



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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March 6, 2019

LETTER OPINION

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Re: *Tracy L. Groff v. Stephen Lawson*, Case No: CL-2018-9089

Dear Counsel:

This matter is before the Court on Defendant's Plea in Bar which asserts that the doctrine of sovereign immunity requires dismissal of Count I of the Complaint (Negligence).

OPINION LETTER

For the reasons stated in this opinion, the Court finds that the doctrine of sovereign immunity does apply to the facts of this case and, therefore, Count I must be dismissed. As the Supreme Court stated in *Afzall ex rel. Afzall v. Com.*, 273 Va. 226 (2007), “if sovereign immunity applies, the court is without subject matter jurisdiction to adjudicate the claim.” *Afzall ex rel. Afzall v. Com.*, 273 Va. 226, 230 (2007).¹

PROCEDURAL POSTURE

Plaintiff filed the Complaint on June 15, 2018 alleging two claims: Negligence (Count I) and Gross Negligence (Count II). On November 7, 2018, Defendant filed a Plea in Bar to Count I of the Complaint on the grounds of qualified sovereign immunity. Plaintiff filed an opposition to the plea in bar on November 20, 2018. On December 7, 2018 Plaintiff filed Plaintiff’s Motion in Limine to Exclude any Testimony Regarding a “Suspicious” Van Emanating an Odor of Marijuana. Defendant filed Defendant’s Bench Brief in Support of Plea in Bar on December 11, 2018. The Court heard the Plea in Bar on Wednesday, December 12, 2018. At the end of that hearing, the Court ordered further briefing on the matter. Defendant filed Defendant’s Post-Hearing Brief in Support of Plea in Bar on January 14, 2019. Plaintiff filed Plaintiff’s Post-Hearing Brief in Opposition to Plea in Bar on January 28, 2019. Defendant filed Defendant’s Post-Hearing Reply Brief on February 4, 2019. The Court then heard further argument regarding the issue on February 27, 2019. The matter is now ripe for decision.

FACTS PERTINENT TO THE PLEA IN BAR

This case arises from an automobile accident that occurred on June 22, 2016 around two a.m. Officer Stephen Lawson (“Defendant”), worked as a School Resource Officer (“SRO”) at Westfield High School. Officer Lawson had served as a police officer since 1997, an SRO for Fairfax Public Schools since 2007, and as SRO for Westfield since 2016. (*See* Dep. Stephen Lawson 6:1-3, 6:15-22, 17:12-22.) Officer Lawson was employed by the Fairfax County Police Department (“FCPD”) as a Master Police Officer (“MPO”) at the time this incident occurred. (*See id.*) The Plaintiff in this case is Tracy L. Groff (“Plaintiff”).

1. The All Night Graduation Party (“ANGP”)

On the night of the accident, Officer Lawson was assigned to work at Westfield’s all-night graduation party (“ANGP”). The ANGP began on June 21, 2016, at 11:00 p.m., and ended on June 22, 2016, at 5:00 a.m. The rules for the ANGP were as follows: (1) the students had to sign up, with permission from their parents; (2) there was an agreement signed between the students’ parents and the Parent Teacher Student Association (“PTSA”); (3) the students were to check in upon arrival, which was to be no later than midnight; (4) the students were expected to stay in the school from the time they checked in until the time they were released the next morning; and

¹ The Plea in Bar does not apply to Count II (Gross Negligence).

(5) the students were not to bring anything to the party that was unlawful or against school regulations. (See Hr.'g Tr. 52:9—53:13.)

2. The Individuals Responsible for Security at the ANGP

Westfield's security team for the ANGP consisted of: Kevin Mahan ("Mr. Mahan"), Westfield's safety and security specialist, Officer Thomas Tilden ("Officer Tilden"), and Officer Lawson. Other adult figures at the party that night included members of the PTSA, the PTSA President, a school administrator, a small custodial staff, and about a dozen parent volunteers. (See Hr.'g Tr. 53:17-22.) The security team and the chaperones for the evening communicated via school-issued radios, colloquially known as "walkie-talkies," throughout the night. (See Hr.'g Tr. 54:6—55:19.)

3. What Mr. Mahan Learned Around Two a.m. on the Night of the ANGP

Around two a.m., Mr. Mahan learned that students were leaving the building. (See Hr.'g Tr. 82.) Mr. Mahan heard that the students leaving the school were leaving in "small groups" over a short period of time. (Hr.'g Tr. 79:16-18.) Mr. Mahan then heard a report regarding a suspicious van at the front of the building. (See *id.* at 82.) Mr. Mahan decided to investigate in his golf cart (also referred to as his "Gator"). (See Hr.'g Tr. 60:15-22.)

4. What Officer Lawson Knew at the Time he Went to His Police Vehicle

a. Mr. Mahan's Testimony

Mr. Mahan testified that he radioed Officer Lawson for backup before he went to investigate the students leaving the school:

A. *I left my office, proceeded to the Gator, which was parked outside of my main office area. At some point before I got onto the Gator or started up the Gator I radioed Officer Lawson that I needed assistance.*

Q. *All right. When you called him and you said you needed assistance, tell us what facts, if any, did you report to him?*

A. *I'm not sure if I relayed any facts, because I was trying to garner a fast response, an immediate response. Also, with the Gator, it is a gasoline powered vehicle, if you will. It is loud once you start it. So, I knew once I would start garnering my response, the transmission with the wind and everything would not be too clear. I know I told him that there were students leaving the building, that I needed a response because I saw something suspicious and that there were kids leaving the building, exiting the building via door five.*

Q. *Did you tell him what it was that was suspicious that you saw?*

A. No.

THE COURT: It's not clear to me what Mr. Mahan just said. Go through it again.

MR. FEORD: I will try to clear it up.

BY MR. FEORD:

Q. Mr. Mahan - -

THE COURT: I'm talking specifically about what he told Officer Lawson.

MR. FEORD: Yes, sir.

BY MR. FEORD:

Q. Before you got into the Gator and started driving that Gator, did you make a radio call to Officer Lawson?

A. Yes, I did.

Q. All right. And when you spoke - - I take it you actually spoke with Officer Lawson?

A. (The witness nods head in the affirmative.)

Q. Is that a yes?

A. Yes.

Q. Can you tell us what you told Officer Lawson?

A. I told Officer Lawson that there was kids, students, fleeing outside of door number five, that I was responding and I needed assistance.

