

Virginia:

In the Circuit Court of the City of Richmond, John Marshall Courts Building

DAVID ALAN CARMICHAEL,

and

JESSE CARMICHAEL

Plaintiffs,

v. Case No.: CL08-2067

THE COMMONWEALTH OF VIRGINIA,

TIM KAINE, GOVERNOR,

**PIERCE R. HOMER, SECRETARY OF THE VIRGINIA
DEPARTMENT OF TRANSPORTATION,**

**D. B. SMIT, COMMISSIONER OF THE VIRGINIA
DEPARTMENT OF MOTOR VEHICLES,**

and

**ROBERT F. MCDONNELL, ATTORNEY GENERAL FOR THE
COMMONWEALTH OF VIRGINIA,**

Defendants.

ORDER

THIS MATTER is before the Court upon the Demurrer, Plea in Bar, and Motions to Dismiss of Defendants the Commonwealth of Virginia (“Commonwealth”), the Honorable Timothy M. Kaine, Governor (“Governor Kaine”), Pierce R. Homer, Secretary of the Virginia Department of Transportation (“Secretary Homer”), D.B. Smit, Commissioner of the Virginia Department of Motor Vehicles (“Commissioner Smit”), and the Honorable Robert F. McDonnell, Attorney General for the Commonwealth of Virginia (“Attorney General McDonnell”), argument of

counsel and the record herein, and it is hereby

ORDERED that Defendants' Demurrer as to Plaintiffs' request for a Writ of Mandamus against Governor Kaine is SUSTAINED;

ORDERED that Defendants' Plea of the Statute of Limitations as to all claims occurring before April 28, 2006 is SUSTAINED;

ORDERED that Plaintiffs' claims for monetary damages are barred by Va. Code § 57-2.02 and are hereby DISMISSED;

ORDERED that Defendants' Motion to Dismiss Plaintiff Jesse Carmichael's suit is DENIED;

ORDERED that, as it is unlawful for David Carmichael, a non-attorney, to litigate pro se the claim of his son, Jesse Carmichael before a court of law [*Myers v. Loudoun County Public Schools*, 418 F.3d 395, 400-401 (4th Cir. 2005)], the action brought on behalf of Plaintiff Jesse Carmichael is CONTINUED for 90 days from the date of the hearing, September 11, 2008, to enable him to employ counsel;

ORDERED that Defendants' Motion to Dismiss for Plaintiffs' failure to timely file an appeal of the decision of an administrative agency is DENIED, as the Commonwealth failed to advise Defendants of the time for filing a notice of appeal pursuant to Va. Sup. Ct. R. 2A:2;

ORDERED that Governor Kaine's Plea of Absolute Immunity is GRANTED, and all claims against Governor Kaine are hereby DISMISSED;

ORDERED that Secretary Homer and Commissioner Smit's Pleas of Qualified Immunity are GRANTED, and all claims against Secretary Homer and Commissioner Smit barred by

immunity are hereby DISMISSED;

ORDERED that Defendants' Demurrer as to the claims against Attorney General McDonnell based on his absolute prosecutorial immunity is SUSTAINED;

ORDERED that the Commonwealth's Motion to Dismiss Plaintiffs' claims against it, with the exception noted below, is GRANTED as to Plaintiffs' request for declaratory and injunctive relief, as Sovereign Immunity extends to suits in equity. See Afzall v. Commonwealth, 273 Va. 226, 231 (2007);

ORDERED that Defendants' Motion to Dismiss Plaintiffs' claims against the Commonwealth is hereby DENIED as to Plaintiffs' Due Process Claims under Article I, Section 11 of the Virginia Constitution. The right to operate a motor vehicle is not a fundamental constitutional right; however, the right may not be revoked or suspended without due process of law. Walton v. Commonwealth, 255 Va. 422, 428 (1998). Whether Defendants' failure to notify Plaintiffs of their right to appeal the decision of the Division of Motor Vehicles deprived them of their Due Process rights is a justiciable issue;

ORDERED that Plaintiffs' Due Process Claims under the Fifth Amendment of the United States Constitution are properly demurred to, as the Fifth Amendment is not an appropriate vehicle for asserting Due Process claims against the Commonwealth, and accordingly, such claims are hereby DISMISSED.

For the aforesaid reasons, Plaintiffs' only remaining viable claims are their fourth cause of action, alleging violations of Article 1, Section 16 of the Virginia Constitution, and their fifth cause of action, alleging violations of Article I, Section 11 of the Virginia Constitution, against

the Commonwealth. These Constitutional provisions are self-executing and not barred by
sovereign immunity. The allegations in the Complaint, viewed in the light most favorable to the
plaintiffs, state a cause of action. All other claims are hereby DISMISSED WITH PREJUDICE.

Copies of this order are mailed this day to counsel of record. Endorsements are waived

pursuant to Rule 1:13.

ENTER: 10/3/08

Margaret P. Spencer
Margaret P. Spencer, Judge

A Copy,
Teste BEVILL M. DEAN, CLERK
BY: [Signature] D.C.