defines a Virginia's public animal shelter's primary purpose is "impounding or sheltering seized, stray, homeless, abandoned, unwanted, or surrendered animals...." (which are all predicated on public health and safety). § 3.2-6500 does not state, or even imply, that a public shelter's purpose is animal sales, importation for resale, which is what occurred in the instant case. Between 2004 and 2019, FCAS imported and resold close to 1,500 dogs.

⁵ The court incorrectly applied the VCPS statutes to dismiss the tort claims against Fairfax County.

C. The lower court's ruling creates a double standard.

Under general contracting principles of agency, selling parties, not their agents, are held liable for tortious conduct.

However, in the instant case, sovereign immunity absolved Fairfax County of tortious conduct, but the court has also ruled that employees cannot be held for tortious conduct as well. (14a) This creates an implausible double standard.

To complicate the matters more, other states do not have to recognize the sovereign immunity privilege, creating an Equal Protection issue. See *Daughtry v. Arlington County, Virginia* 490 F. Supp. 307 (D.D.C. 1980)

V. The Virginia Court's Decision Conflicts With This Court's Precedent, Traditional Contracting Principles And The UCC When It Sustained FCAS's "Non Sui Juris" Defense.

FCAS is Fairfax County's instrumentality, who has direct control and responsibility over FCAS, its personnel and operations.

The courts sustained that FCAS is a non sui juris entity and dismissed all claims against FCAS. (19a)

Virginia has no statutory laws about non sui juris status applicability; it is asserted at the government's convenience. Therefore, there is no conflict with the Constitution's Contract Clause. However, a government or its instrumentality cannot arbitrarily exempt itself from contract and tort liability, whether through law, custom or doctrine, while being a party to a sales contract.

A. This Court has ruled that the US Government is subject to contracting law.

This Court ruled that when the United States government enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals. *Lynch v. United States*, 292 U.S. 571, 579, 54 S. Ct. 840, 843, 78 L. Ed. 1434 (1934). "Contracts' 'rights and obligations are binding under the law, and the parties are entitled to rely on them.'" *Allied Structural Steel* at 438 U.S. 234, 245 (1978).

B. FCAS was given the legal capacity to enter into contracts.

The Virginia Legislature and Fairfax County have authorized FCAS to enter into sales contracts to sell property (animals). Given the capacity to enter into sales contracts also means it has the implicit capacity to be sued. "An operating division of a governmental entity cannot be sued unless the

legislature has vested the operating division with the capacity to be sued." *Ross v. Franklin Cry. Dep't of Soc. Servs.*, 186 F. Supp. 3d 526, 534 (2016).

C. The Virginia UCC expressly waives FCAS's non sui juris status.

The UCC expressly waives FCAS's "non sui juris" status for any UCC claims. § 8.1A-201 (#27) states "person" includes....government, governmental subdivision, agency, or instrumentality".

Here, FCAS, imported a pit bull from another shelter, which was one of thousands of animals that they imported and resold.

The court allowing FCAS to arbitrarily assert a *non sui juris* status to prevent all claims against it and thus, being absolved of liability arguably provides a template for other governments to do the same thing. Besides state claims, this method could be used to prevent future federal claims as well.

VI. When The Court Dismissed The Gross Negligence Claims Against The Fairfax County Board of Supervisors ("BOS"), It Extended Legislative Immunity Beyond The Limits Of What This Court Has Established.

In the instant case, the county BOS had direct knowledge about the other named respondents'

systematic importation and resale of violent animals and knew about the destruction, forging and falsifying of public records to deceive consumers and law enforcement. The BOS intentionally failed to discipline or terminate the employees who were directly responsible.

A. Legislative immunity applies only to legislative activities.

This Court has limited legislative immunity to purely legislative acts and their supporting functions and has stated that elected legislators' hiring and firing of government employees is not a protected legislative activity when it stated that legislative immunity does not protect "everything that is related to the office of a [legislator]," *United States v. Brewster*, 408 U.S. 501, 513 (1972), or even "all conduct relating to the legislative process," *Hutchinson v. Proxmire*, 443 U.S. 111, 131 (1979).

U.S. Senator Robert Menendez, recently sought to use the Speech and Debate Clause to shield himself from allegations of bribery and public corruption. However, the 3rd Circuit ruled that his lobbying activities, on behalf of particular clients, are not protected, and this Court did not grant his Writ of Certiorari. *Menendez v. United States*, 137 S. Ct. 1332, 197 L. Ed. 2d 518 (2017)

B. This Court has ruled that the disciplining and firing of government employees is not a protected legislative function.

