In The

Supreme Court of Virginia

RECORD NO. 090596

CHARLES SIMPSON,

***Appellant*,**

v.

VIRGINIA MUNICIPAL LIABILITY POOL, GOVERNMENT EMPLOYEES INSURANCE COMPANY, a/k/a GEICO, NATIONAL GRANGE MUTUAL INSURANCE COMPANY, a/k/a NGM Insurance Company, and MALCOLM ROBERTSON,

***Appellees*.**

BRIEF OF APPELLEE VIRGINIA MUNICIPAL LIABILITY POOL

David P. Corrigan (VSB No. 26341)
Carson W. Johnson (VSB No. 66047)
HARMAN, CLAYTOR, CORRIGAN & WELLMAN
Post Office Box 70280
Richmond, Virginia 23255
(804) 747-5200 (Telephone)
(804) 747-6085 (Facsimile)
dcorrigan@hccw.com
cwjohnson@hccw.com

Counsel for Appellee
Virginia Municipal Liability Pool

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦www.thelexgroup.com

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STATEMENT OF THE CASE

This coverage action arises out of an injury allegedly sustained by Deputy Sheriff Charles Simpson ("Simpson") while handcuffing Malcolm Robertson ("Robertson") on February 12, 2004. Before the arrest, Simpson and Trooper J.B. Inge ("Inge") were engaged in a vehicle pursuit of Robertson on Route 460. After the pursuit ended, Robertson turned off his vehicle's engine, held his hands in the air with his keys in his hands, and walked away from his vehicle. Simpson parked his vehicle in the median of Route 460, exited the vehicle, and walked towards Robertson to arrest him. Approximately 10 feet away from Simpson's vehicle, Inge tackled Robertson, bringing all three men to the ground. Simpson injured his shoulder as he attempted to handcuff Robertson on the ground.

Simpson filed a personal injury action against Robertson alleging that Robertson was responsible for his injury during the arrest. Simpson presented his claims to Robertson's automobile liability insurer, GEICO Casualty Company ("Geico"), which denied his claims. Simpson also sought Uninsured Motorist ("UM") or Underinsured Motorist ("UIM") coverage from National Grange Mutual Insurance Company ("NGM"), his personal insurer, and Virginia Municipal Liability Pool ("VMLP"), which insures Nottoway County, Simpson's employer.

In order to recover UM or UIM benefits pursuant to the VMLP Policy, Simpson must first qualify as an “insured” in accordance with the Policy terms. Simpson is not an “insured” because he was not “occupying” the police cruiser at the time of his injury as required by the UM Endorsement. Second, even if Simpson qualifies as an “insured,” he is not entitled to UM or UIM benefits because his injury is not causally related to the “use” of Robertson’s vehicle. Geico and NGM also assert that Simpson is not entitled to coverage under their respective policies because Simpson’s injury did not arise out of the use of an uninsured vehicle.

VMLP filed an action in Nottoway County Circuit Court seeking a determination regarding the rights and obligations of all the parties with respect to Simpson’s claims. The matter was tried without a jury before the Honorable Thomas V. Warren. Judge Warren found that the vehicle pursuit “was clearly over,” that Simpson and Robertson were no longer using their vehicles to escape or apprehend, and that the use of the vehicles played no role in Simpson’s injury. The court held that Simpson was not “occupying” or “using” the police cruiser at the time of the injury and is not an “insured” under the VMLP Policy. The court also held that Simpson’s injuries did not arise out of the “use” or “ownership” of

Robertson's vehicle. VMLP respectfully requests that this Court affirm the trial court's findings.

QUESTIONS PRESENTED

The appropriate questions before this Court are the following.

1. Did Simpson's injury arise out of the "use" of Robertson's vehicle?

2. Was Simpson "occupying" the police cruiser at the time of his injury in accordance with the VMLP Policy terms?

STATEMENT OF FACTS

On February 12, 2004, Simpson was employed as a deputy sheriff for Nottoway County when he injured his shoulder while handcuffing Robertson in the median of Route 460. Trooper Inge had attempted to pull Robertson over for speeding, but Robertson had driven away. Inge pursued Robertson for several miles before Simpson joined the pursuit. Appendix p. 97, 99. Robertson testified that he did not pull over because he had a suspended license and an open beer in the car. Appendix p. 393. Robertson originally fled at a high speed, but after several miles he slowed down, turned on his left blinker, and moved to the left lane. Appendix p. 189, 398. He then pulled over on the left side of the road, into the median of Route 460. *Id*.

