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Tort Reform: The Reemergence of Local Government Immunity: The West Virginia Governmental Tort Claims and Insurance Reform Act of 1986

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TORT REFORM: THE REEMERGENCE OF LOCAL GOVERNMENT IMMUNITY

The West Virginia Governmental Tort Claims and Insurance Reform Act of 1986

I. INTRODUCTION

The erosion of sovereign immunity for local governments in the last ten years has exposed, for the first time, the political subdivisions of West Virginia to full liability for their torts. Alert to this potential liability, local officials routinely purchased insurance to protect their budgets. Recently, however, these local authorities have seen their insurance premiums double or even triple; some policies have even been canceled entirely.¹ As justifications for their actions, insurers cite the "litigiousness" of our society and a perceived uncertainty regarding the regulatory authority these subdivisions possess.²

During the spring of 1986, the legislature responded to this "insurance crisis" by enacting the Committee Substitute for Senate Bill No. 3, which contains a new article, the Governmental Tort Claims and Insurance Reform Act,³ and several minor changes in existing code sections to harmonize them with this addition.⁴ The Act attacks the crisis from two fronts. First, it seeks to limit the exposure of political subdivisions by restricting their liability and the amount of damages recoverable. Second, it imposes greater regulation of rates upon the insurance carriers.⁵

II. LIMITED GOVERNMENTAL LIABILITY

A. Political Subdivisions

At the outset, local government entities such as counties, county boards of education, municipalities, combined city-county health departments, volunteer fire departments, public service districts, and other bodies created to perform local governmental functions, where their jurisdictions are coextensive with one or more counties, cities or towns are afforded new protections. Expressly excluded are

¹ Frank, *Cities Besieged: Shelter from Liability Sought*, 71 A.B.A.J. (1985).

² *Id.*; Stewart, *The "Tort Reform" Hoax*, 22 Trial 90 (1986).

³ W. VA. CODE § 29-12A-1 to -18 (Supp. 1986).

⁴ W. VA. CODE § 18-5-13 (1984 & Supp. 1986); W. Va. Code §§ 29-12-5 (1980 & Supp. 1986), 29-12-5a (1980 & Supp. 1986); W. VA. CODE § 33-6-14a (1982 & Supp. 1986).

⁵ W. VA. CODE § 29-12A-1.

hospitals of these entities.⁶ Thus defined, political subdivisions are given immunity from liability for injury or death to persons or property except for actions brought in five broad categories: (1) injuries resulting from the negligent operation of vehicles by employees within the scope of their employment; (2) injuries resulting from the negligent acts of employees acting within the scope of their employment; (3) injuries caused by the negligent maintenance of roads, sidewalks, bridges, or public grounds, except where a municipality has no responsibility to inspect or repair a bridge within its limits; (4) those injuries resulting from the negligence of employees on or within the grounds of buildings used by the subdivision, excepting jails and other places of detention; and (5) where liability is expressly imposed by a provision of the Code.⁷ This last area includes only *express* impositions of liability and not Code provisions which impose merely a duty on the subdivision or which provide generally that a subdivision may sue and be sued.⁸

The Act proceeds immediately to riddle these five areas with exceptions. Subdivisions are granted immunity from liability for legislative functions, judicial or prosecutorial functions, a broad range of executive functions, natural conditions on improved public property other than those affirmatively caused by the negligence of the subdivision, natural conditions on unimproved property, claims covered under worker's compensation, unintentional misrepresentations, products liability or breach of warranty of fitness for a specific purpose, operation of dumps, and operation of prisons, including injuries resulting from the escape of prisoners.⁹ In addition, employees of political subdivisions are given immunity from liability unless the acts fall manifestly outside the scope of their employment, are done with malicious purpose, in bad faith, wantonly or recklessly, or where liability is expressly extended to employees by a provision of the Code.¹⁰

This reestablishment of limited sovereign immunity for local governments is the Act's most important effect. The doctrine of local sovereign immunity had been abolished in a series of West Virginia Supreme Court of Appeals decisions: *Long v. City of Weirton*¹¹ (municipalities), *Gooden v. County Commission of Webster County*¹² (counties), and *Ohio Valley Contractors v. Board of Education of Wetzel County*¹³ (county boards of education).

