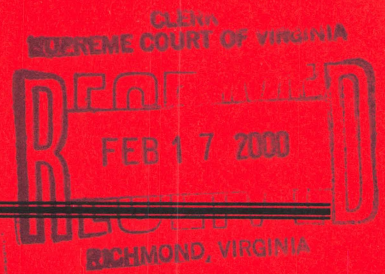


260 Va 66



IN THE

Supreme Court of Virginia

RECORD NO. 992098

GLADYS JANET DECKER,

Appellant,

v.

**THOMAS D. HARLAN, II, Individually and as an
employee of the City of Hampton; and
CITY OF HAMPTON,**

Appellees.

APPENDIX

**Douglas L. Hornsby
SHUTTLEWORTH, RULOFF
& GIORDANO, P.C.
10234 Warwick Boulevard
Newport News, Virginia 23601
(757) 671-6040**

Counsel for Appellant

**Alan Rashkind
FURNISS, DAVIS, RASHKIND
AND SAUNDERS
Post Office Box 12525
Norfolk, Virginia 23541
(757) 461-7100**

Counsel for Appellees

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VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON

Part 4

GLADYS JANET DECKER,
PLAINTIFF,

V.

AT LAW NO. CL98-671
PART:

THOMAS D. HARLAND, II
Individually, and as an
employee of the City of Hampton

Serve at: 309 Cockletown Road
Yorktown, VA 23692

CITY OF HAMPTON
DEFENDANT.

SERVE on: A. Paul Burton, Esq.
Office of City Attorney
22 Lincoln Street
Hampton, Va.. 23669

MOTION FOR JUDGMENT

NOW COMES the Plaintiff, GLADYS JANET DECKER individually and by counsel, and moves for judgment and award of execution against the defendant City of Hampton, on the grounds and in the amount hereinafter set forth:

1. On or about October 29, 1996, Plaintiff GLADYS JANET DECKER was driving a motor vehicle in a lawful and proper manner, on Magruder Boulevard near the intersection with Semple Farm Road in the City of Hampton.
2. At said time and place, while the Plaintiff's car was stopped at a traffic light, a garbage truck operated by Defendant Thomas Don Harland, II, an employee of the Defendant City of Hampton, acting within the scope of his employment, collided with the Plaintiff's vehicle with great force and violence, pushing it forward into the automobile stopped at the light in front of the Plaintiff.

3. At said time and place, it was the duty of the Defendant Thomas Don Harlan to see that his vehicle was operated with reasonable care and with due regard for others.
4. Notwithstanding said duty, the Defendant Harlan, among other things:
 - a. Operated his vehicle in a careless, reckless, and negligent manner without keeping a proper lookout; and
 - b. Failed to keep his vehicle under proper control; and
 - c. Failed to stop for traffic stopped in front of him; and
 - d. Failed to stop at a red light;
 - e. Followed the Plaintiff too close a distance for the conditions.
5. As a direct and proximate result of the above actions, the Plaintiff was caused to sustain serious and permanent injuries to her body, has been prevented from carrying out her daily affairs, has suffered and will, in the future, suffer loss of earning capacity, has suffered and will continue to suffer a loss in wages, has suffered and will continue to suffer great pain and mental anguish, and has incurred and will incur future hospital, doctor and related bills in an effort to be cured of said injuries.
6. Plaintiff, of counsel, has previously notified the Defendant City of Hampton by letter in compliance with Virginia Code §8.01-222 of the substance of this claim.

WHEREFORE, Plaintiff, GLADYS JANET DECKER demands judgment and award and execution against the Defendant for compensatory damages in the sum of THREE HUNDRED FIFTY THOUSAND DOLLARS (\$350,000.00), together with interest on any award from the date of the accident; and her costs in this behalf expended.

PLAINTIFF DEMANDS A TRIAL BY JURY.

GLADYS JANET DECKER.

By

Of Counsel

Douglas L. Hornsby, Esquire
Shuttleworth, Ruloff & Giordano, P.C.
10234 Warwick Blvd.
Newport News, Virginia 23601
(757) 671-6040
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LAW

Filed in the Clerks Office this 29th day of July 1998

049	Writ Tax \$	<u>25.00</u>
304	Fee	<u>150.00</u>
219	Library	<u>2.00</u>
229	CHMF	<u>2.00</u>
123	Leg. Aid	<u>2.00</u>
206	Sheriff	
509	Others	<u>3.00</u>

James P. Bohnaker, Clerk

Total 184.00 Elizabeth C. Cline, DC.

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON; PART IV

GLADYS JANET DECKER,

Plaintiff,

v.

LAW NO. 98-671

THOMAS D. HARLAND, II

and

CITY OF HAMPTON,

Defendants,

PLEA OF GOVERNMENTAL AND STATUTORY IMMUNITY

MEMORANDUM IN SUPPORT OF PLEA

Motion

Now come the defendants, by counsel, and move the Court to dismiss this case on the grounds of both governmental and statutory immunity.

Facts

The plaintiff has alleged that she was injured in an automobile accident. The accident involved a garbage truck which was owned by the City of Hampton and operated by a City employee. The garbage truck had been loaded by employees of the Hampton Coliseum and was filled with waste generated by events held at that facility. The truck

was being driven to a waste disposal site as a normal part of the operation and maintenance of the Hampton Coliseum. Thomas D. Harlan, II, was the employee who was driving the truck when the accident occurred. Mr. Harlan was at that time, and is now, an employee of the Hampton Coliseum. The Hampton Coliseum is operated by the City of Hampton as an entertainment and recreational facility.

Argument

It has long been held that municipal corporations such as the City of Hampton are immune from claims of simple negligence while in the performance of governmental functions. If the operation of a garbage truck in this case constituted a governmental function then the plaintiff has no claim against these defendants for simple negligence.

The Supreme Court of Virginia has on several occasions considered the issue of whether the collection of garbage by a municipality is an activity amounting to a governmental function. In *Ashbury v. Norfolk*, 152 Va. 278 (1929), the Court considered a case in which a plaintiff was injured by a garbage "truck" being pulled by horses. The Court held that the removal of garbage by a municipality is governmental function and sustained a plea of immunity. In *Taylor v. City of Newport News*, 214 Va. 9 (1973), the Court revisited this issue and again held that garbage collection is a governmental function. The plaintiff's claim for simple negligence against the City of Newport News was dismissed.

The defendants in this matter occupy the same positions as the cities of Norfolk and Newport News in the cited cases. Thus, this claim is barred by governmental immunity.

This claim is also barred as the result of statutory immunity. Cities are immune from claims of simple negligence while in the operation or maintenance of recreational facilities, Section 15.2-1809 of the Code of Virginia of 1950, as amended. Facilities such as the Hampton Coliseum have been held by the Virginia Supreme Court to be recreational facilities within the meaning of the statute; see *Frazier v. City of Norfolk*, 234 Va. 388 (1987) (City of Norfolk immune while in the operation of Chrysler Hall).

The disposal of garbage by the operators of the Hampton Coliseum is a necessary part of doing business. This activity is well within the statutory language granting immunity ("in the maintenance or operation of any such park, recreational facility or playground"). Thus, the defendants are immune as a result of the protection afforded by the involved statute.

Conclusion

The defendants, by counsel, respectfully request that the Court sustain their pleas of governmental and statutory immunity and dismiss this case with prejudice to the rights of the plaintiff.

THOMAS D. HARLAN, II and CITY OF HAMPTON

By

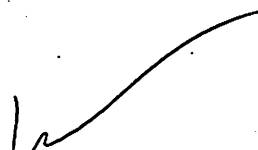


Counsel

CERTIFICATE

I certify that I mailed a copy of the foregoing pleading to the following person on September 14, 1998;

Douglas L. Hornsby, Esq.
10234 Warwick Blvd.
Newport News, Va. 23601



Robert A. Boester, Esq.

ROBERT A. BOESTER, Esq.
Hawkins, Burcher & Boester, P.C.
One East Queen's Way - Second Floor
P. O. Drawer A
Hampton, VA 23669

JAMES P. BOHNAKER
CLERK OF THE CIRCUIT COURT
98 SEP 14 PM 4:16
BK# PG#
CITY OF HAMPTON, VA.

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON

**GLADYS JANET DECKER,
PLAINTIFF,**

V.

**AT LAW NO. 98-671
PART: IV**

**THOMAS D. HARLAN, II
Individually, and as an
employee of the City of Hampton**

and,

**CITY OF HAMPTON
DEFENDANTS.**

JAMES P. BOURNAKER
CLERK OF THE CIRCUIT COURT
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BY PGG
CITY OF HAMPTON, VA.

**Brief in Support of Plaintiffs Motion to Deny
Defendant's Pleas of Sovereign Immunity**

Now comes the Plaintiff in the above styled suit, of counsel, and for its brief in Brief in support of Plaintiffs Motion to Deny Defendant's Pleas of Sovereign Immunity, and says as follows:

I. Facts of the Case

Now comes the Plaintiff in the above styled suit, of counsel, and for its brief in Brief in support of Plaintiffs Motion to Deny Defendant's Pleas of Sovereign Immunity, and says as follows:

I. Facts of the Case

At the time of the accident which forms the basis for this suit, the Plaintiff, Gladys Decker, and her son, Jered Decker, were in their vehicle stopped at the red light at the intersection of Magruder Blvd. and Semple Farm road. The Defendant, Thomas Harlan, a

building mechanic, employed by Hampton Coliseum, was driving a refuse truck, which had been loaded earlier in the day, by other employees, to the steam to plant to dump the refuse in the truck for burning. Although Defendant Harlan had driven the truck occasionally before, Defendant Harlan was not the normal driver for the refuse truck, nor had he been instructed by his supervisor to transport the trash. (See excerpts of deposition attached as Exhibit A. pgs 11-12 lns. 25-6, pg 9, lns 17-22, pg 10, lns 10-22, pg 14-15, lns 12-9) Defendant Harlan noted that traffic on Magruder Blvd. was light, (See Exhibit A pg. 17, ln 11-15). While driving on Magruder Blvd., Defendant Harlan lost control of the truck and plowed into the back of Ms. Decker's vehicle, pushing it into a vehicle stopped in front of the Decker vehicle operated by Anthony Jones. The defendant did not apply his brakes prior to impact, (See accident report attached as Exhibit B, the statements of Thomas Harlan and witnesses), he did not blow his horn, (see Exhibit B), nor did he steer his truck into either the median or on the shoulder of the road to avoid the accident. (See Exhibit A pgs.19-20, ln. 15-17) Both the Decker vehicle and the vehicle driven by Anthony Jones were pushed through the intersection of Magruder and Semple Farm. The police officer who investigated the accident noted that Gladys Decker, Jered Decker, and Anthony Jones were injured in the accident. (See Exhibit B.) There was substantial property damage to all the vehicles involved in the accident. (See pictures attached as Exhibit C and Exhibit B).

II. Sovereign Immunity

A. Governmental v. Proprietary Functions

The defendants in this case have filed a special plea alleging they are protected from liability in this suit because of the doctrine of sovereign immunity. In Virginia, the government may be immune from liability when engaged in actions which are considered "governmental functions" as opposed to "proprietary functions". Governmental immunity is not absolute,

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, (1980). To determine if an employee is entitled to immunity the Court has developed a four factor test:

The factors to be considered include: (1) the nature of the function the employee performs; (2) the extent of the governmental entity's interest and involvement in the function; (3) the degree of control and direction exercised by the governmental entity over the employee; and (4) whether the alleged wrongful act involved the exercise of judgment and discretion.

Ronald Stanfield, v. Tracy Delmar Peregoy, 245 Va. 339, 429 S.E. 2d 11, (1993).

In the instant case, Defendant Harlan was a building maintenance employee who elected to drive the refuse truck from the Hampton Coliseum to the steam plant for burning, even though he was not the normal employee who operated the refuse vehicle. Although garbage collection has been found to be a governmental function, at the time of the accident, the Defendant was not engaged in the act of the collection of garbage. He was merely driving the truck on the highway, not at a place where garbage is collected. In fact, he was not even present when this truck was loaded with refuse. When the accident occurred, Defendant Harlan was merely driving, which is not a governmental function.

Mere driving of a vehicle has been determined by the Court to be a "ministerial" act and is not protected by sovereign immunity. In Heider v. Clemons, 241 Va. 143, 400 S.E. 2d 190, (1990), a police officer doing his official duty and serving court papers on individuals when he caused an accident. The Supreme Court held that the officer was driving his vehicle "in routine traffic" while serving process and driving was "the simple

operation” of the vehicle, not an immune function, merely ministerial. Similarly, in Wynn v. Grady, 170 Va. 590, S.E. 527 (1938), (where a school bus driver was found not entitled to immunity from damages to a student while driving his school bus), the Court found, “ the defense does not apply to the performance of duties which do not involve judgment or discretion in their performance, but which are purely ministerial.” Heider, at 145.

The court stated,

“While 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. In some instances, the operation of an automobile may fall into this category, such as the discretionary judgment involved in vehicular pursuit by a law enforcement officer. (Citations omitted.) However, 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. Thus on the showing here, the trial court properly held that Heider was not entitled to the defense of sovereign immunity.

Heider, at 145. What could be more clear? The wall of sovereign immunity is not erected around mere driving, ministerial acts of the simple operation of a vehicle in routine traffic. Instead, immunity is reserved for those special functions which only the government performs. Mere driving is not one of those protected special governmental functions.

Similarly, the Court made a distinction in Stanfield v. Perego, 245 Va. 339, 429 S.E. 2d 11 (1993), when it determined the driver of a snowplow was entitled to immunity because the driver had special risks in plowing roads covered with dangerous snow and ice. That employee exercised judgement and discretion in carrying out the governments function. While every act of a person involves the exercise of some discretion, there is but

scant discretion involved in this case in driving the shortest route to dump the truck. In commenting that an employee who did indeed exercise discretion in some aspects of his job was not always seen to be exercising discretion when operating that same vehicle at a different time, the Court stated in Stanfield, the snow plow case that,

Perhaps if this accident had happened as defendant was driving his truck en route to the area he was assigned to plow and salt, or if it occurred when he was returning to his Department's headquarters after completing his function of plowing and salting, he would have been engaged in "the simple operation" of the truck "in routine traffic," a ministerial act.

Thus, since there is no immunity from damages for injury caused by a school bus driver, while driving a school bus, nor a police officer while he was on duty serving process to an individual, then logically Defendant Harlan, who is a building mechanic driving a truck on the highway, cannot be immune when he is merely driving in light traffic to the steam plant where someone else will dump the truck.

B. Statutory Immunity

The defendant argues that he is entitled to statutory immunity under § 15.2-1809 of the Code of Virginia of 1950, which provides in part,

No city or town which operates any park, *recreational facility* or playground shall be liable in any civil action or proceeding for damages resulting from any injury to the person or from a loss of or damage to the property of any person caused by any act or omission constituting ordinary negligence on the part of any *officer or agent* of such city or town in the maintenance or operation of any such park, recreational facility or playground. (Italics added)

§15.2-1809 is substantially the same as §15.1-291 which it replaced. Defendant maintains that the Coliseum is a recreational facility. Even if Plaintiff concedes, for purposes of this argument, that the Coliseum is a recreational facility, as defined in Frazier v. City of Norfolk, 234 Va. 388 (1987) immunity from liability has never been extended by the courts

beyond the confines of the facility itself. It is the facility that is protected by the statute, not the activity. The statute does not extend to protect anything other than operation and maintenance of the facility. Mere driving on distant highways must not be fallaciously reasoned as equivalent to activities on the premises of a recreational facility which are for the maintenance or operation of the facility.

In DePriest v. Pearson, 239 Va. 134, 387 S.E.2d 480 (1990), the Court refused to extend statutory immunity to a county bus driver, operating a Department of Recreation bus, county owned, filled with senior citizens on a recreational outing when the driver lost control of the bus and the passengers were injured. The Court reasoned that, “the bus, and Pearson’s use of it simply served as a means of transportation.” DePriest at 137. The bus was not a “recreational facility” within the meaning of the act. We trust likewise that a garbage truck is not a “recreational facility” for the city of Hampton. We doubt a garbage truck on a highway several miles distant from the Coliseum is there intended for the amusement or diversion of the citizens, or their entertainment. A garbage truck is not a recreational facility.

Even if, by any stretch of the imagination, a garbage truck is deemed a recreational facility, or even though it is miles distant from the Coliseum, deemed covered by the statute, per the explicit language of the statute, not all persons employed by the city are immune from liability. Our Supreme Court wisely reminds us in 1980 that there is “no justification for treating a present day government employee as absolutely immune from tort liability, just as if he were an employee of an eighteenth century sovereign.” James, at 53. The limits of liability of §15.2-1809 extend to a special class: officers and agents of a city. The terms “officers” and “agents” are chosen with the legal purpose of specifically designating individuals with supervisory and discretionary functions. These words should be read in *pari materia*, the term agent should derive part of its meaning in this statute from

the meaning of the term officer. The terms “officer” and “agent” as birds of a feather should flock together. Officers of the city are relatively few in number, of higher pay status than those whom they supervise and are imbued with budgets, staff and discretion matching their responsibilities. Likewise, agents, similar to officers, are those who can bind their principle. The statute did not say “all employees”; it did not say “any person”, the legislative body chose to limit itself to officers and agents. Surely a garbage truck driver cannot bind the city as could a person of higher employment status, such as an officer of the city or an agent of the city. The interpretation of the statute should be limited as it seeks to restrict liability for negligence. It is a harsh thing to let a party guilty of negligence go free. This statute is not intended to render immune some truck driver lazily driving down the road miles from the city’s multi-million dollar facility absorbing over 100 acres of land as then and there somehow an officer or agent of the city. To stretch the statute thus is nonsense. To provide mere employees who are off sight of recreational facilities performing ministerial functions as immune would be against the long standing public policy of protection of the general public.

C. The City is Collaterally Estopped from Pleading Immunity

One of the long standing justifications for the doctrine of sovereign immunity is the need for order and uniformity in the administration of the affairs of government. Hinchey v. Ogden, 226 Va. 234, (1983). Three individuals were injured in the accident, including the Plaintiff. There was substantial property damage to the vehicles driven by both the Plaintiff, Gladys Decker, and Anthony Jones. The city cannot deny it accepted liability for the property damage and paid for damage to both vehicles. Furthermore, on information and belief, a claim for personal injuries sustained by Anthony Jones in the accident has also been paid by the City, without seeking shelter in sovereign immunity. It would be manifestly unfair, and against public policy, if the City is allowed to discriminate, based

upon the severity of the injuries, among the victims of the same accident and elect which victims to pay. If you're not hurt much, we pay, if you are hurt, we don't pay. The only basis for the different treatment of similarly situated individuals is the severity of their respective injuries. This discriminatory practice not only offends the sense of common decency and fair play, it also denies the citizens the equal protection of the law. This is selective enforcement. This is wrong.

If the city is allowed to discriminate in this manner, there would be no order or uniformity in the administration of the affairs of the government. There would be no predictable result by the application of law. The application of immunity is by fiat and whim, denying equal protection. The City, by its action has assumed the liability for both the property damage and personal injuries caused by the negligence of its employee, Defendant Harlan. Therefore, even assuming for purposes of argument that the city ever had a valid claim for asserting a defense of immunity, which it has obviously waived, the city assumed liability for the accident when it accepted liability for the personal and property damage which resulted from the same accident, and is collaterally estopped from asserting the defense of sovereign immunity against one of its victim, Gladys Decker and not against another victim. The city is collaterally estopped from this governmental policy of selectively asserting immunity, denying the equal protection of its laws to its citizens, discriminating against one and not another, based purely on the level of the perceived injury of the city's victims. It is wrong.

D. Gross Negligence

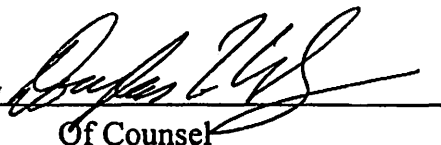
The plaintiff has plead the gross negligence of the defendants. In his deposition, the defendant, Thomas Harlan admitted that he saw the Decker vehicle stopped in the intersection prior to the impact. He indicated that traffic was light, and the light was red. He never applied his brakes prior to impact, he did not blow his horn, nor did he steer his

vehicle into either the median or the shoulder of the road to avoid the vehicles in his path. A jury may well conclude, despite his explanation for his actions that the actions, and inactions of the defendant demonstrate a complete disregard for the safety of other person such as would shock fair minded people.