Simpson and Inge parked and exited their vehicles. Inge stopped his vehicle on the edge of the road, blocking Robertson's vehicle from further movement. Appendix p. 101, 103, 183. Simpson testified that he parked in the median, approximately 10 feet away from Robertson's vehicle. Appendix p. 139, 158, 443. Simpson left the lights and siren on when he exited his vehicle. Appendix p. 140. Simpson did not take any equipment from his cruiser. Appendix p. 157.

Robertson turned off the engine and exited his vehicle. Appendix p. 184. Robertson walked away from the vehicle, holding his hands in the air with his car keys in his hand. Appendix p. 184, 404. Robertson did not attempt to flee the scene, as he intended to surrender. Appendix p. 185, 187. Simpson was approaching Robertson when Trooper Inge tackled Robertson, taking all three men to the ground. Appendix p. 142. The tackle occurred approximately 3 feet away from Robertson's vehicle and 10 feet away from the police cruiser. Appendix p. 139, 159.

Simpson injured his shoulder when he attempted to place handcuffs on Robertson on the ground. Appendix p. 149, 449-452. Simpson filed a Workers' Compensation Claim for Benefits, seeking medical and wage loss benefits related to the shoulder injury. Appendix p. 480. The workers' compensation carrier for Nottoway County made payments to Simpson as

a result of his injury. Simpson received medical and indemnity benefits of approximately $61,000 and a lump sum settlement of $65,000. Appendix p. 433, 484-485.

Simpson filed an action in Nottoway County Circuit Court against Robertson, alleging that he suffered personal injuries while subduing Robertson. Appendix p. 481. Simpson presented his claims to Geico, which insured Robertson under a personal auto liability policy. Geico's liability limit for this claim is $50,000. Appendix p. 334. Geico denied liability coverage to Robertson on the grounds that Simpson's injuries were caused by an intentional act and did not arise out of the use of Robertson's vehicle. Appendix p. 14. Simpson sought UM or UIM coverage for his claims from National Grange, which insured Simpson under a family auto liability policy. National Grange's UM/UIM coverage limit is $100,000. Appendix p. 295.

Simpson also presented his claims to VMLP as another potential UM/UIM carrier. VMLP is a governmental, group self-insurance pool created by Virginia Code §§ 15.2-2700, *et seq*. The legislation specifically provides that the pools are not insurance companies and deems the pools to be "self-insurers" for motor vehicle security under § 46.2-368. *See* §15.2-2709. Although § 46.2-368 requires self-insurers to provide UM

coverage in accordance with § 38.2-2206, self-insurance pools are excluded from that mandate. § 15.2-2704; *VML v. Kennon*, 247 Va. 254, 441 S.E.2d 8 (1994). Self-insurance pools may elect, however, to provide UM coverage to its insureds, but they are not subject to the minimum coverage limits prescribed by § 38.2-2206. *Kennon*, 247 Va. at 258, 441 S.E.2d at 10.

Nottoway County is one of the localities that pools its resources and participates in VMLP. The vehicle driven by Simpson before his injury is a scheduled automobile under a VMLP Policy issued to Nottoway County. VMLP's UM/UIM Coverage limit is $25,000. Appendix p. 260. The UM Endorsement of the VMLP Policy states, "We will pay, in accordance with the Virginia Uninsured Motorists Insurance Law, all sums the **insured** is legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle."[1] Appendix p. 279. The UM Endorsement defines an insured as "anyone…**occupying** a covered auto." *Id*.