The origin of the common-law immunity of local governments was a well-known misunderstanding of a 1788 English case, *Russell v. Men of Devon*.¹⁴ In

⁶ W. VA. CODE § 29-12A-3(c).

⁷ W. VA. CODE § 29-12A-4(c).

⁸ W. VA. CODE § 29-12A-4(c)(5).

⁹ W. VA. CODE § 29-12A-5(a).

¹⁰ W. VA. CODE § 29-12A-5(b).

¹¹ *Long v. City of Weirton*, 158 W. Va. 741, 214 S.E.2d 832 (1975).

¹² *Gooden v. Webster County Comm'n.*, 298 S.E.2d 103 (W. Va. 1982).

¹³ *Ohio Valley Contractors v. Wetzel County Bd. of Educ.*, 293 S.E.2d 437 (W. Va. 1982).

¹⁴ *Russell v. Men of Devon*, 100 Eng. Rep. 359 (1788).

that case no governmental entity was sued; the defendant was the population at large. The concern of the court was that there was no treasury from which the judgment could be paid, not that a public treasury would be called upon to pay it. Despite subsequent English authority clarifying and properly applying *Russell*,¹⁵ the leading American cases, *Mower v. Leicester*¹⁶ and *Bailey v. The Mayor of New York*,¹⁷ had already engrained the error in American common law.¹⁸

The immunity created was not absolute. In most jurisdictions, including West Virginia, an odd dichotomy developed between "governmental" functions, for which local governments could not be held liable, and "proprietary" functions, for which they could. If a function was not "strictly necessary" for the government to perform, it was proprietary. Aside from giving local governments little incentive to expand the range of services offered their citizens, practice caused a function once held proprietary to become governmental. Among services once held proprietary by the West Virginia Supreme Court of Appeals were the maintenance of a waterworks system for domestic use¹⁹ and the quarrying incident to street repairs.²⁰ Citing the unworkable nature of the standard, the West Virginia Supreme Court of Appeals abandoned it along with municipal immunity.²¹

The Act reestablished a comparable dichotomy. Most of the immunities granted in the act are clearly "governmental," e.g., legislative, judicial, licensing and penal powers. Others, however, are less clear, e.g., natural conditions on unimproved subdivision property, ice and snow, and products liability. Despite the broad language used in immunizing "legislative" functions and the like, the finite list of immunities should prove far more workable than the old "governmental-proprietary" test.²²

Actions brought under the Act are subject to the general two-year statute of limitations with the discovery rule tolling until the injury is or should be discovered.²³ There is, however, an important deviation where the action is brought

¹⁵ *Mayor of Lyme Regis v. Henley*, 110 Eng. Rep. 29 (1832), *aff'd* 6 Eng. Rep. 1180 (House of Lords, 1834); See discussion in *Long*, 158 W. Va. at 769-73, 214 S.E.2d at 851-853.

¹⁶ *Mower v. Leicester*, 9 Mass. 247 (1812).

¹⁷ *Bailey v. Mayor of New York*, 3 Hill 531 (N.Y. 1842).

¹⁸ For example, the "doctrine" was adopted by our mother state of Virginia shortly after the division of the State. *Richmond v. Long's Adm'rs*, 58 Va. (17 Grat.) 375 (1867), *overruled*, *First Virginia Bank-Colonial v. Baker*, 225 Va. 72, 301 S.E.2d 8 (1983); See *Long*, 158 W. Va. at 773, 214 S.E.2d at 853.

¹⁹ *Wigal v. Parkersburg*, 74 W. Va. 25, 81 S.E. 554 (1914).

²⁰ *Harrison v. McOwen*, 126 W. Va. 933, 30 S.E.2d 740 (1944). The maintenance of streets, however, was "governmental." *Morgan v. Logan*, 125 W. Va. 445, 24 S.E.2d 760 (1943).

²¹ *Long*, 158 W. Va. at 784-85, 214 S.E.2d at 859-860.

²² The old rule frequently led to some bizarre precedent. The operation of a municipal airport was "governmental," *Van Gilder v. Morgantown*, 136 W. Va. 831, 68 S.E.2d 746 (1949), but operating a municipal park was "proprietary." *Warden v. Grafton*, 99 W. Va. 249, 128 S.E. 375 (1925). See *supra* note 19 and accompanying text.

