VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 8th day of September, 2016.

Matthew W. Cline, Appellant,

against Record No. 151037
Circuit Court No. CL-2010-137

Commonwealth of Virginia, Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of the City of Charlottesville.

Upon consideration of the record, briefs, and argument of counsel, the Court is of opinion that the judgment of the Circuit Court of the City of Charlottesville ("circuit court") granting a plea of sovereign immunity should be reversed.

I.

In *Cline v. Dunlora South, LLC*, 284 Va. 102, 109-10, 726 S.E.2d 14, 18 (2012), we held that a private landowner owes no duty to protect motorists on adjoining public highways from natural conditions on the landowner's property. Accordingly, we concluded that Matthew W. Cline ("Cline") could not recover from the landowner, Dunlora South, LLC ("Dunlora"), for injuries he suffered when a tree fell from Dunlora's property and struck Cline's vehicle while he was driving on East Rio Road in Charlottesville. Cline now pursues negligence and nuisance claims against the Commonwealth because the tree allegedly fell from the Commonwealth's right-of-way on the Dunlora property.

The Virginia Tort Claims Act, Code § 8.01-195.1 *et seq.* (the "Act") provides an express limited waiver of the Commonwealth's immunity from tort claims. As relevant here, the Act states that "the Commonwealth shall be liable for claims of money only . . . on account of damage to or loss of property or personal injury or death caused by the negligent or wrongful act

or omission of any employee while acting within the scope of his employment where the Commonwealth . . . , if a private person, would be liable to the claimant for such damage, loss, injury or death." Code § 8.01-195.3. Thus, if under the same circumstances, a private person owed no duty to Cline, the Commonwealth is immune from liability.

"The threshold question in any tort action is whether the defendant owed a legal duty to the plaintiff." *VanBuren v. Grubb*, 284 Va. 584, 594, 733 S.E.2d 919, 924 (2012) (citation omitted). In this case, Cline argues the Commonwealth is like "a private landowner in a standard premises liability case where someone is injured on the landowner's property" because the risk that gave rise to his injury on a public highway originated from the Commonwealth's right of way. We have not decided, and need not do so in this case, whether an easement holder owes a duty to a third party injured by a dangerous condition arising from property over which an easement runs.[1]

However, this Court has recognized the common-law principle of assumption of a duty. *See Kellermann v. McDonough*, 278 Va. 478, 489-90, 684 S.E.2d 786, 791 (2009). Accordingly, "one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all." *Didato v. Strehler*, 262 Va. 617, 628, 554 S.E.2d 42, 48 (2001) (quoting *Nolde Bros. v. Wray*, 221 Va. 25, 28, 266 S.E.2d 882, 884 (1980)) (internal quotation marks omitted). The issue whether a legal duty in tort exists is a pure question of law. *Yuzefovsky v. St. John's Wood Apts.*, 261 Va. 97, 106, 540 S.E.2d 134, 139 (2001). "But when the issue is not whether the law recognizes a duty, but rather whether the defendant by his

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[*] An easement provides use rights; however, it does not provide ownership rights or a possessory interest in the land. *See Burdette v. Brush Mt. Estates, LLC*, 278 Va. 286, 292, 682 S.E.2d 549, 552 (2009); *Russakoff v. Scruggs*, 241 Va. 135, 138, 400 S.E.2d 529, 531 (1991). In general, a party with no ownership interest in or control over a property owes no duty to a third party regarding a dangerous condition on the property. *See Hiett v. Lake Barcroft Cmty. Ass'n*, 244 Va. 191, 196, 418 S.E.2d 894, 897 (1992) ("Since [defendant] had no ownership interest in or control over the operation of Lake Barcroft, she had no duty to warn [plaintiff] of any dangerous condition therein.") Therefore, any duties imposed on an easement holder cannot be coextensive with the duties imposed on a landowner or possessor because an easement grants only a right "to use the land of another in a particular manner and for a particular purpose." *Russakoff*, 241 Va. at 138, 400 S.E.2d at 531 (citing *Brown v. Haley*, 233 Va. 210, 216, 355 S.E.2d 563, 568 (1987)).

conduct assumed a duty, the existence of that duty is a question for the fact-finder." *Burns v. Gagnon*, 283 Va. 657, 672, 727 S.E.2d 634, 643 (2012).