Q. Did you say anything about a suspicious van?

A. I do not recall.

Q. Did you ask him to back you up?

A. Yes.

Q. What was your intent by asking him to back you up?

A. *That he provide a response to the area that I was going to.*

(Hr.'g Tr. 63:14—65:21.)

b. Officer Lawson's Testimony

Officer Lawson testified at the Plea in Bar hearing. The Court quotes his testimony at some length:

Q. *What was the - -*

A. *I heard something to the effect that students were fleeing the school.*

Q. *When you received that dispatch, where were you in the building, if you recall?*

A. *I don't remember exactly where I was, but it would have been - - I remember that it didn't take me a long time to head out to my cruiser, so somewhere down near door eleven.*

Q. *Okay. So, you receive a dispatch that there are children fleeing from the school. At that point did you make an immediate response with regards to that report?*

A. *I did.*

Q. *What was your immediate response?*

A. *My immediate response was that I needed to respond to that area and find out what was going on.*

Q. *And what area was it?*

A. *It was out door number five.*

Q. *And why did you feel that based on, you know, some kids running out the building, it's a party - - why did you feel that you had to make an immediate police response to that report?*

A. *For a variety of reasons. One would have been they were leaving the school from an area they were already not permitted to be. I had no idea, you know, how many kids were there, what they were doing, and why they were leaving the school. You know, were they fleeing from something? Was there anything from a fight, you know, alcohol, drugs, weapons? Was there anything like that there that is causing them to flee out, or were they - - you know, some wanting to come back and some kids leaving.*

And the area they were going out to for those that were fleeing, as has been described earlier, is very dark and it is dangerous both to them and to anybody that might be traveling on Old Lee Road. It doesn't show on that map but there is a curve in the road. If you've got kids running down into that road, you know, you would want to warn oncoming traffic that there's people in the road.

Q. Did you consider this radio dispatch to be an immediate and imminent threat to the safety and security of the school?

A. Yes.

* * *

A. A number of [] things I already said, but my experience over the years of working, as well as my familiarity with the school and knowing the area that they were fleeing to is, again, not the area they were supposed to be, and it is not where - - it wasn't set up for them to be there.

So, for instance, by door eleven they would have been welcome, there would have been extra lighting. That area would have been very dark and not a place where they were supposed to be, and could have easily - - You know, safety, at the very least, would have been a major concern for them - - for kids running out there in the dark.

Q. And at the worst?

A. At the worst, you know - - I guess the worst situation would have been a shooter, or somebody like that, that was present.

Q. Okay. And how did you initiate your response?

A. I decided - - As soon as I heard that there were kids fleeing from that area, I let Officer Tilden know. I know he wasn't that far from me. Because again, being familiar with it, knowing it was dark, it was like we need to go to this. And the more lights, the more spotlights, the more people we had, not knowing what they are going into, the better. So, I basically let Officer Tilden know we needed to go.

I went out, I got into my cruiser. I went, you know, up to the road. On my way out to the road I saw Officer Mahan and saw him going in the golf cart - -

Q. I'm going to pull you back just a second.

A. Okay, sure.

Q. When did you seek the assistance and backup of Officer Tilden?

A. While I was still in the school.

Q. Do you recall where in the school you were when you alerted Officer Tilden to your need for backup?

A. No, other than the general area where the kids were engaging in the activity.

Q. Can you estimate how much time between when you received the report of children fleeing from the school and your communication with Officer Tilden that you needed backup?

A. Ten seconds.

Q. And with regards to your cruiser, did you go to this cruiser when it was parked here?

A. Yes.

Q. Okay. And I'm going to pull your attention to what's previously been admitted as the picture of the Gator. Is this the Gator that you saw at two a.m.?

A. Yes.

Q. Obviously, this is taken during the daytime.

A. Correct.

Q. But this is what School Security Officer Mahan was riding in at the time?

A. Right.

Q. And I'm going to ask you to identify the top. Is that a yellow light?

A. Yes.

Q. Is that the yellow light that you said you saw?

A. Yes.

Q. Okay. So you got into your car. Do you make any decisions at that time regarding the use of your equipment? You previously said you wanted the car

because of the spotlight. Is there any other reason why you chose to use your vehicle at this point?

A. Yes. Because it would be much easier to corral students in my vehicle than on foot. And the equipment that is on the cruiser may or not be needed based on, you know, what I run into, but it is better to have it.

Q. What specialized equipment, if any, that was in that cruiser did you feel you may need?

A. Everything from the lights and sirens, spotlight, takedown lights.

Q. Do you also have an additional shotgun -- weapon -- in the car?

A. Yes.

Q. And you also have an emergency bag; is that correct?

A. Yes.

Q. With emergency equipment and first aid?

A. Right.

(Hr.'g Tr. 129:18—131:16, 132:12—136:6.)

c. Officer Tilden's Testimony

When asked how Officer Tilden first learned about "a situation developing that night," he testified as follows:

A. MPO Lawson was not too far away from me and came to my location. As he was walking towards me, he was communicating that there was some type of event that was going on, further detail that he believed that kids had run out of the back of the school.

I believe I picked up his walkie-talkie traffic at that time, as well. I think I had mine turned down.

Q. So, before Officer Lawson coming to you, you did not yourself hear a radio report about the children running from the school?

A. Quite frankly, I may have, but I remember seeing him and hearing his words.

Q. Do you remember what it was that - - First, did Officer Lawson talk directly to you when he came over?

A. Yes, he did.

Q. All right. What was it, if you recall, that he said to you?

A. He said that there had been a report of students who had left from the rear of the school, possibly on foot, and that we were going to go investigate, and I followed him outside of the building at that point.

Q. Did you hear anything at that time about the school security officer?

A. He made a reference that it came from school security, not the specific officer that I recall.

Q. Okay. So, what did you do at that point, sir?

A. I followed MPO Lawson out the front of the building where are [sic] cruisers were situated and got into my cruiser. MPO Lawson had pulled off and several seconds later, I think I started to depart the area.

(Hr.'d Tr. 89:5—90:15.)

Officer Tilden further testified that: “In today’s day and age, it could have been anything. It could have been a school assault. It could have been somebody who came into the school and did something and left. We didn’t know what to expect. It was constantly developing.” (Hr.’g Tr. 91:5-9.)

d. What Did Officer Lawson Know?