²³ W. VA. CODE § 29-12A-6(a).

for injuries to a minor. Actions for injuries to children under ten years of age must be brought within two years or prior to the child's twelfth birthday, whichever is longer.²⁴ The two years would of course only be longer where the injury was suffered before the tenth birthday but discovered afterwards. Another subsection further tolls the statute whenever the subdivision commits fraud or collusion in concealing necessary facts.²⁵

The tolling of the statute for both the discovery rule and where the tortfeasor has withheld information is consistent with prior law.²⁶ In its treatment of injuries to minors, however, the Act diverges from past practice. In general, the statute of limitations is tolled by the disability of minority, and will not begin to run until that disability disappears.²⁷ The effect of the Act is to start the running of the statute as early as the minor's tenth birthday rather than at his majority.²⁸

B. *Damage Awards*

Possibly the most significant procedural change under the Act is the prohibition against demands for specific amounts of monetary damages in the complaint. Plaintiffs may take demand only for such damages as the trier of fact deems appropriate.²⁹ This provision obviously contravenes the law applicable to actions in general, as Rule 8(a) of the West Virginia Rules of Civil Procedure requires a "demand for judgment for the relief to which he (the plaintiff) deems himself entitled." Whether this will achieve the apparent goal of lowering awards remains to be seen.

Regardless, awards will doubtless be reduced by the Act's direct limitations. First, the Act forbids recovery of punitive or exemplary damages against a subdivision.³⁰ These were previously recoverable.³¹ While no restriction is placed upon amounts recoverable as compensatory damages, noneconomic losses may not be awarded in excess of five hundred thousand dollars.³² Second, a subdivision's

²⁴ W. VA. CODE § 29-12A-6(b).

²⁵ W. VA. CODE § 29-12A-6(c).

²⁶ For cases expounding the discovery rule *see* *Harrison v. Seltzer*, 165 W. Va. 366, 268 S.E.2d 312 (1980); *Hill v. Clarke*, 161 W. Va. 258, 241 S.E.2d 572 (1978); *Morgan v. Grace Hosp., Inc.*, 149 W. Va. 783, 144 S.E.2d 156 (1965); and *Petrelli v. West Virginia Pittsburgh Coal Co.*, 86 W. Va. 607, 104 S.E. 103 (1920). W. VA. CODE § 55-2-17 (1981) tolls the statute where the tortfeasor fraudulently conceals. For applications *see* *Cameron v. Cameron*, 111 W. Va. 375, 162 S.E. 173 (1931); *Reynolds v. Gawthrop*, 37 W. Va. 3, 16 S.E. 364 (1892); *Vanbibber v. Beirme*, 6 W. Va. 168 (1873); *Duttine v. Savas*, 455 F. Supp. 153 (S.D. W. Va. 1978), *aff'd* 612 F.2d 841 (4th Cir. 1979).

²⁷ W. VA. CODE § 55-2-15 (1981).

²⁸ *See* W. VA. CODE § 29-12A-6(b).

²⁹ W. VA. CODE § 29-12A-6(d).

³⁰ W. VA. CODE § 29-12A-7(a).

³¹ *Long*, 158 W. Va. 741, 214 S.E.2d 832; *Bond v. City of Huntington*, 276 S.E.2d 539 (W. Va. 1981).

³² W. VA. CODE § 29-12A-7(b).

liability as the "deep pocket" among joint tortfeasors is limited. Where a jury attributes less than twenty-five per cent of the liability for the injury to a tortfeasor in an action covered by the Act, that tortfeasor has only several, but not joint liability.³³ Subdivisions thereby avoid being "stuck" by judgment-proof co-defendants. This of course modifies the common-law rule that each joint tortfeasor is liable for the whole, regardless of his relative fault, with only a right of contribution after excess payment.³⁴ Further, no right of contribution exists against a joint tortfeasor who enters into a good-faith settlement before the jury's or court's findings, which allows a subdivision to settle claims without fear of incurring further liability.³⁵ This reflects the prevailing rule.³⁶ No action or appeal is permitted by a taxpayer or anyone else with respect to a settlement thus entered by a political subdivision.³⁷