VMLP filed an action in Nottoway County Circuit Court requesting a coverage determination regarding the rights and obligations of the parties

[1] Virginia's UM law, Code § 38.2-2206, provides in pertinent part that liability insurance policies "relating to the ownership, maintenance, or use of a motor vehicle" must undertake to pay the insured all sums that he is legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle.

with respect to Simpson's personal injury claims against Robertson. VMLP requested a declaration that it has no obligation to provide UM or UIM coverage for any claims Simpson asserted against Robertson related to the incident because Simpson was not an "insured" and his injury did not arise out of the use of an uninsured vehicle. Appendix p. 1. In the event that VMLP had an obligation to provide UM coverage, VMLP requested a declaration that such benefits were completely set off by workers' compensation payments to Simpson pursuant to a policy exclusion, and that such UM coverage is secondary to any other UM coverage. In the event that VMLP has UIM coverage for Simpson's claims, VMLP requested a declaration that its UIM coverage has first priority.

The matter was tried without a jury before the Honorable Thomas V. Warren on December 12, 2008. Judge Warren issued a letter opinion on December 29, 2008. The court found that the vehicle pursuit "was clearly over" and that Simpson and Robertson were no longer using or occupying their vehicles when the injury occurred. Appendix p. 489-490. The court further explained that the use of the vehicles played no role in Simpson's injury. *Id*. The trial court's opinion did not address the issue of VMLP's Policy exclusion or the priority of coverages because there was no coverage under any of the insurer's policies.

On December 30, 2008, Judge Warren entered an Order holding that Simpson was not "occupying" or "using" the police cruiser at the time of the injury and that he was not an "insured" under the VMLP Policy. The court also held that Simpson's injuries did not arise out of the "use" or "ownership" of Robertson's vehicle. Appendix p. 491. Accordingly, the insurance policies issued by GEICO, National Grange, and VMLP do not afford coverage for Simpson's claims.

PRINCIPLES OF LAW, ARGUMENT AND AUTHORITY

I. The Standard of Review.

Virginia Code § 8.01-680 provides that when a case is decided by a court without a jury and a party objects to the decision on the ground that it is contrary to the evidence, the judgment of the trial court will not be set aside unless it appears that such judgment is plainly wrong or without evidence to support it. *Hankerson v. Moody*, 229 Va. 270, 329 S.E.2d 791 (1985). Moreover, the evidence is viewed in the light most favorable to the prevailing party. *Hern v. Cox*, 212 Va. 644, 647, 186 S.E.2d 85, 87 (1972).

Simpson did not assign error to any of the court's factual findings, including the fact that the pursuit was over, that Simpson was no longer using his vehicle to apprehend, that Robertson was no longer using his vehicle to escape, and that the use of the vehicles played no role in Simpson's injury.

Appendix p. 489-490, 492. Thus, these findings are the law of the case and cannot be disturbed. *See* Rule 5:17 of the Supreme Court of Virginia; *State of Maine v. Adams*, 277 Va. 230, 242, 672 S.E.2d 862, 869 ("when a party fails to assign error to a particular holding by the circuit court, that holding becomes the law of the case and is binding on appeal").

Simpson also failed to assign error to the trial court's holding that he is not an "insured" under the VMLP Policy. Therefore, this particular part of the trial court's order is the law of the case, and the issue is not before the Court. *See* Rule 5:17 of the Supreme Court of Virginia; *State of Maine v. Adams*, *supra.* Because the trial court found that Simpson is not an "insured," VMLP has no duty to indemnify Simpson for his injuries under the UM Endorsement of the VMLP Policy.

However, Simpson assigned error to the trial court's ruling that he was not "occupying" or "using" the police cruiser at the time of injury. VMLP will address this issue in the event the Court reaches that question, despite the trial court's order that Simpson was not an "insured" under the VMLP Policy.

II. The Trial Court Correctly Ruled That Simpson Did Not Qualify as an Insured Under the VMLP Policy Because He Was Not "Occupying" or "Using" the Police Cruiser.[2]

Courts must consider the intent of the parties to the insurance agreement in determining the scope of the coverage afforded. *State Farm Mut. Auto. Ins. Co. v. Powell*, 227 Va. 492, 500, 318 S.E.2d 393, 397 (1984). Nottoway County purchased an automobile liability insurance policy from VMLP. The Policy contains a UM Endorsement stating that VMLP will pay an "insured" all sums he is legally entitled to recover as damages from the "owner or operator of an uninsured motor vehicle." Appendix p. 279. Simpson must qualify as an "insured" in order to recover payments under his employer's policy.

