

VIRGINIA:

*In the Supreme Court of Virginia held at the Supreme Court Building in the
City of Richmond on* Friday *the* 31st *day of* October, 2014.

Janet Dudley Anders, Executrix of the
Estate of Dean Corbin Anders, Deceased, Appellant,

against Record No. 131891
Circuit Court No. CL12-523

Justin Matthew Kidd, Appellee.

Upon an appeal from a
judgment rendered by the Circuit
Court of Campbell County.

Upon consideration of the record, briefs, and argument of counsel, the Court is of the opinion that there is no error in the judgment of the circuit court.

In this wrongful death action, Janet Dudley Anders, Executrix of the Estate of Dean Corbin Anders, appeals from the circuit court's judgment sustaining the plea of sovereign immunity filed by Justin Matthew Kidd. Mr. Anders suffered injuries resulting in his death when the pick-up truck he was operating collided with an ambulance that was being operated by Kidd, who was transporting a patient to the hospital.¹ Mrs. Anders contends on appeal that the circuit court erred in granting Kidd's plea of sovereign immunity because Kidd "was not engaged in activity that involved special

¹ The complaint filed by Mrs. Anders alleges that Kidd was negligent in failing to keep a proper lookout, exceeding a reasonable speed, failing to apply his brakes in time to avoid the collision, failing to give full time and attention to the operation of the ambulance, operating his vehicle in a reckless manner, and failing to stop for the traffic signal that was red when Kidd entered the intersection where the accident occurred.

risks or the exercise of judgment or discretion beyond that required by ordinary driving in routine traffic about the proper means of effectuating the governmental purpose."

The issue of whether a governmental employee is entitled to sovereign immunity is a question of law that we review de novo. City of Chesapeake v. Cunningham, 268 Va. 624, 633, 604 S.E.2d 420, 426 (2004). However, when evidence is presented "on [a] 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." Hawthorne v. VanMarter, 279 Va. 566, 577, 692 S.E.2d 226, 233 (2010). See also McBride v. Bennett, ___ Va. ___, ___, ___ S.E.2d ___, ___ (this day decided).

When analyzing whether the driver of a vehicle is entitled to sovereign immunity, the court must determine whether the operation of the vehicle involved the exercise of judgment and discretion about the proper means of effectuating the governmental purpose as opposed to the simple operation of a vehicle in routine traffic. Id. at ___, ___ S.E.2d at ___.² Thus, we have held that sovereign immunity is applicable under circumstances where the operation of an

² See also Friday-Spivey v. Collier, 268 Va. 384, 388-91, 601 S.E.2d 591, 593-95 (2004); Linhart v. Lawson, 261 Va. 30, 36, 540 S.E.2d 875, 878 (2001); Nationwide Mut. Ins. Co. v. Hylton, 260 Va. 56, 64-65, 530 S.E.2d 421, 424-25 (2000); Smith v. Settle, 254 Va. 348, 353 n.7, 492 S.E.2d 427, 430 n.7 (1997); Stanfield v. Peregoy, 245 Va. 339, 343-45, 429 S.E.2d 11, 13-14 (1993); National R.R. Passenger Corp. v. Catlett Volunteer Fire Co., 241 Va. 402, 413, 404 S.E.2d 216, 222 (1991); Heider v. Clemons, 241 Va. 143, 145, 400 S.E.2d 190, 191 (1991); Colby v. Boyden, 241 Va. 125, 129-30, 400 S.E.2d 184, 187 (1991).

automobile "involve[d] 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 v. Clemons, 241 Va. 143, 145, 400 S.E.2d 190, 191 (1991).

At the hearing on the plea, the evidence established that Justin Kidd and Scott Campbell, employees of the Campbell County Department of Public Safety, were dispatched to the home of Jessica Lovejoy who needed transportation to a hospital.³ While in route, Kidd and Campbell were notified that Lovejoy was complaining of chest pain and shortness of breath. Upon arrival, Kidd and Campbell performed an initial assessment of Lovejoy, who reported a history of psychiatric problems and complained of anxiety, severe headache, chest pains, and shortness of breath. Kidd and Campbell checked her vital signs, initiated a twelve-lead EKG, and placed her onto a stretcher for transport. Kidd drove the ambulance to the hospital while Campbell, the attendant in charge of Lovejoy's care, remained in the back of the ambulance. Because Lovejoy's condition was stable, Kidd operated the ambulance in a non-emergency manner, without the activation of lights or siren.

