

IN THE SUPREME COURT OF VIRGINIA

RUDOLPH DiGIACINTO,

Appellant,

v.

VIRGINIA DEPARTMENT OF CONSERVATION AND RECREATION,

Appellee.

On Petition for Appeal from
The Circuit Court of Fairfax County

**BRIEF OF THE VIRGINIA DEPARTMENT OF CONSERVATION
AND RECREATION IN OPPOSITION
TO THE PETITION FOR APPEAL**

ROBERT F. McDONNELL
Attorney General of Virginia

WILLIAM E. THRO
State Solicitor General
Counsel of Record

STEPHEN R. MCCULLOUGH
Deputy State Solicitor General

OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219

Telephone: (804) 786-2436
Facsimile: (804) 786-1991

WILLIAM C. MIMS
Chief Deputy Attorney General

RICHARD B. CAMPBELL
Deputy Attorney General

ROGER L. CHAFFE
Senior Assistant Attorney General

DAVID C. GRANDIS
Assistant Attorney General

*Counsel for
The Virginia Department of
Conservation and Recreation*

January 26, 2007

ASSIGNMENTS OF ERROR

In his Petition for Appeal, DiGiacinto articulates the following assignments of error:

1. The circuit court erred in sustaining the plea of sovereign immunity because Virginia Constitution Article I, § 13, is self-executing and pronounces the sovereign will of the people through their constitution and therefore sovereign immunity has been waived by the people and cannot be invoked.
2. The circuit court erred in sustaining the plea of sovereign immunity because the Virginia Constitution Article I, § 5 declares a separation of powers and under the well established doctrine of judicial review, judicial review is the only protection against legislation which has become unconstitutional as applied and therefore sovereign immunity cannot be invoked.
3. The circuit court erred in sustaining the plea of sovereign immunity because a violation of the Virginia Constitution Article I, § 13, by the Commonwealth constitutes a breach of contract with the people of Virginia and therefore the doctrine of sovereign immunity has been waived and cannot be invoked.
4. The circuit court erred in sustaining the Demurrer and dismissing the case with prejudice because a violation of Mr. DiGiacinto's rights under the Virginia Constitution Article I, § 13, creates a cause of action for declaratory and injunctive relief under *Virginia Code* § 8.01-184 and *Virginia Code* § 8.01-620.

SUBJECT INDEX

	Page
ASSIGNMENTS OF ERROR	i
TABLE OF CITATIONS	iii
INTRODUCTION	1
STATEMENT OF THE CASE.....	1
QUESTION PRESENTED.....	2
STATEMENT OF FACTS	2
ARGUMENT	2
I. SOVEREIGN IMMUNITY BARS DIGIACINTO’S CLAIMS.....	2
II. NEITHER THE <i>EX PARTE YOUNG</i> DOCTRINE NOR ANY STATE LAW EQUIVALENT APPLIES TO DIGIACINTO’S CLAIMS.	4
CONCLUSION.....	7

TABLE OF CITATIONS

Page

CASES

Afzall v. Commonwealth,
___ Va. ___, ___ S.E. 2d ___, 2007 WL 79172 (2007)..... 1, 3, 4

Alliance to Save the Mattaponi v. Commonwealth,
270 Va. 423, 621 S.E.2d 78 (2005),
cert. denied sub nom.
Mattaponi Indian Tribe v. Virginia,
126 S. Ct. 2862 (2006) 2, 5

City of Chesapeake v. Cunningham,
268 Va. 624, 604 S.E.2d 420 (2004) 2

City of Virginia Beach v. Carmichael Dev. Co.,
259 Va. 493, 527 S.E.2d 778 (2000) 2

Commonwealth v. Harley,
256 Va. 216, 504 S.E.2d 852 (1998) 1, 6

Commonwealth v. Luzik,
259 Va. 198, 524 S.E.2d 871 (2000) 3

Commonwealth v. National Private Truck Council,
253 Va. 74, 480 S.E.2d 500 (1997) 3

Croatian Books, Inc. v. Virginia,
574 F.Supp. 880 (E.D. Va. 1983) 3

DeBauche v. Trani,
191 F.3d 499 (4th Cir. 1999) 5

Elizabeth River Tunnel Dist. v. Beecher,
202 Va. 452, 117 S.E.2d 685 (1961) 3

Ex parte Young,
209 U.S. 123 (1908) 4, 5

Frew v. Hawkins,
124 S. Ct. 899 (2004) 5

Gayton Triangle Land Co. v. Board of Supvrs.,
216 Va. 764, 222 S.E.2d 570 (1976) 6

