

**Supreme Court of Virginia - Order Denying  
Petition for Rehearing (Demurrer) - Record  
No. 201283 (June 30, 2021)**

VIRGINIA:

**In the Supreme Court of Virginia held at the  
Supreme Court Building in the City of  
Richmond on Wednesday the 30th day of June,  
2021.**

Barry McCabe, Appellant,

Against Record No. 201283  
Circuit Court No. CL2019-8951

Fairfax County, et al., Appellees.

**Upon a Petition for Rehearing**

On consideration of the petition of the appellant to set aside the judgment rendered herein on May 14, 2021 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,  
Teste:  
Douglas B. Robelen, Clerk

By: \_\_\_\_\_ s/ \_\_\_\_\_  
Deputy Clerk

**Supreme Court of Virginia - Order Denying  
Petition for Rehearing (Plea in Bar) - Record  
No. 201134 (June 30, 2021)**

**VIRGINIA:**

**In the Supreme Court of Virginia held at the  
Supreme Court Building in the City of  
Richmond on Wednesday the 30<sup>th</sup> day of June,  
2021.**

Barry McCabe, Appellant,

against      Record No. 201134  
Circuit Court No. CL2019-8951

Fairfax County, et al., Appellees.

**Upon a Petition for Rehearing**

On consideration of the petition of the  
appellant to set aside the judgment rendered herein  
on May 14, 2021 and grant a rehearing thereof, the  
prayer of the said petition is denied.

A Copy,  
Teste:  
Douglas B. Robelen, Clerk

By: \_\_\_\_\_ s/ \_\_\_\_\_  
Deputy Clerk

**Virginia Supreme Court - Order Denying  
Review (Demurrer) - Record No. 201283 (May  
14, 2021)**

**VIRGINIA:**

**In the Supreme Court of Virginia held at the  
Supreme Court Building in the City of  
Richmond on Friday the 14th day of May, 2021.**

Barry McCabe, Appellant,  
against Record No. 201283  
Circuit Court No. CL2019-8951

Fairfax County, et al., Appellees.

From the Circuit Court of Fairfax County

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of the opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

The rule to show cause previously entered herein is discharged.

A Copy,  
Teste:  
Douglas B. Robelen, Clerk

By: \_\_\_\_\_ s/ \_\_\_\_\_  
Deputy Clerk

**Supreme Court of Virginia - Order Denying  
Review (Plea in Bar) - Record No. 201134 (May  
14, 2021)**

**In the Supreme Court of Virginia held at the  
Supreme Court Building in the City of  
Richmond on Friday the 14th day of May, 2021.**

Barry McCabe, Appellant,

against Record No. 201134  
Circuit Court No. CL2019-8951

Fairfax County, et al., Appellees.

From the Circuit Court of Fairfax County

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of the opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

The rule to show cause previously entered herein is discharged.

A Copy,  
Teste:  
Douglas B. Robelen, Clerk

By: \_\_\_\_\_ s/ \_\_\_\_\_  
Deputy Clerk

**Fairfax County Circuit Court – Denial of  
Reconsideration (Plea in Bar) - CL-2019-8951  
(June 23, 2020)**

**VIRGINIA**

**IN THE CIRCUIT COURT OF FAIRFAX  
COUNTY**

BARRY MCCABE )  
 )  
Plaintiff, )  
 )  
v. ) CL 2019-8951  
 )  
FAIRFAX COUNTY, ET AL. )  
 )  
Defendant. )

**ORDER**

THIS CAUSE came before the Court upon the Plaintiff's Motion for Reconsideration of the Order entered by this Court on February 7, 2020.

IT APPEARING to the Court that the Motion for Reconsideration has not raised any issues such that this Court should reverse the Order; it is therefore

ORDERED that the Plaintiff's Motion for Reconsideration is denied.

ENTERED this 23 day of June 2020.

s/  
Grace Burke Carroll

**Fairfax County Circuit Court – Denial of  
Plaintiff's Motion For Reconsideration  
(Demurrer) – CL-2019-8951 (May 4, 2020)**

**VIRGINIA**

**IN THE CIRCUIT COURT OF FAIRFAX  
COUNTY**

BARRY MCCABE )  
 )  
Plaintiff, )  
 )  
v. ) CL 2019-8951  
 )  
FAIRFAX COUNTY, ET AL. )  
 )  
Defendant. )

**MEMORANDUM OPINION AND ORDER  
ADDRESSING PLAINTIFF'S REQUEST FOR  
RECONSIDERATION**

**THIS MATTER** came to the attention of the Court on April 17, 2020 due to a number of comments sent by Mr. McCabe regarding the April 13, 2020 decision on a Demurrer that was heard on March 6, 2020.<sup>1</sup> Under the final order for this cause, the Court sustained the Demurrer as to Count I (breach of contract), Count IV (product liability), Count V (breach of implied warranty) and Count VI (breach of