Conclusion

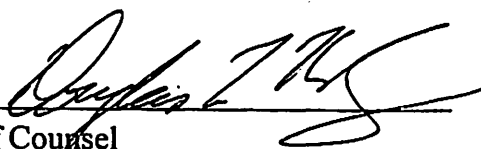
Therefore, for the reasons stated above, the Plaintiff respectfully requests that this Court deny Defendants' Plea of Sovereign Immunity, permit Plaintiff's filing of the Amended Motion for Judgment, and allow Plaintiff's claim to be decided by a jury based upon the merits of the case.

GLADYS JANET DECKER

By 
Of Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Plaintiff's Brief in Support of Plaintiffs Motion to Deny Defendant's Pleas of Sovereign Immunity, has been both faxed and forwarded by mail, postage prepaid, to Robert A. Boester, Esquire, Hawkins, Burcher & Boester, P.C., 29 North King's Way, P.O. Drawer A, Hampton, VA 23669, on October 23, 1998.


Of Counsel

Douglas L. Hornsby, Esquire
Shuttleworth, Ruloff & Giordano, P.C.
10234 Warwick Blvd.
Newport News, Virginia 23601
(757) 671-6040

C:\WP\DOCS\PADECKER\RESPONSE.IMM

1 A I don't have any idea.

2 Q Is it the standard garbage truck we've
3 seen in a residential setting?

4 A I believe so, yes.

5 Q Was it anything smaller with a Dixie
6 Dumpster on the back of it?

7 A No, not at all. A regular compactor.

8 Q This was a unit that you put trash in?
9 It compresses it; is that correct?

10 A Yes, it is.

11 Q And does the trash load from the rear
12 of the vehicle?

13 A Yes, it does.

14 Q On the day in question, did you observe
15 that specific truck you were driving in the accident,
16 did you observe it being loaded?

17 A Yes, I did.

18 Q And what type of materials were put in
19 it?

20 A Papers, residue left over, boxes and
21 what have you from a computer show that had been in
22 the building, and also part of some concert trash from
23 the day before.

24 Q No food?

25 A Not at that time, to my knowledge.

EXHIBIT A

1 There may be some food in it. I'm not really aware.

2 Q Was it a full load?

3 A Yes, it was.

4 Q So just paper and paper products; is
5 that correct?

6 A There's also scraps, I'm sure, from the
7 concession stands and what have you, and alcohol
8 sales, beer sales and what have you.

9 Q All right. And when was the truck
10 loaded? What time of the day?

11 A I'm not really sure. I have no idea.
12 It was loaded when I realized -- when I seen it later
13 on that evening. I didn't start out to look at the
14 truck. It just came to my attention.

15 Q Sure. You came to work that day at
16 3:00?

17 A Yes, I did.

18 Q And that's your typical time for
19 reporting to work?

20 A Yes, it is.

21 Q Does that vary when you have an event
22 coming up? Do you come to work earlier or later if
23 there's an event to clean up an event or to get ready
24 for it?

25 A Not usually. Usually it's from 3:00 to

1 11:00 on a daily basis.

2 Q And how many days a week do you work?

3 A Five.

4 Q The same time -- the same five days
5 then as now?

6 A Yes.

7 Q So you got to work at 3:00?

8 A Yes, I did.

9 Q Do you recall the status of that truck
10 you later drove at the time you came to work at 3:00?

11 A Clarify "status," if you would.

12 Q Do you know where it was?

13 A Yes. It was out behind the Coliseum.

14 Q All right. Around the back where those
15 big doors are?

16 A Yes.

17 Q Was there anything in the truck when
18 you arrived at 3:00? In the trash part, we'll call
19 it.

20 A Yes. It was full of trash.

21 Q It had already been loaded?

22 A Yes.

23 Q How was it you know what was in the
24 truck? Did you look?

25 A Normal trash is -- normal trash. What

1 brought it to my attention was I went to check the
2 back of the building to see that everything was
3 cleared on the outside for the load-in of the show the
4 next day. And when I opened the back door, I got a
5 whiff of alcohol, trash, truck and what have you, and
6 that's how it came to my attention.

7 Q Okay.

8 A And I walked over and looked in it and
9 you could see cups, paper and all.

10 Q Are you the supervisor there or --

11 A No, I'm not.

12 MR. BOESTER: Tom, let Mr. Hornsby
13 finish his question before you answer it.

14 THE WITNESS: I'm sorry.

15 MR. BOESTER: That's all right.

16

17 BY MR. HORNSBY:

18 Q It's easier for her. To whom do you
19 report?

20 A Rick Myers.

21 Q Was he there that day?

22 A I believe he was, yes.

23 Q What did you do between the time you
24 arrived at 3:00 and when you got in the cab of the
25 truck to drive it? Tell me what you did that day, if

1 you recall.

2 A Went through the building, checked the
3 setup, tables, chairs, spaces, electrical
4 requirements, made sure cords were out, hallways were
5 cleared, everything was ready to accept the next day's
6 event.

7 Q And how long did it take to complete
8 those tasks you've just described?

9 A It's a varying amount of time. I
10 suppose it was three or four hours.

11 Q You can't recall specifically? You
12 just -- you're guessing that it was three or four
13 hours on that day?

14 A Yes. Somewhere in that -- as far as I
15 can tell.

16 Q You're guessing is based on the fact
17 that you've done that type of thing before?

18 A Yes.

19 Q How many times have you done it before?

20 A I've been doing it for fourteen years.

21 Q All right. More than ten?

22 A Yes.

23 Q When were you advised or did you come
24 to know that you were supposed to be driving that
25 truck later in the day?

1 A I wasn't advised by anyone. I made the
2 -- the decision was left up to me.

3 Q Was there anyone else that was supposed
4 to drive it?

5 A There is a person on the crew that it's
6 his job to deal with the garbage truck.

7 Q Okay. And why did that person not
8 drive the truck?

9 A That I have no idea.

10 Q All right.

11 A Well, they work in the daytime, but I
12 have no idea why it wasn't emptied.

13 Q Did somebody say "I want you to drive
14 the truck"?

15 A No, they did not.

16 Q When did you get into the truck to
17 drive it?

18 A I can't tell you a specific time.

19 Q Do you have dinner at work there?

20 A Not usually.

21 Q So you work from 3:00 to 11:00 with no
22 break?

23 A Usually I don't.

24 Q Do you catch a hot dog or something
25 like that?

1 A Not usually.

2 Q When did you leave the Coliseum that
3 night driving the truck, if you know?

4 A That I can't recall either.

5 Q When you did leave, was anybody in the
6 truck with you?

7 A No.

8 Q Did you pick up any passengers before
9 or after the accident?

10 A No, I didn't.

11 Q And when you left the Coliseum, where
12 did you go? What route did you take?

13 A I came up Coliseum Drive onto the
14 interstate for a short time, off onto 134, and down
15 134, Magruder Boulevard, towards the steam plant.

16 Q What was your intention in going that
17 route? Where -- you were going to the steam plant,
18 but why were you going to the steam plant?

19 A That's the normal route, the shortest
20 route.

21 Q And what occurs at the steam plant with
22 respect to that truck?

23 A You pull it in, and then back it up and
24 dump it into the pit, and it empties the truck, and
25 then take the truck back.

1 Q Do they burn the trash there?

2 A Yes, they do.

3 Q How long does it take to get -- I mean,
4 you've driven the route many times?

5 A A few, yes.

6 Q Well, how many times have you driven
7 that route?

8 A More than ten.

9 Q How comfortable were you driving that
10 truck at that time? Had you driven that truck many
11 times?

12 A Yes, I had driven it quite a bit.

13 Q All right. How many? Can you
14 quantify? How many is "quite a bit"?

15 A Like I say, more than ten. I don't
16 keep track of each time that I --

17 Q Sure. Fair enough. I mean, whenever
18 the Coliseum is emptied of trash, do you drive the
19 truck?

20 A No.

21 Q And there's another fellow that
22 sometimes drives the truck?

23 A Yes, there is.

24 Q Does he more often drive the truck than
25 you?

1 A Yes, he does.

2 Q And what's that person's name?

3 A Horace Bryant.

4 Q Horace?

5 A Horace Bryant.

6 Q Okay. Is he employed by the City?

7 A Yes, he is.

8 Q Does he work at the Coliseum all the
9 time?

10 A Yes, he does.

11 Q And does he work there still today?

12 A To my knowledge, yes.

13 Q Do you know where he lives?

14 A I have no idea.

15 Q How long does it take to go from the
16 Coliseum to the steam plant traditionally? Typically,
17 rather.

18 A Typically it's a round-trip of right at
19 an hour to an hour-and-ten-minutes.

20 Q So thirty minutes up and thirty minutes
21 back?

22 A Respectfully, yes.

23 MR. BOESTER: Well, that includes
24 dumping; doesn't it?

25 THE WITNESS: Yes, that includes

1 dumping as well.

2

3 BY MR. HORNSBY:

4 Q All right. Let me understand you
5 correctly then. So to drive there, dump the truck and
6 come back is one hour?

7 A Within reason, yes.

8 Q Can you tell us how long it takes to
9 drive from the Coliseum to the steam plant?

10 A I really can't. I've never paid any
11 attention -- I mean, I've never looked at that from a
12 "how long does it take me get there" standpoint.

13 Q Would it take less than 30 minutes?
14 And I don't want you to guess.

15 A I have no idea.

16 Q Tell me specifically the day of this
17 accident -- you left the Coliseum. Do you remember
18 specifically taking the route you've described or do
19 you just suppose that you took that route because you
20 normally --

21 A Oh, I specifically remember taking that
22 route.

23 Q And what were the weather conditions?

24 A Dry, as I recall.

25 Q And about what time of night was this

1 or day?

2 A I'm not aware. I'm sure it was before
3 9:00.

4 Q Would it be accurate to say around 7:00
5 or do you recall?

6 A That's very possible.

7 Q How fast were you driving on Magruder
8 Boulevard?

9 A 40 to 45. Usual speed that trucks
10 drove.

11 Q Any unusual traffic conditions?

12 A Not really.

13 Q How would you describe the traffic?
14 Light? Heavy? Medium?

15 A Fairly light.

16 Q Light. When you first -- where were
17 you when you first noticed Ms. Decker's vehicle, the
18 van in front of you?

19 A It was some distance down the road.

20 Q How far was that, if you recall?

21 A I am not good with distances.

22 Q I don't want to put words in your
23 mouth. I just want to suggest was it more than a
24 football field away?

25 A I couldn't honestly say.

1 Q At the time you first saw her vehicle
2 was it moving or was it stopped?

3 A It was stopped.

4 Q Do you recall any other vehicles in her
5 immediate vicinity which were also stopped or moving?

6 A There were other vehicles, but I was
7 focused on one particular.

8 Q All right. How many other vehicles and
9 in which lanes?

10 A I have no idea.

11 Q Were those other vehicles that you
12 perceived there, were they stopped?

13 A They were stopped as well.

14 Q And when you noticed her vehicle at
15 whatever distance you were, do you recall the color of
16 the traffic lights at that time?

17 A Red, as I recall.

18 Q And how fast were you going at that
19 time?

20 A Between 40 and 45. It was on a
21 deceleration.

22 Q How many gears on that truck?

23 A Oh, I -- it's automatic and I have no
24 idea.

25 Q Automatic, all right. From the time

1 you noticed her to the time of the collision, tell me
2 chronologically what occurred.

3 A I was coming down Magruder Boulevard,
4 134; and just as the road starts to break into a curve
5 to the light at the far end, there's a spot where they
6 fixed the pavement, and that's the bump that evidently
7 was hit, and my foot slipped off the gas pedal; and
8 when it did, I went to swing it back up to go to the
9 brake pedal, and the shoelace went around the brake
10 pedal -- excuse me, the accelerator pedal. And I
11 panicked, and I tried to remove it and I couldn't get
12 it off.

13 Q And you were going how fast at the time
14 you panicked realizing your shoelace was caught?

15 A It was 45 and decelerating.

16 Q You didn't step on your brakes at all
17 before impact; did you?

18 A No, I did not.

19 Q From the point of impact to your right,
20 were there any vehicles to your right?

21 A Yes, there were.

22 Q Describe their positioning and such, to
23 your recollection.

24 A They were just in the right-hand lane.
25 I recall glancing over there to see if I could go that

1 way, and I could not.

2 Q Do you recall more than one vehicle?

3 A Yes, I believe there was.

4 Q Were they cars? Were they trucks? Any
5 colors? Do you recall?

6 A I have no idea.

7 Q How about from the point of impact to
8 your left? Were there any vehicles that way?

9 A I don't recall that.

10 Q Do you know of anything that prevented
11 you from turning to your left?

12 A There very well may have been a car in
13 the left-hand turn lane.

14 Q But you just can't recall?

15 A I don't recall.

16 Q Is there a medium strip there also?

17 A Yes, there is.

18 Q How far back distant were you from
19 Ms. Decker's car when your foot slipped off the gas
20 pedal?

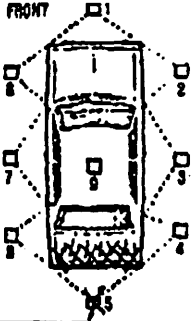
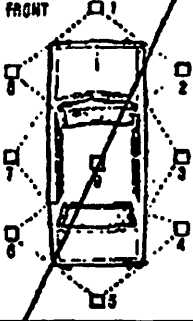
21 A I have no idea of the distance. It was
22 a good ways.

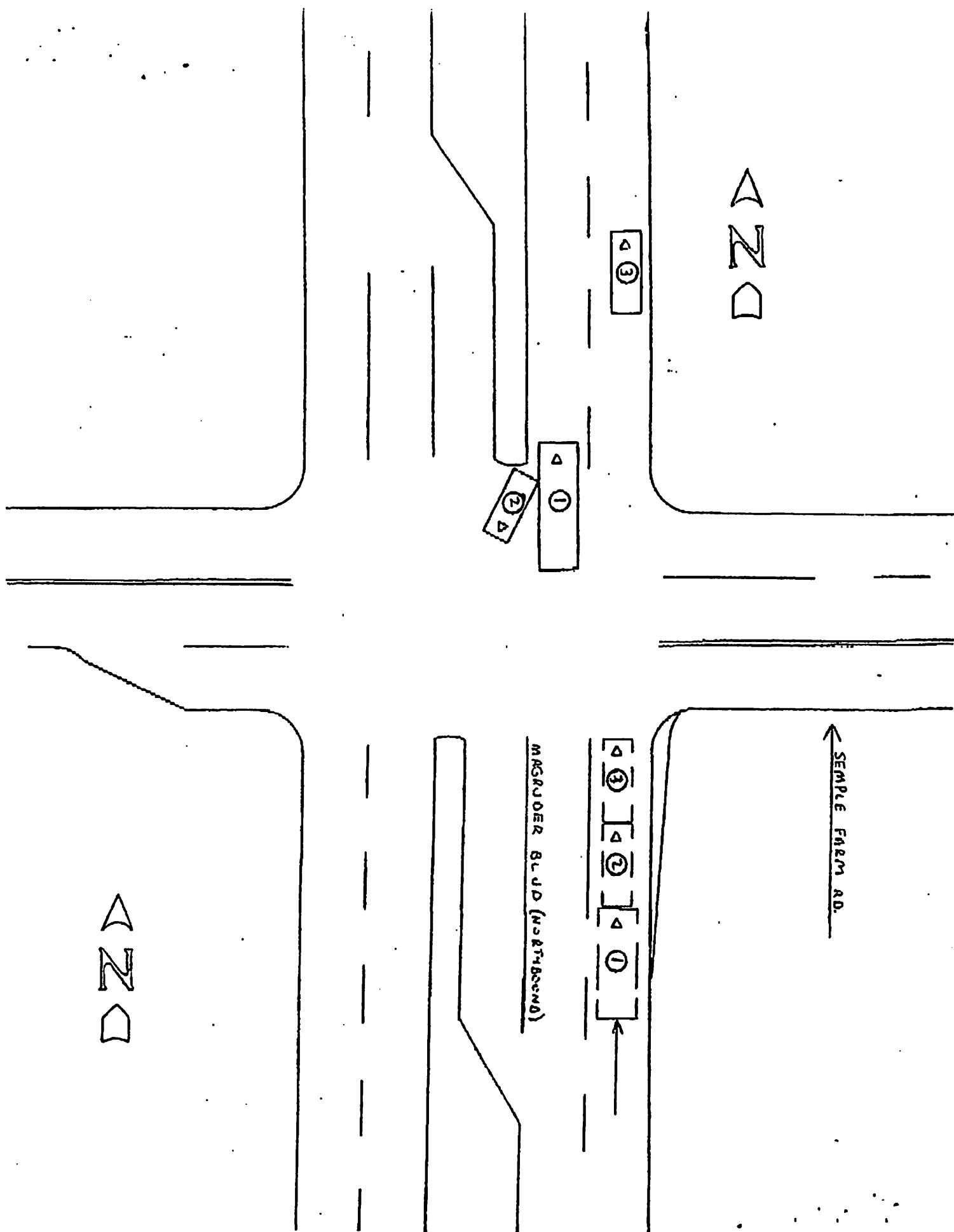
23 Q In truck lengths? Football field? Any
24 idea?

25 A I have no idea. After the foot

POLICE ACCIDENT REPORT										OMV COPY		FR 300P (REV 1/90)	
PAGE 1 OF 1 PAGES		ACCIDENT DATE 10/29/91		TIME 1938 AM PM		COUNTY OF ACCIDENT X		MILE POST MARK X		AL ROAD CROSSING ID. NO. WITHIN 150 FEET			
CITY OR TOWN X OF Hampton		LANDMARKS AT SCENE X		HARMER OF VEHICLES 3		OFFICIAL USE ONLY R 1938 O 1956 A 2010		303026				32	
ROUTE NO. OR STREET NAME AT SCENE Magruder Blvd													
ROUTE NUMBER OR STREET NAME X AT INTERSECTION WITH OR _____ MILES _____ FEET N S E W OF Sample Farm Rd													
1 VEHICLE NO. 1 W 838 5153		H 898 1020		VEHICLE NO. 2 (OR PEDESTRIAN) W N/A									
DRIVER'S NAME (LAST, FIRST, MIDDLE) HARLAN 2nd, Thomas Don		OCCUPATION Mechanic		DRIVER'S NAME (LAST, FIRST, MIDDLE) Decker Gladys Janet		OCCUPATION Unemployed							
1 ADDRESS (STREET & NO.) 309 Cockletown Road		YEARS OF DRIVING EXPERIENCE 24		ADDRESS (STREET & NO.) 400 Bolivia Dr		YEARS OF DRIVING EXPERIENCE 21						19	
CITY Yorktown		STATE VA		CITY Yorktown		STATE VA		ZIP CODE 23192				20	
1 DATE OF BIRTH 10/23/51 M		SEX M		DATE OF BIRTH 10/28/51 F		SEX F		DRIVER'S LICENSE NUMBER 282-160-7073		DRIVER'S LICENSE NUMBER 143-516-4389		21	
VEHICLE OWNER'S NAME (LAST, FIRST, MIDDLE) City of Hampton				VEHICLE OWNER'S NAME (LAST, FIRST, MIDDLE) Decker Richard Daniel								22	
1 ADDRESS (STREET & NO.) 413 N Armistead Avenue				ADDRESS (STREET & NO.) 400 Bolivia Drive								23	
CITY Hampton		STATE VA		CITY Yorktown		STATE VA		ZIP CODE 23169		ZIP CODE 23192		24	
MAKE & TYPE OF VEHICLE (SHOW MOPED, MOTORCYCLE, AMBULANCE, ETC.) De Suse Truck		YEAR 81		MAKE & TYPE OF VEHICLE (SHOW MOPED, MOTORCYCLE, AMBULANCE, ETC.) Dodge Van		YEAR 90		REPAIR COST \$16,500		REPAIR COST \$10,000		25	
1 LICENSE PLATE NUMBER 787221		STATE VA		LICENSE PLATE NUMBER TAS620		STATE VA		NAME OF INSURANCE CO. (NOT AGENT) Self Ins. City of Hampton		NAME OF INSURANCE CO. (NOT AGENT) Liberty Mutual		26	
DAMAGE TO PROPERTY OTHER THAN VEHICLES X		OBJECT STRUCK (TREE, FENCE, ETC.) X		OWNER'S NAME (LAST, FIRST, MIDDLE) X		ADDRESS X		REPAIR COST X				27	
4 VEHICLE NO. 1 DAMAGE CHECK POINTS OF IMPACT		ACCIDENT DIAGRAM										VEHICLE NO. 2 DAMAGE CHECK POINTS OF IMPACT	
FRONT 												FRONT 	
SPEED BEFORE ACCIDENT 45		LIMIT 55		MAXIMUM SAFE 55		See Attached Diagram						28	
VEHICLE NO. 1 DAMAGES: 1 UNKNOWN 2 NO DAMAGE		OVERTURNED 3		UNDERCARRIAGE 4		BY FIRE 7		VEHICLE NO. 2 DAMAGES: 1 UNKNOWN 2 NO DAMAGE		OVERTURNED 3		29	
		MOTOR 4		TOTALLED 6		OTHER 8				MOTOR 4		30	
												31	
ACCORD DESCRIPTION Veh #3 And Veh #2 were stopped at the light on Magruder Blvd At Sample Farm. Veh #1 was traveling Northbound on Magruder Blvd behind Veh #3 and Veh #2 when a collision occurred. All three vehicles were in the far right northbound lane on Magruder Blvd.													
OFFENSES CHARGED Veh #1 - Reckless Driving													
NAMES OF INJURED - IF DECEASED, INCLUDE DATE OF DEATH													
A	2	1	4	1	12/25/57	F	3	X	Gladys Decker				
B	2	3	4	1	8/25/87	M	3	X	Jared Decker				
C	3	1	4	1	7/21/62	M	4	X	Anthony Jones				
D													
E													
TROOPER/OFFICER'S NAME L. Saunders / D. Brown				BADGE/ID NUMBER 410 / 577		DEPARTMENT NAME AND CODE NUMBER HPD / VA1110000				REVIEWING OFFICER AW		DATE REPORT FILED	

