In The

Supreme Court of Virginia

RECORD NO. 110733

VIOLET SEABOLT,

Appellant,

v.

COUNTY OF ALBEMARLE,

Appellee.

BRIEF OF APPELLEE

John W. Zunka (VSB No. 14368)
ZUNKA, MILNOR & CARTER, LTD.
414 Park Street
Charlottesville, Virginia 22902
(434) 977-0191 (Telephone)
(434) 977-0198 (Facsimile)
jzunka@zmcilaw.com

Counsel for Appellee

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

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STATEMENT OF THE CASE

This case comes before this Court on appeal from the Circuit Court for the County of Albemarle ("Trial Court"), the Honorable Cheryl V. Higgins presiding, which sustained the Demurrer of the appellee, the County of Albemarle ("Albemarle County"). The appellant, Violet Seabolt ("Mrs. Seabolt"), sued Albemarle County for injuries allegedly resulting from her trip and fall at the Scottsville Community Center at Dorrier Park ("Scottsville Community Center") on July 2, 2005. App. 1-6. At issue in this appeal is Mrs. Seabolt's Amended Complaint ("Amended Complaint"), which she filed on December 23, 2009, alleging that Albemarle County was liable for gross negligence under Virginia Code § 15.2-1809 ("Liability of Localities in the operation of parks, recreational facilities and playgrounds"). App. 1-6.

Albemarle County responded to the Amended Complaint by filing four defensive pleadings on January 20, 2010. App. 7-19. First, Albemarle County filed a Special Plea of Sovereign Immunity, asserting that counties in the Commonwealth of Virginia ("Commonwealth") enjoy sovereign immunity from liability for tortious personal injuries, including those resulting from gross negligence of county officers and agents in the operation and maintenance of a park, recreational facility, or playground under Virginia Code § 15.2-1809. App. 7-8. Second, Albemarle County filed a Demurrer

on the ground that the Amended Complaint failed to allege compliance with the presentment and appeal procedures set forth in Virginia Code §§ 15.2-1243 *et seq*., which prescribe the mandatory and exclusive mode for bringing any claim against a county. App. 9-12. Third, Albemarle County filed a Demurrer on the ground that the Amended Complaint failed to allege facts that rose to the level of gross negligence, and thus Albemarle County enjoyed sovereign immunity from ordinary negligence of its officers and agents under Virginia Code § 15.2-1809. App. 13-17. Albemarle County's final defensive pleading was a Plea of Statute of Limitations. App. 18-19.

The Trial Court heard oral arguments on all four defensive pleadings on August 27, 2010. App. 21-46. At a hearing on September 2, 2010, the Trial Court announced its judgment denying Albemarle County's Plea of Statute of Limitations and sustaining Albemarle County's Demurrer for failure to plead gross negligence. App. 47-57. In sustaining the Demurrer, the Trial Court held that, even when viewed in a light most favorable to Mrs. Seabolt, reasonable persons could not find that the facts as pled in the Amended Complaint rose to the level of gross negligence. App. 53-56. Albemarle County continued to assert its other grounds of defense and requested that the Court rule on its Special Plea of Sovereign Immunity and

its Demurrer for failure allege compliance with the presentment and appeal procedures of Virginia Code §§ 15.2-1243 *et seq*. App. 66. Although the Trial Court found that Albemarle County's interpretation of the procedures set forth in Virginia Code §§ 15.2-1243 *et seq*. was correct (App. 37), the Trial Court declined to rule on either that Demurrer or the Special Plea of Sovereign Immunity. App. 66. The Trial Court entered the Final Order on January 20, 2011, to which Mrs. Seabolt objected. App. 65-67.

On July 22, 2011, this Court granted Mrs. Seabolt's Petition for Appeal, in which she claims that the Trial Court erred by sustaining Albemarle County's Demurrer as to gross negligence. Albemarle County asserts that the Trial Court did not err in its judgment regarding gross negligence, and also continues to assert that the case should be dismissed on the grounds of sovereign immunity and Mrs. Seabolt's failure to allege compliance with the presentment and appeal procedures of Virginia Code §§ 15.2-1243 *et seq*.

STATEMENT OF FACTS

According to the Amended Complaint, the incident that gave rise to this lawsuit occurred at the Scottsville Community Center, which Albemarle County operates and maintains pursuant to Virginia Code § 15.2-1811(1). App. 1-3. On July 2, 2005, Mrs. Seabolt attended a rummage sale at the

Scottsville Community Center and as she walked up a wooden handicapped access ramp to the entrance of the Scottsville Community Center, she allegedly tripped on some nails that were slightly protruding above the level of the access ramp and fell. App. 2. Mrs. Seabolt claims that she "could not see the nails" because, as she emphasizes, the nails were "difficult to detect" and there was no warning sign. App. 2-5. Mrs. Seabolt assumes that because the nails were rusted and weathered, they must have been protruding above the access ramp for a "considerable length of time." App. 2. Also, since Albemarle County employees visited the Scottsville Community Center three times per week to conduct maintenance and repairs, Mrs. Seabolt believes that Albemarle County and its employees knew of the nails' condition. App. 3-4. Although Mrs. Seabolt also claims "on information and belief, that another pedestrian on the same ramp sustained an injury by catching her foot on said nails," Mrs. Seabolt never alleges that Albemarle County was informed or knew of this prior injury. App. 2.

Mrs. Seabolt asserts that Albemarle County and its employees were grossly negligent for failing to fix and warn of the nails, as well as for failing to have a railing in place on the ramp. App. 3-5. Specifically, Mrs. Seabolt claims that because Albemarle County employees regularly visited the

Scottsville Community Center in order to maintain and repair any unreasonably dangerous condition, they deliberately chose not to repair the difficult-to-detect nails. App. 3-4. Mrs. Seabolt bases her lawsuit on the assumption that Virginia Code § 15.2-1809, which subjects cities and towns to liability for the gross negligence of municipal officers and agents in the maintenance and operation of a park, recreational facility, or playground, also subjects counties to liability for the gross negligence of county officers and agents in the maintenance and operation of a park, recreational facility, or playground. App. 5. Furthermore, although Mrs. Seabolt has brought a claim for monetary damages against Albemarle County, she has never alleged that she complied with all of the presentment and appeal procedures set forth in Virginia Code §§ 15.2-1243 *et seq*., which are the mandatory requirements for bringing any claim against a county. App. 1-6, 9, 29-32, 36-42.

SUMMARY OF THE ARGUMENT

Albemarle County asserts three main grounds for dismissal of this case. First, the Court lacks subject matter jurisdiction to adjudicate the case because Albemarle County enjoys sovereign immunity from liability for tortious personal injuries, including gross negligence under Virginia Code § 15.2-1809, and because Mrs. Seabolt failed to allege compliance

with the mandatory presentment and appeal procedures prescribed by Virginia Code §§ 15.2-1243 *et seq*. for bringing her claim against Albemarle County. Second, the Trial Court did not err in sustaining Albemarle County's Demurrer for failure to plead gross negligence because the allegations fail to show that Albemarle County had actual notice of the difficult-to-detect nails or of prior falls caused by the nails, and the absence of a warning sign or guardrail constituted ordinary negligence, at best. Third, if the Trial Court erred in sustaining Albemarle County's Demurrer for failure to plead gross negligence, the Court may apply the "right result for the wrong reason" doctrine to dismiss the case for failure to plead compliance with Code §§ 15.2-1243 *et seq*. and for sovereign immunity.