Legislative immunity, which is granted by Article I's Speech or Debate Clause, this Court, and federal common law, is given to members of Congress, state and local legislatures and their aides only while performing legislative functions. *Supreme Court of Va. v. Consumers Union of U.S.*, 446 U.S. 719, 733 (1980) and *Gravel v. United States*, 408 U.S. 606, 618 (1972). However, this Court has curtailed that privilege when it pertains to the hiring and firing of government employees, it is not a protected legislative function. *Bogan v. Scott-Harris*, 523 U.S. 44, 45, 118 S. Ct. 966, 968, 140 L. Ed. 2d 79 (1998).

Legislative immunity extends only to "purely legislative activities." *Brewster* 408 U.S. at 512. It does not protect legislators' actions that are administrative, rather than legislative, in nature. See *Forrester v. White*, 484 U.S. 227-29 (1988) and *Isle of Wight County v. Nogiec*, 281 Va. 140 (2011), which reiterates the same principles.

C. The respondents never established how legislative immunity protected their actions.

Although the respondents cited legislative immunity eight times in their plea in bar, they never cited how legislative immunity protected the specific

acts that pertained to the county BOS knowing about the alleged grossly negligent conduct and failing to act. As a rule of thumb, the proponent of a privilege has the burden to establish that privilege's basis. Despite failing to do this, the courts still sustained their legislative immunity assertion. (19a)

D. It was not the role of the court to decide if the BOS was entitled to legislative immunity.

Whether or not their conduct was protected by legislative immunity was an issue for a jury to decide.

Not granting this sends a dangerous message: governments can claim anything to be legislative immunity while not specifying what function they were performing to assert such privilege. The court's ruling has extended legislative immunity beyond the boundaries of what this Court has established and thus, needlessly privileges unconstitutional, unlawful and grossly negligent conduct while violating all tenets of public safety.

VII. The Court Decision To Dismiss Every UCC Claim Has Created Friction Between Other States Who Have Identical UCC Laws.

The UCC is one of the most important developments in American jurisprudence, with 49 of the 50 state legislatures having passed virtually identical articles. Its intent is simple: simplify the

law, promote trade, and make the laws uniform. (§ 8.1A-103).

This Court recognized the benefit and federal interest to uniform laws pertaining to interstate and intrastate commerce. *New York v. O'Neill*, 359 U.S. 1, 10, 79 S. Ct. 564,570 (1959). Because there is a substantial federal interest in keeping harmony between the states, this case presents an excellent vehicle for this Court to promote substantial federal public policy about uniformity.

To dismiss McCabe's UCC claims, the court made decisions that not only completely negated and contradicted multiple UCC's statutes, but they have now created friction between 49 other states, who have identical statutes.

Under this Court's precedent, the Supreme Court of Virginia should have reversed the circuit court's order dismissing the respondents.

1. McCabe properly pleaded his UCC's claims.

To assert a UCC breach of warranty claim, a plaintiff must identify the contract, the bargain and the precise facts to support such claims - specifically breach of express (§ 8.2-313) and implied warranties (§ 8.2-314 and 8.2-315) and allege that the purported adverse actions involved. See *Whitecap Inv. Corp. v. Putnam Lumber & Exp. Co.*, No. 2010-139, 2013 WL 1155430, at *3 (D.V.I. Feb. 19, 2013).

While UCC litigation against government entities is almost nonexistent, the UCC does have jurisdiction. § 8.1A-201 (#27) states governments and their instrumentalities are subject to it.

In *Gall v. Allegheny County Health Dep't*, 521 Pa. 68, 74-75, 555 A.2d 786, 789-90 (1989), the Supreme Court of Pennsylvania ruled that a water utility, which was a county instrumentality, was subjected to the UCC since it was considered to be a "merchant" who sold water, which is a "good". Also see *Arcon Construction Co. v. South Dakota Cement Plant*, 349 N.W.2d 407, 410 (S.D.1984).

2. The court blatantly disregarded UCC's codified standards.

It was not the job of the court to evaluate if McCabe's claims conformed to the UCC. If a "plausibility" test does not screen out a case like this, it is difficult to imagine what it does bar from state courts who rely on such standards.

Article 2 of the UCC governs only contracts for the sale of goods, (§8.2-102), governs who merchants are (§8.2-104) and states all animals, including pregnant ones, are goods. (§8.2-105) ("Goods" also includes the unborn young of animals).⁶

⁶ The "unborn young of animals" is in reference to pregnant animals being identified within a sales contract.

The court asserted that the respondents were not “merchants” who were not selling “goods”, and the seller’s contract exempted all parties from all UCC claims. (8a-9a) The signed contract contained no clause exempting the sellers from liability for the sale of a known violent animal. As a matter of § 8.2-302 and § 8.2-316 and public policy, sellers cannot contract themselves out of liability.

