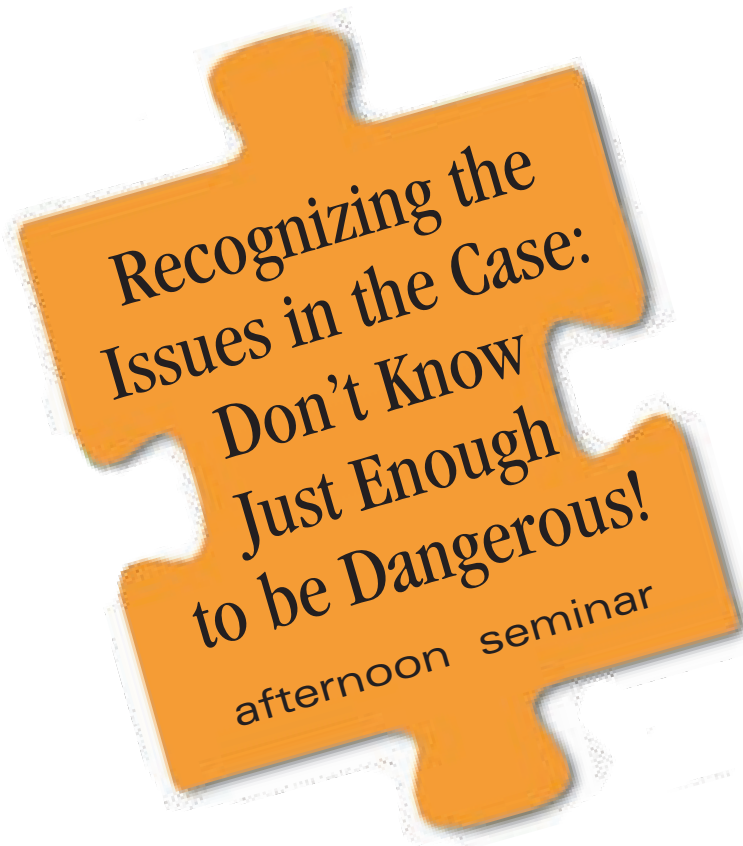


Virginia Trial Lawyers Association



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Five Myths about Immunity of Governmental Employees

by Roger T. Creager and Thomas J. Curcio¹

America's great writer Mark Twain said, "The report of my death has been greatly exaggerated."² America's great general Ulysses S. Grant said, "The distant rear of an army engaged in battle is not the best place from which to judge correctly what is going on in front."³ Two related principles emerge: First, rumors and misunderstandings have a tendency to arise. Second, the best way to dispel misunderstandings is by close examination of the facts at the source. Both these principles apply to the determination of the immunity of governmental employees. Misunderstandings of the controlling legal principles tend to develop, but those misunderstandings are readily dispelled by a careful examination of the actual decisions of the Supreme Court of Virginia.

Myth Number 1: There is an easily applied all-purpose pass-or-fail test for the immunity of governmental employees.

Attorneys litigating immunity issues frequently ask a court to apply the "*James v. Jane* four-part test" to determine whether a governmental employee is protected by immunity. They argue that the test is met or not met, as though immunity analysis merely involves checking off boxes on a four-item list to produce a "yes" or "no" answer. This erroneous notion is perhaps somewhat understandable, since the case law does refer at times to the "four-part test enunciated in *James v. Jane*, 221 Va. 43, 282 S.E.2d 864 (1980)."⁴ Closer examination of the full text of the decisions of the Court clearly shows, however, that *James v. Jane* did not establish an easily applied litmus test or list of check-off boxes. *James v. Jane* set forth four nonexclusive factors that courts should consider in evaluating whether immunity should apply.⁵

There is no simple litmus test for immunity.⁶ An overly broad application of immunity would unsoundly protect and encourage irresponsible, reckless, and even unlawful actions by public employees. An unduly narrow application of immunity would have an unwarranted chilling effect on public service. What is required in all cases is a close consideration of all the facts and circumstances, the pertinent factors, and the competing public policies involved.

Myth Number 2: The actions of governmental employees usually are entitled to the special protection of governmental-employee immunity.

Only the immunity of the sovereign itself is automatic and absolute (unless waived).⁷ There is no automatic or absolute immunity for governmental employees.⁸ Whether they are entitled to the special protection of immunity depends upon the particular facts of each case,⁹ and the employee has the burden of proving that his or her actions are entitled to immunity.¹⁰ Even when a governmental employee's actions are entitled to immunity, the employee is still not protected from liability for breach of a ministerial duty or for gross negligence.¹¹ Determination of governmental-employee immunity issues necessarily "requires line-drawing" and the courts "must engage in this difficult task."¹² "Yet, by keeping the policies that underlie the rule firmly fixed in our analysis, by distilling general principles . . . , and by examining the facts and circumstances of each case this task can be simplified."¹³

Myth Number 3: If an activity involves "judgment and discretion," then the governmental employee is always protected by immunity.

The governmental employee will, of course, usually insist that the conduct in question required her to use "judgment and discretion" and thus she is protected by governmental-employee immu-

nity. This assertion is, quite simply, the legal equivalent of an exaggeration. The true rule of law is set forth in the *James v. Jane* decision, where the Virginia Supreme Court made very clear: “Whether the act performed involves the use of judgment and discretion is a consideration, but it is not always determinative. Virtually every act performed by a person involves the exercise of some discretion.”¹⁴

Moreover, it is evident from the case law that the fact that a governmental actor used “discretion” may in some cases support immunity, but in other cases will oppose immunity. Thus, the argument for extending immunity to a governmental employee is strongest at the “highest levels of the three branches of government,” where the exercise of judgment and discretion is an inherent and assigned part of the responsibilities involved but becomes weaker “the farther one moves away from the highest levels of government.”¹⁵ This is because in the case of governmental employees at the highest levels, the exercise of “judgment and discretion” (in the fullest, immunity-protected sense) is centrally and quintessentially important to the job and the responsibilities assigned to them. The exercise of judgment and discretion by high-level governmental employees is fundamentally necessary in the public interest and warrants granting them immunity. By contrast, in the case of a lower-level employee, the fact that the employee used little or no discretion would usually support granting immunity (since the employee had little or no discretion and essentially did what he was ordered to do), while the exercise of judgment and discretion might well favor denying immunity (since the exercise of judgment and discretion do not lie at the heart of the low-level employee’s assigned role). Thus, the Supreme Court of Virginia has held that the argument for extending immunity to a low-level employee is strongest when there is “no evidence that they did anything other than exactly what they were required to do by the sovereign” and “were simply carrying out instructions given them.”¹⁶ On the other hand, there is little or no public interest in protecting a low-level governmental employee from liability for conduct that involved the exercise of a judgment and discretion that was not actually entrusted to or required of her.

The governmental employee’s own descriptions of the nature of his conduct are not controlling. As previously noted, the governmental employee facing liability will almost always say that he had to use judgment and discretion in the

activity in question. In many cases, the governmental employee will say that he was confronted with an emergency or at least with a situation that was unusual and required urgent actions. These self-serving labels assigned by the employee to his own actions may perhaps be relevant in some cases, but they surely cannot be controlling or determinative. If they were, the immunity decision would, in effect, be made by the employee himself by virtue of self-serving assertions rather than by the courts to which the decision is properly entrusted. The mere fact that the employee claims he used his judgment and discretion to determine and implement a particular course of action does not automatically mean immunity applies to any and all conduct involved.¹⁷ Moreover, as noted above, virtually every action involves the use of some kind of judgment and discretion. The critically important issue is whether the action in question involved an exercise of the “special kind of judgment and discretion” which, under the circumstances presented, merit the special protection of governmental-employee immunity.

Myth Number 4: Policy manuals and instructions are irrelevant and inadmissible with respect to the immunity issue.

Governmental employees asserting immunity sometimes contend that violations of the employer’s guidelines or orders or the employee’s training and instructions are inadmissible “private rules” and cannot have any bearing on the issues raised by a plea in bar. This assertion is illogical and contrary to Virginia law. The Supreme Court

...virtually every action involves the use of some kind of judgment and discretion.

of Virginia has held that private rules are not admissible to establish the standard of care in a negligence action, but they can be introduced into evidence for other purposes.¹⁸ Moreover, it is obvious that the public interest is not well served by granting immunity protection to conduct that is contrary to the limitations the governmental entity has deliberately and specifically imposed upon the employee’s activities and conduct. As noted above, the Supreme Court of Virginia has

long held that an employee who exceeds his authority does not deserve immunity protection. In a 2004 decision that rejected immunity, the Supreme Court relied repeatedly on the written procedures of the Fairfax County Fire Department.¹⁹

Myth Number 5: The fact that an employee exceeded his authority, violated the law, or violated his employer's instructions and requirements is of no consequence in the immunity analysis.

Governmental employees seeking the protection of immunity often argue that the fact that they exceeded their authority, violated the law, or violated their employer's instructions and requirements is of no consequence in the immunity analysis. Once again, this argument is contrary to the decisions of the Supreme Court of Virginia. When an individual governmental employee fails to act in accordance with duties imposed upon him by law or by his governmental employer, then he is not entitled to immunity. "There is no statute which authorizes the officers or agents of the state to commit wrongful acts. On the contrary, they are under the legal obligation and duty to confine their acts to those that they are authorized by law to perform. If they exceed their authority, or violate their duty, they act at their own risk[.]"²⁰

When an individual governmental employee fails to act in accordance with duties imposed upon him by law or by his governmental employer, then he is not entitled to immunity.

Defendants arguing that immunity applies even though their conduct violated applicable laws, duties, orders, training, or instructions frequently rely upon a misinterpretation of the Supreme Court's decision in *Colby v. Boyden*.²¹ In *Colby*, the issue was whether a police officer engaged in a vehicular pursuit was entitled to governmental-employee immunity. A statute enacted by the General Assembly sets forth²² conditions that must be present in order for a police officer to be exempt from complying with the usual motor vehicle laws and thus be allowed to speed, run red lights, and engage in other conduct

that would usually be unlawful.²³ In the course of holding that under the circumstances presented (which the Court assumed did comply with the requirements of the emergency-response statute), the Court said that the emergency-response statute "neither establishes nor speaks to the degree of negligence necessary to impose civil liability on one to whom the section applies. The degree of negligence required to impose civil liability will depend on the circumstances of each case."²⁴ Police defendants sometimes incorrectly interpret this statement as meaning that whether or not their conduct violated the law (including the emergency-driving statute) makes no difference and is irrelevant and inadmissible on the issue of whether their conduct is protected by immunity. The *Colby* decision cannot, however, fairly be understood to establish such an illogical conclusion. After all, decades of Supreme Court decisions (previously cited) establish that whether an employee has violated the law or exceeded his authority and instructions does matter.²⁵ It would be illogical to think that the public interest requires granting the special protection of immunity to a governmental employee who violates the law or exceeds his authority

Defendants also sometimes cite *Colby* in support of an argument that whether they violated guidelines or requirements governing their conduct is irrelevant with respect to the immunity determination. It is important to understand the arguments and issues that the Court ruled upon in *Colby*. In *Colby*, the injured plaintiff argued that because the police department had guidelines addressing emergency-response driving any and all emergency driving was ministerial in nature and a police officer engaged in emergency driving (even emergency driving that complied with all applicable laws, orders, guidelines, training, and instructions) would never be protected by immunity. It is not surprising that the Supreme Court of Virginia rejected this absurd argument. The Court held:

The City exercised administrative control and supervision over Officer Boyden's activities through the promulgation of guidelines governing actions taken in response to emergency situations. However, those guidelines do not, and cannot, eliminate the requirement that a police officer, engaged in the delicate, dangerous, and potentially deadly job of vehicular pursuit, must make prompt, original, and crucial decisions in a highly stressful situation. Unlike the driver in rou-

tine traffic, the officer must make difficult judgments about the best means of effectuating the governmental purpose by embracing special risks in an emergency situation. Such situations involve necessarily discretionary, split-second decisions balancing grave personal risks, public safety concerns, and the need to achieve the governmental objective.²⁶

It would be a mistake, however, to conclude that this language means that any time a police officer or other public official claims he was confronted with an emergency, he is always automatically entitled to immunity, and that he should be granted immunity regardless of whether he violated applicable rules, guidelines, or statutes. Any such conclusion would be contrary to the explicit holding of the Court in *Colby* that was tied to the facts and circumstances presented.²⁷

In *Colby*, the Supreme Court also rejected an illogical argument that where all the requirements of the emergency-response statute were met the statutory reference to “civil liability for failure to use reasonable care” in effect eliminated the immunity that would otherwise apply.²⁸ Once again, the Supreme Court of Virginia soundly rejected this absurd argument which would have stood logic and immunity law on its head.²⁹

Nothing in the *Colby* opinion, however, stands for the proposition that whether the police officer complied with the emergency-response statute or other applicable guidelines or duties should be completely disregarded for purposes of the immunity analysis. To the contrary, the *Colby* decision itself recognized that in enacting the emergency-response statute the legislature struck a critically important balance between competing policy considerations and decided how the proper balance should be achieved. The Supreme Court of Virginia held:

In enacting the statute, the legislature balanced the need for prompt, effective action by law enforcement officers and other emergency vehicle operators with the safety of the motoring public. A similar concern for balance underlies the Virginia sovereign immunity doctrine. Both concerns are satisfied here without conflict.³⁰

The public interest in the safety of the motoring public that underlies both the statutory emergency-response requirements and the immunity analysis is a profound and important public interest indeed. Studies show that when a high-

speed police chase ends in a fatality, an innocent bystander is likely to be the one killed a third of the time.³¹ The governmental-employee immunity analysis must include consideration of the statutory requirements, because “a similar concern for balance underlies” both the immunity analysis and the statutory provisions. It would be an anomalous result to conclude that a police officer who runs a red light in direct violation of statutory mandates and in direct violation of her orders, guidelines, training, and instruction should be granted the special protection of governmental-employee immunity. The public interest is not served by actions by governmental employees who exceed their authority or violate the law. If a governmental employee expects his conduct to be accorded the special protection of immunity, it is reasonable and just, and serves the public interest, to insist that the employee must comply with the law and with orders, requirements, and guidelines that govern his conduct. If they fail to do so, they “act at their own risk.” This is the balance struck by the law of Virginia and this balance properly promotes and serves the competing public interests involved. ☪

Endnotes:

- 1 The authors were recently co-counsel in a major police-response case in Fairfax County. A Fairfax County police officer responding to a report of a fight at a grocery store ran a red light, struck a car in the intersection, and killed the driver of that car. Fairfax County was protected by absolute sovereign immunity. The authors sued the police officer, who then asserted she was entitled to governmental-employee immunity. The immunity plea was tried to the court. Judge R. Terrence Ney of the Fairfax Circuit Court overruled the plea and held the police officer would be liable for simple negligence. Judge Ney stated that the police officer’s “belief that it was an emergency, simply put, does not make it an emergency.” Volume II, Transcript of August 12, 2009, Trial at page 337 lines 21-22. See *McIntosh v. Perry*, Case No. 2009-00354, Order entered August 12, 2009 (Fairfax Cir. Court). Shortly before the subsequent jury trial on the tort claims, Fairfax County agreed to pay \$1.5 million to settle the case. The *Washington Post* reported that Supervisor Gerald W. Hyland, who represents the district where the accident occurred, said the settlement was the first time during his time on the board (since 1988) that the county had agreed to pay any amount to settle a lawsuit involving a vehicular collision. See <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/26/AR2010012603513.html>.
- 2 Clemens, Clara, *My Father, Mark Twain* 184 (New York: 1931).

- 3 Ulysses S. Grant, *Personal Memoirs* 182 (Modern Library Paperback Ed. 1999).
- 4 *Heider v. Clemons*, 241 Va. 143, 145, 400 S.E.2d 190, 191 (1991).
- 5 The Supreme Court of Virginia has explained:
In *James [v. Jane]* we developed a test to determine entitlement to immunity. Among the factors to be considered are the following:
 1. the nature of the function performed by the employee;
 2. the extent of the state's interest and involvement in the function;
 3. the degree of control and direction exercised by the state over the employee; and
 4. whether the act complained of involved the use of judgment and discretion.*Messina v. Burden*, 228 Va. 301, 313, 321 S.E.2d 657, 663 (1984) (citing *James v. Jane*, 221 Va. at 53, 267 S.E.2d at 113). All emphasis in this article is added to the original quoted material unless otherwise indicated.
- 6 "Admittedly, no single all-inclusive rule can be enunciated or applied in determining entitlement" to immunity. *James*, 221 Va. at 53, 282 S.E.2d 864, 869.
- 7 See, e.g., *Messina v. Burden*, *supra*.
- 8 *Id.*
- 9 "The degree of negligence required to impose civil liability will depend on the circumstances of each case" and "[e]ach case must be evaluated on its own facts[.]" *Colby v. Boyden*, 241 Va. 125, 130, 132, 400 S.E.2d 184, 187 (1991). Immunity has been extended to lower-level governmental employees only on a "case-by-case basis." *Messina*, 228 Va. at 309, 321 S.E.2d at 661.
- 10 See *Tomlin v. McKenzie*, 251 Va. 478, 480, 468 S.E.2d 882, 884 (1996).
- 11 *Colby v. Boyden*, 241 Va. at 128-29, 400 S.E.2d at 186-87.
- 12 *Messina v. Burden*, 228 Va. at 310, 321 S.E.2d at 662.
- 13 *Id.*
- 14 *James v. Jane*, 221 Va. at 53, 282 S.E.2d at 869.
- 15 *Messina*, 228 Va. at 309, 321 S.E.2d at 661.
- 16 *Id.*
- 17 See, e.g., *Friday-Spivey v. Collier*, 268 Va. 384, 387 n.3, 390, 601 S.E.2d 591, 592 n.3, 594 (2004) (where the evidence showed that the fire truck driver was "driving in a nonemergency manner without lights and sirens" and that department procedures for emergencies required lights and siren, and the trial court erred in applying immunity). In *Friday-Spivey*, the Supreme Court held that immunity did not apply despite the fire truck driver's testimony he felt an urgent response was necessary since an infant was locked in a car and "we just [did not] know what to expect when we [got] there" and "despite a natural inclination to classify the report of a child in a locked car as an 'emergency.'" *Id.* Even though the fire truck driver thought that an urgent response was necessary, the evidence showed that the fire truck driver "knew nothing about the infant's condition at that time." 268 Va. at 387, 601 S.E.2d at 594. As *Friday-Spivey* shows, what matters is not the governmental employee's after-the-fact, self-serving, subjective claim of urgency but rather what all of the evidence shows regarding whether the officer was actually required to use and did use the kind of "judgment and discretion" that warrants the application of governmental immunity. See *McIntosh v. Perry*, *supra*; *Lake v. Mitchell*, 77 Va. Cir. 14, *; 2008 Va. Cir. LEXIS 118 (Prince George Cir. Ct. 2008) (police officer's subjective claim of

"emergency" was rejected as a matter of law since the actual evidence showed he did not respond in an emergency manner and violated his departmental orders). In *Lake*, the Court held:

Defendant fails all four prongs of the test first set forth in *James v. Jane*, 221 Va. 43, 53, 282 S.E.2d 864 (1980). (1) Mitchell [the police officer] was not performing an emergency function at the time he was driving to the homicide scene; (2) the Commonwealth had no interest in Mitchell's use of excessive speeds; (3) there was not a sufficient degree of control and direction exercised by the Commonwealth over Mitchell; and (4) nor was Mitchell using discretion to act in a manner, which is integral to the Commonwealth's interest of public safety.

Lake v. Mitchell, 77 Va. Cir. at 15.

- 18 The evidentiary rule in Virginia is that private rules are not admissible to establish the standard of care in a negligence action. See *Virginia Ry. & Power Co. v. Godsey*, 117 Va. 167, 83 S.E. 1072 (1915); *Pullen v. Nickens*, 226 Va. 342, 310 S.E.2d 452 (1983). The Supreme Court of Virginia has recognized that evidence regarding "private rules" is admissible when offered for other purposes. Thus, for example, the Court has held that a defendant's safety policies may be relevant and admissible in a negligence action on the issue of defendant's knowledge of a potential danger and as evidence of the foreseeability of the occurrence that caused injury. See *New Bay Shore v. Lewis*, 193 Va. 400, 408-409, 69 S.E.2d 320, 325-326 (1952) ("The safety rules adopted by defendant, and its instructions to its employees, clearly indicate that defendant was aware of the potential dangers involved"). Similarly, the Court has held that training and instruction that a defendant has received is relevant and admissible evidence on the issue of whether his conduct constituted willful and wanton negligence. See *Alfonso v. Robinson*, 257 Va. 540, 546, 514 S.E.2d 615, 619 (1999). Rules may also be relevant and admissible evidence with respect to issues such as vicarious liability and sovereign immunity. See *Houchens v. Univ. of Va.*, 23 Va. Cir. 202 (Charlottesville Cir. Ct. 1991). In 2006, the Supreme Court of Virginia held that no error had been committed when the trial court admitted evidence of private rules where the evidence was admitted for a purpose other than proving the standard of care required in a negligence action. See *Riverside Hospital, Inc. v. Johnson*, 272 Va. 518, 636 S.E.2d 416 (2006).
- 19 In *Friday-Spivey*, the Supreme Court of Virginia, in rejecting an immunity plea, observed that under the Fairfax County Fire and Rescue Department Standard Operating Procedures a "Priority 1" call means that there is a "great potential for loss of life or serious injury" and a "[r]esponse to a Priority 1 [emergency] call requires the use of warning equipment," and stressed that at the time of the collision he was "driving in a nonemergency manner without lights and sirens" and under such circumstances he "was required [by department procedures] to obey all traffic regulations." 268 Va. 387 n.1, 390, 601 S.E.2d 591, 592 n.3, 594.
- 20 *James v. Jane*, 221 Va. at 55, 282 S.E.2d at 870 (quoting *Eriksen v. Anderson*, 195 Va. 655, 660-61, 79 S.E.2d 597, 600 (1954)). See *Bowers v. Commonwealth, Dep't of Highways & Transp.*, 225 Va. 245, 248-249, 302 S.E.2d 511, 513 (1983) ("Our conclusion is that the immunity of the State from actions for tort extends to State agents and employees where they are acting legally and within the scope of their employment, but if they exceed their authority and go beyond the sphere of their employment, or if they step aside from it, they do not enjoy such immunity when they are sued by

- a party who has suffered injury by their negligence”) (quoting *Sayers v. Bullar*, 180 Va. 222, 230, 22 S.E.2d 9, 13 (1942).
- 21 241 Va. 125, 400 S.E.2d 184 (1991).
- 22 The emergency-response statute is currently set forth at Virginia Code 46.2-920. At the time of the *Colby* decision, the emergency-response statute was set forth at former Virginia Code § 46.1-226.
- 23 Under Virginia law, a police officer must abide by all traffic laws unless his conduct is within some express statutory exception. See *Virginia Transit Co. v. Tidd*, 194 Va. 418, 425 (1952) (even police officer responding to an emergency has a duty to comply with all motor vehicle laws unless some statutory exemption applies); *White v. John Doe*, 207 Va. 276 (1966) (all statutory duties imposed by motor vehicle statutes applied to the police officer unless some statutory provision specifically exempted him); *Yates v. Potts*, 210 Va. 636, 640 (1970) (police officer who brought personal injury action against speeder he was pursuing was not guilty of negligence per se “if the exemption [established by a predecessor to current Virginia Code § 46.2-920] is applicable”). The General Assembly has expressly provided that the statutory duties governing motor vehicle operation are applicable to all drivers, including police officers, unless some specific exception is proved to apply. See Virginia Code § 46.2-801 (“The provisions of this chapter applicable to the drivers of vehicles on the highways shall apply to the drivers of all vehicles . . . subject to such exceptions as are set forth in this chapter”).
- 24 241 Va. at 132, 400 S.E.2d at 188.
- 25 See footnote 20 *supra*.
- 26 241 Va. at 129-130, 400 S.E.2d at 187.
- 27 “While each case must be evaluated on its own facts, to hold that Officer Boyden’s acts here were merely ministerial, thereby denying him the protection of the sovereign immunity defense for the actions complained of in this case, not only ignores the realities of the circumstances under which he performed his **job**, but also would inhibit law enforcement officers faced with similar decisions regarding vehicular pursuit in the future. Applying the four-part test of *James*, we concur with the trial court that the defense of sovereign immunity was applicable to Officer Boyden’s actions in this case.” 241 Va. at 130, 400 S.E.2d at 187.
- 28 241 Va. at 132, 400 S.E.2d at 188 (quoting statutory language).
- 29 “Adopting *Colby*’s position would create the anomalous result of requiring a showing of simple negligence in order to impose civil liability on a policeman who complies with Code § 46.1-226 [now § 46.2-920] during a vehicular pursuit, while requiring gross negligence as a prerequisite for imposing liability upon an officer who fails to comply with the statute. If, for example, an officer in hot pursuit failed to have the requisite insurance in force, the statute would be inapplicable and he would be civilly liable only on a showing of gross negligence. Yet, if his colleague had the requisite insurance, simple negligence would be sufficient to impose liability upon him. Such a result is illogical and is not required by the statute or by the cases decided thereunder.” *Colby v. Boyden*, 241 Va. at 132, 400 S.E.2d at 188.
- 30 *Colby v. Boyden*, 241 Va. at 132, 400 S.E.2d at 188.
- 31 See editorial, April 21, 2010, “Law Enforcement; Deadly Pursuits,” *Richmond Times-Dispatch* reprinted at http://www2.timesdispatch.com/news/2010/apr/21/ed-chas21_20100420-175804-ar-156137.

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX

JOHN MCINTOSH and
CYNTHIA COLASANTO
Co-Administrators for the Estate
of Ashley McIntosh, Deceased

Plaintiffs,

v.

AMANDA PERRY

Defendant.

Case No. 2009-00354

DEFENDANT PERRY'S MEMORANDUM IN SUPPORT OF PLEA IN BAR

Defendant Officer Amanda Perry (Officer Perry), by counsel, hereby submits this memorandum in support of her plea in bar of sovereign immunity asserted in this matter.