EXHIBIT B

ACCIDENT DATE Month Day Year 10/29/90 10/29/90 1990		TIME AM PM 10 PM		COUNTY OF ACCIDENT X		MILE POST NUM 1X		AIR ROAD CROSSING ID. NO. WITHIN 150 FEET	
CITY OR TOWN X <input type="checkbox"/> OF Hampton		LANDMARKS AT SCENE X		NUMBER OF VEHICLES 3		OFFICIAL USE ONLY R 1938 D 1956 A 2010			
ROUTE NO. OR STREET NAME AT SCENE Magruder Blvd						ROUTE NUMBER OR STREET NAME 7 of Sample Farm Rd			
AT INTERSECTION WITH OR _____ MILES _____ FEET		H S E W		OF Sample Farm Rd					
VEHICLE NO. 1 H 890 0094 W 722 7038		VEHICLE NO. 2 (OR PEDESTRIAN)							
DRIVER'S NAME (LAST, FIRST, MIDDLE) JONES Anthony Wescott		OCCUPATION Sales		DRIVER'S NAME (LAST, FIRST, MIDDLE)		OCCUPATION			
ADDRESS (STREET & NO.) 402 Jonadab Road		YEARS OF DRIVING EXPERIENCE 18		ADDRESS (STREET & NO.)		YEARS OF DRIVING EXPERIENCE			
CITY Grafton		STATE VA		ZIP CODE 23192		CITY		STATE ZIP CODE	
DATE OF BIRTH Month Day Year 7/21/62 M		SEX M		DRIVER'S LICENSE NUMBER 223-02-9249		DOL DCDL		STATE	
VEHICLE OWNER'S NAME (LAST, FIRST, MIDDLE) Same		VEHICLE OWNER'S NAME (LAST, FIRST, MIDDLE)							
ADDRESS (STREET & NO.) Same		ADDRESS (STREET & NO.)							
CITY Same		STATE ZIP CODE		CITY		STATE ZIP CODE			
MAKE & TYPE OF VEHICLE (SHOW MOPED, MOTORCYCLE, AMBULANCE, ETC.) Dodge Pickup		YEAR 82		REPAIR COST 1000		MAKE & TYPE OF VEHICLE (SHOW MOPED, MOTORCYCLE, AMBULANCE, ETC.)		YEAR REPAIR COST	
LICENSE PLATE NUMBER 7AM5750 VA		NAME OF INSURANCE CO (NOT AGENT) Farmers Inc.		LICENSE PLATE NUMBER		STATE		NAME OF INSURANCE CO (NOT AGENT)	
DAMAGE TO PROPERTY OTHER THAN VEHICLES X		OBJECT STRUCK (TREE, FENCE, ETC.) X		OWNER'S NAME (LAST, FIRST, MIDDLE) X		ADDRESS		REPAIR COST	
VEHICLE NO. 1 DAMAGE CHECK POINTS OF IMPACT FRONT 		ACCIDENT DIAGRAM See Attached Diagram						VEHICLE NO. 2 DAMAGE CHECK POINTS OF IMPACT FRONT 	
SPEED BEFORE ACCIDENT LIMIT MAXIMUM 00 55 55		INDICATE NORTH BY ARROW		SPEED BEFORE ACCIDENT LIMIT MAXIMUM					
VEHICLE NO. 1 DAMAGES: 1 UNKNOWN 2 NO DAMAGE		OVERTURNED 3 MOTOR 4		UNDERCARRIAGE 6 TOTALED 8		BY FIRE 7 OTHER 9		VEHICLE NO. 2 DAMAGES: 1 UNKNOWN 2 NO DAMAGE	
OVERTURNED 3 MOTOR 4		UNDERCARRIAGE 6 TOTALED 8		BY FIRE 7 OTHER 9		VEHICLE NO. 2 DAMAGES: 1 UNKNOWN 2 NO DAMAGE		OVERTURNED 3 MOTOR 4	
UNDERCARRIAGE 6 TOTALED 8		BY FIRE 7 OTHER 9		VEHICLE NO. 2 DAMAGES: 1 UNKNOWN 2 NO DAMAGE		OVERTURNED 3 MOTOR 4		UNDERCARRIAGE 6 TOTALED 8	
BY FIRE 7 OTHER 9		VEHICLE NO. 2 DAMAGES: 1 UNKNOWN 2 NO DAMAGE		OVERTURNED 3 MOTOR 4		UNDERCARRIAGE 6 TOTALED 8		BY FIRE 7 OTHER 9	
ACCIDENT DESCRIPTION Damages: Veh #1 Front bumper, B-pill, headlight, left and right quarter panel Veh #2 Front and Rear bumper, rear hatch, rear window, taillights, front headlights, hood, windshield, driver's door, passengers door Veh #3 Rear bumper									
OFFENSES CHARGED DRIVER									
NAMES OF INJURED - IF DECEASED, INCLUDE DATE OF DEATH									
TROOPER/OFFICER'S NAME L Saunders / T.D. Brown									
BADGE/ID NUMBER 410/597									
DEPARTMENT NAME AND CODE NUMBER H.P.D. / VA 1110000									
REVIEWING OFFICER AW									
DATE REPORT FILED									



Vehicle - MR. H. RIAN

I was coming up to light at 45 mph and I was decelerating. I was moving my foot from the gas pedal and it slipped. I went to bring my foot back up and my shoe lace hung on the gas pedal. I was trying to jerk my foot off. As my foot got hung I saw the caravan and it was too late. I finally got my shoe lace unhung after the caravan was turning around, then I stopped.

Q - Were you wearing your seat belt

A - Yes

Q - What time did you go to work

A - 3:00 pm

Q - Did you start driving then

A - No, it was about quarter til 4.

Q - Was the light red

A - Yes

Q - When did you apply your brakes

A - After we hit

Q - When your shoelace got hung up did it untie

A - Yes

Q - When did you tie it back

A - When I sat on the curb, I tied it.

Q - How far back from the vehicles were you when you saw them

A -

Q - Where were you looking when you hit the other cars

A - I was looking down, not straight ahead dues
not over the front of the truck.

Q - When your shoelace became tangled, where were you looking

A

ADDENDUM VI

A CONTINUATION OF A ACCIDENT

REPORT

DATE OF INCIDENT

3 VICTIM'S NAME (LAST, FIRST, MIDDLE; OR FIRM NAME IF BUS)

4 LOCATION OF INCIDENT (HOUSE NO. & ST.)

(MILE)

MUGRUER AND MAPLE FARM

10-29-96

5 BLOCK NO. INDICATE BLOCK LETTER OR NUMBER IN LEFT MARGIN

Q- When your foot got tangled why didn't you use your left foot

A- I couldn't get it around the steering wheel

Veh #3 - Mr. Jones

I had stopped in the right lane, the very first vehicle. I can't remember whether the light was red or green when I heard a "boom". My next recollection was ending up on the other side of the intersection. I tried to start my truck but it stalled. I undid my seat belt and went to the other people standing in the intersection.

Q- Did you see the City truck in your rear view mirror at any time.

A- No

Q- Did you hear any sounds like brakes squealing before the impact

A- No, I only heard a bang during the impact

RECORDS

6 DATE OF THIS ADDENDUM

10-29-96

REPORTING OFFICER(S)

L SAUNDERS / T. BROWN

CAD #

410/577

SUPERVISOR

17C FORM 102-D 6-80

ADDENDUM

A CONTINUATION OF A ACCIDENT

REPORT

3 VICTIM'S NAME (LAST, FIRST, MIDDLE) OR FIRM NAME

53

4 LOCATION OF INCIDENT (HOUSE &

ST NAME)

5. DATE OF INCIDENT

MARRUEN AND SEMPLE FARM

10-29-96

BLOCK NO. INDICATE BLOCK LETTER OR NUMBER IN LEFT MARGIN

I was in the lane next to the left turn lane on #134 / Semple Farm Rd.

I was the second car stopped at the red stoplight.

I heard a moving vehicle sound coming behind me and to the right, so I looked in my rear view mirror to see and noticed the truck truck proceeding at a fast speed and I knew he wasn't preparing to stop & he hit the car which was stopped at the light.

Peggy Jackson
41 Redwood Drive
Hampton, VA 23669
hm 851-4728
wk - 851-4314

ADDENDUM REPORT

HAMPTON POLICE DIVISION

RECORDS

6 DATE OF THIS ADDENDUM

10-29-96

REPORTING OFFICER(S)

CAD #

SUPERVISOR

T. BROWN / L. SAUNDERS

577 / 410

100 FORM 102-A 8-88

57
of
10
PAGE

ADDENDUM REPORT

HAMPTON POLICE DIVISION

ADDENDUM VI		A CONTINUATION OF A ACCIDENT REPORT		DATE OF INCIDENT	
3. VICTIM'S NAME (LAST, FIRST, MIDDLE) OR FIRM NAME IF BUS		4. LOCATION OF INCIDENT (HOUSE NO., ETC)		5. DATE OF INCIDENT	
		Magruder & Sampierhorn INT		10/29/96	
BLOCK NO. INDICATE BLOCK LETTER OR NUMBER IN LEFT MARGIN.					
My NAME: <u>MARK RADER</u> 114 GRAY LANE, GRAFTON, VA 23692					
(557) 898-8656 (H) (557) 249-1234 (W)					
I was in the left lane at the stop light at the intersection of Magruder & Sampierhorn - heading towards Yorktown					
I was the second car stopped at light. The light was <u>RED</u> ! The van next to me on my Right was hit from behind by a Garbage truck. The van was rear ended and pushed into a car Pickup in front of her who was the first at the stop light getting ready to go because the light just changed.					
The garbage truck never slowed down and the van was pushed through into the pickup and spun around across the intersection and the car in front of me and myself avoid the sideswipe somehow.					
NO I did see it the truck coming in the mirror ^(my rearview) and it did not appear to even slow down.					
Mark Rader					
10/29/96					
6. DATE OF THIS ADDENDUM				RECORDS	
10-29-96					
REPORTING OFFICER(S)		CAD #	SUPERVISOR		
T. BROWN / L. SHUNDERS		577/410			

ADDENDUM VI

A CONTINUATION OF A Accident

REPORT

2. VICTIM'S NAME (LAST, FIRST, MIDDLE) OR FIRM NAME IF F

4. LOCATION OF INCIDENT (HOUSE NO

NAME)

6. DATE OF INCIDENT

Magruder and Semple Farm

10-29-96

BLOCK NO. INDICATE BLOCK LETTER OR NUMBER IN LEFT MARGIN

Veh # 2 Ms Decker

I felt an impact and I put my foot on, no my foot was already on the brake, I pressed it hard and harder and he kept on dragging me.

Q- Where were you - on what road

A- I was on Magruder, near McDonalds at the light

Q- Was the light Red

A- Yes

Q- Were you wearing your seat belt

A- Yes

Q- How did you get out of seat belt

A- I climbed out of the belt because there was smoke and I thought it was going to explode.

Q- Did you hear any noises prior to the impact - such as the brakes squealing

A- No.

Q- What lane were you in

A- the left, straight lane - I dont remember

7 DATE OF THIS ADDENDUM

10-29-96

REPORTING OFFICER(S)

L. Saunders / T.D. Brain

CAD #

410/

SUPERVISOR

RECORDS

15.77

HPD FORM 102-B 8-80

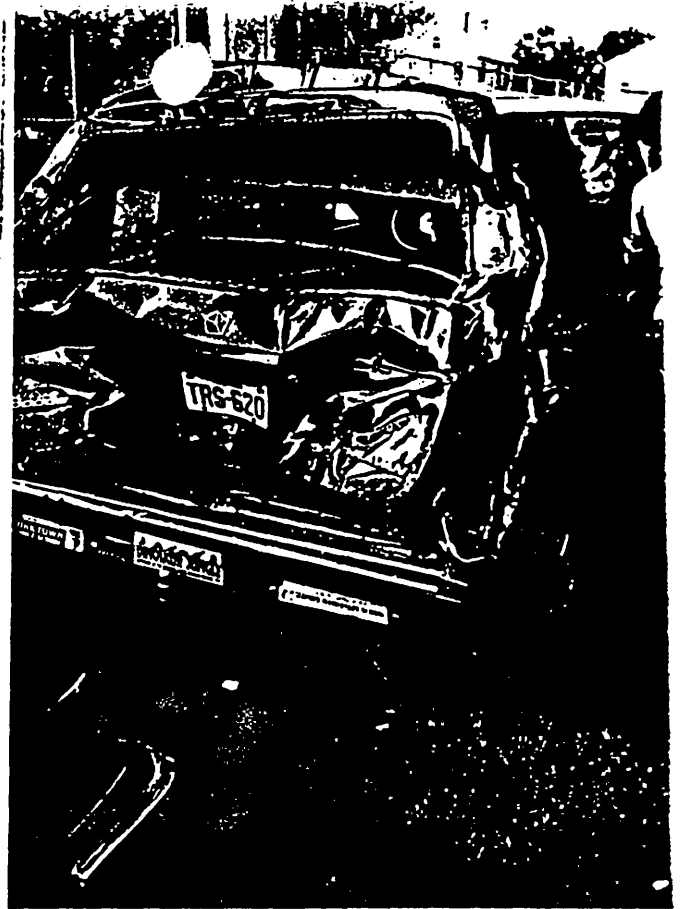
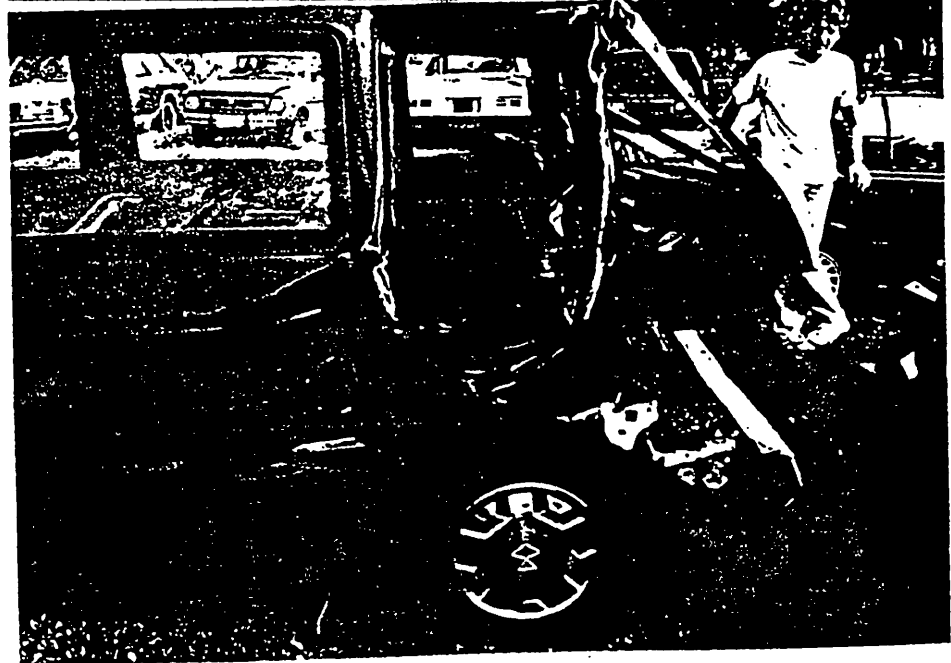
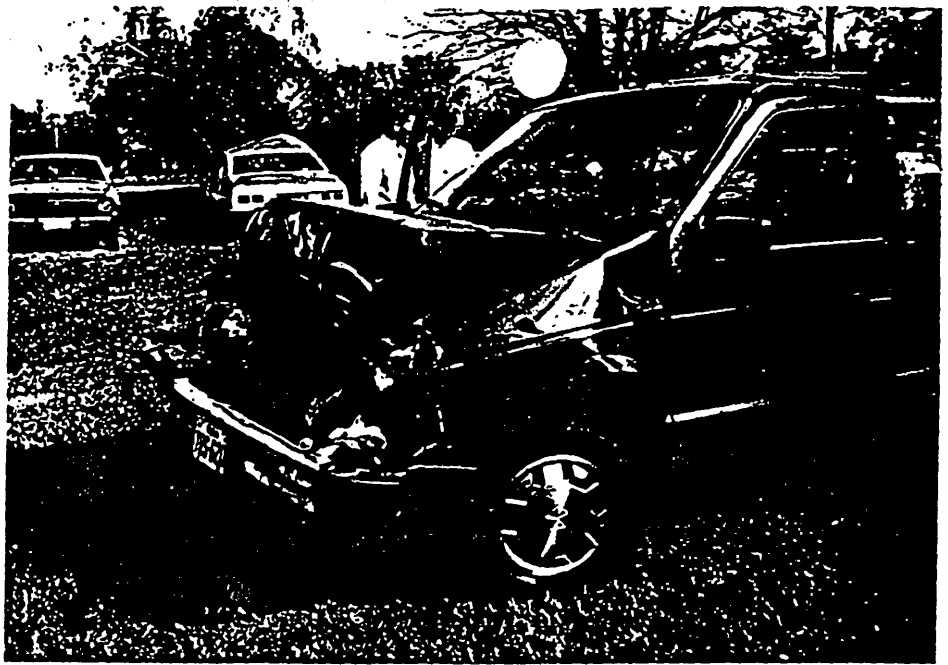
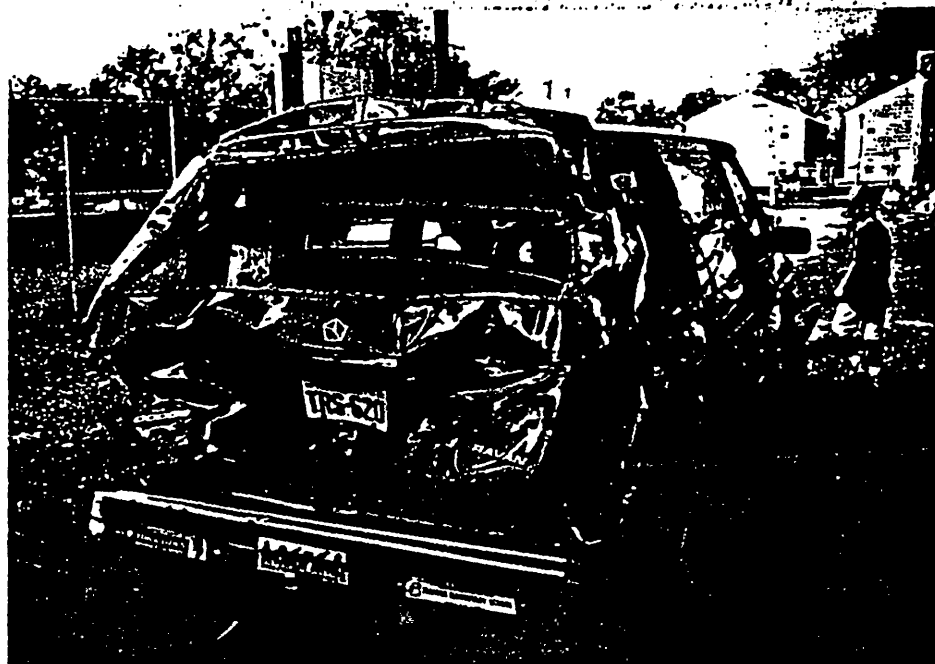


EXHIBIT C







VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON, PART 4

CLERK
JUN 01 1999
RICHMOND, VIRGINIA
GLADYS DECKER

VS

THOMAS D. HARLAND, II

Law No. 98-671

Stenographic report of all the testimony, together with all the motions, objections and exceptions on the part of the respective parties, the action of the Court in respect thereto, and all other incidents during the motion of the case of Gladys Decker vs Thomas D. Harland, II, tried in the Circuit Court for the City of Hampton, at Hampton, Virginia, on October 28, 1998, before the Honorable Wilford J. Taylor, Jr., Judge of said Court.