The insuring agreement in VMLP's UM Endorsement narrows the definition of "insured" for uninsured motorist coverage purposes. An "insured" is defined to include "anyone…**occupying** a covered auto." (emphasis added). "Occupying" is defined as "in, upon, using, getting in, on, out or off." Appendix p. 277.

Simpson argues that he was "using" the police cruiser at the time of his injury and, therefore, qualifies as an insured under the VMLP Policy.

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[2] Simpson's Brief lists this issue as the second "Question Presented." However, VMLP will address this issue first, as Simpson must first qualify as an "insured" under the VMLP Policy before he is entitled to UM coverage for an injury arising out of the use of an uninsured vehicle.

However, the word “using” within the definition of “occupying” must be read in the context in which it is employed in the Policy. *See Penn. Nat’l Mutl. Cas. Ins. Co. v. Bristow*, 207 Va. 381, 150 S.E.2d 125 (1966). Simpson clearly was not “occupying” the vehicle in the ordinary sense of the word. He was not inside the vehicle or operating the vehicle. He was not touching the vehicle or in the process of getting in or out of the vehicle. Simpson had exited the vehicle and was arresting a suspect on the ground 10 feet away from the vehicle when he was injured.

Even a review of the extensive Virginia case law assessing “use” of a vehicle for purposes of UM coverage does not bring Simpson’s claims within the VMLP Policy. This Court is clear that “the critical inquiry is whether there was a causal relationship between the incident and the employment of the insured vehicle as a vehicle.” *Slagle v. Hartford Ins. Co. of the Midwest*, 267 Va. 629, 636, 594 S.E.2d 582, 586 (2004); *United States Fire Ins. Co. v. Parker*, 250 Va. 374, 377, 463 S.E.2d 464, 466 (1995); *State Farm Mut. Auto. Ins. Co. v. Powell*, 227 Va. 492, 500, 318 S.E.2d 393, 397 (1984).

This Court has also pointed out that the causal relationship inquiry depends on the particular facts of each case. There is no “set formula” or list of dispositive factors that the trial court must consider. *Slagle,* 267 Va.

at 636, 594 S.E.2d at 586. Rather, there are general guidelines to assist the court in determining whether there was a causal relationship between the incident and the employment of the vehicle. The injured person "must be using the insured vehicle as a vehicle and as an integral part of his mission." *Id*. Other factors that courts may consider are occupancy of the vehicle, the immediate intent to occupy the vehicle, and the utilization of special safety equipment from or on the vehicle. *Id*. at 637, 594 S.E.2d at 586.

For example, in *Ins. Co. of North America v. Perry*, 204 Va. 833, 134 S.E.2d 418 (1964), a Norfolk police officer was struck by a passing vehicle after parking his cruiser and walking down the roadway to serve a warrant. This Court found that the officer was not entitled to UM coverage under the policy issued to the city of Norfolk because he was not using the police cruiser at the time of his death. *Perry*, 204 Va. at 838, 134 S.E.2d at 421.

In *United States Fire Ins. Co. v. Parker*, an automobile insurer sought a declaration that its policy did not provide UIM coverage for Parker, its insured's employee, who was struck by an underinsured motorist. 250 Va. at 375, 463 S.E.2d at 465. Parker was employed as a landscape gardener and was planting cabbages near the road when she was injured. Parker and her co-workers had driven their employer's truck to the worksite. The

truck carried the cabbages, the gardening equipment, and a two-way radio. Parker positioned the vehicle at the worksite to provide a safety barrier to the gardeners. Parker was struck while digging a hole to plant a cabbage. *Id.* at 376, 463 S.E.2d at 465.

The issue decided at trial was whether Parker was "using" the truck at the time of her accident. The trial court determined that Parker was using the truck for purposes of UIM coverage, as the truck was being used as a safety barrier to other motorists, for communication with the supervisor, and to load and unload plants. *Id.* at 377, 463 S.E.2d at 466. This Court reversed, explaining that the issue was not necessarily whether the person was injured "while using" the vehicle. Rather, the inquiry is whether there was a causal relationship between the incident and the use of the vehicle. *Id*. The Court held that Parker was not engaged in a transaction essential to the use of the truck when she was injured. Parker was in the act of digging a hole when she was struck and she "was not utilizing the truck as a vehicle at that time." *Id*.