FACTUAL STATEMENT

This action arises out of an automobile accident which occurred on February 12, 2008, just before 5 p.m., at the intersection of Rt. 1 and Boswell Avenue in Fairfax County, when a marked police cruiser driven by Fairfax County Police Officer Perry collided with a vehicle driven by decedent Ashley McIntosh, resulting in the death of Ms. McIntosh.

At 16:45:01¹ on February 12, a 911 operator or "call taker" at the Fairfax County Department of Public Safety Communications documented a call from a citizen concerning an incident at the

¹ Precise times of certain events and other information related to an incident are generated by the Computer Aided Dispatch ("CAD") system used by the Department of Public Safety Communications ("DPSC") for communications with police and fire department personnel and for communications among the police and fire personnel in the field. Each police cruiser is equipped with a computer (Mobile Data Terminal or "MDT") which the officer can use to send to or receive information from DPSC or "dispatch," and to communicate with other officers in the field via the CAD system. Messages sent through the system are generally referred to as "CAD messages."

Giant Food Store at Beacon Mall in the Mount Vernon District.² The information entered into the CAD system concerning the event was "two white males hitting a black male at the entrance to the store. Black jacket, blue pants." This information was sent immediately by the CAD system to Gary Branton, the dispatcher responsible for the Mount Vernon District area. The event was automatically assigned by the CAD system a high priority of "Priority Two", which meant that the event needed to be dispatched to the police in five minutes or less.

Branton viewed the event information and checked for available units to respond to the scene of the fight, which, according to established procedure, required two units to be dispatched to the scene. He determined from the CAD system that Officer Perry was the only available officer to send, even though the incident was outside Officer Perry's assigned patrol area. The weather that day had put a strain on police resources, as rain starting to freeze had caused a number of accidents, particularly in the Franconia District, north of the Mount Vernon District, requiring officers to respond to the scenes of numerous accidents. Additionally, the Franconia and Mount Vernon districts shared a radio frequency for voiced radio communications, and the increased radio traffic made it difficult to communicate by radio.

Under normal circumstances, given that the fight call was a high priority event according to dispatch procedures, Branton would have dispatched the event to available units and would have also voiced the event to the available police units over the radio. Given the existing circumstances, however, Branton determined that the best way to proceed was to send Officer Perry a CAD message at 16:47:38 telling her to "start north for event # 2531." Officer Perry at that time had just finished

² For police coverage, Fairfax County is divided into eight districts, in each of which is located a police district substation.

assisting Officer Gary Allen in canvassing a neighborhood for possible witnesses to a burglary, and the two officers were in their cruisers at Grist Mill Park, several miles south of Beacon Mall. Upon receiving the CAD message from Branton, Officer Perry accessed on her computer or MDT the information concerning event number 2531 and saw the event remarks of two white males hitting a black male at the entrance to the store, which she determined to be an emergency which could result in serious bodily harm, requiring her to respond quickly to the scene. At 16:47:48 she self dispatched to the scene by touching a button on the touch screen of her MDT, which automatically sent a message to dispatch that she had self dispatched to the scene. She informed Officer Allen that she was responding to a fight, and Officer Allen decided to back her up for the event. They then both left in their cruisers, proceeding toward Rt. 1 to head north to Beacon Mall.

As Officer Perry drove north on Route 1, she exceeded the speed limit of 45 mph at times, but she did not activate her lights and siren until confronted with a red light at Sherwood Hall Lane, when she used her lights and siren to clear the intersection.³ She then turned off her lights and siren and proceeded north on Route 1. Although this use of lights and siren was not in strict compliance with Fairfax County Police General Order 501.1, which required the use of lights and siren at all times while responding to an emergency, Officer Perry believed that she could proceed safely and quickly to the scene without constant use of lights and siren. This conclusion was based on her experience that citizens often responded to lights and sirens by stopping and turning unpredictably, blocking the path of emergency vehicles.

As Officer Perry approached South Fordson Road, which is a short distance south of Boswell,

³ Officer Perry's driving was captured on the vehicle's Mobile Video Recorder ("MVR") which was activated from Sherwood Hall Lane up to the collision at Boswell. The tape also indicates when lights and siren were in use and when brakes were applied.

she saw the light at South Fordson turn yellow, so she activated her emergency lights and began to try to activate her siren, which she was unsuccessful in activating. As she approached Boswell, where the light was now red, she slowed her vehicle to a speed below the speed limit, moved her vehicle to the center through lane, and proceeded through what appeared to be a clear intersection with vehicles stopped in all directions. Suddenly, the vehicle driven by Ms. McIntosh came from Officer Perry's left and traveled directly in front of Officer Perry's vehicle, which struck Ms. McIntosh's vehicle broadside. Ms. McIntosh had been waiting at the light in a left turn only lane, presumably to turn left to proceed north on Route 1, but rather than turn left, she proceeded straight across the intersection, directly into the path of Officer Perry's vehicle.

Around the time of the collision, the fight incident was changed from a fight to a shoplifting incident with the suspect in custody, based on further information phoned in to the dispatch center. This information was sent to Officer Perry's MDT or computer, but in order to view the message she would have had to access it by pulling the information up on her computer while she was expediting to the scene. Officer Perry did not view the message and only became aware of the change in the event description after the accident. From all available information, the accident occurred within less than a minute from when the updated information was sent to Officer Perry's MDT. Officer Allen, who was also responding to the fight scene, did not become aware of the change until after the accident. Significantly, the change information was not voiced over the radio because of heavy radio traffic that day.

STATEMENT OF ISSUE

Plaintiffs have alleged claims for both simple and gross negligence, recognizing that, if Officer Perry is entitled to assert the defense of sovereign immunity, then she can be held liable only

for gross negligence. The parties have stipulated that the sole issue for determination at the plea in bar hearing is whether Officer Perry is entitled under the facts presented to claim the defense of sovereign immunity. The issue of whether Officer Perry's driving conduct amounts to gross negligence or not is reserved for the trial on the merits, set for February 8, 2010.

Further, the existence of sovereign immunity is a question of law for the court to determine. *City of Chesapeake v. Cunningham*, 268 Va. 624, 633, 604 S.E.2d 420, 426 (2004). Any genuine disputed issues of fact are to be determined by the trier of fact, which in this case is the jury. It is respectfully submitted that there are no issues of fact to be determined by the jury.

ARGUMENT

1. Officer Perry Exercised Judgment and Discretion in Responding to the Call and is Thus Entitled to the Protection of Sovereign Immunity.

The doctrine of sovereign immunity serves a multitude of purposes, including protecting the public purse, providing for smooth operation of government, eliminating public inconvenience and danger that might spring from officials being fearful to act, assuring that citizens will be willing to take public jobs, and preventing citizens from improperly influencing the conduct of governmental affairs through the threat or use of vexatious litigation. *Messina v. Burden*, 228 Va. 301, 308, 321 S.E.2d 657, 660 (1984).

Messina is the seminal case in Virginia regarding whether individual employees of local governments are entitled to the protection of sovereign immunity. In *Messina*, the Virginia Supreme Court distinguished between officials at the very highest levels of government who have generally been accorded absolute immunity and lesser-ranking governmental officials whose immunity must be assessed on a case-by-case basis. *Messina*, 228 Va. at 309-10, 321 S.E.2d at 661-62. To assist in

its assessment, the Court reiterated the four-part test it had adopted in *James v. Jane*, 221 Va. 43, 282 S.E.2d 864 (1980), that a defendant employee is entitled to qualified immunity when (1) he performs a governmental function; (2) the county has a strong interest and involvement in that function; (3) the county exercises control over him; and (4) he must use his own judgment and discretion in performing the function. *Messina*, 228 Va. at 313, 321 S.E.2d at 663, citing *James v. Jane*, 221 Va. at 53, 282 S.E.2d at 869. When a public employee meets this four-part test, an action for simple negligence is barred.

In this case, there is no dispute that the four factors of the test for immunity are met. Fairfax County necessarily has a strong interest in providing law enforcement services to its citizens, and it exercises control over its officers in providing such services by requiring them to complete specialized law enforcement training and by promulgating regulations to guide the officers' discretion while in the field. See Va. Code Ann. §§ 15.2-823 and 15.2-842. At the time of the accident, Officer Perry was responding to the scene of a crime where two white males were assaulting a black male, which is clearly a governmental function. Moreover, Officer Perry was required to use her own judgment and discretion as she operated her police vehicle through traffic in an emergency response, and she was clearly not involved in a ministerial function of driving in routine traffic.

Under the applicable law in Virginia, it is undisputed that Officer Perry was performing a governmental function and that she was required to exercise judgment and discretion under the circumstances giving rise to this case. In *Colby v. Boyden*, 241 Va. 125, 400 S.E.2d 184 (1991), the Court found that a police officer who was in pursuit of a traffic offender and ran a red light, with emergency lights on and only a short burst of the siren, was exercising judgment and discretion and

was entitled to sovereign immunity. The Court in *Nationwide Mutual Insurance Co. v. Hylton*, 260 Va. 56, 530 S.E.2d 421 (2000), found that a state trooper, who had made the decision to apprehend a traffic offender and was in the process of determining the manner in which to proceed when he was involved in an accident, was entitled to the bar of sovereign immunity. In *National R.R. Passenger Corp. v. Catlett Volunteer Fire Co.*, 241 Va. 402, 404 S.E.2d 216 (1991), the Court held that the driver of a fire truck which collided with a train as it crossed a railroad track while responding to a call was entitled to sovereign immunity. In each of these cases, the Court held that the defendant driver was entitled to sovereign immunity because each was performing a governmental function that involved the exercise of judgment and discretion in carrying out governmental purposes.

Further, in *Smith v. Settle*, 254 Va. 348, 492 S.E.2d 427 (1997), the Court held that an ambulance driver who was involved in a collision that occurred when he was driving to a location where he could establish radio contact with his squad, which had been dispatched to a call, was entitled to sovereign immunity. The Court concluded that the ambulance driver was not merely preparing to respond to the call; his actions were actually a necessary part of responding to the call. This decision is particularly persuasive here, as, if driving to a location to establish radio contact is protected, then obviously expediting to the scene of a fight which could easily result in severe bodily harm must also be protected.

Although the case did not involve an emergency vehicle, the decision in *Stanfield v. Peregoy*, 245 Va. 339, 429 S.E. 2nd 11 (1993), demonstrates the importance of the doctrine of sovereign immunity in Virginia. In that case, the defendant was an employee of the City of Alexandria who operated one of the city's salt trucks. On the day in question, on which between four and eight inches of snow had fallen, he had spread salt along three streets. As he was salting a fourth street, he

approached an intersection and, faced with a stop sign, attempted to stop, but the truck skidded on the ice into the intersection and collided with plaintiffs' vehicle. The Court held that sovereign immunity applied:

At the time of the accident, this defendant was not involved in 'the simple operation' of the vehicle... nor was he driving 'in routine traffic.' Perhaps if this accident had happened as defendant was driving his truck en route to the area he was assigned to plow and salt, or if it occurred when he was returning to his Department's headquarters after completing his function of plowing and salting, he would have been engaged in 'the simple operation' of the truck 'in routine traffic, a ministerial act. But in this case, the conduct of driving and spreading salt combined as an integral part of the governmental function of rendering the city streets safe for public travel. Manifestly, the operation of this vehicle involved special risks arising from the governmental activity and the exercise of judgment or discretion about the proper means of effectuating the governmental purpose of the defendant's employer.

245 Va. at 343-344.

Like the drivers in *Colby*, *Callett*, and *Settle*, Officer Perry was performing a governmental function which necessarily involved the exercise of judgment and discretion in determining how best to respond to the scene of a crime, where the crime was still in progress. Moreover, like those drivers and the driver in *Stanfield*, she was in the very act of performing a governmental function when the accident occurred. Officer Perry had to make decisions necessary to ensure that she arrived at the scene in the most expeditious manner possible. She had to decide, among other things, how fast to drive, whether or not to pass other motorists, and whether to stop completely at intersections or whether to clear them with lights and siren. These decisions required the exercise of judgment and discretion not required in ordinary driving situations. Accordingly, Officer Perry is entitled to the defense of sovereign immunity and the claim for simple negligence against her is barred.

Plaintiffs may argue that, because Officer Perry did not constantly use her lights and siren and arguably violated General Order 501.1, then she is stripped of the defense of sovereign

immunity. This, however, is not the law in Virginia. The test here is not whether Officer Perry complied with a general order which was promulgated to guide her discretion in the field, but whether she was engaged in driving under circumstances which required judgment and discretion or was performing a ministerial act under normal driving conditions. In short, whether she made a mistake in the exercise of judgment and discretion under emergency conditions or violated a general order in the process is not determinative.

For example, the driver in *Colby* drove through a red light with only his lights activated after only giving a short burst of the siren as he approached the intersection, yet the Court upheld his right to assert sovereign immunity, and further, upheld the trial court's decision that he was not grossly negligent as a matter of law because he slowed below the speed limit and braked and swerved to try to avoid the accident. In *Campbell v. Compton*, 28 Va. Cir. 317 (Va. Cir. Ct., July 8, 1992) (attached), a state trooper caused an accident when pursuing a speeding motorist at speeds approaching 80 miles per hour with no emergency lights or siren and he was protected by sovereign immunity. Similarly, in *Hawthorne v. VanMarter*, 2008 Va. Cir. Lexis 165 (Va. Cir. Ct. December 23, 2008) (attached), sovereign immunity was upheld where a Roanoke police officer caused a fatal accident when proceeding at a high rate of speed with no lights or siren activated. Finally, as the court in *Lake v. Mitchell*, 2008 Va. Cir. Lexis 118 (Va. Cir. Ct., May 23, 2008) (attached) succinctly stated in finding that the use of a siren or not is immaterial to the threshold question of whether sovereign immunity applies: "A law enforcement officer is not automatically cloaked by the veil of sovereign immunity simply because his siren is activated, nor is he automatically outside its scope simply because his siren is not activated." All of the drivers above caused accidents when full

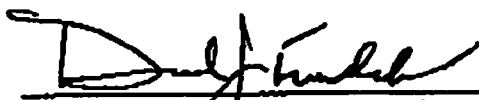
emergency equipment was not in use, and presumably, each of them violated a departmental regulation, yet in each case, this fact was not determinative of whether sovereign immunity applied.

CONCLUSION

For the reasons stated above, the claim for simple negligence should be dismissed, and the court should enter an order that Officer Perry is entitled to sovereign immunity which can be overcome only by a finding of gross negligence.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true copy of the foregoing pleading was faxed and mailed by first class mail this 14th day of July, 2009 to:

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4 of 4 DOCUMENTS

Mable J. Campbell v. Duane Philip Compton**[NO NUMBER IN ORIGINAL]****CIRCUIT COURT OF ESSEX COUNTY, VIRGINIA****28 Va. Cir. 317; 1992 Va. Cir. LEXIS 300****July 8, 1992****HEADNOTES**

[**1] In this case, the plaintiff failed to prove that the defendant police officer was guilty of gross negligence that caused the automobile accident in question.

JUDGES: Judge Joseph E. Spruill, Jr.

OPINION BY: SPRUILL**OPINION**

[*317] This case was heard by the Court without a jury on June 30, 1992, and taken under advisement.

The plaintiff was injured when an automobile in which she was a passenger was struck from the rear by a state police vehicle being operated by a trooper pursuing a speeding motorist. The trooper had been travelling south on U.S. Route 17 when a northbound vehicle came through his radar beam at 68 m.p.h. in a 55 m.p.h. zone. The trooper turned around and gave chase. He accelerated to speeds of between 70 and 80 miles per hour. He did not activate his siren or emergency lights. When he came upon the northbound vehicle in which plaintiff was riding, the trooper pulled to the

left, across double yellow lines, to pass. He testified he was in the southbound lane only 2 or 3 seconds when he saw oncoming traffic, whereupon he pulled back to the right behind plaintiff's vehicle, which was travelling approximately 45 m.p.h. The front wheels of the police vehicle "locked." The trooper's [*2] vehicle struck the plaintiff's vehicle, and the plaintiff was injured.

The first issue has been previously addressed by the court. Relying on *Colby v. Boyden*, 241 Va. 125, 400 S.E.2d 184 (1991), the Court concluded that under the circumstances here, the trooper is entitled to sovereign immunity protection, notwithstanding his failure to activate his flashing lights and siren as directed by § 46.2-920 of the Code.

Therefore, in order for the plaintiff to recover, she must show that the trooper was guilty of gross negligence. The question is then whether the facts here, which are not in dispute, warrant a finding of gross negligence on the part of the defendant trooper.

[*318] Gross negligence is defined as "that degree of negligence which shows indifference to others or constitutes an utter disregard of prudence amounting to a complete neglect of the safety of another. It must be such a degree

28 Va. Cir. 317, *; 1992 Va. Cir. LEXIS 300. **

of negligence as would shock fair-minded people although something less than willful recklessness." *Ferguson v. Ferguson*, 212 Va. 86, 181 S.E.2d 648 (1971); *Meagher v. Johnson*, 239 Va. 380, 389 S.E.2d 310 (1990).

In urging a finding of gross negligence, plaintiffs counsel argues that the officer neglected to activate his flashing [**3] lights and siren, either of which might have alerted other motorists of impending danger; that he exceeded the speed limit by between 15 and 25 miles per hour; and that he crossed a double yellow line at a point when his visibility ahead was at least partially obstructed.

The defendant, on the other hand, contends that when the accident happened, he was acting in the discharge of his official duties as a member of the state police. He was in pursuit of a speeding motorist in a rural area in open country. He was travelling between 70 and 80 miles per hour in order to catch up to the speeder. He

crossed the center line for a matter of 2 or 3 seconds and then returned to the northbound lane. But for his front wheels "locking," he says there would have been no accident.

The Court holds that under the facts and circumstances here, the officer was not guilty of gross negligence. We find that he did exercise some degree of diligence and due care, and therefore, as a matter of law, his acts would not show "utter disregard of prudence amounting to complete neglect of the safety of another." See *Colby*, at page 133. As did the officer in *Colby*, the officer here "swerved and braked in [**4] an attempt to avoid the collision." The actions of the officer here do not indicate "an absence of slight diligence or the want of even scant care."

Accordingly, the plaintiff has not sustained her burden of proving gross negligence, and the court finds in favor of the defendant.



1 of 343 DOCUMENTS

Paxton Hawthorne and Joseph Anthony, Co-Administrators of the Estate of Joyce Hawthorne, Deceased, and Kevin Guthrie v. Timothy VanMarter

Case Nos. CL06-000816-00 and CL060000886-00

CIRCUIT COURT OF ROANOKE COUNTY, VIRGINIA

2008 Va. Cir. LEXIS 165

December 23, 2008, Decided

PRIOR HISTORY: Hawthorne v. Lavinder, 2006 Va. Cir. LEXIS 271, 72 Va. Cir. 375 (2006)

COUNSEL: [*1] Paul R. Thomson III, Esq., Michie Hamlett Lowry Rasmussen & Tweel PLLC, Roanoke, Virginia.

Jim H. Guynn Jr., Esq., Guynn, Memmer & Dillon, P.C., Salem, Virginia.

JUDGES: Charles N. Dorsey.

OPINION BY: Charles N. Dorsey

OPINION

This case is before the Court on Plaintiffs' Motion to Vacate the Verdict and Motion for a New Trial. Plaintiffs base their motions on four grounds: (1) the Court erred in ruling that Defendant was entitled to sovereign immunity and in declining to instruct the jury on simple negligence; (2) the Court erred in limiting *voir dire* questioning and by refusing to strike for cause certain prospective jurors; (3) the Court erred in granting Jury Instructions Nos. 3 and 11; and

(4) the Court erred in transferring venue from Roanoke City Circuit Court to Roanoke County Circuit Court.

After having carefully reviewed the record, the applicable case law, and the arguments of counsel, the Court, for the reasons set forth below, denies Plaintiffs' motions.

I. Factual and Procedural Background

This case arises out of a motor vehicle accident on June 10, 2005. On that date, Joyce Hawthorne was driving a vehicle owned by Kevin Guthrie. As Hawthorne attempted to enter Chaparral Drive from a private driveway, Defendant [*2] Timothy VanMarter, an on-duty police officer with the Roanoke County Police Department, was proceeding along Chaparral Drive at a high rate of speed, without emergency lights, when he collided with the vehicle driven by Hawthorne. This collision caused fatal injuries to Hawthorne and serious injuries to Guthrie.

Guthrie and the co-administrators of Hawthorne's estate ("Plaintiffs") filed this case against VanMarter ("Defendant") in Roanoke City Circuit Court. It was, however, then trans-

ferred to Roanoke County Circuit Court on Defendant's motion. After the transfer, the Court sustained Defendant's Special Plea in Bar of Sovereign Immunity, holding that he was entitled to sovereign immunity as to any ordinary negligence that he may have committed.

At the conclusion of *voir dire* at the jury trial, the Court denied Plaintiffs' motion to strike for cause prospective jurors Carolyn Harris, Elizabeth Draper, Samuel Tuckwiller, Carolyn Blankenship, and Sylvia Hodges. The Court then denied Plaintiffs' request to question each prospective juror individually. At that point, Plaintiffs exercised their peremptory challenges to remove prospective jurors Harris and Draper.

At trial, Plaintiffs objected [*3] to Jury Instructions Nos. 3 and 7. Instruction No. 3 stated the standard of care for an emergency vehicle -- gross negligence. Instruction No. 11 stated the standard of care for a vehicle entering a highway from a private driveway -- simple negligence. The Court overruled Plaintiffs' objection to both instructions, and submitted them, along with the other instructions, to the jury. The jury then returned a verdict in favor of Defendant.

II. Analysis

A. Sovereign Immunity

For the reasons stated in the Court's opinion of December 29, 2006, Defendant was entitled to sovereign immunity insofar as it required Plaintiffs to prove gross negligence, as opposed to simple negligence, in order to hold Defendant liable. Thus, there was no error in refusing to submit a simple negligence instruction to the jury.

B. *Voir dire*

In the second ground for their motions, Plaintiffs raise two issues: first, whether the Court erred in denying their motion to extend *voir dire* or to question prospective jurors individually; and second, whether the Court erred in denying their motion to strike for cause cer-

tain prospective jurors. Each of these issues is addressed separately.

1. Motion to Extend *Voir dire* or to Question [*4] Prospective Jurors Individually

Plaintiffs assert that the Court erred in denying their motion to extend *voir dire* or to question prospective jurors individually.¹ Defendant, quoting in part the Court's comments during *voir dire*, responds, "The record indicates that the extensive *voir dire* continued 'longer than any felony case [that the Court had] ever presided over,' and satisfied the Court that each of the jurors were willing and able to stand impartial' and to 'render a fair and direct verdict based on the law and evidence, instructions of the Court and arguments of counsel.'" ²

1 Pl.'s Mot. to Vacate Verdict and Mot. for New Trial 2 [hereinafter Pl.'s Mott.]. Guthrie and the co-administrators of Hawthorne's estate filed separate memoranda in support of their motions. The two memoranda are virtually identical. Thus, for the sake of convenience, all citations in this opinion letter are to Guthrie's memorandum.

2 Def.'s Opp'n to Pl.'s Mot. to Vacate Verdict and Mot. for New Trial 10 [hereinafter Def.'s Opp'n].

Counsel-conducted *voir dire* is a statutory right provided by Va. Code § 8.01-358, which in pertinent part provides:

The court and counsel for either party shall have the right [*5] to examine under oath any person who is called as a juror therein and shall have the right to ask such person or juror directly any relevant question to ascertain whether he is related to either party, or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or preju-

dice therein; . . . and if it shall appear to the court that the juror does not stand indifferent in the cause, another shall be drawn or called and placed in his stead for that trial of the case.

This right, however, is limited. The Supreme Court of Virginia has repeatedly found that counsel has "no right, statutory or otherwise, to propound any question he wishes, or to extend *voir dire* questioning *ad infinitum*." ³ The trial court "must afford a party full and fair opportunity to ascertain whether prospective jurors 'stand indifferent in the cause,' but the trial judge retains the discretion to determine when the parties have had sufficient opportunity to do so." ⁴ Further, counsel has no right to question each prospective juror individually on *voir dire*. "Whether this procedure is employed remains a matter within the trial court's discretion" ⁵

³ *LeVasseur v. Commonwealth*, 225 Va. 564, 581, 304 S.E.2d 644, 653 (1983) [*6] (citations omitted); *see also* *Juniper v. Commonwealth*, 271 Va. 362, 396, 626 S.E.2d 383, 405 (2006).

⁴ *LeVasseur*, 225 Va. at 564, 304 S.E.2d at 653.

⁵ *Tuggle v. Commonwealth*, 228 Va. 493, 504-05, 323 S.E.2d 539, 545-46 (1984), *vacated on other grounds*, 471 U.S. 1096, 105 S. Ct. 2315, 85 L. Ed. 2d 835 (1985); *see also* *Fisher v. Commonwealth*, 236 Va. 403, 410, 374 S.E.2d 46, 50, 5 Va. Law Rep. 1019 (1988).

Contrary to their assertion, Plaintiffs were given sufficient opportunity to determine whether any prospective juror could not "stand indifferent in the cause." The record reflects that *voir dire* lasted several hours, with Plaintiffs questioning prospective jurors on numerous issues, including whether they spoke with

their mothers every day. ⁶ Moreover, the record shows that prospective jurors were open and honest in answering each of Plaintiffs' questions. Accordingly, there was no abuse of discretion in denying Plaintiffs' motion to extend *voir dire* or to question prospective jurors individually.

⁶ Jury Selection Hr'g Tr. 72:4-5, May 8, 2007 ("Okay. Who here talks to their mother every day?"); *see also id.* at 70:12-17 ("Those of you with children that have left the home, are they still asking you all for advice and guidance in their lives?").

2. [*7] Motion to Strike Prospective Jurors for Cause

Plaintiffs contend that the Court erred in denying their motion to strike for cause prospective jurors Harris, Draper, Tuckwiller, Blankenship, and Hodges. ⁷ In response, Defendant argues that, when looking at the totality of each prospective juror's *voir dire*, there is no indication that any of them lacked the necessary impartiality or were *per se* disqualified under Code § 8.01-358. ⁸

⁷ Pl.'s Mot. 21.

⁸ Def.'s Opp'n 10-11.