The Court finds the following: (1) Officer Lawson heard a report that students were “fleeing” the school; (2) Officer Lawson did not know why the students were fleeing the school, but considered the situation to be dangerous, both to the students and the public; (3) Officer Lawson understood that the exit the students were using to flee the school was dark and that, once out of the school, the students would be near an unlit, curving street called Old Lee Road, creating a “dangerous” situation given the darkness and curves in the road; (4) Officer Lawson also knew there to be a retaining pond in the area; and (5) Officer Lawson had never previously received a report of students “fleeing” a school, but he knew that the possible reasons for students fleeing a school included a fight, alcohol or drug involvement, or a school shooter.

Under these circumstances, the Court finds that Officer Lawson was faced with an urgent situation requiring an immediate response to protect the safety of students and the community.

5. Did Officer Lawson Know About the Suspicious Van?

Much argument in this matter was devoted to whether the Defendant was aware of the presence of a suspicious van in the parking lot. The reason why this was a focus of the parties' attention is that the presence of a suspicious van in the parking lot – if (and only if) it was known to Officer Lawson at the time he left the building – would add a distinct and additional concern of a potentially criminal nature to the matters to which Officer Lawson was responding.

For the reasons stated below, the Court will not factor the suspicious van into its sovereign immunity decision. The evidence is simply too uncertain and unclear as to whether Officer Lawson was aware of the van. Therefore, the Court finds that it cannot attribute knowledge of the suspicious van to Officer Lawson.

There are three witnesses whose testimony is germane to this issue: Mr. Mahan, Officer Lawson and Officer Tilden.

a. Mr. Mahan's Testimony

Mr. Mahan's testimony is unclear regarding whether or not he told Officer Lawson about the presence of the suspicious van. At one time Mr. Mahan testified: "I'm not sure if I relayed any facts I know I told [Officer Lawson] that there were students leaving the building, that I needed a response because I saw something suspicious and that there were kids leaving the building, exiting the building via door five." (Hr'g. Tr. 63:21—64:8.) When asked if he told Officer Lawson what was "suspicious," Mr. Mahan said "[n]o." (Hr'g. Tr. 64:9-11.) After his recollection was refreshed by reviewing his deposition transcript, however, Mr. Mahan testified that when radioing Officer Lawson for backup:

I believe I did say that there was a suspicious vehicle. I believe that I would have put together as much information as I could before getting onto the Gator, so that way Officer Lawson had an idea of what the situation was before I wasn't able to transmit anything else due to the response.

I believe that I would have said that there was a suspicious vehicle and that there were kids fleeing the building.

(Hr'g. Tr. 70:12-20.)

b. Officer Lawson's Testimony

Officer Lawson stated that it was "probable that [he] missed some radio traffic throughout the night." (Hr.'g Tr. 129:5-6.) Officer Lawson's testimony during the December 12, 2018 hearing regarding whether or not he knew about the "suspicious van" report on the night of the ANGP was as follows:

Q. You had no information concerning a suspicious van; isn't that correct?

A. *It's correct that I do not remember that information.*

Q. *Okay. And is it fair to say, Officer, that you being a trained officer and Ms. Townes took you through the number of hours and very impressive training receive [sic] that that's something that you would have remembered; correct?*

A. *I would not be able to say that given two and a half years after the event.*

* * *

Q. *I'm going to hand you what's been marked as Plaintiff's Exhibit Number 3, Officer Lawson.*

* * *

Q. *Okay. And when you prepared this statement, you put all pertinent information regarding that incident; is that correct?*

A. *No.*

Q. *It's not?*

A. *It's not.*

* * *

Q. *Okay. And you would agree with me that there is no mention, whatsoever, of the suspicious van; right?*

A. *Yes.*

Q. *Okay. And there's nothing about any type of odor of marijuana; correct?*

A. *That is correct.*

Q. *All right. And is it your testimony that that would not have been relevant to this statement being tendered to your supervising officer?*

A. *That is my testimony, yes.*

Q. *Let me hand to you, if I could, Plaintiff's Exhibit Number 2. Could you take a look at that, sir?*

A. Yes.

Q. All right. And I'll represent for the Court that this is three pages, Officer Lawson, of your interrogatory answers.

* * *

Q. And then I asked you in Question Number 13, okay, state how this collision occurred, include a description of what you were doing immediately before the crash; okay?

A. Yes.

Q. And you answered: See attached statement of MPO Lawson.

A. Yes.

Q. And that was your answer; correct?

A. Since it is written here, yes.

* * *

Q. All right. And then I asked you in Number 16 whether or not you were responding to an emergency at the time of the subject collision, and, if so, describe the nature of the emergency and how you received notice to respond; do you see that?

A. I do.

Q. Okay. And your answer, we could agree, is see attached statement of MPO Lawson; is that right?

A. That was an answer that was given. I don't think I said that. But if, for instance, my counsel would have said, hey, that's covered in the memo, and that's what you guys agreed to, then - - I would not have said see attached memo of MPO Lawson.

Q. You agree with me, though, we just went through this, that these are your interrogatory answers; right?

A. Yes.

* * *

Q. Okay. And do you recall me asking you about your statement at your deposition back on November 6, 2018?

A. Yes.

* * *

Q. Okay. And do you remember me asking you whether or not you wanted to add or change anything about that?

A. I don't remember it but I wouldn't argue that you did say that.

* * *

Q. All right. And you never once during the course of the deposition said anything about a suspicious van emanating an odor of alcohol; isn't that right?

A. Uh-huh-uh.

(Hr.'g Tr. 165:13-23; 166:7-8; 168:2-7; 168:13—169:6; 169:21—170:7; 170:15—171:8; 171:11-14; 171:22—172:3; 172:18-21.)

c. Officer Tilden's Testimony

Officer Tilden's recollection is unclear as to whether or not Officer Lawson knew about the report of a suspicious van. During the hearing, Plaintiff's attorney asked Officer Tilden: "it is true that Officer Lawson did not mention to you anything at all about a suspicious van being anywhere near the school; isn't that correct?" (Hr'g. Tr. 94:20-22.) Officer Tilden replied: "I don't recall hearing anything about that." (Hr'g. Tr. 94:23—95:1.)

On this record, the Court cannot find that Officer Lawson knew about the suspicious van when he got into his vehicle to investigate.²

6. The Collision

Upon leaving the school grounds, Officer Lawson chose not to activate his cruiser's lights or sirens as the roads appeared clear and he did not want to cause any fleeing students to run further from the school:

Q. Did you make a decision with regards to your lights and sirens?

A. Yes.

² Given this determination, the Court need not address Plaintiff's assertion that *Massie v. Firmstone*, 134 Va. 450 (1922) prevents the Court from finding that Defendant knew about the suspicious van.

