VIRGINIA:

In the Supreme Court of Virginia Held at the Supreme Court Building in the City of Richmond on Thursday the 11th day of July, 2019.

Present: All the Justices

Timothy B. Pridemore, et al., Appellants,

against Record No. 180373
Circuit Court Nos. CL16-3261-00 through -03 and
CL16-3262-00 through -03

Richard J. Hryniewich, et al., Appellees.

Richard J. Hryniewich, Appellant,

against Record No. 180379
Circuit Court Nos. CL16-3261-00 through -03 and
CL16-3262-00 through -03

Timothy B. Pridemore, et al., Appellees.

Upon an appeal from orders entered
by the Circuit Court of the City of Norfolk.

These interlocutory appeals arise out of orders entered by the circuit court in *Timothy B. Pridemore v. Richard J. Hryniewich and the City of Norfolk, Virginia*, and *David I. Glover* v. *Richard J. Hryniewich and the City of Norfolk, Virginia*. In particular, the circuit court certified two orders for interlocutory appeal: (1) The circuit court's order entered December 29, 2016, denying Pridemore's[1] motion to strike the plea in bar filed by the City and Hryniewich; and (2) The circuit court's order entered February 16, 2018, denying the motion for summary judgment

[1] Although Pridemore and Glover filed separate actions, they filed pleadings that present the same facts and legal issues and briefed their cases together as if they were consolidated. The circuit court entered a single order certifying these interlocutory appeals and we have paired these cases for purposes of appeal. For simplicity, we refer to Pridemore and Glover as "Pridemore." Therefore, any reference to Pridemore includes Glover.

filed by Hryniewich and the motion for reconsideration of the order entered on December 29, 2016, filed by Pridemore.

Upon consideration of the record, briefs, and argument of counsel, we affirm the circuit court's order entered December 29, 2016. With regard to the order entered on February 16, 2018, we conclude the circuit court erred in declining to apply federal maritime law to Hryniewich's motion for summary judgment and remand for further proceedings consistent with this order.

I.

Pridemore was aboard a police boat owned by the City of Norfolk when it capsized in Willoughby Bay, a body of water within the navigable waters of the United States. At the time, Hryniewich, a member of the City's police department, was operating the vessel during a sea trial conducted to test the vessel after Pridemore's employer upgraded the vessel's engines and replaced its steering system. Pridemore filed a complaint in the circuit court against the City and Hryniewich alleging simple and gross negligence against the defendants and seeking damages for personal injuries he sustained when the vessel capsized.

The defendants filed a plea in bar asserting that Pridemore's claims against them were barred under the doctrine of sovereign immunity. Pridemore filed a motion to strike the plea in bar on the grounds that he was "entitled to bring a suit" in the circuit court "pursuant to the 'savings to suitors' clause" encompassed in 28 U.S.C. § 1333(1)[2] and that "municipalities are not entitled to plead state sovereign immunity under the general maritime law."

On December 29, 2016, the circuit court entered an order denying Pridemore's motion to strike the plea in bar for the reasons set forth in its letter opinion dated December 16. In its letter opinion, the circuit court concluded that "general maritime law does not preempt state sovereign immunity" and that "sovereign immunity therefore is potentially available to [the City and Hryniewich]."

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[2] 28 U.S.C. §1331(1) provides that "[t]he district courts shall have original jurisdiction, exclusive of the courts of the States, of . . . [a]ny civil case of admiralty or maritime jurisdiction, *saving to suitors in all cases all other remedies to which they are otherwise entitled.* (Emphasis added) (italicized language hereinafter referred to as the "savings clause").

