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CLERK, CIRCUIT COURT
FAIRFAX, VA

**VIRGINIA:**

**IN THE CIRCUIT COURT OF FAIRFAX COUNTY**

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| **GRAFTON WILLIAM PETERSON, Administrator of the Estate of Erin Nicole Peterson, deceased,** | ) | |
| **Plaintiff,** | ) | **Case No. 2009-5670** |
| **v.** | ) | |
| **JOHN W. THYDEN, Administrator of the Estate of Seung-Hui Cho, deceased, *et al.*,** | ) | |
| **Defendants.** | ) | |

**PLEA OF SOVEREIGN IMMUNITY AND DEMURRER**

Defendants, the Commonwealth of Virginia ("the Commonwealth"), Virginia Polytechnic Institute and State University ("Virginia Tech"), and individual defendants Wendell R. Flinchum, Charles W. Steger, James A. Hyatt, Mark G. McNamee, David R. Ford, Lawrence G. Hincker, Ralph M. Byers, James Thomas Brown and Kay K. Heidbreder (collectively "the Virginia Tech officials"), by counsel, and pursuant to the Rules of the Supreme Court of Virginia, state as follows for their Plea of Sovereign Immunity and Demurrer:

1. Counts I, IV and VII against Virginia Tech must be dismissed pursuant to the Commonwealth's sovereign immunity.

2. Count II against the Commonwealth alleging *respondeat superior* liability for the alleged negligence and gross negligence of Virginia Tech must be dismissed pursuant to the Commonwealth's sovereign immunity.

3. Count I against Virginia Tech and Counts II, IV, V, VII and VIII against Virginia Tech and the Commonwealth alleging *respondeat superior* liability for the alleged negligence and gross negligence of any officers, agents and employees must be dismissed as the Complaint

fails to allege a cognizable legal duty to the plaintiff or the decedent and a breach of any such duty by Virginia Tech or by any officer, agent or employee that was also the proximate cause of the plaintiff's damages. Moreover, the facts alleged in the Complaint, as a matter of law, cannot support a claim of gross negligence against Virginia Tech or any officer, agent or employee of Virginia Tech or the Commonwealth.

4. Count VI against the Virginia Tech officials allegedly constituting the Emergency Policy Group must be dismissed because these defendants, as high-level governmental officials, are absolutely immune from suit pursuant to sovereign immunity.

5. Count VI against the Virginia Tech officials allegedly constituting the Emergency Policy Group must be dismissed because claims of simple negligence against officers, agents and employees of the Commonwealth are barred by sovereign immunity and the facts alleged in the Complaint, as a matter of law, cannot support a claim of gross negligence against any of these defendants.

6. The Complaint must be dismissed in its entirety as to Defendants Brown, Flinchum and Heidbreder because the Complaint does not state any cognizable cause of action against any of them.

7. Count I against Virginia Tech, Count VI against the Virginia Tech officials allegedly constituting the Emergency Policy Group, and Counts II, IV, V, VII and VIII against Virginia Tech and the Commonwealth alleging *respondeat superior* liability for the alleged negligence and gross negligence of agents, officers and employees must be dismissed because, under Virginia law, no legal duty exists to warn or protect with regard to third party criminal acts.

8. Count I against Virginia Tech, Count VI against the Virginia Tech officials allegedly constituting the Emergency Policy Group and Counts II, IV, V, VII and VIII against Virginia Tech and the Commonwealth alleging *respondeat superior* liability for the alleged negligence and gross negligence of agents, officers and employees must be dismissed because Virginia's public duty rule bars the claims asserted against Virginia Tech and the agents, officers and employees of Virginia Tech and/or the Commonwealth.

9. Count VI against the Virginia Tech officials allegedly constituting the Emergency Policy Group and Counts II, VII and VIII against Virginia Tech and the Commonwealth alleging *respondeat superior* liability for the alleged negligence and gross negligence of agents, officers and employees must be dismissed because the Complaint does not identify the authority and source of any alleged duty to warn or protect for each Virginia Tech official.

10. Count I against Virginia Tech, Count VI against the Virginia Tech officials allegedly constituting the Emergency Policy Group, and Counts II, IV, V, VII and VIII against Virginia Tech and the Commonwealth alleging *respondeat superior* liability for the alleged negligence and gross negligence of agents, officers and employees must be dismissed because the facts pled in the Complaint cannot support a finding that any of the acts or omissions alleged was the proximate cause of the decedent's death.

11. The Complaint's claims of "deliberate indifference" or "reckless indifference" against these defendants must be dismissed because no such common law cause of action exists in Virginia.

WHEREFORE, for the foregoing reasons, and for reasons to be set forth in a separate memorandum of points and authorities that will be filed when a hearing date and briefing schedule is set, these defendants respectfully request that the Complaint be dismissed with

prejudice as to them and that they be awarded such further and additional relief as deemed appropriate and necessary.

Respectfully submitted,

THE COMMONWEALTH OF VIRGINIA,[2] VIRGINIA POLYTECHNIC INSTITUTE[13] AND STATE UNIVERSITY, WENDELL[12] R. FLINCHUM, CHARLES W. STEGER,[14] JAMES A. HYATT,[15] MARK G.[16] McNAMEE, DAVID R. FORD,[17] LAWRENCE G. HINCKER,[18] RALPH M.[19] BYERS, JAMES THOMAS BROWN[20] and KAY K. HEIDBREDER[21]

By: Mike Melis
Counsel

William C. Mims
Attorney General of Virginia

Maureen Riley Matsen
Deputy Attorney General

*Peter R. Messitt (VSB No. 18882)
Senior Assistant Attorney General

*Mike F. Melis (VSB No. 43021)
Assistant Attorney General

*Counsel of Record

Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-2071
(804) 371-2087 (fax)

## CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was forwarded by U.S. mail, first class and postage prepaid, on this 15th day of May, 2009, to:

Robert T Hall, Esq.
Hall, Sickels, Frei & Mims, P.C.
12120 Sunset Hills Road, Suite 150
Reston, Virginia 20190
(703) 925-0500
(703) 925-0501 (fax)
*Counsel for Plaintiff*

Edward J. McNelis, III, Esq.
John D. McChesney, Esq.
Rawls & McNelis
111 East Main Street, Suite 1701
Richmond, Virginia 23219

Jim H. Guynn, Jr., Esq.
Elizabeth K. Dillon, Esq.
Adam G. Swann, Esq.
Guynn, Memmer & Dillon, P.C.
415 South College Avenue
Salem, Virginia 24153

John W. Thyden, Administrator of the Estate
Of Seung-Hui Cho, deceased
4312 North 40th Street
Arlington, Virginia 22207