In reaching its conclusion that Kidd was entitled to sovereign immunity, the circuit court found as follows:

³ Prior to the dispatch to Kidd and Campbell, Sergeant Green of the Campbell County Sheriff's Office responded to Lovejoy's home for a "welfare check" based on a complaint that Lovejoy threatened a neighbor. After discussing the incident with Lovejoy, who explained that her doctors had recently changed her psychiatric medications, Green and Lovejoy determined she should go to a hospital to have her medications checked. Because Lovejoy had no other transportation, Green requested the ambulance.

The operation of the ambulance by Kidd involved judgment and discretion. The patient had chest pain that was described as a classic sign of a heart attack. She was continually being monitored with a 10 lead EKG on the transport to the hospital. Kidd, as the driver of the ambulance had to continue to monitor the patient and use his judgment and discretion in transporting her to the hospital. The judgment included the route to take, the choice of hospital and the manner of driving which depended on the condition of the patient. The patient was strapped in a stretcher that was locked into the ambulance.

Specifically distinguishing our holding in Friday-Spivey v. Collier, 268 Va. 384, 601 S.E.2d 591 (2004), the circuit court found that "[t]he transport of Ms. Lovejoy was more than a public service call. There were special risks in transferring Ms. Lovejoy due to the complaints, suspicious of a cardiac issue." (Internal quotation marks omitted). The circuit court's findings of fact are supported by the evidence and entitled to deference. Hawthorne, 279 Va. at 577, 692 S.E.2d at 233.

We agree with the circuit court's conclusion that Kidd was entitled to sovereign immunity under these facts. As Kidd testified, this was an advanced life support transport, which is the highest level of transport, since Lovejoy's medical condition could have deteriorated prior to arrival at the hospital. The purpose of this transport was to obtain a higher level of care for Lovejoy. Throughout the transport, Kidd monitored the condition of Lovejoy and the actions of Campbell, who was attempting to keep Lovejoy calm by talking to her. Kidd was the senior member on the transport, designated as the Senior Public Safety Technician. He was required

to stay alert for any deterioration in Lovejoy's physical condition in the event he needed to accelerate the transport, activate lights and siren, or stop and assist Campbell.⁴ In addition, Kidd was

⁴ Pursuant to 12 VAC 5-31-1150(2), EMS personnel are authorized to operate an ambulance under emergency conditions, as allowed by Code § 46.2-920, "when the attendant-in-charge has determined that the patient's condition is unstable or life threatening." The County of Campbell Department of Public Safety has adopted standard operating guidelines with respect to "EMS Vehicle Operations" providing that "[t]he decision on whether or not to respond in an emergency mode is left to the discretion of the [S]enior Public Safety Technician assigned to the apparatus with consultation of the driver when applicable." In this case, Kidd was both the Senior Public Safety Technician and driver. However, Campbell was the attendant-in-charge. We need not decide whether the operating guidelines adopted by Campbell County are inconsistent with 12 VAC 5-31-1150(2) or whether the determination to operate the ambulance under emergency conditions was within Kidd's authority. This regulation affects the application of Code § 46.2-920, which may be dispositive of a traffic offense but is not dispositive of the application of sovereign immunity in a civil liability context.

Furthermore, regardless of whether it was Kidd or Campbell who was charged with determining if Lovejoy's condition justified operation of the ambulance under emergency conditions, 12 VAC 5-31-1150(2) certainly does not stand for the proposition that the driver of the ambulance is without authority to monitor the patient's condition and stay alert for deterioration in the patient's condition. In other words, it makes no difference whether the determination that operation of the ambulance under emergency conditions should be undertaken was to be made by Kidd or made by Campbell because, in either case, Kidd would have been monitoring the situation with Lovejoy either to make the decision himself or to become aware of any such determination made by Campbell.

Moreover, as we have held, policies and law governing the conduct of government employees do not eliminate the need for such employees to exercise judgment and discretion when faced with "difficult judgments about the best means of effectuating the

concerned about a change in Lovejoy's mental status given that she had threatened her neighbor with harm. Thus, Kidd not only listened to what was being said but frequently checked his rear view mirror to observe what was occurring in the back of the ambulance.

In sum, the evidence established that Kidd's operation of the ambulance involved special risks arising from the transportation of Lovejoy and the exercise of judgment and discretion about the proper means of effectuating the governmental purpose of transporting Lovejoy to the hospital as distinguished from the simple operation of a vehicle in routine traffic.⁵ Therefore, the circuit court did not err in ruling that Kidd was entitled to sovereign immunity.

For these reasons, we affirm the judgment of the circuit court. Appellant shall pay to the appellee two hundred and fifty dollars damages.

governmental purpose." Colby, 241 Va. at 129-30, 400 S.E.2d at 187; see also National R.R. Passenger Corp., 241 Va. at 413, 404 S.E.2d at 222.