The standard the Court must apply "in deciding whether to exclude or retain a prospective juror is whether the prospective juror's views 'would prevent or substantially impair the performance of his duties in accordance with his instructions and his oath.'" ⁹ The Court's decision whether to strike a prospective juror for cause is entitled to great deference on review, because it "has the opportunity . . . to observe and evaluate the apparent sincerity, conscientiousness, intelligence, and demeanor of prospective jurors first hand." ¹⁰ Accordingly, the Court's decision will not be disturbed "unless manifest error" appears in the record. ¹¹

9 *Juniper*, 271 Va. at 400, 626 S.E.2d at 408 (quoting *Breard v. Commonwealth*, 248 Va. 68, 78, 445 S.E.2d 670, 676, 10 Va. Law Rep. 1465 (1994)).

10 *Id.*, 626 S.E.2d at 408 [*8] (quoting *Pope v. Commonwealth*, 234 Va. 114, 123-24, 360 S.E.2d 352, 4 Va. Law Rep. 502-24, 234 Va. 114, 360 S.E.2d 352, 358, 4 Va. Law Rep. 502 (1987)); see also *Green v. Commonwealth*, 262 Va. 105, 115, 546 S.E.2d 446, 451 (2001).

11 *Calhoun v. Commonwealth*, 226 Va. 256, 258, 307 S.E.2d 896, 898 (1983) (citing *Briley v. Commonwealth*, 222 Va. 180, 185, 279 S.E.2d 151, 154 (1981)).

Moreover, in reviewing whether a prospective juror should have been excluded for cause, the Court must "consider the juror's entire *voir dire*, not merely isolated statements." ¹² With this in mind, the *voir dire* of each prospective juror that Plaintiffs argue should have been stricken for cause is examined separately.

12 *Lovitt v. Commonwealth*, 260 Va. 497, 510, 537 S.E.2d 866, 875 (2000) (citing *Vinson v. Commonwealth*, 258 Va. 459, 467, 522 S.E.2d 170, 176 (1999)).

a. Juror Harris

Plaintiffs assert that the Court abused its discretion in denying their motion to strike for cause prospective juror Harris, since "a reasonable doubt existed as to whether . . . [she] could stand indifferent in the cause" of this case. ¹³ In support of this assertion, Plaintiffs cite Harris's *voir dire* statements in which she expressed some concern about sitting on the jury because a few members of her church [*9] work in law enforcement. ¹⁴ Defendant responds that the Court properly gave the cited statements little weight in its decision to retain Harris because they were made in response to leading questions. ¹⁵

13 Pl.'s Mot. 12.

14 *Id.* at 8-9.

15 Def.'s Opp'n 16.

The statements that Plaintiffs cite from Harris's *voir dire* are taken from the following exchange:

MR. THOMSON: Anyone here work with police or law enforcement on a regular basis? By that I mean if you coach a school athletic thing or something like that and maybe one of the other coaches is a referee or somebody is a police officer. Anybody?

MS. HARRIS: I just thought about, we have two police officers at our church.

MR. THOMSON: At church?

MS. HARRIS: Yes, I see every Sunday at church. I forgot about that.

MR. THOMSON: Do you have much contact with them?

MS. HARRIS: No, just seeing them at church.

MR. THOMSON: Is it going to bother you at all to sit on this?

MS. HARRIS: I don't know. I know a lot of policemen. Maybe I shouldn't.

....

MR. THOMSON: Okay. You think it would make, you think the fact that you know so many police officers it would be a little difficult to sit on this case?

MS. HARRIS: I think it might.

....

MR. THOMSON: And if the [*10] evidence came out in favor

of the plaintiff and you were having to render a verdict against the police officer, would that cause you some concern because you would have to be facing all of these police officers on a weekly basis as you said?

MS. HARRIS: I think it would. I hadn't thought about that. ¹⁶

16 Jury Selection Hr'g Tr. 61:24-63:17.

This exchange, Plaintiffs contend, demonstrates that Harris could not be a fair and impartial juror, and thus should have been excluded for cause. ¹⁷ The Court, however, must examine more than just this exchange in determining whether Harris should have been struck for cause. As noted above, the Supreme Court of Virginia has stated that a prospective juror's entire *voir dire* must be considered, not merely isolated statements. Applying this principle, it is clear that there was no error in retaining Harris.

17 Pl.'s Mot. 8-9.

Before Harris was questioned about the police officers she knew through her church, she was questioned about her relationship with the wife of Roanoke County's Chief of Police:

MR. THOMSON: Does anyone here themselves or anyone that you know well have any education, training or experience with law enforcement?

....

MS. HARRIS: I [*11] have two nephews, but they are out of state. I know the Roanoke City Chief of Police.

MR. THOMSON: Gaskins?

MS. HARRIS: I am sorry, Ray Lavinder is the County.

MR. THOMSON: He is County. How do you know Chief Lavinder?

MS. HARRIS: I used to work with his wife.

....

MR. THOMSON: Would the fact that Officer Vanmarter [sic] is still an employee of the Chief and was an employee at that point in time, would that make it at all difficult since you have a friendship with the Chief's wife to sit on this case?

MS. HARRIS: I don't think so. ¹⁸

18 Jury Selection Hr'g Tr. 37:22-40:9.

In addition to this exchange, the record shows that, when asked by the Court whether she knew of any reason why she could not give Plaintiffs and Defendant a fair and impartial trial, Harris responded, "No." ¹⁹ The record also shows that the Court observed that there was nothing in Harris's demeanor during *voir dire* to suggest that she, along with the other prospective jurors, could not "stand impartial for cause and render a fair verdict based on the law and evidence after consideration of the evidence, instructions of the Court and arguments of counsel." ²⁰ Given this observation and that the totality of Harris's *voir* [*12] *dire* demonstrates that she could act fairly and impartially, there was no error in refusing to strike her for cause.

19 *Id.* at 19:19.

20 *Id.* at 94:24-95:4.

b. *Juror Draper*

Plaintiffs argue that the Court should have removed prospective juror Draper for cause because her statements during *voir dire* raised a reasonable doubt as to whether she could be a fair and impartial juror.²¹ In support of this argument, Plaintiffs cite the following exchange from the record:

MR. THOMSON: Who here thinks or feels that that is a little unfair, that the plaintiff just has to prove 51 percent in order to succeed to get a verdict?

....

MS. DRAPER: Yes, if that is the law that is the law. Well -

MR. THOMSON: You have a little bit of a problem with it?

MS. DRAPER: Probably.

MR. THOMSON: Is that a belief that you have had for a while?

MS. DRAPER: No, but I think a person is innocent until proven guilty. If they are going to be proven guilty. If they are going to be proven guilty it has to be 100 percent I would have to feel it in my mind.

MR. THOMSON: Okay.

MS. DRAPER: If it was malicious or whatever.

MR. THOMSON: You understand this is a civil case., And no matter what the outcome is the officer is not going to [*13] jail or anything like that?

MS. DRAPER: Yes.²²

21 Pl.'s Mot. 12.

22 Jury Selection Hr'g Tr. 80:17-82:8.

While this exchange shows that Draper was confused about the standard of proof in a civil case, it does not show that she would be unable to follow the law as instructed by the Court or act fairly and impartially. This is the conclusion that the Court reached in denying Plaintiffs' motion at the conclusion of *voir dire*:

MR. THOMSON: You are denying my request to continue the *voir dire*?

THE COURT: Yes, sir.

MR. THOMSON: Does that ruling also go with the lady that had the two children, the daughter-in-law and son-in-law who were police officers? She said she couldn't be fair.

THE COURT: She did not say she couldn't be fair. . . .

MR. THOMSON: She was saying the wrong standard. After I told her it was a civil case, she said she needed to hear beyond a reasonable doubt that he had to be 100 percent at fault.

THE COURT: Then you corrected her on that. You didn't use the term thereafter, I think you didn't use the term criminal or convicted, I forget which one it was, it escapes me. But in any event, the point being these are laypersons. Again, they are answering candidly.

I am not going to exclude [*14] that fair and candid answer on the fact that under the most strained analysis that it may sug-

gest some difficulty. . . . And everything, all of her answers taken in toto, suggest beyond any doubt to me that she absolutely would follow the law, weigh the evidence as instructed, and render a fair verdict based on the law and the evidence.
23

23 *Id.* at 96:5-97:17.

Moreover, as Defendant points out, Draper was never asked by Plaintiffs' counsel whether her views would prevent or substantially impair her ability to be a fair and impartial juror, which is the standard that must be applied in determining whether a prospective juror should be struck for cause. Instead, Plaintiffs' counsel asked Draper whether she had "a little bit of a problem" with the "preponderance of the evidence" standard, to which she responded, "Probably." Based on the applicable case law, this response is not in of itself sufficient to remove a prospective juror for cause given the phrasing of the question by Plaintiffs' counsel.
24 Accordingly, there was no error in refusing to excuse Draper for cause.

24 See, e.g., *Briley v. Commonwealth*, 222 Va. 180, 187 n.3, 279 S.E.2d 151, 155 n.3 (1981) ("[T]he trial court must weigh [*15] the meaning of the answers given in light of the phrasing of the questions posed, the inflections, tone, and tenor, and the general demeanor of the prospective juror." (quoting *Smith v. Commonwealth*, 219 Va. 455, 464-65, 248 S.E.2d 135, 141 (1979))).

c. Juror Tuckwiller

Plaintiffs contend that the Court erred in refusing to strike for cause prospective juror Tuckwiller because his sister worked for Defendant's counsel as a paralegal, and as such

had assisted in the preparation of correspondence and other documents related to this case.
25 Defendant responds that "[a] familial relationship with an employee of one of the attorneys [sic] is not grounds for *per se* exclusion, and Mr. Tuckwiller answered in the negative when Plaintiffs' counsel asked him if that relationship would make it difficult to decide the case and whether he ever talked to his sister about any of the cases she works on." 26

25 Pl.'s Mot. 22.

26 Def.'s Opp'n 12.

Tuckwiller's familial relationship with an employee of Defendant's counsel was revealed in the following exchange:

MR. THOMSON: One of the questions was did you know or had you ever been a client of my firm or Mr. Guynn's firm. Having heard the firm names, do you [*16] know anyone that works for Mr. Guynn's firm or for my firm? Yes, Mr. Tuckwiller?

MR. TUCKWILLER: My sister works for one of you, but I don't remember which one.

MR. THOMSON: What is her name?

MR. TUCKWILLER: Chris Counts.

MR. GUYNN: She works for us, Your Honor.

MR. THOMSON: What does she do there?

MR. TUCKWILLER: I have no idea.

MR. GUYNN: Neither do I.

MR. THOMSON: Does the fact that your sister works for the defense attorney, would that make

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it kind of difficult for you to decide this case?

MR. TUCKWILLER: No, sir, it should not.

MR. THOMSON: Do you talk to her at all about the cases she works on or anything?

MR. TUCKWILLER: No, no.
27

27 Jury Selection Hr'g Tr. 29:11-30:9.

The Supreme Court of Virginia has held on numerous occasions "that relationship does not automatically disqualify a potential juror from being fair and impartial." ²⁸ For example, in *Jackson v. Commonwealth*, ²⁹ the Court held that the trial court did not err in refusing to strike for cause a prospective juror whose first cousin was the wife of the Commonwealth's attorney. ³⁰ Similarly, in *Wise v. Commonwealth*, the Court held that the trial court did not err in failing to excuse for cause a prospective juror who was a "golfing [*17] buddy" and "long standing" friend of the Commonwealth's attorney. ³¹

28 *Juniper v. Commonwealth*, 271 Va. 362, 407, 626 S.E.2d 383, 412 (2006) (citing *Wise v. Commonwealth*, 230 Va. 322, 325, 337 S.E.2d 715, 717 (1985)).

29 255 Va. 625, 499 S.E.2d 538 (1998).

30 *Id.* at 641, 499 S.E.2d at 548.

31 *Wise*, 230 Va. at 325, 337 S.E.2d at 717.

Looking at Tuckwiller's entire *voir dire*, it is clear that he held no bias towards Defendant or against Plaintiffs as a result of his sister's employment with Defendant's counsel. Indeed, when asked whether his sister's employment with Defendant's counsel would make it hard for him to decide this case, Tuckwiller unequi-

vocally responded, "No, . . . it should not." ³² Consequently, because the record does not indicate that Tuckwiller's familial relationship with Defendant's counsel would prevent him from being fair and impartial in this case, there was no error in refusing to strike him for cause.

32 Jury Selection Hr'g Tr. 30:6.

d. *Juror Blankenship*

Plaintiffs claim that the Court erred in failing to excuse for cause prospective juror Blankenship because her responses during *voir dire* raised a reasonable doubt as to whether she could act impartially in this case. [*18] ³³ Specifically, Plaintiffs cite Blankenship's *voir dire* statement that "if [Defendant] was doing his job, [she] would have a problem with finding him personally liable." ³⁴

33 Pl.'s Mot. 12.

34 Jury Selection Hr'g Tr. 83:14-16.

Soon after Blankenship indicated that she might have a problem finding against Defendant, the following colloquy occurred:

MR. THOMPSON: Okay. Anybody else agree with Ms. Blankenship?

....

MR. WHITMER: I think it would come down to not only was [Defendant] doing his job, but was he doing everything within the guidelines of what his job required him to do.

MR. THOMPSON: Okay. Does anybody agree with what Ms. Blankenship and Ms. Harris said, if he was doing his job they would have a hard time finding against him?

....

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MS. BLANKENSHIP: Maybe I need to qualify mine. Maybe if there was negligence in doing his job.³⁵

35 *Id.* at 83:17-84:22.

As noted above, in determining whether a prospective juror should have been struck for cause, the Court must consider the juror's entire *voir dire*, not just isolated statements. Applying this principle, the totality of Blankenship's *voir dire* demonstrates that she would be able to stand indifferent in the cause and fairly and impartially [*19] perform her duties as a juror. As a result, there was no error in failing to strike Blankenship for cause.

c. Juror Hodges

Plaintiffs argue that the Court should have struck prospective juror Hodges for cause because, like Harris, Draper, and Blankenship, her responses during *voir dire* raised a reasonable doubt as to whether she could act impartially in this case.³⁶ In support of their argument, Plaintiffs cite Hodges's *voir dire* statements in which she, agreeing with Blankenship, stated that she would have a hard time finding against Defendant if he were doing his job.³⁷

36 Pl.'s Mot. at 12.

37 *Id.* at 10.

Defendant submits that the statements that Plaintiffs cite from Hodges's *voir dire* should be given little weight, since they were affirmative answers to leading questions.³⁸ Also, Defendant notes that Plaintiffs' counsel failed to follow up his leading questions "with the inquiry which is the crux of a venireman's suitability -- whether their feelings and opinions would inhibit their ability to render a fair and impartial verdict."³⁹

38 Def.'s Opp'n 17.

39 *Id.* at 17.

The record contains the following exchange between Plaintiffs' counsel and Hodges:

MR. THOMSON: Okay. Does anybody agree [*20] with what Ms. Blankenship and Ms. Harris said, if [Defendant] was doing his job they would have a hard time finding against him? Ms. Hodges?

MS. HODGES: I believe like she did.

MR. THOMSON: You believe like Ms. Blankenship?

MS. HODGES: Yes, right.⁴⁰

40 Jury Selection Hr'g Tr. 84:5-12.

While Hodges stated that she agreed with Blankenship, she did not, as Defendant points out, state that she could not act fairly and impartially. The Court made this same observation when ruling on Plaintiffs' motion to strike Hodges and the other prospective jurors for cause:

MR. THOMSON: Draper, Harris, Blankenship and Sylvia Hodges. Sylvia Hodges said if Vanmarter [sic] was doing his job she would have a hard time finding against him. Several of those people I asked if they could even set aside those beliefs if you instructed them, and they said no. So we move to strike all of those people.

THE COURT: Who said that?

MR. THOMSON: I wish we had gotten the real time transcript.

THE COURT: You said hard time. You didn't ask them if they would be able to follow.

MR. THOMSON: I think a hard time is sufficient enough to show it is well-founded, and a well-founded belief if they are having that, they said they are going [*21] to have difficulty if Your Honor tells them, I think that I have met my burden

....

THE COURT: There were a number of questions that were phrased in the guise of functionally philosophical questions "Do you believe that is the way it ought to be, would you have a hard time," those sort of questions, all of which have been permitted for the purpose of counsel being well advised and well informed as to permissible statutory bases for exercising preemptory challenges.⁴¹

41 *Id.* at 92:23-94:13.

While Hodges stated candidly that she would have a hard time finding against Defendant if he were doing his job, she did not indicate that she could not act as a fair and impartial juror. To the contrary, when the Court asked Hodges whether there was any reason that she could not give a fair and impartial trial to Plaintiffs based solely on the law and evidence, she and the other prospective jurors responded, "No."⁴² Moreover, the Court observed Hodges along with the other prospective jurors and found that there was

nothing about the tone of voice,
nothing about something that we

would ordinarily use to evaluate witnesses suggested to me, nor the substance of their answers as already noted, the inability [*22] of any of them to stand impartial for cause and render a fair verdict based on the law and evidence after consideration of the evidence, instructions of the Court and arguments of counsel.⁴³

Given this observation and that Hodges's *voir dire*, taken as a whole, demonstrates that she could be a fair and impartial juror, there was no error in failing to exclude her for cause.

42 *Id.* at 19:19.

43 *Id.* at 94:19-95:4.

C. Jury Instructions

Plaintiffs assert that Jury Instructions Nos. 3 and 11 were misstatements of the law; that using "law enforcement vehicle" in Instruction No. 3, and "emergency vehicle" in Instruction No. 4 was misleading to the jury; and that Instruction No. 11 placed an improper burden on Plaintiffs.⁴⁴ For the reasons discussed below, there was no error in granting Instructions Nos. 3 and 11.

44 Pl.'s Mot. 13-19.

1. Jury Instruction No. 3

Instruction No. 3 stated: "The driver of an emergency vehicle may exceed the speed limit provided he is not grossly negligent." Plaintiffs contend that this instruction was not a correct statement of the law. Were this a criminal trial, they would be correct, insofar as the instruction did not include the qualification that emergency vehicles [*23] are only exempt from speed limits when using their lights and siren.⁴⁵ However, this is a civil trial on the issue of liability for injuries sustained in an accident, im-

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mediately before which Defendant was speeding.

45 Va. Code § 46.2-920 (2008).

It was appropriate to instruct the jury regarding the relationship between the rate of speed at which Defendant was traveling and the negligence alleged. Jury instructions should be based upon the evidence presented.⁴⁶ Because there was a great deal of evidence as to the rate of speed at which Defendant was traveling, the instruction was appropriate. Plaintiffs had to prove gross negligence on the part of Defendant in order to recover. However, merely breaking a traffic law, while a factor to be considered by the jury, was not enough to determine liability on its own.⁴⁷ Thus, it was proper to include an instruction explaining that distinction.

46 See *Banner v. Commonwealth*, 204 Va. 640, 648, 133 S.E.2d 305, 311 (1963).

47 See *Doerr v. Barnes*, 198 Va. 306, 309, 94 S.E.2d 271, 274 (1956); *Hershman v. Payne*, 196 Va. 241, 245-46, 83 S.E.2d 418, 420-21 (1954).

Alternatively, the language of Instruction No. 4 cures any lack of qualifying language, [*24] even if Instruction No. 3, taken alone, would have been improper.⁴⁸ "That an error not amounting to a positive misstatement of the law can be cured by a clear, definite, and correct statement upon the same subject in another instruction is beyond question."⁴⁹ Instruction No. 3 was not a positive misstatement of the law. Instruction No. 4 set forth the full test for circumstances under which emergency vehicles may lawfully exceed posted speed limits and incorporated language that explained the connection between speed and the question of gross negligence. Instruction No. 4 amounted to a clear, definite, and correct statement of the law on the same subject as Instruction No. 3.

48 Instruction No. 4 stated:

The driver of a law enforcement vehicle may disregard speed limits, while having due regard for safety of persons and property, only when the operator of such vehicle displays a flashing emergency light or lights, and sounds a siren.

Violation of this law does not, in itself, constitute gross negligence, but you may consider this together with other facts and circumstances in this case in determining whether the Defendant Tim VanMarter was grossly negligent.

49 *Tri-State Coach Corp. v. Walsh*, 188 Va. 299, 310, 49 S.E.2d 363, 368 (1948) [*25] (citing *Va. Ry. & Power Co. v. Smith & Hicks, Inc.*, 129 Va. 269, 105 S.E. 532 (1921)).

Plaintiffs also contend that the use of the terms "emergency vehicle" and "law enforcement vehicle" interchangeably must have been misleading to the jurors.⁵⁰ Words are to be given their plain meaning, and the plain meaning of these terms overlaps. A police vehicle equipped with emergency lights is typically considered to be both an emergency vehicle and a law enforcement vehicle. The terms are not confusing on their face, and it was appropriate to use both words when instructing the jury. There was only one vehicle to which these terms would apply, and the statements in each instruction were consistent with one another, not conflicting so as to give rise to a question of which would apply. The use of different terms did not change the fact that Instruction

No. 4 was a complete statement of the law, with which Instruction No. 3 did not conflict.

50 Pl.'s Mot. 15.

2. Jury Instruction No. 11

Instruction No. 11 stated:

Immediately before entering a highway from a private driveway, a driver of a vehicle has a duty to stop and use ordinary care to yield to any vehicle that is so near the driveway that the [*26] driver cannot safely enter the highway. If the driver fails to perform this duty, then she is negligent.

Under applicable law, Defendant would ordinarily have the right of way at the intersection of a private driveway and Chaparral Drive.⁵¹ However, "[t]he driver of any vehicle traveling at an unlawful speed shall forfeit the right of way which he might otherwise have."⁵² There was a duty of ordinary care, regardless of who had the right of way.⁵³ Therefore, if Defendant was speeding, "neither driver had the right of way over, or was required to yield to, the other. Each was merely under a duty of ordinary care to avoid the collision."⁵⁴ Plaintiffs owed a duty only to "yield the right of way to those lawfully approaching so near the intersection that he [could not] safely enter it."⁵⁵ It would be improper to place the burden on the car entering from the private road to "yield the right of way to all vehicles approaching" on the highway.⁵⁶

51 See Va. Code § 46.2-826 ("The [*27] driver of a vehicle entering a public highway or sidewalk from a private road . . . shall stop immediately before entering such highway . . . and yield the right-

of-way to vehicles approaching on such public highway.").

52 Va. Code § 46.2-823.

53 See *Swisher v. Swisher*, 223 Va. 499, 503, 290 S.E.2d 856, 858 (1982); *Sayre v. Shields*, 209 Va. 409, 410-11, 164 S.E.2d 665, 666-67 (1968).

54 *Pannell v. Fauber*, 201 Va. 380, 384, 111 S.E.2d 445, 448 (1959).

55 *Irvan v. Jamison Oil Co.*, 205 Va. 1, 6, 135 S.E.2d 153, 156 (1964) (quoting *Temple v. Ellington*, 177 Va. 134, 142, 12 S.E.2d 826, 829 (1941)).

56 *Id.* at 5, 135 S.E.2d at 156.

The instruction that Plaintiffs had a duty "to yield to any vehicle that is so near the driveway that the driver cannot safely enter the highway" was a correct statement of the law. This instruction did not go so far as to require that Plaintiffs yield to all oncoming traffic, but merely to yield to that traffic that was dangerously close. Assuming that Defendant was speeding, Plaintiffs owed a duty of ordinary care to avoid a collision. Since Defendant's rate of speed was at issue, it was necessary to instruct the jury on the law as it would apply should they have found that [*28] Defendant was speeding.⁵⁷

57 See *Banner v. Commonwealth*, 204 Va. 640, 648, 133 S.E.2d 305, 311 (1963).

D. Venue

As set forth in the Court's opinion letter of June 29, 2006, venue was proper in Roanoke County because the evidence showed that Defendant had moved there from Roanoke City before Plaintiffs filed this case. Accordingly, there was no abuse of discretion in transferring venue from Roanoke City Circuit Court to Roanoke County Circuit Court.

For the above stated reasons, Plaintiffs' motions are denied

/s/ Charles N. Dorsey

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Charles N. Dorsey



1 of 4 DOCUMENTS

GILL LAKE, Plaintiff, v. ALFRED MITCHELL, AND CASEY LYNN LAFEVER, Defendants. DAVID. G. BARNES, Plaintiff, v. ALFRED MITCHELL, ET AL., Defendants. CASEY LYNN LAFEVER, Administrator of the Estate of Vernon T. LaFever, Plaintiff, v. ALFRED MITCHELL, Defendant.

At Law No. CL07-10, At Law No. CL07-01, At Law No. CL07-13

CIRCUIT COURT OF PRINCE GEORGE COUNTY, VIRGINIA

2008 Va. Cir. LEXIS 118

May 23, 2008, Decided

JUDGES: [*1] The Honorable Sam Campbell.

OPINION BY: Sam Campbell

OPINION

MEMORANDUM OPINION

This cause came before the court on the Plaintiffs' demand for a jury trial regarding Defendant's Plea of Sovereign Immunity.

I. ISSUES

A. Is a jury needed to resolve disputed material facts in the case at bar?

B. Should sovereign immunity apply to Officer Alfred Mitchell's (hereinafter, Mitchell) actions in the case at bar?

II. SHORT ANSWER

A. No. Sovereign immunity often presents questions of law and questions of fact. This hybrid nature has caused a great deal of dispute amongst the courts concerning whether the judge can play the role of fact-finder. The modern trend has been to have disputed material facts determined by a jury and not the court. In addition, the United States Supreme Court has held that the defense of sovereign immunity should be heard no later than

the summary judgment phase, due to the fact that sovereign immunity "is an immunity from suit rather than a mere defense to liability. . . ." In the case at bar, however, a jury is not needed, as there are no material facts in dispute.

B. No. Defendant fails all four prongs of the test first set forth in *James v. Jane*, 221 Va. 43, 53, 282 S.E.2d 864 (1980). (1) Mitchell was not performing [*2] an emergency function at the time he was driving to the homicide scene; (2) the Commonwealth had no interest in Mitchell's use of excessive speeds; (3) there was not a sufficient degree of control and direction exercised by the Commonwealth over Mitchell; and (4) nor was Mitchell using discretion to act in a manner, which is integral to the Commonwealth's interest of public safety.