- - - o0o - - -

PRESENT:

Mr. Douglas L. Hornsby, Attorney
for the Plaintiff.

Mr. Robert A. Boester, Attorney
for the Defendant.

- - - o0o - - -

MICHELLE BRADLEY
SCHNEIDER AND ASSOCIATES
107 TELFORD DRIVE
NEWPORT NEWS, VIRGINIA 23602

JAMES P. BOERHAVER
CLERK OF THE CIRCUIT COURT
99 APR -2 AM 9:33
CITY OF HAMPTON, VA

COPY

I N D E X

DEFENDANT'S WITNESSES:				DIRECT	CROSS	REDIRECT	RECROSS
Joe Tsao	4	12		
Thomas D. Harland, II.	.	.	.	15	20		

1 (The Court Reporter was duly sworn.)

2
3 THE COURT: Let me tell you up front
4 that I'm not going to decide this today. I have had to go back
5 and look at some things governing this. It's going to take me
6 about a week. I would like to get your arguments as to how you
7 see it and what you expect me to do. Then what I will do is
8 either come back or I'll have a conference call with the
9 attorneys.

10 MR. BOESTER: Yes, sir. I didn't get
11 the brief filed by the Plaintiff until this morning. I had a
12 jury trial yesterday, so actually I would like to file a
13 response brief anyway.

14 THE COURT: I was wondering about
15 that.

16 MR. HORNSBY: I think we delivered it,
17 but you were in trial.

18 MR. BOESTER: Right. It came to my
19 office yesterday. I just didn't see it until this morning.

20 THE COURT: Do y'all want to argue it
21 today?

22 MR. BOESTER: If we could, Your Honor.

23 THE COURT: Who do you have with you?

24 MR. BOESTER: This is Tom Harland,
25 Your Honor, the Defendant, and Joe Tsao. He's the Coliseum

1 director.

2 THE COURT: Welcome to the Court.

3 MR. BOESTER: Your Honor, I filed a
4 motion for both statutory and governmental immunity on behalf of
5 the City of Hampton and Thomas Harland in this case. I would
6 like to put on some evidence if I could.

7 THE COURT: Go ahead.

8 MR. BOESTER: Mr. Tsao, would you take
9 the witness stand.

10
11 JOE TSAO,
12 called as a witness by the Defendant, having been first
13 duly sworn, was examined and testified as follows:

14
15 DIRECT EXAMINATION

16
17 BY MR. BOESTER:

18 Q Mr. Tsao, identify yourself for the
19 Court, please.

20 A I am Joe Tsao. Last name is spelled
21 T-s-a-o.

22 Q And how are you employed, sir?

23 A I am the director of Hampton Coliseum.

24 Q Would you describe briefly what it
25 means to be the director of the Hampton Coliseum.

1 A By and large I'm the CEO in charge of
2 the overall management of the Coliseum.

3 Q Does the City of Hampton operate the
4 Coliseum as a recreational facility?

5 A Yes, it does.

6 MR. HORNSBY: Objection, Your Honor.
7 That's a conclusion of the witness.

8 THE COURT: All right. I will sustain
9 that. That's a legal conclusion.

10 MR. BOESTER: All right.

11
12 BY MR. BOESTER:

13 Q Are you a department head within the
14 City?

15 A Yes.

16 Q Is the City actually your employer?

17 A Yes.

18 Q How many full-time employees are there
19 at the Hampton Coliseum?

20 A Twenty-eight.

21 Q Are all of those people employed by
22 the City of Hampton?

23 A Yes.

24 Q Is Tom Harland an employee of the
25 Coliseum and also the City of Hampton?

1 A Yes.

2 Q Would you tell the Court Tom's title
3 and his general duties.

4 A Tom is employed as the building
5 mechanic and his duty, generally speaking, is to set up and take
6 down shows and also responsible for the general maintenance of
7 the building as well.

8 Q Tell the Court generally the types of
9 events that are held at the Hampton Coliseum.

10 A Generally speaking, we have concerts,
11 family shows, sports events, conventions, trade and consumer
12 shows and meetings.

13 Q And can you give the Court an idea of
14 how many event days there are in an average year?

15 A About 165 to 170 event days a year.

16 Q And an event day would be a day in
17 which something is being held at the building?

18 A That's correct.

19 Q Can you compare the Coliseum to
20 Chrysler Hall which is located in Norfolk, please.

21 A By and large we are very similar in
22 nature except we are larger with more seats and the variety of
23 events that we do is probably greater than the Chrysler Hall.
24 By and large we are very similar in nature.

25 Q Is it true that part of the duties of

1 a building mechanic is to take down a show that's just been held
2 and set up for the next event?

3 A Yes, it is.

4 Q Was Tom Harland the building mechanic
5 in October 1996?

6 A Yes.

7 Q Was there an event scheduled in the
8 Coliseum on October 30th, 1996?

9 A Yes.

10 Q What was that event?

11 A The Sea Fest.

12 Q Can you explain for the Court what the
13 Sea Fest is.

14 A Sea Fest is a -- what we call a trade
15 and consumer show put on by the Chamber of Commerce showcasing
16 the seafood industry on the Peninsula.

17 Q And in the previous week preceding
18 October 30, 1996, had other events been held at the Coliseum?

19 A Yes.

20 Q What events had been held the previous
21 week?

22 A We had a series of events the previous
23 week. We had the NBA exhibition game.

24 Q Can you explain for the record what an
25 NBA exhibition game is.

1 A Yes. It's a professional basketball
2 exhibition game with the National Basketball Association
3 featuring the Golden State Warriors and the Philadelphia 76ers.

4 Q And what else was held that week?

5 A We also had a sold-out Phish concert.

6 Q What is Phish?

7 A Phish is an alternative rock band.

8 Q So it was a rock concert?

9 A Yes.

10 Q For the record, Phish is P-h-i-s-h?

11 A Correct.

12 Q What else was held that week?

13 A That same weekend we had a market pro
14 computer show, which is a trade and consumer show.

15 Q Is that basically a computer sale,
16 computer wares?

17 A Yes.

18 Q And the next event to be held after
19 that was the Sea Fest?

20 A That's correct.

21 Q Can you give me an idea of the
22 attendance at the various events you just described, the three.

23 A We sold out for the basketball game to
24 the tune of about ten thousand. Phish was about fourteen
25 thousand. The market pro was probably three or four thousand

1 people.

2 Q What types of things would the
3 building mechanic need to do to make the transition from those
4 three events to the Sea Fest?

5 A Clean up, tear down all of the staging
6 set up from the previous event, totally clean the building, mark
7 the floor and set up the tables and the chairs and the displays.

8 Q Who decides how and when the building
9 set-up gets done?

10 A That is usually left up to the
11 mechanic.

12 Q That would be Tom Harland in that
13 case?

14 A Yes.

15 Q Who decides in what manner the set-up
16 and take-down gets done?

17 A That's usually the mechanic.

18 Q Do you intervene and specifically
19 direct the building mechanic on the particulars of the set-up or
20 the take-down of the building?

21 A No.

22 Q Specifically on the occasion of the
23 Sea Fest in October 1996, did you intervene with the building
24 mechanic on how he was doing his job?

25 A No.

1 Q Does garbage accumulate at the Hampton
2 Coliseum?

3 A Yes.

4 Q What type of things generate trash?

5 A The refuse from selling concessions at
6 the Coliseum for the most part.

7 Q And specifically after the three
8 events you talked about, the NBA game, the rock concert and the
9 computer show, had trash been generated by those shows?

10 A Yes, and to a very large amount.

11 Q In what manner is trash removed from
12 the Hampton Coliseum?

13 A I'm not sure I understand that.

14 Q When trash accumulates at the
15 building, how does it leave the premises?

16 A It's carried out by a trash truck.

17 Q Is the trash truck assigned by the
18 City to the City Coliseum?

19 A Yes.

20 Q Is it part of the duties of the
21 building mechanic to make sure that the trash truck provided for
22 the Coliseum is empty when a new event is about to take place?

23 MR. HORNSBY: Your Honor, this is
24 leading. I'm going to go along with it, but if he's going to
25 describe the duties and then he says yes -- maybe he can ask him

1 in a different way. I mean, we are going to get there but --

2 MR. BOESTER: That's fine.

3

4 BY MR. BOESTER:

5 Q What does the building mechanic have
6 to do with getting trash out of the building?

7 A As I stated before, their duty is to
8 set up, tear down and get ready for the next event or to take
9 the last event out and set up for the next event. Whatever
10 duties that may be applicable on any given day when they come to
11 work, they will be responsible for that. If garbage removal
12 happens to be one of the duties, then that would be the duty
13 that they perform on that given day.

14 Q Now, on the evening of October 29th,
15 1996, if the building mechanic, Mr. Harland, had found the trash
16 truck full, what would have been his duty as far as that trash
17 truck?

18 A In order to get ready for the
19 following event, his duty would be to empty that trash truck at
20 the steam plant.

21 Q For the record, what is the steam
22 plant?

23 A The steam plant is an establishment in
24 the City of Hampton where you take the garbage to and have the
25 garbage burned.

1 Q To operate in your job as Coliseum
2 Director of the City of Hampton's Coliseum, can the building be
3 operated without trash being removed?

4 A No, not at all.

5 Q Is trash removal a part of the normal
6 maintenance of the building?

7 A Yes, it is.

8 MR. BOESTER: That's all the questions
9 I have, Judge.

10
11 CROSS-EXAMINATION

12
13 BY MR. HORNSBY:

14 Q Mr. Tsao, I have a few questions, sir,
15 if I may. When Mr. Harland exercises his function there at the
16 Coliseum -- and I'm speaking specifically prior to and during
17 the day of October 29th of '96 and the week prior to that --
18 wouldn't it be accurate to say that his job is just to get the
19 place ready?

20 A Yes.

21 Q So if there's something in there that
22 needs to be taken out, he takes it out, right?

23 A That's correct.

24 Q And if there's something that needs to
25 be set up, he sets it up, right?

1 A That's correct.

2 Q How he does it, y'all don't much care
3 as long as it just gets done?

4 A That's correct.

5 Q If the chairs are in the right place
6 -- that's all you require is to have the chairs in the right
7 place or the chairs out of the right place or to have the trash
8 picked up? You don't care how it's done? You just want it
9 done?

10 A That's correct.

11 Q And, in fact, would it be accurate to
12 say it's not a function that takes special skills and expertise?
13 It's just more labor-intensive, correct?

14 A That's correct.

15 Q If a person knows where the chairs are
16 stored, then that person can exercise the quantity of labor and
17 get the chairs out and put them in the right place, correct?

18 A That's correct.

19 Q And also with the trash bins, assuming
20 people haven't put it all on the floor, they just take the bins
21 and they put it in the receptacle and it eventually gets to the
22 truck? Nothing special about that, is there?

23 A No.

24 Q Have you ever seen the trash trucks
25 emptied at the steam plant?

1 A Personally, no.

2 Q So if you tell us what happens there,
3 you'd only be speculating as to what activity goes on at the
4 steam plant, right?

5 A I have not seen our own trash truck
6 emptied at the steam plant. However, I have personally visited
7 the steam plant on a different occasion and in a different
8 capacity so I do have some personal knowledge about how that is
9 done because of having been there personally.

10 Q Fair enough. You've seen trash trucks
11 emptied at the steam plant. Yes or no?

12 A Yes.

13 Q Is that a function where an operator
14 kind of backs up to the right place and pushes a button or does
15 an individual instead have to get in there with a shovel and
16 take all that stuff out?

17 A I believe the trash truck backs up to
18 the designated location and the truck does the dumping.

19 Q There's nothing special about it?
20 It's an automated function, correct?

21 A I believe so, yes.

22 Q So it's not where a person has to make
23 a decision as to how I'm going to dump the garbage truck? They
24 just put it in the place where all garbage trucks go and they
25 push the button or pull the lever and the truck is dumped,

1 correct?

2 A That's correct.

3 Q Can any member of the general public
4 go to the steam plant and pay a fee and dump things?

5 A I don't know that.

6 Q Not certain. All right. The trash
7 that's dumped from the Coliseum or taken from the Coliseum, is
8 there ever an occasion when a private service or another city
9 vehicle comes to the Coliseum to take trash away?

10 A No. We perform that function
11 ourselves.

12 MR. HORNSBY: Okay. That's all I
13 have.

14 MR. BOESTER: Nothing further, Your
15 Honor.

16 THE COURT: Thank you.

17 MR. BOESTER: I would call Mr.
18 Harland, Your Honor.

19
20 THOMAS D. HARLAND, II,
21 called as a witness by the Defendant, having been first
22 duly sworn, was examined and testified as follows:

23
24 DIRECT EXAMINATION
25

1 BY MR. BOESTER:

2 Q Mr. Harland, state your name, please.

3 A Thomas D. Harland, II.

4 Q You are a Defendant in this case this
5 morning; is that correct?

6 A Yes, I am.

7 Q Are you employed at the Hampton
8 Coliseum?

9 A Yes, I am.

10 Q And how long have you been employed at
11 the Hampton Coliseum?

12 A Going on fourteen years.

13 Q What is your job there?

14 A I'm the building mechanic.

15 Q Can you describe briefly to the Court
16 what the duties are of the building mechanic.

17 A Ready the physical building itself for
18 events that are put in the building as far as changeover from
19 one event to the other.

20 Q Can you tell the Court, for example,
21 how you set up a show.

22 A The chairs are put in place or
23 removed, whatever is required, dashers for hockey or whatever it
24 may be.

25 Q For example, tonight we have Disney On

1 Ice there. What does that take to set up?

2 A That includes putting ice on the floor
3 and making ice for the ice show and readying the building for
4 the public to use it.

5 Q Who decides how and when the show is
6 to be set up?

7 A I do.

8 Q Are you directed by Mr. Tsao, the
9 building director, or any other person on the specifics of how
10 you are to prepare the building for the event?

11 A No, I'm not.

12 Q Are you familiar with the three events
13 Mr. Tsao described that were conducted the week prior to October
14 29th, 1996?

15 A Yes.

16 Q Those would be the NBA game, the rock
17 concert and the computer show, correct?

18 A Yes.

19 Q Were you involved in the set-up and
20 take-down of those events?

21 A Yes, I was.

22 Q Did anyone direct you as to how to do
23 that?

24 A No, they did not.

25 Q What were your specific duties on the

1 evening of October 29th, 1996?

2 A I needed to clear the hallways, make
3 ready for the vendors that had moved in partially and the rest
4 that were moving in the next morning for the Sea Fest.

5 Q What does it mean to make ready for a
6 vendor?

7 A See that the spaces, the curtains are
8 up, all the electric is run, the requirements for those people
9 to move in in the morning.

10 Q What do you mean the electric is run?

11 A They require 110 at some booths to do
12 whatever cooking or whatever displays they are doing.

13 Q How did you carry out the final set-up
14 of the show on the evening of October 29, 1996?

15 A I checked the hallways, went to the
16 back of the building, the elephant door.

17 Q What is the elephant door?

18 A That is the loading door at the back
19 of the building that the shows move in through.

20 Q Just for the record, it's called the
21 elephant door because it's large enough to bring the circus in?

22 A Elephants come in and out of it, yes.

23 Q What else did you do?

24 A I raised the door to check the back of
25 the building to make sure the back was ready for vehicles to

1 pull up and finish doing their unloading in the morning. That
2 was the end of it.

3 Q Was there anyone else working in the
4 building the night of October 29, 1996 to set up that show
5 besides you?

6 A No, there was not.

7 Q While you were working that evening,
8 did you check the trash truck?

9 A Yes, I did.

10 Q What did you find?

11 A It was full.

12 Q And what did you do when you found
13 that it was full?

14 A Realized that with the amount of trash
15 generated by the Sea Fest, seafood shells and what have you,
16 that it had to be emptied for the next morning.

17 Q What did you do with the truck then?

18 A I got in the truck and attempted to
19 take it to the steam plant.

20 Q Is the steam plant located within the
21 City of Hampton?

22 A Yes, it is.

23 Q The accident that is the basis for
24 this lawsuit, did that happen on the way to the steam plant?

25 A Yes, it did.

1 Q Was the trash truck filled with trash
2 generated by the previous events while you were driving to the
3 steam plant?

4 A Yes, it was.

5 MR. BOESTER: That's all the questions
6 I have, Judge.

7

8 CROSS-EXAMINATION

9

10 BY MR. HORNSBY:

11 Q Mr. Harland, when you get ready for an
12 event, specifically the events preceding and on the day of
13 October 29th of '96, you are told when the events are going to
14 occur, correct?

15 A There's a list, a schedule of events.
16 It's self-explanatory.

17 Q You don't book the events?

18 A No.

19 Q Somebody says here's the date and you
20 have to get the floors ready on that date?

21 A Well, I see the events and I know when
22 they are coming. Nobody particularly says do it on this day.

23 Q The thing that you get to decide is
24 really when you're going to start as long as you finish and get
25 the job set up before the show is supposed to commence, correct?

1 A Within the parameters of how it takes
2 to set that show up and what the different requirements are for
3 the day. It changes.

4 Q Right. You often get layouts? People
5 tell you where they want the tables and they give you a diagram
6 that shows where things go on the floor, correct?

7 A Yes.

8 Q And they would show you if any
9 equipment needs to be in a certain place or ice as you mentioned
10 for a show? You are told where that ice needs to be, where
11 those tables need to be? You are told where to place those
12 objects?

13 A I am also from time to time involved
14 in the construction of the maps for the events.

15 Q You've been there fourteen years?

16 A Yes.

17 Q Do you sign any checks?

18 A No, I do not.

19 Q You don't book the events, do you?

20 A No, I don't.

21 Q Do you have anybody that works under
22 you? Do you supervise any workers?

23 A No, absolutely not.

24 Q Would it be fair to say -- and I don't
25 want to diminish what you do -- but what you are is a very

1 skilled laborer and very familiar with how the Coliseum is set
2 up and taken down on a timely and efficient basis so these shows
3 can be put on, right?

4 A That's an opinion.

5 Q Would you agree with me on that?

6 A Sure.

7 Q Now, at the time this accident
8 occurred, you were merely driving the garbage truck, weren't
9 you?

10 A Yes, I was.

11 Q You weren't on the radio talking to
12 anybody, were you?

13 A No. There's no radio on the truck.

14 Q You were driving the shortest point
15 from the Coliseum to the steam plant, correct?

16 A Yes, I was.

17 Q You weren't on any special travel
18 route that the city said you must take?

19 A No, not at all.

20 Q You had driven that route before, in
21 fact?

22 A Yes.

23 Q And having driven the truck before,
24 what you do when you get to the steam plant is push a button,
25 pull a lever and it dumps itself basically?

1 A Yes, basically.

2 Q Do you ever have to get out of the
3 truck at the steam plant?

4 A Yes, each time.

5 Q And the thing that dumps the truck,
6 that takes the trash out of the truck -- and I speak
7 inarticulately -- you have to get out of the cab of the truck
8 with the truck backed up to the right place, pull the lever and
9 it automatically dumps itself?

10 A Yes.

11 Q And then you get back in the truck and
12 you drive back?

13 A That's right.

14 Q Assuming I have any intelligence,
15 which may be a great assumption, you could probably show me how
16 to do that in about an hour?

17 A Probably less. You seem to be fairly
18 intelligent.

19 Q I appreciate that. It may take me
20 twice as long.

21 MR. HORNSBY: That's all I have.

22 MR. BOESTER: Nothing further, Judge.
23 That's our evidence for this hearing, Judge.

24 MR. HORNSBY: I've got one piece of
25 evidence, Your Honor. I call Mr. Tony Jones to the stand very

1 briefly.

2 MR. BOESTER: Judge, I would object.
3 Mr. Jones was a third driver in this accident. How the accident
4 happened has no bearing on whether the city is immune either
5 from a governmental status or from a statutory status.