C. Other Matters

The Act generally leaves payment of claims by insurers to the terms of the particular contract of insurance. It does, however, forbid an insurer from entering into a settlement exceeding policy limits, and gives the subdivision a right of indemnity against the insurer to the policy limit.³⁸ Subdivisions also need not fear that their funds or property will be the subject of execution.³⁹ Only funds specifically appropriated for the payment of judgments may be used for that purpose.⁴⁰ The old rule permitted execution upon property or funds not devoted to essential government services.⁴¹ Clearly, a rule which protects these basic structures from liquidation to satisfy a judgment is a matter of necessity. The Act goes further and protects *all* property and funds of the subdivision except those devoted to paying judgments. If the funds available are insufficient, the fiscal officer of the subdivision must certify the amount owed to the appropriate taxing authority for inclusion in the budget of the next fiscal year, which tempers the new shields with consideration for the injured party.⁴² In the case of insurance carriers, however, holders of judgments may proceed in any manner allowed by law.⁴³

³³ W. VA. CODE § 29-12A-7(d).

³⁴ *Bradley v. Appalachian Power Co.*, 163 W. Va. 332, 256 S.E.2d 879 (1979) (joint and several liability). W. VA. CODE § 55-7-13 (1981) gives right of contribution, which is based upon each tortfeasor's pro rata comparative fault. *Sitzes v. Anchor Motor Freight, Inc.*, 169 W. Va. 698, 289 S.E.2d 679 (1982).

³⁵ *Cf.* W. VA. CODE §§ 29-12A-7(e)-(f), 29-12A-11(b)(1).

³⁶ *Tennant v. Craig*, 156 W. Va. 632, 195 S.E.2d 727 (1973); *See also* W. VA. CODE § 55-7-12 (1981) (release of one tortfeasor no bar to suit against others).

³⁷ W. VA. CODE § 29-12A-11(b)(2).

³⁸ W. VA. CODE § 29-12A-9.

³⁹ W. VA. CODE § 29-12A-10(a).

⁴⁰ W. VA. CODE § 29-12A-10(b).

⁴¹ *Brown v. Gates*, 15 W. Va. 131 (1879).

⁴² W. VA. CODE § 29-12A-10(b).

⁴³ W. VA. CODE § 29-12A-10(c).

Employees and officers of subdivisions are given extensive shields against liability. In addition to sharing the subdivision's various immunities, the entity must provide for the employee's defense in any action in which the acts of the employee giving rise to the suit are not manifestly outside the scope of his employment, except where the action is brought by a political subdivision.⁴⁴ Subdivisions must also indemnify their employees for any liability the employee is exposed to by acts within the scope of his employment.⁴⁵ If, on the other hand, it is later shown that the employee was, after all, acting without the scope of his employment, the subdivision has a right of indemnity.⁴⁶ This should eliminate the unfortunate situation in which a city councilman or county commissioner is forced to resign because of his inability to insure himself against liability.⁴⁷

III. REGULATION OF INSURERS

The second arm of the Act provides for more strict regulation of insurance rates. Insurance in effect as of the effective date of the article (June 1, 1986) cannot be reduced except by consent of the insured, and increases in premiums are limited to less than ten per cent per annum.⁴⁸ Additionally, such policies cannot be canceled unless the subdivision has failed to pay premiums, has committed fraud in the procurement of the policy, or has exposed the insurer to a substantial increase in exposure to loss.⁴⁹ An insurer who wishes to increase its rates must file with the insurance commissioner any information the commissioner requires to determine the profitability of the insurer's business, whereupon the commissioner may approve or disapprove the requested increase.⁵⁰

These limitations do not revolutionize policy cancellation. Cancellation of policies is usually left to the terms of the contract.⁵¹ Failure to pay premiums is clearly a breach of contract which would relieve the insurer from liability in any event, and fraud in the inducement of an insurance policy has long been held to invalidate the same.⁵² Moreover, the provisions allowing cancellation for substantial increase in the risk of loss reflects at least the *stated* reason insurers have given for cancelling policies during the recent "crisis."⁵³ Finally, a strict reading

⁴⁴ W. VA. CODE § 29-12A-11(a)(1).