Q. *And did you make that decision before you started moving?*

A. *I made the decision before I started moving that I wouldn't turn them on when I initially got in the car, and then you continue to reevaluate that decision as you proceed the route you're going.*

Q. *Okay. It's two a.m.; is that correct? Around that time?*

A. *Correct, around that time.*

Q. *Is it fair to say it is pitch black?*

A. *Yes.*

Q. *Why didn't you want to use your lights and sirens?*

A. *One is because many times the reason you use your lights and sirens is to move traffic out of your way as you are responding to something. And there was no traffic that I observed as I was coming out. And other than seeing Officer Mahan in the Gator, there wasn't any other traffic I saw on the road. So, there wasn't any need to initially turn them on to move anybody out of my way.*

In addition, you don't - - I did not want the students that were fleeing - - if you turn on lights and sirens, many times that just disburses the crowd in a more chaotic and crazy way that I wanted less of that.

Q. *Did you feel that it would assist you in expediting your response to the location?*

A. *No.*

(Hr.'g Tr. 138:3—39:10.) Officer Tilden also chose not to turn on his lights or sirens:

Q. *All right. When you were in your vehicle and leaving the parking lot, did you turn your lights and siren on?*

A. *I did not.*

Q. *You chose not to?*

A. *I chose not to.*

Q. *And why did you choose not to turn them on?*

A. There were several reasons. At that moment with the information that was provided to me I didn't feel that that was necessary. And based upon my experience, oftentimes in a situation with the information as it was presented, that was not the best approach.

Q. What do you mean?

A. It was a rather short distance. A lot of times - - I didn't think it was justified, regardless. But even if I did feel it was justified and I activated my emergency equipment, oftentimes that can cause fleeing individuals to flee further away.

(*Id.* at 91:22—92:18.) Officer Lawson also decided not to turn on his computer aided dispatch device (“CAD”) as he felt it would take too long to turn on (about three to five minutes) and would not provide enough benefit to make the loss of time worth it as it would not take him long to drive to the exit from which the students were reported to be fleeing. (*See id.* at 136:7-21.)

While driving, Officer Lawson focused on: (1) trying to spot Mr. Mahan to provide backup; (*see* Hr.'g Tr. 145:14-16) (2) looking to ensure none of the fleeing students ran into the road (*see id.* at 143:17-19); and (3) monitoring his walkie-talkie for further updates. (*See id.* at 141:4-17.) As Officer Lawson approached the intersection of Stonecroft Boulevard and Old Lee Road, he stopped his vehicle in the left turn lane and then moved into the intersection in order to gain a visual of Mr. Mahan. (*See id.* at 148, 157-58.) Officer Lawson first looked to the left and saw neither Mr. Mahan nor any students. He then looked to the right and caught sight of Mr. Mahan's golf cart travelling East, parallel to Old Lee Road. Upon catching sight of Mr. Mahan, Officer Lawson checked his rearview mirror and saw headlights which he presumed belonged to Officer Tilden. Officer Lawson then made a right turn onto Old Lee Road from the left travel lane of Stonecroft Boulevard. (*See id.* at 150-52.) Ms. Groff was traveling South on Stonecroft Boulevard in the center lane. The two vehicles collided with Ms. Groff's vehicle making contact with the rear passenger side of Officer Lawson's cruiser.

Ms. Groff alleged in her Complaint that, as a result of the collision, she suffered “serious and permanent bodily injuries, physical pain, mental anguish, [] inconvenience” and substantial medical expenses. (Compl. 2, ¶¶8-9).

ANALYSIS

1. Introduction

Sovereign immunity exists for a variety of reasons, including, but not limited to:

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 (1984).

Sovereign immunity, however, has its limits in the context of governmental employees:

We find 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. It is proper that a distinction be made between the state, whose immunity is absolute unless waived, and the employees and officials of the state, whose immunity is qualified, depending upon the function they perform and the manner of performance.

James v. Jane, 221 Va. 43, 53 (1980). The Court further cautioned that “[a]dmittedly, no single all-inclusive rule can be enunciated or applied in determining entitlement to sovereign immunity.” *Id.* The Court explained the difficulty in applying an all-inclusive rule as certain tort actions cannot be covered by sovereign immunity: “[a] state employee who acts wantonly, or in a culpable or grossly negligent manner, is not protected. And neither is the employee who acts beyond the scope of his employment, who exceeds his authority and discretion, and who acts individually.” *Id.*

2. The Four-Factor Test

A four-factor test has been adopted by the Supreme Court of Virginia to determine whether sovereign immunity applies to the acts of a government employee. See *James v. Jane*, 221 Va. 43 (1980):

[W]e examine the function this employee was performing and the extent of the state's interest and involvement in that function. 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. Of equal importance is the degree of control and direction exercised by the state over the employee whose negligence is involved.

James, 221 Va. at 53. In other words, the four factors are: (1) function of the employee; (2) the government's interest; (3) the government's involvement; and (4) the degree of control and direction the state has over the employee versus the employee's power of discretion.³

³ This Court has substituted the word “government” for “state” in the *James* test based upon the Virginia Supreme Court's decision in *Messina v. Burden*, 228 Va. 301 (1984), in which the Court held that “the word ‘state’ was used in this test only because in *James* the State was the immune body for which the doctors worked. Our use of the word ‘state’ did not mean that in cases where the individual seeking immunity was not a State employee the State's interest in and control over the individual still had to be examined. Had the doctors in *James* worked for another immune governmental entity, that entity's name would have been used in the test. Thus, in applying the *James* test to employees of other immune governmental entities, the word ‘state’

The Court notes that Plaintiff agrees that the first factor, function of the employee, and the third factor, the government's involvement, have been satisfied in this case.⁴

A. Function of the Employee

Officer Lawson testified that he had been employed by the Fairfax County Police Department for twenty years at the time of the hearing, so around eighteen years at the time of the accident. (*See* Hr'g Tr. 103:19-21.) Officer Lawson further testified that his role as a school security officer is essentially the same role as other patrol officers, but with extra training specifically tailored to his role as a school resource officer. (*See id.* 106:23—109:18.) Officer Lawson stated that his primary function was to be a visible deterrent to crime, to enforce laws, to respond to incidents, to conduct investigations, and to "maintain peace and protect life and property of those in the patrol area." (*Id.* at 102:10-11.) Furthermore, although Officer Lawson was working overtime at Westfield High School on the night of the accident (*see* Dep. Stephen Lawson 19:3—20:13, 23:22—27:4.), Officer Lawson still was required to report in first to Sully Station to trade his personal vehicle for his police cruiser and to change into his police uniform. (*See* Hr.'g Tr. 118:13-20.) Officer Lawson further testified that he was subject to Fairfax County Police Department Standard Operating Procedures and General Orders. (*See id.* at 120:15-23.)