6 MR. HORNSBY: I'm not going to ask him
7 about the accident. I'm going to ask him about, as mentioned in
8 my motion, the city settling with him. I would proffer that --

9 THE COURT: Why don't you do that? I
10 will let you proffer.

11 MR. HORNSBY: Okay. I will ask him if
12 he was involved in the accident. I have a reasonable good faith
13 belief that he will say yes. I will ask him if he incurred
14 property damage. He will say yes. I will ask him if he
15 incurred personal injuries. I believe he will say yes. I will
16 ask him if the city paid him. He will say yes on the property
17 damage and the personal injury. That's all I will ask him.

18 MR. BOESTER: For the purposes of this
19 hearing, I will stipulate that's what he will say.

20 THE COURT: Okay. Then that's it.

21 MR. HORNSBY: Then we have no further
22 need of him and I appreciate him coming over.

23 THE COURT: Thank you, sir.

24 MR. HORNSBY: That's all the evidence
25 we have.

1 THE COURT: I will listen to your
2 comments.

3 MR. BOESTER: Judge, the city and Mr.
4 Harland, I believe, are clearly immune in this case for two
5 reasons. Cities are immune, as you well know, when they are
6 doing governmental functions but not proprietary functions.
7 Issue Number 1 is whether or not garbage removal is a
8 governmental function. If garbage removal is a governmental
9 function, the city and the employee are immune. There is a
10 large line of cases which states that when cities are removing
11 garbage that is, in fact, a governmental function going back to
12 1929 with a horse-drawn garbage truck. I am moving forward into
13 1973 in a case decided involving the City of Newport News. The
14 Supreme Court has held that the removal of garbage is a
15 governmental function and cities are immune. I don't know of
16 any cases that say anything to the contrary. I think the case
17 should be decided in the city and the employee's favor on that
18 basis alone.

19 Beyond that, there's a statutory
20 immunity. Cities would be reluctant to operate recreational
21 facilities if they were subject to lawsuits against them on a
22 regular basis. Section 15.2-1809 of the Code says that cities
23 are immune from simple negligence in the operation of
24 recreational facilities, which then raises the issue is the City
25 of Hampton a recreational facility? That issue was cleared up

1 in 1987 in a case filed against the City of Norfolk involving
2 Chrysler Hall. In that case the Supreme Court found that
3 Chrysler Hall is a recreational facility under that statute.
4 The City of Hampton's Coliseum is essentially the same as
5 Chrysler Hall although much larger. I don't think there's any
6 issue at all in this case that statutory immunity applies as
7 well thereby making the city immune and the employee immune for
8 statutory reasons as well as common law reasons.

9 The next issue would be whether or not
10 the employee is immune as well as the city. There are a series
11 of cases on that. In this case the major issue is whether or
12 not the employee was imbued with discretion of a significant
13 nature. Here we have an employee who is very experienced, whose
14 job was to set up and take down shows and make all the decisions
15 as to how that was done and make all the decisions as to when
16 that was done, was not being directed by any superior in doing
17 that, and I think clearly meets the definition set forth in the
18 case law there as well. I think he and the city are invested
19 with the same governmental and statutory immunity in this case,
20 although the statutory immunity issue doesn't really apply to
21 the employee. That's more of a governmental immunity issue. In
22 this case I think the employee whether he has discretion or not
23 is protected by that statute.

24 Now, the argument made, I believe, by
25 the Plaintiff in quickly reading their brief is that he was

1 essentially just driving around in his garbage truck and that
2 the Heider case says that immunity doesn't apply. There have
3 been three cases cited. In the Heider case, a deputy sheriff
4 had finished serving a summons and was driving back in traffic
5 having finished that act. The Supreme Court held that since he
6 was just driving in traffic, the sheriff was not immune. The
7 school bus case that was cited -- if memory serves me correctly,
8 it was not operating as a school bus at the time. It was just
9 driving. In the snowplow case that was cited, the same issue
10 came up. You can boil all those cases down and what the case
11 law says is if a city employee is out just driving a vehicle and
12 not performing any function, there's no immunity. That's just
13 everyday driving. But like the snowplow case and also like the
14 school bus case, Wynn against Gandy, if the city employee is
15 driving a truck in the pursuit of a duty -- if a police officer,
16 for example, is in the midst of a high-speed chase, to use an
17 activity I've had before in this Court before Judge Overton on
18 an immunity case, then they are immune.

19 Now, in this case I will tell you that
20 if Mr. Harland had reached the steam plant and was driving to
21 his house with the truck, then he would not be immune, but he
22 had not reached the steam plant. He was taking the garbage to
23 the steam plant. He was in the pursuit of a governmental and a
24 statutorily-immune activity at the time. That's the key in the
25 case. That's what makes this different from Heider against

1 Clemons and Wynn against Gandy and the same as the snowplow
2 case, Smith against Peregoy, which is actually a City of Hampton
3 case. In this case I think clearly those cases do not put this
4 outside of the immunity.

5 As far as the argument that we are
6 collaterally-estopped, we are not collaterally-estopped. The
7 fact that settlements have been reached with other individuals
8 does not take the immunity away. If the city chooses to pay off
9 cases, they can do that. That doesn't take this outside of the
10 realm of immunity. I think this is an absolutely clear issue.

11 The final issue to be reached, there
12 has been an Amended Motion for Judgment filed but no order
13 granted by the Court which would raise the issue of gross
14 negligence. I think that's an entirely separate issue. There
15 needs to be a factual determination made by the Court I think on
16 a different occasion than today on whether or not this Plaintiff
17 can pursue a claim of gross negligence against the employee and
18 the city. The immunity granted to the city both on a common law
19 and a statutory basis is for simple negligence only. The Court
20 has not granted an order allowing the filing of the Motion for
21 Judgment as of yet, so I am asking the Court to make a ruling
22 this morning based on the claim of simple negligence only. When
23 the Court does rule -- and I don't mean this morning. If the
24 Court does rule in favor of the Defendants in this case and
25 finds that the Defendants are, in fact, immune on simple

1 negligence, I do think that the Plaintiff should be allowed in
2 this case to proceed on gross negligence if there are any facts
3 to support that. I will tell you that it will be my full
4 intention to come back before the Court on a Motion for Summary
5 Judgment because I don't think there are any facts to support
6 gross negligence, but that's not an issue to be determined
7 today.

8 THE COURT: Okay. Mr. Hornsby?

9 MR. HORNSBY: Thank you, Your Honor.
10 We have filed the Amended Motion for Judgment on August 24th.
11 It has been filed with the Court. We would ask that our
12 amendment be allowed. What Counsel says is correct. We have
13 alleged gross negligence and we have a reasonable good faith
14 belief based on the information pled in that item that it may
15 well shock the conscience of a reasonably-minded individual and
16 constitute gross negligence and we will look forward to the
17 Motion for Summary Judgment at a later time. Hopefully, the
18 Court could later on allow that amended motion to not only be
19 filed but entered and then Counsel can respond as necessary.
20 Our statute runs tomorrow.

21 MR. BOESTER: If I could just
22 intervene, I don't have any objection to that at all. I'm just
23 trying to keep this morning's issue separate from the gross
24 negligence issue.

25 THE COURT: You don't have an

1 objection to what?

2 MR. BOESTER: I don't have any problem
3 with the filing of an Amended Motion for Judgment. In fact, I
4 think yesterday I filed a response to that and anticipated the
5 fact that the Court would allow that. I don't want Mr. Hornsby
6 and his client to get past the statute, but I don't want to
7 muddy the argument we have this morning either. I think a
8 decision needs to be made on the immunity and the simple
9 negligence issue.

10 THE COURT: Okay. I will allow the
11 mere filing of the amended motion.

12 MR. HORNSBY: Thank you. With that
13 out of the way, Your Honor, let me respond quickly. Certainly
14 what Counsel says is correct. If the city is involved in a
15 governmental function and if garbage in toto, shall we say, is a
16 governmental function, then we have a problem in sovereign
17 immunity. If the activity involved -- let me rephrase that. If
18 what Counsel says is correct, if anything of or having to do
19 with a garbage truck is automatically a governmental function,
20 if that be true, then I would say we have a problem -- we as a
21 Plaintiff have a problem. But I would suggest that the special
22 thing which sovereign immunity seeks to cover is that special
23 function, as well it's called, a governmental function. It's a
24 thing which government does.

25 Now, we all know that there's a

1 privatization of certain trash collections and such. I will not
2 digress to that. But going from house to house, picking up the
3 cans, putting them in the truck, that act of collecting the
4 garbage, that's the thing which we would suggest to the Court is
5 protected. In the Taylor case the activity which led to the
6 greasy can spilled on the road was the act of picking up
7 residential garbage. In this case we have mere driving miles
8 from a facility, driving on the road like any other vehicle,
9 driving on the road like all the city vehicles. Mere driving is
10 not a protected activity.

11 The cases go on to talk about
12 ministerial acts, acts which involve little, if any, discretion.
13 I think the evidence is uncontroverted that this man was merely
14 driving. He's not exercising discretion other than -- as I
15 stand and speak and as we all walk in the room and as we each
16 drive cars, there's a modicum of discretion we all exercise. So
17 far as a special governmental function of merely driving on the
18 highway from point A to point B, that's not the type of activity
19 which is a specific governmental function which government
20 reserves unto itself as opposed to others.

21 If we look closely at the Taylor case,
22 we see that activity occurring at the curb. If we look at other
23 governmental cases such as when the sheriff has been driving
24 around and he's been serving process, boy, if that's not
25 reserved for the government, I don't know what is. The process,

1 to make the pun, of serving process. But, indeed, the Supreme
2 Court said that there comes a time when he is just driving.
3 There comes a time when the school bus -- that bus was driving,
4 I believe, elderly folks to a recreational event. They said
5 that -- and I don't want to mix my facts -- but that bus is not
6 a recreational facility. They are just driving. The snowplow
7 case was an emergency. The snowplow was in Hampton. It was
8 snow. It was ice. I would say that the Court stretched it a
9 bit, but it opined that the driver exercised discretion to clean
10 this street first or not the next. It was that special
11 emergency snow and ice situation. That's different from merely
12 driving a garbage truck. This is not the exercise of a
13 governmental function, merely driving on the roads. If that be
14 true, then the city would try to hold up a shield to any
15 activity on the highways period. Sovereign immunity is a
16 shield. Sovereign immunity is a special thing. I don't have
17 it. The city, the government, has it. We have to be careful
18 how we extend it.

19 As to the statutory immunity, we would
20 concede, for the purpose of the argument, that certainly the
21 Coliseum is a recreational facility as defined in the statute.

22 THE COURT: Let me go back. Are you
23 agreeing or not agreeing that the trash or refuse collection is
24 governmental?

25 MR. HORNSBY: Not all elements.

1 THE COURT: Not all elements. What
2 elements would not be --

3 MR. HORNSBY: Well, I would ask the
4 question is the garbage truck through with its pickup?

5 THE COURT: As I understand it, he was
6 on his way with loaded trash to the steam plant or wherever it
7 is that they burn it.

8 MR. HORNSBY: No question about that.
9 We would suggest that loading and unloading the truck is --
10 that's what garbage collection and delivery, shall we say, is
11 all about. Merely driving the truck from point A to point B,
12 there's nothing special about that at all. Trucks are driven
13 all day long. To say that mere driving is a protected
14 governmental function --

15 THE COURT: I understand that's your
16 position. I just want to make sure I understand your rationale.

17 MR. HORNSBY: The reason for that,
18 Your Honor, is simple. We look at the case where the sheriff in
19 the brown shirt with the gun in the brown car is driving a
20 city-owned vehicle, doing city-owned things. There comes a
21 point in time when his activity out there on the highway is not
22 a governmental function, although he smells, acts, tastes and
23 breaths in all ways governmental. There comes a time when his
24 mere driving is simply that, mere driving, not the exercise of
25 his governmental function.

1 In the snowplow case we talked about
2 the emergency, the exigent circumstances there. In the cases we
3 have cited in our brief, the Courts have taken the opportunity
4 to parse the activity and to determine which elements of it are
5 governmental and which are not.

6 THE COURT: You would agree then that
7 the trash collector picking up the trash is governmental?

8 MR. HORNSBY: I would contend as I
9 understand the cases -- and I haven't found one directly on
10 point -- that if something occurs which injures a party in the
11 act of picking up the trash, as did in the Taylor case, then
12 that activity, according to the Court, was protected.

13 THE COURT: Then you would argue that
14 actually delivering the trash to wherever it has to be disposed
15 of would be different?

16 MR. HORNSBY: That's just mere
17 driving. We can parse that activity as did the Court in the
18 other cases. The Court has done that for us already. It's
19 right and proper to look at the elements of the activity and
20 when governmental function stops. Mere ministerial activity --
21 the word ministerial is used throughout. I have used mere
22 driving. They have another term. Acts which don't exercise any
23 discretion, acts which don't exercise the government's function
24 are not protected.

25 Should I go to statutory immunity?

1 THE COURT: Go ahead. I just want to
2 make sure I understand your position. I believe I do.

3 MR. HORNSBY: Yes, sir. Again, I
4 think we have elucidated that perhaps in our brief and I will
5 look forward to Counsel's reply.

6 The statutory immunity speaks of
7 protection for the operation of a recreational facility. We
8 have conceded --

9 THE COURT: One more questin. Back to
10 the common law. In that instance -- and I guess this was not
11 adduced, but I think the Court can take judicial notice that
12 there is a landfill in virtually every city. We do have a
13 landfill in the City of Hampton. Trash has to be deposited. If
14 a person is taking -- if a trash collector takes trash from a
15 neighborhood and then transports it to the landfill, at what
16 point under your analysis -- are you saying when they leave the
17 community they become liable for their actions and they are not
18 protected on their way to the landfill?

19 MR. HORNSBY: Certainly there was
20 testimony adduced that it's in the City of Hampton and that it
21 is -- that's where the trash goes. We are agreeing on that.
22 The act of --

23 THE COURT: This is not the landfill.
24 Let's say trash is being collected on the street of a
25 residential neighborhood. Trash has to be delivered somewhere

1 for argument's sake. At what point in time does the immunity
2 stop under your assessment?

3 MR. HORNSBY: As the Court has parsed
4 the activities of the sheriffs and the school buses and other
5 activities, it's right and proper to parse the activities of the
6 garbage truck. As we go from Residence 1 to Residence 2 and
7 pick the trash up and go to the next house, that is all the
8 collecting of trash. I would suggest that if anything occurs
9 during the exercise of those elements of the function, then
10 that's protected under immunity. But there comes a time when
11 the truck drives out of the subdivision and gets on the roads of
12 the Commonwealth and it's merely driving next to the pizza
13 delivery truck or it's merely driving next to you or me. It's
14 just driving from point A to point B.

15 THE COURT: But they are going to
16 dispose of it. When they don't have trash and they make a stop
17 or they go somewhere different from on their way to the trash
18 delivery, the question is when are they protected and when are
19 they not protected en route?

20 MR. HORNSBY: I would suggest that
21 under the earlier cases it's at such time as they cease picking
22 up from residence to residence. They finish that last residence
23 and drive away from it. Now they are merely delivering. It
24 could be argued, Your Honor, on the spectrum of when -- if
25 everything a garbage truck does at all times, if it's always,

1 always, always a protected activity -- and I think the cases say
2 that's not true -- but as the Court suggested, if it's empty or
3 let's say an employee gets to drive the garbage truck home, if
4 that is not a protected activity --

5 THE COURT: I don't think that would
6 be. I think Mr. Boester has conceded that.

7 MR. HORNSBY: Therefore, it's right
8 and proper to say if that activity of the garbage truck is not
9 protected, then what other activities of the garbage truck might
10 not be protected? I'm suggesting that what the Court has said
11 in earlier cases is picking up garbage is protected. Then when
12 we get to delivering it itself, you hit a switch and it dumps.
13 That's our position. The cases and the doctrines of immunity
14 from a public policy perspective do not intend to cover garbage
15 trucks as immune in all circumstances and all cases.

16 THE COURT: I'm not going to stop you.
17 You can go to statutory.

18 MR. HORNSBY: Yes, sir. Just to
19 conclude, if we put this shroud around everything the garbage
20 truck does between pickup and delivery, it's simply not fair to
21 the citizens of the Commonwealth when they are merely driving.
22 We can parse that activity. We can turn the clock on and off.
23 We can turn the immunity on and off. The Courts have done that
24 regularly.

25 As to statutory immunity --

1 THE COURT: Before we leave it, what
2 the Defendants are asking me to do is to not do that. They are
3 asking me to say or conclude that he was, in fact, discharging
4 his governmental mission of going directly to the steam plant to
5 dispose of the trash.

6 MR. HORNSBY: Yes, sir. I think
7 Counsel is saying that he's picking up the garbage and he's in
8 the act of delivering it and all of that road in between is
9 protected. That's what they are saying. We are saying that's
10 not true. We turn the immunity off and on as the Court has done
11 it.

12 THE COURT: I understand. Go ahead.

13 MR. HORNSBY: Statutory immunity, the
14 statute provides for protection of recreational facilities. It
15 really talks about the activity within the four corners of the
16 facility itself. The case on the orchestra pit where the young
17 boy at Chrysler Hall fell into the pit, he was injured. The
18 Court said that the city was immune because the operation and
19 the maintenance of that recreational facility at Chrysler Hall
20 protects the city from injury. We have no quarrel with that.
21 Here we have a garbage truck driving miles from the facility
22 itself and what Counsel is attempting to do is to extend that
23 recreational facility protection way down the road and have a
24 moveable shroud, shall we say, covering the garbage truck. It's
25 the facility and the activity at the facility that is protected

1 and, again, not mere driving on the road. If we were to extend
2 that logically, then we would say that every activity which is
3 indirectly or in any way related -- if we can in any way touch
4 the Coliseum, then we extend those tentacles of protection to
5 all activities which in any way touch the Coliseum. I don't
6 think that's what the statutory intention is. I believe that we
7 must strictly construe that statute to find that there is only
8 limited circumstances under which immunity, shall we say, in
9 that statute is performed.

10 In the cases decided on that, there is
11 no case which I can find, as diligent as I might be, to find
12 where protection for injury of a recreational facility has been
13 extended beyond the facility. All the protections are at the
14 four corners of the facility itself. Secondly, there is the
15 case where I think the elderly folks were in a bus. They were
16 injured on the bus. The Court said that bus is not a
17 recreational facility. We might say, gracious me, they were
18 driving to or from a recreational facility. The Court says
19 that's not the issue. The bus is not a recreational facility.
20 As I've said tongue in cheek, I trust the garbage truck is not a
21 recreational facility. That's not the facility. It has to be
22 the Hampton Roads Coliseum that's the facility. What in the
23 world does this activity way over here -- how is that activity
24 to be protected by statute? If we extend the logic of the
25 Courts that far, then anything directly or indirectly touched --

1 the city would love to have that protection but that's not what
2 the statute should construe.

3 As to the employee immunity, with all
4 due deference to the Defendant, we have an employee here who is
5 not one who exercises certain discretion as would be seen in the
6 cases. He doesn't write checks. I have suggested, with all due
7 deference, that he is merely a skilled laborer in what he does.
8 Nobody tells him how to do it. He just has to set up the chairs
9 and put the tables up. Is there any discretion at all?
10 Obviously there is. There's discretion as to what door I go out
11 here. There's always an exercise of some scant discretion in
12 any activities which we undertake. But to say that this is an
13 individual whose discretionary activities rise to the level as
14 set in the statute of an officer of the city or an agent -- and
15 as I've suggested, In pari materia. Those birds of a feather
16 must flock together. We have to have a department head perhaps
17 as Mr. Tsao who is an agent of the city who is ordering and
18 purchasing and writing checks and saying you go here and says to
19 a man go and he goes and says to a man come and he comes. Mr.
20 Harland has no supervisory performance. They say here's the
21 paper. Go do it. Just please get it set up in time. Just
22 please clean it up in time. That is not the kind of discretion
23 that would afford a sovereign immunity protection. That is mere
24 ministerial activity. Gracious me, he is just driving a truck.
25 He is the pizza man for garbage. He's just making the delivery.

1 There's really no discretion involved in that. Was there
2 discretion in the snowplow case? Absolutely. That was an
3 exigent circumstance, a governmental function in keeping the
4 highways clean. Do we have that in this mere driving? No, we
5 don't. We don't have that from this employee. To say that
6 driving in all respects is protected as a pursuit of the
7 government's function is to illogically extend the protections
8 of sovereign immunity.