⁴⁵ W. VA. CODE § 29-12A-12.

⁴⁶ W. VA. CODE § 29-12A-11(a)(2).

⁴⁷ Compare the general rule which imposes liability on both master and servant. *Robertson v. LeMaster*, 301 S.E.2d 563 (W. Va. 1983); RESTATEMENT (SECOND) OF AGENCY § 343 (1958).

⁴⁸ W. VA. CODE § 29-12A-17(a).

⁴⁹ W. VA. CODE § 29-12A-17(a)(1) to -(3).

⁵⁰ W. VA. CODE § 29-12A-17(b).

⁵¹ Absent statutory limitation. 10A MICHIE'S JUR. *Insurance* § 27 (1977). In key areas, the Legislature has seen fit to prescribe the conditions for cancellation. *E.g.* W. VA. CODE § 33-6A-1 to -5 (1982 & Supp. 1986) (cancellation of automobile insurance policies).

⁵² *Jarvis v. Pennsylvania Casualty Co.*, 129 W. Va. 291, 40 S.E.2d 308 (1946); *Federal Mutual Ins. Co. v. Deal*, 239 F. Supp. 618 (S.D. W. Va. 1965).

⁵³ See *supra* notes 1, 2 and accompanying text.

of the subsection involved reveals that only those policies in effect on the effective date of the article, (i.e. June 1, 1986) are involved.⁵⁴ Consequently, the provision should eventually die of attrition, leaving insurers free to cancel policies according to any contract provision they may develop. Even as to those policies clearly under the subsection, the change from prior practice is mild. Subdivisions gain probably little added protection from this subsection.

The subdivisions themselves are given broad leeway in insuring themselves against liability. They may self-insure, contract with other persons or subdivisions to provide for self-insurance, or purchase liability insurance.⁵⁵ If they choose the group self-insurance option, they may provide for joint administration of such a program, and do not thereby waive any of the immunities given them by the article.⁵⁶ If a subdivision chooses to buy liability insurance, it may opt to obtain it through the State Board of Risk and Insurance Management.⁵⁷

The subsection requiring an insurer to submit proposed fee changes and information as to the insurer's profitability to the insurance commissioner does, however, provide the *State* a mechanism to protect its subdivisions from profiteering. The new powers granted subdivisions to self-insure and pool their resources to either self-insure or buy liability insurance should also help divisions budget potential liability.

IV. MISCELLANEOUS MATTERS

Finally, the article deals with several miscellaneous matters.⁵⁸ Venue for actions under the article lies in the county where such political subdivision is located or where the cause of action arose.⁵⁹ The plaintiff must be a real party in interest; no claim is permitted under a right of subrogation.⁶⁰ The defendant is to be the political subdivision, and employees acting within the scope of their duties are not to be made defendants.⁶¹ The Act is not retroactive to those actions which

⁵⁴ The subsection reads, in pertinent part:

(a) Liability insurance coverage for political subdivisions in effect on the effective date of this article [June 1, 1986] shall not be reduced without the written consent of the insured and the policy premiums for such coverage shall not be increased by more than ten percent per annum. Such coverage shall not be cancelled except for. . . W. VA. CODE § 29-12A-17(a).

⁵⁵ W. VA. CODE § 29-12A-16.

⁵⁶ W. VA. CODE § 29-12A-16(e).

⁵⁷ W. VA. CODE § 29-12A-16(a).

⁵⁸ With one possible exception, the provisions of the Act are consistent with one another. W. VA. CODE § 29-12A-5(5) prescribes immunity from liability for civil insurrection, riot, insurrection, or the method of, or failure to provide, police protection. W. VA. CODE § 29-12A-4(5) provides for liability where it is imposed by another section of the code. W. VA. CODE § 61-6-12 (1984) imposes liability on counties for failure to prevent a lynching.

⁵⁹ W. VA. CODE § 29-12A-13(a).

⁶⁰ W. VA. CODE § 29-12A-13(c).