In sum, Officer Lawson was performing a governmental function when he responded to a radio report of students "fleeing" the school. His actions were taken in connection with his duties as a Fairfax County Police Department officer and as Westfield High School's SRO.

B. Government's Interest

Plaintiff's counsel argues that the government "[h]ad no interest" in Officer Lawson's response after he received the radio transmission in this case. (Pl.'s Mem. Opp. Plea in Bar 6.) This is based on the assertion that on the night of the accident, Officer Lawson was not enforcing the laws of the Commonwealth but, rather, enforcing a contract between the students' parents and the PTSA:

At the time of the collision, Officer Lawson was responding to a school radio transmission on a handheld walkie-talkie. Officer Lawson stated that the radio transmission came from a parent chaperone or someone on the school staff. The Parent Teacher Student Association (PTSA) at Westfield High School created the rule that students are not allowed to leave the school once they enter for the all-night grad party. Officer Lawson's search for the school golf cart and students

should be deleted and the proper description of the governmental entity substituted." *Messina v. Burden*, 228 Va. 301, 313 (1984).

⁴ *See* Plaintiff's post-hearing brief: "As made known to defense counsel following the evidentiary hearing, plaintiff is no longer challenging that the defendant was performing a governmental function and that the County exercised a sufficient degree of control over him such that the defendant has met his burden regarding the first and third factors of the *James* analysis." (Pl.'s Post-Hearing Br. Opp. Plea in Bar, 2.)

outside of the school was an attempt to preserve that rule issued by the PTSA at Westfield High School. Officer Lawson was not attempting to prevent and detect crime, apprehend criminals, or enforce state and local laws, regulations, or ordinances at the time of the collision. Instead, Officer Lawson was attempting to enforce a PTSA rule that all students should remain in the school for the entirety of the all-night grad party.

(Pl.'s Mem. Opp. Plea in Bar 4-5.)

Plaintiff's counsel also argues that the government had a reduced interest in Officer Lawson's activities on June 22, 2016 because Officer Lawson "was not paid by the Fairfax County Police Department for this special assignment." (Pl.'s Mem. Opp. Plea in Bar 2.)

In contrast, defense counsel argues the government had a compelling interest in Officer Lawson's actions the night of the ANGP as Officer Lawson was serving the governmental purpose of protecting the safety of all civilians at Westfield High School and enforcing the laws of the Commonwealth: "Officer Lawson's assignment that night was to provide security to the participants, parent volunteers, and school staff, and to enforce the laws of the Commonwealth of Virginia protecting both life and property." (Def.'s Mem. Support Plea in Bar of Stephen Lawson 1.)

Defense counsel points to the primary concerns enumerated in the Memorandum of Understanding Between the Fairfax County Public Schools and the Fairfax County Police Department ("MOU"), which include: "provid[ing] a safe and positive learning environment." (Def.'s Bench Br. Supp. Plea in Bar 11) Defense counsel also argues that the Virginia School-Law Enforcement Partnership Guide (SLEP) supports his position, given its description of the SRO's role as being to "provide **law enforcement services** to the school, school grounds, and areas adjacent to the school." (*Id.* at 30 (emphasis in Def.'s Br.))

In sum, defense counsel argues that the government had a compelling interest in Officer Lawson's actions the night of the accident as those actions "were essential to the objective of safety for those at the school." (*Id.* at 5.) Defense counsel states: "Fairfax County has great interest and involvement in the provision of safety to students, parents, and staff." (*Id.*)

The Court finds that the Government's interest in Officer Lawson's work, both generally and in the early morning hours of June 22, 2016, was very substantial. The Plaintiff asserts that Officer Lawson's job on June 22 – and his actions in driving away from the school at around two a.m. – was merely to enforce a contract prohibiting ANGP participants from leaving the school. The Court does not agree. Officer Lawson's job on June 22 was the same job he had each day – to be the school's SRO. That required him to protect the safety of ANGP participants and enforce the laws of the Commonwealth.⁵ When Officer Lawson heard that students were "fleeing" the school, he recognized, and acted upon, the clear danger this posed to the students

⁵ The MOU specifically provides that "SROs shall not become involved in routine school matters such as administrative actions or actions not directly related to the safety of the students and staff." (MOU 7.)

and public and the need to immediately investigate the reason why students were fleeing the school. These are core responsibilities of a police officer and required an immediate law enforcement response.

Finally, the Court does not find it significant that Officer Lawson's overtime pay was being funded that evening by the Fairfax County Public Schools rather than the Fairfax County Police Department. The funding source in no way altered Officer Lawson's SRO responsibilities or law enforcement duties. Whether paid by Fairfax County Public Schools or Fairfax County Police Department, he was still being paid by Fairfax County to perform a law enforcement function and to protect the safety of the students and the community.

C. Government's Involvement

Officer Lawson stated he was employed with the Fairfax County Police Department as a full-time employee at the time of the accident. (*See Hr.'g Tr.* at 101:2-4.) Officer Lawson further explained that he was subject to obeying the "General Orders" which are, essentially, "statements on administrative and operational areas. It's things that will impact you as you do your job." (*Id.* at 110:1-9.) Officer Lawson also testified that he was bound to comply with the General Orders. (*See id.* at 111:10-12.) As stated in *Colby v. Boyden*, 241 Va. 125 (1991), guidelines and regulations are a good indication of a government entity's level of control over an employee: "[t]he City exercised administrative control and supervision over Officer Boyden's activities through the promulgation of guidelines governing actions taken in response to emergency situations." *Colby v. Boyden*, 241 Va. 125, 129 (1991). The Virginia Supreme Court has further stated that "[t]he extent of a government's control and direction of its employee also influences our consideration of that employee's claim of immunity. A high level of control weighs in favor of immunity; a low level of such control weighs against immunity." *Lohr v. Larsen*, 246 Va. 81, 87 (1993).

The Court finds that the government's involvement in Officer Lawson's work as an SRO was comprehensive and pervasive. In this respect, Officer Lawson was in no different position than a police officer patrolling the community or its roadways.

