

While less commonly encountered than sovereign immunity, charitable immunity is alive and well in Virginia and available as a bar to liability for negligence committed by insureds engaged in the activities of a charitable institution where the plaintiff is a beneficiary of the institution's charitable services. Whether the doctrine applies hinges on a two-part analysis which was recently rearticulated by the Virginia Supreme Court in *University of Virginia Health Services Foundation v. Morris*, 275 Va. 319, 331 (2008).

The doctrine of charitable immunity in Virginia applies to protect a charitable institution from liability to beneficiaries for acts of ordinary negligence by its servants or agents. *Bailey v. Lancaster Ruritan Rec. Ctr., Inc.*, 256 Va. 221, 224 (1998). Under the doctrine, "a volunteer of a charity is immune from liability to the charity's beneficiaries for negligence while the volunteer [is] engaged in the charity's work." *Moore v. Warren*, 250 Va. 421, 425 (1995). However, the protection afforded to a charitable institution is limited to acts of ordinary negligence and "does not extend to acts of gross negligence and willful and wanton negligence. *Cowan v. Hospice Support Care, Inc.*, 268 Va. 482, 488 (2004). Furthermore, the doctrine does not shield charitable institutions from the duty to "exercise due care in the selection and retention of its servants." *Hill v. Memorial Hospital, Inc.*, 204 Va. 501, 505 (1963); quoting, *Norfolk Prot. Hospital v. Plunkett*, 162 Va. 151, 153 (1934).

Charitable immunity developed as a judicially-created policy intended to "prevent him who accepts the benefit of a charity from suing it for the torts of its agents . . . and thus taking for his private use the funds which have been given for the benefit of humanity." *Memorial Hospital v. Oakes*, Adm'x, 200 Va. 878, 888 (1959); quoting, *Bodenheimer v. Confederate Memorial Ass'n.*, 68 F.2d 507 (1934). The doctrine is not without criticism as the Virginia Supreme Court noted in *Memorial Hospital* stating, "the wisdom of the rule of immunity as applied to charitable institutions is debatable." *Memorial Hospital*, 200 Va. at 889. However, "[t]he doctrine of charitable immunity

"is firmly embedded in the law of this Commonwealth and has become a part of the general public policy of the State." *UVA Health Services Foundation* 275 Va. at 331.

While the early cases on charitable immunity predominantly involve charitable hospitals, a wide variety of institutional purposes have been found to qualify as "charitable purposes" triggering the applicability of the doctrine. In *Bodenheimer*, an institution incorporated "to collect, arrange, and preserve statutes, portraits, photographs, and historical data relating to the Southern Confederacy" was entitled to charitable immunity. *Bodenheimer* 68 F.2d at 508. The *Urbanna Chamber of Commerce*, whose stated purposes included "promoting of civic welfare and community spirit" and the sponsoring of the *Urbanna Oyster Festival* was assumed by the Virginia Supreme Court to qualify as a charitable organization in *Straley v. Urbanna Chamber of Commerce*, 243 Va. 32, 35 (1992). Likewise, the charitable nature of *Mountain Magic, Inc.*, an entity whose corporate purpose was to organize and promote an annual "Spring Festival" in Buchanan and "to engage in other community activities, and to donate its net earnings to local charities" was not disputed in the case of *Thrasher v. Winand* 239 Va. 338, 339 (1990). In *Ola v. YMCA of South Hampton Roads, Inc.*, 270 Va 550 (2005), the YMCA was granted immunity where its charitable purpose was "to put Judeo-Christian principles into practice through programs that build a healthy body, mind and spirit for all." The Virginia Supreme Court's recent ruling in *University of Virginia Health Services Foundation* restates the test for charitable immunity as follows, "[f]irst, the entity must show it is organized with a recognized charitable purpose and that it operates in fact in accord with that purpose" and, "[s]econd [the entity] must then establish that the tort claimant was a beneficiary of the charitable institution at the time of the alleged injury." *UVA Health Services Foundation* 275 Va. at 333, 334.

In determining the first prong of the test, courts look to the organization's articles of incorporation, or other formative governing document, to determine whether they state a charitable or eleemosynary purpose. *Id.* 275 Va. at 333. Assuming the entity's

documents do state such a purpose courts then apply some or all of ten factors which are considered indicative of whether a charitable organization actually operates in accordance with its charitable purpose. Those factors are as follows:

- (1) Does the entity's charter limit the entity to a charitable or eleemosynary purpose?
- (2) Does the entity's charter contain a not-for-profit limitation?
- (3) Is the entity's financial purpose to break even or earn a profit?
- (4) Does the entity in fact earn a profit, and if so, how often does that occur?
- (5) If the entity earns a profit must that be used for a charitable purpose?
- (6) Does the entity depend on contributions and donations for a substantial portion of its existence?
- (7) Is the entity exempt from federal income tax and/or local real estate tax?
- (8) Does the entity's provision of services take into consideration a person's ability to pay for such services?
- (9) Does the entity have stockholders or others with an equity stake in its capital?
- (10) Are the directors and officers of the entity compensated and if so, on what basis?