⁶¹ W. VA. CODE § 29-12A-13(b).

accrued prior to June 1, 1986, and is wholly inapplicable to actions in contract, by sureties under surety bonds, those brought under the Constitution or laws of the United States, and those involving certain labor disputes between the subdivision and its employees.⁶²

The entire bill contains several minor changes in other code sections. These either delete provisions requiring insurers to waive assertions of governmental immunity or insert provisions allowing them to assert the statutory immunity created by the Act.⁶³ In addition, one change allows the Board of Risk and Insurance Management to provide coverage to subdivisions.⁶⁴

V. CONCLUSION

Was the enactment of this legislation the most prudent means of confronting the insurance "crisis?" In order to answer in the affirmative, it is at least necessary to show that the causes of the crisis were those identified by the insurance companies: the "litigiousness" of our society and the risk of enormous verdicts.⁶⁵ In a recent study, Professor Marc Galanter concluded that the notion that ours is a litigious society is supported by only anecdotal evidence, and that our society compares favorably with other industrial nations in our resort to the courts.⁶⁶ Other studies have found a similar lack of empirical support for the idea.⁶⁷

Nor does it appear that the insurance industry is on the verge of collapse. The total return on the net worth of the industry has not once shown a loss for any year in recent memory.⁶⁸ Profits dipped drastically in the early 1980s, but a close examination shows that the drop was the result of irresponsible slashing of rates during the boom years of the late seventies.⁶⁹

⁶² W. VA. CODE §§ 29-12A-15, 29-12A-18.

⁶³ W. VA. CODE §§ 18-5-13 (1984 & Supp. 1986), 29-12-5a (each deletes requirement that insurers of county boards of education waive board's immunity); W. VA. CODE § 29-12-5 (grants insurer right to rely upon statutory immunity of political subdivisions); W. VA. CODE § 33-6-14a (deletes reference to governmental subdivisions in section requiring insurers to waive immunity of charitable organizations).

⁶⁴ W. VA. CODE § 29-12-5(b).

⁶⁵ See *supra* notes 1, 2 and accompanying text.

⁶⁶ M. Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigation Society*, 31 UCLA L. REV. 4 (1983).

⁶⁷ From 1980 through 1985, tort cases in federal courts increased at an annual rate of 4.6%. During the same period, other civil litigation rose at an annual rate of 11.7%. Between 1981 and 1984, verdicts in medical malpractice cases increased at an annual rate of 3.9%, well below the corresponding increase in health-care costs (11.8%). Stewart, *supra* note 2, at 91 (citing ADMINISTRATIVE OFFICE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR A-16 (1980); ADMINISTRATIVE OFFICE, U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR A-6 (1985); P. DANZON, THE FREQUENCY AND SEVERITY OF MEDICAL MALPRACTICE CLAIMS 6 (1982) (Institute for Civil Justice, Rand Corp.)).

⁶⁸ See Stewart, *supra* note 2, at 93, Chart 1.

⁶⁹ *Id.* at 92.

The Act does address the insurance companies by requiring them to justify raising rates to subdivisions. In its reestablishment of limited sovereign immunity however, it has cut off the head to cure the headache. Why should not the public at large pay (through taxes) for the torts of its governmental entities? Sovereign immunity makes no more sense now than it did when abrogated by the West Virginia Supreme Court of Appeals. The Act ignores the fact that jurors are taxpayers, and when and if those taxpayers reach the limit of their ability to finance this liability, their attitudes will adjust and verdicts will stabilize.⁷⁰ This internal control has been the ultimate force behind all changes in the tort system since its beginnings somewhere in the dim past.⁷¹ We should trust it now.

The best reason, however, for not excepting political subdivisions from tort liability is found in the opinion of the West Virginia Supreme Court of Appeals in *Long*: “[O]ne does not know whether he will have to suffer harm without recompense or whether he will be adequately compensated for the damage done him since he does not ‘choose’ his tort-feasor.”⁷²

Let us all hope we are lucky enough not to be “chosen” by our political subdivisions.

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⁷⁰ A new statute, however, makes it less likely that a person will serve as a juror in a case against a political subdivision in which he resides. W. VA. CODE § 52-1-13 (Supp. 1986).

⁷¹ Stewart, *supra* note 2, at 90; See, generally W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, *Prosser and Keeton on Torts* § 3 (5th Ed., 1984).

⁷² *Long*, 158 W. Va. at 782, 214 S.E.2d at 858.