The court wrongfully stated that McCabe could not recover because he did not have privity with the respondents. § 8.2-318 negates this.

Finally, the court asserted that the UCC governs “commercial profit” without providing the statute that states this. This is not possible because no such statute exists.

3. The court disregarded standards in both Iqbal/Twombly and Virginia Code when it used evidence, obtained from outside of the filings, to dismiss the UCC claims.

Neither Iqbal/Twombly nor § 8.01-273 allow a court to evaluate claims using outside arguments, filings or exhibits.

The court wrongfully asserted that the money Owner #4 paid was used to perform a medical procedure, and therefore, was not a purchase price and thus had no claims. No parties argued this nor

did any documentation to substantiate this. When questioned, the court never stated how it came to such conclusions.

To have arrived at this, the court either obtained documentation from outside sources or created a lie about events that never occurred.

4. 16 cases in 5 different states have sustained the UCC's application to animals in sales transactions. With the exception of Virginia's anti-privity statute, the applicable UCC statutes are identical to Virginia.⁷

The court's decision is in complete conflict with the facts of the case, the UCC and with 5 other state courts, who all operate under *identical* UCC statutes, and had cases involving very similar circumstances.

1) *O'Brien v. Wade*, 540 S.W.2d 603 (Mo. App. 1976)

The court sustained the seller liable under the UCC for breach of warranty regarding the sale of a dog.

2) *Clifton Cattle Co. v. Thompson*, 43 Cal. App. 3d 11, 117 Cal. Rptr. 500 (Ct. App. 1974).

In case involving sale of cattle, the court stated

⁷ In the states cited, Virginia is the only state with an anti-privity statute incorporated into the UCC. See § 8.2-318 - "When lack of privity no defense in action against manufacturer or seller of goods".

“goods’ of course includes animals.”

3) *Wang v. Miss Ark Fisheries*, 1996 U.S. Dist. No. 4:93CV325-D, 1996 WL 671728 (N.D. Miss. Oct. 11, 1996).

The court applied the UCC over a dispute about the sale of striped bass fingerlings.

4) *Alpert v. Thomas*, 643 F. Supp. 1406, 1413 (D. Vt. 1986).

The court stated “the provisions of the UCC are applicable to the sale of the [Arabian] stallion in this case.”

5) *Bazzini v. Garrant*, 455 N.Y.S.2d 77, 78 (N.Y. Misc. 2d 1982)

The court upheld the District Court’s UCC application to a bird’s sale.

6) *Dempsey v. Rosenthal*, 468 N.Y.S.2d 441, 443 (NY Misc. 2d 1983).

The court ruled that the dog was defective because he had an undescended testicle.

7) *Saxton v. Pets Warehouse, Inc.*, 180 Misc. 2d 377, 378, 691 N.Y.S.2d 872 (App. Term 1999)

8) *O'Rourke v. Am. Kennels*, 7 Misc. 3d 1018(A), 801

N.Y.S.2d 237 (NY Civ. 2005).

The court ruled that the dog's breed did not conform to the product description.

9) *Appell v. Rodriguez*, 14 Misc. 3d 131(A), 836 N.Y.S.2d 483 (App. Term 2007)

10) *Budd v. Quinlan*, 19 Misc. 3d 66, 67, 860 N.Y.S.2d 802, 803 (App. Term 2008)

11) *Hardenbergh v. Schudder*, 2009 WL 4639722 (N.Y.A.T. 2009). The court stated:

“Since the puppy came within the definition of ‘goods’ as set forth in UCC 2-105 and since the defendant was a ‘merchant’ within the meaning of UCC 2-104(1), plaintiff was entitled to recover damages under a theory of breach of the implied warranty of merchantability...and was not limited to pursuing his remedies under article 35-D of the (GBL) governing the sale of dogs and cats.”

12) *Rizzo v. Puppy Boutique*, 27 Misc. 3d 1227(A), 911 N.Y.S.2d 695 (NY Civ. 2010)

13) *Smith v. A World of Pups, Inc.*, 27 Misc. 3d 1236(A), 910 N.Y.S.2d 765 (NY Civ. 2010).

The court stated:

“under the UCC, dogs are considered ‘goods’ and pet stores are “merchants” (UCC § 2-105). If a merchant failed to deliver the correct goods, such failure would result in a non-conforming delivery under Article 2, which constitutes a breach of contract.

14) *Gebbia v. Schulder*, 32 Misc. 3d 144(A), 939 N.Y.S.2d 740 (App. Term 2011).

In a case where a plaintiff brought suit for breach of implied warranty of merchantability, the court ruled that a genetically defective dog that died was a “good” and the seller, a commercial breeder, was a “merchant”.