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<sup>1</sup> The Court would like to note that on page 4 of the April 13, 2020 Order, 8.01-316 was mistakenly cited instead of 8.02-316.

express warranty) against Defendants Barbara Hutcherson and Amanda Novotny as a matter of law.<sup>2</sup>

Mr. McCabe comes back before the Court asking for a reconsideration, stating three major points: 1) Defendants Roessler, Matos, and Rohrer were not dismissed from the lawsuit; 2) Defendants should not have brought up a statute of limitations claim in a Demurrer; and 3) Odin was purchased by its last owner and not adopted.<sup>3</sup>

Regarding the first point, Defendants Roessler, Matos, and Rohrer were only sued under Counts II (Gross Negligence), III (Public Nuisance), VII (VCPA), VIII (Fraud by Omission), VIII (Material misrepresentation), and X (Fraudulent Concealment). All of those counts were dismissed under the Plea in Bar heard on January 24, 2020. As such, since the counts against those Defendants were all dismissed, the Defendants were dismissed as well.

As for the statute of limitations, regardless of whether the defendants improperly raised a statute of limitations argument under the Demurrer the Court neither addressed the argument nor relied on the statute of limitation for its decision because the Court decided the dog was not a product that was sold. The statute of limitation argument was moot.

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<sup>2</sup> The Amended Complaint was filed November 15, 2019.

<sup>3</sup> The Court misread the Amended Complaint and thought that both Novotny and Hutcherson were former employees. Hutcherson is a former employee, but Novotny has been the FCAS Animal Placement Coordinator starting in 2014 and was still in the same position when the Amended Complaint was filed.

Mr. McCabe makes many interesting points as to why a dog is a product but the Court declines to find a dog as a “product” as in its earlier decision because the behavior of a dog as a pet is too varied to constitute a product that can be reasonably expected to produce a certain result. Va. Code § 3.2-6540(G) states that a dog cannot be determined to be dangerous just because it is a certain breed. There are many different varieties of dogs and breeds and each breed also has their own separate personalities and traits. Just because some pit bulls are prone to be aggressive does not mean all pit bulls are aggressive. On the other hand, a product that is manufactured can be expected to exhibit common characteristics with all other products manufactured under the same specifications. Setting aside a product that has defective traits not experienced in other similarly manufactured products, colloquially referred to as “lemons”, a product under the Uniform Commercial Code cannot act out on its own and have individualized personalities.

McCabe implores the court to conclude that because payment was in exchange for the dog in question, it is a product under the UCC. The Court declines to adopt that conclusion because under Va. Code § 3.2-6579, animal shelters are allowed to charge a fee for the release of a dog “for adoption to ensure sterilization.” Payment of this fee does not make animal shelters merchants, nor a dog acquired from the shelter a product. Therefore, the product warranties of the UCC do not apply. The 125 dollars was not payment for the dog but for the administrative fees associated with getting the dog adopted and sterilized. Even if the payment was for

commercial profit, a pet dog is not a product under the UCC.

Mr. McCabe's loss and injuries are horrific. The decisions of the Court cannot, however, be guided by sympathy. A decision on a Demurrer does not judge the fault of any party. Here, the only conclusion is that the Amended Complaint does not state a cause of action and Mr. McCabe does not have standing to pursue some of the claims asserted.

## Conclusion

UPON CONSIDERATION of the e-mails sent to the court, it is hereby **ORDERED, ADJUDGED and DECREED** that the Plaintiff's request for Reconsideration is **DENIED**.

The April 13, 2020 Order remains the final order in this cause. It was entered during the period when a judicial emergency has been declared. On April 22, 2020, the Virginia Supreme Court entered an order extending the March 16, 2020 declaration of a judicial emergency to May 17, 2020 and tolled all applicable time limits for the circuit court.

Consequently, the 21-day rule under Rule 1:1 and the 30-day time limit for noting an appeal of this decision will not start to run until May 18, 2020.

Entered this 4<sup>th</sup> day of May, 2020

s/  
Judge John M. Tran

**Fairfax County Circuit Court – Opinion  
(Demurrer) – CL-2019-8951 (April 13, 2020)**

**VIRGINIA**

**IN THE CIRCUIT COURT OF FAIRFAX  
COUNTY**

BARRY MCCABE	)	
	)	
Plaintiff,	)	
	)	
v.	)	CL 2019-8951
	)	
FAIRFAX COUNTY, ET AL.	)	
	)	
Defendant.	)	

**MEMORANDUM OPINION AND FINAL  
ORDER**

THIS MATTER came before the Court on March 6, 2020 upon a Demurrer filed by the Defendants. Mr. McCabe sued the County for injuries that he suffered and the death of his dog, caused by an adopted Pitbull dog. The County's animal shelter had placed the Pitbull for adoption. Upon conclusion of the hearing, the Court took the matter under advisement to review the pleadings and address the standing of the Plaintiff. The day prior to the March 6<sup>th</sup> hearing, Mr. McCabe had filed a lengthy brief in opposition to the Demurrer and it did not reach the Court prior to the hearing.