1 See *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985).

III. ANALYSIS

A) Is a jury needed to resolve disputed material facts in the case at bar?

The real issue here is not who should make the ultimate determination of whether sovereign immunity is a proper defense, but who should consider any disputed

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material facts. As sovereign immunity is a question of law, the court must decide it.² Disputed material facts, however, are questions of fact and must be decided by the fact finder/jury. "Though 'immunity ordinarily should be decided by the court,' ... that is true only in those cases where the facts concerning the availability of the defense are undisputed; otherwise jury consideration is normally required...."³

² See *Hunter v. Bryant*, 502 U.S. 224, 228, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991): "...immunity ordinarily should be decided by the court....," [*3] and *St. Hilaire v. City of Laconia*, 71 F. 3d 20, 24 (1st Cir. 1995): "The ultimate question of qualified immunity should ordinarily be decided by the court."

³ See *Kerman v. City of New York*, 374 F. 3d 93, 109 (2nd Cir. 2004) quoting *Oliveira v. Mayer*, 23 F. 3d 642, 649 (2nd Cir. 1994).

However, the disputed facts must be material in nature to warrant a jury deciding them. The *Oliveira* court held that "as with any issue of nominally disputed fact, if the state of the evidence is such that reasonable jurors could reach only one conclusion, then the factual issue is appropriate for decision by the court as a matter of law."⁴ In order for the court to determine whether the disputed facts are such as should be decided by a jury, the court must know exactly which facts are in dispute. If it is then determined that the facts in dispute are of a material nature, those facts should be decided by a jury. However, if the "state of the evidence is such that reasonable jurors could reach only one conclusion, then the factual issue[s] [are] appropriate for decision by the court...."⁵

⁴ See *Oliveira* at 649.

⁵ *Id.*

In the case at bar, plaintiffs suggest that there are disputed facts, which warrant a jury. [*4] However, the court finds that none of these "disputed facts" are both material and of such a nature that reasonable jurors could reach more than one conclusion. The following is a discussion of the "disputed facts" presented by plaintiff counsel.

1. Was Mitchell's siren on or off?

The court does not find this to be a material issue. A law enforcement officer is not automatically cloaked by the veil of sovereign immunity simply because his siren is activated, nor is he automati-

cally outside its scope simply because his siren is not activated. However, even if this were considered a material issue, the court holds that the evidence presented, including testimony by witnesses, is of such a nature that reasonable jurors could come to only one conclusion. The evidence overwhelmingly pointed to the siren not being activated until Mitchell engaged the tow truck.

2. Did Mitchell's speed exceed his authority?

The evidence presented makes it very clear that Mitchell did exceed his authority. According to the General Orders of the Waverly Police Department, "[t]he department...imposes on the officer the restriction of driving no faster than 20 miles per hour above the posted speed limit in an emergency [*5] response (excluding pursuits)."

Thus, even in an emergency situation, an officer is limited to traveling 20 miles per hour over the speed limit. The court finds that, considering the evidence, reasonable jurors could come to no other conclusion than Mitchell violated the above-mentioned General Orders and thus, exceeded his authority.

3. Did Mitchell honestly believe an emergency existed?

The court finds that, considering the evidence presented, reasonable ju-

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rors could come to no other conclusion than Mitchell did not believe an emergency existed. After receiving the phone call from his Chief, Mitchell continued to shave instead of leaving immediately. Reasonable jurors could not conclude that the amount of time it took Mitchell to leave his home is reflective of a law enforcement officer reacting to an emergency call.

4. Did Mitchell create the emergency?

Mitchell could not have possibly created the emergency. Firstly, if the court accepts plaintiff's argument, there was no emergency. Secondly, if there was an emergency, the emergency was taking place in a location where Mitchell was not present.

5. Did Mitchell breach Va. Code § 46.2-804(2) and 46.2-829?

This is not material in deciding [*6] whether sovereign immunity applies. Law enforcement officers are permitted to violate traffic laws in furtherance of the Commonwealth's purpose to protect public safety. Breaching these statutes does not prove that Mitchell was engaged in ordinary driving and not emergency driving. Therefore, it has no applicability to this sovereign immunity discussion.

As mentioned above, in order to warrant a jury, there must be material facts in dispute. Then, even if there are disputed material facts, if the court determines that reasonable jurors could come to only one conclusion, a jury is not necessary. The court finds that even those disputed facts, which could be considered material, need not be decided by a jury, because reasonable jurors could not differ in their opinions once the evidence is presented. As this is the case, the court finds it proper to decide these disputed facts itself.

B). Should sovereign immunity apply to Mitchell's actions in the case at bar?

The Supreme Court of Virginia outlined a four-prong test for determining whether a government employee is entitled to claim sovereign immunity in *James v. Jane*, 221 Va. 43, 53, 282 S.E.2d 864 (1980). The factors to be considered are:

1. The nature [*7] of the function performed by the employee;
2. the extent of the state's interest and involvement in the function;
3. the degree of control and direction exercised by the Commonwealth over the employee;
4. whether the act complained of involved the use of judgment and discretion.

(1) The nature of the function performed by the employee

The court finds that Mitchell was involved in ministerial driving. A government employee driving to or from the location at which his governmental function is to be performed is not a discretionary act to which immunity attaches. In *Heider v. Clemons*, 241 Va. 143, 400 S.E.2d 190, 7 Va. Law Rep. 1392 (1991), the Supreme Court of Virginia held that an officer engaged in driving after the performance of his duties was involved in ministerial driving. Similarly, in *Friday-Spivey v. Collier*, 268 Va. 384, 601 S.E.2d 591 (2004), the Supreme Court of Virginia, after distinguishing *Friday-Spivey* from *Heider*, held that the driver of a fire department pump truck en route to a scene where a child was locked in a car was also involved in ministerial driving.

In the case at bar, Mitchell was driving to the scene of a suspected homicide. He was not involved in a pursuit, nor do Mitchell's actions demonstrate that he believed [*8] there was an immediate threat to public safety. A law enforcement officer who believes there is an emergency situation, which warrants an immediate

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response, does not take his time to finish shaving. This would be akin to an officer finishing his lunch before responding to a shoot-out. Mitchell was simply en route to the scene of a suspected homicide, in order to perform the governmental function of a law enforcement officer. Thus, Mitchell was engaged in ministerial driving.

(2) The extent of the Commonwealth's interest and involvement in the function

The function being performed by Mitchell was driving to the scene of a suspected homicide. The Commonwealth obviously has an interest in law enforcement officers getting to suspected homicide scenes, but it certainly does not have an interest in such officers responding in the manner Mitchell did. As stated earlier, as Mitchell was not involved in a pursuit or responding to an immediate threat to public safety, he was involved in ministerial driving. The *Friday-Spivey* court made it clear that ministerial driving does not have sufficient Commonwealth interest for immunity to attach. *

6 See *Friday-Spivey v. Collier*, 268 Va. 384, 391, 601 S.E.2d 591 (2004).

In [*9] addition, Mitchell was excessively exceeding the posted speed limit while engaged in this ministerial driving. The Commonwealth certainly has no interest in its law enforcement officers driving in such a manner when engaged in ordinary driving. This would present a constant threat to public safety.

(3) The degree of control and direction exercised by the Commonwealth over the employee

The court finds that the Commonwealth did not exercise a sufficient degree of control and direction over Mitchell during the time in question. The court in *Messina v. Burden*, 228 Va. 301, 311, 321 S.E.2d 657 (1984), held that "[o]ne of the critical factors in deciding whether a government employee is entitled to immunity is whether he was acting within or without his authority at the time of doing or failing to do the act complained of." In Mitchell's case, the General Orders of the Waverly Police Department lay out what authority its law enforcement officers have and do not have. These orders state in pertinent part:

"Code 1: Code 1 responses are authorized for any emergency where the preservation of life is a consideration.

*Primary and support units responding to Code 1 calls should proceed rapidly to the location of [*10] the emergency by the most direct means (consis-*

tent with § 46.2-920), using all emergency warning devices with a paramount consideration for the safety of the public and the assigned officers."

"The department, however, imposes on the officer the restriction of driving no faster than 20 miles per hour above the posted speed limit in an emergency response (excluding pursuits)."

Mitchell did not respond to the call as if it were a Code 1 call. An officer responding to such a call would not take the time to finish shaving, but would leave immediately. In addition, the evidence shows that Mitchell was driving faster than 20 miles per hour above the posted speed limit. Even if the above policies were not part of the department's General Orders, Mitchell would have still been acting outside of his authority as a law enforcement officer. When engaged in ministerial driving the degree of direction and control exercised by the Commonwealth is minimal if existent at all.

(4) Whether the act complained of involved the use of judgment and discretion

In *Lohr v. Larsen*, 246 Va. 81, 87, 431 S.E.2d 642, 9 Va. Law Rep. 1454 (1993), the Supreme Court of Virginia stated, "...a government employee's use of judgment and discretion is an element [*11] in determining the issue of immunity. A necessary part of an immunity analysis is the level of discretion required of a government employee in performing his job and whether the employee is exercising that discretion in the discharge of his duties when the allegedly negligent act occurred." The court then went on to state that "...the use of judgment and discretion 'is not always determinative,'" and that the defendants in *James v. Jane*, 221 Va. 43, 282 S.E.2d 864 (1980) were not exercising their judgment and discretion in a manner that furthered the Commonwealth's interest or function, so there was no immunity. *

7 See *Lohr v. Larsen*, 246 Va. 81, 87, 431 S.E.2d 642, 9 Va. Law Rep. 1454 (1993). "Thus, because the broad discretion vested in the physicians in *James* was not attendant to actions that were integral to the Commonwealth's interest or function, there was no immunity."

Similar to the physicians in *James*, Mitchell's judgment and discretion was not integral to the Commonwealth's interest or function. When employing law en-

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forcement officers the Commonwealth's interest and function is to protect the public safety. Driving down a major roadway at excessive speeds to the scene of a non-emergency, where the preservation of human life is [*12] not a concern, is not integral to furthering this interest and function. Therefore, the court finds that even if this were a situation, which would require an officer to use his judgment and discretion, immunity does not apply, because Mitchell's judgment and discretion were not integral to the furtherance of the Commonwealth's interest or function.

IV. CONCLUSION

In sum, the court finds that there are no facts in dispute, which are material and of a nature where reasonable jurors could come to more than one conclusion. Thus, a jury is not needed for fact-finding purposes. In addition, the court finds that the Defendant fails all four prongs of the sovereign immunity test set forth in *Jamas*. Therefore, sovereign immunity cannot apply.

/s/ Sam Campbell

The Honorable Sam Campbell

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX

JOHN MCINTOSH et al., Plaintiffs)
)
v.) **Case No. 2009-00354**
)
AMANDA PERRY, Defendant.)

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO PLEA IN BAR

Factual Statement

In rush-hour traffic late on a drizzly gray winter afternoon at the busy intersection of Route 1 and Boswell Avenue, Fairfax County Police Officer Amanda Perry ran a red light at high speed and slammed into a car driven by Ashley McIntosh that had entered the intersection on a green light. McIntosh sustained severe injuries and died the next day. The following facts are undisputed:

1. At the time of the collision, Perry was headed to the location of a reported fight involving three people at the entrance to the Giant food store at Beacon Mall. She had no information indicating anyone had been injured or any weapons were involved. The event information stated: "2 W/M HITTING A B/M AT THE ENTRANCE TO THE STORE BLK JACKRT BLUE PANTS"

2. The CAD message regarding the reported fight was not sent as an emergency message and did not direct Perry to respond on an emergency basis. The CAD message stated "START NORTH FOR EVENT #2531 TKS".

3. Although state law and Fairfax County Police Department General Order 501.1 both provide that an emergency response involves and requires use of lights and siren, Perry did not use her lights and siren as she drove more than three miles (except for a few seconds at Sherwood Hall Lane) and was not using her siren or air horn when she ran the red light without stopping or slowing.

4. At the time Perry ran the red light, Perry knew that another Fairfax officer was also responding to the location of the reported fight and his marked police cruiser was ahead of her and already through the intersection.

5. Before Perry ran the red light, Perry knew that the light had been red for at least two seconds and yet neither Perry's siren nor her horn was activated as she approached and entered this intersection against the red light.

6. Before Perry ran the light, Perry knew very poor weather conditions and icy roads had spawned numerous collisions and her view of other vehicles (and their drivers' view of her vehicle) was obscured by other vehicles.

7. Perry knew she had the duty, under state law, under department orders, and under her very recent training and instructions to use both her lights **and siren** as she approached and entered this intersection against the red light. Perry admits that she violated these duties.

Argument

Virginia law establishes that immunity does not apply to Perry's activities. Perry incorrectly implies that merely because Perry claims she used her "discretion" to determine she needed to respond expeditiously immunity automatically applies to any and all conduct by her no matter what the circumstances. This assertion is contrary to Virginia immunity law. *See, e.g., Friday-Spivey v. Collier*, 268 Va. 384, 387 n.1, 390 (2004) (where the evidence showed that the fire truck driver was **"driving in a nonemergency manner without lights and sirens"** and **department procedures for emergencies required lights and siren** the trial court erred in applying immunity).¹

¹ All emphasis to quotations in this brief is added. In *Friday-Spivey*, the Supreme Court held that immunity did **not** apply despite the fire truck driver's testimony he felt an urgent response was necessary since an infant was locked in a car and "we just [did not] know what to expect when we [got] there" and "despite a natural inclination to classify the report of a child in a locked car as an 'emergency.'" 268 Va. at 387, 390. Just as Perry had no specific information about the reported fight, the fire truck driver "knew nothing about the infant's condition at that time." 268 Va. at 387. As in *Friday-Spivey*, the immunity determination here is clearly not governed or controlled by Perry's subjective, conclusory claim (unsupported by her actual contemporaneous conduct) that, despite the lack of any actual information regarding injuries or weapons, she felt the fight call was a life-threatening "emergency" that required her to act as she did. The governmental official claiming immunity always claims the actions were justified by a situation that she believed required the use of "discretion," but that claim is not determinative. *See James v. Jane*, 221 Va. 43, 53 (1980) ("Whether the act performed involves the use of judgment and discretion is a consideration, but it is not always determinative. Virtually every act performed by

Perry also erroneously contends that her violations of state law, her departmental orders, and her extensive training, cannot possibly be of any consequence in the immunity determination. This assertion is illogical and contrary to Virginia law. See *Friday-Spivey*, 268 Va. at 33 (relying on departmental procedures in denying immunity).²

Perry is not entitled to any easy, broad, categorical, or automatic application of immunity. Instead, she must prove she is entitled to immunity under the specific circumstances of this case.

a person involves the exercise of some discretion"). What matters is not the officer's after-the-fact, self-serving, subjective claim of urgency but what the contemporaneous evidence shows regarding whether the officer was actually engaged in an emergency response. *Lake v. Mitchell*, 2008 Va. Cir. Lexis 118 (Prince George Cir. Ct. 2008) (police officer's subjective claim of "emergency" was rejected as a matter of law since the actual evidence showed he did not respond in an emergency manner and violated his departmental orders).

² In *Friday-Spivey*, in rejecting immunity, the Virginia Supreme Court relied repeatedly upon the written procedures of the Fairfax County fire department. The Supreme Court observed that under the department "Standard Operating Procedures" a "'Priority 1' call means that there is a 'great potential for loss of life or serious injury' and a '[r]esponse to a Priority 1 [emergency] call requires the use of warning equipment,'" and stressed that at the time of the collision he was "driving in a nonemergency manner without lights and sirens" and under such circumstances he "was required [by department procedures] to obey all traffic regulations." 268 Va. 387 n.1, 390. The 2004 decision in *Friday-Spivey* thus clearly disproves Perry's contention that the *Colby* opinion held that violations of laws or department orders are immaterial to the immunity analysis. In *Colby*, the Supreme Court rejected the argument that all emergency response activities by the officer were necessarily ministerial (and thus not immune as a matter of law) since the police department had guidelines for such situations. In *Colby*, the Supreme Court also rejected an illogical argument that where all the requirements of the emergency response statute were met and common law immunity was applicable the statutory reference to "civil liability for failure to use reasonable care" in effect eliminated that immunity. 241 Va. at 132 ("adopting *Colby's* position would create the anomalous result of requiring a showing of simple negligence in order to impose civil liability on a **policeman who complies** with Code § 46.1-226 [now § 46.2-920])" In *Catlett*, the Supreme Court rejected the argument that immunity expressly conferred by a statute not involved here (which established a broad exemption "from suit for damages done incident to fighting fires") was defeated by local training which would have, in effect, been inconsistent with the statutory immunity. None of those arguments or issues is presented here. Rather, in this case the Plaintiffs contend that, as in *Friday-Spivey*, all of the evidence (including the department orders) shows that Perry was "driving in a nonemergency manner without lights and sirens," was not engaged in an emergency response, and acted in violation of duties expressly imposed upon her by statute, and by General Order 501.1 and training (which were consistent with and implemented the pertinent statutory duties). She therefore acted contrary to her authority, duties and training and acted at her own risk.

Even the cases cited by Perry clearly establish that there is no simple, automatic "test" for immunity.³ Determination of immunity issues necessarily "requires line-drawing" and the courts "must engage in this difficult task." *Messina v. Burden*, 228 Va. 301, 310 (1984). "Yet, by keeping the policies that underlie the rule firmly fixed in our analysis, by distilling general principles . . . , and by examining the facts and circumstances of each case this task can be simplified." 228 Va. at 310. Some of the general principles firmly established by the Virginia Supreme Court are:

First, any analysis of Perry's claim of immunity must begin with the recognition that the argument for granting immunity to governmental employees "does not have the same strength it had in past years" and there is **"no justification for treating a present day government employee as absolutely immune from tort liability,** just as if he were an employee of an eighteenth century sovereign." *James*, 221 Va. at 52.

Second, the only type of immunity which a lower level governmental employee or official can ever enjoy "is **qualified, depending upon the function they perform and the manner of performance.**" *Id.* at 53.

Third, the **argument for extending immunity to a governmental employee** is strongest at the "highest levels of the three branches of government" but **becomes weaker and weaker "the farther one moves away from the highest levels of government."** *Messina*, 228 Va. at 309 .

Fourth, the argument for extending immunity to a low-level employee is **strongest** when there is **"no evidence that they did anything other than exactly what they were required to do"** and thus **"were simply carrying out instructions** given them" by the governmental entity involved. *Ibid.*

Fifth, when an individual governmental employee fails to act in accordance with duties imposed upon him by law or by his governmental employer then he is **not entitled to immunity.** "There is no statute which authorizes the officers or agents of the State to commit wrongful acts. On the contrary, they are under the legal obligation and duty to confine their acts to those which they are authorized by law to perform. **If**

³ "[N]o single all-inclusive rule can be enunciated or applied in determining entitlement" to immunity. *James*, 221 Va. at 53. "The degree of negligence required to impose civil liability will depend on the circumstances of each case" and "[e]ach case must be evaluated on its own facts[.]" *Colby v. Boyden*, 241 Va. , 125, 130, 132 (1991). Immunity has been extended to lower-level governmental employees only on a "case-by-case basis." *Messina*, 228 Va. at 309.

they exceed their authority, or violate their duty, they act at their own risk[.]”
James, 221 Va. at 55.

The foregoing considerations guide the application of the *James* factors:

a. **Nature of the function performed by the employee.** Law enforcement is clearly a governmental function. Consideration of this factor clearly requires more, however, than this type of very general, categorical showing. Rather, the immunity determination requires a “close examination” of the particular function Perry was performing and “the manner of its performance.” Perry was not performing any function at a supervisory or policy-making level. Moreover, although Perry claims an emergency required her actions, the evidence shows that at the time of the collision she was **not** engaged in an emergency response and she was not required to act in the extraordinarily dangerous manner she did (see Exhibit A). To the contrary, even if Perry did believe she was engaged in an emergency response which required her to run this red light, her “manner of performance” violated duties (mandating use of lights and siren, slowing or stopping, etc.) which were specifically and expressly applicable to that situation.

b. **Extent of the government’s interest and involvement in the function.** Although the government has an interest in the orderly and effective provision of law enforcement services for the protection and safety of its citizens, that interest is not served by police officers running red lights when not engaged in an emergency response or doing so in a manner that violates duties imposed upon them. The government and public interest are served by concluding that governmental officials who violate their duties do so at their own risk. Moreover, the government interest is not served by Perry’s conduct in violation of the duties imposed by Section 46.2-920 and General Order 501.1 since a failure when running a red light to use lights and siren, slow, and stop if necessary, defeats **both** the purpose of responding to the call (since the officer is far more likely to be involved in a collision, which terminates her own

response to the call and diverts additional police resources to respond to the collision) and defeats the purpose of protecting the safety of the public and police officers.

c. The degree of control and direction exercised by the state over the employee.

In a case where the government exercises close control over a low-level employee, and the low-level employee does exactly what the government requires her to do, this control and direction factor points towards extending immunity. In this case, by contrast, at the time of the collision Perry was **not** doing exactly what she was required to do. Rather, she was doing exactly what state law, her official training, and her employment orders mandated that she **not** do. She was knowingly running a red light at high speed in busy traffic without giving any warning by siren or air horn.

d. Whether the act complained of involved the use of judgment and discretion.

Perry was not required to make a discretionary decision regarding when she could run red lights. The law and her employment duties specifically directed that she could run red lights only when engaged in an emergency response and only when using her siren and/or horn to give warning (and slowing and stopping if necessary). An employee who uses his "discretion" to violate her training, orders, and duties has not used any discretion of the type that would trigger or justify immunity. Rather, she has acted contrary to the duties of her employment and 'acts at her own risk.'

Perry glibly admits that her "use of lights and siren was not in strict compliance" with FCPD General Order 501.1 [it also obviously violated state law (*Virginia Code* § 46.2-920) and her training at the police academy],⁴ as though admitting this fact could somehow make it

⁴ Virginia Code § 46.2-920 is attached hereto as Exhibit B. Pertinent provisions of Fairfax County Police Department General Order 501.1 are attached hereto as Exhibit C. Pertinent

inconsequential. Actually, Perry's admitted failure to run lights and siren is important for two reasons. **First**, it powerfully belies her contention that she was engaged in an emergency response to Beacon Mall. See *Friday-Spivey*, 268 Va. at 390 (where departmental procedures mandated use of lights and siren in any emergency response, a fire truck driver who "was driving in a nonemergency manner without lights and siren" was not entitled to immunity). Perry was only eight-months out from extensive training that an emergency response involved and required the use of lights and siren. She knew how to make an emergency response and she was not making one. **Second**, Perry's failure to activate her lights and siren was a violation of duties expressly imposed her by *Virginia Code* § 46.2-920 and FCPD General Order 501.1. When she ran the red light at Boswell, Perry was not complying with these duties. She has admitted she was not even trying to sound her siren or horn or slow down as she ran the light.

Perry claims that she "believed she could proceed safely and quickly to the scene without constant use of lights and siren." Perry argues that she was entitled to use her own discretion to strike the proper balance regarding whether to run this red light and whether to use her siren or air horn. In fact, however, this is a matter which is **not** entrusted to her discretion. Even if she had been responding to an emergency, she had no discretion to violate speed limits and traffic lights without activating lights and siren.⁵

provisions of the training Perry admits she received are attached hereto as Exhibit D. Highlighting of key provisions has been added.

⁵ The General Assembly and FCPD General Order 501.1 have already struck the proper balance on that issue, and it was no longer an issue entrusted to Perry's discretion. Under *Virginia Code* § 46.2-920, police officers are not automatically exempted from the duty to stop for red lights and other traffic laws. Rather, the express statutory standards provide that a police officer is exempted from the requirement that he obey traffic lights **only** if 1) he is the driver of any emergency vehicle, 2) the vehicle is **in fact** at the time in question being used in the performance of public services under **emergency conditions**, and 3) the vehicle is being used at the time in question **in response to an emergency**. Extensive evidence supports the conclusion that these predicates were **not** met in this case. Moreover, even if Perry could prove that these three factual

Perry's conclusory, after-the-fact, self-serving claim that she felt that any dispatch to a reported fight scene necessarily constituted an emergency call requiring emergency response driving by her is obviously not determinative. Of course Perry now claims that she believed an emergency required her to do what she did. But the contemporaneous evidence shows that neither the dispatcher nor anyone else directed Perry to make an emergency response and Perry never received any information indicating that guns or other weapons were involved in this reported fight involving only 3 persons. Perry traveled substantial distances in a non-emergency manner and even with her FM radio playing music. At the very moment Perry ran this red light, she knew another Fairfax County Police Officer was ahead of her responding to the reported fight scene. The activities and conduct of Perry and Allen prior to and after the collision belie the after-the-fact assertion that they thought they had to make an emergency response that required Perry to run the red light. Allen was so relaxed that he even casually typed a text message to Perry which he obviously expected her to receive while they were en route to the

predicates were met, she will need to do more. The statute expressly provides even in an emergency when the first three factual predicates are met, **a police officer can violate speed limits and traffic lights only if the police officer has activated both the lights and siren on his vehicle.** [The statute contains limited exceptions to this requirement, such as situations involving passing on the shoulder or where no sounded warning is needed. Those exceptions are inapplicable here even by Perry's own admission. Perry testified in deposition the siren requirement was inapplicable upon close approach to the scene of an ongoing crime or on an empty roadway, but it is clear that the siren requirement applied at this busy intersection.] In *Colby*, the Virginia Supreme Court held: "While one responding to an emergency situation is not excused from civil tort liability, Code § 46.1-226 [now Section 46.2-920] **affords the protection of a standard tailored to the situation.** One [i.e., an emergency responder] will not be held negligent per se for the specific acts authorized under the statute. . . . In enacting the statute, the legislature balanced the need for prompt, effective action by law enforcement officers and other emergency vehicle operators with the safety of the motoring public. A similar concern for balance underlies the Virginia sovereign immunity doctrine." 241 Va. at 132 (emphasis added). Perry's running of the red light without lights and siren was not authorized under the statute and she therefore owed and violated the duty to stop for the red light.

Mall suggesting that they consider stopping for coffee later ("MIGHTAS WELL HIT BUCKS SINCE WE GOIN").