ARGUMENT

I. THE COURT LACKS SUBJECT MATTER JURISDICTION TO ADJUDICATE THIS CASE.

Albemarle County respectfully requests that the Court dismiss this action for lack of subject matter jurisdiction.

"Subject matter jurisdiction is the power of a court to adjudicate a class of cases or controversies." *Virginia-Pilot Media Cos. v. Dow Jones & Co.*, 280 Va. 464, 467, 698 S.E.2d 900, 901 (2010). Pursuant to the basic separation of powers principle under Article III, Section 1 of the Virginia Constitution, subject matter jurisdiction exists in the courts "only when it

has been granted by a constitution or statute." *Id.* at 467-68, 698 S.E.2d at 901-02 (citing *In re Commonwealth*, 278 Va. 1, 11, 677 S.E.2d 236, 240 (2009)). This Court has held that "[s]ubject matter jurisdiction cannot be waived or conferred on a court by the litigants and the lack of subject matter jurisdiction may be raised *at any time*." *In re Commonwealth*, 278 Va. at 11, 677 S.E.2d at 240 (emphasis added). A judgment or order entered by a court that lacks subject matter jurisdiction is a "nullity." *Virginia-Pilot Media Cos.*, 280 Va. at 468, 698 S.E.2d at 902 (citing *Morrison v. Bestler*, 239 Va. 166, 169-70, 387 S.E.2d 753, 755 (1990)).

The Court lacks subject matter jurisdiction to adjudicate this case for two reasons. First, Albemarle County enjoys sovereign immunity from liability for tortious personal injuries, including those resulting from gross negligence under Virginia Code § 15.2-1809, and thus the Court lacks subject matter jurisdiction to adjudicate Mrs. Seabolt's tort claim against Albemarle County. Second, the Trial Court lacked subject matter jurisdiction because Mrs. Seabolt never alleged compliance with the presentment and appeal procedures set forth in Code §§ 15.2-1243 *et seq*., which are the mandatory and exclusive mode for bringing any claim against a county in the Commonwealth. Albemarle County raised both of these grounds with the Trial Court by filing and arguing a Special Plea of

Sovereign Immunity and a Demurrer for failure to allege compliance with the presentment and appeal procedures prescribed by Code §§ 15.2-1243 *et seq*. App. 7-12, 23-42. The Trial Court, however, declined to rule on these two defenses and sustained Albemarle County's Demurrer on the ground of failure to plead gross negligence. App. 66. Albemarle County was not required to assign cross-error to the Trial Court's declination to rule on these grounds and may raise both defenses on appeal because each is a matter of subject matter jurisdiction, which a party can raise at any time.

Therefore, Albemarle County respectfully requests the Court to dismiss this action for lack of subject matter jurisdiction.

A. The Court Does Not Have Subject Matter Jurisdiction Because Albemarle County Enjoys Sovereign Immunity from Liability for Tortious Personal Injuries.

1. Sovereign immunity is a subject matter jurisdiction issue.

Albemarle County, as an arm of the Commonwealth, may, on appeal, reassert its sovereign immunity from liability for tortious personal injuries.

The Commonwealth, and thus its counties and municipalities, can raise the defense of sovereign immunity at any time, even for the first time on appeal, because "if sovereign immunity applies, the court is without subject matter jurisdiction to adjudicate the claim." *Afzall v. Commonwealth*, 273 Va. 226, 230, 639 S.E.2d 279, 281 (2007) (citing

Commonwealth v. Luzik, 259 Va. 198, 206-07, 524 S.E.2d 871, 876-77 (2000)). The rule that failure to preserve an alleged error by assignment of error or cross-error results in the finality of the judgment does not apply to the issue of sovereign immunity because "only the legislature acting in its policy-making capacity can abrogate the Commonwealth's sovereign immunity." *Luzik*, 259 Va. at 206, 524 S.E.2d at 876. A "'waiver of immunity cannot be implied from general statutory language' but must be 'explicitly and expressly announced' in the statute." *Afzall*, 273 Va. at 230, 639 S.E.2d at 281 (quoting *Hinchey v. Ogden*, 226 Va. 234, 241, 307 S.E.2d 891, 895 (1983)). In the absence of such a waiver by the legislature, the courts of this Commonwealth do not have the necessary jurisdiction "to entertain [an] action." *Afzall*, 273 Va. at 230, 639 S.E.2d at 281 (quoting *Luzik*, 259 Va. at 206, 524 S.E.2d at 877). The Commonwealth, its counties, or its municipalities cannot waive this subject matter jurisdiction and a court cannot acquire this subject matter jurisdiction by agreement or inaction of the parties. *Afzall*, 273 Va. at 230, 639 S.E.2d at 282.

Pursuant to the rules above, sovereign immunity is a subject matter jurisdiction issue. Therefore, at this appeal stage, Albemarle County may

reassert its sovereign immunity from liability for tortious personal injuries, including claims of gross negligence under Code § 15.2-1809.

2. Albemarle County remains absolutely immune from liability for tortious personal injuries, including any alleged gross negligence under Virginia Code § 15.2-1809.

The Court lacks subject matter jurisdiction to adjudicate this case because Albemarle County enjoys sovereign immunity from tort liability, including claims for the alleged gross negligence of its officers and agents under Code § 15.2-1809.

Counties are integral parts of the Commonwealth, created for civil administration, and "[i]n the absence of constitutional or statutory provisions imposing liability," they are entitled to the same immunity that the Commonwealth enjoys. *Mann v. County Bd. of Arlington County*, 199 Va. 169, 173-74, 98 S.E.2d 515, 518 (1957). While the Virginia Tort Claims Act has waived the Commonwealth's sovereign immunity in limited circumstances, the Virginia Tort Claims Act specifically preserves the sovereign immunity of counties. Va. Code Ann. § 8.01-195.3 (1950, as amended through 2009) ("nor shall any provision of this article be applicable to any county, city or town in the Commonwealth or be so construed as to remove or in any way diminish the sovereign immunity of any county, city or town in the Commonwealth"). This Court has long held

that counties "are not liable for tortious personal injuries resulting from negligence of its officers, servants, and employees." *Mann*, 199 Va. at 174, 98 S.E.2d at 518 (citing *Fry v. County of Albemarle*, 86 Va. 195, 9 S.E. 1004 (1890)). Thus, the only way in which a county can be liable for the negligence of its officers or employees is "through legislative action and not by judicial fiat." *Mann*, 199 Va. at 174, 98 S.E.2d at 519. This Court has found "no legislation allowing [a county] to be sued for tortious personal injuries." *Id.* Furthermore, circuit courts in the Commonwealth have held that "Code § 15.2-1809 does *not* waive the immunity counties enjoy for allegations of gross negligence or intentional conduct." *Altizer v. County of Tazewell*, 75 Va. Cir. 5, 6 (2008); *Krochmal v. Fairfax County*, 25 Va. Cir. 293, 294-95 (1991) (holding that the predecessor statute, Code § 15.1-291, does not waive or limit a county's immunity from all tortious personal injuries).