D. The Degree of Control and Direction Exercised by the Government Over the Employee

With regards to "discretionary decisions" made in government jobs requiring special training, the Virginia Supreme Court has stated as follows:

The extent of a government's control and direction of its employee also influences our consideration of that employee's claim of immunity. A high level of control weighs in favor of immunity; a low level of such control weighs against immunity.

At first glance, the issue of wide discretion that influences our consideration of the grant of governmental immunity in applying the third element of the James test appears to be at odds with our consideration of a higher level of governmental control in the application of the fourth element of that test in this case. However, when a government employee is specially trained to make discretionary decisions, the government's control must necessarily be limited in order to make maximum use of the employee's special training and subsequent experience.

Lohr v. Larsen, 246 Va. 81, 88 (1993) (citations omitted). Furthermore, “if a broad discretion is vested in a government employee in performing the function complained of . . . it will weigh heavily in favor of a government employee's claim of immunity.” *Id.* at 87.

As the matter before this Court involves an officer operating a vehicle, the Court first looks to similar cases involving police officers driving their police cruisers.

1. Cases Involving Police Officers Driving Police Cruisers

a. McBride v. Bennett

In *McBride v. Bennett*, 288 Va. 450 (2014), Officer Bennet was assigned to a domestic disturbance call. *See McBride v. Bennett*, 288 Va. 450, 453 (2014). Officer Folston was originally assigned to transport a prisoner, but upon hearing the dispatch regarding the domestic call Folston decided to provide backup for Bennet. *See id.* As no code was assigned to the dispatch, any officers responding were supposed to designate the dispatch as a Code 3 under the police department's General Orders. *See id.* at 454. For calls designated as Code 3, no lights or sirens were to be used and the officers were to follow all posted signs. *Id.* Both officers chose to speed, and while en route to the domestic disturbance Bennet came upon a bicyclist who was “swerving” in his lane. *See id.* Bennet was able to come to a quick stop, then the cyclist “swerved his bicycle into the right lane, where he was then hit by Folston, who had maneuvered into that lane to avoid hitting Bennett's vehicle. Tragically, Worsley died as a result of injuries sustained when he was struck by Folston's vehicle.” *Id.* When analyzing the case, the Virginia Supreme Court stated that:

When embracing special risks, government employees are necessarily called upon to make “split-second decisions balancing grave personal risks, public safety concerns, and the need to achieve the governmental objective.” *Id.* Such split-second decisions may lead to negligent acts, which can result in death or serious injury, as the present case demonstrates. At the same time, the failure to make such split-second decisions could similarly result in death or serious injury, and one of the purposes served by sovereign immunity is to “eliminate[] public inconvenience and danger that might spring from officials being fearful to act.” *Messina v. Burden*, 228 Va. 301, 308, 321 S.E.2d 657, 660 (1984). Therefore, our jurisprudence is clear that, in the context of driving a vehicle, whether the act in question involves the requisite exercise of discretion such that sovereign immunity applies depends on

whether that act embraces “special risks” in order to effectuate a governmental purpose.

Id. at 455-56. The Court further held that the test in these kinds of cases is an objective test:

In cases like the present one, the proper application of sovereign immunity should not be based upon a court second-guessing a split-second decision made by a government employee effectuating a governmental function by embracing special risks. If that were the case, sovereign immunity would be rendered meaningless. Rather, the proper application of sovereign immunity requires a court to make an objective determination as to whether the decision made and the actions taken pursuant thereto were necessary to the performance of a governmental function and embraced special risks The driver's evaluation of the situation must be objectively reasonable to permit the application of sovereign immunity.

Id. at 456. The Court ultimately held that the defendant was entitled to sovereign immunity.

b. *Colby v. Boyden*

In *Colby v. Boyden*, 241 Va. 125 (1991), a police officer was pursuing a motorist who had run a red light. *See Colby v. Boyden*, 241 Va. 125, 126. (1991). In order to determine whether Officer Boyden was entitled to sovereign immunity, the Court had to determine whether Officer Boyden's actions were ministerial or discretionary:

In Virginia, as in the District, the question of whether a particular act is entitled to the protection of sovereign immunity depends upon whether the act under consideration is classified as discretionary or ministerial in nature. Our resolution of that question, however, goes beyond determining whether the act constitutes the formulation or execution of policy.

Id. at 128-29. The Court looked at factors such as the City's level of control over Officer Boyden, and in doing so the Court highlighted the difference between a police officer driving in pursuit versus routine traffic:

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 routine 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. The exercise of discretion is involved even in the initial decision to undertake the pursuit, as the *Biscoe* court recognized.

Id. at 129-30. The Court held that the defendant was entitled to sovereign immunity.

c. *Hawthorne v. VanMarter*

In *Hawthorne v. VanMarter*, 279 Va. 566 (2010), a police officer was making a U-turn to pursue a vehicle traveling at 63 miles-per-hour in a 25 mile-per-hour zone. *See Hawthorne v. VanMarter*, 279 Va. 566, 573 (2010). VanMarter did not immediately activate his emergency lights and siren, but when he began pursuit and looked down to activate his emergency equipment he missed the entrance of the car driven by Hawthorne from a driveway onto the road and was unable to apply his breaks in time to avoid a collision. *See id.* at 573-74. The Court found that sovereign immunity applied in this case. *See id.* at 578-79.

d. *Nationwide Mut. Ins. Co. v. Hylton*

In *Nationwide Mut. Ins. Co. v. Hylton*, 260 Va. 56 (2000), a police officer, Officer DeHart, was about to pursue a truck Officer DeHart had observed turning right through a red light without stopping. *See Nationwide Mut. Ins. Co. v. Hylton*, 260 Va. 56, 62 (2000). As Officer DeHart looked in his rearview mirror to clear himself for merging into the right lane, the car in front of him suddenly stopped and Officer DeHart rear-ended the vehicle in front. *See id.* The Court held that “DeHart was not merely engaged in routine driving activities. Rather, at the time of the accident that is the subject of this litigation, DeHart had made a decision to apprehend a traffic violator, and DeHart was required to exercise discretion and judgment in executing that action.” *See id.* at 64-65.

e. *Heider v. Clemons*

In contrast to *Bennet*, *Boyden*, *VanMarter*, and *Hylton*, the Court in *Heider v. Clemons*, 241 Va. 143 (1991) found that a police officer who was driving his vehicle, during work hours, and was involved in an accident, was not entitled to sovereign immunity. *See Heider v. Clemons*, 241 Va. 143 (1991). Officer Heider had just finished serving a citizen with process and was pulling out of a parking space when he hit a motorcyclist. *See id.* at 143. The Court found that “[w]hile every person driving a car must make myriad decisions, in ordinary driving situations the duty of due care is a ministerial obligation. The defense of sovereign immunity applies only to acts of judgment and discretion which are necessary to the performance of the governmental function itself.” *Id.* at 145. The Court ultimately held that: “under the circumstances of this case, the simple operation of an 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." *Id.*⁶