Moreover, even if Perry had truly believed she was engaged in an emergency response that required her to speed and violate traffic lights, she would nevertheless not be entitled to immunity because she violated duties expressly imposed upon her in the event of an emergency response. Virginia law establishes that even a police officer has a mandated statutory duty to comply with the specific requirements of motor vehicle operation statutes unless he shows that some statutory exemption from those duties applies.⁶ Even where qualified immunity might otherwise apply, a government official is not entitled to immunity if he acts in excess of his authority or in violation of duties owed by him. A duty expressly imposed by statute is a ministerial duty. Because Perry did not activate her siren or air horn, she cannot fall within the exception of § 46.2-920 and she thus violated her duty to stop for the red light. *See Messina*, 228 Va. at 311 ("[o]ne of the critical factors in deciding whether a government employee is entitled to immunity is whether he was acting within or without his authority at the time of doing or failing to do the act complained of").⁷

⁶ See fn. 6 *supra*; *Virginia Transit Co. v. Tidd*, 194 Va. 418, 425 (1952) (even police officer responding to an emergency has a duty to comply with all motor vehicle laws unless some statutory exemption applies); *White v. John Doe*, 207 Va. 276 (1966) (all statutory duties imposed by motor vehicle statutes applied to the police officer unless some statutory provision specifically exempted him); *Yates v. Potts*, 210 Va. 636, 640 (1970) (police officer who brought personal injury action against speeder he was pursuing was not guilty of negligence per se "if the exemption [established by a predecessor to current *Virginia Code* § 46.2-920] is applicable"). The General Assembly has expressly provided that the statutory duties governing motor vehicle operation are applicable to **all drivers, including police officers**, unless some specific exception is proved to apply. See *Virginia Code* § 46.2-801 ("The provisions of this chapter applicable to the drivers of vehicles on the highways **shall apply to the drivers of all vehicles . . . subject to such exceptions as are set forth in this chapter**").

⁷ All of the Supreme Court cases relied upon by Perry were decided before *Friday-Spivey* and all are readily distinguished. *Colby and Hylton* (260 Va. 56 (2000)) both involved "hot pursuit"

Wherefore, the Plea in Bar should be overruled.

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driving by a police officer chasing a motorist at the very time of the collision. This case is not a "hot pursuit" case but instead is a case where at the time of the collision the police officer was en route to the location where he intended to provide law enforcement services, a situation less deserving of immunity. See *Friday-Spivey*, 268 Va. at 387-388 (holding fire truck driver was not immune where at the time of the collision he "was en route to the shopping mall in response to a 'Priority 2' dispatch" and "was on his way to accomplish the governmental purpose of delivering the manpower and equipment necessary to rescue an infant locked in a car"); *Lake*, 2008 Va. Cir. Lexis 118 at *7 ("driving to or from the location at which his governmental function is to be performed is not a discretionary act to which immunity attaches"). Perry also erroneously argues that *Colby* and *Catlett* granted immunity despite the failure to use lights and siren, but it is clear the Virginia Supreme Court does not view those cases as no-lights-and-siren cases. In *Friday-Spivey*, the Virginia Supreme Court noted that in both *Colby* and *Catlett* the statutory duties to run lights and siren had been met. 268 Va. at 390 (distinguishing, in the Supreme Court's own words, "cases such as *Colby* (police officer in hot pursuit in a high speed chase with emergency lights and siren activated), or *National R.R. Passenger Corp. v. Catlett Volunteer Fire Co.*, 241 Va. 402 . . . (1991) (fire truck en route to a burning vehicle with emergency lights and siren activated)" (emphasis added). In *Smith*, the Supreme Court held that an ambulance driver was entitled to qualified immunity where he was engaged in an "immediate and necessary response" to an emergency, he made his trip "in conformity with the [county fire and rescue communications] center's dispatch order," and "with its [the ambulance's] siren and red lights in operation." In *Smith* and *Catlett*, no traffic light was involved and the duties mandated by statute in situations involving running red lights for emergencies were not involved. The three circuit court decisions attached to Perry's brief have no persuasive value since they contain essentially no discussion or reasoning. Circuit Court opinions are not binding precedent, although the logic and reasoning in them may sometimes be viewed as informative. See, e.g., *Cassen v. Slater*, 75 Va. Cir. 327, 331 (City of Chesapeake Cir. Ct. 2008).

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Certificate of Service

I hereby certify that on the 28th day of July, 2009, I served a copy of the foregoing document, upon counsel for all other parties by causing a copy of the same to be delivered by hand on that date to Paul R. Pearson, Esquire, Law Offices of Roger S. Mackey, 14200 Park Meadow Drive, Suite 100 N, Chantilly, Virginia 20151 (Counsel for Travelers Property Casualty Insurance Company), and by causing a copy of the same to be delivered by hand on that date to David J. Fudala, Esquire, 4010 University Drive, Second Floor, Fairfax, VA 22030 (Counsel for Amanda Perry).


Thomas J. Curcio

EXHIBIT A

Some of the Extensive Facts Supporting A Finding
Perry Was Not Engaged in an Emergency Response
And Did Not Believe an Emergency Necessitated Her Conduct

1. At 4:45:01 p.m. Event #P080432531 was entered into the public safety communications computer containing the event remark "2 W/M HITTING A B/M AT THE ENTRANCE TO THE STORE BLK JACKRT BLUE PANTS".
2. At 4:46:01 p.m. a supplemental remark was added to the event history for event #2531 stating "CALLER LOST SIGHT OF THEM. LAST SAW THEM ALL GOING BACK INTO THE STORE".
3. At 4:46:37 p.m. a CAD message was sent by dispatch to Perry's computer stating "start north for event #2531 tks"
4. The CAD message was sent by the dispatcher as a routine message and not as an emergency.
5. The CAD message contained no information directing or requesting an urgent or emergency response by Perry.
6. At 4:47:02 p.m. Perry responded by CAD message sent to the dispatcher "K" (okay).
7. Perry never received any follow up CAD messages directing or requesting an urgent or emergency response or requesting information on the status of her response.
8. Sometime between 4:47:02 p.m. and 4:47:49 p.m. Perry checked the event remarks for event # 2531 and admits to having read the following information "2 W/M HITTING A B/M AT THE ENTRANCE TO THE STORE BLK JACKRT BLUE PANTS". At 4:47:48 p.m. Perry self-dispatched herself to the call. At no time did Perry ever receive any information indicating any injuries or weapons were involved. Perry never sought any additional information regarding the report.
9. Perry was over six miles away from the Giant food store when she dispatched herself to the fight report. Even though Perry knew that an emergency response requires the activation of lights and siren, and knew that weather and visibility conditions were very bad, Perry did not activate her lights and siren at that time or for more than three miles of her driving toward the event.
10. For over 3 miles while driving north on Route 1 up to the intersection of Route 1 and Sherwood Hall Lane, Perry went through 10 lights and they were either all green or she stopped for any and all red lights. At no time during this distance did she believe that the situation she was responding to was an emergency that required her to violate any red light.
- 11.. During her entire trip, Perry continued to have her car radio playing music.

EXHIBIT A

12. No other officer was sent the CAD message by the dispatcher concerning the reported fight call. No CAD message or voice message requested any other officer to become involved in responding. Officer Gary Allen was with Perry when she received the CAD message and he volunteered to go to the Giant as well in his vehicle.

13. Neither Perry nor Allen ever communicated en route regarding the reported fight or their plans for responding at the scene.

14.. While en route, neither Perry nor Allen ever sought any updated or additional information regarding the reported fight.

15.. While Officer Allen and Officer Perry were traveling to the scene in tandem, Officer Allen sent a text message to Officer Perry which was devoid of any shared sense of emergency, urgency, or even concern about the reported fight, but instead stated “MIGHTAS WELL HIT BUCKS SINCE WE GOIN.”

16. After Perry was involved in the collision, Perry took no action regarding reassigning the reported fight call nor did she say anything about reassigning it to the dispatcher or anyone else.

17. Perry had a very close relationship and strong bond with her partner Allen which contributed to their strong desire to keep their vehicles together en route to the call. After Officer Allen and Officer Perry got separated at the intersection of Route 1 and Sherwood Hall Lane, he sent her a second CAD message stating: (“WHATCHA DOING GIRL SHOULDA STAYED BEHIND ME”).

18. The first time Perry activated her lights and siren was when she became separated from her partner Allen at the intersection of Route 1 and Sherwood Hall Lane, which is a few blocks before the collision scene, and became annoyed and angry at the motorist. (Perry’s mobile video recorder captured her saying, “what the ##### [expletive not clearly audible]”) at being blocked by a motorist ahead of her at the Sherwood Hall Lane intersection.

19. When Perry ran the red light at Boswell Avenue, Officer Allen had already made it through the intersection and was on his way to the Beacon Mall, and they were becoming separated again.

20. Perry’s close relationship with her partner Allen and her frustration at being separated from Officer Allen did not constitute “public emergencies” requiring Perry to run the red light and to do so without sounding her siren or air horn and without stopping or slowing.

21. The fight call was assigned a priority 2 by the public safety communication computer. A dispatcher has up to 10 minutes to send a priority 2 call to an officer.

22. As Officer Perry was not mandatorily dispatched to the call by the dispatcher, was not dispatched by any voice message, and was not sent any emergency message, she could have ignored the CAD message sent to her computer stating “start north for event #2531”.

EXHIBIT A

23. After very briefly activating his lights and siren to pass through the intersection of Route 1 and Sherwood Hall Lane, Officer Allen's MVR shows Allen's vehicle (which was generally traveling in tandem with Perry) traveling with traffic in a normal and ordinary manner as the two officers traveled north towards the Boswell Avenue intersection.

Va. Code Ann. § 46.2-920 (2009)

(emphasis added to pertinent portions)

§ 46.2-920. Certain vehicles exempt from regulations in certain situations; exceptions and additional requirements

A. **The driver of any emergency vehicle**, when such vehicle is being used in the performance of public services, and **when such vehicle is operated under emergency conditions**, may, without subjecting himself to criminal prosecution:

1. **Disregard speed limits, while having due regard for safety of persons and property;**

2. **Proceed past any steady or flashing red signal, traffic light, stop sign, or device indicating moving traffic shall stop if the speed of the vehicle is sufficiently reduced to enable it to pass a signal, traffic light, or device with due regard to the safety of persons and property;**

3. Park or stop notwithstanding the other provisions of this chapter;

4. Disregard regulations governing a direction of movement of vehicles turning in specified directions so long as the operator does not endanger life or property;

5. Pass or overtake, with due regard to the safety of persons and property, another vehicle at any intersection;

6. Pass or overtake with due regard to the safety of persons and property, while en route to an emergency, stopped or slow-moving vehicles, by going to the left of the stopped or slow-moving vehicle either in a no-passing zone or by crossing the highway centerline; or

7. Pass or overtake with due regard to the safety of persons and property, while en route to an emergency, stopped or slow-moving vehicles, by going off the paved or main traveled portion of the roadway on the right. **Notwithstanding other provisions of this section, vehicles exempted in this instance will not be required to sound a siren or any device to give automatically intermittent signals.**

B. **The exemptions granted to emergency vehicles by subsection A of this section shall apply only when the operator of such vehicle displays a flashing, blinking, or alternating emergency light or lights as provided in §§ 46.2-1022 and 46.2-1023 and sounds a siren, exhaust whistle, or air horn designed to give automatically intermittent signals, as may be reasonably necessary,** and, only when there is in force and effect for such vehicle either (i) standard motor vehicle liability insurance covering injury or death to any person in the sum of at least \$

100,000 because of bodily injury to or death of one person in any one accident and, subject to the limit for one person, to a limit of \$ 300,000 because of bodily injury to or death of two or more persons in any one accident, and to a limit of \$ 20,000 because of injury to or destruction of property of others in any one accident or (ii) a certificate of self-insurance issued pursuant to § 46.2-368. Such exemptions shall not, however, protect the operator of any such vehicle from criminal prosecution for conduct constituting reckless disregard of the safety of persons and property. Nothing in this section shall release the operator of any such vehicle from civil liability for failure to use reasonable care in such operation.

C. For the purposes of this section, the term "*emergency vehicle*" shall mean:

1. Any law-enforcement vehicle operated by or under the direction of a federal, state, or local law-enforcement officer (i) in the chase or apprehension of violators of the law or persons charged with or suspected of any such violation or (ii) in response to an emergency call;

2. Any regional detention center vehicle operated by or under the direction of a correctional officer responding to an emergency call or operating in an emergency situation;

3. Any vehicle used to fight fire, including publicly owned state forest warden vehicles, when traveling in response to a fire alarm or emergency call;

4. Any ambulance, rescue, or life-saving vehicle designed or used for the principal purpose of supplying resuscitation or emergency relief where human life is endangered;

5. Any Department of Emergency Management vehicle or Office of Emergency Medical Services vehicle, when responding to an emergency call or operating in an emergency situation;

6. Any Department of Corrections vehicle designated by the Director of the Department of Corrections, when (i) responding to an emergency call at a correctional facility, (ii) participating in a drug-related investigation, (iii) pursuing escapees from a correctional facility, or (iv) responding to a request for assistance from a law-enforcement officer; and

7. Any vehicle authorized to be equipped with alternating, blinking, or flashing red or red and white secondary warning lights under the provisions of § 46.2-1029.2.

D. Any law-enforcement vehicle operated by or under the direction of a federal, state, or local law-enforcement officer may disregard speed limits, while having due regard for safety of persons and property, (i) in testing the accuracy of speedometers of such vehicles, (ii) in testing the accuracy of speed measuring devices specified in §

46.2-882, or (iii) in following another vehicle for the purpose of determining its speed.

E. A Department of Environmental Quality vehicle, while en route to an emergency and with due regard to the safety of persons and property, may overtake and pass stopped or slow-moving vehicles by going off the paved or main traveled portion of the highway on the right or on the left. These Department of Environmental Quality vehicles shall not be required to sound a siren or any device to give automatically intermittent signals, but shall display red or red and white warning lights when performing such maneuvers.

F. Any law-enforcement vehicle operated by or under the direction of a federal, state, or local law-enforcement officer while conducting a funeral escort, wide-load escort, dignitary escort, or any other escort necessary for the safe movement of vehicles and pedestrians may, without subjecting himself to criminal prosecution:

1. Disregard speed limits, while having due regard for safety of persons and property;
2. Proceed past any steady or flashing red signal, traffic light, stop sign, or device indicating moving traffic shall stop if the speed of the vehicle is sufficiently reduced to enable it to pass a signal, traffic light, or device with due regard for the safety of persons and property;
3. Park or stop notwithstanding the other provisions of this chapter;
4. Disregard regulations governing a direction of movement of vehicles turning in specified directions so long as the operator does not endanger life or property; or
5. Pass or overtake, with due regard for the safety of persons and property, another vehicle.

Notwithstanding other provisions of this section, vehicles exempted in this subsection may sound a siren or any device to give automatically intermittent signals.

**FAIRFAX COUNTY
POLICE**

GENERAL ORDERS

501.1

VEHICLE OPERATIONS

GENERAL ORDER

FAIRFAX COUNTY POLICE DEPARTMENT



SUBJECT: OPERATION OF POLICE VEHICLES

NUMBER: 501.1

CANCELS ORDER DATED: 4-1-05

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I. PURPOSE

This policy is issued for the purpose of delineating policy, providing guidelines, establishing rules governing the operation of County vehicles, and outlining procedures for specific incidents. Accidents and collisions involving police vehicles may involve property damage ranging from minimal to extensive, and may result in personal injuries or death to police officers and other citizens. The serious consequences and potential losses resulting from accidents make the issue of vehicle operation one of grave concern.

II. POLICY

The safety of the public and employees of the Department is of paramount importance in the operation of police vehicles. Accordingly, Department policy is that all County vehicles shall be driven within the limits of State law and County ordinance, and with a goal of establishing for all citizens an example of safe driving. Under emergency situations, sworn personnel are permitted to operate emergency vehicles beyond the limits of normal driving. The guidelines for these situations and other vehicle operations are set forth in this policy.

III. APPLICABILITY

The provisions of this policy are applicable to every employee of the Police Department, police officer and civilian, who is required to operate a County vehicle in the performance of official duties. Certain sections, by the very nature of their design, apply specifically to police officers.

IV. TERMINOLOGY

As used in this policy, the following words and terms shall have the meaning ascribed:

- A. Controlled Intersection - Any location of intersecting streets or highways where vehicular traffic is controlled by signal lights or signs.
- B. Normal Driving - That driving which relates to the maintenance of vehicle

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speed concurrent with the normal flow of traffic, the obedience to motor vehicle laws and requirements of posted vehicular control signs, the adherence to the "Rules of the Road," and the practice of courtesy as a responsible driver.

C. Pursuit Driving.- The act of following another vehicle, with emergency lights and siren activated (in accordance with the provisions of Section 46.2-920 of the Code of Virginia), in order to overtake and apprehend a violator who has disregarded the signal to stop. This definition is applicable regardless of the distance, speed, duration or number of police vehicles involved in the pursuit, and whether or not an apprehension is made.

D. Pacing - The act of following a motor vehicle at a coordinated speed to determine the followed vehicle's actual speed in violation of the posted speed limit.

E. Response Driving - That driving of an expeditious nature which relates to the effort made in a police vehicle to proceed to the location of an emergency, in a manner consistent with the provisions of Section 46.2-920 of the Code of Virginia, to include the usage of emergency lighting equipment, siren, and having due regard for the safety of persons and property. The term response driving includes operation of a law enforcement vehicle both in apprehension of persons suspected of committing a violation of law or in a response to an emergency call.

An active attempt by one or more officers operating police vehicles, equipped with emergency lights and siren, to overtake and capture a suspect or violator of the law operating a motor vehicle, while that person is making no willful effort to disregard the signal to stop is also considered response driving. This applies to the time between the observation of an offense until the point and time that the police vehicle has moved into a position behind the suspect/violator vehicle. If the suspect/violator vehicle yields to the signal to stop, then the encounter ends as a response driving situation. If the suspect/violator fails to yield to the police vehicle and willfully disregards the signal to stop, then the encounter escalates to a pursuit (see section IV. C.).

F. Precision Immobilization Technique - The intentional act of using a police vehicle to physically force a fleeing vehicle from a course of travel in order to stop it. P.I.T. is a specific, technical maneuver which requires advanced

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practical training prior to use.

- G. Serious or Fatal Injuries - Life-threatening injuries or injuries resulting in death.
- H. Incident - When a police vehicle comes into contact with another vehicle, object, or person as a direct result of the intentional actions of the officer. The use of the Precision Immobilization Technique shall not be considered an incident for reporting purposes.
- I. Close Pursuit - Pursuit that is initiated with the intent to overtake and arrest. Close pursuit does not necessarily imply immediate pursuit, rather pursuit without unreasonable delay. Close pursuit shall be synonymous with hot or fresh pursuit.
- J. Foreign Jurisdiction - Maryland, the District of Columbia and/or other states.
- K. MARNIS (Mutual Aid Radio Network Interface System) - A system which allows officers of Fairfax County to communicate directly with officers in another jurisdiction (Alexandria, Arlington County, Metropolitan Police Department, Maryland State Police, Montgomery and Prince George's Counties).
- L. Major Jurisdictional Boundary - Any jurisdictional boundary beyond which the pursuing officer would cease to have authority under normal conditions (i.e., state boundaries, the District of Columbia boundaries, and certain federal boundaries).
- M. Probable Cause - Where facts and circumstances are such as to cause a person of reasonable caution to believe that an offense is being or has been committed.
- N. Felonies Involving Violence - Crimes under this definition are murder, manslaughter, mob-related felonies, malicious wounding, felony kidnapping or abduction, robberies, carjacking, felony criminal sexual offenses, escape with force, and any felonies involving the discharge of a firearm.

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V. GENERAL OPERATIONS AND GUIDELINES

Police response must, of necessity, be governed by the nature of the occurrence, the amount of information a caller or complainant provides, and the credibility of that information.

During normal day-to-day police operations, many calls are received from citizens which concern mostly matters of routine services and complaints. In the majority of these calls, the situation reported is neither urgent nor of an emergency nature; hence, an officer responding to such an assignment would not be justified in operating the police vehicle in a manner other than that defined as normal driving. In other cases, however, an officer may or may not be justified to expedite to the location of a call, depending upon (1) the nature of the call, (2) the seriousness of the situation, and (3) the variable conditions of traffic congestion, weather, road surface, etc., present at the time.

No attempt is made to establish a fixed order or priority to include every possible situation; however, some form of guideline must be offered and, of necessity, that guideline must concern itself with the matter of whether a human life is or is not in danger - based upon the total information known at the time.

Any situation in which there is a high probability of death or serious bodily injury to a person is one that calls for action that is immediate and swift.

Recognizing that protection of human life is paramount, the responding officer must bear in mind that the response objective is to get to the location of the occurrence as soon as possible, safely, without danger to the officer or to others.

Since an officer's judgment and decision to expedite or not to expedite will depend upon the total information received from the Police Radio Dispatcher or other source, it is critically important for such information to be complete and accurate. Recognizing the importance of communication content and accuracy, EVERY INDIVIDUAL involved in the communication process must exercise great care to obtain as much information as possible from the reporting source, and to make every effort to ensure information accuracy throughout the process, from the initial source to the officer in the field.

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VI. RULES GOVERNING VEHICLE OPERATION

The following rules govern the operation of police vehicles:

- A. The operator of a County vehicle has the responsibility to inspect the safety features of the vehicle prior to commencing operation. The check should include (but not be limited to) all lights, brakes, fluid levels, siren, horn, and steering. No officer or employee shall operate any County vehicle which is believed to be operationally unsafe. Vehicles shall not be operated without fully functioning emergency equipment. A County vehicle with serious mechanical defects shall be towed, not driven, to the County Garage. All weapons shall be removed from any police vehicle prior to delivering to a County garage or other service location.
- B. Safety belts shall be worn by drivers and passengers whenever the vehicle is so equipped. This applies to the operation of County-owned vehicles, commercial, or privately owned vehicles if used while on-duty.
- C. No operator of a County vehicle shall modify, remove, deactivate, or otherwise tamper with the vehicle safety belts, supplemental restraint systems (airbags), emission control devices, or any part of the vehicle which affects its operation.
- D. During periods of inclement weather when County vehicles cannot be washed regularly, the operator of a County vehicle must ensure that headlight, barlight, and taillight lenses are kept clean, insofar as circumstances permit.
- E. The operator of a County vehicle, upon being made aware of any unsafe condition, shall advise the squad supervisor who shall ensure the vehicle is transported to the respective Department of Vehicles Services (DVS) facility as soon as practicable. DVS personnel shall determine the condition of the vehicle and its suitability for service.
- F. The operator of a County vehicle shall exercise careful observation of surrounding conditions before turning or backing any vehicle and operate the vehicle with due regard for these conditions.
- G. A County vehicle shall not be left unsecured with its engine in operation.

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- H. The operator of a County vehicle must recognize the variable factors of weather, road surface conditions, road contour, and traffic congestion, all of which directly affect the safe operation of any motor vehicle, and shall operate the vehicle with due regard for these factors.
- I. In addition to the provisions of this policy, the operation of County vehicles is governed by the Motor Vehicle Laws of the Commonwealth of Virginia and the County of Fairfax.
- J. Except for the very limited period of time in which pacing is accomplished, response or pursuit driving shall require the use of emergency equipment. Under certain limited conditions such as open highway with no traffic, the siren may be used intermittently with the red and blue, or blue light in constant operation. Police vehicle operation under these conditions requires extreme caution.
- K. The nature of certain crimes in progress may call for the use of the siren to be discontinued upon close approach to the location of the occurrence, and although such action is authorized by the Code of Virginia, Section 46.2-920, police vehicle operations under these conditions require prudent judgment and extreme caution.
- L. The operator of any police vehicle equipped with the "Wig-Wag" light system shall have the system, in addition to emergency equipment, in operation during daylight hours when responding to an emergency or while in pursuit. Vehicles not so equipped will have the headlights illuminated. Use of the "Wig-Wag" system during the hours of darkness is prohibited.
- M. For the call "Police Officer in Trouble" (Signal 13), only the units assigned and those nearest the location should respond. For reasons of safety, responding units should advise the radio dispatcher as to the location from which they are en route. The first officer arriving at the location who can do so should advise the dispatcher of the conditions as soon as possible in order that additional units can be canceled or dispatched without delay.
- N. Upon approaching a controlled intersection or other location where there is a reasonable possibility of collision, the operator of a police vehicle being operated under response or emergency driving conditions and having the

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right-of-way shall control the vehicle in such a manner so as to avoid a collision, reducing the vehicle's speed or stopping if necessary. When the operator of the police vehicle being operated under emergency conditions does not have the right-of-way, the operator shall reduce the speed of the vehicle and control the vehicle in such a manner so as to avoid collision with another vehicle or pedestrian, **stopping completely, if necessary**, before entering and traversing the intersection, while having due regard for the safety of persons and property.

- O. Regardless of the seriousness of the situation to which an officer is responding, and excepting circumstances that are clearly beyond the officer's control, the operator of a police vehicle shall be held accountable for the manner in which the vehicle is operated.
- P. At the scene of a crime, a motor vehicle crash, or other police incident, a police vehicle should be parked in such a manner so as to not create an obstacle or hazard to other traffic. If it is necessary to warn other drivers approaching the location, the emergency lights, four-way flashers, traffic flares or cones, or other warning devices shall be used.
- Q. The public address system located in police vehicles shall be used for official purposes only. The system may be used for purposes such as crowd control, felony vehicle stops, evacuation, riot scene control, and other similar incidents. The specific use shall be at the discretion of the officer when an articulable need exists.
- R. The spotlights and alley lights located on police vehicles shall be utilized in accordance with state law and for official purposes only. The system may be used for vehicle stops, checking businesses, or other patrol related functions.
- S. Truck chassis vehicles shall not engage in vehicle pursuits.
- T. Truck chassis vehicles may respond to emergency calls for service with emergency equipment activated; however, the posted speed limit shall not be exceeded.
- U. When entering a curve or entrance/exit ramp, operators of truck chassis vehicles shall adhere to the posted maximum safe speed.

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- V. Truck chassis vehicles shall always be slowed when going off the roadway or traveling on uneven pavement.
- W. While operating a County vehicle, personal or issued communication devices shall not distract a sworn or civilian employee from the safe operation of the vehicle.