In this case, Simpson was not "occupying" or "using" the police cruiser. He was outside of the vehicle, placing handcuffs on a suspect on the ground. He had no immediate intent to occupy the vehicle. He did not have any equipment from his vehicle. As in *Perry, supra*, Simpson had

walked away from the vehicle and was engaged in a separate act of making an arrest. There is no causal relationship between the police cruiser and Simpson's injury during the arrest on the ground.

Simpson's Brief spends a considerable amount of time discussing his "mission." Simpson asserts that "the critical inquiry is not the presence or absence of factors recited in prior Supreme Court decisions, but whether the factors disclose that the vehicle's mission is ongoing or has ended." [3] Appellant's Brief p. 11-12. Simpson argues that his mission was to arrest Robertson and that he was injured while still engaged in that mission. Therefore, he concludes that his use of the cruiser "was causally related to the arrest mission at the time of the injury" and he is entitled to coverage. *Id*. p. 23.

Simpson's argument demonstrates a fundamental misunderstanding of the case law. The ultimate inquiry is not whether the injured person is still engaged in the same mission at the time of injury as when he was using or occupying the insured vehicle. The injured person previously may have used the vehicle as part of his mission and continued to pursue that mission long after ceasing any use of the vehicle.

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[3] This argument is contrary to other assertions in the Brief where Simpson states that the trial court did not consider certain "required" factors. *See*, *e.g.*, Brief at 19.

The trial court may consider the injured person's mission to assess whether he was still using the vehicle as an integral part of that mission. *Slagle*, 267 Va. at 637-638, 594 S.E.2d at 587. However, as set forth above, the crucial question is whether there is a causal relationship between that continued use of the vehicle and the injury. In this case, Simpson had previously used the police cruiser in a vehicle pursuit of Robertson. The pursuit was clearly over at the time of the injury. Robertson had been captured and subdued when the injury occurred. Simpson was no longer using the cruiser to pursue Robertson, nor was he using the cruiser to place handcuffs on Robertson. Regardless of his mission, he was not "using" or "occupying" the vehicle.

Simpson also argues that he was "using" the vehicle because the police cruiser is a specialized vehicle with a siren and blue lights. *See*, *e.g.*, *Great American Ins. Co. v. Cassell*, 239 Va. 421, 389 S.E.2d 476 (1990). Simpson argues that this case falls under the *Cassell* precedent because the cruiser's lights and siren were still running when he was injured. However, in other cases in which the Court considered the specialized nature of the vehicle, the use of the specialized features was causally related to the injury.

In *Cassell*, the fireman was using the vehicle's lights and position as a barrier to other motorists and another motorist caused the injury. The Court also focused on the facts that the fireman was completing a fire report on a clipboard stored on the truck when he was hit by the motorist and that other items taken from the truck to fight the fire were being loaded back on the truck at the time. 239 Va. at 424, 389 S.E.2d at 477.

In this case, the lights and siren had nothing to do with the injury Simpson incurred during the arrest. Those features merely helped Simpson during the pursuit. They may also have alerted other motorists on Route 460 of the presence of law enforcement personnel, but this fact does not create the necessary nexus. Here, it cannot be argued that any causal relationship existed between Simpson's injury and the use of the lights and siren, as Simpson was not struck by a passing motorist who disregarded the lights and siren.

This case is also distinguishable from *Cassell* as Simpson was not using any equipment from his vehicle "as an integral part of his mission" at the time of his injury. Nor were any of the other officers at the scene utilizing any equipment from the cruiser during the arrest, or loading or unloading equipment from the vehicle at the time of injury.

Finally, Simpson posits that he is entitled to coverage because he was “alighting from” his vehicle when he was injured. Appellant’s Brief p. 25-28. This argument is contrary to Simpson’s testimony at his deposition and at trial that he was handcuffing Robertson approximately 10 feet away from his vehicle when he was injured. Appendix p. 154, 158, 443-444, 452. Moreover, this language does not appear in the VMLP Policy or in Virginia Code § 38.2-2206, and it is not relevant to this case.