Following the hearing, the court's docket was impacted by issues associated with COVID-19 and the impact delayed the issuance of this Opinion. On March 16, 2020 the Virginia Supreme Court issued an Order declaring a judicial emergency and ordering the suspension of all of non - emergency matters. On March 27, 2020, the Virginia Supreme Court entered an order extending the March 16, 2020 declaration of a judicial emergency from April 6, 2020 to April 26. 2020. Consequently, the 21-day rule under Rule 1:1 under which this Court retains jurisdiction and the time for noting an appeal of this decision will not start to run until April 27, 2020.

Although the Court is issuing this opinion to clear its docket of an overdue matter, the parties should observe the orders of the Virginia Supreme Court as well as the Governor's Executive Orders and act consistent with the policy of social distancing and remaining sheltered to be safe during this period of national and statewide concerns.

It also is possible that the Virginia Supreme Court will issue another Order extending the suspension of non-emergency matters and tolling any deadlines for another 21 days. This case is not a matter that is considered urgent or an emergency, although it is understandably important to the parties. Under the present Orders no action is required with respect to this cause until further order of this Court or until the suspension orders are lifted on April 27, 2020.

#### **Background and Material Facts**

The Pitbull – Odin – was alleged to be a

dangerous dog with an extensive history of attacking other animals and yet was allowed to be put up for adoption leading to the unfortunate circumstances of Mr. McCabe's injuries. On June 30, 2016, Mr. McCabe was out on a walk with his dog, Kaiser, when Odin, charged and mauled both Mr. McCabe and Kaiser. Kaiser was killed and Mr. McCabe suffered major injuries. Mr. McCabe sued various defendants with the underlying complaint that the defendants failed to notify the public that Odin was a dangerous dog.

The nine counts of the amended complaint include Count I (Breach of Contract); Count II (Gross Negligence); Count III (Public Nuisance); Count IV (Product Liability); Count V (Breach of Express Warranty); Count VI (Breach of Implied Warranty); Count VII (Violation of the Virginia Consumer Protection Act); Count VIII (Fraud by Omission); Count IX (Material Misrepresentation) and Count X (Fraudulent Concealment).

Defendants filed a Plea-in-Bar and Demurrer to the Amended Complaint. On January 24, 2020, the Court sustained the Plea-in-Bar as to all counts due to the Mr. McCabe's failure to note an appeal of his grievance pursuant to the Virginia Claims Procedure Statute and also sustained the plea in bar as to Count II (Gross Negligence) and Count III (Public Nuisance) applying the two- year statute of limitations.

The Court further sustained the plea-in-bar as to Count VII (VCPA), Count VIII (Fraud by Omission), Count IX (Material Misrepresentation) and Count X (Fraudulent Concealment) on grounds that any fraud could have been discovered as of

December 19, 2016, a period of time more than two years prior to the date of filing.

The Court further sustained the plea in bar filed by the Fairfax County Animal Shelter on grounds that the Shelter is not a legal entity and is essentially a *non-sui juris*.

Lastly, the Court sustained the plea in bar filed by the Fairfax County Board of Supervisors as to all counts on grounds that the Board of Supervisors is a legislative body and is therefore afforded immunity. All counts of the amended complaint appear to have been dismissed in accordance with the prior order sustaining the plea in bar as to all counts.

Due to the lack of clarity as to which claims have been actually brought against the defendant, the County takes the position that the only remaining claims were under Count I (breach of contract), Count IV (product liability), Count V (breach of implied warranty) and Count VI (breach of express warranty) are against Defendants Barbara Hutcherson and Amanda Novonty – two former employees of Fairfax County Animal Shelter. *See* footnote 1, page 1 of the Defendants' Memorandum of Points and Authorities in Support of Demurrer.

Mr. McCabe alleges that all defendants are liable for the deceptive practices exercised by Defendants Hutcherson and Novonty. The plea of bar having been sustained as to all counts have resulted in the dismissal of all other defendants who were the subjects of the plea-in-bar. Consequently, the County argues that it is only Hutcherson and Novonty who

remain the subject of this Demurrer. This position is consistent with the ruling under the plea-in-bar recognizing that claims touching upon negligence and fraud are governed by the two-year statute of limitation and are barred regardless of who may have been specifically subject to those counts.