Albemarle County enjoys sovereign immunity from liability for personal injuries resulting from simple *and* gross negligence of its officers and agents in the maintenance or operation of a park, recreational facility, or playground. In her Amended Complaint, Mrs. Seabolt incorrectly assumes that Code § 15.2-1809 waives the sovereign immunity of counties for gross negligence. Although Code § 15.2-1809 subjects a *city or town* to

liability for gross negligence of its officers and agents in the maintenance or operation of a park, recreational facility, or playground, the plain language of the Code section shows that the General Assembly did not intend to impose the same liability for gross negligence on counties. First of all, the last sentence of the first paragraph only mentions cities and towns, thus excluding counties from liability for gross negligence: "[e]very such *city or town* shall . . . be liable in damages for the gross negligence of any of its officers or agents . . . ." Va. Code Ann. § 15.2-1809 (1950, as amended through 2009) (emphasis added). Furthermore, the final paragraph of the Code section expressly refrains from waiving or limiting counties' complete sovereign immunity from liability for tortious personal injuries, including those resulting from gross negligence: "[t]he immunity created by this section is hereby conferred upon counties in addition to, and *not limiting on*, other immunity [of counties] existing at common law or by statute." *Id*. As this Court has stated, "Years ago Virginia committed itself to the principle that counties were not liable for tortious personal injuries resulting from negligence of its officers, servants and employees." *Mann*, 199 Va. at 174, 98 S.E.2d at 518 (citing *Fry*, 86 Va. 195, 9 S.E. 1004 (1890)). Since a county is not liable for negligent personal injuries unless legislative action expressly imposes that liability, and Code § 15.2-1809 expressly states that

it does *not* limit the sovereign immunity that counties enjoyed at common law or by statute, a county, unlike a municipality, remains immune from all negligence committed by its officers and agents in the maintenance or operation of a park, recreational facility, or playground. Thus, according to the plain language of the statute, Albemarle County enjoys sovereign immunity from liability for personal injuries resulting from simple *and* gross negligence under Code § 15.2-1809.

When discussing the legislative intent of Code § 15.2-1809, this Court has noted that "[t]he legislative title was, An ACT to amend the Code of Virginia by adding thereto a new section numbered 3032-a, limiting the civil liability on the part of *cities and towns* in the maintenance or operation of recreational facilities to cases of gross or wanton negligence." *Frazier v. City of Norfolk*, 234 Va. 388, 391, 362 S.E.2d 688, 690 (1987) (quoting Acts 1940, ch. 153) (emphasis added). Further, this Court concluded that according to the "plain terms" of the statute, "the General Assembly intended to limit the civil liability of *municipalities* in the maintenance and operation of *any* recreational facilities to cases of gross or wanton negligence." *Id.* (first emphasis added). Thus, this Court has recognized that the General Assembly only intended to subject municipalities to liability for gross negligence under Code § 15.2-1809, not counties.

The Code's distinction between the sovereign immunity of counties and that of municipalities is consistent with this Court's precedent, which has long held that counties enjoy greater sovereign immunity than municipalities. For instance, in *Nelson County v. Loving*, this Court stated:

> [I]t has been for a long while firmly settled in this State that the counties of the Commonwealth stand upon a different footing [than municipalities] with respect to liability for damages, and that, although it has been for some time settled that municipal corporations are liable in suits for damages, counties are not so liable [for damages for personal injuries] if the cause of action arises from a tort.

126 Va. 283, 293, 101 S.E. 406, 409 (1919). While municipalities are only immune from tort liability for negligence committed during the exercise of governmental functions, rather than proprietary functions, this governmental-proprietary distinction has no application to counties, which are political subdivisions of the state. *Fry*, 86 Va. at 199, 9 S.E. at 1005. A county even retains its complete sovereign immunity from liability for tortious personal injuries when the county has "taken on characteristics of a city and exercises many powers and performs services rendered by municipal corporations." *Mann*, 199 Va. at 175, 98 S.E.2d at 519.

Furthermore, although this Court has not encountered a suit attempting to sue a county for gross negligence under Code § 15.2-1809, the circuit court cases of *Altizer* and *Krochmal* are directly on point. In

Altizer, the plaintiff sued Tazewell County and a Tazewell County Park Ranger, alleging ordinary and gross negligence for failing to secure the front gate of a county park so that it would not swing into the path of vehicles entering or exiting the park. 75 Va. Cir. at 5. The court held that Tazewell County was immune from liability for ordinary and gross negligence because "Code § 15.2-1809 does not waive the immunity counties enjoy for allegations of gross negligence or intentional conduct. This immunity is extended to protect counties from the negligence of its employees and officers." *Id.* at 5-6 (citing *Mann*, 199 Va. at 174, 98 S.E.2d at 518).

Similarly, in *Krochmal*, the court granted Fairfax County's special plea of sovereign immunity when a plaintiff sued Fairfax County after falling at a public school building. 25 Va. Cir. at 294. The court distinguished between the sovereign immunity of counties and municipalities, and explained that since the "common law provides that counties enjoy sovereign immunity from tort claims in all their activities[,] [c]ounties cannot be sued in tort unless such a suit is expressly permitted by statute." *Id*. (citing *Fry*, 86 Va. 195, 9 S.E. 1004 (1890)). Furthermore, the court held that Code § 15.1-291, which is a predecessor statute to Code § 15.2-1809, does not subject a county to tort liability; rather, it "only increases *without limiting*

counties' existing immunity." 25 Va. Cir. at 294 (emphasis added). Thus, Fairfax County was immune from the tort suit because "existing case law provides complete tort immunity for Virginia counties, Code § 15.1-291 does not limit this immunity, and tort actions against counties are not explicitly authorized by statute." *Id*. at 295.

In the case at bar, Albemarle County enjoys complete sovereign immunity from tortious personal injuries resulting from the alleged simple *and* gross negligence of its officers and agents in the maintenance and operation of the Scottsville Community Center. As expressly stated in the plain language of Code § 15.2-1809, which is consistent with this Court's precedent, and as expressly held in *Altizer* and *Krochmal*, Code § 15.2-1809 does not limit or waive Albemarle County's complete sovereign immunity from liability for tortious personal injuries. Therefore, because Albemarle County is immune from this suit, the Court lacks subject matter jurisdiction to adjudicate this case and Albemarle County respectfully requests that the Court dismiss this action.

