NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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March 18, 2019

John Robert Kelly, Esquire
4020 University Drive
Suite 501
Fairfax, VA 22030
Counsel for Plaintiff, Dora Fatima Prada-Segova

Robert M. Hardy, Esquire
Assistant County Attorney
12000 Government Center Parkway
Suite 549
Fairfax, VA 22035
Counsel for Defendant, Kenneth Todd Barlow

Re: ***Dora Fatima Parada-Segova v. Kenneth Todd Barlow and County of Fairfax*, Case No. CL-2018-9390**

Dear Counsel:

This matter is before the court on Defendant, Kenneth Todd Barlow's (hereinafter "Defendant") Plea in Bar. The issue to be decided is whether sovereign immunity bars Plaintiff, Dora Fatima Parada-Segova's (hereinafter "Plaintiff") simple negligence claim against Defendant, an employee of the County of Fairfax. Plaintiff previously nonsuited Defendant, County of Fairfax, therefore only claims against this individual Defendant remain. After considering the pleadings and oral arguments of both parties, the court finds that Defendant is entitled to sovereign immunity and Defendant's Plea in Bar is sustained as to any claim of simple negligence.

OPINION LETTER

I. BACKGROUND

The facts are taken from the Complaint and those presented at the evidentiary hearing. In the early morning hours of January 17, 2017, Plaintiff, a pedestrian, crossed the intersection of Holly Hill Road and Route 1 in Fairfax County, Virginia. It was still dark while Plaintiff was standing in the median of the intersection. At which time, Defendant made a left turn from Holly Hill Road onto Route 1 and struck Plaintiff, causing her to sustain injuries.

Defendant is employed by Fairfax County as a Heavy Equipment Operator, with Fairfax County's Department of Public Works and Environmental Service's Solid Waste Management Program, where he has been employed for over twenty (20) years. To be a heavy equipment operator one must have a commercial driver's license, and a union medical card which attests to the holder's physical health to be able to operate such machinery. At the time of the accident, Defendant was on his route operating a county-owned front-end loader. He had already made several pick-ups that morning and was carrying a significant amount of refuse to his next pick-up. Defendant was acting within the scope of his employment at the time of the accident.

Defendant's first witness, Duane Hendrix, is the Certified Director of Safety at the Newington County Facility where the waste management trucks are housed and maintained. Mr. Hendrix was in charge of training Defendant. He testified that the truck Defendant was operating was one of sixty (60) county-owned refuse trucks. Mr. Hendrix stated that he facilitates safety training throughout the year for the truck operators. He further testified that before every trip the Defendant performed a pre-trip inspection and operated the vehicle throughout the day. Mr. Hendrix testified that empty, the front-loader operated by Defendant, weighs 37,000 pounds. The vehicle has two forks or prongs, that when lowered, are guided through commercial dumpsters and then raised by the operator to empty the dumpster contents into the bed of the truck. Once the refuse is collected, the dumpster is then lowered and put back into place. The forks then are raised over the truck cab while it is being operated. Mr. Hendrix stated that on the day of the accident, Defendant was designated to pick up refuse from dumpsters at commercial buildings owned or operated by the county.

Defendant's second witness, Conrad Mehan, is the Complex Manager at Newington – Solid Waste Management Department of Public Works. Mr. Mehan testified that waste disposal is an essential government function to maintain the health of the residents of Fairfax County. He testified that he sets the route sheets for the drivers, including Defendant. He further stated that operating this vehicle requires situational awareness, because as the driver progresses through his route, the truck becomes heavier and heavier and thus, more cumbersome to operate.