2. Cases Involving Other Government Employees Asserting a Claim of Sovereign Immunity

a. *Friday-Spivey v. Collier*

In *Friday-Spivey v. Collier*, 268 Va. 384 (2004), the Court examined the concept of sovereign immunity in relation to the driver of a fire truck. The driver, Collier, was responding to a dispatch regarding an infant locked in a car which was deemed a non-emergency matter. See *Friday-Spivey v. Collier*, 268 Va. 384, 387 (2004). Collier drove without lights or sirens, and he stated that the decisions he made were: "the route of travel, the address, I am driving a large piece of equipment, it's pretty heavy, so I have to be extra careful when I'm driving the fire truck, it's not like driving my personal car on the road. Stopping distances, and so forth." *Id.* Collier

⁶ See also *Smith v. Daniel*, 47 Va. Cir. 451 (Richmond, Jan. 25, 1999) (holding that an officer who collided with another car while responding to a call for backup was entitled to sovereign immunity as he "had to decide how quickly he had to get to the other deputy's location, what route to take, what action was needed to protect the public, whether to alert the occupants of the stopped vehicle of his approach by employing his flashing lights and siren, whether to call for additional backup, whether to have his weapon in hand, and so on. While the court in no way means to belittle the level of judgment and discretion required to apply salt to a street, it pales in comparison to the level of judgment and discretion required of the defendant in the case at bar. Sovereign immunity applies."); *Muse v. Schleiden*, 349 F. Supp. 2d 990 (E.D. Va., Dec. 17, 2004) (determining that courts' decisions regarding whether or not sovereign immunity applies should not turn only on whether or not an officer activated lights and sirens as "a rule that makes sovereign immunity turn on whether emergency equipment is actually activated would ignore the teachings of the Supreme Court of Virginia on this issue and convert the sovereign immunity issue into a "flip of the switch" question. Emergency vehicle drivers would be presented with a simple, but inappropriate choice: activate the emergency equipment and ensure sovereign immunity protection or choose not to do so and risk a negligence suit."); *Clemens v. Pleasants*, 86 Va. Cir. 398 (Charlottesville, Apr. 5, 2013) (holding an officer was entitled to sovereign immunity when responding to a call for assistance from a fellow officer as "[i]n the cases that rejected sovereign immunity, there is a common theme, in that the vehicle being operated was on the way to or on the way back from a governmental function" but "defendants have been able to assert sovereign immunity when actively engaged in the governmental function in question" and as the officer-in-question's actions fell somewhere in between, he was entitled to sovereign immunity); *Cunningham v. Rossman*, 80 Va. Cir. 543 (Danville, July, 2012) (holding an officer was entitled to sovereign immunity when she backed her police car into a brick column while en route with a prisoner to the police department as "[w]hen a police officer arrests an individual and transports him to jail, the officer must exercise substantial judgment and discretion. During transit, the officer must exercise her discretion, be aware of her surroundings, be on guard for any unusual or threatening behavior by the detainee, and take into consideration her own safety as well as the safety of the detainee and the public.").

also stated that he took “‘the quickest route possible’ because an infant was locked in a vehicle and ‘we just [did not] know what to expect when we [got] there.’” *Id.* The Court decided Collier was not entitled to sovereign immunity, however as “‘the facts of this case do not support the conclusion that Collier’s driving involved the exercise of judgment and discretion beyond that required for ordinary driving in routine traffic situations. Collier testified that ‘Priority 2 calls are considered public service calls’” *Id.* at 390. Furthermore, Collier admitted that based upon his knowledge at the time of the dispatch, “‘there was no danger’ involved in the call to which they were responding” *Id.*

b. *Smith v. Settle*

In *Smith v. Settle*, 254 Va. 348 (1997), an ambulance driver, Smith, was driving an ambulance with the lights and siren in operation and was responding to an emergency on an interstate. *See Smith v. Settle*, 254 Va. 348, 350-52 (1997). The plaintiffs in the case argued: that Smith was not entitled to sovereign immunity because: (1) his trip to a location where he could establish radio contact was mere preparation for a possible emergency dispatching; (2) he had not been dispatched to the scene by the county fire and rescue communications center as required by Prince William County Code § 7-29; (3) he was not then responding “‘to the location of an emergency call” as required by a regulation of the Board of Health; and (4) he was not operating his vehicle with due regard to the safety of persons and property as required by Code § 46.2-920.

Id. at 353. The Court did not find the plaintiffs’ arguments persuasive, however, and held that Smith was entitled to sovereign immunity as:

The evidence supports a conclusion (1) that Smith’s ambulance trip was not mere preparation but an immediate and necessary response to the emergency, and (2) that the trip was made in conformity with the center’s dispatch order and in response to the location of an emergency call as required by the county code and health board regulations.

Id.

c. *Stanfield v. Peregoy*

In *Stanfield v. Peregoy*, 245 Va. 339 (1993), the Court examined a case in which a snow plow driver was salting and plowing the streets and accidentally crashed into a car when the driver was unable to stop due to a patch of ice. *See Stanfield v. Peregoy*, 245 Va. 339, 341 (1993). The Court stated that:

In performing their emergency duties, the selected employees initially had to determine whether a particular street needed to be salted, plowed, or a combination of both. Based on the employee’s assessment of the street conditions, the employee

had to decide whether to spread salt on the entire street, or only a section, and had to ascertain the amount of salt to be spread.