B. The Trial Court Also Lacked Subject Matter Jurisdiction Because Mrs. Seabolt Failed to Allege Compliance with the Mandatory Presentment and Appeal Procedures Set Forth in Code §§ 15.2-1243 *et seq.*

In addition, the Trial Court lacked subject matter jurisdiction to adjudicate this case because Mrs. Seabolt never alleged that she complied

with the required presentment and appeal procedures prescribed by Code §§ 15.2-1243 *et seq.* for bringing a claim against Albemarle County.

Since a county is "a political subdivision" of the Commonwealth, it may be sued "only in the mode prescribed in the law granting the right to sue." *Botetourt County v. Burger*, 86 Va. 530, 533, 10 S.E. 264, 265 (1889). This Court has held that the "requirements of former Code §§ 15.1-550 *et seq.*, now Code §§ 15.2-1243 *et seq*., 'provide the *exclusive* procedure for litigating claims against a county' and the '[f]ailure to allege compliance with these statutes is fatal to an action against a county.'" *Viking Enter., Inc. v. County of Chesterfield*, 277 Va. 104, 110-11, 670 S.E.2d 741, 744 (2009) (quoting *New Kent County v. Worley Aviation, Inc.*, 255 Va. 186, 193, 496 S.E.2d 70, 74 (1998)) (emphasis added). The Code specifies that "[n]o action shall be maintained by any person against a county upon any claim or demand until such person has presented his claim to the governing body of the county . . . ." Va. Code Ann. § 15.2-1248 (1950, as amended through 2009). If the claim is disallowed, "[t]he determination of the governing body . . . shall be a bar to any action in any court founded on such claim, unless (i) the decision of the governing body disallowing the claim is appealed; (ii) the governing body consents to the institution of an action by the claimant against the county; or (iii) the

governing body refuses or neglects to act upon any claim duly presented to it." Va. Code Ann. § 15.2-1247 (1950, as amended through 2009).

The claimant may appeal the disallowance of a claim to the circuit court of a county *only by* complying with the "mode prescribed" by Code § 15.2-1246, which includes written notice and bond requirements. *Viking*, 277 Va. at 111, 670 S.E.2d at 744 (quoting *Burger*, 86 Va. at 533, 10 S.E. at 265). Under Code § 15.2-1246, if the claimant is present at the board meeting when his or her claim against a county is disallowed, he or she may appeal within 30 days (and not more than six months) from the date of the decision. Va. Code Ann. § 15.2-1246 (1950, as amended through 2009). If the claimant is not present at the board meeting, he or she may appeal within 30 days after the service of notice of the decision and not more than six months from the date of the decision. *Id.* To perfect the appeal, Code § 15.2-1246 specifies that the claimant must "serv[e] written notice on the clerk of the governing body and execut[e] a bond to the county, with sufficient surety to be approved by the clerk of the governing body . . .." *Id*. This Court has held that the "failure to substantially comply with the statutory requirement for executing a bond with sufficient surety [under Code § 15.2-1246] 'constitutes a *jurisdictional defect*' that prevents a circuit court from acquiring jurisdiction of an appeal from a county's

disallowance of a monetary claim." *Viking,* 277 Va. at 111, 670 S.E.2d at 744 (quoting *Parker v. Prince William County*, 198 Va. 231, 235, 93 S.E.2d 136, 139 (1956)) (emphasis added).

In *Viking*, this Court affirmed the circuit court's dismissal of the plaintiff's complaint because the plaintiff failed to comply with procedures mandated by Code § 15.2-1246 for appealing the disallowance of a claim against the county. 277 Va. at 107, 670 S.E.2d at 742. After the county board of supervisors had disallowed the plaintiff's claim against the county, the plaintiff filed a complaint in the county circuit court, but failed to (1) serve written notice of its appeal on the clerk of the county's governing body and (2) execute a bond with sufficient surety pursuant to Code § 15.2-1246. *Id.* at 107-08, 670 S.E.2d at 742. This Court held that since the "notice and bond requirements set forth in Code § 15.2-1246 are the 'mode prescribed' for pursuing an appeal from a county's disallowance of a monetary claim," the plaintiff's failure to comply with those requirements resulted in the circuit court never acquiring jurisdiction of the claimant's appeal. *Id.* at 111-12, 670 S.E.2d at 744-45 (quoting *Burger*, 86 Va. at 533, 10 S.E. at 265).

Likewise, in *Parker*, this Court affirmed the circuit court's dismissal of the plaintiff's nuisance and takings claims against the county because the

circuit court never acquired jurisdiction due to the plaintiff's failure to tender a proper appeal bond pursuant to Code § 15-259, the predecessor statute to Code § 15.2-1246. 198 Va. at 235, 93 S.E.2d at 139. After the plaintiff properly presented her claims to the county board of supervisors, which disallowed the claim, the plaintiff complied with one part of the mandated appeal procedure by serving written notice of appeal on the clerk of the county board of supervisors. *Id*. at 233-34, 93 S.E.2d at 137-38. Although the plaintiff also filed a check for $50 with the clerk of court as a guarantee of court costs, the court found that this check did not qualify as a bond to the county "with sufficient surety to be approved by the clerk," as required by Code § 15-259. *Id.* at 235, 93 S.E.2d at 138-39. The plaintiff's failure to substantially comply with the bond requirement was "not . . . a mere technical defect," but rather a "jurisdictional defect" that was fatal to her claim and could not be corrected after the six-month limit had expired. *Id*. at 235, 93 S.E.2d at 139. Thus, the Court held that the trial court "did not acquire jurisdiction of [Mrs.] Parker's appeal from the Board's decision." *Id*.

The *Viking* and *Parker* cases directly govern the case at bar because Mrs. Seabolt failed to allege compliance with the mandatory presentment and appeal procedures prescribed by Code § 15.2-1243 *et seq.*, and thus the Trial Court never obtained subject matter jurisdiction over Mrs.

Seabolt's claim against Albemarle County. Although Mrs. Seabolt argued to the Trial Court that she presented her claim to the Albemarle County Board of Supervisors ("Board of Supervisors") and that on December 3, 2009, the Board of Supervisors sent Mrs. Seabolt written notice of its disallowance of her claim (App. 36-40), Mrs. Seabolt never alleges these facts in her Amended Complaint. App. 1-6. Furthermore, even if her Amended Complaint had alleged that she presented her claim to the Board of Supervisors, Code §§ 15.2-1246 and -1247 specify that to appeal the disallowance of a claim, Mrs. Seabolt had 30 days (or a maximum of six months) to (1) serve written notice of her appeal on the clerk of the Board of Supervisors and (2) execute a bond to Albemarle County, "with sufficient surety to be approved by the clerk of the governing body." Va. Code Ann. § 15.2-1246. Like the plaintiff in *Viking*, however, Mrs. Seabolt has never claimed that she served written notice on the clerk of the Board of Supervisors or executed a bond with sufficient surety within 30 days or six months, as required under Code § 15.2-1246. Therefore, as this Court held in *Viking* and *Parker*, Mrs. Seabolt's failure to allege compliance with the notice and bond requirements of Code § 15.2-1246 constitute a jurisdictional defect such that the Trial Court never acquired jurisdiction over this case.