Ironically, Simpson relies on language in *Bristow*, *supra*, to support this argument. The *Bristow* Court found that the injured party was not an “insured” for purposes of UM coverage because he was not “occupying” the vehicle, despite the fact that he was leaning over the hood of the car to check wiring when he was struck by an uninsured vehicle. The policy at issue defined “occupying” as “in or upon or entering into or alighting from,” and the question for the Court was whether the injured party was “upon” the vehicle at the time of the accident. 207 Va. at 383, 150 S.E.2d at 127. The Court determined that he was not “upon” it in the sense of “occupying” it. The Court explained that the words in the definition of “occupying” must be read together with the other words in the phrase and must have some connection with the word “occupying.” 207 Va. at 385, 150 S.E.2d at 128.

Nottoway County purchased the Policy at issue to provide UM/UIM coverage to individuals "occupying" its vehicles. Because Simpson was not "occupying" the vehicle, he wishes to expand the class of persons entitled to UM/UIM coverage to include people outside the intent of the Policy. Simpson argues that he was "using" or "occupying" the vehicle because it was positioned to warn other motorists and protect him, Robertson, and Inge from other vehicles. Appellant's Brief p. 23. Pursuant to Simpson's logic, anyone within the vicinity of a police cruiser with lights on and sirens blaring is "occupying" or "using" the cruiser and, therefore, covered by the County's insurance policy. Even Robertson would be considered an "insured" under Simpson's theory, as Robertson was arguably protected by the position of the cruiser and the specialized equipment. This Court has adopted the causal nexus requirement to prevent such a result.

There is no nexus between the scuffle on the ground and any "use" of the police vehicle. Simpson's prior use of the cruiser to pursue Robertson had ended. Any purported continuing "use" of the cruiser through the lights and siren was unrelated to the arrest and subsequent injury. Therefore, Simpson is not an "insured" within the VMLP Policy terms.

III. Simpson is Not Entitled to UM Coverage Because There is No Causal Relationship Between Simpson's Injury and Any "Use" of Robertson's Vehicle.

A. Robertson was not "using" his vehicle.

Even if this Court were to hold that Simpson qualifies as an "insured" under the UM Endorsement of the VMLP Policy, which VMLP disputes, Simpson is still not entitled to recover UM or UIM benefits under the Policy because Simpson was not injured by an uninsured motorist. His injury simply did not arise out of the use of an uninsured vehicle.

A strikingly similar fact pattern was presented to this Court in *Travelers Ins. Co. v. LaClair*, when this Court held that a sheriff's injury during a traffic stop was not causally related to the use of the suspect's vehicle. 250 Va. 368, 463 S.E.2d 461 (1995). In that case, an Arlington County Deputy Sheriff was operating a police cruiser when he attempted to pull over Arban, who was driving erratically. Arban first sped away and then stopped in the road. The sheriff exited his vehicle and approached Arban's vehicle. The sheriff was injured when Arban shot at him from his vehicle. The sheriff filed a personal injury action against Arban's estate, and the question was whether the incident resulted from the ownership, maintenance or use of Arban's vehicle, which was uninsured. 250 Va. at 370-371, 463 S.E.2d at 462-463.

This Court held that Arban's use of his vehicle during the incident did not constitute "use" of his vehicle for purposes of UM coverage, and, therefore, the sheriff was not entitled to UM benefits. *LaClair* at 373, 463 S.E.2d at 464. Significantly, the Court reached this decision despite the facts that Arban used the vehicle to lure the sheriff into stopping behind him, Arban was partially inside the car at the time of the shooting, Arban employed the car as a shield, and he used the car as a means to escape. The Court explained that none of those acts involved the use of the vehicle as a vehicle. Thus, the requisite causal relationship between the incident and the employment of the automobile as a vehicle did not exist. *Id*.

Similarly, in *Erie Ins. Co. Exch. v. Jones*, 248 Va. 437, 448 S.E.2d 655 (1994), the estate of West sought uninsured motorist coverage from Erie, which insured the vehicle in which West was riding. West had been shot and killed when Tyree, who was riding in another vehicle, got out of his vehicle, walked to West's vehicle and tapped a rifle on the window. Tyree's vehicle was uninsured, and the question for the court was whether the incident arose out of the use of Tyree's uninsured vehicle. The Court held that the decedent "had no nexus whatever with the uninsured vehicle, and the rifle Tyree used had no connection with the use to which the uninsured truck was being put." *Id*. at 442, 448 S.E.2d at 658.