VII. VEHICLE ESCORTS

Requests for various vehicle escorts are received on a regular basis by the Police Department. These range from escorts for funeral processions to dignitary protection to hazardous material transportation. Requests for these services will generally originate with the Traffic Division, Operations Support Bureau and will be provided by the Motor Section. Occasionally, staffing constraints may dictate the need for patrol assistance via personnel from affected district stations. Personnel should be aware of the hazardous circumstances which are present while conducting escorts. Thus, it is recommended that all escorts be conducted with marked police vehicles, motors, or cruisers. Marked police vehicles provide maximum visibility to other motorists, which will reduce the risk of accidents.

- A. Officers assigned to escorts have the responsibility to choose the travel route. Factors to be considered in route selection are time of day, local traffic, workload, road hazards, permit requirements, and weather. If the escorted party does not agree to the selected route, they will be advised to proceed at their own risk without an escort or, in the case of hazardous materials or wide loads, that they cannot traverse the County until they agree to the specified conditions.
- B. Officers have the responsibility to refuse any escort, after consulting with their supervisor, which presents an unreasonable hazard to their safety or that of the public. The primary concern in all escorts is to ensure the safety of the officers involved, persons being escorted, and the public. It is the secondary concern of police personnel to ensure minimal disruption to the normal traffic flow.
- C. Police vehicles actively involved in traffic control during an escort assignment shall have their emergency lighting equipment in operation at all times. Intermittent use of the siren may be required as a warning to other motorists.

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No escorted vehicle shall be permitted to exceed the posted speed limits.

- D. The officer in charge of a funeral escort will determine the manageable number of vehicles which can be escorted, based on assigned personnel, route and weather conditions. Generally, processions with less than fifteen vehicles will not be escorted unless circumstances dictate otherwise. Prior to refusing such an escort, the officer will confer with the immediate supervisor. In the event that the procession is larger than anticipated and cannot be safely escorted with available staffing, the officer will advise the procession coordinator that there will be a delay to await additional assistance or the procession can (1) proceed without escort at its own risk or (2) the officer may take a manageable number of vehicles, to include the family vehicle and funeral coach. Additionally, funeral home personnel shall be advised of the need to have all participating vehicles illuminate their headlights and activate their 4-way flashers. Placarding for the lead and last vehicle should also be recommended.
- E. Officers shall enter controlled intersections only on a green traffic signal. The officer may take control of the intersection; however, once this is done, control shall be maintained until the last vehicle in the procession has passed through the intersection. Motor officers may take control of any intersection, regardless of the signal color, when required by traffic conditions.
- F. When officers pass vehicles in a procession in order to reach the front, they shall not pass within the same traffic lane as the escorted vehicles and shall exercise due regard for their safety and the public. Escorted vehicles shall not be allowed to proceed against a red traffic signal, unless under the direction of a police officer.
- G. When the route of travel includes the interstate highway system, officers will advise a funeral home representative that the procession may not be assisted onto the interstate by police. Escort officers will remain in the right lanes of the interstate at a speed of less than 55 miles per hour to facilitate the reassembly of the procession.

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- H. Escorts of public officials and dignitaries will be coordinated with the appropriate personnel representing the official or dignitary and the Commander, Operations Support Bureau through the Traffic Division Commander. The Motor Section supervisor will be responsible for establishing the specific duties and assignments of police personnel related to the escort. When such escorts will be done in conjunction with a security detail for the officials, then the policies and procedures established under General Order 520.6, VIP Protection Policy, will also be followed.
- I. Escort requests of an unusual nature, such as for hazardous materials, oversized loads, parades, etc., shall be approved by and coordinated through the Operations Support Bureau Commander or the Traffic Division Commander.
- J. Escorts of civilian vehicles or other nonemergency equipped vehicles in emergency situations is prohibited.

VIII. ACCIDENTS OR INCIDENTS INVOLVING POLICE VEHICLES

Recognizing that motor vehicle accidents will occur despite all preventive efforts, this policy establishes the following investigative responsibilities and procedures:

- A. The operator of a police vehicle involved in any type of accident or incident shall, unless physically disabled, notify the police radio dispatcher without delay.
- B. Upon being notified of such accident or incident, the radio dispatcher shall advise the involved operator's supervisor.
- C. A complete investigation of the facts and circumstances surrounding the accident or incident shall be conducted.
 - 1. Generally, the investigation shall be conducted by the operator's squad supervisor. In the event the respective squad supervisor is not available, the investigation shall be conducted at the direction of the nearest available supervisory officer.

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2. An officer of equal or superior rank shall investigate any accident or incident involving a supervisor or staff officer. The services of any Accident Investigation Unit may be utilized for assistance.
3. The Internal Affairs Bureau, with the assistance of the Accident Reconstruction Unit, shall investigate the following specific types of accidents or incidents:
 - a. All accidents resulting from **or incidents involving** a police vehicle coming into contact with another vehicle, object, or person as a direct result of the intentional actions of the officer, **which result in death or serious physical injury.**
 - b. All accidents resulting in fatalities or serious physical injury which directly involve a police vehicle.
 - c. Use of the Precision Immobilization Technique.
 - d. Accidents which result in death or serious physical injury which occur coincidentally with a vehicle pursuit involving Fairfax County officers shall be investigated by the Internal Affairs Bureau.
4. In those cases to which they are assigned, the Internal Affairs Bureau is responsible for the following tasks:
 - a. Completing all investigative activities, reports and administrative actions usually assigned to the employee's immediate supervisor.
 - b. Ensuring a thorough examination of all issues likely to be questioned in future civil proceedings.
- D. Incidents, as defined in this General Order, shall be reported in accordance with General Order 540.1 "Use of Force".
- E. The investigating officer shall determine the cause of the accident, based upon all evidence and known facts, and shall include such factual findings, together with the conclusions, in a detailed administrative investigation report

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directed to the Chief of Police. All such reports shall be routed through the investigating officer's station, division or bureau commander, as applicable, for initial review.

F. Form FR 300 shall be completed for cruiser accidents only when required by law:

1. Any accident resulting in death or injury to any person, regardless of the location of the accident.
2. Any accident in which total property damage is \$1000 or greater and taking place on public property (highways, roadways, streets, or public parking lots maintained by the State, County, or municipalities).
3. Any "hit and run accident."

The "10-99 Accident Report" can be used in all other cases, without regard for the classification of the accident (i.e., preventable, non-preventable) or the eventual imposition of disciplinary action. Station, division, or bureau commanders may use this form during the review process.

A rough draft of all accident reports shall be faxed to the Patrol Bureau by the conclusion of the investigating supervisor's shift.

G. In all police vehicle accidents resulting in the filing of a FR 300 Form, the operator, unless physically incapable of doing so, shall submit a memorandum detailing the circumstances of the case. In accident cases resulting in the filing of a "10-99 Accident Report", the operator may either indicate concurrence with the investigating supervisor's findings by signature on the form or may submit a memorandum detailing the circumstances surrounding the collision.

H. The completed FR 300 Form and Factual Report (Administrative Investigation report or 10-99 Cruiser Accident Form) shall be transmitted to the Office of the Chief of Police as soon as possible. Only the original reports are to be submitted; however, copies may be made for station or division files.

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- I. Fatal or serious injury accidents or incidents require an oral report to be made to the Chief of Police as soon as possible after the occurrence. The Staff Duty Officer or ranking supervisor on-duty in the Public Safety Communications Center at the time of the accident or incident shall make the oral report. In the event the Chief of Police is unavailable, the report shall be made to the appropriate Deputy Chief.
- J. The investigation of any police vehicle accident that occurs outside the boundaries of Fairfax County that involves death or serious injury to any party or involve allegations of criminal conduct by police personnel shall be conducted in accordance with Section VIII, C, 3, of this policy. All other police vehicle accidents will be investigated in accordance with Section VIII, and the following is provided as a general guide for supervisory staff. Any such investigation conducted outside Fairfax County shall be coordinated with the local jurisdiction investigating the accident to the maximum extent possible.
 1. Accidents occurring within the greater Washington Metropolitan Area (contiguous jurisdictions to Fairfax County, Washington D.C., Prince Georges County, and Montgomery County Maryland) - appropriate supervisory police personnel will respond and investigate any police accident that occurs. In some limited instances involving minor accidents occurring outside Fairfax County, an immediate on-site investigation by Fairfax County police supervisory personnel may not be required. Minor accidents, such as an accident which meets the requirements to be reported on the Nonreportable Accident Report (PD Form 190), may at the discretion of the affected Bureau Commander or Staff Duty Officer be investigated by the assigned supervisor utilizing police information and reports from the foreign police jurisdiction, telephone interviews, interviews and statements from the involved employee and other means in lieu of having personnel respond to a distant, minor accident scene.
 2. Accidents occurring outside the Washington Metropolitan Area will not require the routine response of police supervisory personnel in most instances. The assigned supervisor may utilize the accident report and related investigative reports from the foreign police department. In cases where the accident does not meet the foreign jurisdictions reporting requirements, an on-scene accident investigation and

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written report shall be requested by the assigned supervisor as a professional courtesy.

IX. ACCIDENTS INVOLVING RENTAL VEHICLES

Accidents involving rental vehicles will be investigated in accordance with Section VIII of this policy. There are, however, several differences in dealing with the vehicle.

A. Towing/Storage

1. If needed, the closest available County contracted wrecker will be used. During business hours, the vehicle will be taken to a repair facility predesignated by the rental agency. After normal business hours, the vehicle will be taken to the nearest police facility until the next working day. The rental agency will be contacted at that time to arrange removal to a repair facility.
2. If the vehicle can be driven, it should be returned to the operating employee's station/assignment.

B. Repair/Replacement Arrangements

1. If the employee is at fault or fault cannot be determined, the investigating supervisor must obtain two repair estimates. The Technical Services Bureau's Vehicle Coordinator will assist in arranging for estimates. This information, along with the vehicle, will be given to the rental agency. The rental agency will then provide a replacement rental car. A copy of the estimates will be forwarded to the Administrative Support Bureau, Financial Resources Division, for processing.
2. If a nonemployee party is at fault, the vehicle will be taken to the designated location for repair. The rental agency will make every effort to collect from the party at fault. If the rental agency is unable to collect, Fairfax County will become responsible for payment of damage.

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X. ACCIDENT OR INCIDENT REVIEW PROCEDURES

- A. The station, division or bureau commander of the officer involved in the accident or incident shall conduct a hearing upon receipt of the investigating officer's report. The hearing is for the purpose of determining whether there was any violation of statutes or ordinances, violation of General Orders or Regulations, and to arrive at a decision on whether the accident was preventable.
- B. If the accident was determined to be preventable, the reviewing commander shall indicate in the narrative report how that conclusion was reached and what specifically the involved officer did or did not do which resulted in the preventable accident.
- C. In cases where the accident is ruled preventable, the reviewing commander shall include in the report what disciplinary action was taken or recommended (if beyond the scope of delegated authority), and/or what remedial training is recommended.
- D. The reviewing commander shall forward the report to the next higher level of command for further review. The commander at the next level shall review the accident and reach a determination on two points: whether the accident was preventable and whether the disciplinary action is appropriate and consistent with other similar cases. The bureau commanders shall consult on the question of the consistency of disciplinary action. The decision at this level shall be reached within five (5) workdays after receiving the report.
- E. Disciplinary action shall be imposed in accordance with General Order 310.2, Disciplinary Actions and Appeals. Appeals from decisions on disciplinary action shall be in accordance with the procedures in General Order 310.2 or 310.3.

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XI. PURSUIT OF VIOLATORS

There are occasions when suspects flee from police authority or criminal or traffic law violators refuse to stop when given a signal to do so. Such circumstances require special consideration.

- A. A pursuit is justified when the officer knows or has reasonable suspicion to believe that a suspect has committed or is attempting to commit a crime; or a traffic infraction and refuses to stop when given a signal to do so and the necessity of immediate apprehension for a traffic infraction outweighs the level of danger created by the pursuit. Supervisors and pursuing officers must take into consideration the potential risk of death or serious injury to any person created by the pursuit itself.
- B. As soon as the pursuit is initiated, the pursuing officer must advise the radio dispatcher immediately of the pursuit and the reason for the pursuit. A first-line supervisor will also be notified as soon as practical, via the PSCC. The supervisor is required to acknowledge awareness of the pursuit and assume incident command verbally, either through the voice radio or another oral communications device. As soon as practical, thereafter, a supervisor shall give specific direction that either (a) the pursuit may continue or (b) the pursuit shall be terminated. This provision does not preclude the termination of a pursuit by a supervisor or officers at any time within the criteria set forth in this order. A supervisor actively involved in the pursuit may assume command and control of the pursuit. This does not preclude a higher ranking supervisor or the Duty Officer from taking command of the pursuit.
- C. In many circumstances, the decision by an officer to abandon a pursuit may be the most prudent course of action:
 1. If, in the opinion of the pursuing officer or supervisor, there is a clear and unreasonable danger to the officer and others that outweighs the necessity for immediate apprehension.
 2. If the suspect's identity has been established to the point that later apprehension can be accomplished and there is no longer any need for immediate apprehension.
 3. If the prevailing traffic, roadway, and environmental conditions

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indicate the futility of continued pursuit.

4. If the pursued vehicle's location is no longer known.
 5. If the officer is unfamiliar with the area and is unable to determine the pursuit location and direction of travel, especially in pursuits outside of Fairfax County.
 6. If the communications capability between the pursuing officer(s) and the PSCC becomes severely limited.
- D. The pursuit shall be terminated at or prior to the jurisdictional boundary consistent with the exceptions authorized within this General Order. It shall be the responsibility of each pursuing officer and supervisor to be aware of the exact location of these boundaries. Additionally, officers not directly involved in a pursuit are not permitted to position themselves in another jurisdiction in anticipation of assisting or joining a pursuit where the most recent information does not authorize pursuit beyond the boundaries of Fairfax County, as directed in this General Order.
- E. At no time will more than three police units be directly involved in the pursuit, except in instances where specific need for them can be clearly defined. If more assistance is necessary, the number of units will be determined by:
1. the nature of the offense;
 2. the number of suspects;
 3. whether the participating police vehicles have more than one officer;
and
 4. other clear and articulable facts that would warrant the increased hazard.

The decision to commit additional vehicles shall rest with the supervisor based on information supplied by officers in pursuit. All officers involved shall advise the radio dispatcher, preferably through verbal communications, at the earliest possible moment. Units joining or participating in a pursuit without the specific, acknowledged authority of a dispatcher may be subject to discipline.

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F. Officers involved in or responding to a pursuit shall monitor the pursuit radio talkgroup utilized by the Fairfax County police dispatcher and supervisor controlling the pursuit, so as to acknowledge information, direction and orders, such as pursuit termination.

G. Whenever possible, use of unmarked police vehicles as pursuit vehicles should be avoided. The increased danger created by the less visible unmarked units makes it necessary that officers operating unmarked cruisers during a pursuit withdraw at the earliest possible time. Whenever marked police vehicles become available to take over the pursuit, the unmarked vehicle shall withdraw from the pursuit.

Police vehicles manufactured on truck chassis (patrol wagon, four-wheel drive utility vehicle, van, etc.) shall not be used to engage in a pursuit.

H. There should be no attempt by officers to pass other units involved in the pursuit unless the passing is first coordinated with the unit to be passed. All units in pursuit, whether the vehicle in front of the unit is the suspect vehicle or another police vehicle, shall space themselves at a distance that will ensure proper braking and reacting time in the event the lead vehicle stops, slows, or turns.

I. As outlined in General Order 530.2, Police Helicopter Operations, when a police helicopter enters the pursuit, other pursuing officers should reduce their speed and maintain radio contact with the aircraft, enabling the helicopter to direct and coordinate the pursuit. Officers not directly involved in the pursuit should monitor radio traffic for the pursuit location. It is recognized that instances will arise where officers would be acting properly in not reducing their speed after helicopter involvement. Examples of such instances include:

1. If the light and/or weather conditions are such that it is likely the pursued vehicle will be able to evade the helicopter.
2. If the terrain is such that the pursued vehicle could be easily concealed from the helicopter's view, i.e., wooded areas, etc.
3. If the suspects are wanted for a serious felony and their immediate apprehension is necessary once the vehicle is stopped.

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- J. If there is sufficient time, number of officers, and the road and traffic conditions allow, the deployment of the 3' STOP Stick Tire Deflating Device may be utilized to bring the pursuit to a conclusion. The following rules govern the deployment and use of the 3' STOP Stick:
1. **Shall** only be deployed by officers trained in the deployment of the STOP Stick.
 2. **Shall** only be used on vehicles with 4 or more tires traveling at speeds greater than 10 mph.
 3. The police dispatcher shall be advised of the exact location of the STOP Stick deployment, and pursuing units shall be notified by radio of the existence and location of the STOP Stick deployment.
 4. Officers shall deploy the 3' STOP Stick in accordance with the deployment methods, prescribed by the Department's training guidelines.
 5. Use of the STOP Stick shall be documented in the Incident Report (PD 42) and the STOP Stick Pursuit Report Form. A copy of both reports shall be forwarded to the Technical Services Bureau.
 6. Once the STOP Stick has been used or damaged and cannot be reused, it must be returned to the property room and a replacement obtained (**DO NOT DISCARD THE USED DEVICE**, as there is a lifetime warranty, with free replacement).
- K. Due to the potential dangers associated with vehicle collisions, the use of police vehicles to strike or make intentional contact with another vehicle should be avoided except in the following circumstances:
1. In accordance with the Precision Immobilization Technique (P.I.T.) procedures established by these General Orders;
 2. In accordance with the training and procedures established by specialized units of this Department (e.g. Organized Crime and Narcotics Division, etc.);

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3. When such action is not likely to cause serious injury or death and is likely to terminate an incident which, if permitted to continue, will place officers and citizens at risk of serious injury or death (e.g. boxing and trapping maneuvers).
- L. Except in extreme cases, three units are sufficient to box in a vehicle and slow its rate of speed to effect a safe, forced stop, minimizing the risk of serious injury and damage to property. This method requires extreme caution because it places the officer in the danger zone of an armed suspect and may expose the police vehicle to ramming by the suspect.
- M. If, in the judgment of the police officer or officers in pursuit, the fleeing vehicle must be stopped immediately to safeguard life and preserve the public safety, the Precision Immobilization Technique (PIT) may be used. Only those officers who have successfully completed training in PIT shall utilize it. This decision may be made by a pursuing officer. The decision to use the PIT must take into account the safety of bystanders, the risk of physical injury to the occupant(s) of the fleeing vehicle, and to the police officer. The Precision Immobilization Technique shall be considered Non-Deadly Use of Force. The use of PIT within the prescribed training guidelines of the Fairfax County Police Department is not likely to cause serious bodily injury or death. The decision to do so shall be reviewed on a case-by-case basis to determine whether it meets the criteria herein established. The review shall be conducted as specified in Section VIII of this policy.
- N. As a last resort, when all other means have failed to stop and apprehend a person fleeing in a motor vehicle who has committed a serious felony or who presents an immediate threat to life or injury to any person, the use of a stationary roadblock may be considered to effect an arrest and to stop the fleeing vehicle. The decision to use a stationary roadblock must take into account the risk of injury to or death of any person, and shall be made by a supervisor. The use of a stationary roadblock shall be established as follows:
 1. Under no circumstances shall a citizen's vehicle be utilized to establish a moving or stationary roadblock.
 2. The roadblock must be clearly visible and provide adequate warning to allow vehicles to come to a safe stop.

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3. The police dispatcher shall be advised of the exact location of the roadblock, and all pursuing units shall be notified by radio of the existence and location of the roadblock.

O. When possible, civilian passengers should not be allowed to remain in an emergency vehicle during pursuits.

XII. CLOSE PURSUIT INTO MARYLAND AND THE DISTRICT OF COLUMBIA

Maryland and the District of Columbia have granted statutory authority for Virginia law enforcement officers to pursue across their boundaries and effect arrests provided that probable cause exists involving the occurrence of an offense which is a felony. After entry, the laws of such jurisdictions control the permissible conduct for pursuing officers.

It is the policy of this agency that close pursuit shall extend into Maryland and the District of Columbia solely in accordance with the following requirements:

A. Vehicle operation shall be in compliance with this policy and Virginia state law.

B. The pursuing officer(s) has established probable cause that the person being pursued has committed, has attempted to commit, or is committing a felony involving violence or the threatened use of violence, as defined in Section 19.2-297.1 of the 1950 Code of Virginia, as amended. Crimes included under this code definition are murder, manslaughter, mob-related felonies, malicious wounding, felony kidnapping or abduction, robberies, carjacking, and felony criminal sexual assaults. In addition to these crimes, officers may also pursue for escape with force and any felony involving the discharge of a firearm.

C. A first-line supervisor shall be notified as soon as practical and a supervisor must specifically authorize the pursuit to continue. Officers are not required to delay entry into a foreign jurisdiction while awaiting supervisory approval. The supervisor's decision to allow continuation of the pursuit shall be based on the seriousness of the crime, traffic condition, time of day, and environmental conditions. If a first-line supervisor is not available, authorization shall be obtained from the Duty Officer. In the event the Duty

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Officer is not available, the PSCC supervisor shall assume responsibility for authorization.

D. Responsibilities of pursuing officer(s) before entering Maryland or the District of Columbia.

1. When an officer(s) in close pursuit perceives the likelihood that the pursuit will involve movement into Maryland or the District of Columbia, the officer shall notify the Public Safety Communications Center and request a MARNIS patch. This request should be made as soon as possible to allow sufficient time for the Public Safety Communications Center to establish the contact. The officer(s) shall provide the Public Safety Communications Center with the description of the vehicle, occupants, indication of weapons present, location of entry into the jurisdiction, and criminal charges involved.
2. No more than two emergency vehicles should cross a major jurisdictional boundary in a pursuit, unless additional units are authorized by supervisory personnel for articulable reasons. When more than two units pursue across a major jurisdictional boundary, those in excess of two shall terminate pursuit as units from the entered jurisdiction join pursuit. As soon as practicable, the pursuit shall be relinquished to personnel from the entered jurisdiction, with a unit from the initiating jurisdiction continuing in response until the pursuit is concluded or terminated. This does not preclude a continued response by additional units of the pursuing agency at the discretion of their supervisor.
3. Officers shall not cross major jurisdictional boundaries to pursue for a non-violent felony, misdemeanor, or traffic infraction. If a nonviolent felony, misdemeanor or traffic infraction continues as the vehicle crosses a major jurisdictional boundary, the law enforcement agency of the entered jurisdiction shall be notified.

E. Responsibilities of pursuing officer(s) after entering Maryland or the District of Columbia.

1. The pursuing officer(s) shall maintain contact with the jurisdiction's unit, to the extent possible. The dispatcher in the Public Safety Communications Center shall monitor all communications regarding

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the pursuit and ensure the frequency is clear of unrelated traffic. The unit from the jurisdiction in which the pursuit is taking place will assume control of the pursuit and initiate any additional requests for assistance. In the event units from the jurisdiction in which the pursuit is entering do not assume control of the pursuit, the supervisory personnel, as outlined in paragraph C, who authorized the pursuit shall direct the pursuing officer when to terminate the pursuit.

2. Roadblocks shall not be initiated by any Fairfax County unit after crossing a major jurisdictional boundary.
3. Officers may arrest felons after a legal pursuit across major jurisdictional boundaries; however, they shall hold the individual for, and relinquish the individual to, the law enforcement agency of the entered jurisdiction. Custody of this individual should then be administratively processed through the entered jurisdiction with extradition procedures initiated by the Commonwealth of Virginia.
4. Any violations that occur after entry into a foreign jurisdiction will be charged by law enforcement officers of that jurisdiction.

XIII. CLOSE PURSUIT WITHIN THE COMMONWEALTH OF VIRGINIA, OUTSIDE THE BOUNDARIES OF FAIRFAX COUNTY

This section is applicable to pursuits entering Prince William County, Loudoun County, Arlington County, Alexandria City, Falls Church City, Fairfax City, and any other city or county within the Commonwealth of Virginia. It is not applicable to the Towns of Vienna, Herndon, or Clifton.

It is the policy of this agency that close pursuit shall be permitted anywhere within the state in accordance with the following requirements.

- A. All vehicle operation shall be in compliance with this policy and Virginia State law.

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- B. The pursuing officer(s) has established reasonable suspicion that the person being pursued has committed, has attempted to commit, or is committing any of the following:
1. A felony involving violence or the threatened use of violence. Crimes under this definition are murder, manslaughter, mob-related felonies, malicious woundings, felony kidnapping or abduction, robberies, carjacking, felony criminal sexual offenses, escape with force, and any felonies involving the discharge of a firearm;
 2. The following misdemeanor violations; parental abductions, assault, exposure, peeping, and sexual battery; and
 3. Any offense involving the use, threatened use, display or possession of a firearm or explosive device.
- C. With supervisory approval, an officer may continue beyond the boundary of Fairfax County, but within the Commonwealth of Virginia, under the following circumstances.
1. When only one officer from another jurisdiction is actively involved in the pursuit, or if the number of suspects, nature of crime and the possibility of weapons requires additional units for officer safety; or,
 2. The suspect(s) are reasonably suspected of having committed a felony that poses a threat to public safety. Examples may include serial burglars, auto theft rings, professional shoplifters, fugitive warrants for violent offenses, etc. This exception is not intended to include Speed to Elude under Title 46.2, Code of Virginia or single instances of property crimes; or,
 3. With prior approval of the OCN Division commander, pursuits may be authorized for the offenses of distribution and/or possession with the intent to distribute illegal drugs. The decision to grant authorization will be based on the type and amount of illegal substance, as well as information regarding previous dealings and criminal history of the suspect(s).