Lastly, Defendant testified. He stated he had been a heavy equipment operator for over twenty (20) years. Defendant testified that on January 17, 2017, at approximately 6:40 a.m. he was operating the 37,000-pound truck attempting to turn from Holly Road onto Route 1. Defendant stated that the vehicle has ten (10) tires, forks in the front, and long and short mirrors on either side of the cab. He further testified that operating this vehicle is different from ordinary driving, because there are limited sightlines (especially behind the cab); increased

breaking distances; difficulty making turns; and that overhead obstructions raise a constant danger to the upraised forks. He stated that while on the route, as the truck become heavier, the operator has to decide whether to dump the load at a refuse station or to continue with the prearranged route. Further, the trash is constantly being packed while the operator is moving to the next pick-up site. On the day of the accident, Defendant stated that he reported to work and 5:30 a.m. and was given the South Route (southern portion of the county), which consisted of county buildings, low income housing, churches, and two pools. Defendant states that he had just picked up refuse at stop number six, which was a fire station, and was on his way to stop number seven. Defendant claims that he did not make any other detours after the pickup from stop six en route to stop seven when the incident occurred.

After considering both the oral arguments and the briefs, the court took the matter under advisement. [1]

II. ARGUMENTS

The Defendant argues that he is entitled to sovereign immunity because he was performing a governmental function in which the county has great interest and involvement; that the county exercises a great deal of control and direction over the function as evidenced by the extensive training and oversight; and that the act of collection and transportation of garbage involved the use of judgment and discretion.

Plaintiff argues that Defendant is not entitled to sovereign immunity due to the fact that he was engaged in an ordinary driving situation at the time of the accident, and because Defendant was not exercising judgment and discretion at the time of the accident.

III. ANALYSIS

A. Standard of Review

A plea in bar is a defensive pleading which "shortens the litigation by reducing it to a distinct issue of fact which, if proven, creates a bar to the plaintiff's right of recovery." *Tomlin v. McKenzie*, 251 Va. 478, 480 (1996) (citation omitted). "The moving party carries the burden of proof on that issue of fact." *Id.*

> [A] plea, whether at law or equity, is a discrete form of defensive pleading. As distinguished from an answer or grounds of defense, it does not address the merits of the issues raised by the bill or complaint or the motion for judgment. Yet, a plea is a pleading which alleges a single state of facts or circumstances which, if proven constitutes an absolute defense to the claim. *Nelms v. Nelms*, 236 Va. 281, 289 (1988).[2]

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[1] Plaintiff presented no evidence at the evidentiary hearing.
[2] The Supreme Court of Virginia illustrated what would be the proper use of a plea, including; the statute of

"When considering the pleadings, 'the facts stated in the plaintiffs' motion for judgment [i.e., the complaint] [are] deemed true.'" *Id.* (quoting *Glascock v. Laserna*, 247 Va. 108, 109, (1994)).

> If the parties present evidence on the plea *ore tenus*, the circuit court's factual findings are accorded the weight of a jury finding and will not be disturbed on appeal unless they are plainly wrong or without evidentiary support. *Hawthorn v. VanMarter*, 279 Va. 566, 577 (2010) (citation omitted).

B. Sovereign Immunity Generally

The Doctrine of Sovereign Immunity is a policy "...which protects the state from burdensome interference with the performance of its governmental functions and preserves its control over state funds, property, and instrumentalities." *Messina v. Burden*, 228 Va. 301, 308 (1984) (quoting *Hinchey v. Ogden*, 226 Va. 234, 240 (1983)). The threshold question to be determined when considering whether sovereign immunity applies is whether or not the employee in question was working for an immune governmental entity at the time the complained simple negligence occurred. *See Friday-Spivey v. Collier*, 268 Va. 384, 387 (2004). Here, it is undisputed that Defendant is a county employee and was acting within the scope of his employment at the time of the accident, thus he may qualify for sovereign immunity. *See id.* at 387–388.

C. The James Four-Factor Test

The Supreme Court of Virginia has established a four-factor test for determining whether a government employee qualifies for sovereign immunity. *See James v. Jane*, 221 Va. 43, 53 (1980); *Messina*, 228 Va. at 313. The *James* test consists of the following four factors:

> (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. *See James*, 221 Va. at 53; *Messina*, 228 Va. at 313 (clarifying the four-part test enacted by *James*).