For the foregoing reasons, Albemarle County respectfully requests that the Court dismiss this action for lack of subject matter jurisdiction because Albemarle County enjoys sovereign immunity from tort liability, including gross negligence under Code § 15.2-1809, and because Mrs. Seabolt failed to allege compliance with the presentment and appeal procedures prescribed by Code §§ 15.2-1243 *et seq.* for bringing a claim against Albemarle County.

II. THE TRIAL COURT WAS CORRECT IN SUSTAINING ALBEMARLE COUNTY'S DEMURRER BECAUSE THE AMENDED COMPLAINT FAILED TO PLEAD GROSS NEGLIGENCE.

The Trial Court did not err in sustaining Albemarle County's Demurrer because reasonable minds could not differ that Mrs. Seabolt failed to plead facts that rise to the level of gross negligence. Therefore, because Albemarle County is immune from liability for ordinary negligence of its officers and agents under Code § 15.2-1809, Albemarle County respectfully requests that the Court affirm the Trial Court's judgment.

The standard of review of a circuit court's judgment in sustaining a demurrer is de novo "[b]ecause appellate review of the sustaining of a demurrer involves a matter of law." *Glazebrook v. Bd. of Supervisors of Spotsylvania County*, 266 Va. 550, 554, 587 S.E.2d 589, 591 (2003). In reviewing the judgment, this Court addresses "the same issue that the trial

court addressed, namely whether the amended motion for judgment alleged sufficient facts to constitute a foundation in law for the judgment sought, and not merely conclusions of law." *Hubbard v. Dresser*, 271 Va. 117, 122, 624 S.E.2d 1, 4 (2006) (citing *Moore v. Jefferson Hosp., Inc*., 208 Va. 438, 440, 158 S.E.2d 124, 126 (1967)). "A demurrer tests the legal sufficiency of a pleading and can be sustained if the pleading, considered in the light most favorable to the plaintiff, fails to state a valid cause of action." *Welding, Inc. v. Bland County Serv. Auth.*, 261 Va. 218, 226, 541 S.E.2d 909, 914 (2001) (citation omitted). "It is well settled that while a demurrer admits as true all averments of material facts which are sufficiently pleaded, it does not admit the correctness of the conclusions of law stated by the pleader. Nor does a demurrer admit inferences or conclusions from facts not stated." *Arlington Yellow Cab Co. v. Transp., Inc.*, 207 Va. 313, 318-19, 149 S.E.2d 877, 881 (1966) (internal quotation marks and citations omitted).

If the Court determines that a county is liable for gross negligence under Code § 15.2-1809, a county remains immune from liability for acts or omissions that a plaintiff pleads as mere simple or ordinary negligence. *See Frazier v. City of Norfolk*, 234 Va. 388, 362 S.E.2d 688 (1987). This Court has defined gross negligence as "that degree of negligence which

shows an utter disregard of prudence amounting to complete neglect of the safety of another." *Id.* at 393, 362 S.E.2d at 691. "It is a heedless and palpable violation of legal duty respecting the rights of others . . . [that] amounts to the absence of slight diligence, or the want of even scant care." *Id*. (internal quotation marks and citation omitted). "Deliberate conduct is important evidence on the question of gross negligence." *Chapman v. City of Virginia Beach*, 252 Va. 186, 190, 475 S.E.2d 798, 801 (1996) (internal quotation marks and citation omitted). While failure to heed *actual* notice of a hazardous condition evidences deliberate conduct, this Court has held that constructive knowledge, standing alone, or speculative actual knowledge can be insufficient to present a jury issue on gross negligence. *City of Lynchburg v. Brown*, 270 Va. 166, 171, 613 S.E.2d 407, 410 (2005). Although the issue of whether a plaintiff has sufficiently established gross negligence is ordinarily a matter of fact to be decided by a jury, the court has a "duty" to rule as a matter of law "when reasonable minds could not differ upon the conclusion that such negligence has not been established." *Frazier*, 234 Va. at 393, 362 S.E.2d at 691 (citation omitted). Accordingly, circuit courts in the Commonwealth have sustained demurrers for a plaintiff's failure to plead gross negligence when "reasonable minds cannot differ on the conclusion to be reached from the facts, as pled in the

[c]omplaint." *Altizer*, 75 Va. Cir. at 6-7 (stating that gross negligence "becomes a question of law when the Court must determine if the facts, as pled, are sufficient to determine whether the protection of sovereign immunity may be set aside"). *See also Scott v. City of Salem*, 80 Va. Cir. 210 (2010) (sustaining the City of Salem's demurrer because the plaintiff pleaded ordinary negligence rather than gross negligence); *Miller v. P.G. Harris Constr. Co.*, 79 Va. Cir. 631 (2009) (sustaining the defendant's demurrer because the plaintiff failed to plead gross negligence).

In *Frazier*, the plaintiff, a 13-year old boy, failed to establish a prima facie case of gross negligence against the City of Norfolk after he fell through a gap between the lowered orchestra pit and the stage at Chrysler Hall in Norfolk. 234 Va. at 392-93, 362 S.E.2d at 690-91. The plaintiff was playing drums with a church choir when he dropped a drum stick, reached behind him, and lost his balance, falling 18 feet through the gap that existed because the orchestra pit was lowered from the stage. *Id*. at 392, 362 S.E.2d at 690-91. Although the City of Norfolk possessed protective barriers "specifically designed to provide protection against falls through the gap," it had not installed them, which violated its own building code. *Id*. at 392-93, 362 S.E.2d at 691. Furthermore, a six-year old child had fallen from the pit into the basement two years prior to this incident. *Id*. at 393,

362 S.E.2d at 691. Nevertheless, the Court found that the City of Norfolk's "failure to install protective devices or to post warnings for children at a platform edge which was open and obvious amounts, *at the most*, to ordinary negligence and a failure to exercise reasonable care." *Id*. (emphasis added). Since "[s]uch acts of omission do not rise to that degree of egregious conduct which can be classified as a heedless, palpable violation of rights showing an utter disregard of prudence," this Court held that the trial court was correct in sustaining the City of Norfolk's motion to strike the evidence. *Id*.