TABLE OF CITATIONS – Continued

	Page
<i>Green v. Mansour</i> , 474 U.S. 64 (1985)	5
<i>Haas v. Quest Recovery Servs., Inc.</i> , 2007 WL 91601 at *1	5
<i>Hinchey v. Ogden</i> , 26 Va. 234, 307 S.E.2d 891 (1983)	2, 3
<i>Idaho v. Coeur d’Alene Tribe</i> , 521 U.S. 261 (1997)	5
<i>Messina v. Burden</i> , 228 Va. 301, 321 S.E.2d 657 (1984)	2
<i>Mosher Steel-Virginia, Inc. v. Teig</i> , 229 Va. 95, 327 S.E.2d 87 (1985)	3
<i>Quern v. Jordan</i> , 440 U.S. 332 (1979)	5
<i>Rector and Visitors of the University of Virginia v. Carter</i> , 267 Va. 242, 591 S.E.2d 76 (2004)	3
<i>State Bd. of Elections v. Forb</i> , 214 Va. 264, 199 S.E.2d 527 (1973)	5
<i>United States v. Georgia</i> , 126 S. Ct. 877 (2006)	5
<i>Virginia Bd. of Med. v. Virginia Physical Therapy Ass’n</i> , 13 Va. App. 458, 413 S.E.2d 59 (1991) (<i>VBM I</i>), <i>aff’d</i> , 245 Va. 125, 427 S.E.2d 183 (1993) (<i>VBM II</i>)	3, 4
 STATUTES	
<i>Virginia Code</i> § 9-6.14:16(A)	4

**BRIEF OF THE VIRGINIA DEPARTMENT OF CONSERVATION AND
RECREATION IN OPPOSITION TO THE PETITION FOR APPEAL**

Virginia Attorney General Robert F. McDonnell, on behalf of Virginia Department of Conservation and Recreation (“the Department”), submits this Brief in Opposition to the Petition for Appeal.

INTRODUCTION

Rudolph DiGiacinto disagrees with certain regulations of the Department concerning the possession of firearms in Virginia’s state parks. Although he has never been charged with violating these regulations, DiGiacinto filed a suit for declaratory and injunctive relief in the circuit court. Essentially, he asked the circuit court to render an advisory opinion concerning the validity of regulations. *Cf. Commonwealth v. Harley*, 256 Va. 216, 220-21, 504 S.E.2d 852, 852 (1998) (“the courts are not constituted to render advisory opinions, to decide moot questions, or to answer inquiries which are merely speculative.”).

Sovereign immunity bars an action for declaratory and injunctive relief, see *Afzall v. Commonwealth*, ___ Va. ___, ___ S.E. 2d ___, 2007 WL 79172 (2007). Thus, the circuit court dismissed DiGiacinto’s suit.

STATEMENT OF THE CASE

The background for this Petition for Appeal is straightforward. DiGiacinto filed an action seeking declaratory and injunctive relief in the circuit court. The Department demurred on a variety of grounds including sovereign immunity, standing, and mootness. The circuit court dismissed all claims on sovereign immunity grounds.

QUESTION PRESENTED

When reduced to its essentials, DiGiacinto's Petition for Appeal presents the following question:

Does sovereign immunity bar a claim for declaratory and injunctive relief against the Commonwealth or its agencies?

STATEMENT OF FACTS

The relevant facts are not in dispute. DiGiacinto believes that certain regulations of the Department are invalid. He filed suit asking the circuit court to declare them invalid and enjoin their enforcement.

ARGUMENT

I. SOVEREIGN IMMUNITY BARS DIGIACINTO'S CLAIMS.

The doctrine of sovereign immunity is "alive and well" in Virginia. *Messina v. Burden*, 228 Va. 301, 307, 321 S.E.2d 657, 660 (1984). Indeed, "the doctrine of sovereign immunity protects the Commonwealth from interference with the performance of its governmental duties and preserves the Commonwealth's ability to control its funds, properties, and instrumentalities." *Alliance to Save the Mattaponi v. Commonwealth*, 270 Va. 423, 454, 621 S.E.2d 78, 96 (2005), *cert. denied sub nom. Mattaponi Indian Tribe v. Virginia*, 126 S. Ct. 2862 (2006). *See also City of Chesapeake v. Cunningham*, 268 Va. 624, 633, 604 S.E.2d 420, 426 (2004); *City of Virginia Beach v. Carmichael Dev. Co.*, 259 Va. 493, 499, 527 S.E.2d 778, 781 (2000); *Hinchey v. Ogden*, 226 Va. 234, 240, 307 S.E.2d 891, 894 (1983). "As a general rule, the Commonwealth is immune" from all proceedings, regardless of whether brought in law or in equity. *Alliance*, 270 Va. at 454, 621 S.E.2d at 96. *See also Hinchey*, 226 Va. at 239, 307 S.E.2d at 894. Only the General Assembly, acting in its capacity of making social policy, can abrogate the