The question presented under Demurrer is whether the two individual defendants, former employees of the Animal Shelter can be sued by Mr. McCabe for breach of contract, product liability and breach of warranty.

### **Legal Argument**

Mr. McCabe lacks standing to bring any of the remaining contract and warranty claims against the defendants. The court declines to find that a dog adopted for purposes of a pet is a “product” because the behavior of pet dogs are too varied to constitute a product that can reasonably be expected to produce a certain result.

With respect to the contract claims, Mr. McCabe is neither in direct privity with the County nor with the parties under the adoption contract. Furthermore, since neither Hutcherson and Novotny are parties to the adoption contract and they are not “merchants” under the Virginia Uniform Commercial Code, they cannot be sued for breach of contract or breach of warranties. If they were parties to the adoption contract, claims of breach of warranties would fail under the express exclusion set forth under the contract. Va. Code § 8.1-316.

Lastly, the contract itself was not made for the

benefit of the Mr. McCabe “The third-party beneficiary doctrine is subject to the limitation that the third party must show that the parties to the contract clearly and definitely intended it to confer a benefit upon him. *Valley Landscape Co., Inc. v. Rolland*, 218 Va. 257, 259 (1977) (quoting *Professional Realty v. Bender*, 216 Va. 737, 739 (1976)). As correctly argued by the County, “[a] third-party does not have standing unless” the parties to the contract clearly and definitely intended it to confer a benefit upon him” *Kelly Health Care, Inc. v. Prudential Ins. Co.*, 226 Va. 376, 380 (1983).

The third-party doctrine does not apply generally to the community at large or known neighbors. “[P]ersons who are neither the promisees of a contract nor third parties to whom performance is to be rendered may sometimes derive a benefit from the contract’s performance. These persons who occupy the space of the general public are not intended beneficiaries. Hence, they are neither from nor creditor beneficiaries. They instead form the class of unprotected, incidental beneficiaries. An incidental beneficiary acquires no right either against the promisor or the promise by virtue of the promise.” § 37:21. Incidental beneficiaries, 13 Williston on Contracts § 37:21 (4<sup>th</sup> ed.).

The principles of law concerning contract and warranties apply to all other defendants who McCabe may assert are still subject to this lawsuit to include Defendants Roessler, Matos and Rohrer. The opposition to the demurrer alleges a breach of a common law duty of care. Any such breach is an element of a tort claim and not a contract claim.

At the hearing the Court received copies of e-mails relating to FOIA request # 1 (1 of 3), (2 of 3) and (3 of 3) and FOIA request – Shenandoah Valley Animal Services Center (SVASC). Mr. McCabe did not have extra copies with him. Consequently, the clerk was requested to make copies of e-mails that were received and send such copies to Mr. McCabe and counsel for the County for their record. The e-mails cannot be considered as they are not a part of the complaint, however, they were considered in determining whether there were any fair inferences that would allow Mr. McCabe to continue the claims that survived the plea in bar.

Mr. McCabe's stated claims are a matter of grave concern. The decision to sustain a demurrer is not a decision on the merits of the claim. It recognizes that despite taking all the allegations in Mr. McCabe's in the light most favorable to forming a cause of action, the Court is unable to find a cause of action. The decision applied here rests upon principles of law that do not adjudicate the merits of the claims.

### **Conclusion**

UPON CONSIDERATION of the pleadings filed with the court and the hearing held on March 6, 2020, it is hereby

**ORDERED, ADJUDGED and DECREED**  
that the County's Demurrer is SUSTAINED, and the Counts affected are dismissed in addition to the dismissal resulting from the ruling on the Plea in Bar. No leave to amend is granted due to the futility of granting such leave.

**AND THIS ORDER IS FINAL.**

ENTERED this 13<sup>th</sup> Day of April, 2020.

\_\_\_\_\_  
s/

Judge John M. Tran

ENDORSEMENT OF THIS ORDER IS  
DISPENSED WITH IN THE DISCRETION OF THE  
COURT PURSUANT TO RULE 1:13 OF THE  
SUPREME COURT OF VIRGINIA.

**Fairfax County Circuit Court – Opinion (Plea  
in Bar) - CL-2019-8951 (February 7, 2020)**

**VIRGINIA**

**IN THE CIRCUIT COURT OF FAIRFAX  
COUNTY**

BARRY MCCABE	)	
	)	
Plaintiff,	)	
v.	)	CL 2019-8951
	)	
FAIRFAX COUNTY BOARD	)	
OF SUPERVISORS, ET AL	)	
	)	
Defendant.	)	

**ORDER**

THIS MATTER came before the Court on Defendants' Plea in Bar heard on January 24, 2020.