15) *Lombardo v. Empire Puppies*, 50 Misc. 3d 143(A), 36 N.Y.S.3d 48 (App. Term 2016)

The trial court ruled that respondents were “merchants” that sold a diseased dog, which is a “good” and were subject to UCC’s breach of warranty claims.

16) *Cocuzza v. Love My Dawg*, 61 Misc. 3d 134(A), 110 N.Y.S.3d 866 (App. Term. 2018).

The trial court ruled that the dog was a “good” under the UCC, and the respondents were “merchants” who had breached the express warranty.

5. The court's actions set a dangerous precedent.

Failing to grant certiorari on this will undermine everything within the UCC and will be referenced as a basis to dismiss all claims involving animal sales.

VIII. The Court Disregarded This Court's Precedent And McCabe's Pleadings When They Dismissed His Product Liability Claims.

This Court should grant certiorari because the position that the lower court has adopted contradicts this Court's precedent.

This Court has laid out the basis for a common law "failure to warn" product liability claim, which the petitioner pleaded. Instead, the court dismissed his claim based on arguments that petitioner never stated.

1. This Court has laid out a "duty to warn" standard.

This Court has stated that a "duty to warn" standard applies to all common law product liability claims. *Air & Liquid Sys. Corp. v. DeVries* 139 S. Ct. 986, 988, 203 L. Ed. 2d 373 (2019). Virginia courts have also reiterated the same principals. *Morgen Indus. Inc. v. Vaughan*, 252 Va. 60, 66 (1996) and *Powell v. Diehl Woodworking Mach. Inc.*, 198 F. Supp. 3d 628, 633 (E.D. VA 2016).

While McCabe's complaint did state that pit bulls were an inherently dangerous dog breed, his argument basis was a "failure to warn" - he specifically stated that respondents were aware of the pit bull's violent history, they failed to disclose its violent history to Owner #4 and it was completely foreseeable that the pit bull would attack again.

2. The court disregarded McCabe's "failure to warn" theory.

The court went beyond its prescribed role in *Iqbal/Twombly*, to short circuit McCabe's claims against the government respondents.

It is common knowledge that dogs are not manufactured but are products of biological processes. However, the court concluded that McCabe pleaded a "negligent design" theory, stating "a product that is manufactured can be expected to exhibit common characteristics with all other products manufactured under the same specifications." (8a)

McCabe stated that defendants had sold a pit bull with a violent history, where it was entirely foreseeable that the pit bull would attack again. [Amended Complaint ¶48-76] To facilitate its sale, the defendants forged documents and mislabeled its breed to mask the inherent dangers of the pit bull breed [Exhibit 05] and failed to warn Owner #4 about its violent history, claiming it was very safe.

3. The court misapplied a criminal procedure statute and conflated UCC statutes to dismiss the product liability claim.

The court misapplied a criminal procedure statute - §3.2-6540(G), used *exclusively* to charge an owner of a dangerous dog ⁸ ⁹ and conflated statutory UCC standards, which are not related to product liability claims, as a basis to dismiss McCabe's product liability claims.

4. Virginia has no product liability laws.

Virginia is one of the few states that lacks any statutory product liability law. Therefore, all product liability claims are based on court rulings. Therefore, almost any property sold could be considered a product.

If an animal is both a "good" (under UCC) and is personal property (§ 3.2-6585), then it is logical to

⁸ §3.2-6540(G) - "Dangerous dogs; investigation, summons, and hearing". (2017 Code). Section (G) states

"No canine or canine crossbreed shall be found to be a dangerous dog solely because it is a particular breed, nor is the ownership of a particular breed of canine or canine crossbreed prohibited."

⁹ In 2021, §3.2-6540 (G) was amended to be subsection K(1).

5. Three other states have ruled that animals are subject to product liability laws.

1) *Beyer v. Aquarium Supply Co.*, 404 N.Y.S.2d 778, 778-79 (N.Y. Misc. 2d 1977)

The court held that the Defendant was retail seller; court ruled that a hamster is a product.

2) *Worrell v. Sachs*, 563 A.2d 1387, 1387-89 (Conn. Super. 1989)

The court held that a puppy sold to plaintiff (i.e. his property) was a “product”.

3) *Sease v. Taylor's Pets, Inc.*, 700 P.2d 1054 (Or. App. 1985)

The court held that that a rabid skunk is a “product” for sale of rabid skunk.

This ruling sets a dangerous precedent: the court acted outside the scope of what it was supposed to do during a demurrer, it disregarded this court’s precedent and decided that McCabe pleaded a standard that was not pled.

CONCLUSION

The Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

Barry McCabe
9470 Canonbury Square
Fairfax, Virginia 22031
(703) 598-0064
bm.mccabe@gmail.com
Pro Se Litigant