In *Chapman*, on the other hand, this Court reversed a trial court's judgment that set aside a verdict for the plaintiff in a wrongful death case. 252 Va. at 190-91, 475 S.E.2d at 800-01. The plaintiff, an eight-year old child, died on the boardwalk at Virginia Beach when her head became entrapped between metal bars of a swinging gate that provided access to the beach. *Id*. at 188, 475 S.E.2d at 799. The evidence showed that one section of the gate had been broken and lay in the sand for at least two months before the incident, allowing the standing section to swing freely rather than remain latched and fastened. *Id*. at 188, 475 S.E.2d at 799-800. Furthermore, on at least three separate occasions during the three months prior to the incident, the City of Virginia Beach supervisor who

was in charge of maintaining the gate received notice, including a written report, from an employee that the gate was broken. *Id*. at 190-91, 475 S.E.2d at 801. Despite the repeated notices, the supervisor made a "deliberate decision not to order" that the gate be repaired or secured because boardwalk maintenance work usually occurred in the spring, which was months away. *Id*. at 191, 475 S.E.2d at 801. The City of Virginia Beach's failure to take action after repeated notices by its own employee showed deliberate conduct, which is important evidence to the question of gross negligence. *Id*. The Court found that reasonable persons could differ on whether the cumulative effect of these circumstances constituted gross negligence and thus, the case properly went to the jury. *Id*.

In *Brown*, this Court held that even when viewing the facts in the light most favorable to the plaintiff on appeal, the trial court erred in refusing to rule as a matter of law that the plaintiff failed to establish that the City of Lynchburg was grossly negligent. 270 Va. at 168, 171, 613 S.E.2d at 408, 410. The plaintiff was injured when she slipped on and fell from a damaged bleacher at an athletic park maintained and operated by the City of Lynchburg. *Id*. at 167, 613 S.E.2d at 408. Evidence showed that the damaged bleacher was open and obvious, that it could have been repaired, and that City of Lynchburg employees regularly worked at the park,

including four employees who worked a combined 20 hours on the day of the accident. *Id*. at 168-69, 613 S.E.2d at 409. Despite this evidence, the Court relied on *Frazier* and distinguished *Chapman*, finding that the City of Lynchburg's employees' failure to observe the open and obvious damaged bleacher was merely ordinary negligence. *Id*. at 171, 613 S.E.2d at 410. Since constructive notice of the damaged bleacher was insufficient to present a jury issue, and reasonable persons could only speculate that the City of Lynchburg had actual notice of the damaged bleacher, the Court found "no evidence of deliberate conduct . . . or total disregard of precautions" by City of Lynchburg employees. *Id*. Therefore, the Court held that, as a matter of law, a reasonable jury could not find gross negligence on the part of the City of Lynchburg. *Id*.

In the case at bar, the Trial Court was correct in holding that the Amended Complaint fails to plead facts sufficient to constitute gross negligence. First, as the Trial Court found, the Amended Complaint fails to allege facts that show Albemarle County had actual notice of the difficult-to-detect nails or any prior fall or injury due to those nails. App. 53-56. Since the Amended Complaint never alleges that Albemarle County was actually informed of the difficult-to-detect nails or any prior falls, this case is distinguishable from *Chapman*, in which the City of Virginia Beach received

three separate notices, including a written report, from an employee regarding the broken gate. Furthermore, although the Amended Complaint alleges that an Albemarle County employee regularly visited the location of the ramp each week, these visits at most resulted in constructive notice, which is insufficient to constitute gross negligence in this case. In *Brown*, this Court found that even though City of Lynchburg employees regularly cleaned and maintained the park where the damaged bleacher was located, including four employees who performed 20 hours of work on the day of the accident, the City of Lynchburg had, at most, constructive notice or speculative actual notice of the hazard, and thus did not engage in deliberate conduct. In the case at bar, reasonable minds can only speculate whether Albemarle County had constructive notice because, as highlighted by the Trial Court, the Amended Complaint emphasizes that the nails were difficult to detect, unlike the open and obvious dangers in *Frazier* (a gap opening to an 18-foot drop), *Brown* (a broken bleacher), and *Chapman* (a broken, swinging gate on the Virginia Beach boardwalk). App. 53-56. Under the facts of this case, when considered in light of *Brown*, since Albemarle County did not have actual notice of the difficult-to-detect nails or any prior falls, Mrs. Seabolt failed to allege facts that show that

Albemarle County engaged in deliberate conduct or total disregard of precautions that rose to the level of gross negligence.

Second, as the Trial Court found, under *Frazier* and *Brown*, Albemarle County's alleged failure to fix or warn of the difficult-to-detect nails and to install a handrail on the ramp is, at most, ordinary negligence, for which Albemarle County is immune from liability. If the *Brown* Court held that the City of Lynchburg employees' failure to observe and fix the open and obvious damaged bleacher was merely ordinary negligence, even after employees spent a combined 20 hours at the park on the day of the accident, then the Albemarle County employees' alleged failure to fix the difficult-to-detect nails is also at most ordinary negligence. Although the *Brown* case was at a further procedural stage, this Court viewed those facts in a light most favorable to the plaintiff, who had prevailed at trial, and still held, as a matter of law, that no reasonable person could find gross negligence. In addition, even if somebody had fallen on the nails prior to Mrs. Seabolt's accident and Albemarle County knew of the previous fall, Albemarle County did not engage in conduct more egregious than the City of Norfolk in *Frazier*, which did not install barriers or post warning signs after it knew that a six-year-old child had fallen through the same gap years before the plaintiff's 18-foot fall *and* it possessed barriers specifically

designed to prevent the plaintiff's fall. Accordingly, under this Court's precedent, Albemarle County's alleged acts of omission do not rise to that degree of egregious conduct which can be classified as a heedless, palpable violation of rights showing an utter disregard of prudence.

Finally, while Mrs. Seabolt argues that the Trial Court changed the traditional fact-driven analysis and established a *per se* rule that a plaintiff must plead that the hazard was open and obvious (Appellant's Br. 20-25), the Trial Court's discussion of open and obvious dangers related solely to the notice issue, which, under this Court's precedent, is an important factor in determining whether Albemarle County engaged in deliberate conduct. App. 52-56. The Trial Court determined that since Mrs. Seabolt emphasized that the nails were so difficult to detect, Albemarle County's employees did not acquire the requisite notice of the hazardous condition; thus, their failure to correct the condition did not constitute gross negligence. App. 53-56. The Trial Court never states that *Brown* established a *per se* rule that a plaintiff must plead the danger is open and obvious, nor did the Trial Court abandon the fact-driven inquiry of *Brown*, *Frazier*, and *Chapman*. App. 53-56. Rather, applying this Court's precedent, the Trial Court found that the alleged facts of this case, even when viewed in a light most favorable to Mrs. Seabolt, did not rise to the

level of gross negligence because (1) Albemarle County lacked actual or even constructive notice of a condition that was not open and obvious and (2) the County's failure to warn or install a guardrail was ordinary negligence, at most. App. 53-56. If reasonable minds cannot differ that the facts as pled in the Amended Complaint do not constitute gross negligence, then the court has a duty to rule as a matter of law.

Therefore, Albemarle County respectfully requests that the Court affirm the Trial Court's judgment sustaining Albemarle County's Demurrer.

III. IF THE TRIAL COURT ERRED REGARDING THE GROSS NEGLIGENCE ISSUE, THE COURT SHOULD DISMISS THE ACTION UNDER THE "RIGHT RESULT FOR THE WRONG REASON" DOCTRINE.