The *Jones* Court pointed out that the named insured pays consideration for the insurer's covenant to compensate victims for vehicle-caused personal injuries and damages. Such damages are not vehicle-caused when the incident is "merely incidental or tangential to the ownership, maintenance, or use of the vehicle." *Id*. at 442-443, 448 S.E.2d at 658-659; *see also Nationwide Mut. Ins. Co. v. Futrell*, 57 Va. Cir. 105 (2001) (holding that police officer was not entitled to UM benefits for injuries sustained after stopping a suspect on I-95 and engaging in a foot pursuit, despite the fact that the officer feared the suspect would return to his car; the suspect was no longer a motorist and was not "using" his vehicle).

In *State Farm v. Powell*, 227 Va. 492, 318 S.E.2d 393 (1984), this Court held that a death resulting from the discharge of a shotgun resting in gun rack in a truck did not arise out of use of the truck. The decedent had walked to the side of the truck to talk to the truck's occupants when a gun resting in a gun rack accidentally fired. This Court held that "consideration must be given to what the injured person was doing when he was injured, as well as his purpose and intent, in determining whether that person was in such position in relation to the vehicle to be injured in its use." *Id*. at 501, 318 S.E.2d at 397. The decedent in *Powell* had not been a passenger in the truck and had no intent to occupy the truck. His only connection with

the truck was as a place for social gathering. Thus, the requisite causal relationship between the accident and the employment of the truck as a vehicle did not exist, and there was no coverage.

The foregoing cases demonstrate that there is no causal relationship between Simpson's injury and any use of Robertson's vehicle. Simpson's injury was merely tangential to the prior use of Robertson's vehicle. *See Jones*, *supra.* The injury during the scuffle was not causally related to any use of the vehicle merely because it occurred in the same chronological sequence of events or merely because it occurred within close proximity to Robertson's vehicle. *Id*. Moreover, as in *Powell*, Simpson had no connection to the uninsured vehicle. He had never been a passenger in Robertson's vehicle and had no intent to occupy the vehicle.

Similar to *LaClair*, Simpson was injured while attempting to make an arrest after a traffic stop. And, like the officer in *LaClair*, Simpson argues that Robertson "lured" Simpson into stopping behind him. However, the facts of this case are even more favorable than those presented in *LaClair*, in which the Court found no "use" of the suspect's vehicle. Robertson was no longer inside his vehicle. He was not using the car "as a shield" or to facilitate Simpson's injury during the scuffle. Robertson clearly was not using his vehicle in any way at the time Simpson claims he was injured. He

was no longer a motorist. He had stepped away from his vehicle and was in the course of surrendering when Simpson injured his shoulder.

B. Robertson was no longer an "operator" of an uninsured vehicle.

Simpson states that Robertson was still "operating" his vehicle when he was injured, and, therefore, he is entitled to coverage. Simpson relies on *Colonial Ins. Co. v. Rainey*, 237 Va. 270, 377 S.E.2d 393 (1989) for this proposition. Appellant's Brief p. 14-15, 24. However, *Rainey* supports the opposite conclusion. In *Rainey*, this Court considered whether Rainey was entitled to UM coverage in an action against Augustin, who was uninsured. Augustin had a flat tire on the interstate and was walking to a service station when he dropped his spare tire down an embankment and the tire struck Rainey's vehicle. The insurer conceded that the accident arose out of the ownership, maintenance or use of the uninsured vehicle because Augustin was "maintaining" his vehicle. Rather, the insurer argued that Augustin was no longer an "operator" of the vehicle because he was 200 feet away from it, and, therefore, the insurer contended that Rainey was not entitled to UM coverage.[4] 237 Va. at 273, 377 S.E.2d at 395.

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[4] Like the UM Endorsement in the VMLP Policy, the UM Endorsement in *Rainey* only paid damages recoverable from the "owner or operator of an uninsured vehicle" in accordance with Virginia Code § 38.2-2206.