**IT APPEARING TO THE COURT** that it has considered the briefs submitted by the parties and oral argument.

**IT FURTHER APPEARING TO THE COURT** that the Plea in Bar be GRANTED as to all counts due to Plaintiff's failure to timely note an appeal pursuant to the Virginia Claims Procedure Statute, therefore no monetary claims can go forward against the County;

**FURTHER** as to Count II (Gross Negligence) and Count III (Public Nuisance), as the two-year

statute of limitations expired before the filing of the Complaint;

**FURTHER** the Plea in Bar be GRANTED as to Count VII (VCPA), Count VIII (Fraud by Omission), Count IX (Material Misrepresentation), and Count X (Fraudulent Concealment) as Plaintiff's letter dated December 19, 2016, attached an Exhibit 1 to his Complaint, illustrated Plaintiff's notice of potential fraud more than two years prior to commencing the action;

Moreover, the Plea in Bar should be GRANTED as to the Fairfax County Animal Shelter on the grounds of non-sui juris;

**FURTHER** this Court takes judicial notice that the Fairfax County Board of Supervisors is a legislative body and thus is afforded immunity.

Therefore, the Plea in Bar for the Fairfax County Board of Supervisors is GRANTED;

Therefore; for the foregoing findings it is hereby **ORDERED** that the Plea in Bar be GRANTED as to all counts.

ENTERED this 7th February 2020

/s/

**JUDGE GRACE CARROL BURKE**

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA.

**Fourth Circuit Court of Appeals – Judgement -  
No. 19-1583 (March 31, 2020)**

FILED: March 31, 2020

**UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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No. 19-1583 (1:19-cv-00053-CMH-TCB)

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BARRY MCCABE  
Plaintiff - Appellant

v.

FAIRFAX COUNTY ANIMAL SHELTER  
Defendant – Appellee

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**JUDGEMENT**

In accordance with the decision of this court,  
the judgment of the district court is affirmed.

This judgment shall take effect upon issuance  
of this court's mandate in accordance with Fed. R.  
App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

**Fourth Circuit Court of Appeals – Opinion -  
Unpublished - No. 19-1583 (March 31, 2020)**

**UNPUBLISHED**

**UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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**No. 19-1583**

---

**BARRY MCCABE  
Plaintiff - Appellant**

**v.**

**FAIRFAX COUNTY ANIMAL SHELTER  
Defendant – Appellee**

---

Appeal from the United States District Court for the  
Eastern District of Virginia, at Alexandria. Claude  
M. Hilton, Senior District Judge. (1:19-cv-00053-  
CMH-TCB)

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Submitted: March 19, 2020

Decided: March 31, 2020

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Before WILKINSON, THACKER, and HARRIS,  
Circuit Judges.

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Affirmed by unpublished per curiam opinion.

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Barry McCabe, Appellant Pro Se. Kimberly Pace Baucom, Assistant County Attorney, FAIRFAX COUNTY ATTORNEYS OFFICE, Fairfax, Virginia, for Appellee.

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Unpublished opinions are not binding precedent in this circuit.

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PER CURIAM:

Barry McCabe appeals the district court's order dismissing his 42 U.S.C. § 1983 (2018) action against the Fairfax County Animal Shelter ("FCAS") based on FCAS's motion to dismiss for lack of personal jurisdiction and failure to state a claim filed pursuant to Fed. R. Civ. P. 12(b)(2), (6). <sup>4</sup>

McCabe alleged that FCAS was liable for an unconstitutional taking of his property under the Fifth Amendment after his dog, Kaiser, was killed by

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<sup>4</sup> In addition to his § 1983 claim, McCabe also brought various state law claims that the district court dismissed without prejudice to McCabe's ability to file the claims in the appropriate court. We conclude that the district court did not abuse its discretion by dismissing the remaining state law claims without prejudice after dismissing all claims over which it had original jurisdiction. See 28 U.S.C. § 1367(c)(3) (2018) (permitting district court to decline supplemental jurisdiction when court "dismissed all claims over which it ha[d] original jurisdiction"); *Jordahl v. Dem. Party of Va.*, 122 F.3d 192, 203 (4th Cir. 1997) (reviewing dismissal of state law claims for abuse of discretion).

another dog, Odin. According to the complaint, Odin’s owner adopted Odin from FCAS in January 2016, and FCAS intentionally failed to disclose Odin’s violent history. In June 2016, Odin’s owner was training him off-leash in a public area when Odin attacked McCabe and Kaiser, killing Kaiser.