Prong 1: Nature of the Function

In order to satisfy the first prong of the *James* test the government employee must be engaged in a governmental function. *See Edwards v. City of Portsmouth*, 237 Va. 167, 170

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limitations, absence of proper parties, *res judicata*, usury, a release, an award, infancy, bankruptcy, denial of partnership, *bona fide* purchaser, denial of an essential jurisdictional fact alleged in the bill.

(1989). "Where a local government exercises powers delegated or imposed, it performs a governmental function." *Id.* at 171 (citing *Hoggard v. Richmond*, 172 Va. 145, 147 (1939); *Franklin v. Richlands*, 161 Va. 156 (1933)).

> If the function that the government employee was negligently performing was essential to the governmental objective and the government had a great interest and involvement in that function, those factors weigh in favor of the employee's claim for sovereign immunity. On the other hand, if that function has only a marginal influence upon a governmental objective...these factors weigh against granting governmental immunity to a government employee. *Lohr v. Larsen*, 246 Va. 81, 85 (1993).

In *Edwards*, the court states that any function of the government that is directly tied to the "health, safety, and welfare of the citizens," is considered a governmental function. *See Edwards*, 237 Va. at 170. The Supreme Court of Virginia held that the removal of garbage is a public governmental function because it concerns the preservation of public health. *See Ashbury v. Norfolk*, 152 Va. 278, 292 (1929).

At the hearing, testimony was taken by Mr. Mehan indicating that the collection and disposal of garbage is a governmental function because it reduces disease, rodents, and blight. Further, the function performed by the Defendant at the time of the accident was to the benefit of the government buildings such as low income housing and recreational centers. Here, the collection of garbage is a governmental function that is directly tied to health, safety, and welfare of its citizens.

During the hearing in this matter, the Plaintiff argued that sovereign immunity cannot apply because other private enterprises are also engaged in the collection of garbage in Fairfax County. However, this argument has been addressed by the Supreme Court of Virginia in *Edwards v. City of Portsmouth*, 237 Va. 167 (1989). The *Edwards* court specifically rejected that argument stating that:

> [T]he test cannot be whether the same thing is done by private entities, but rather whether, in providing such services, the governmental entity is exercising the powers and duties of government conferred by law for the general benefit and well-being of its citizens. *See Edwards*, 237 Va. at 171–72.

While the *Edwards* case involved ambulance services and not garbage disposal, the parallel is clear. Defendant was engaged in the governmental function of garbage disposal at the time of the alleged simple negligence and therefore the court finds that the first prong of the *James* test has been met.

Prongs 2 & 3: State's Interest and Involvement & Control and Direction

In order to satisfy the second prong of the *James* test, the function that the "government employee was negligently performing [must be] essential to a governmental objective and the government [must have] a great interest and involvement in that function." *Lohr v. Larsen*, 246 Va. 81, 85 (1993).

The third prong of the *James* test is determined by the amount of control and direction that the state exercises over the state employee. *See James*, 221 Va. at 53. "A high level of control by the state over an employee weighs in favor of immunity; a low level of such control weighs against immunity." *Lohr*, 246 Va. at 88 (citing to *James*, 221 Va. at 53–54).

Here, the second and third prongs are not in dispute. Fairfax County had a great interest in keeping the county clean for the health and well-being of its citizens. This includes waste disposal. The Fairfax County Code states that:

> In the interest of public health, public safety, environmental quality, and the safeguarding of public and private property, this Article describes the manner in which [Municipal Solid Waste] shall be collected. Lawful storage, set-out, collection, vehicles, and service levels are also addressed.

See FAIRFAX COUNTY, VA. CODE art. 5, § 109.1-5-1.