If this Court finds that the Trial Court erred in sustaining Albemarle County's Demurrer for failure to plead gross negligence, Albemarle County respectfully requests that the Court dismiss the case under the "right result for the wrong reason" doctrine on the grounds of (1) Mrs. Seabolt's failure to allege compliance with the presentment and appeal procedures set forth in Code §§ 15.2-1243 *et seq*. and (2) Albemarle County's sovereign immunity.

A. The Right Result for the Wrong Reason Doctrine Applies in This Case.

This Court recently upheld and explained the "right result for the wrong reason" doctrine in *Perry v. Commonwealth*, 280 Va. 572, 701 S.E.2d 431 (2010), and *Banks v. Commonwealth*, 280 Va. 612, 701 S.E.2d 437 (2010). Under this doctrine, "'it is the settled rule that how[ever] erroneous . . . may be the reasons of the court for its judgment upon the face of the judgment itself, if the judgment be right, it will not be disturbed on account of the reasons.'" *Perry*, 280 Va. at 579, 701 S.E.2d at 435 (quoting *Schultz v. Schultz*, 51 Va. (10 Gratt.) 358, 384 (1853)). Thus, a party can raise an argument for the first time on appeal, even without assigning cross-error, as long as the record supports the alternative argument and does not require the development of additional facts. *Perry*, 280 Va. at 579, 701 S.E.2d at 435 (citing *Whitehead v. Commonwealth*, 278 Va. 105, 115, 677 S.E.2d 265, 270 (2009)). *See also Chesterfield County v. Stigall*, 262 Va. 697, 554 S.E.2d 49 (2001) (applying the doctrine to affirm the trial court's judgment for an alternative reason because the trial court misconstrued the applicable statute).

The standard of review under the right result for the wrong reason doctrine is "whether the record demonstrates that all evidence necessary to the alternative ground for affirmance was before the circuit court and, if the

evidence was conflicting, how it resolved the dispute, or weighed or credited contradicting testimony." *Banks*, 280 Va. at 618, 701 S.E.2d at 440. The rule does not apply to cases "where, because the trial court has rejected the right reason or confined its decision to a specific ground, further factual resolution is needed before the right reason may be assigned to support the trial court's decision." *Perry*, 280 Va. at 579, 701 S.E.2d at 435-36 (quoting *Whitehead*, 278 Va. at 115, 677 S.E.2d at 270). This Court has clarified that an appellee does *not* have to actually present or argue the right reason before the trial court; rather, the focus is on "[c]onsideration of the facts in the record and whether additional factual presentation is necessary to resolve the newly-advanced reason." *Perry*, 280 Va. at 580, 701 S.E.2d at 436 (limiting, in part, the holding of *Whitehead*, 278 Va. at 114, 677 S.E.2d at 270).

In *Perry*, for example, this Court affirmed the Court of Appeals of Virginia's application of the right result for the wrong reason doctrine to affirm the trial court's conviction of the defendant for drug possession. 280 Va. at 582, 701 S.E.2d at 437. The trial court had denied the defendant's motion to suppress, holding that the officer had reasonable articulable suspicion to conduct a *Terry* frisk of the defendant. *Id*. at 577, 701 S.E.2d at 434. The Court of Appeals of Virginia assumed, without deciding, that

the trial court had erred when it found that the officer had reasonable articulable suspicion to conduct a *Terry* stop; yet, under the right result for the wrong reason doctrine, it affirmed the conviction and the trial court's denial of the motion to suppress on the alternative ground that the officer had probable cause to search the defendant for drugs. *Id*. This Court agreed, noting that the "'appellee may, without taking a cross-appeal, urge in support of a decree *any matter appearing in the record*, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it.'" *Id*. at 581, 701 S.E.2d at 437 (quoting *United States v. American Ry. Express Co.*, 265 U.S. 425, 435, 44 S. Ct. 560 (1924)) (emphasis added). Thus, the Court upheld the application of the right result for the wrong reason doctrine because the record supported the alternative ground of probable cause, even though the Commonwealth had not presented that alternative argument prior to the appeal. *Id*. at 581-82, 701 S.E.2d at 436-37.

In *Stigall*, this Court applied the right result for the wrong reason doctrine to affirm the trial court's grant of summary judgment to the plaintiff for an erroneous property tax assessment by the county. 262 Va. at 705-06, 554 S.E.2d at 54-55. The plaintiff's parcel originally qualified for reduced assessment and taxation because it was devoted to forest use. *Id*.

at 700, 554 S.E.2d at 51. The county had used its eminent domain power to acquire a portion of the plaintiff's parcel for a parkway, which essentially separated the parcel into two sections, and the plaintiff later conveyed each section of the parcel to different owners. *Id*. at 700-01, 554 S.E.2d at 51. After the conveyances, Chesterfield County assessed roll-back taxes against the entire parcel pursuant to Code § 58.1-3241(A) because the parcel was now separated or split-off. *Id.* The trial court ruled that while the county's construction of the parkway "separated or split off" the parcel under Code § 58.1-3241(A), the split did not result from the owner's action and thus the roll-back tax assessment was not triggered. *Id.* at 702, 554 S.E.2d at 52. This Court held that the "trial court erred in ruling that the eminent domain taking . . . caused a 'separation or split-off' of that property as contemplated by Code § 58.1-3241(A)"; however, the "proper construction of Code § 58.1-3241(A) nonetheless supports the result reached by the trial court under the facts of this case." *Id.* at 705-06, 554 S.E.2d at 54. Thus, even though the trial court misconstrued the statute, this Court affirmed the trial court's judgment under the right result for the wrong reason doctrine.

In contrast, this Court declined to apply the right result for the wrong reason doctrine in *Whitehead* because new factual determinations were

required to support the alternative ground for convicting the defendant of receipt of stolen property. 278 Va. at 115, 677 S.E.2d at 270. The Commonwealth had relied on one theory at trial, but on appeal, asserted alternative theories that required different presentation of facts to prove the offense. *Id.* While the Court upheld the doctrine itself, the record did not support the alternative grounds and thus the doctrine did not apply.[1] *Id.*

In the case at bar, Albemarle County presented both of its additional arguments to the Trial Court: (1) a Demurrer for failure to allege compliance with the presentment and appeal procedure prescribed by Code §§ 15.2-1243 *et seq*. and (2) a Special Plea of Sovereign Immunity. Even though the Trial Court declined to rule on either of these two defenses, this Court may apply the right result for the wrong reason doctrine to dismiss this case for both of these "right" reasons. In contrast to *Whitehead*, both of these right reasons are sufficiently present in the record because Albemarle County presented both of the grounds to the Trial Court through

[1] Although the *Whitehead* court also held that the doctrine does not apply if the party seeking affirmance did not present the argument in the trial court, the *Perry* Court expressly rejected this holding as "too broad and . . . inconsistent with case law." *Perry*, 280 Va. at 580, 701 S.E.2d at 436. The *Perry* Court clarified that "[f]ailure to make the argument before the trial court is not the proper focus" of the doctrine; rather, the proper focus is "whether additional factual presentation is necessary to resolve the newly-advanced reason." *Id*.

properly-filed defensive pleadings and oral argument. App. 7-12, 23-42. Therefore, because this Court can assign the right reasons to support the Trial Court's correct judgment without having to resolve further factual determinations, the right result for the wrong reason doctrine applies.