9 As we've perhaps conceded, if he was
10 merely driving from the steam plant home, that's an activity
11 that perhaps is not covered as immune. Well, why wouldn't that
12 be any different from driving the truck to the facility? Unless
13 you're going to leave it there and take your own car, he is
14 driving back. Why isn't driving back to any spot -- if he's
15 hurt, I think it's going to be a Worker's Comp claim perhaps.
16 He's doing something within the scope of his employment. I
17 don't think we can have our cake and eat it too and just find
18 that there's immunity going but not coming. There are many
19 instances when I've suggested the immunity shield comes up and
20 goes down.

21 Finally, as to collateral estoppel, we
22 give pause for a moment to examine this because this is not an
23 individual who has the right under Virginia law to bifurcate the
24 personal injury and the property damage. This is the
25 government, that same government who would have us say, hey,

1 hey, sorry -- for purposes of argument -- that we ran into you
2 and you're hurt. Sorry I was negligent -- and I'm not trying to
3 be flip -- but we are not responsible for that because we are
4 the government. By the same token, that same government says,
5 well, we are not collaterally-estopped. We can settle with this
6 person and not that person, same accident, same people involved.
7 I think the proffer -- I think the evidence as we have it is
8 here's another vehicle, the same accident. The city has paid
9 that but not the other. We all discriminate on a daily basis.
10 We are discriminated on the basis of price. I can't afford the
11 Rolls Royce and so I am discriminated on that basis. But the
12 government has to give equal protection of the laws to its
13 citizens, that same government that seeks to enjoy sovereign
14 immunity. For the government to say I'm going to pay a person
15 injured in the accident but not another person injured in the
16 same accident, same transaction, same parties, is incongruous.
17 They should be collaterally-estopped to deny that they are
18 liable. Having paid, that's an admission. Therefore, liability
19 should not be an issue and sovereign immunity should not be able
20 to attach. That's our argument. Of course, we have the motion
21 filed for gross negligence.

22 THE COURT: I have the brief.

23 MR. BOESTER: If I could just respond
24 briefly. On the governmental immunity, I think Mr. Hornsby is
25 muddying the water considerably. The Heider against Clemons case

1 which he cites completely supports the City's position.

2 THE COURT: What case?

3 MR. BOESTER: Heider against Clemons.

4 That's the one where the deputy sheriff is driving and he is
5 just driving around and gets in an accident. The Court says in
6 that case had he been serving a summons while he got in the
7 accident he would be immune. If he's just out driving around,
8 then he's not immune. That's the equivalent of us taking the
9 trash out there. That's where the line has been drawn. Mr.
10 Hornsby continually says there's got to be some line somewhere.
11 Well, that's where it's been drawn. We're doing the activity
12 while this happens. We are like the deputy sheriff who is out
13 serving the summons. We are like the school bus driver in Wynn
14 against Gandy had she had a bus loaded with students. We are
15 like the snowplow driver clearing the streets.

16 As far as whether or not you have to
17 be an employee who is a department head like Mr. Tsao to be
18 immune, that's not true. Immunity has attached to the lowest
19 level police officers who are out doing a hot pursuit. Immunity
20 attached to a snowplow driver and the only decision he was
21 making with any discretion at all is should I plow this street
22 first or that street first? Mr. Harland has light years more
23 discretion than that. He's got to set up and take down a
24 building that houses as many as fourteen thousand people for
25 shows and decide how to do that and he's doing that using his

1 fourteen years' experience.

2 Beyond that, there are no cases that
3 talk about when cities are immune statutorily on the maintenance
4 of a building. Here the magic phrase in the statute that
5 operates this morning is that the city is immune in the
6 operation and maintenance of recreational facilities. Here we
7 are in the process of maintaining our building. There is no way
8 that we can maintain our building without getting rid of vast
9 amounts of trash that accumulate following shows. As Mr. Tsao
10 testified, we had had, if memory serves, in the area of thirty
11 thousand people in the building previous to that who had
12 generated a lot of trash that was being taken out. If our
13 maintenance somehow stops when the truck leaves the elephant
14 doors, we are in serious trouble. That just can't be. The
15 logic of that statute is to allow municipalities to run
16 recreational facilities without being immune for simple
17 negligence. If we can't take our trash to the steam plant and
18 be immune, we can't maintain the building. The building cannot
19 be operated. I don't think there's any question at all that the
20 city is immune as is the employee on both of the arguments that
21 we've made, governmental immunity by common law and statutory
22 immunity.

23 I will submit a reply brief to Mr.
24 Hornsby and I would ask the Court to rule that neither the city
25 nor the employee are subject to suit in this case based on

1 simple negligence.

2 THE COURT: All right. I will be glad
3 to do that as soon as I --

4 MR. BOESTER: I can have that within a
5 week, Your Honor.

6 THE COURT: Okay. Give me a week to
7 ten days after that.

8 MR. BOESTER: Yes, sir.

9 THE COURT: I will do a letter
10 opinion. I don't mind doing that. I will be glad to handle it
11 that way. I don't want you to have to come back just for me to
12 tell you what my decision is.

13 MR. HORNSBY: Coming back is fine or
14 if the Court wishes additional argument or research, we would
15 certainly be willing to do that.

16 THE COURT: I don't need any more. If
17 there's anything you want to send me, that's fine, but I think I
18 have enough to study here. Give me a week to ten days after I
19 get your --

20 MR. BOESTER: I will have it in in
21 seven days.

22 THE COURT: I would like -- could I
23 get the transcript of today?

24 MR. BOESTER: Yes. We will order the
25 transcript and provide you with a copy.

1 THE COURT: Okay. Of course, with all
2 that, I would say a week to ten days after that, after you get
3 your brief in and the transcript. That would be a big help to
4 me.

5 Thank y'all for coming.

6 MR. BOESTER: Thank you, Judge.

7 THE COURT: Have a good day.

8
9 (The Proceedings were concluded.)

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VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON; PART IV

GLADYS JANET DECKER,

Plaintiff,

v.

LAW NO. 98-671

THOMAS D. HARLAND, II

and

CITY OF HAMPTON,

Defendants,

JAMES P. BOINAKER
CLERK OF THE CIRCUIT COURT
98 NOV -3 PM 4:23
EX# _____ PG# _____
CITY OF HAMPTON, VA.

DEFENDANTS' RESPONSIVE MEMORANDUM

The defendants, by counsel, have moved this Court to sustain their pleas of governmental and statutory immunity. The defendants respectfully submit that they can be liable in this case only on the basis of gross, wilful or wanton negligence. Thus, the defendants move the Court to strike the plaintiff's claim for "simple negligence."

ARGUMENT

I. THE DISPOSAL OF GARBAGE BY A MUNICIPALITY IS A GOVERNMENTAL FUNCTION.

The Virginia Supreme Court has held on numerous occasions that the disposal of garbage is a governmental function. The plaintiff argues that municipalities are immune while actually picking up trash, but not while they are transporting it to a disposal site.

There is no logical or legal justification for that position.

The plaintiff has cited *Heider v. Clemons*, 241 Va. 143 (1990) and *Wynn v. Gandy*, 170 Va. 590 (1938) in support of her position that mere driving is not an activity which is governmental in nature. However, it should be noted that in *Heider* the involved Deputy Sheriff had completed his duty (serving a summons) and was in traffic just as any other vehicle. Likewise, in *Wynn* there were not children on the school bus at the time the accident occurred.

The Supreme Court has found driving to be a governmental activity on a variety of occasions. They include; *Stanfield v. Peregoy*, 245 Va. 339 (1993) (snow plow operator who was cleaning the streets after a storm); *Colby v. Boyden*, 241 Va. 125 (1991) (city police officer pursuing a fleeing lawbreaker); *National R.R. Passenger Corp. v. Catlett Fire Co.*, 241 Va. 402 (1991) (fire truck involved in accident with train); *Edwards v. City of Portsmouth*, 237 Va. 167 (1989) (operation of ambulance service); *Ashbury v. Norfolk*, 152 Va. 278 (1929) (plaintiff struck by horses pulling city garbage truck).

In this case the City of Hampton, through its employee Thomas D. Harlan, II, was in the process of disposing of garbage when the accident occurred. Garbage disposal by a municipality must involve the operation of vehicles to achieve a governmental purpose to the mutual benefit of all citizens. This activity constitutes a governmental function and, as such, the plaintiff may not recover for acts of simple negligence.

It is respectfully submitted that the City of Hampton is immune in this matter as to claims of simple negligence.

II. THOMAS D. HARLAN, II, IS ENTITLED TO IMMUNITY FROM ACTS OF SIMPLE NEGLIGENCE.

If an individual is employed by an immune governmental entity then, in a proper case, that individual will be eligible for the protection afforded by the doctrine. In *Messina v. Burden*, 228 Va. 301 (1984), the Court set forth the reasons for the existence of the doctrine of sovereign immunity. They include;

- (1) the protection of public purse; and
- (2) officials who are made fearful while carrying out public duties; and
- (3) public services which are threatened because citizens might be reluctant to hold jobs; and
- (4) orderly administration of government.

In *Messina* the building superintendent of Tidewater Community College was sued for an alleged negligent injury to an actor caused by a fall on a stairway behind the stage of the college theater. The employee was held to be immune.

The plaintiff has correctly stated that the Supreme Court has announced a four factor test to determine whether an employee is immune along with a municipality in situations such as the one in the case at Bar. In *James v. Jane*, 221 Va. 43 (1980) the factors to be considered were set forth as follows:

- (1) the nature of the function performed by the employee:
- (2) the extent of the governmental unit's interest and involvement in the function:
- (3) the degree of control and direction exercised by the governmental unit over the employee:
- (4) whether the act complained of involved the use of judgment and discretion.

In the case at bar the involved employee was the building mechanic for the Hampton Coliseum. His substantial duties included the setting up and taking down of events at a facility which holds as many as 14,000 people. He was vested with the full discretion to decide in what manner and when that job was to be done. Significantly, on the evening in question he was the only person in the building and was setting up for an event to be conducted the next day. As a part of his responsibilities he was in the process of cleaning the building. This job included the removal of trash from the facility.

Thomas D. Harlan, II, was clearly imbued with the type of discretion contemplated by *James*, and, as such, is entitled to governmental immunity.

III. THE DEFENDANTS ARE ENTITLED TO STATUTORY IMMUNITY IN THE OPERATION OF THE HAMPTON COLISEUM.

Section 15.2-1809 of the Code of Virginia of 1950, as amended, states as follows;

No city or town which operates any park, recreational facility or playground shall be liable in any civil action or proceeding for damages resulting from any injury to the person or from a loss of or damage to the property of any person caused by any act or omission constituting ordinary negligence on the part of any officer or agent of such city or town in the *maintenance or operation of any such park, recreational facility or playground* (emphasis supplied). Every such city or town shall, however, be liable in damages for the gross negligence of any of its officers or agents in the maintenance or operation of any such park, recreational facility or playground.

There is no question that the Hampton Coliseum is a recreational facility. The Virginia Supreme Court has applied this statute in favor of Chrysler Hall, *Frazier v. City of Norfolk*, 234 Va. 388 (1987). The Hampton Coliseum is an equivalent facility, only substantially larger.

The issue in this case is whether the disposal of garbage generated by the Hampton Coliseum was being done in the "maintenance or operation" of the building. Given the fact that the Hampton Coliseum could not operate without the removal of the vast amounts of trash generated by those who attend the myriad of events held there, the resolution of that issue is axiomatic. There is no question that the activity which is the basis of the case at bar was one involving the maintenance and operation of the Hampton Coliseum.

To impose liability for simple negligence on the City of Hampton and the employee who was carrying out the favored endeavor would violate both the letter and spirit of Section 15.2-1809 of the Code.

The plaintiff has cited *DePriest v. Pearson*, 239 Va. 134 (1990) in support of her position on this issue. However, the opinion is inapposite. In *DePriest*, the Henrico County Parks and Recreation Department sponsored a shopping trip for senior citizens and provided transportation. The involved bus became involved in an accident. The Court correctly held that this activity did not amount to the maintenance or operation of a recreational facility. In fact, no building of any type was involved in this fact pattern.

However, unlike *DePriest*, the case at bar directly concerns a recreational facility in both its operational and maintenance modes.

The defendants respectfully submit that they are entitled to statutory immunity in this matter.

IV. THE DOCTRINE OF ESTOPPEL HAS NO APPLICATION TO THIS CASE.

The elements required for the application of the doctrine of equitable estoppel are well founded, *Cowan v. Psychiatric Assocs.*, 239 Va. 59 (1990);

- (1) A knowingly false representation or concealment of material facts; and
- (2) Reliance; and
- (3) Change of position; and
- (4) Detriment.

It is obvious that these factors do not exist in this case.

Likewise, collateral estoppel does not apply to this situation. The elements of collateral estoppel are equally well determined, *Angstadt v. Atlantic Mutual Ins. Co.*, 249 Va. 444 (1995);

The doctrine of collateral estoppel precludes parties to a prior action and their privies from litigating in a subsequent action any factual issue that actually was litigated and was essential to a valid, final judgment in the prior action. *Glasco v. Ballard*, 249 Va. 61 (1995); *Bates v. Devers*, 214 Va. 667 (1974). For collateral estoppel to apply, the following requirements must be met: (1) the parties to the prior and subsequent proceedings, or their privies, must be the same, (2) the factual issue sought to be litigated actually must have been litigated in the prior action, (3) the factual issue must have been essential to the judgment in the prior proceeding, and (4) the prior action must have resulted in a judgment that is valid, final, and against the party against whom the doctrine is sought to be applied. *Glasco*, 249 Va. at 64; *Bates*, 214 Va. at 671. In addition to these elements, there also must be "mutuality," i.e., a litigant cannot invoke collateral estoppel unless he would have been bound had the litigation of the issue in the prior action reached the opposite result. *Hampton Roads San. Dist. v. City of Va. Beach*, 240 Va. 209 (1990).

Neither the fact that the City of Hampton has settled a claim made by another driver involved in the same accident nor the payment of the plaintiff's property damage claim serves to invoke collateral estoppel.

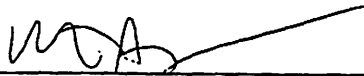
CONCLUSION

It is respectfully requested that the Court find that both the City of Hampton and its employee are immune from claims of simple negligence based on both governmental and statutory immunity.

It is further requested that the Court permit the plaintiff to proceed only on claims of gross, wilful or wanton negligence.

THOMAS D. HARLAN, II and CITY OF HAMPTON


By


Counsel

CERTIFICATE

I certify that I mailed a copy of the foregoing pleading to the following person on November 3, 1998;

Douglas L. Hornsby, Esq.
10234 Warwick Blvd.
Newport News, Va. 23601


Robert A. Boester, Esq.

ROBERT A. BOESTER, Esq.
Hawkins, Burcher & Boester, P.C.
One East Queen's Way - Second Floor
P. O. Drawer A
Hampton, VA 23669

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON

**GLADYS JANET DECKER,
PLAINTIFF,**

V.

**AT LAW NO. 98-671
PART: IV**

**THOMAS D. HARLAN, II
Individually, and as an
employee of the City of Hampton**

and,

**CITY OF HAMPTON
DEFENDANTS.**

AFFIDAVIT OF PLAINTIFF

NOW COMES the undersigned Plaintiff in the above styled cause and for her affidavit to supplement the hearing *ore tenus* held before this Honorable Court on Wednesday, October 28, 1998, and says as follows:

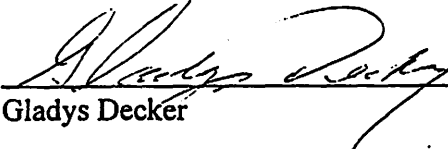
1. I was present for a portion of the hearing held before the Court on the Defendants Plea of Sovereign Immunity, but due my emotional response to being in Court and hearing part of the live testimony by the Defendants to exculpate themselves from liability on their plea of sovereign immunity, I was overwhelmed and thus unable to remain in the courtroom. I had to leave.
2. I intended to testify briefly on my own behalf to offer the following evidence with respect to the issues raised in Plaintiff's counsel's brief on collateral estoppel, and now proffer the following:
 - a. I am the Plaintiff in the above styled case
 - b. The vehicle in which I was driving was damaged from the collision with the vehicle operated by the Defendant.
 - c. The City of Hampton paid me for the property damages to the vehicle.
 - d. I can identify Tony Jones, who was in the courtroom on October 28th as the driver

of the other vehicle damaged when my van was pushed forward into his vehicle as a result of being impacted by the vehicle driven by the Defendant.

3. Further, on an issue of fact as to the weather the Defendant Harlan was operating the garbage truck while exercising an alleged governmental function, I intended to testify, and now proffer the following:
 - a. The responses to Interrogatories by the Defendant Harlan indicate he resides at 309 Cockletown Road, Yorktown, VA 23692.
 - b. As I am now familiar with the Defendant Harlan's address, his home was "straight ahead" on (highway/state route) from the place of the accident.
 - c. As I am now familiar with the location of the "Steam Plant" where the Defendant Harlan alleges he was headed in the garbage truck, to get from the scene of the accident to the steam plant, one would logically turn RIGHT at the intersection of MaGruder and Semple Farm Road, the place of the accident where I was stopped at the light, in the right lane, headed north, behind driver Tony Jones.
 - d. On information and belief, it is logical and should be considered as factual evidence for consideration by the judge that if the Defendant Harlan was truly intending to travel to the steam plant, then he would have gotten in the RIGHT turn lane instead of in the straight ahead lane, as if going to his house. Thus, there is a credibility issue for the Court's consideration as to whether at the time of the impact Harlan was indeed headed to the Steam Plant or home.
 - e. The defendant Harlan never made any attempt to speak with me at the scene if the accident or afterwards. He never enquired as to my well being, my health, or that of my nine year old son who was also injured in the accident.
4. The Court has not made a ruling on the Defendants' Plea of Sovereign Immunity.
5. The Court has requested but, at the time of the filing of this Affidavit, has not received a transcript of the ore tenus testimony at the hearing.
6. There is no prejudice in admitting this Affidavit as evidence, first, for the factors set forth above, for judicial economy, and finally, the undersigned will submit herself, at the Defendants' and the Courts' convenience, for any cross examination concerning any of

the foregoing statements.

Wherefore, your Plaintiff, undersigned, prays the foregoing affidavit be admitted as a supplement to the evidence adduced ore tenus by the parties before the Honorable Judge at the hearing on October 28, 1998.


Gladys Decker

I certify that Gladys Decker appeared before me on November 9, 1998 and being first duly sworn by me as to the truth of the foregoing affidavit, did thereafter execute this Affidavit before me.


Notary

PWC:\WPDOCS\PINDECKER\SUP_AFFI.001

my commission expires: 5/31/2000

Filed Nov. 9, 1999



City of Hampton

OLDEST CONTINUOUS ENGLISH SPEAKING SETTLEMENT IN AMERICA

Post Office Box 40
Hampton, Virginia 23669



Circuit Court of the City of Hampton

WALTER J. FORD
JUDGE

WILFORD TAYLOR, JR.
JUDGE

Eighth Judicial Circuit of Virginia

CHRISTOPHER W. HUTTON
JUDGE

WILLIAM C. ANDREWS, III
JUDGE

January 5, 1999

Douglas L. Hornsby, Esquire
Shuttleworth, Ruloff, and Giordano, P.C.
10234 Warwick Boulevard
Newport News, VA 23601

Robert A. Boester, Esquire
Hawkins, Burcher, and Boester, P.C.
1 East Queen's Way, Second Floor
Post Office Drawer A
Hampton, VA. 23669

**Re: Gladys Janet Decker v Thomas D. Harland, II and the City of Hampton
Law No. 98-671**

Dear Counsel:

This dispute concerns a vehicle accident between Plaintiff, Gladys Janet Decker (Mrs. Decker) and defendant, Thomas D. Harland, II (Mr. Harland), an employee for defendant, City of Hampton (Hampton). Mrs. Decker requests damages alleging Mr. Harland's negligence. Mr. Harland and Hampton contend that they are immune because Mr. Harland was removing garbage. I agree and award judgement for Mr. Harland and Hampton.

The pertinent facts are as follows: Hampton owns and operates the Hampton Coliseum primarily for concerts, family shows, sports events, conventions, trade and consumer shows, and meetings. Mr. Harland is an employee of the Hampton Coliseum. He is a building mechanic responsible for taking down events and removing waste. On October 29, 1996, Mr. Harland was delivering trash to the steam plant where garbage is taken and burned. While driving this trash truck en route to the steam plant, Mr. Harland struck Mrs. Decker's vehicle on Magruder Boulevard.