Further, Fairfax County is instrumental in the collection of waste in the county. At the hearing, Defendant presented evidence that Fairfax County is in charge of creating the trash routes, including the route Defendant was on when the accident occurred. Plaintiff herself argues that Fairfax County had ample control over Defendant's trash route. Further, Defendant presented evidence that Fairfax County provides extensive training for the drivers involved in waste management, and that it determines the sequencing of pickup locations which cannot be deviated from, unless there is an emergency or an extreme traffic situation.

Due to Fairfax County's great interest in waste management, and its involvement, control, and direction in the collection of waste, the court finds that the second and third prongs of the *James* test have been met.

Prong 4: Judgment and Discretion

The fourth prong of the *James* test is whether the act complained of involved the use of judgment and discretion by the government employee. *See James*, 221 Va. at 53. While virtually every act performed involves some level of discretion, there are additional considerations involved in assessing the use of judgment and discretion in driving situations. *See id.*; *see also McBride v. Bennett*, 288 Va. 450, 455 (2014).

> In deciding whether the operation of a vehicle in a particular situation was ministerial or discretionary, we repeatedly have focused on whether the "operation of [the] 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. *Id.* at 460.

The Supreme Court of Virginia stated that "...the line demarcating the boundary of sovereign immunity in Virginia is indistinct; indeed, at least one Supreme Court of Virginia jurist has described the case law applying the sovereign immunity doctrine as...a 'maze of confusion.' *Muse v. Schleiden*, 349 F.Supp.2d 990, 994 (2004) (quoting *Hinchey*, 226 Va. at 242 (Cochran, J., dissenting)). Most of that confusion likely comes from interpreting the case law surrounding the fourth prong of the *James* test, as it appears to be prevalent. *See e.g. McBride v. Bennett*, 288 Va. 450, 455 (2014); *Friday-Spivey*, 268 Va. at 388; *Muse*, 349 Va. at 995; *Stanfield v. Peregoy*, 245 Va. 339, 342 (1993).

Much of what Defendant argued revolved around the idea that operating the front-end loader required extensive training and that the vehicle's sheer size required more discretion than is needed to operate a normal sized automobile. However, as Plaintiff indicated, the Supreme Court of Virginia rejected a blanket immunity for government employees who drive specialized vehicles. *See Friday-Spivey*, 268 Va. at 390–391.

In *Friday-Spivey v. Collier*, 268 Va. 384, 387 (2004), the driver of a firetruck argued that due to the weight of the truck he had to use more discretion because of "...stopping distances, and so forth." *Id.* at 387. The driver of the firetruck in *Friday-Spivey*, was responding to a non-emergency dispatch at the time of the accident, and the court held that he was not entitled to sovereign immunity. *See id.* at 387 & 391. The court reasoned that the driver of the firetruck was not using "...judgment and discretion beyond that necessary in an ordinary driving situation – a ministerial act." *Id.* at 391. Defendant in the instant case cannot claim sovereign immunity simply because he was driving a specialized vehicle. This court does not rest its decision purely on factors such as Defendant's special training and the weight of the vehicle he was driving. However, consideration is given to the Defendant's driving of a very large and unusual vehicle in the performance of his governmental function; and that the accident occurred in the middle of a sequential route for the collection of refuse. Further, during the route Defendant must pack down the load after dumping it into his truck and the increased weight makes the vehicle increasingly difficult to maneuver; therefore, requiring more judgment and discretion.