On August 30, 2017, the circuit court entered an order sustaining the plea in bar with respect to the claims against the City and the claims of simple negligence against Hryniewich. The circuit court overruled the plea in bar with respect to the claims of gross negligence against Hryniewich.[3] Accordingly, the circuit court dismissed, with prejudice, Pridemore's claims against the City and dismissed, with prejudice, Pridemore's simple negligence claims against Hryniewich. The circuit court ruled that Pridemore's gross negligence claims against Hryniewich "may proceed."[4]

Hryniewich filed a motion for summary judgment asserting that under "the general maritime law, municipal employees like Officer Hryniewich are entitled to the protection of 'qualified immunity,'" and "are entirely immune to maritime tort claims arising out of the performance of their official duties unless the plaintiff can show the violation of a clearly-established statutory or constitutional right." Hryniewich argued that because Pridemore has not alleged that Hryniewich violated any of Pridemore's clearly established rights, Hryniewich is "entirely immune to [Pridemore's] claims" under federal maritime law.

In response to the motion for summary judgment, Pridemore moved the circuit court to reconsider its order entered December 29, 2016. Pridemore asserted that to the extent the circuit court would "entertain [Hryniewich's] claim that he is entitled to federal qualified immunity, it should re-examine its decision regarding the grant of state-based sovereign immunity to [the City and Hryniewich]" and "conclude that [the City and Hryniewich] are not entitled to state sovereign immunity." Pridemore also argued "that while the federal doctrine of qualified immunity can provide protection to employees of governmental agencies under certain

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[3] The circuit court reasoned that the City was engaged in a governmental function at the time of the sea trial and, therefore, was entitled to sovereign immunity. With respect to Hryniewich, the circuit court reasoned that he "has satisfied each of the factors in the *James [v. Jane*, 221 Va. 43 (1980)] four-fact[or] immunity test . . . thereby immunizing him from simple negligence claims." The circuit court concluded that "addressing an allegation that there was no gross negligence, as a matter of law, at the plea in bar stage – without at least the benefit of an evidentiary hearing – would be premature."

[4] This order *was not* certified by the circuit court for interlocutory appeal to this Court, but is recited herein to provide context to the subsequent order entered February 16, 2018, which *was* certified for interlocutory appeal.

circumstances, it is inapplicable to [Hryniewich] under the facts of this case" because Hryniewich was "plainly incompetent."[5]

On February 16, 2018, the circuit court concluded that there was "no basis to disrupt its prior rulings regarding the applicability of Virginia law to immunity issues in this case," and entered an order denying Pridemore's motion for reconsideration and denying Hryniewich's motion for summary judgment.

II.

With regard to the circuit court's order entered December 29, 2016, denying Pridemore's motion to strike the plea in bar filed by the City and Hryniewich, we affirm the circuit court's order because the Commonwealth's sovereign immunity, which extends to municipalities and is jurisdictional in nature, is not abrogated by the savings clause or federal maritime law.

The savings clause "allows litigants to bring *in personam* maritime actions in state courts." *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222 (1986). It "leaves state courts competent to adjudicate maritime causes of action in proceedings *in personam*" and "means that a state, having concurrent jurisdiction, is free to adopt such remedies, and to attach to them such incidents, as it sees fit so long as it does not attempt to give *in rem* remedies or make changes in the substantive maritime law." *Id.* (citations omitted).[6]

The savings clause does not confer jurisdiction on the state courts; rather, "its meaning is, that in cases of concurrent jurisdiction in admiralty and common law, the jurisdiction in the latter is not taken away." *Waring v. Clarke*, 46 U.S. 441, 461 (1847); *see also Colonna Shipyard v. Bland*, 150 Va. 349, 354 (1928) (noting that the savings clause "preserves to such litigants a

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[5] Hryniewich replied that the "'plainly incompetent'" standard applies only to the analysis of whether a defendant's conduct violated the plaintiff's constitutional rights in a manner that permits liability" but "does not stand alone as an independent basis for overcoming qualified immunity in the absence of a right that was allegedly violated."