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- D. When an officer in close pursuit perceives the likelihood that the pursuit will necessitate movement into another jurisdiction within the state, the officer shall advise the Public Safety Communications Center and provide information such as vehicle and occupant description, location, and charges. The officer shall request a MARNIS patch, as soon as possible, if the pursuit will be entering a participating jurisdiction (Arlington County or the City of Alexandria).
- E. Responsibilities of pursuing officer(s) after entering another jurisdiction within the Commonwealth of Virginia.
 - 1. The officer shall maintain contact with the jurisdiction's unit if a MARNIS patch is established. In all other cases, the officer shall maintain, to the extent possible, communications with the Public Safety Communications Center relaying information that will assist the jurisdiction in locating and apprehending the person pursued.
 - 2. Upon apprehension and arrest of the person pursued in a city or county adjacent to Fairfax County (City of Alexandria, City of Falls Church, City of Fairfax, Loudoun County, Prince William County, Arlington County), the arresting officer shall immediately return the accused to a Special Magistrate in Fairfax County.
 - 3. Upon apprehension and arrest of the person pursued in a city or county not adjacent to Fairfax County, the arresting officer shall take the accused before the proper official of the city or county in which the arrest occurred.
 - a. If the arrest takes place with a warrant, the judicial officer shall either commit the accused to the custody of the arresting officer for immediate transfer to Fairfax County, admit the accused to bail, or commit the accused to jail for transfer as soon as possible.
 - b. If the arrest takes place without a warrant, the arresting officer shall obtain a warrant from the judicial officer where the arrest was made, charging the accused with the offense(s) committed in Fairfax County.

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NOTE: Offenses which are observed by pursuing officer(s) occurring beyond Fairfax County shall be reported to the authorities of such jurisdiction. The pursuing officer shall offer all reasonable assistance to authorities to further the investigation and any resulting prosecution for the offenses.

F. Responsibilities of Public Safety Communications Center Personnel.

1. When an officer in close pursuit notifies the dispatcher that a pursuit is likely to continue into another jurisdiction within the state, the Public Safety Communications Center personnel shall immediately alert the affected jurisdiction and provide all known information. If the affected jurisdiction, based on their department's policy, refuses to participate in the pursuit, this fact should be immediately relayed to the pursuing officer.
2. The appropriate first-line supervisor shall be notified as soon as practical of the pursuit and of any instances of nonparticipation by the affected jurisdiction.

XIV. PURSUIT INTO FAIRFAX COUNTY BY OTHER JURISDICTIONS

Officers may assist with pursuits by other jurisdictions into Fairfax County if it meets the Department's criteria and if approved by a supervisor. All vehicle operation and pursuit criteria shall be in compliance with this policy. Officers assisting an outside agency shall terminate their assistance when the pursuing officer leaves Fairfax County unless the pursuit continues to meet the Department's criteria as outlined in Section XIII. The Public Safety Communications Center personnel shall notify the pursuing jurisdiction that we are terminating the pursuit at the County line. Warrants for traffic and criminal violations committed by the pursued driver may be obtained in the event that the identity of the violator is established. In the event that the other jurisdiction terminates its pursuit while within the County, officers will continue to pursue only on the basis that the pursuit continues to meet the Department's criteria and approval is granted by a supervisor.

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XV. DOCUMENTATION AND REVIEW

- A. Whenever an officer is involved in a motor vehicle pursuit, the immediate supervisor shall be informed of the incident. This procedure applies to all pursuits regardless of outcome. In all cases, the involved officers shall provide a complete description of the incident in a Field Investigation Report (42) with the pursuit carried as "Event 2." The first event normally will reflect the incident that started the pursuit, i.e., reckless driving, stolen auto, etc. If more than one officer is involved in the pursuit, each additional officer shall file a supplement to the original case. Copies of the Field Investigation Report and any associated supplementary reports shall be forwarded to the station or division commander for review. After the report has been reviewed, the station or division commander must initial the report and forward a copy to the commander of the Internal Affairs Bureau. This policy is applicable to all motor vehicle pursuits and not limited to those pursuits which continue outside the boundaries of the Commonwealth of Virginia.
- B. The controlling supervisor shall respond to the location of the end of the pursuit to assist officers at the scene, unless circumstances exist that prohibit them from responding. As soon as practical following the pursuit, a debriefing will be conducted by the first-line supervisor and involved officers, unless the pursuit results in a criminal or administrative investigation at which time a debriefing may only be conducted with the specific approval of the bureau commander. Information and observations provided by PSCC personnel and helicopter crew, if applicable, may also be considered for inclusion. The purpose of the review is to evaluate the observations and actions of all personnel in light of pursuit procedures and training issues.
- C. The pursuit will be documented by the supervisor in a PD42SP (New form) supplement to the original preliminary investigation report of the pursuit for Departmental use only. A copy of this supplement will be faxed to the Internal Affairs Bureau by the conclusion of the investigating supervisor's shift. The investigating supervisor's supplement shall include, but may not be limited to, the following information:
 - 1. Reason the pursuit was initiated.

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2. Total number of police vehicles involved in the pursuit.
3. Time the pursuit began and the time that it was terminated.
4. Path traveled by the suspect vehicle during the pursuit from the starting point of the pursuit to the location where the pursuit ended. (Include the approximate mileage traveled.)
5. Number of persons in the suspect vehicle.
6. Reason for the termination of the pursuit (i.e., apprehension, accident, suspect vehicle lost, risks of pursuit outweighed need for apprehension, supervisor/officer decided to end pursuit, etc.).
7. Any injuries involved.
8. Damage to property involved.

The Internal Affairs Bureau will be responsible for forwarding this information to the Criminal Justice Academy for review by the Driver Training staff.

- D. The Staff Duty Officer shall include a brief synopsis of any pursuit occurring during their tour of duty in their report.

XVI. LEGAL REFERENCE

A. Code of Virginia

- | | | |
|----------------|-------------|-------------|
| 1. 46.2-852 | 4. 46.2-373 | 7. 46.2-834 |
| 2. 46.2-829 | 5. 46.2-828 | 8. 19.2-76 |
| 3. 46.2-920 | 6. 46.2-817 | 9. 19.2-77 |
| 10. 19.2-79 B. | | |

B. Code of the County of Fairfax

- | | |
|-----------|------------|
| 1. 82-1-6 | 4. 82-1-18 |
| 2. 82-4-1 | 5. 82-1-19 |

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3. 82-4-12

XVII. ACCREDITATION STANDARDS REFERENCE

VLEPSC

ADM.	OPR.		PER.
05.01	01.01	01.09	09.02
05.04	01.02	03.05	
	01.03	07.08	
	01.04	07.13	
	01.08		

This General Order becomes effective July 1, 2005 and rescinds all previous General Orders pertaining to the subject.

ISSUED BY:

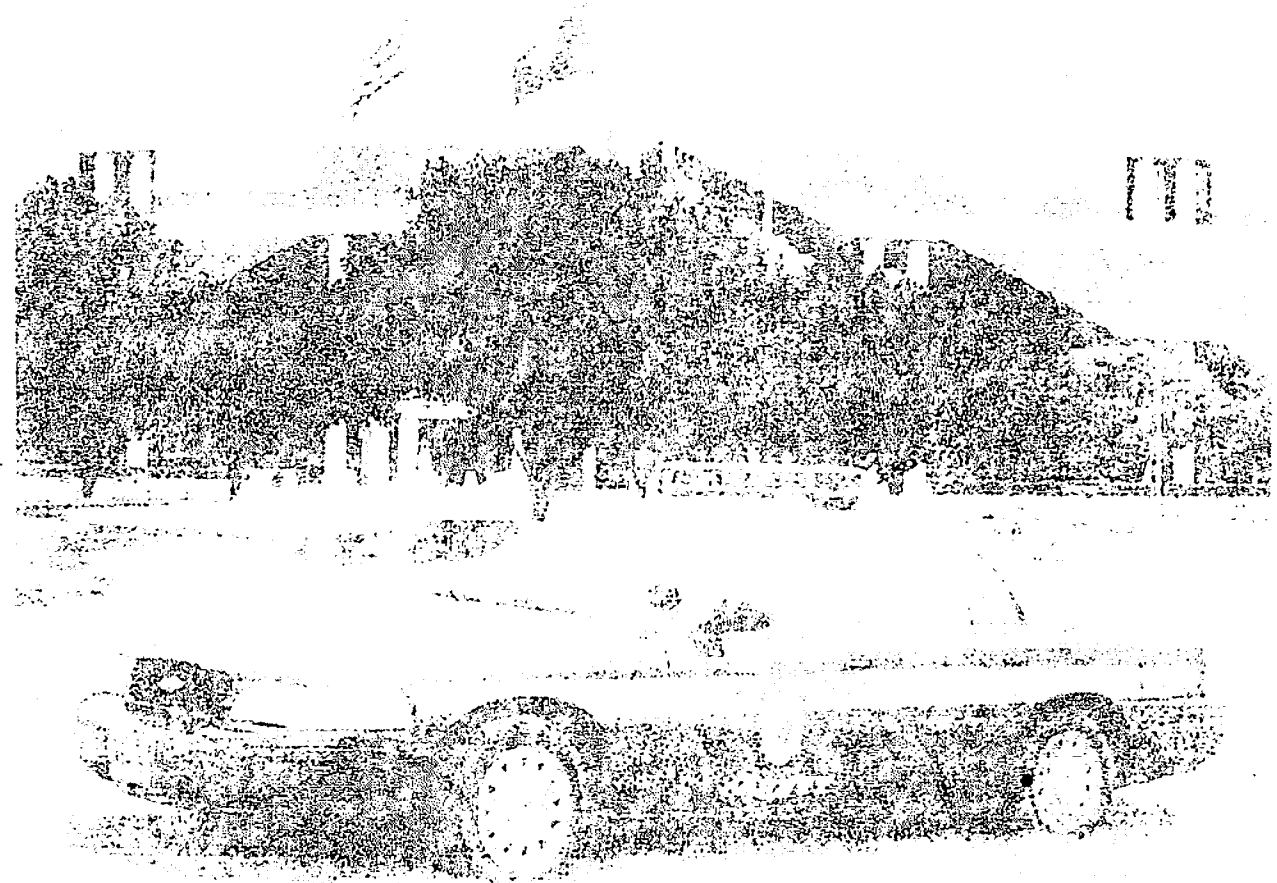
APPROVED BY:

Chief of Police

County Executive

Pertinent Portions of
Session 51
Emergency Vehicle
Operations Training Manual

Fairfax County Criminal Justice Academy Emergency Vehicle Operations Center



Session 51

EXHIBIT

Perry 1

A Perry

FORWARD

This Driver Training Workbook was developed to aid you, as a student, in the basic law enforcement driving course. The material presented in this workbook is not all inclusive. During your training period, you will be presented with additional information. You are encouraged to take notes in this manual.

The information contained in this manual is essential to the safe, effective operation of emergency vehicles. Adherence to the basic driving principles and legal guidelines presented during the course should reduce the chances of being involved in a traffic accident. You are responsible for ALL of the material in this manual as well as any material presented to you while attending this course. It is the student's responsibility to ask instructors to clarify any information that is not understood.

COURSE GOAL

The goal of the Basic Law Enforcement Driving Course is to help the student develop safe driving skills while operating an emergency vehicle. This will include patrol driving practices, emergency response driving skills and pursuit driving skills. Great emphasis will be placed on safety, using good judgment and decision making.

DURATION OF COURSE

Basic Law Enforcement Driving.....88 hours

THE STAFF

SUPERVISOR: 2ND LT. KEN MAY

INSTRUCTORS:	MPO	PAT SMITH
	PFC	LONNIE DOUCET
	MPO	JOHN LAMPER
	PFC	MICHELLE HUMPHRIES
	MDS	KEVIN GARLOW
	MPO	TOM BECKMAN

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Introduction to Defensive Driving

What is defensive driving? We believe that numerous things combined, define defensive driving. When we speak of attitude, we mean the ability of a person to recognize and admit that everyone has driving deficiencies. Recognizing one's own personal limitations is no easy task. One must first be receptive to the fact that we have personal limitations and driving deficiencies. Next, a person must be willing to change from old "bad habits" and adopt proper methods and techniques for the daily task of driving. Attitude is one of the most important factors in defensive driving.

Common courtesy, knowledge of traffic laws and ordinances, departmental policy and General Orders, control of physical faculties, emotions and concentration all work together to produce a professional emergency vehicle operator and a good defensive driver, who is alert to accident potentials, and exercises good judgment in an effort to avoid them.

After recognizing our driving deficiencies and possessing a willingness to improve them, we should begin with an overall inspection of the vehicle we intend to operate.

To begin with, the vehicle walk-around inspection is not only for maintenance purposes, but more important, for your safety. When you go on duty, you do not know at what moment you may be called upon to respond to an emergency situation with that vehicle. In these high stress conditions, you want to have the assurance and confidence that your vehicle is safe and operable even at speeds above the posted limits.

The visual and physical inspection can be completed in less than three minutes and will provide you with a sense of security. In the final analysis, responsibility for the mechanical safety of a vehicle rests with the operator. You can minimize the hazard inherent to our type of operation by knowing that your vehicle is mechanically safe. NEVER operate a vehicle or allow anyone else to operate a vehicle which you feel or know is mechanically unsafe. The civil ramifications and risk to the public and yourself is not worth the risk of driving that type of vehicle on the highways. **(REFER TO VEHICLE INSPECTIONS SECTION FOR INSTRUCTION ON HOW TO COMPLETE THE VEHICLE INSPECTION)**

After inspection of the vehicle is complete, adjust the seat to a comfortable position which places the steering wheel the proper distance from you. The distance is normally correct if you hang your wrists across the top of the steering wheel and find a slight bend in your elbows. Remember, in an emergency situation, you need room to maneuver, but not so much room that you have to reach for the steering wheel, accelerator, or brake pedal. Small persons should be careful not to sit too close to the steering wheel in the event the airbag deploys. Vehicles with adjustable pedals are recommended for those persons.

(Refer to the Behind the Wheel section for further instruction on proper seating position, proper mirror placement, and all other fundamentals reference safe operation of the police vehicle.)

Now it is time for the defensive actions on the part of the driver. The following five defensive driving principles, if practiced, will reduce the chance of being placed in an emergency or critical driving situation.

1. Expand your field of vision and look ahead

Allow yourself enough time and space to take proper action should an unexpected situation arise. Never tailgate and don't concentrate solely on the road directly in front of the car. This type of driver is very prone to the effects of "Tunnel Vision".

2. Size up the whole scene- create a "space cushion" around your vehicle

Constantly be aware of not only what is in front of you, but also those vehicles which are to both sides and to the rear of you. Be alert for sudden changes in road and weather conditions, visibility, and other factors.

3. Signal your intentions early

Let other drivers know well in advance what you are going to do by using turn signals or hand signals. Be predictable. Know the law governing turning and signaling or changing lanes.

4. Always plan an escape route

By maintaining a space cushion around your vehicle, you are already planning alternatives should something unexpected happen. Be prepared to yield to other vehicles

in any situation, even if the other driver does not have the right of way. Expect the unexpected.

5. Take decisive action

Make quick and accurate decisions based on your skills and limitations, knowledge and estimate of road and traffic conditions. Knowing what to do, doing it and controlling it confidently and decisively are what emergency vehicle operations is all about. Basically you have to identify a problem or hazard, analyze the situation, decide on a maneuver, and execute the maneuver. Use the eyes effectively.

As defined by the National Safety Council:

A. Defensive Driving is driving to prevent accidents in spite of the incorrect actions of others, adverse conditions, and;

B. A preventable accident is one in which you failed to do everything you reasonably could have done to prevent it.

S I P D E

The term "**S I P D E**", plays a vital role for the safe operation of the vehicle. This acronym should be applied over and over again while operating the motor vehicle. The five defensive driving principles discussed on page 7, are simplified by this acronym.

S-----SCAN ----- the roadway for any identifiable hazards or risks. This is done by the operator using their eyes to pan back and forth from one side of the roadway to the other, scanning 12 seconds ahead while driving.

I-----IDENTIFY ----- any hazards, or potential risks to the driver, or other vehicles.

P-----PREDICT----- what you, the driver or the other vehicle is going to do next. This is somewhat of a guessing game; however, this prepares the driver of the police vehicle to formulate a plan or avenue of escape.

D-----DECIDE -----what course of action you will take to avoid the obstacle

E-----EXECUTE----- the plan to avoid the obstacle

Following these five basic principles will allow the driver more time to prepare, react, and avoid obstacles while operating the motor vehicle. By formulating this plan, the driver creates a safer environment for all who use the roadway.

REMEMBER: An ounce of prevention is worth a pound of cure!

Liability Issues

LEGAL ASPECTS OF EMERGENCY VEHICLE OPERATIONS

The controversy surrounding high speed pursuit of violators is a problem of increasing concern to law enforcement administrators, officers and the public. The controversy may be attributed, in part to conflicting statistical research data developed by groups such as Physicians for Automobile Safety, the National Highway Traffic Safety Administration and Citizens for Effective Law Enforcement. In addition to these groups, the press and mass media tend to sensationalize pursuits in the extreme. The public is often misled and given false impressions of emergency vehicle operations by the media.

Law Enforcement Officers contribute to the controversy by getting behind the wheel of their patrol vehicle and driving 40 and 45 MPH through residential zones while on patrol or disregarding traffic control signs and signals while not operating under emergency conditions. We are very often our own worst enemy when it comes to the impression we make on the public.

The actions presented above represent a very sound basis for a civil case of negligence should an officer have an accident while driving in such a manner.

WHAT IS CIVIL NEGLIGENCE

Courts across the nation define negligence as; "The failure to conform one's conduct to a minimum legal standard." If you are on patrol and exceeding the posted speed limit, is this action conforming to a minimum legal standard? We often complain because the courts and the public have restricted our action in performing our law enforcement duties. The fact of the matter is that the courts and the public are not asking that much of us. Virginia law does not provide any exemption for officers operating police vehicles in normal everyday circumstances. Therefore, we must attune our driving behavior to the same legal standard we expect from the motoring public- compliance with all traffic regulations at all times, except during Emergency Response or Pursuit Driving.

APPLICABLE VIRGINIA STATUTES:

There are three types of regulations which an officer must be aware of and have a working knowledge of when operating an emergency vehicle:

1. Motor Vehicle and Traffic Laws enacted by the State Legislature.
2. Local Ordinances (which may or may not parallel State Statute), and;

3. Departmental policy concerning what you may or may not do as a vehicle operator for your agency.

This section deals specifically with related legislation enacted into law by Virginia, under Title 46.2 of the Code of Virginia, 1950, as amended.

46.2-829 Citizens must yield the right-of-way to emergency vehicles. This section applies only if FULL EMERGENCY EQUIPMENT is in operation (As may be reasonably necessary).

What is Liability?

1. legal obligation
2. subject to prosecution
3. You are held accountable for your actions

Many Officers trying to do the right thing make poor judgments and decisions, causing problems after the event.

Types of Police Driving

★
A. Normal Patrol

- a. routine patrol → different than citizen drivers

B. Emergency Response

- a. Point A to Point B

C. Pursuit

- a. Point A to ???

★Due Regard for Safety

A. Defined:

Each person is held to owe a duty to other persons to protect them from unreasonable risks.

B. Test applied to Due Regard for Safety:

Would a "trained" Police Officer, given the same circumstances, react this way; or was he or she negligent? Did the action shock the conscience of the public?

Two Types of Legal Charges

A. Criminal

a. Elements; found guilty beyond a reasonable doubt

B. Civil

a. Elements; based on preponderance of the evidence

b. The officer owed this person(s) and others a certain duty of due care.

c. The officers was negligent and violated that duty.

d. The plaintiff did, in fact, have an injury or died.

The officers negligence was a direct cause of the injury or death.

Type of Damages

A. Compensatory Damages

a. The victim is compensated for the damage and it is paid for by the County

B. Punitive (Punishment) Damages

a. You may have to pay

b. You may be ordered to pay

c. The county may pay

WHAT IS AN EMERGENCY?

A. Threat of injury or death; Property protection?

B. Property does not carry the same weight as injury or death to a person

Virginia State Legislation § 46.2-920

The Virginia legislation, which governs the use of emergency vehicles responding to an emergency situation is § 46.2-920.

"Limited" authority to disregard *certain traffic regulations*.

These statutory provisions do not apply to, under normal non-emergency situations.

You must obey the law as any other Citizen. The exceptions are granted only when an emergency exists.

The Seven Exemptions:

1. Exceed the Speed Limit.
2. Park or Stand Anywhere.
3. Disregard regulations governing turning.
4. Pass in Intersections.
5. Pass on the Right Off the Improved Portions of the Highway.....SIREN NOT REQUIRED.
6. Pass Stopped or Slow Moving Vehicles on the Left in a No Passing Zone or by Crossing the Highway Center Line.
7. Disregard Stop Signs and Red Traffic Lights.

Things You Can Not Do:

- A. You cannot go the wrong way on a one-way street.
- B. You cannot go the wrong way on an exit ramp.
- C. You cannot go eastbound in the westbound lanes or north in the southbound lanes, west in the eastbound lanes or south in the northbound lanes.

Requirements:

A. The Siren Must Be on "as may be reasonably
necessary."



B. Remember, an emergency must exist. If a trained Police Officer knows that an emergency no longer exists, the emergency response must cease.

Extreme Caution must be used if the siren is turned off, "driving adjusted for Safety."

The Officer should be able to articulate the reason or reasons why the siren was not in operation.

A defective siren or no operable emergency lights And you are no longer an emergency vehicle as described in the definitions.

Fairfax County is self insured meeting that standard for emergency vehicles.

What is Due Regard?

A. There is no Statutory definition of "due regard."

B. "Due regard" depends on the circumstances related to the existing situation.

C. The Officer who fails to drive with "Due Regard" for the safety of other highway users, may be held negligent "per se" as a matter of Law.

Negligence:

A. Failure to comply with statutory requirements.

B. Failure to comply with Departmental policy.

C. General principles of negligence and defined by law;

a. "Due regard for safety"

b. Actions that shock the conscience.

Vehicle Inspections

Each day, participants are allotted time to inspect the vehicle they will be operating. The standard vehicle inspection form shall be used. Any problems found during this inspection shall be brought to the attention of an instructor. This inspection procedure is one of the training objectives students must complete. It is also intended to promote good habits of insuring the vehicle is in a safe operating condition whether in training or on patrol.

Listed below is the recommended order of vehicle inspection steps that should be followed.

1. External appearance of the vehicle; as you approach the vehicle check for fluids on the ground or anything hanging low to indicate that the vehicle has been damaged from underneath.
2. Tires and Wheels; Check tread depth, tire pressure, look for sidewall damage or cuts in the sidewalls of the tires, or any cracks in the wheels.
3. Visually check for damage; if found, determine if it has been reported.
4. Engine compartment; Check all fluid levels (see section on checking fluid levels below). Visually inspect drive belts for cuts or wear.
5. Check all emergency equipment, all other lights, Virginia State Inspection and service due date.
6. Sirens may be sounded at the driver training facility during vehicle inspections. Each station has their own rules regarding the testing of sirens.
7. Check the passenger compartment and trunk; check for drugs, weapons, loose objects. Check under all seats as if your life depends on it...AND IT DOES!
8. Check the Public Address System; this may be done during the vehicle inspection on site as with the siren. All other use of the Public Address System is governed by the General Orders.

Emergency Vehicle Operations & Legal Requirements

This lecture will provide the student more in-depth information concerning the legal requirements of police vehicle operation in the state of Virginia. Subjects to be addressed are:

- The General Orders of the Fairfax County Police Department. For testing purposes students will be responsible for the General Orders of the Fairfax County Police Department regardless of their agency.
- The Virginia State Code 46.2-920
- Tactical procedures for responding to an emergency call
- Emphasis will be placed on tactical decision making incorporating the General Orders and Virginia State Law
- Students will also discuss the use of the police radio under these types of responses.

EMERGENCY RESPONSE AND PURSUIT

Local Ordinances and Departmental General Orders can never supersede the authority of State Code. However, General Orders can further restrict the officer's action. Officers must obey the General Orders to prevent civil repercussions.

46.2-920 Emergency Vehicle Operators may disregard 7 specific segments of the Virginia Code that non-emergency operators cannot.

1. **Exceed speed limits while having Due regard for safety of persons and property.**
2. **Park or Stand Anywhere**
3. **Disregard regulations governing turning**
4. **Pass in Intersections**
5. **Pass on the right off the improved portions of the highway. (SIREN NOT REQUIRED)**
6. **Pass Stopped or slow moving vehicles on the left in a no passing zone, or by crossing the highway center line**
7. **Disregard Stop Signs and Red Traffic Signals**

Under no circumstances can an emergency vehicle cross the center line or double line unless passing slow moving or stopped vehicle, and the officer must return to the right side of the road as soon as safely possible.

An emergency vehicle may not go the wrong direction on a one way street or northbound in the southbound lanes, or eastbound in the westbound lanes, etc. except as mentioned above. Emergency vehicles are prohibited from traveling in the oncoming lanes under any other circumstances (except as mentioned above).

- 46.2-920 The siren must be used "As may be reasonably necessary" except where specified. This allows officers to comply with parking and standing anywhere, and pass on the right without use of the siren.
- 46.2- 888 Prohibits stopping on the highway, except in emergencies.
- 46.2- 818 Authorizes vehicle stops when engaged in the performance of duties.
- 46.2- 1019 Spotlights on vehicles are authorized. The beam cannot be directed left of the center of the highway and no more than 100 feet ahead of the vehicle. No exceptions, the spotlight should never be used to pressure or blind a violator.
- 46.2- 1029 Authorizes auxiliary lights on police and fire fighting equipment (alley lights may not be utilized in excess of 15 miles per hour)

As you can see, there are only seven exemptions allowed in the State Code during a pursuit or emergency response. Knowledge of these specific code sections insures that your actions during routine or emergency operations of a patrol vehicle meet the minimum legal standard.

INTERPRETING THE LAW- NATURE OF THE EMERGENCY, DUE REGARD FOR SAFETY.

Your actions as an emergency vehicle operator will be judged by others (supervisors, judges, and juries) from at least two aspects;

1. Did an emergency exist?
2. Did the officer exercise due regard for safety?

If the answer to either one or both questions is NO, the officer may find themselves in a position as a defendant in a criminal or civil case.

Courts throughout the country have held that if the "emergency" does not in fact exist, but is a false alarm or exaggeration, such fact is irrelevant to the officer's actions. A reasonable belief in the existence of the emergency is all that is required of an officer. Very often, the nature of the emergency is designated to the officer by:

1. A department coded response system which designates the response priority of the emergency:
2. Information provided by and solicited from the dispatcher will make the nature of the emergency clear, and:
3. Pursuit is an immediate emergency and its nature is clear, as long as the pursuit does not represent a greater danger to the public than the offender.