The *Friday-Spivey* case seems to be an outlier in the precedent set by the Supreme Court of Virginia, which usually holds that where a government employee is on route and an accident occurs, he is entitled to sovereign immunity. *See e.g. McBride v. Bennett*, 288 Va. 450 (2014) (holding a police officer responding to a domestic disturbance without engaging emergency lights or sirens was entitled to sovereign immunity); *Colby v. Boyden*, 241 Va. 125 (1991) (holding a police officer pursuing a fleeing lawbreaker was entitled to sovereign immunity); *Muse v. Shleiden*, 349 F.Supp.2d 990 (2004) (holding a deputy responding to a domestic

violence call was entitled to sovereign immunity); *Nationwide Mutual Insurance Co. v. Hylton*, 260 Va. 56 (2000) (holding a police officer apprehending a violator of a traffic infraction was entitled to sovereign immunity); *Linhart v. Lawson*, 261 Va. 30 (2001) (holding a school bus driver transporting children was entitled to sovereign immunity); *Stanfield v. Peregoy*, 245 Va. 339 (1993) (holding a truck driver spreading salt during a snowstorm was entitled to sovereign immunity); *Taylor v. City of Newport News*, 214 Va. 9 (1973) (holding a garbage truck driver who spilled grease on the sidewalk on his route which later caused a citizen to fall was entitled to sovereign immunity); *Ashbury v. City of Norfolk*, 152 Va. 278 (1929) (holding a garbage carriage driver who got in an accident on route was entitled to sovereign immunity); *Anders v. Kidd*, 2014 WL 11398555, Record No. 131891 (holding an ambulance driver transporting a patient to a hospital in a non-emergency manner was entitled to sovereign immunity).

In line with that reasoning, when a government employee is no longer on route, but is either on the way to his route or has already completed his route he is not entitled to sovereign immunity. *See Wynn v. Gandy*, 170 Va. 590 (1938) (holding a driver of a school bus who was driving the bus to the school after getting it serviced was not entitled to sovereign immunity); *Heider v. Clemons*, 241 Va. 143 (1991) (holding a sheriff who had already served process was not entitled to sovereign immunity). The court in *Heider* reasoned that sheriff's operation of the automobile "...did not involve special risks arising from the governmental activity, or the exercise of judgment or discretion about the proper means of effectuating the governmental purpose of the driver's employer." *Heider*, 241 Va. at 145.

When reviewing the case law surrounding sovereign immunity involving automobiles, two distinct categories emerge: (1) those cases which involve emergency vehicles, and (2) those which involve non-emergency vehicles. The emergency vehicle cases include automobiles such as police cruisers, ambulances, and firetrucks. *See e.g. McBride v. Bennett*, 288 Va. 450 (2014); *Colby v. Boyden*, 241 Va. 125 (1991); *Muse v. Shleiden*, 349 F.Supp.2d 990 (2004). The non-emergency vehicle cases include snow plows, school buses, and garbage trucks. *See e.g. Linhart v. Lawson*, 261 Va. 30 (2001); *Stanfield v. Peregoy*, 245 Va. 339 (1993); *Taylor v. City of Newport News*, 214 Va. 9 (1973); *Ashbury v. City of Norfolk*, 152 Va. 278 (1929). While courts in emergency vehicle cases tend to rest their decisions on whether the employee was involved in making high-risk decisions during an emergency dispatch, the non-emergency vehicle cases tend to turn on whether or not the employee was performing their governmental function at the time of the accident. *See generally Colby*, 241 Va. at 129 (stating that "[u]nlike the driver in routine traffic, [a government employee in an emergency situation] must make difficult judgments about the best means of effectuating the governmental purpose by embracing special risks."). *But see generally Linhart v. Lawson*, 261 Va. at 36 (stating that "[a]s the trial court observed, the transportation of children in a school bus is a governmental function").

Here, Defendant was a garbage truck driver, and thus this case falls in line with the non-emergency vehicle cases. For instance, In *Linhart v. Lawson, et al.* 261 Va. 30 (2001), plaintiff was injured when the vehicle he was driving was hit by a school bus. *See Linhart v. Lawson, et al.* 261 Va. 30, at 30 (2001). In *Linhart*, the court upheld the trial court's decision and found that the school bus driver was entitled to sovereign immunity. *See id.* at 36. The court in *Linhart* reasoned that the act of transporting children involved judgment and discretion. *See id.* Here,

Defendant was transporting garbage. Although a crude comparison, the two defendants were on route between pick-up destinations, and performing a governmental function at the time the alleged negligence occurred.