Commonwealth's sovereign immunity. *Commonwealth v. Luzik*, 259 Va. 198, 206, 524 S.E.2d 871, 876 (2000). A waiver of sovereign immunity will not be implied from general statutory language but must be explicitly and expressly stated in the statute. *Hinchey*, 226 Va. at 241, 307 S.E.2d at 895; *Elizabeth River Tunnel Dist. v. Beecher*, 202 Va. 452, 457, 117 S.E.2d 685, 689 (1961). See also *Rector and Visitors of the University of Virginia v. Carter*, 267 Va. 242, 244-45, 591 S.E.2d 76, 78 (2004).

Sovereign immunity bars a declaratory judgment action against the Commonwealth and its agencies.¹ See *Afzall*, ___ Va. at ___, ___ S.E.3d at ___, 2007 WL 79172 at *3-4; *Virginia Bd. of Med. v. Virginia Physical Therapy Ass'n*, 13 Va. App. 458, 413 S.E.2d 59 (1991) (*VBM I*), *aff'd*, 245 Va. 125, 427 S.E.2d 183 (1993) (*VBM II*). See also *Croatian Books, Inc. v. Virginia*, 574 F.Supp. 880, 884 (E.D. Va. 1983) (applying Virginia law and holding that the Commonwealth is immune from declaratory judgment action absent express waiver to the contrary). *VBM I* illustrates the point. In that case, the Court of Appeals was confronted with a private party's attempt to obtain a declaratory judgment against a state agency regarding the propriety of the agency's promulgation of a new rule. The agency asserted that sovereign immunity barred the declaratory judgment action. The Court of Appeals, in an opinion written by then Judge Koontz, framed the issue as follows:

the General Assembly has waived sovereign immunity only to allow a party to obtain judicial review of the Board's adoption of rules or the Board's case decisions, as such are defined in the VAPA, *in the manner provided in the VAPA*. In short, the Board has consented to and may be sued only for its promulgation of a rule or its decision of a case, as both are defined in the VAPA. *The VPTA's right to bring a declaratory judgment action and in turn the court's jurisdiction to*

¹ When the Commonwealth has failed to raise the defense of sovereign immunity, this Court has entertained declaratory judgment actions against the Commonwealth or its officials. See *Commonwealth v. National Private Truck Council*, 253 Va. 74, 76 n.1, 480 S.E.2d 500, 501 n.1 (1997); *Mosher Steel-Virginia, Inc. v. Teig*, 229 Va. 95, 327 S.E.2d 87 (1985).

exercise jurisdiction over the action must be founded on the provisions of Code § 9-6.14:16(A) and fall within the explicit and limited waiver of sovereign immunity contained in that Code section.

VBM I, 13 Va. App. at 64, 413 S.E.2d at 466 (first emphasis original; second emphasis added). After examining the relevant statute, the Court of Appeals concluded that the private party “may not bring an action pursuant to the provisions of *Virginia Code* § 9-6.14:16(A) applicable to the adoption of rules or the enforcement of such rules in an action in court.” *Id.* at 65, 413 S.E.2d. at 467. On appeal, this Court summarily affirmed “for the reasons assigned by the Court of Appeals in its opinion.” *VBM II*, 245 Va. at 126, 425 S.E.2d at 184.

Similarly, in *Afzall*, this Court was confronted with a declaratory judgment action against the Commonwealth seeking to clarify the meaning of a statute. Relying on the Court of Appeals’ reasoning in *VBM I*, this Court held that, in the absence of a statute explicitly authorizing a declaratory judgment action, sovereign immunity bared the action against the Commonwealth. *Afzall*, ___ Va. at ___, ___ S.E.3d at ___, 2007 WL 79172 at *3-4.