We review de novo a district court’s dismissal under Rule 12(b)(2) or 12(b)(6). *Semenova v. Md. Transit Admin.*, 845 F.3d 564, 567 (4th Cir. 2017) (Rule 12(b)(6)); *Perdue Foods LLC v. BRF S.A.*, 814 F.3d 185, 188 (4th Cir. 2016) (Rule 12(b)(2)). In evaluating a Rule 12(b)(2) motion, if “the court addresses the personal jurisdiction question by reviewing only the parties’ motion papers, affidavits attached to the motion, supporting legal memoranda, and the allegations in the complaint, a plaintiff need only make a *prima facie* showing of personal jurisdiction to survive [a] jurisdictional challenge.” *Grayson v. Anderson*, 816 F.3d 262, 268 (4th Cir. 2016) (emphasis omitted). When deciding whether the “plaintiff has made the requisite *prima facie* showing, the court must take the allegations and available evidence relating to personal jurisdiction in the light most favorable to the plaintiff.” *Id.* (emphasis omitted).

“In Virginia, an operating division of a governmental entity cannot be sued unless the legislature has vested the operating division with the capacity to be sued.” *Harrison v. Prince William Cty. Police Dep’t*, 640 F. Supp. 2d 688, 711 (E.D. Va. 2009) (internal quotation marks omitted); *see Fed. R. Civ. P. 17(b)(3)* (providing that capacity of defendant to be sued based on “law of the state where the court is located”). The Fairfax County Board of Supervisors

established FCAS pursuant to Va. Code Ann. § 3.2-6546(B) (Supp. 2019), which provides that “[t]he governing body of each county . . . shall maintain or cause to be maintained a public animal shelter.” *See* Fairfax Cty. Code § 41.1-2-5 (2020) (establishing that “County Animal Shelter shall be operated and maintained in accordance with Virginia law”). There is no statutory provision in the Virginia Code that renders FCAS subject to suit. Accordingly, FCAS lacks the capacity to be sued. Although McCabe argues that this can be remedied by substituting Fairfax County itself as defendant, such substitution would be futile because the complaint also was properly dismissed for failure to state a claim for relief.

In evaluating a Rule 12(b)(6) motion, “we accept as true all of the factual allegations contained in the complaint and draw all reasonable inferences in favor of the plaintiff.” *King v. Rubenstein*, 825 F.3d 206, 212 (4th Cir. 2016). “To survive a [Rule 12(b)(6) motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted).

“The Takings Clause of the Fifth Amendment states that private property shall not be taken for public use, without just compensation.” *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2167 (2019) (internal quotation marks omitted). “[A] government violates the Takings Clause when it takes property without compensation, and . . . a property owner may bring a Fifth Amendment claim under § 1983 at that time.” *Id.* at 2177. McCabe’s theory of liability was grounded

on his allegation that FCAS failed to disclose Odin's violent history in order to facilitate his adoption, as part of a broader policy of knowingly adopting out dangerous dogs. However, Odin was neither in FCAS's possession nor under its control at the time of the attack, which occurred almost six months after Odin's adoption. Odin's owner made the decision to have Odin off-leash in a public area. Accepting McCabe's well-pled allegations as true, there has been no actual government interference with his property. *See Sunrise Corp. of Myrtle Beach v. City of Myrtle Beach*, 420 F.3d 322, 329-30 (4th Cir. 2005). Therefore, although we grant McCabe's motion to exceed the length limitation for his informal brief, we affirm the district court's order.

We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

*AFFIRMED*

**US District Court for the Eastern District of  
Virginia – Order - 1:19-CV-53 (March 20, 2019)**

**IN THE UNITED STATE DISTRICT COURT  
FOR THE  
EASTERN DISTRICT OF VIRGINIA  
Alexandria Division**

BARRY MCCABE	)
	)
Plaintiff,	)
	)
v.	) Civil Action
	) No. 1:19-CV-53
FAIRFAX COUNTY	)
ANIMAL SHELETR	)
	)
Defendant.	)

**ORDER**

THIS MATTER comes before the Court on Defendant's Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(2) and 12(b)(6). For the reasons stated from the bench, it is hereby ORDERED that Defendant's Motion to Dismiss is GRANTED, Plaintiff's constitutional claims are DISMISSED, and Plaintiff's state law claims are DISMISSED without prejudice to be filed in the appropriate court.