In the *UVA Health Services Foundation* case, the Court found that the entity's Articles of Incorporation did set out a charitable purpose which creates a rebuttable presumption that the entity operates itself as a charity. *Id.* at 335. However, in applying four of the ten factors, the Court found that the *Health Services Foundation* was not entitled to charitable immunity, despite the fact that it did provide medical care to indigent patients, because the organization "is operated 'in a manner calculated to produce a profit or gain.'" *Id.* at 340.

The criterion to satisfy the second prong of the test, that the tort claimant was a beneficiary of the charitable institution, is set forth in the *Ola* case. There the Court found that "a beneficiary is a person who receives something of value, which the organization by its charitable purpose, undertakes to provide." *Ola* 270 Va. at 564. Applying



that test to the facts of the case, the Court found that “Ola clearly was a beneficiary of the YMCA’s charity, not because she received membership at a reduced fee, but because she was participating in the YMCA swimming program at the time of her injury.” *Id.* at 565. “The fact that an organization receives compensation from those who are able to pay for services received does not remove its charitable immunity.” *Id.* at 563; quoting, *Hospital of St. Vincent v. Thompson*, 116 Va. 101, 104 (1914).

**KP&M JOINS EFFORT TO ESTABLISH THE NATIONAL RETAIL AND RESTAURANT DEFENSE ASSOCIATION**

KP&M is always searching for innovative and progressive ways to maintain its position as a leader in the defense industry, while identifying ways to protect its clients outside the confines of litigation. As such, KP&M is proud to announce that it is one of the flagship regional defense firms collaborating on the creation of the National Retail and Restaurant Defense Association (NRRDA).

NRRDA is a new independent non-profit organization specifically dedicated to protecting the interests of the retail and restaurant industry. NRRDA provides educational live and web-based seminars focusing on cutting-edge issues relevant to the retail and restaurant industries, and maintains a qualified roster of attorneys and industry professionals. The organization is committed to developing strategies to reduce the number and severity of claims, managing common risks, and enhancing the defense position in litigated matters.

NRRDA’s membership is maintained at a high level to ensure that the most qualified professionals are working together to share resources. Its membership is restricted to retail and restaurant professionals, in-house counsel, insurance professionals, defense attorneys and vendors committed to the defense of the retail and restaurant industries. In addition to seminars, webinars, newsletters, and e-blasts that focus on relevant news, rulings, on recent trends, members of NRRDA collaborate and share litigation strategies, experiences, and suggestions on relevant topics. All of NRRDA’s members work for or spe-

cialize in the defense of the retail and restaurant industry.

KP&M is pleased to announce that Brian A. Cafritz, head of the firm’s commercial defense practice, has been elected as President of NRRDA. Detailed information on applications and membership in NRRDA is provided on the NRRDA Landing Page, found at [www.join-narrda.org](http://www.join-narrda.org). The official NRRDA website can be found at [www.nrrda.org](http://www.nrrda.org). The official NRRDA website can be found at [www.nrrda.org](http://www.nrrda.org).

If you are interested in obtaining more information on NRRDA and what it can do for you, please feel free to contact Brian Cafritz in our Richmond office or call the NRRDA headquarters at 847-324-7050.



*KALBAUGH, PFUND & MESSERSMITH, P.C. wishes to thank our clients and friends for allowing us the opportunity to earn your business. If you are not currently a client of our firm and would like more information on our progressive and aggressive approach to the practice of law, please call or e-mail Bill Pfund at 804-320-6300 or [bill.pfund@kpmllaw.com](mailto:bill.pfund@kpmllaw.com). We also invite you to visit our website at [www.kpmllaw.com](http://www.kpmllaw.com) for valuable information and links.*

This publication is intended for general information only and is not intended to serve as legal advice. For legal questions the reader should consult legal counsel to determine how applicable law relates to specific facts or situations. While all articles are thoroughly researched, no warranty is given for their accuracy.

ADDRESS SERVICE REQUESTED

Serving Virginia, Washington, D.C., and Metro Maryland.