B. Under the Right Result for the Wrong Reason Doctrine, the Court Should Sustain Albemarle County's Demurrer Because Mrs. Seabolt Failed to Plead Compliance with the Presentment and Appeal Procedures of Code §§ 15.2-1243 *et seq*.

If the Court finds that Mrs. Seabolt sufficiently pled gross negligence, the case should still be dismissed on demurrer under the right result for the wrong reason doctrine because Mrs. Seabolt failed to allege compliance with the presentment and appeal procedures prescribed by Code §§ 15.2-1243 *et seq*.

As discussed above (Section I.B.), the requirements of Code §§ 15.2-1243 *et seq*. "'provide the exclusive procedure for litigating claims against a county' and the '[f]ailure to allege compliance with these statutes is fatal to an action against a county.'" *Viking*, 277 Va. at 111, 670 S.E.2d at 744 (quoting *New Kent County*, 255 Va. at 193, 496 S.E.2d at 74). Furthermore, this Court has held that "where a claim, whether legal or equitable in nature, is asserted against a county, failure to allege compliance with [Code §15.2-1248] requires dismissal *upon demurrer*."

County of Chesterfield v. Town & Country Apts. & Townhouses, 214 Va. 587, 590-91, 203 S.E.2d 117, 120 (1974) (emphasis added). *See also Mansoor v. County of Albemarle*, 124 F. Supp. 2d 367, 382, 2000 U.S. Dist. LEXIS 18612 (W.D. Va. 2000) (granting the county's motion to dismiss because the plaintiff failed to allege compliance with Code §§ 15.2-1243 *et seq.*).

In the case at bar, even though the Trial Court sustained Albemarle County's Demurrer on the gross negligence issue, this Court may also dismiss the Amended Complaint on demurrer on the ground that Mrs. Seabolt failed to allege compliance with Code §§ 15.2-1243 *et seq*. The record below supports this ground because all necessary evidence was before the Trial Court. As set forth in Albemarle County's Demurrer (App. 9-12) and in oral argument (App. 29-32, 36-42), the Amended Complaint never alleges that (1) Mrs. Seabolt presented her claim to the Board of Supervisors under Code § 15.2-1248 or (2) complied with the appeal procedures under Code § 15.2-1246, which require Mrs. Seabolt to have served written notice on the clerk of the Board of Supervisors and executed a bond with sufficient surety within 30 days or six months. Mrs. Seabolt merely filed a complaint in the Trial Court and nothing more.

Therefore, since Mrs. Seabolt has not alleged compliance with the mandatory presentment and appeal procedures prescribed by Code §§ 15.2-1243 *et seq*., Albemarle County respectfully requests that the Court dismiss the Amended Complaint upon demurrer under the right result for the wrong reason doctrine.

C. Under the Right Result for the Wrong Reason Doctrine, the Court Should Also Dismiss the Action Based on Albemarle County's Sovereign Immunity.

If the Court finds that the Trial Court erred by granting Albemarle County's demurrer on the ground of gross negligence, the Court may apply the right result for the wrong reason doctrine to dismiss this case on the ground that Albemarle County enjoys sovereign immunity from liability for tortious personal injuries.

As argued above (Section I.A.2), a county enjoys sovereign immunity from liability for tortious personal injuries, including those resulting from gross negligence of its employees and agents under Code § 15.2-1809. Although a demurrer is a different type of defensive pleading than a special plea of sovereign immunity, they both achieve a similar result: dismissal of the case. The rationale behind the right result for the wrong reason doctrine is to affirm a judgment that is correct even if the reason is wrong. Under the doctrine, a prevailing party may urge an appellate court to affirm

a judgment on *any ground appearing in the record*. *See Perry*, 280 Va. at 579-82, 701 S.E.2d at 435-37; *Banks*, 280 Va. at 617-18, 701 S.E.2d at 440-441. Therefore, since no additional facts are necessary to resolve the defense of sovereign immunity, and sovereign immunity achieves a similar result as the demurrer, the right result for the wrong reason doctrine allows the Court to dismiss the case on this ground.

For the foregoing reasons, Albemarle County respectfully requests that the Court dismiss the case under the right result for the wrong reason doctrine on the grounds of (1) failure to allege compliance with the mandatory presentment and appeal procedures of Code §§ 15.2-1243 *et seq*. and (2) Albemarle County's sovereign immunity from liability for tortious personal injuries.

CONCLUSION

The Court may dismiss this case on the three main grounds set forth above. First, the Court lacks subject matter jurisdiction to adjudicate the case because Albemarle County remains absolutely immune from liability for tortious personal injuries, including claims arising from gross negligence under § 15.2-1809, and because Mrs. Seabolt failed to allege compliance with the mandatory presentment and appeal procedures prescribed by Code §§ 15.2-1243 *et seq*. for bringing a claim against Albemarle County.

Second, the Trial Court did not err in sustaining Albemarle County's demurrer for failure to plead gross negligence because the allegations fail to show that Albemarle County had actual notice of the difficult-to-detect nails or of any prior falls caused by the nails, and the County's failure to warn of the nails or install a guardrail was ordinary negligence, at most. Finally, if the Trial Court erred in sustaining Albemarle County's demurrer for failure to plead gross negligence, the right result for the wrong reason doctrine allows the Court to dismiss the case on the grounds of Mrs. Seabolt's failure to plead compliance with Code §§ 15.2-1243 *et seq*. and Albemarle County's sovereign immunity.

Respectfully Submitted,

John W. Zunka (VSB No. 14368)
Zunka, Milnor & Carter, Ltd.
414 Park Street
Charlottesville, Virginia 22902
(434) 977-0191 (Telephone)
(434) 977-0198 (Facsimile)
jzunka@zmcilaw.com

Counsel for Appellee

CERTIFICATE

In accordance with Rule 5:26(h), I hereby certify that fifteen (15) bound copies and one (1) electronic copy on CD of this Brief of Appellee have been hand-filed with the Clerk of the Supreme Court of Virginia and three (3) bound copies and one (1) electronic copy on CD of the same have been served, via U.S. Mail, postage prepaid, upon:

James B. Feinman (VSB No. 28125)
Andrew D. Finnicum (VSB No. 80358)
Post Office Box 967
Lynchburg, Virginia 24505
(434) 846-7603 (Telephone)
(434) 846-0158 (Facsimile)
jb@jfeinman.com
andrew@jfeinman.com

Counsel for Appellant

This 23rd day of September, 2011.

John W. Zunka (VSB No. 14368)