[6] The savings clause provides a plaintiff in a maritime case alleging an *in personam* claim with three options: "(1) the plaintiff may file suit in federal court under admiralty jurisdiction; (2) the plaintiff may file suit in federal court under diversity jurisdiction; or (3) plaintiff may file suit in state court." *St. Paul Fire and Marine Ins. Co. v. Lago Canyon, Inc.*, 561 F.3d 1181, 1194 n.5 (11th Cir. 2009); *see also In re Lockheed Martin Corp.*, 503 F.3d 351, 354-55 (4th Cir. 2007).

common-law remedy in the State courts"). Thus, whether the state court has jurisdiction over a particular maritime action, and is therefore competent to adjudicate the matter, is determined by state law. *See, e.g., Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981) (noting that while federal law may confer "rights binding on state courts, the subject-matter jurisdiction of [the state courts] is governed in the first instance by state laws").[7]

Under Virginia law, the bar of sovereign immunity is jurisdictional in nature. As this Court has stated, where sovereign immunity applies, "the court is without subject matter jurisdiction to adjudicate the claim." *Afzall v. Commonwealth*, 273 Va. 226, 230 (2007); *see also Commonwealth v. Luzik*, 259 Va. 198, 206 (2000) (noting that in the absence of a waiver of sovereign immunity by the General Assembly, "the courts of this Commonwealth do not have the necessary jurisdictional authority" to entertain an action against the Commonwealth). Because municipalities are arms of the Commonwealth under Virginia law, *City of Virginia Beach v. Carmichael Dev. Co.*, 259 Va. 493, 499 (2000), Virginia courts likewise do not have the necessary jurisdiction to adjudicate claims against municipalities when the bar of sovereign immunity applies, s*ee Seabolt v. County of Albemarle*, 283 Va. 717, 719-722 (2012) (holding that the circuit court was without subject-matter jurisdiction to adjudicate claim against local government).[8]

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[7] *See also Claflin v. Houseman,* 93 U.S. 130, 133-37 (1876) (noting that because the state and federal sovereignties are "distinct, and neither can interfere with the proper jurisdiction of the other," state courts exercising concurrent jurisdiction over enforcement of rights under federal law do not exercise a new jurisdiction conferred upon them, but their ordinary jurisdiction derived from their constitutions under state law).

[8] In Virginia, "[w]hen a municipality exercises, or fails to exercise, a governmental function . . . the municipality is performing as an agency of the state." *Carmichael Development*, 259 Va. at 499. Therefore, under Virginia law, "[s]overeign immunity protects municipalities from tort liability arising from the exercise of governmental functions," *City of Chesapeake v. Cunningham*, 268 Va. 624, 634 (2004), and their employees in a proper case, *Messina v. Burden*, 228 Va. 301, 312 (1984).

As noted previously, the circuit court ruled that sovereign immunity applied to the claims against the City and the claims of simple negligence against Hryniewich when it sustained the plea in bar in its order entered August 30, 2017. That order was not certified for interlocutory appeal.

Virginia's doctrine of sovereign immunity is not abrogated by maritime law. As the United States Supreme Court has recognized, "States retain immunity from private suit in their own courts." *Alden v. Maine*, 527 U.S. 706, 754 (1999). This sovereign immunity "is beyond the congressional power to abrogate by Article I legislation." *Id.* Therefore, the savings clause does not abrogate or supersede the Commonwealth's sovereign immunity. *Id.* at 712 (noting that "the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts"); *see also Clark v. Virginia Dept. of State Police*, 292 Va. 725, 731 (2016); *Luzik*, 259 Va. at 205. This immunity from suit extends not only to the Commonwealth but entities that are arms of the Commonwealth under Virginia law. *Alden*, 527 U.S. at 756; *see also Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977) (determining whether entity is arm of State based on nature of entity created under state law).[9]

In sum, because Virginia's bar of sovereign immunity is jurisdictional in nature and is not abrogated or superseded by the savings clause or federal maritime law, the circuit court did not err in denying Pridemore's motion to strike the defendants' plea in bar.[10]

III.

With regard to the circuit court's order entered February 16, 2018, denying Hryniewich's motion for summary judgment, we conclude that the circuit court erred in refusing to apply federal maritime law and, therefore, remand for the circuit court to apply federal maritime law to resolve the issues raised by Hryniewich's motion for summary judgment.