When the decision to initiate emergency response is not readily made and there is some doubt on the officer's part whether or not an emergency exists, careful thoughtful consideration should be given to the following definition:

EMERGENCY:

A situation in which there is a high probability of death or serious bodily injury to an individual, or significant property loss, and action by an emergency vehicle operator may reduce or eliminate the seriousness of the situation.

What is meant by the clause in 46.2-920 with respect to DUE REGARD FOR SAFETY OF OTHERS? The answer to this question must be based on all the circumstances of each individual case. Due regard in one case may be a negligent act in another case. If you hold your actions to the following "trained reasonable officer doctrine", chances are that you will have exercised due regard:

Each person is held to owe a duty to other persons to protect them against unreasonable risks. A trained officer performing similar duties and under similar circumstances, would act in the same manner.

Professional law enforcement officers must be certain that their actions are reasonable and justifiable under a given set of circumstances. As an Emergency Vehicle Operator, you must be able to articulate the reasoning behind your actions when they come under review. Knowledge of the law and your department policy will assist you in making sound, split-second decisions of this type on the street.

HIGHWAY RESPONSE AND EMERGENCY VEHICLE OPERATIONS

HIGHWAY RESPONSE (EMERGENCY RUNS)

1. The objective of the emergency vehicle response is to get from point A to point B safely. Officers have a duty to arrive at the scene of an emergency quickly to protect life or property.
2. Officers are absolutely useless to anyone in need of help if they fail to arrive at the scene of the emergency.

3. In a true emergency, all personnel are essential. If someone crashes

en-route to the scene, there is now a second emergency. This will cause a drain on manpower and render the police response less effective to the first call for help. The worst case scenario would mean that someone may lose their life or be injured because of the second emergency. This second emergency may end with discipline for the officer or, loss of a career.

PURSUIT OPERATION

1. THE DECISION TO PURSUE/ CONTINUE PURSUIT

Safe controlled pursuit operation is a necessary part of effective law enforcement. Pursuit is not a competition between the violator and the officer, nor is it a competition between the officers. The primary objective is to keep the violator in sight until such time as he or she decides to surrender or the pursuit is terminated. Pursuit is a complex law enforcement event. Officers must consider a variety of issues from initiation of the pursuit to the conclusion or termination. Pursuit by its very nature exposes the officer, the violator and the public to unusual danger. Only the need to apprehend the suspect(s) to protect the public from harm justifies the pursuit.


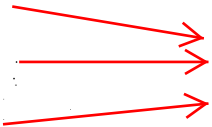
2. COMMUNICATIONS DURING PURSUIT OR EMERGENCY RESPONSE.

Radio communications should be limited to those instances where the police vehicle is in a straight away or it is reasonable at that point to drive with one hand. During cornering, it is advisable to use two hands on the steering wheel. This will maximize your ability to control the vehicle. Experience has shown us that officers will wrap the microphone cord around the steering column when cornering, creating a dangerous situation. Remember, the dispatcher, and key units need necessary information only. Keep radio traffic to a minimum. In pursuits where two or more units are necessary, it is recommended that the second or third unit transmit the necessary information. This allows the first unit(s) to concentrate on safety and the objective. Units arriving on the scene should advise units not on the scene of the progress of the situation.

This will eliminate the possibility of units responding in emergency mode if it is not necessary.

3. USE OF SIREN AND EMERGENCY LIGHTS

Although required by law that the siren be used "As may be reasonably necessary" during emergency response, officers must realize that the siren and lights REQUEST the right of way. Tests over the years have shown conclusively that the siren is not as effective at warning motorists as was once thought. Pedestrians can hear a siren at great distances. Drivers are limited. A siren from a police vehicle traveling as close as 30 feet behind another vehicle is almost impossible to hear at highway speeds. Police officers should limit their response based on this fact. The



fact is that officers must use the siren and lights when responding to emergencies as stated by Virginia Law 46.2-920 and their Department General Orders or Standard Operating Procedures. A decision to turn the siren off should be made in accordance with Virginia Code, Department orders and procedures. *Experience* when responding to certain emergencies, also enhances decisions.

4. MISCELLANEOUS ITEMS IN THE POLICE VEHICLE

Glass bottles, batons, clipboards, briefcases, pens, and pencils are just some of the numerous items which tend to accumulate in the front and rear seats of police vehicles. What officers tend to overlook is that a car traveling at 60 MPH hits a tree or stops instantly, any loose objects in the passenger compartment continue to travel at 60 MPH until they hit something and stop. Accidents have occurred (in Fairfax County) where the officer survived the crash but was injured by flying objects inside the car. Everything inside the passenger compartment should be secured inside a briefcase, which is secured in the passenger seat by use of the seatbelt. Non- essential items should be placed in the trunk.

RESPONSIBILITIES DURING HIGHWAY RESPONSE OR PURSUIT

1. Your first responsibility is to yourself. No call or situation is so urgent that it requires you to ignore your training and drive above your personal limits or the limits of the vehicle.
2. Your second responsibility is to the public. We are hired to protect the public, not to place them in unreasonable danger. The officer who terminates a pursuit because it has become too dangerous is exercising sound judgment, not fear or cowardice.
3. Your third responsibility is to the suspect or violator. Some pursuits end in the death or serious injury to the violator or passenger in the violator's vehicle. Remember that the violator's safety is *your* responsibility. We are not responsible for the violator's bad decisions, but we are responsible for our decisions. Make trained decisions.
4. Your fourth responsibility is to the equipment. During an emergency response or pursuit care of assigned equipment shall be required. As the operator of an emergency vehicle you must understand and respect your responsibilities. You must know what your abilities and limitations are when operating under these conditions. You must know the limitations imposed upon you by law, and by departmental General Orders. You must respect these abilities and limitations and never try to out- drive yourself. You must remain calm and keep your emotions under control at all times. In other words, you must be professional and perform professionally when driving under *ALL* circumstances. Remember, you are trained to make safe decisions. The violator has no training so it would not be wise to follow his/ her lead.

PRIOR TO ENGAGING IN EMERGENCY RESPONSE

SEAT BELTS: No matter what your feelings are on seat belt usage, they will be worn at all times during non- emergency driving or emergency response or pursuit. The human body develops kinetic energy just like a vehicle. No matter how strong you think you are, one cannot protect the body in an accident without the assistance of a seat belt. It is the law, as well as required by Departmental General Orders.

PURSUIT CONSULTATION

All students will perform a mock pursuit exercise. Each student will be responsible for tactical operations of a primary police vehicle and a backup police vehicle. This will include proper high risk vehicle positioning at the conclusion of the pursuit.

Decision Making

Decision making is determined by individual maturity levels. Three areas that make up a persons maturity level are Mental, Spiritual and Physical. A law enforcement officer well rounded in all three areas will make sound decisions under stress. Any officer who lets a pursuit become "Personal" or works more in the Physical realm, will make decisions that can place him/her and/or the public at much greater risk.

An officer must weigh all known facts and circumstances to determine whether or not to initiate a pursuit. If the decision is made to pursue, the officer must continuously evaluate the entire situation and decide to continue or terminate the pursuit. A pursuit is a very fluid event and circumstances are constantly changing. The officer must see "The big picture" to make this evaluation.

The lecture will go into great detail the factors that must be considered to make these decisions. The lecture will also cover the psychological factors that affect the law enforcement driver during pursuit and response driving.

PURSUIT POLICY

1. Consider, does the necessity of immediate apprehension outweigh the level of danger created by the pursuit?
2. Consider the potential risk of death or serious injury created by the pursuit, considering the seriousness of the crime, traffic conditions, time of day, and environmental conditions and location.

PURSUIT WITHIN FAIRFAX COUNTY:

1. Officers must have reasonable suspicion of a crime or traffic infraction.

PURSUIT WITHIN VIRGINIA, OUTSIDE OF FAIRFAX COUNTY

1. Officers must have reasonable suspicion that the person being pursued has committed, has attempted to commit, or is committing:

A. A felony involving violence or the threatened use of violence. Crimes under this definition are; murder, manslaughter, mob- related felonies, malicious wounding, felony kidnapping or abduction, robbery, car jacking, felony criminal sexual offenses, escape with force, and any felonies involving the discharge of a firearm;

B. The following five misdemeanor violations: Parental abduction, assault, exposure, peeping, and sexual battery, and;

C. Any offense involving the use, threatened use, display, or possession of a firearm or explosive device.

PURSUIITS: OUTSIDE OF VIRGINIA INTO MARYLAND & WASHINGTON D.C.

1. **Probable Cause** that a felony involving violence or threatened use of violence (19.2-297.1) has been committed, is being committed, or was attempted. Crimes under this section are: Murder, manslaughter, mob related felonies, malicious wounding, felony kidnapping / abduction, robberies, carjacking, and felony criminal sexual assault.

2. May also pursue for escape with force and any felony involving the discharge of a firearm. **Probable Cause** is still required.

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX

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JOHN McINTOSH and CYNTHIA COLASANTO, :
Co-Administrators for the Estate of :
Ashley McIntosh, Deceased, :
:
Plaintiffs, :
:
vs. : Civil Action
: No. 2009 00354
AMANDA PERRY, :
:
Defendant. :
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Fairfax, Virginia

Tuesday, August 11, 2009

Volume I

The hearing commenced at 10:08 a.m.

BEFORE THE HONORABLE R. TERRENCE NEY

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<p style="text-align: right;">6</p> <p>1 E X H I B I T S (Continued)</p> <p>2 FOR IN</p> <p>3 PLAINTIFFS' IDENT. EVID.</p> <p>4 No. 1 EVOC booklet 141 268</p> <p>5 No. 4 Intersection listing 263 268</p> <p>6 No. 5 Mount Vernon District</p> <p>7 Station map 264 268</p> <p>8 No. 6 Code Section 46.2-920 149 151</p> <p>9 No. 8 Video disk 265 268</p> <p>10 No. 9 Photograph 265 268</p> <p>11 No. 10 Requests for admissions 225 225</p> <p> (Substituted and re-marked) 275 275</p> <p>12 No. 11 Slide 266 268</p> <p>13 No. 12 Slide 266 268</p> <p>14 No. 13 Slide 266 268</p> <p>15 No. 14 Slide 266 268</p> <p>16 No. 15 Slide 266 268</p> <p>17 No. 16 Slide 266 268</p> <p>18 No. 17 Slide 266 268</p> <p>19 No. 18 Slide 266 268</p> <p>20 No. 19 Slide 266 268</p> <p>21 No. 20 Slide 266 268</p> <p>22</p>	<p style="text-align: right;">8</p> <p>1 as well for decision, along with the legal issues.</p> <p>2 THE COURT: All right. And a one-day</p> <p>3 estimate is a good estimate?</p> <p>4 MR. CURCIO: Yes, it is, Your Honor.</p> <p>5 THE COURT: All right. You may proceed,</p> <p>6 Mr. Curcio.</p> <p>7 MR. CURCIO: Your Honor, I believe the</p> <p>8 burden is on Mr. Fudala.</p> <p>9 THE COURT: Oh, sure.</p> <p>10 And you may proceed, Mr. Fudala.</p> <p>11 MR. FUDALA: Yes, sir.</p> <p>12 I just want to give a very brief opening</p> <p>13 statement just for the focus of the Court. And I'm</p> <p>14 sure Mr. Curcio would like to do the same.</p> <p>15 THE COURT: All right.</p> <p>16 MR. FUDALA: This involves only the question</p> <p>17 of sovereign immunity.</p> <p>18 THE COURT: I'm familiar with that.</p> <p>19 MR. FUDALA: You had a chance to read the</p> <p>20 memo, Your Honor?</p> <p>21 THE COURT: Yes, sir.</p> <p>22 MR. FUDALA: Thank you.</p>
<p style="text-align: right;">7</p> <p>1 P R O C E E D I N G S</p> <p>2 (The court reporter was sworn.)</p> <p>3 THE COURT: John McIntosh and</p> <p>4 Cynthia Colasanto, co-administrators, against</p> <p>5 Amanda Perry.</p> <p>6 Ready for the plaintiff?</p> <p>7 MR. CURCIO: Yes, Your Honor. Good morning.</p> <p>8 Thomas Curcio representing the plaintiffs,</p> <p>9 John McIntosh and Cynthia Colasanto.</p> <p>10 THE COURT: Yes, sir.</p> <p>11 MR. CURCIO: With me this morning I have</p> <p>12 co-counsel, Roger Creager, from Richmond; and</p> <p>13 Gary Lonergan also, Your Honor, will be assisting me.</p> <p>14 THE COURT: Thank you.</p> <p>15 And the defendant?</p> <p>16 MR. FUDALA: Good morning, Your Honor.</p> <p>17 David Fudala for defendant, Amanda Perry.</p> <p>18 THE COURT: All right. You all are, I</p> <p>19 understand, waiving jury and setting the trial before</p> <p>20 the Court.</p> <p>21 MR. CURCIO: That's correct, Your Honor. We</p> <p>22 are going to be submitting the factual issues to you</p>	<p style="text-align: right;">9</p> <p>1 Then you're familiar with the fact that this</p> <p>2 involves a response by a Fairfax County police officer</p> <p>3 to a call at Beacon Mall in Fairfax County on February</p> <p>4 12th, 2008, in response to two white males hitting a</p> <p>5 black male.</p> <p>6 She responded to the scene at times using</p> <p>7 lights and siren, other times not using lights and</p> <p>8 siren; at the time of the collision, had lights on,</p> <p>9 was attempting to go put on the siren, but did not</p> <p>10 succeed in getting her siren on, and proceeded through</p> <p>11 a red light.</p> <p>12 Those facts, I think, are clear and</p> <p>13 undisputed. And really it's going to be a decision</p> <p>14 for the Court on the legal matter whether or not</p> <p>15 Officer Perry was involved in driving under such</p> <p>16 exigent circumstances that require judgment and</p> <p>17 discretion, which is different from normal, ordinary,</p> <p>18 everyday driving. That really is the issue for the</p> <p>19 Court.</p> <p>20 THE COURT: Yes, sir.</p> <p>21 MR. FUDALA: Thank you.</p> <p>22 THE COURT: Thank you.</p>

<p style="text-align: right;">331</p> <p>1 leaky pipe, I think, he added. But that was the 2 evidence in that case, which is very different. 3 Counsel suggests that here the fact that 4 Officer Perry just comes in here and says, I thought 5 it was an emergency, and that's all the evidence 6 showed, absolutely not. 7 It showed that she was proceeding quickly to 8 the scene; when she got to a red light, she didn't 9 stop and wait for the traffic to clear; she used her 10 lights and siren; she proceeded from that, exceeding 11 the speed limit at times; she put on her lights; she 12 didn't get her siren on. That is not indicative of 13 someone who did not think there was an emergency. 14 And I don't understand the significance of 15 the 6-miles-away issue. The testimony of Mr. Branton, 16 the dispatcher, was that Officer Perry, when he 17 checked, was the only officer available to send to 18 that call. That was his unrefuted testimony. 19 So the fact that she had to respond from 6 20 miles away had nothing to do with anything. She had 21 to get there, I think, quickly. And the analogy to 22 driving from Richmond, I think, really doesn't give</p>	<p style="text-align: right;">333</p> <p>1 whether it applies or not. 2 So I would ask the Court to grant the plea 3 in bar and dismiss the simple negligence claim. 4 THE COURT: Thank you very much, Mr. Fudala. 5 This is a really a terrible, terrible 6 situation, a tragic case when you have on the one hand 7 a person who has lost her life and great misfortune to 8 her, obviously, and her family; and on the other hand, 9 you have a law enforcement officer trying to do her 10 duty consistent with her responsibilities to protect 11 the public and a member of the public dies. 12 This case has been very well argued and well 13 presented by counsel for Officer Perry and for the 14 administrators of the estate of Ashley McIntosh. 15 I want to say at the outset that few judges 16 on this Court or on any Court in the Commonwealth of 17 Virginia have more respect for the police officers, 18 public safety officers, the fire department officials 19 than I do. 20 If you're in this courtroom every day, as I 21 have been for the last ten years, hardly a week goes 22 by, if not a day, where you don't see police officers</p>
<p style="text-align: right;">332</p> <p>1 much guidance to the Court. 2 The issue -- I think the Court understands, 3 I think, accepts that just because you violate a 4 departmental regulation, it doesn't equal loss of 5 sovereign immunity. 6 All of counsel's arguments go to, in my 7 mind, the negligence issue. All of these things 8 that -- if you question her judgment and what her 9 judgment was guided by goes to the level of 10 negligence. I think that's where that's applied. 11 There is a remedy for the public. But also, 12 in balancing these issues, you cannot have a ruling 13 which tells a police officer, If you are mistaken in 14 thinking that there was an emergency, when there 15 really was -- you know, it's just a circumstance where 16 there are fact to support it, Your Honor, not some 17 clear-cut incident -- that you're not going to get 18 sovereign immunity. That just really constricts what 19 a police officer can do in the field. 20 They have to use their judgment, and she did 21 in this case. As we know, it resulted in a mistake 22 being made. But that's not part of the analysis of</p>	<p style="text-align: right;">334</p> <p>1 doing everything they can to protect members of the 2 community, protect the citizens of this County and 3 this Commonwealth. 4 They place their lives at risk on a regular 5 basis. They have to make difficult decisions under 6 very stressful circumstances, snap judgments, instant 7 decisions; and they do so on a daily basis in their 8 efforts to protect the members of public. And I 9 include the sheriff's department in those remarks as 10 well. 11 But we have to apply the law of the 12 Commonwealth of Virginia to the facts of this 13 particular case. 14 As was pointed out in Colby against Boyden, 15 241 Virginia 125, 400 Southeastern 2d 184 in 1991, 16 each case must be evaluated on its own facts. 17 Now, in Colby the police officer was 18 pursuing a fleeing lawbreaker. He was in hot pursuit 19 trying to catch this person before he got away in a 20 car. A crash resulted in an intersection with 21 personal injuries, and suit was brought. And the 22 defense of sovereign immunity was interposed on behalf</p>

<p style="text-align: right;">335</p> <p>1 of the police officer.</p> <p>2 The Court stated in the finding that</p> <p>3 sovereign immunity applied; and I quote, The police</p> <p>4 officer engaged in the delicate, dangerous, and</p> <p>5 potentially deadly job of vehicular pursuit was</p> <p>6 embracing special risks in an emergency situation.</p> <p>7 Sovereign immunity was upheld.</p> <p>8 Now, conversely in Friday-Spivey against</p> <p>9 Collier, 268 Virginia 384, 601 Southeastern 2d 591,</p> <p>10 2004, the officer was driving a fire truck, responding</p> <p>11 to a child locked in a car.</p> <p>12 And, again, for the reasons -- or not the</p> <p>13 reasons -- but as mentioned in the colloquy with</p> <p>14 counsel, a child locked in a car can be a very</p> <p>15 dangerous situation.</p> <p>16 And the driver of the fire truck which</p> <p>17 struck a person and the fire truck driver's fault for</p> <p>18 failure to yield right-of-way because he was taking,</p> <p>19 in his words, the quickest route possible -- that's a</p> <p>20 quote -- that he was concerned about the potential of</p> <p>21 injury or loss of life, especially with a child in the</p> <p>22 car, and that was the judgment that he made.</p>	<p style="text-align: right;">337</p> <p>1 was no suggestion of weapons or guns or knives or</p> <p>2 anything of that sort on the response -- or rather,</p> <p>3 the CAD message that was given to Officer Perry.</p> <p>4 Officer Perry believed, based upon what she</p> <p>5 received, as she testified, that this could be a</p> <p>6 dangerous situation; she'd responded to other fights</p> <p>7 and they were dangerous; the necessity for two</p> <p>8 officers responding for fights; and, hence,</p> <p>9 Officer Allen later received a message that he was to</p> <p>10 go to the location as well.</p> <p>11 We know, of course, that it turned out to be</p> <p>12 a shoplifting incident and that no -- of no big</p> <p>13 import.</p> <p>14 So the question is: Whether or not her</p> <p>15 belief that it was an emergency to which she needed to</p> <p>16 respond in an emergency fashion is sufficient?</p> <p>17 And it seems to the Court, without</p> <p>18 suggesting that Officer Perry was not doing her</p> <p>19 best -- we're not impugning her trying to figure out</p> <p>20 what she should do, making no finding one way or the</p> <p>21 other -- but her belief that it was an emergency,</p> <p>22 simply put, does not make it an emergency. And it</p>
<p style="text-align: right;">336</p> <p>1 And he was also relying on the doctrine of</p> <p>2 sovereign immunity because he was exercising his</p> <p>3 discretion, as was the officer in Collier against</p> <p>4 Boyden, as to what needed to be done under the</p> <p>5 circumstances.</p> <p>6 The Supreme Court in Friday-Spivey did not</p> <p>7 grant sovereign immunity. And I quote, The facts of</p> <p>8 this case do not support the conclusion that the</p> <p>9 officer's driving involved the exercise of judgment</p> <p>10 and discretion beyond that required for ordinary</p> <p>11 driving in routine traffic situations. His belief</p> <p>12 that it was an emergency did not make it an emergency.</p> <p>13 Now, turning those two decisions, those two</p> <p>14 opposite pole decisions in some respects, both of</p> <p>15 which were split decisions, 4 to 3 in Colby and 5 to 2</p> <p>16 in Friday-Spivey, we apply it to the facts of this</p> <p>17 case.</p> <p>18 In this case one central fact remains</p> <p>19 indisputable in that this was not an emergency. We</p> <p>20 know that. Everybody in this courtroom knows it was</p> <p>21 not an emergency.</p> <p>22 There was a fight two against one. There</p>	<p style="text-align: right;">338</p> <p>1 seems to the Court that that's the lesson of</p> <p>2 Friday-Spivey. It just -- it just does not.</p> <p>3 And here the facts as to her response, the</p> <p>4 other facts that we look to, do not suggest that she</p> <p>5 was responding in an emergency fashion until shortly</p> <p>6 before the fatal accident. Traveling up the road</p> <p>7 without her emergency equipment on -- and for the</p> <p>8 reasons she gave, which are perfectly fine reasons,</p> <p>9 perhaps; but they're inconsistent with being this</p> <p>10 really an emergency. And it's not a case of hot</p> <p>11 pursuit; and the travel was just at a reasonable rate</p> <p>12 until the very, very last.</p> <p>13 The Court cannot even say that even if this</p> <p>14 were an emergency, but perhaps even if this were like</p> <p>15 or akin to an emergency, her behavior would have been</p> <p>16 acceptable, because there just was no reason for the</p> <p>17 speed that she was traveling prior to the accident.</p> <p>18 There was no reason for her to continue</p> <p>19 without her siren. There was no reason to force this</p> <p>20 particular intersection against red lights without the</p> <p>21 absence of an emergency, especially here, without</p> <p>22 slowing down, without stopping. It just did not</p>

<p style="text-align: right;">339</p> <p>1 present itself, in just this short part of her trip, 2 responding to a situation, that despite her belief 3 initially, simply was not an emergency. 4 We know from the pictures that were shown 5 from the camera of the police car that her brakes were 6 not engaged prior to entering the intersection. And 7 it's -- Mr. Fudala is correct, this Court is not 8 concerned with issues of negligence with regard to 9 this particular motion, but rather whether or not the 10 officer was exercising her discretion as opposed to 11 driving along the road and not driving in a proper 12 fashion. 13 Here, the decision she made with regard to 14 an emergency and the actions she took in responding to 15 what she thought was an emergency simply did not make 16 it an emergency and do not make her actions protected 17 under the exemptions provided by the statute. 18 It was not an emergency. Her speed was not 19 sufficiently reduced to enable her to pass through a 20 traffic light. She did not have her lights and siren 21 on in her cruiser, which she should have had, had she 22 been responding to an emergency.</p>	<p style="text-align: right;">341</p> <p>1 CERTIFICATE OF REPORTER 2 3 I, Malynda D. Whiteley, RPR, do hereby certify 4 that the foregoing proceedings were taken by me in 5 stenotype and thereafter reduced to typewriting under 6 my supervision; that said proceedings are a true 7 record of the testimony given by said witnesses; that 8 I am neither counsel for, related to, nor employed by 9 any of the parties to the action in which these 10 proceedings were taken; and further, that I am not a 11 relative or employee of any counsel employed by the 12 parties hereto, nor financially or otherwise 13 interested in the outcome of this action. 14 Given my hand this 24th day of August, 2009. 15 16 17 18 Notary Public in and for the 19 State of Virginia 20 Notary Registration No. 247874 21 Registered Professional Reporter 22 My commission expires: February 28, 2013</p>
<p style="text-align: right;">340</p> <p>1 For these reasons, the plea in bar filed on 2 behalf of the defendant, Amanda Perry, is denied. The 3 exception to the Court's ruling is noted. Sovereign 4 immunity does not apply in this case. That's the 5 ruling of the Court. 6 Court stands adjourned. 7 (At 11:17 a.m. the proceedings in the above- 8 entitled matter were concluded.) 9 10 11 12 13 14 15 16 17 18 19 20 21 22</p>	

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX

JOHN MCINTOSH and
CYNTHIA COLASANTO
Co-Administrators for the Estate
of Ashley McIntosh, Deceased

Plaintiffs,

v.

Case No. 2009-00354

AMANDA PERRY

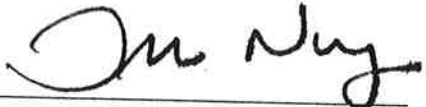
Defendant.

ORDER

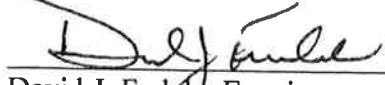
This matter came before the court for hearing on defendant's plea in bar of sovereign immunity. Upon consideration of the evidence presented and the authorities and arguments submitted by the parties, it is hereby

Ordered *that the Plea in Bar is denied.*

Entered this 12 day of August, 2009.



Circuit Court Judge

Seen and **OBJECTED TO FOR THE REASONS STATED IN THE RECORD**



David J. Fudala, Esquire
Counsel for Amanda Perry

Seen and **AGREED:**



Thomas J. Curcio, Esquire
Counsel for Plaintiffs

Seen and:

No appearance

Paul Pearson, Esquire
Counsel for Travelers Insurance