Assumption of duty to a third person is addressed in Restatement (Second) of Torts § 324A, which provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Burns, 283 Va. at 672, 727 S.E.2d at 644.

Cline alleges that the Commonwealth's employee, Billy Mayo, entered onto Dunlora's property "to inspect trees and remediate dangerous conditions" on the Commonwealth's right-of-way. Cline further alleges that Mayo "noticed the tree and the dangerous condition presented by it," but "mistakenly believed the tree was not located within the Commonwealth's right of way" and "chose not to have it removed." These allegations are sufficient to give rise to a cause of action against the Commonwealth on a theory it assumed a duty by undertaking the inspection and remediation of dangerous conditions on the right-of-way.

Based on the record before us, we cannot decide as a matter of law whether the Commonwealth assumed such a duty. *Burns*, 283 Va. at 673, 727 S.E.2d at 644. This question must be decided by the factfinder on remand. The Commonwealth can only be subject to liability under the standards summarized in Restatement § 324A if Cline proves, first, that the Commonwealth undertook to inspect trees on the Dunlora property for the purpose of remediating any dangerous conditions created by trees and then either: (1) the Commonwealth's failure to exercise reasonable care in performing this undertaking increased the risk of the harm; or (2) the Commonwealth undertook to perform a duty owed by another to Cline; or (3) Cline's

harm was suffered by his reliance upon the Commonwealth's undertaking. *See id.*

II.

The Commonwealth argues that the claims asserted by Cline arise out of a legislative function and the Act preserves the Commonwealth's immunity for any act or omission based upon "the legislative function" of an agency of the Commonwealth. Code § 8.01-195.3(2). We disagree. Cline alleges that the Commonwealth was negligent in failing to remove the tree that injured him after it assumed a duty to remediate dangerous conditions existing in its right-of-way. More specifically, Cline asserts that its employee, Mayo, "noticed the tree and the dangerous condition presented by it," but "mistakenly believed the tree was not located within the Commonwealth's right of way" and "chose not to have it removed." The decision not to remove the tree did not require the Commonwealth "to determine whether public funds should be expended" and, therefore, did not involve the exercise of a legislative function. *See Maddox v. Commonwealth*, 267 Va. 657, 663, 594 S.E.2d 567, 570 (2004) (deciding whether the plan and design of a sidewalk would include installing a guardrail and/or backfilling the area adjacent to the sidewalk necessarily called for the exercise of discretion because it required the agency to determine whether public funds should be expended to install those particular safety features).

We reverse the judgment granting the plea, and remand the case to the circuit court for proceedings consistent with this order.

Justice Mims took no part in the consideration of this case.

This order shall be certified to the said circuit court.

JUSTICE POWELL, with whom JUSTICE GOODWYN and SENIOR JUSTICE MILLETTE join, concurring in part and dissenting in part.

I fully concur with the majority's analysis regarding assumption of duty and legislative function. However, in my opinion, the majority has prematurely foreclosed the issue of whether an easement holder owes a duty to a third party injured by a dangerous condition arising from the property over which the easement runs. In reaching this conclusion, the majority relies on *Heitt v. Lake Barcroft Cmty. Ass'n*, 244 Va. 191, 418 S.E.2d 894 (1992), for the notion that a party

with no ownership interest in or control over a property owes no duty to a third party regarding a dangerous condition on the property. By that same logic, it stands that a party with an ownership interest in or control over the property would owe a duty to a third party.

> Under well settled principles, where no evidence is taken in support of a plea in bar, the trial court, and the appellate court upon review, consider solely the pleadings in resolving the issue presented. In doing so, the facts stated in the plaintiff's motion for judgment are deemed true.

Lostrangio v. Laingford, 261 Va. 495, 544 S.E.2d 357 (2001).

In the present case, Cline specifically pled that the tree that caused his injury was on land "owned, controlled, inspected, serviced, and/or maintained by Defendants." The Commonwealth did not dispute this allegation in its Plea of Sovereign Immunity and Demurrer, and no evidence was taken in support of the plea in bar.[2] Therefore, in my opinion, Cline has pled sufficient facts to place the issue of whether the Commonwealth owed Cline a duty before the circuit court.

A Copy,

Teste:

Patricia L Harrington

Clerk

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[*] Indeed, it is particularly telling that the word easement is never once mentioned in either party's pleadings to the circuit court.