Afzall and *VBM I* are indistinguishable from the instant case. In all three instances, a private party attempted to obtain a declaratory judgment against the Commonwealth or its agency. In all three instances, the ability to bring a declaratory judgment action turns on whether there is a statute explicitly waiving sovereign immunity. In all three instances, there is no such statute. Thus, as in *Afzall* and *VBM I*, sovereign immunity bars the action.

II. NEITHER THE *EX PARTE YOUNG* DOCTRINE NOR ANY STATE LAW EQUIVALENT APPLIES TO DIGIACINTO’S CLAIMS.

The doctrine of *Ex parte Young*, 209 U.S. 123 (1908), holds that sovereign immunity is inapplicable to *some* injunctive relief claims. *Federal* courts generally may enjoin individual state officers, in their official capacities, to conform their conduct to federal law. *See Frew v.*

Hawkins, 124 S. Ct. 899, 903 (2004); *Quern v. Jordan*, 440 U.S. 332, 337 (1979). The *Ex parte Young* doctrine ensures “that the doctrine of sovereign immunity remains meaningful, while also giving recognition to the need to prevent violations of federal law.” *Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261, 269 (1997). However, the *Ex parte Young* doctrine applies only where there is an on-going violation of federal law, *DeBauche v. Trani*, 191 F.3d 499, 505 (4th Cir. 1999), and does not apply when the alleged violation of federal law occurred entirely in the past. *Green v. Mansour*, 474 U.S. 64, 68 (1985). Similarly, the doctrine applies only in the *federal* courts, see *Coeur d’Alene Tribe*, 521 U.S. at 270-74 (Kennedy, J., joined by Rehnquist, C.J., announcing the judgment of the Court), and only to *federal* claims. See *Alliance*, 270 Va. at 455-56, 621 S.E.2d at 96-97 (refusing to apply the doctrine of *Ex parte Young* where there is no federal claim). Because DiGiacinto does not explicitly claim an on-going violation of federal law in this state proceeding, the doctrine of *Ex parte Young* is inapplicable.

Undoubtedly, there is an exception to sovereign immunity that allows this Court to issue an injunction requiring state officials to comply with both federal and Virginia law. See *Coeur d’Alene Tribe*, 521 U.S. at 317 & n.15 (Souter, J., joined by Stevens, Ginsburg, & Breyer, JJ., dissenting) (noting that all fifty States have, at least implicitly, recognized a state judicial power to direct state officers to conform their conduct to federal law and citing this Court’s opinion in *State Bd. of Elections v. Forb*, 214 Va. 264, 265-66, 199 S.E.2d 527, 528 (1973) as an illustration of implicit recognition). At a minimum, the invocation of such an exception should require that a litigant both have standing and state a claim upon which relief can be granted. See *United States v. Georgia*, 126 S. Ct. 877, 882 (2006) (Before addressing questions of sovereign immunity, court should determine whether litigant has stated a claim.). See also *Haas v. Quest Recovery Servs., Inc.*, 2007 WL 91601 at *1) (Ginsburg, J., concurring in the decision to grant,

vacate, & remand) (suggesting that the lower court should not have addressed the sovereign immunity issue after it had concluded that litigant failed to state a claim). This Court has not adopted such an exception or articulated its precise contours.

If this Court had a desire to find such an exception, DiGiacinto's claims are a poor vehicle for this Court to use. The Department has not taken any action against DiGiacinto. "[I]t is elementary the courts will not anticipate circumstances which may never materialize...." *Gayton Triangle Land Co. v. Board of Supvrs.*, 216 Va. 764, 767, 222 S.E.2d 570, 573 (1976). DiGiacinto's claim is nothing more than a request for an advisory opinion. *See Harley*, 256 Va. at 220-21, 504 S.E.2d at 852.

CONCLUSION

For the reasons stated above, the Petition for Appeal should be **DENIED**.

Respectfully submitted,

**VIRGINIA DEPARTMENT OF
CONSERVATION AND RECREATION**

BY: /s/ William E. Thro
Counsel

ROBERT F. MCDONNELL
Attorney General of Virginia

WILLIAM E. THRO
State Solicitor General
Counsel of Record

STEPHEN R. MCCULLOUGH
Deputy State Solicitor General

OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219

Telephone: (804) 786-2436
Facsimile: (804) 786-1991

WILLIAM C. MIMS
Chief Deputy Attorney General

RICHARD B. CAMPBELL
Deputy Attorney General

ROGER L. CHAFFE
Senior Assistant Attorney General

DAVID C. GRANDIS
Assistant Attorney General

*Counsel for
The Virginia Department of
Conservation and Recreation*

January 26, 2007