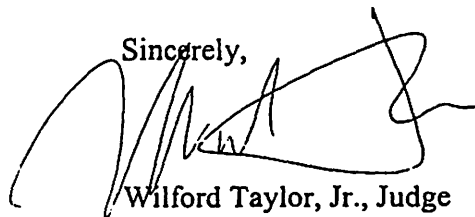
The issue in this case is whether Mr. Harland and Hampton are immune from this suit. I conclude that are both immune. Hampton is immune from tort actions when it conducts governmental functions. Garbage removal is a governmental function, under common law. In addition, Section 15.2-1809 of the Code of Virginia provides that cities are immune from simple negligence in the operation of recreational facilities. The Hampton Coliseum is a recreational facility. Applying both common law and statutory provisions to these facts make Hampton

Douglas L. Hornsby, Esquire
Robert A. Boester, Esquire
January 5, 1999
Page 2

immune from this law action.

Mr. Harland is immune because he was the only building mechanic on duty that evening charged with removing the trash in preparation for the next event. Mr. Harland followed standard operating procedure when he got into the truck and departed the Hampton Coliseum to the steam plant where the trash would be deposited and burned. This job was performed pursuant to Hampton's governmental mission of garbage disposal. Mr. Harland was vested with the same immunity afforded to Hampton.

In accordance with this letter opinion judgement is entered in behalf of Mr. Harland and Hampton. Counsel for defendants is requested to prepare the Order.

Sincerely,

Wilford Taylor, Jr., Judge

WT/nm

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON; PART IV

GLADYS JANET DECKER,

Plaintiff,

v.

LAW NO. 98-671

THOMAS D. HARLAND, II

and

CITY OF HAMPTON,

Defendants,

ORDER

The defendants, by counsel, have moved the Court to sustain their pleas of governmental and statutory immunity in this matter. It is noted that the correct name of the individual defendant is Thomas D. Harlan, II.

The Court has written a letter opinion sustaining the pleas made by the defendants and it is incorporated by reference as a part of this Order.

The plaintiff may proceed against the defendants on the basis of gross negligence. The Court finds that both defendants are immune as to claims of simple negligence for the reasons set forth in the letter opinion.

ENTER

Judge

DATE

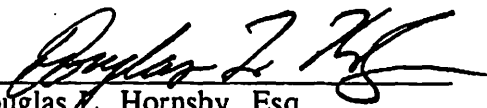
, 1999

I ASK FOR THIS:



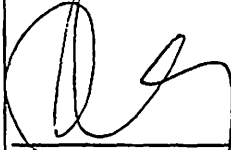
Robert A. Boester, Esq.
Attorney for Defendants

HAVE SEEN AND OBJECTED TO:



Douglas L. Hornsby, Esq.
Attorney for Plaintiff

HAVE SEEN:



Robert B. Rigney, Esq.
Attorney for Liberty Mutual Insurance Company

ROBERT A. BOESTER, Esq.
Hawkins, Burcher & Boester, P.C.
One East Queen's Way - Second Floor
P. O. Drawer A
Hampton, VA 23669

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF HAMPTON CLERK
CITY OF VIRGINIA

GLADYS JANET DECKER,

Plaintiff,

vs.

THOMAS D. HARLAND, II

and

CITY OF HAMPTON,

Defendants.

JUN 01 1999

AT LAW NO. 98-671
PART IV

ORIGINAL

DEPOSITION UPON ORAL EXAMINATION OF
THOMAS D. HARLAN, II

October 14, 1998 - 11:00 a.m.

Hampton, Virginia

APPEARANCES: Shuttleworth, Ruloff & Giordano, P.C.

By: Douglas L. Hornsby, Esquire
Counsel for the Plaintiff

Hawkins, Burcher & Boester, P.C.

By: Robert A. Boester, Esquire
Counsel for the Defendants

ALSO PRESENT: Joe Tsao, Director
Hampton Coliseum

REPORTED BY: Gale W. Murphy

I N D E X

WITNESS

	Examination by:	Page
Thomas D. Harlan, II	Mr. Hornsby	3
	Mr. Boester	34

1 Deposition upon oral examination of
2 THOMAS D. HARLAN, II, taken before Gale W. Murphy; a
3 Notary Public in and for the Commonwealth of Virginia
4 at Large, pursuant to notice and agreement, commencing
5 at 11:00 a.m. on October 14, 1998, in the law offices
6 of Hawkins, Burcher & Boester, P.C., One East Queens
7 Way, Second Floor, Hampton, Virginia; and this in
8 accordance with the Rules of the Supreme Court of
9 Virginia, 1950, as amended.

10
11 -----oOo-----

12
13 THOMAS D. HARLAN, II, called as a
14 witness on discovery, having been first duly sworn,
15 was examined and testified as follows:

16
17 EXAMINATION

18
19 BY MR. HORNSBY:

20 Q Mr. Harlan, my name is Doug Hornsby.
21 I'm an attorney and I represent the plaintiff, Gladys
22 Decker, in an action filed against yourself and the
23 City, and I'm going to ask you some questions
24 concerning that accident.

25 If there is anything you don't

107

1 understand, if you would please ask me to repeat it.
2 I'm going to rely on your responses and I'm going to
3 presume that if you answer a question, that you've
4 understood it. Is that okay?

5 A Yes.

6 Q All right. For the record, as they
7 say, tell us your full name with no "D" on the end.

8 A Pardon?

9 Q Tell us your name.

10 A Thomas D. Harlan.

11 Q Okay. And it's H-A-R-L-A-N?

12 A Yes.

13 Q And by whom were you employed at the
14 time of this accident which was back in '96, I
15 believe?

16 A The City of Hampton.

17 Q All right. Now, specifically when you
18 get a paycheck, who is that check from?

19 A City of Hampton.

20 Q Is it from any other entity of the
21 city, as a certain department or is it just a city
22 check?

23 A It's just a city check. City of
24 Hampton.

25 Q And in what capacity were you employed

1 at that time? All of my questions are with respect to
2 the time frame on the occurrence of the accident.

3 MR. BOESTER: Nothing has changed.

4 MR. HORNSBY: Oh, okay.

5
6 BY MR. HORNSBY:

7 Q So how were you employed by the City of
8 Hampton?

9 A As a building mechanic.

10 Q What does a building mechanic do?

11 A Looks after the physical plan of the
12 Coliseum. Heating; air conditioning.

13 Q Okay.

14 A To make sure the building is ready and
15 acceptable for the events to come in and patrons to
16 use our building.

17 Q Is that the only facility you work in?

18 A Yes.

19 Q So when you're working for the city,
20 it's always at the Hampton Coliseum?

21 A Yes, it is.

22 Q All right. Does most of your activity
23 take place within the perimeter, shall we say, of the
24 Coliseum property?

25 A For the most part, yes.

1 Q What, if any, activities take place
2 outside of the perimeter of the parking lot and the
3 building itself?

4 A Generally on an average day nothing
5 other than to pick up fuel on occasion.

6 Q In what kind of vehicle do you pick up
7 fuel?

8 A In a pickup truck. A city pickup.

9 Q Do you have a commercial driver's
10 license?

11 A Yes, I do.

12 Q All right. You're wearing glasses
13 today and you had glasses mentioned, corrective
14 vision, on your interrogatories. Were you wearing
15 glasses that day?

16 A Yes, I was.

17 Q How can you see without glasses? I
18 mean, how was your vision uncorrected?

19 A I have no idea. I mean, I can see, but
20 I have no way to answer that.

21 Q The truck you were driving was what we
22 might term a garbage truck; correct?

23 A Yes, it was.

24 Q Do you know what the weight of that
25 vehicle was?

1 A I don't have any idea.

2 Q Is it the standard garbage truck we've
3 seen in a residential setting?

4 A I believe so, yes.

5 Q Was it anything smaller with a Dixie
6 Dumpster on the back of it?

7 A No, not at all. A regular compactor.

8 Q This was a unit that you put trash in?
9 It compresses it; is that correct?

10 A Yes, it is.

11 Q And does the trash load from the rear
12 of the vehicle?

13 A Yes, it does.

14 Q On the day in question, did you observe
15 that specific truck you were driving in the accident,
16 did you observe it being loaded?

17 A Yes, I did.

18 Q And what type of materials were put in
19 it?

20 A Papers, residue left over, boxes and
21 what have you from a computer show that had been in
22 the building, and also part of some concert trash from
23 the day before.

24 Q No food?

25 A Not at that time, to my knowledge.

1 There may be some food in it. I'm not really aware.

2 Q Was it a full load?

3 A Yes, it was.

4 Q So just paper and paper products; is
5 that correct?

6 A There's also scraps, I'm sure, from the
7 concession stands and what have you, and alcohol
8 sales, beer sales and what have you.

9 Q All right. And when was the truck
10 loaded? What time of the day?

11 A I'm not really sure. I have no idea.
12 It was loaded when I realized -- when I seen it later
13 on that evening. I didn't start out to look at the
14 truck. It just came to my attention.

15 Q Sure. You came to work that day at
16 3:00?

17 A Yes, I did.

18 Q And that's your typical time for
19 reporting to work?

20 A Yes, it is.

21 Q Does that vary when you have an event
22 coming up? Do you come to work earlier or later if
23 there's an event to clean up an event or to get ready
24 for it?

25 A Not usually. Usually it's from 3:00 to

1 11:00 on a daily basis.

2 Q And how many days a week do you work?

3 A Five.

4 Q The same time -- the same five days
5 then as now?

6 A Yes.

7 Q So you got to work at 3:00?

8 A Yes, I did.

9 Q Do you recall the status of that truck
10 you later drove at the time you came to work at 3:00?

11 A Clarify "status," if you would.

12 Q Do you know where it was?

13 A Yes. It was out behind the Coliseum.

14 Q All right. Around the back where those
15 big doors are?

16 A Yes.

17 Q Was there anything in the truck when
18 you arrived at 3:00? In the trash part, we'll call
19 it.

20 A Yes. It was full of trash.

21 Q It had already been loaded?

22 A Yes.

23 Q How was it you know what was in the
24 truck? Did you look?

25 A Normal trash is -- normal trash. What

1 brought it to my attention was I went to check the
2 back of the building to see that everything was
3 cleared on the outside for the load-in of the show the
4 next day. And when I opened the back door, I got a
5 whiff of alcohol, trash, truck and what have you, and
6 that's how it came to my attention.

7 Q Okay.

8 A And I walked over and looked in it and
9 you could see cups, paper and all.

10 Q Are you the supervisor there or --

11 A No, I'm not.

12 MR. BOESTER: Tom, let Mr. Hornsby
13 finish his question before you answer it.

14 THE WITNESS: I'm sorry.

15 MR. BOESTER: That's all right.

16

17 BY MR. HORNSBY:

18 Q It's easier for her. To whom do you
19 report?

20 A Rick Myers.

21 Q Was he there that day?

22 A I believe he was, yes.

23 Q What did you do between the time you
24 arrived at 3:00 and when you got in the cab of the
25 truck to drive it? Tell me what you did that day, if

1 you recall.

2 A Went through the building, checked the
3 setup, tables, chairs, spaces, electrical
4 requirements, made sure cords were out, hallways were
5 cleared, everything was ready to accept the next day's
6 event.

7 Q And how long did it take to complete
8 those tasks you've just described?

9 A It's a varying amount of time. I
10 suppose it was three or four hours.

11 Q You can't recall specifically? You
12 just -- you're guessing that it was three or four
13 hours on that day?

14 A Yes. Somewhere in that -- as far as I
15 can tell.

16 Q You're guessing is based on the fact
17 that you've done that type of thing before?

18 A Yes.

19 Q How many times have you done it before?

20 A I've been doing it for fourteen years.

21 Q All right. More than ten?

22 A Yes.

23 Q When were you advised or did you come
24 to know that you were supposed to be driving that
25 truck later in the day?

1 A I wasn't advised by anyone. I made the
2 -- the decision was left up to me.

3 Q Was there anyone else that was supposed
4 to drive it?

5 A There is a person on the crew that it's
6 his job to deal with the garbage truck.

7 Q Okay. And why did that person not
8 drive the truck?

9 A That I have no idea.

10 Q All right.

11 A Well, they work in the daytime, but I
12 have no idea why it wasn't emptied.

13 Q Did somebody say "I want you to drive
14 the truck"?

15 A No, they did not.

16 Q When did you get into the truck to
17 drive it?

18 A I can't tell you a specific time.

19 Q Do you have dinner at work there?

20 A Not usually.

21 Q So you work from 3:00 to 11:00 with no
22 break?

23 A Usually I don't.

24 Q Do you catch a hot dog or something
25 like that?

1 A Not usually.

2 Q When did you leave the Coliseum that
3 night driving the truck, if you know?

4 A That I can't recall either.

5 Q When you did leave, was anybody in the
6 truck with you?

7 A No.

8 Q Did you pick up any passengers before
9 or after the accident?

10 A No, I didn't.

11 Q And when you left the Coliseum, where
12 did you go? What route did you take?

13 A I came up Coliseum Drive onto the
14 interstate for a short time, off onto 134, and down
15 134, Magruder Boulevard, towards the steam plant.

16 Q What was your intention in going that
17 route? Where -- you were going to the steam plant,
18 but why were you going to the steam plant?

19 A That's the normal route, the shortest
20 route.

21 Q And what occurs at the steam plant with
22 respect to that truck?

23 A You pull it in, and then back it up and
24 dump it into the pit, and it empties the truck, and
25 then take the truck back.

1 Q Do they burn the trash there?

2 A Yes, they do.

3 Q How long does it take to get -- I mean,
4 you've driven the route many times?

5 A A few, yes.

6 Q Well, how many times have you driven
7 that route?

8 A More than ten.

9 Q How comfortable were you driving that
10 truck at that time? Had you driven that truck many
11 times?

12 A Yes, I had driven it quite a bit.

13 Q All right. How many? Can you
14 quantify? How many is "quite a bit"?

15 A Like I say, more than ten. I don't
16 keep track of each time that I --

17 Q Sure. Fair enough. I mean, whenever
18 the Coliseum is emptied of trash, do you drive the
19 truck?

20 A No.

21 Q And there's another fellow that
22 sometimes drives the truck?

23 A Yes, there is.

24 Q Does he more often drive the truck than
25 you?

1 A Yes, he does.

2 Q And what's that person's name?

3 A Horace Bryant.

4 Q Horace?

5 A Horace Bryant.

6 Q Okay. Is he employed by the City?

7 A Yes, he is.

8 Q Does he work at the Coliseum all the
9 time?

10 A Yes, he does.

11 Q And does he work there still today?

12 A To my knowledge, yes.

13 Q Do you know where he lives?

14 A I have no idea.

15 Q How long does it take to go from the
16 Coliseum to the steam plant traditionally? Typically,
17 rather.

18 A Typically it's a round-trip of right at
19 an hour to an hour-and-ten-minutes.

20 Q So thirty minutes up and thirty minutes
21 back?

22 A Respectfully, yes.

23 MR. BOESTER: Well, that includes
24 dumping; doesn't it?

25 THE WITNESS: Yes, that includes

1 dumping as well.

2

3 BY MR. HORNSBY:

4 Q All right. Let me understand you
5 correctly then. So to drive there, dump the truck and
6 come back is one hour?

7 A Within reason, yes.

8 Q Can you tell us how long it takes to
9 drive from the Coliseum to the steam plant?

10 A I really can't. I've never paid any
11 attention -- I mean, I've never looked at that from a
12 "how long does it take me get there" standpoint.

13 Q Would it take less than 30 minutes?
14 And I don't want you to guess.

15 A I have no idea.

16 Q Tell me specifically the day of this
17 accident -- you left the Coliseum. Do you remember
18 specifically taking the route you've described or do
19 you just suppose that you took that route because you
20 normally --

21 A Oh, I specifically remember taking that
22 route.

23 Q And what were the weather conditions?

24 A Dry, as I recall.

25 Q And about what time of night was this

1 or day?

2 A I'm not aware. I'm sure it was before
3 9:00.

4 Q Would it be accurate to say around 7:00
5 or do you recall?

6 A That's very possible.

7 Q How fast were you driving on Magruder
8 Boulevard?

9 A 40 to 45. Usual speed that trucks
10 drove.

11 Q Any unusual traffic conditions?

12 A Not really.

13 Q How would you describe the traffic?
14 Light? Heavy? Medium?

15 A Fairly light.

16 Q Light. When you first -- where were
17 you when you first noticed Ms. Decker's vehicle, the
18 van in front of you?

19 A It was some distance down the road.

20 Q How far was that, if you recall?

21 A I am not good with distances.

22 Q I don't want to put words in your
23 mouth. I just want to suggest was it more than a
24 football field away?

25 A I couldn't honestly say.

1 Q At the time you first saw her vehicle
2 was it moving or was it stopped?

3 A It was stopped.

4 Q Do you recall any other vehicles in her
5 immediate vicinity which were also stopped or moving?

6 A There were other vehicles, but I was
7 focused on one particular.

8 Q All right. How many other vehicles and
9 in which lanes?

10 A I have no idea.

11 Q Were those other vehicles that you
12 perceived there, were they stopped?

13 A They were stopped as well.

14 Q And when you noticed her vehicle at
15 whatever distance you were, do you recall the color of
16 the traffic lights at that time?

17 A Red, as I recall.

18 Q And how fast were you going at that
19 time?

20 A Between 40 and 45. It was on a
21 deceleration.

22 Q How many gears on that truck?

23 A Oh, I -- it's automatic and I have no
24 idea.

25 Q Automatic, all right. From the time

1 you noticed her to the time of the collision, tell me
2 chronologically what occurred.

3 A I was coming down Magruder Boulevard,
4 134; and just as the road starts to break into a curve
5 to the light at the far end, there's a spot where they
6 fixed the pavement, and that's the bump that evidently
7 was hit, and my foot slipped off the gas pedal; and
8 when it did, I went to swing it back up to go to the
9 brake pedal, and the shoelace went around the brake
10 pedal -- excuse me, the accelerator pedal. And I
11 panicked, and I tried to remove it and I couldn't get
12 it off.

13 Q And you were going how fast at the time
14 you panicked realizing your shoelace was caught?

15 A It was 45 and decelerating.

16 Q You didn't step on your brakes at all
17 before impact; did you?

18 A No, I did not.

19 Q From the point of impact to your right,
20 were there any vehicles to your right?

21 A Yes, there were.

22 Q Describe their positioning and such, to
23 your recollection.

24 A They were just in the right-hand lane:
25 I recall glancing over there to see if I could go that

1 way, and I could not.

2 Q Do you recall more than one vehicle?

3 A Yes, I believe there was.

4 Q Were they cars? Were they trucks? Any
5 colors? Do you recall?

6 A I have no idea.

7 Q How about from the point of impact to
8 your left? Were there any vehicles that way?

9 A I don't recall that.

10 Q Do you know of anything that prevented
11 you from turning to your left?

12 A There very well may have been a car in
13 the left-hand turn lane.

14 Q But you just can't recall?

15 A I don't recall.

16 Q Is there a medium strip there also?

17 A Yes, there is.

18 Q How far back distant were you from
19 Ms. Decker's car when your foot slipped off the gas
20 pedal?

21 A I have no idea of the distance. It was
22 a good ways.

23 Q In truck lengths? Football field? Any
24 idea?

25 A I have no idea. After the foot

1 slipped, it's pretty much a blur.

2 Q All right. How much time in seconds
3 was it from the time your foot slipped off -- although
4 it may have seemed like an eternity -- until the
5 moment of impact, if you know?

6 A I really don't. It was immediate. I
7 don't know in time frame.

8 Q Seconds?

9 A I'm sure it was.

10 Q From where you're sitting, out the
11 window, any trees or bushes or buildings -- looking
12 out the window, does that help you recall how far you
13 were when your foot slipped off the gas?

14 A No, not really.

15 Q Do you recall how far you intended to
16 be back from her vehicle to start braking? With your
17 foot off the gas rather.

18 A Similar to right around where the curve
19 starts to make a break.

20 Q Now, you're familiar with that stretch
21 of road?

22 A Fairly, yes.

23 Q And you've driven it many times before
24 the accident and since then?

25 A Yes, I have.

1 Q How far is that bump in the road from
2 where this accident occurred?

3 A That I couldn't honestly say either.

4 Q Is that bump in the road still there?

5 A I'm not aware.

6 Q And it's your contention that the bump
7 in the road caused your foot to slip off the gas?

8 A Yes, it did.

9 Q All right. What kind of shoes were you
10 wearing?

11 A I can't recall.

12 Q If you know.

13 A They were like a leather tennis shoe.

14 Q Do you still have those shoes?

15 A I don't believe so.

16 Q You don't know the make or model or the
17 brand of the shoes?

18 A I don't recall.

19 Q Now, how would you describe the impact?

20 A I don't understand what response you're
21 looking for.

22 Q Was it a slight tap? Was it a
23 concussive crash or anything in between?

24 A A good size jolt.

25 Q And what happened to you at the moment

1 of impact, if anything, in your vehicle?