⁵ The existence of an emergency or circumstances requiring emergency operation of a vehicle is not required under our precedent. In the context of the operation of vehicles, many of the cases in which we have found that government employees exercised judgment and discretion about the manner of effectuating the governmental purpose involved neither exigent circumstances nor an emergency response. See, e.g., Linhart, 261 Va. at 36, 540 S.E.2d at 878 (act of transporting children on a school bus involved judgment and discretion); Hylton, 260 Va. at 64-65, 530 S.E.2d at 425 (state trooper in process of determining manner in which he would proceed to apprehend a driver who committed a traffic violation was exercising judgment and discretion); Stanfield, 245 Va. at 344, 429 S.E.2d at 13-14 (acts of operating truck in snow and ice and spreading salt involved exercise of judgment and discretion).

This order shall be certified to the said circuit court.

JUSTICE MIMS, with whom JUSTICE GOODWYN AND JUSTICE POWELL join, dissenting.

I dissent from the conclusion that sovereign immunity attached to Kidd's transportation of a stable patient on a nonemergency basis.

Friday-Spivey v. Collier, 268 Va. 384, 390, 601 S.E.2d 591, 594 (2004) should dictate the outcome of this case. In Friday-Spivey, the defendant argued that the "special characteristics of the fire truck" warranted application of sovereign immunity. 268 Va. at 391, 400 S.E.2d at 595. In addition, the defendant indicated that he "just [did not] know what to expect" and cited his "determination of the route" as examples of his discretion and judgment. Id. at 387, 388, 400 S.E.2d at 593. The Court rejected these arguments, finding no "nexus" between the special characteristics of the truck and the accident. The Fairfax County Fire and Rescue Department Standard Operating Procedures provided an objective means for evaluating the defendant's decision and actions taken pursuant thereto. Thus, the Court held that: "[The defendant] was in routine traffic under a mandate 'to respond in a nonemergency manner and conform to all the traffic regulations.'" Id. at 391, 400 S.E.2d at 595. Under the circumstances, the defendant's driving was "a ministerial act requiring no significant judgment and discretion." Id.

Similarly, in this case there is no nexus between Kidd's purported special circumstances and the accident. The majority

points to the fact that Kidd continued to monitor Lovejoy's condition and Campbell's actions. However, as explained further below, Kidd decided to transport the patient under nonemergency procedures. Nothing changed en route to the hospital that suddenly required Kidd to switch to emergency transport. There were no changes in the patient's condition, no calls or transmissions, and no distractions. Nothing occurred en route that required "prompt, original, and crucial decisions in a highly stressful situation." Colby v. Boyden, 241 Va. 125, 129, 400 S.E.2d 184, 187 (1991). Indeed, when asked what discretion he exercised, Kidd responded: "The fact that it was the most direct route and there - there were no delays or detours on that route." Yet every person on the road has the discretion to choose their route. This is not the type of discretion that permits an official to raise the shield of immunity.

As in Friday-Spivey, Kidd's employer had issued directives exercising "control and direction" over his actions, which he failed to comply with while transporting Lovejoy to the hospital. The County of Campbell Department of Public Safety Standard Operating Guidelines require "a priority emergency response" to all advanced life support calls. In turn, a priority emergency response mandates the use of "lights and sirens to display a visual and audible warning." Kidd acknowledged that the County guidelines restricted his discretion when it came to implementing a response: "[D]ue to our protocol for priority one, priority two responses, we're supposed to respond in an emergent [sic] manner." Accordingly, Kidd did activate his lights and siren while responding to the call.

However, on the return transport, the County guidelines permitted either Kidd or his partner to decide whether to activate lights and sirens. Kidd testified that other drivers respond erratically to lights and sirens, and so, he often transported patients to hospitals without lights on a nonemergency basis because most "patients are stable enough." But while transporting patients on a nonemergency basis, drivers must "obey all traffic laws," including all "speed limits and stop signs [and] stoplights."

Once Kidd decided to initiate a nonemergency transport, the act of driving did not require Kidd to exercise any judgment or discretion. He was required to follow traffic signals, abide by the speed limit, and otherwise obey the Commonwealth's traffic regulations. In other words, the guidelines authorized Kidd to make a specific decision, and then once he made that specific decision, the guidelines dictated "routine" driving. Friday-Spivey v. Collier, 268 Va. 384, 390, 601 S.E.2d 591, 594 (2004); see Colby v. Boyden, 241 Va. 125, 129, 400 S.E.2d 184, 187 (1991).

Quite clearly, by choosing to transport Lovejoy under nonemergency procedures, Kidd chose to undertake "routine driving" according to the laws of the road and the direction of his employer. He violated his ministerial duty when he ran a red light, striking a truck driven by Dean Anders, and killing Anders.

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Teste:

Pat L. Hamington

Clerk