Id. at 342. The Court held that the driver was exercising discretion and that “[a]t the time of the accident, this defendant was not involved in ‘the simple operation’ of the vehicle, *Heider*, 241 Va. at 145, 400 S.E.2d at 191, nor was he driving ‘in routine traffic.’ *Colby*, 241 Va. at 129, 400 S.E.2d at 187.” *Id.* at 343-44.

d. *Burns v. Gagnon*

The Court has also applied sovereign immunity in some cases involving school teachers and principals. In *Burns v. Gagnon*, 283 Va. 657 (2012), a principal, Burns, was deemed to have sovereign immunity when he had received a tip from one student that two other students were going to get into a fight later in the day, but Burns did not act on the tip. See *Burns v. Gagnon*, 283 Va. 657, 677 (2012). The Court held that “[u]pon receiving [the student’s] report, Burns had to make several decisions. To start, Burns had to decide whether to respond at all Next, Burns had to decide when to respond And finally, Burns had to decide how to respond.” *Id.*

e. *Lentz v. Morris*

In *Lentz v. Morris*, 236 Va. 78 (1988), a physical education teacher was found to have sovereign immunity as “a teacher's supervision and control of a physical education class, including the decision of what equipment and attire is to be worn by the student participants, clearly involves, at least in part, the exercise of judgment and discretion by the teacher.” *Lentz v. Morris*, 236 Va. 78, 83 (1988). The Court highlighted the importance of granting teachers sovereign immunity under certain circumstances as:

If school teachers performing functions equivalent to this defendant are to be haled [sic] into court for the conduct set forth by these facts, fewer individuals will aspire to be teachers, those who have embarked on a teaching career will be reluctant to act, and the orderly administration of the school systems will suffer, all to the detriment of our youth and the public at large.

Id.

3. Discussion regarding Special Risks and the Exercise of Discretion

The Court finds that Officer Lawson’s driving in the early morning hours of June 22, 2016 involved “special risks” and the exercise of substantial discretion. This is for the following reasons:

- Officer Lawson was faced with an urgent situation requiring immediate action to protect the safety of students, to back up Mr. Mahan, and to protect the community. Students

“fleeing” from the school could indicate the presence of grave danger (such as a school shooter). The fact that the students were “fleeing” into a dark area, in the middle of the night, adjoining a dark and curving street, and near a retention pond, posed additional danger to students. Immediate action was required.

- Officer Lawson had to make a series of split-second decisions. He had to decide how best to pursue the students, how best to investigate why the students were fleeing, and how best to provide backup to Mr. Mahan. Should he proceed by foot or by cruiser?⁷ Should he activate the Computer Assisted Dispatch (“CAD”) system before he drove off?⁸ Should he use lights and/or sirens?⁹ Should he request Officer Tilden to provide backup or have him remain on school grounds?¹⁰
- As Officer Lawson was driving, he was continuing to make split-second decisions. He was continuing to “reevaluate” the decision not to use lights and sirens (Hr.’g Tr. 138:8-11.); he was scanning the roadway for the presence of children (“I knew kids could be running across the street” if this was a situation where students had parked vehicles on Old Lee Road) (*Id.* 145:1-9.); he was searching for Mr. Mahan (*Id.* at 145:1-16.); and he was actively monitoring his radio “listening for any updates.” (*Id.* at 145:17-20.)
- Officer Lawson drove into the left turn lane of Stonecroft, stopped his vehicle and then moved up the lane, searching for Mr. Mahan and looking for the students. (*See* Hr.’g Tr.

⁷ He chose to proceed by vehicle because “it would be much easier to corral students in my vehicle than on foot. And the equipment that is on the cruiser may or not be needed based on, you know, what I run into, but it is better to have it.” (Hr.’g Tr. 135:13-17.)

⁸ He chose not to activate the CAD because of the amount of time it would take for the CAD to activate. (Hr.’g Tr. 136:7-21.)

⁹ He decided not to activate the cruiser’s lights and sirens. “[M]any times the reason you use your lights and sirens is to move traffic out of your way as you are responding to something. And there was no traffic that I observed as I was coming out. And other than seeing Officer Mahan in the Gator, there wasn’t any other traffic I saw on the road. So, there wasn’t any need to initially turn them on to move anybody out of my way. In addition, you don’t - - I did not want the students that were fleeing - - if you turn on lights and sirens, many times that just disbursts the crowd in a more chaotic and crazy way that I wanted less of that.” (Hr.’g Tr. 138:19—139:7.)

¹⁰ Officer Lawson requested that Officer Tilden also proceed immediately to investigate the “fleeing” students. “I decided - - as soon as I heard that there were kids fleeing from that area, I let Officer Tilden know. I know he wasn’t that far from me. Because again, being familiar with it, knowing it was dark, it was like we need to go to this. And the more lights, the more spotlights, the more people we had, not knowing what they are going into, the better. So, I basically let Officer Tilden know we needed to go.” (Hearing Tr. 133:8-15.)

148:6-10.) He then moved his vehicle into the middle of the intersection of Stonecroft and Old Lee Road in order to be able to “see left and right.” (*Id.* at 151:3-22.) He spotted Mr. Mahan’s Gator to the right and turned right to head in Mr. Mahan’s direction, at which point the collision occurred. (*See id.* at 152:16-18.)

Officer Lawson was not driving to work or driving home from work. He was not on routine patrol. This was not a public service call. Rather, he was providing armed backup to the school’s safety and security specialist and he was searching for students “fleeing” from the school. The fact that he “didn’t have any idea what was going on” (Hr.’g Tr. 145:4), added additional urgency to the situation. Even if the “worst situation” (*id.* at 133:4) – a school shooter – was not the reason for the students fleeing, Officer Lawson knew that the environment posed its own dangers, given the hour, given the darkness, given the curving road, and given the retention pond. Nor was Officer Lawson simply driving from Point A to Point B. Rather, he was looking for Mr. Mahon, watching out for the “fleeing” students, monitoring his radio for updates, and trying to determine what was going on.

In short, Officer Lawson’s driving in the early morning hours of June 22, 2016 involved special risks. Moreover, every action Officer Lawson took—from the moment he learned of “fleeing” students to the moment of collision—involved the exercise of discretion.

As the case law makes clear, the “proper application of sovereign immunity requires a court to make an objective determination as to whether the decision made and the actions taken pursuant thereto were necessary to the performance of a governmental function and embraced special risks The driver’s evaluation of the situation must be objectively reasonable to permit the application of sovereign immunity.” *McBride* at 456. In the instance case, Officer Lawson’s evaluation of the situation – that he was dealing with an urgent situation that posed an immediate danger to students and the public – was objectively reasonable, as was his decision to employ his vehicle, and undertake special risks, in an effort to address the danger.

CONCLUSION

Each of the four James factors weighs in favor of a finding of sovereign immunity. Therefore, the Court sustains the Plea in Bar and dismisses Count 1 (Negligence) with prejudice.

Defendant’s counsel shall prepare an order in accordance with this opinion, provide it to Plaintiff’s counsel for review and to note objections, and to submit it to the Court for entry within fourteen (14) calendar days.

Sincerely,



Randy I. Bellows
Circuit Court Judge

OPINION LETTER