/s/  
CLAUDE M. HILTON  
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia  
March 20, 2019

**US District Court for the Eastern District of  
Virginia – Order - Notice of Voluntary  
Dismissal in 1:18-CV-572 (July 18, 2018)**

**IN THE UNITED STATE DISTRICT COURT  
FOR THE  
EASTERN DISTRICT OF VIRGINIA  
Alexandria Division**

BARRY MCCABE	)
	)
Plaintiff,	)
	)
v.	)
	Civil Action
	)
FAIRFAX COUNTY	)
ANIMAL SHELETR	)
	)
Defendant.	)

**NOTICE OF VOLUNTARY DISMISSAL**

COMES NOW the plaintiff, by counsel and for a Notice of Voluntary Dismissal states:

1. The plaintiff seeks pursuant Rule 41 of the Federal Rules of Civil Procedure to non-suit this matter;
2. The plaintiff, having not previously dismissed any federal or state-court action based on these claims, seeks to dismiss without prejudice in hope of conserving resources and create judicial economy.  
WHEREFORE, the plaintiff notifies this Court and opposing counsel by way of pleading that it his request that the Court dispose of this action without

prejudice pursuant to Rule 41 of the Federal Rules of Civil Procedure and to enter an Order to that end.  
RESPECTFULLY SUBMITTED:

/s/  
Jonathan Phillips, Esq  
Virginia Bar Number 77188  
10505 Judicial Drive, Suite 200  
Fairfax, Virginia 22030  
(703) 293-9301, (703) 293-9301 facsimile  
Email: [jpbillips@leffierphillips.com](mailto:jpbillips@leffierphillips.com)  
*Counsel for Barry McCabe*

/s/  
T. S. Ellis.  
United States District Judge

## **Applicable Virginia Code Statutes**

### **§ 3.2-6500 - Comprehensive Animal Care - Definitions**

"Adoption" means the transfer of ownership of a dog or a cat, or any other companion animal, from a releasing agency to an individual.

"Consumer" means any natural person purchasing an animal from a dealer or pet shop or hiring the services of a boarding establishment. The term "consumer" shall not include a business or corporation engaged in sales or services.

"Public animal shelter" means a facility operated by the Commonwealth, or any locality, for the purpose of impounding or sheltering seized, stray, homeless, abandoned, unwanted, or surrendered animals or a facility operated for the same purpose under a contract with any locality.

"Releasing agency" means (i) a public animal shelter or (ii) a private animal shelter, humane society, animal welfare organization, society for the prevention of cruelty to animals, or other similar entity or home-based rescue that releases companion animals for adoption.

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

A pet shop shall sell or offer for adoption a dog procured only from a humane society; a private or public animal shelter as those terms are defined in § 3.2-6500;

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

All dogs and cats shall be deemed personal property and may be the subject of larceny and malicious or unlawful trespass. Owners, as defined in § 3.2-6500, may maintain any action for the killing of any such animals, or injury thereto, or unlawful detention or use thereof as in the case of other personal property. The owner of any dog or cat that is injured or killed contrary to the provisions of this chapter by any person shall be entitled to recover the value thereof or the damage done thereto in an appropriate action at law from such person.

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

In cases not provided for in § 8.2-318 where recovery of damages for injury to person, including death, or to property resulting from negligence is sought, lack of privity between the parties shall be no defense.

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

E. Dismissal, abatement, or nonsuit.

1. Except as provided in subdivision 3, if any action is commenced within the prescribed limitation period and for any cause abates or is dismissed without determining the merits, the time such action is pending shall not be computed as part of the period within which such action may be brought, and another action may be brought within the remaining period.
3. If a plaintiff suffers a voluntary nonsuit as prescribed in § 8.01-380, the statute of limitations with respect to such action shall be tolled by the commencement of the nonsuited action, regardless of whether the statute of limitations is statutory or contractual, and the plaintiff may recommence his action within six months from the date of the order entered by the court, or within the original period of limitation, or within the limitation period as provided by subdivision B-1, whichever period is longer. This tolling provision shall apply irrespective of whether the action is originally filed in a federal or a state court and recommenced in any other court, and shall apply to all actions irrespective of whether they arise under common law or statute.

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

The cause of action in the actions herein listed shall be deemed to accrue as follows:

1. In actions for fraud or mistake, in actions for violations of the Consumer Protection Act (§ 59.1-196 et seq.) based upon any misrepresentation, deception, or fraud, and in actions for rescission of contract for undue influence, when such fraud, mistake, misrepresentation, deception, or undue influence is discovered or by the exercise of due diligence reasonably should have been discovered;

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

A. In any suit in equity or action at law, the contention that a pleading does not state a cause of action or that such pleading fails to state facts upon which the relief demanded can be granted may be made by demurrer. All demurrers shall be in writing and shall state specifically the grounds on which the demurrant concludes that the pleading is insufficient at law. No grounds other than those stated specifically in the demurrer shall be considered by the court. A demurrer may be amended as other pleadings are amended.

§ 8.1A-201 - UCC - General definitions.

(a) Unless the context otherwise requires, words or phrases defined in this section, or in the additional definitions contained in other titles of the Uniform Commercial Code that apply to particular titles or parts thereof, have the meanings stated.

(11) "Consumer" means an individual who enters into a transaction primarily for personal, family, or household purposes.