In *Stanfield, et al. v. Peregoy*, 245 Va. 339 (1993), the defendant was operating a city truck spreading salt during a snowstorm when the plaintiff and defendant were involved in an automobile accident. *See Stanfield, et al. v. Peregoy*, 245 Va. 339, at 339 (1993). The court in *Stanfield* found that operating the truck was clearly effectuating a governmental purpose and in doing so, exercised judgment and discretion. *See id.* at 343. The court reasoned that:

> 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 had 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 defendant's employer. *Id.* at 344.

Here, like the defendant in *Stanfield*, Defendant was effectuating a governmental purpose at the time of the accident. With every stop, the contents of the dumpster were added to the vehicle increasing the weight of the truck. Maneuvering of that vehicle becomes more challenging until the driver must make a determination when to dump his load or to continue on with his route.

More persuasive are the non-emergency cases involving garbage truck drivers. In *Taylor v. City of Newport News, et al.*, 214 Va. 9 (1973), a citizen fell on the sidewalk where earlier a city employee spilled grease while collecting garbage. *See Taylor v. City of Newport News, et al.*, 214 Va. 9, 10 (1973). The *Taylor* court found that the garbage collector was entitled to sovereign immunity because the employee was engaged in a governmental function at the time the negligence occurred. *See id.* Similarly, Defendant was engaged in the function of collecting garbage at the time that the alleged negligence occurred.

In *Ashbury v. City of Norfolk*, 152 Va. 278 (1929), the plaintiff was injured when hit by a pair of horses which had been hitched to a trailer used for garbage collection. *See Ashbury*, 152 Va. 280. The accident occurred when the king pin which fastened the double bar broke causing the horses to break free. *See id.* In the *Ashbury* case, the court upheld the finding that the garbage collector was entitled to sovereign immunity because at the time he was involved in

a government function, that of the removal of garbage. *See id.* at 292. Although times have changed and garbage collectors no longer ride along on horse and buggy, this case is quite similar to the case at hand. Here, much like the defendant in *Ashbury*, Defendant was en route to his next stop to pick up garbage.

Finally, this case is distinguished from *Wynn v. Gandy*, 170 Va. 590 (1938), where a city employee was returning from getting a school bus serviced back to school where the children were waiting to be picked up. *See Wynn v. Gandy*, 170 Va. 590, 591–92 (1938). The court in *Wynn*, like the court *Heider v. Clemons*, 241 Va. 143 (1991), found that the defendant was not entitled to sovereign immunity because he was not effectuating his governmental function at the time the alleged negligence occurred. *See generally Wynn*, 170 Va. 590. Instead, the two defendants in *Wynn* and *Heider*, were either on their way back from completing their task or on their way to their task. *See Wynn*, 170 Va. at 591–92; *Heider*, 241 Va. at 143. In this case, Defendant was effectuating his governmental purpose at the time of the accident. He was driving his route and collecting garbage at his required stops. He was not driving home from work nor was he driving to work.

The case at bar is similar to cases in which the Supreme Court of Virginia found that the driver of a non-emergency vehicle was exercising judgment and discretion. This court finds that Defendant was using sufficient judgment and discretion while engaged in the governmental function of collecting garbage, and thus prong four of the James test has been met.

IV. CONCLUSION

For the reasons stated herein, this court holds that Defendant has met the four-factor James test. Accordingly, this court further holds that Defendant's Plea in Bar is sustained as to any claim of simple negligence.

Parties are to circulate and submit an appropriate order reflecting the court's ruling and address any remaining claims by April 1, 2019.

Very truly yours,

[redacted]

Grace Burke Carroll
Judge, Circuit Court of Fairfax County 19th Judicial Circuit of Virginia

OPINION LETTER