

*State Board for Community Colleges v. Calvert*, 09 Va. S. Ct. UNP 081248  
(2009)

UNPUBLISHED  
VIRGINIA

In the Supreme Court of Virginia held at the Supreme Court Building  
in the City of Richmond on Friday the 6th day of February, 2009.

**State Board for Community Colleges, Appellant,**

**v.**

**Richard W. Calvert, Appellee.**

Record No. 081248  
Circuit Court No. CL-2007-8316

Upon an appeal from a judgment rendered by the Circuit Court of Fairfax County.

Upon consideration of the record, the briefs, and the argument by counsel for the appellant and by the appellee, in proper person, the Court is of opinion there is error in the judgment of the said circuit court.

Richard W. Calvert filed a complaint for declaratory relief against Northern Virginia Community College (College). The College filed a motion to dismiss for lack of *in personam* jurisdiction and a plea of sovereign immunity. The circuit court granted the motion to dismiss “due to lack of jurisdiction” but granted Calvert leave to amend his complaint. Calvert filed an amended complaint for declaratory relief, naming the State Board for Community Colleges (Board) as the sole defendant. The Board filed a demurrer to the amended complaint but did not assert a plea in bar of sovereign immunity. The circuit court overruled the demurrer and, after a trial on the merits, entered a declaratory judgment in favor of Calvert. The Board now asserts on appeal that the circuit court erred by failing to sustain a plea in bar of sovereign immunity.

In *Afzall v. Commonwealth*, 273 Va. 226, 234, 639 S.E.2d 279, 284 (2007), this Court held a declaratory action against the Commonwealth was barred by sovereign immunity. The Court made this determination despite the fact that the Commonwealth first invoked the doctrine of sovereign immunity at oral argument before this Court. *See id.* at 230, 639 S.E.2d at 281. The Court held that “the Commonwealth can raise the defense of

sovereign immunity for the first time on appeal because if sovereign immunity applies, the court is without subject matter jurisdiction to adjudicate the claim.” *Id.* (citation omitted).

Despite the Board's failure to assert a plea in bar of sovereign immunity to the amended complaint and an assignment of error that is insufficient, the doctrine of sovereign immunity nevertheless applies to the Board, which is an agency and governmental instrumentality of the Commonwealth, *see* Code §§ 23-14 and 23-215, and bars Calvert's amended complaint for declaratory relief. Therefore, the circuit court was without jurisdiction to adjudicate Calvert's claim. *See id.* Accordingly, the judgment of the circuit court is reversed and vacated, and the amended complaint for declaratory relief is dismissed.

This order shall be certified to the said circuit court.

A Copy,  
Teste:  
Clerk

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