2 A I was thrown forward and was hanging
3 onto the steering wheel.

4 Q You described in interrogatories that
5 you couldn't get your left foot around the steering
6 wheel. Can you explain that for me?

7 A Yes. The steering column -- the way
8 you sit in the garbage truck, it's a very straight
9 flat back seat, and there's no floorboard to our left.
10 And the way the steering column comes down, it comes
11 down like up from your -- out from your knees and
12 straight to the floor.

13 Now, the only thing you're actually
14 holding yourself on the seat with is the steering
15 wheel, and seat belt or whatever, but you can still
16 fall to the side.

17 And I kept trying to bring my foot
18 around because I was attached to the gas pedal, and I
19 could not get it to go around. And I had the
20 sensation of falling down past the steering wheel.

21 Q Falling down to which side? You
22 gestured --

23 A To the left side.

24 Q That would be towards the door?

25 A Yes.

1 Q How was it you were falling down toward
2 the door? I don't understand. Describe the movement
3 for me.

4 A Just tried to swing the foot around,
5 which is dangling off the side of the seat -- tried to
6 swing it around. And as I swung it around, the weight
7 of our body moves to the left.

8 Q Are the steam plant and the landfill
9 the same thing?

10 A No. Two separate.

11 Q Do you ever take things to the
12 landfill?

13 A I have on occasion over fourteen years,
14 yes. Mostly in the pickup truck.

15 Q What types of things do you take to the
16 landfill as opposed to the steam plant?

17 A Anything you can't burn.

18 Q Like food, refuge and things like that?

19 A No. Steel. Wood pallets.

20 Q Okay. So is it accurate to say that
21 based on your recollection that there wasn't any
22 food materials in the truck? Maybe some cups with
23 alcohol --

24 A Oh, I'm sure there were. I'm sure
25 there were.

1 Q But you don't recall specifically?

2 A I don't open the truck and look.

3 Q You didn't watch it being loaded?

4 A No, I did not. There is always debris.

5 Food scraps, French fries, hot dogs and what have you.

6 Q What was the event y'all were cleaning
7 up from?

8 A They had cleaned up from the --

9 Q Computer show, did you say?

10 A Yes. It was Market-Pro Computer Show.

11 MR. BOESTER: Off the record.

12

13 [A discussion was held off the record.]

14

15 BY MR. HORNSBY:

16 Q Do you recall the trash that was in
17 that truck taken on that day, when the next previous
18 time was that the garbage truck had gone from the
19 Coliseum?

20 A I have no idea.

21 Q Were you in communication by radio or
22 otherwise with the facility just prior to the impact?

23 A No, I was not.

24 Q Do you have any radio device in the
25 truck?

1 A No.

2 MR. BOESTER: Doug, he would have been
3 the only one there at this time.
4

5 BY MR. HORNSBY:

6 Q You were the only one there?

7 A I was the only one there.

8 Q When you left the Coliseum, was there
9 nobody else there?

10 A There was no one there.

11 Q When you got through with the run to
12 the steam plant, had you made it there, what would you
13 have done after that?

14 A I would have probably gotten ready to
15 go home. The rest of the event was straightened out
16 -- what needed to be, if anything, and it was ready.

17 Q Would you drive back to the Coliseum or
18 somewhere else?

19 A Yes, I would.

20 Q You'd park the truck at the Coliseum?

21 A Yes, I would.

22 Q And then take your personal vehicle
23 home?

24 A Yes, I would.

25 Q Does that truck stay at the Coliseum?

1 A Yes, it does.

2 Q Is it -- do they like to call it the
3 Coliseum garbage truck?

4 A Yes.

5 Q Is it used for any other purpose in the
6 City?

7 A Not that I'm aware of.

8 Q Nobody tells you what route to take; do
9 they?

10 A Not at all.

11 Q Any other stops on the road from the
12 time you left the Coliseum until the time of the
13 accident?

14 A No, none whatsoever.

15 Q Stop to get a Coke somewhere?

16 A None whatsoever.

17 Q Drive to see a friend and then get back
18 on the road or anything like that?

19 A No, none whatsoever.

20 Q Bear with me just a second. You gave a
21 statement to an investigating police officer. Do you
22 remember that?

23 A I remember giving the statement, yes.

24 Q I have a -- let me show you what's a
25 handwritten -- this is a piece of a report -- and if I

1 may rise to the occasion -- certainly take time to
2 familiarize yourself with that. I take it this is not
3 your handwriting?

4 A No, it's not.

5 Q If I may point, sir. Down here is a
6 question that says "How far back from the vehicles
7 were you when you saw them?" And there's an "A" which
8 I assume is the answer and there's a blank. Do you
9 know why that's blank?

10 A I have no idea.

11 Q Are you able to answer his question
12 sitting here today?

13 A Not at all.

14 MR. HORNSBY: Off the record.

15

16 [A discussion was held off the record.]

17

18 BY MR. HORNSBY:

19 Q Let me borrow that back, if I may.

20 A Sure.

21 Q If you can just take a second, I'm
22 going to gesture you review this page and I think up
23 to the top of this next page there's a "Q and A." Can
24 you read that to yourself and tell -- and take your
25 time -- if there's anything in there that you believe

1 today is inaccurate. I take it they were your
2 responses. Please tell me if they're not your
3 responses or if there's anything that is inaccurate in
4 those statements as you think about them today.

5 A Okay. The question here "When did
6 you start driving then?" The answer is, "No, it was
7 about a quarter to 4:00." That's -- I guess they
8 were referring to answer to when I started driving
9 and that's not what -- I didn't start what I was
10 doing for the day until about a quarter to 4:00.
11 That wasn't driving. I didn't drive at that time
12 of the day.

13 Q So you get there at 3:00?

14 A Yes.

15 Q And although -- tell me if I say this
16 wrong. That question and answer seems to indicate you
17 were driving at quarter to 4:00.

18 A That's what appears -- it reads to me.
19 I don't know how you interpret it.

20 Q But that's not accurate?

21 A No, it's not.

22 Q You started to drive sometime later
23 that day?

24 A Yes. It was later that day.

25 Q And we already asked that earlier, but

1 you can't recall specifically except that it was
2 before 9:00 you think?

3 A I'm sure it was before 9:00.

4 Q Anything else on there which doesn't
5 ring true today?

6 A Not that I'm aware of.

7 Q Okay. Thanks. Do you know of anybody
8 else who gave a statement or spoke to you at the scene
9 of the accident?

10 A I don't know of any witnesses to
11 anything. I didn't speak to anyone but a police
12 officer.

13 Q All right. And did you say anything to
14 the police officer other than what's been reviewed in
15 that statement you just read?

16 A Not that I'm aware of.

17 Q No independent recollection or any
18 other statements, people said to you, things you said
19 to others?

20 A Absolutely not.

21 Q All right. Do you recall any persons
22 talking to one another where you overheard their
23 conversations?

24 A No.

25 Q Finally in that realm, anybody making

1 any gestures or nonverbal activity pointing or making
2 some bodily movements?

3 A No.

4 Q Any damage to the garbage truck?

5 A I believe there was, yes.

6 Q Do you know -- could you describe that
7 damage to me?

8 A I am not aware. I didn't actually look
9 at the truck after it was wrecked.

10 Q On the day of this accident while you
11 were at the Coliseum, the things you were doing to
12 maintain the facility, were they just done at the
13 facility?

14 A Yes.

15 Q Is garbage ever removed by a private
16 contractor?

17 A No.

18 MR. BOESTER: I'm not sure if you're
19 looking for a legal conclusion on what it takes to
20 maintain the facility, but if that question was
21 designed to get that out, then I'll object. That's a
22 legal concept. I don't think Tom is in a position to
23 answer it.

24 MR. HORNSBY: Fair enough.
25

1 BY MR. HORNSBY:

2 Q Let me ask you this, if I may, sir: Do
3 you believe that your speed prior to the impact, given
4 that you didn't brake at all before impact -- well,
5 I'll just ask you. Did you have any indifference to
6 the people in front of you as to how fast you were
7 going and what happened?

8 A No, I didn't.

9 MR. HORNSBY: That's all the questions
10 I have.

11 MR. BOESTER: What was the last -- I
12 didn't understand the last question and answer.

13 MR. HORNSBY: I didn't either. Don't
14 worry. I asked him if he was indifferent to the
15 people on the road.

16 MR. BOESTER: What did you mean by that
17 answer?

18 THE WITNESS: What did you mean by the
19 question?

20

21 BY MR. HORNSBY:

22 Q Well, I apologize. Let me ask it
23 again. My question is: At the time or just prior to
24 the impact as you were driving down the road when you
25 mentioned your shoelace was caught and you were

1 driving at however many miles per hour you said, and
2 that you weren't able to brake before the impact --

3 A Right.

4 Q -- did you have personally an
5 indifference to the people in front of you on the
6 road, whereas you didn't care whether you ran into
7 them or not?

8 A Oh, yes, I cared very much.
9 Absolutely. Absolutely. You should have been there.

10 Q But you didn't talk to them?

11 A No, not at all.

12 Q Why not?

13 A I didn't know what they looked like. I
14 had no reason to talk to them.

15 Q Did any of the people get out of the
16 vehicle?

17 A I'm sure they did. I didn't see any of
18 them.

19 Q Did you get out of your vehicle?

20 A Oh, absolutely.

21 Q But you didn't speak to Ms. Decker?

22 A No.

23 Q You didn't speak to Mr. Jones?

24 A No, I did not.

25 Q You spoke only to the police officer?

1 A As far as I'm aware, yes. I spoke to
2 no one other than a uniformed individual. I spent
3 most of the time sitting in the back of the police
4 cruiser.

5 MR. HORNSBY: That's all the questions
6 I have.

7 THE WITNESS: We were trying to figure
8 out how to --

9 MR. HORNSBY: Thank you.

10

11

EXAMINATION

12

13 BY MR. BOESTER:

14 Q Tom, what did you do when you realized
15 your shoelace was caught to try to avoid hitting the
16 vehicle?

17 A I tried to jerk my leg and break the
18 shoelace.

19 Q And what about with your left leg? Did
20 you make any movement with that?

21 A Yes. I kept trying to get it to swing
22 around and hold onto the steering wheel and come
23 around to get the brake pedal. The brake pedals are
24 molded onto the way the -- they're curved onto where
25 they fit to the floor. It's just not a regular

1 straight brake pedal like you have in your car.

2 MR. BOESTER: Okay. Tom, you have the
3 right, if you want to, to read and sign this
4 deposition or you can waive that right. As your
5 attorney in this matter, I advise you to waive. Just
6 say "I waive."

7 THE WITNESS: I waive.

8
9 [The deposition ended at 11:30 a.m.]

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VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON

**GLADYS JANET DECKER,
PLAINTIFF,**

V.

AT LAW NO. 98-671, PART: IV

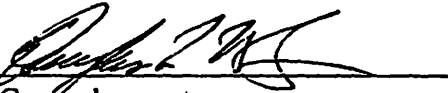
**THOMAS D. HARLAN, II
and
CITY OF HAMPTON
DEFENDANTS.**

**NOTICE OF FILING OF TRANSCRIPT
PURSUANT TO SUPREME COURT RULE 5:11**

Please take notice the transcripts of the October 28, 1998 hearing and the deposition of the defendant in the above styled matter were filed with the Circuit Court of the City of Hampton on April 2, 1999.

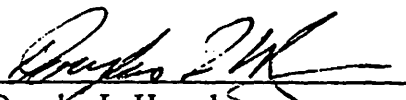
Please govern yourself accordingly.

GLADYS JANET DECKER

By 
Of Counsel

CERTIFICATE

I hereby certify that a true and correct copy of the foregoing pleading was both sent by facsimile copier and sent by first-class mail, postage prepaid, on April 2, 1999 to Robert A. Boester, Esquire, Hawkins, Burcher & Boester, P.C., 29 North King's Way, P.O. Drawer A, Hampton, VA 23669, and to Robert B. Rigney, Protogyrou & Rigney, P.L.C., 215 East City Hall Avenue, PO Box 3205, Norfolk, Virginia 23514.


Douglas L. Hornsby

CITY OF HAMPTON, VA.

99 APR -2 AM 9:33

JAMES P. BOHRNER

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON

GLADYS JANET DECKER,
PLAINTIFF,

V.

AT LAW NO. 98-671, PART: IV

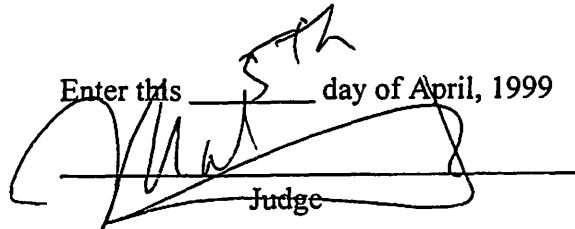
THOMAS D. HARLAN, II
and
CITY OF HAMPTON
DEFENDANTS.

ORDER FOR NONSUIT OF GROSS NEGLIGENCE CLAIM

Now comes the Plaintiff in the above styled cause, of counsel, and takes a voluntary nonsuit of its claim for gross negligence against the several defendants, and not for any other claim, including simple negligence, and hereby reserves such claims for simple negligence against the Defendants, jointly and severally, for trial. Accordingly, it is,

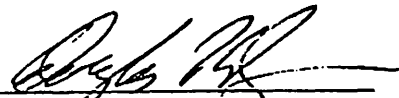
ORDERED, that the Plaintiff's claim against the Defendants for gross negligence is nonsuited and all other claims against the Defendants remain.

Enter this 5th day of April, 1999



Judge

I ask for this:



DOUGLAS L. HORNSBY
SHUTTLEWORTH, RULOFF & GIORDANO, P.C.
10234 Warwick Boulevard
Newport News, VA 23601
(757) 671-6040

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VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON

**GLADYS JANET DECKER,
PLAINTIFF,**

V.

AT LAW NO. 98-671, PART: IV

**THOMAS D. HARLAN, II
and
CITY OF HAMPTON
DEFENDANTS.**

FINAL ORDER

On May 17, 1999, came the parties to the above-styled cause, in person and of counsel, in a telephonic conference before the Honorable Court to argue the various motions now pending before the Court in this cause.

It appearing to the court that the Defendants, Thomas Harlan, II and City of Hampton, filed their Pleas of Sovereign Immunity, and was argued by counsel on October 28, 1998. The Court GRANTED the Defendants' motion and entered an order on March 4, 1999, to which the Plaintiff noted her exception.

The underinsured motorist automobile insurance carrier, Liberty Mutual Insurance Company, filed its Motion for Summary Judgment claiming that it was not liable to Plaintiff if the Defendants were exempted for sovereign immunity. That motion was argued on March 1, 1999, and GRANTED by the Court. An order was entered on March 31, 1999, granting summary judgment for Defendant Liberty Mutual, to which the Plaintiff noted her exception.

On or about April 29, 1999, Plaintiff filed her voluntary nonsuit in this cause regarding her claim of gross negligence against the Defendants, Thomas Harlan, II and City of Hampton.

On or about March 5, 1999, Plaintiff filed her motion for a rehearing of the Court's ruling on sovereign immunity. During the telephonic conference of May 17, 1999, the matter was argued by counsel for the Plaintiff and Defendants, but not counsel for Liberty.

The court DENIED Plaintiff's motion for rehearing, to which Plaintiff noted her exception.

On April 2, 1999, Plaintiff noted her appeal of the Court's ruling on sovereign immunity. On April 29, 1999, the Plaintiff noted her appeal of the Court's ruling on Liberty Mutual's motion for summary judgment.

Accordingly, to clarify the several rulings of the Court, and to assure the parties that this is a final order in all issues before the Court in this cause, the Court rules as follows:

The Pleas of Sovereign Immunity filed by the Defendants Thomas Harlan II and City of Hampton are GRANTED.

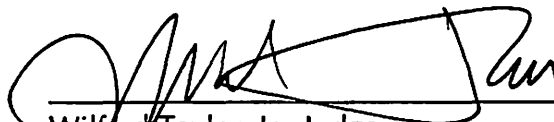
The Motion for summary judgment filed by Liberty Mutual Insurance Company is GRANTED.

The Plaintiff's Motion for Rehearing to the Court on the issue of Sovereign Immunity is DENIED.

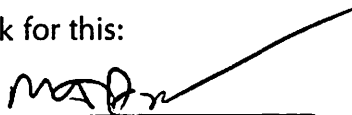
All orders of this Court on this cause shall be deemed entered and consolidated as of the entry date of this Order. The Plaintiff notes her exception to all the rulings of the Court. Once this Order is entered, the Plaintiff shall have 30 days from such date to note her appeal from any ruling in this Order.

There being no more matters before the Court in this cause, the Clerk is instructed that this cause of action has been dismissed

Enter this 10th ^{June} Day of ~~May~~, 1999


Wilford Taylor, Jr., Judge

I ask for this:



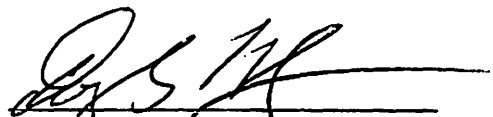
Robert A. Boester,
Counsel for Thomas D. Harlan, II and
City of Hampton
Hawkins, Burcher & Boester, P.C.
29 North King's Way
Hampton, VA 23669

I ask for this:



Robert B. Rigney
counsel for Liberty Mutual Insurance Company
Protopgyrou & Rigney, P.L.C.
215 East City Hall Avenue
PO Box 3205
Norfolk, Virginia 23514.

Have seen and Objected to, Exceptions noted:



DOUGLAS L. HORNSBY
counsel for Plaintiff
SHUTTLEWORTH, RULOFF & GIORDANO, P.C.
10234 Warwick Boulevard
Newport News, VA 23601
Direct Dial: (757) 671-6040
Facsimile: (757) 873-9758

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VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON

**GLADYS JANET DECKER,
PLAINTIFF,**

V.

AT LAW NO. 98-671, PART: IV

**THOMAS D. HARLAN, II
and
CITY OF HAMPTON
DEFENDANTS.**

NOTICE OF APPEAL

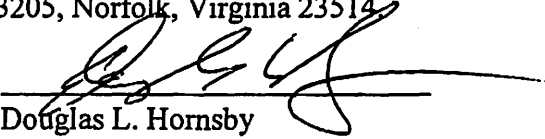
The plaintiff hereby serves notice of her appeal of this Court's Judgment Orders entered on June 10, 1999 with respect to the Final Order consolidating all previous Orders and dismissing the law suit. All relevant transcripts of hearings in this matter have already been filed with this Court.

GLADYS JANET DECKER

By 
Of Counsel

CERTIFICATE

I hereby certify that a true and correct copy of the foregoing pleading was both sent by facsimile copier and sent by first-class mail, postage prepaid, on June 10, 1999 to Robert A. Boester, Esquire, Hawkins, Burcher & Boester, P.C., 29 North King's Way, P.O. Drawer A, Hampton, VA 23669, and to Robert B. Rigney, Protogyrou & Rigney, P.L.C., 215 East City Hall Avenue, PO Box 3205, Norfolk, Virginia 23514.


Douglas L. Hornsby

Douglas L. Hornsby, Esq.
Shuttleworth, Ruloff & Giordano, P.C.
10234 Warwick Blvd.
Newport News, VA 23601
757-671-6040
Facsimile: 757-873-9758
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99 JUN 16 PM 1:57
CITY OF HAMPTON
JAMES P. BOESTER
ROBERT B. RIGNEY

ASSIGNMENTS OF ERROR

1. The Circuit Court erred in holding that the doctrine of sovereign immunity bars liability to the Plaintiff for both the City and its employee where the employee was merely driving a trash truck, loaded by other employees, on the public highway to a steam plant and ran into the back of a row of vehicles stopped at a red light miles from the pickup facility.

2. The Circuit Court erred in holding that statutory immunity for operation and maintenance of a recreational facility bars both the city and its employee from liability to the Plaintiff where the City's employee negligently operated a trash truck loaded with refuse on its way from a recreational facility to a steam plant, miles from the facility.