(12) "Contract," as distinguished from "agreement," means the total legal obligation that results from the parties' agreement as determined by the Uniform Commercial Code as supplemented by any other applicable laws.

(27) "Person" means an individual, corporation, business trust..... government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity.

(29) "Purchase" means taking by sale, lease, discount, negotiation,

mortgage, pledge, lien, security interest, issue or reissue, gift, or any other voluntary transaction creating an interest in property.

#### § 8.1A-304 · Obligation of good faith

Every contract or duty within the Uniform Commercial Code imposes an obligation of good faith in its performance and enforcement.

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

(1) "Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

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

(1) "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Title 8.8A) and things in action. "Goods" also includes the unborn young of animals.....

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

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

§ 8.2-314 · Implied warranty: Merchantability; usage of trade .....

- (1) Unless excluded or modified (§ 8.2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.
- (2) Goods to be merchantable must be at least such as
  - (a) pass without objection in the trade under the contract description; and
  - (b) in the case of fungible goods, are of fair average quality within the description; and
  - (c) are fit for the ordinary purposes for which such goods are used; and
  - (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
  - (e) are adequately contained, packaged, and labeled as the agreement may require; and
  - (f) conform to the promises or affirmations of fact made on the

container or label if any.

(3) Unless excluded or modified (§ 8.2-316) other implied warranties may arise from course of dealing or usage of trade.

§ 8.2-315 · Implied warranty: Fitness for particular purpose;

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section [§ 8.2-316] an implied warranty that the goods shall be fit for such purpose.

§ 8.2-316 · Exclusion or modification of warranties.

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this title on parol or extrinsic evidence (§ 8.2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability

and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

(3) Notwithstanding subsection (2)

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty;

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

(1) Unless otherwise unambiguously indicated by the language or circumstances

(a) an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances;

(b) an order or other offer to buy

goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or nonconforming goods, but such a shipment of nonconforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer.

(2) Where the beginning of a requested performance is a reasonable mode of acceptance an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance.

#### § 8.2-314 · UCC · Implied warranty: Merchantability

(1) Unless excluded or modified (§ 8.2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as  
(a) pass without objection in the trade under the contract

description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (§ 8.2-316) other implied warranties may arise from course of dealing or usage of trade.

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

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment

to select or furnish suitable goods, there is unless excluded or modified under the next section [§8.2-316] an implied warranty that the goods shall be fit for such purpose.

§ 8.2-316. Exclusion or modification of warranties.

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this title on parol or extrinsic evidence (§ 8.2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

(3) Notwithstanding subsection (2)

(a) unless the circumstances indicate otherwise, all implied

warranties are excluded by expressions like "as is," "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and

(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

(4) Remedies for breach of warranty can be limited in accordance with the provisions of this title on liquidation or limitation of damages and on contractual modification of remedy (§§ 8.2-718 and 8.2-719).

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

Lack of privity between plaintiff and

defendant shall be no defense in any action brought against the.....seller of goods to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did not purchase the goods from the defendant, if the plaintiff was a person whom .....the seller might reasonably have expected to use, consume, or be affected by the goods.....

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

(1) A "person in the position of a seller" includes as against a principal an agent who has paid or become responsible for the price of goods on behalf of his principal or anyone who otherwise holds a security interest or other right in goods similar to that of a seller.

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

A. Every claim cognizable against any county, city, or town for negligence shall be forever barred unless the claimant or his agent, attorney, or representative has filed a written statement of the nature of the claim, which includes the time and place at which the injury is alleged to have occurred, within six months after such cause of action accrued. Failure to provide such statement shall not bar a claim against any county, city, or town, provided that

the attorney, chief executive, or mayor of such locality, or any insurer or entity providing coverage or indemnification of the claim, had actual knowledge of the claim, which includes the nature of the claim and the time and place at which the injury is alleged to have occurred, within six months after such cause of action accrued....

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

The members of the governing bodies of any locality or political subdivision and the members of boards, commissions, agencies and authorities thereof and other governing bodies of any local governmental entity, whether compensated or not, shall be immune from suit arising from the exercise or failure to exercise their discretionary or governmental authority as members of the governing body, board, commission, agency or authority which does not involve the unauthorized appropriation or misappropriation of funds. However, the immunity granted by this section shall not apply to conduct constituting intentional or willful misconduct or gross negligence.

§ 15.2-1246 - Appeal from disallowance of claim.

When a claim of any person against a county is disallowed in whole or in part

by the governing body, if such person is present, he may appeal from the decision of the governing body within 30 days from the date of the decision. If the claimant is not present, the clerk of the governing body shall serve a written notice of the disallowance on him or his agent, and he may appeal from the decision within 30 days after service of such notice.....