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[9] Pridemore's reliance on *Workman v. New York City*, 179 U.S. 552 (1900), which was an action filed in federal court, is misplaced. *Workman* involved a question of the substantive law of admiralty; it did not involve the issue of a state court's jurisdiction or the State's immunity from suit in its own courts. *See Northern Ins. Co. v. Chatham County*, 547 U.S. 189, 190-91 (2006); *In re State of New York*, 256 U.S. 490, 499 (1921).

[10] Having concluded the circuit court did not err in denying Pridemore's motion to strike the plea in bar, we also conclude that the circuit court did not err in denying Pridemore's motion for reconsideration.

Hryniewich argues that the circuit court erred in holding that the federal common law defense of qualified immunity was unavailable to Hryniewich and in failing to conclude that Hryniewich was immune. Specifically, Hryniewich contends that the circuit court's "principal error was in failing to recognize that maritime qualified immunity, unlike sovereign immunity, is a non-jurisdictional affirmative defense that applies equally in state or federal court." Relying on, among other authorities, *Otis v. Watkins*, 13 U.S. 339, 353-56 (1815) and *Wilkes v. Dinsman*, 48 U.S. 89, 122-32 (1849), Hryniewich asserts that the defense of qualified immunity "has a long history in the federal common law and the general maritime law, which have long recognized immunity for public officials who, while performing their duties in good faith, nevertheless commit unintentional torts."[11]

Pridemore agrees that Hryniewich may assert a qualified-immunity defense in a maritime-tort action in a state court but argues that the standard for evaluating an immunity defense is "whether the officer was plainly incompetent." According to Pridemore, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).[12]

Therefore, the parties agree that federal qualified immunity is available as a defense under federal maritime law and that a state court having jurisdiction over a maritime law claim must apply substantive maritime law. *See Offshore Logistics*, 477 U.S. at 223; *see also Colonna*

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[11] Hryniewich further notes that "because a claim of the violation of the plaintiff's federal statutory or constitutional rights is the only way to bypass a public employee's immunity to maritime tort claims," many courts have applied an analysis under 42 U.S.C. § 1983 to maritime tort claims. *See, e.g., Hoefling v. City of Miami*, 811 F.3d 1271 (11th Cir. 2017); *Hoefling v. City of Miami*, 17 F.Supp.3d 1227 (S.D.Fla. 2014); *Hoefling v. City of Miami*, 876 F.Supp.2d 1321 (S.D.Fla. 2012); *see also Sol v. City of Miami*, 776 F.Supp.2d 1375 (S.D.Fla. 2011); *Rabenstine v. Nat'l Ass'n of State Boating Law Adm'rs, Inc.*, Case No. 4:14-cv-78, 2015 WL 3470191 (E.D.Va. June 1, 2015) (unpublished); *cf. Yacht Sales International, Inc. v. City of Virginia Beach*, 977 F.Supp. 408 (E.D. Va. 1997).

[12] In support of his position, Pridemore also cites *Stanton v. Sims*, 571 U.S. 3 (2013); *Messerschmidt v. Millender*, 565 U.S. 535 (2012); *Durham v. Horner*, 690 F.3d 183 (4th Cir. 2012); and *Castro v. United States*, 34 F.3d 106 (2d Cir. 1994).

Shipyard, 150 Va. at 354-58.[13] The circuit court erred because it declined to apply federal maritime law. We remand for the circuit court to apply the correct standard.[14]

This order shall be certified to the said circuit court.

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Teste:

Clerk

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[13] Although the circuit court cited *Pearson v. Callahan*, 555 U.S. 223, 231, 232 (2009) for the proposition that federal qualified immunity is a jurisdictional question, the United States Supreme Court in *Pearson* did not classify the defense of qualified immunity as jurisdictional.

[14] Bearing in mind that what is before us is an interlocutory appeal, we believe the circuit court should have the first opportunity to address this issue. *See Cherry v. Lawson Realty Corp.*, 295 Va. 369, 379 (2018).