This Court held that "one's status of 'operator' is not relinquished or lost merely by leaving the vehicle," as one must ordinarily be outside the vehicle to perform maintenance on it. *Id.* at 274, 377 S.E.2d at 396. However, the Court explained that "when the operator is not inside the vehicle in control of it, there must be a direct causal connection between the 'operator,' the accidental injury, and the maintenance or use of the vehicle." *Id*. at 275, 377 S.E.2d at 396. Because Augustin was still the operator and the insurer conceded that the injury arose out of the vehicle's maintenance, Rainey was entitled to UM coverage. *Id*.

In this case, VMLP does not concede that the injury arose out of the maintenance or use of the uninsured vehicle. Moreover, Robertson was no longer an "operator" of his vehicle in any sense of the word. He was not performing maintenance on the vehicle or using the vehicle. He was outside the vehicle, lying on the ground, being handcuffed. There is no "direct causal connection between [Robertson], [Simpson's] injury, and the maintenance or use of the vehicle." *Rainey*, 237 Va. at 275, 377 S.E.2d at 396.

C. Robertson was not "using" or "occupying" his vehicle at the time of injury, regardless of his mission.

The crux of Simpson's argument regarding the "use" of Robertson's vehicle relates to Robertson's "mission" at the time of Simpson's injury.

Simpson asserts that his injury arose out of the use of an uninsured vehicle solely because Robertson was still engaged in his escape mission. Appellant's Brief p. 24. Simpson's argument is misplaced. The relevant question is not whether Robertson is still engaged in an escape mission, but whether he was still using the vehicle as an integral part of that mission. If the answer to that inquiry is affirmative, it is only then that the court must assess whether Simpson's injury was causally related to that use.

The trial court determined that Robertson was no longer attempting to escape and that the pursuit was over. However, even if the trial court found that Robertson was still trying to escape, which VMLP disputes, the result would be the same: Robertson was no longer using his vehicle as part of that mission or any mission. For example, if Robertson had jumped out of his vehicle and fled into the woods near Route 460, he would still be engaged in an escape mission, but he would not be "using" his vehicle. Simpson's injury would not be causally related to any "use" of Robertson's vehicle whether Robertson had walked three feet away from his vehicle with his hands in the air (with a mission to surrender) or walked three feet away from the vehicle (with a mission to escape) or sprinted 200 yards into the woods (with a mission to escape). He is not using his vehicle in any of

these scenarios, and there is no nexus between Simpson's injury and the vehicle regardless of Robertson's mission.

Simpson relies on *State Farm Mut. Auto. Ins. Co. v. Rice*, 239 Va. 646, 391 S.E.2d 71 (1990) to support his "escape mission" argument. However, while the *Rice* Court may have considered the vehicle occupants' mission, the person found to be "using" the car still had a causal connection to the vehicle.

In *Rice*, this Court assessed whether Vest was entitled to liability coverage for the accidental shooting of Rice. Vest was only entitled to coverage if the accident arose out of the use of the covered vehicle. The Court considered the nexus between the injured party (Rice) and the vehicle. Rice had been a passenger in the insured vehicle, and the vehicle had been used to transport Rice, the driver (Vest), and their hunting equipment to a hunting site. The Court also looked at the tortfeasor's relation to the vehicle. Vest had not completed his use of the vehicle when his gun accidentally discharged. Vest was still standing at the vehicle, placing a thermos in the seat and removing his rifle when it discharged. Thus, based on these factors, the Court found that there was a sufficient causal relationship between the accident and the use of the vehicle. 239 Va. at 650, 391 S.E.2d at 73.

Neither Robertson nor Simpson had the necessary connection to the uninsured vehicle at the time of injury. Unlike *Rice*, Simpson was never a passenger in Robertson's vehicle and had no relation to the vehicle. Robertson had completed all use of his vehicle and had no intent to occupy his vehicle again. He was on the ground being arrested when the injury occurred. There is no nexus whatsoever between Simpson's injury and Robertson's vehicle.

Simpson's injury while arresting a suspect on the ground was not a risk contemplated by the parties to this automobile insurance contract. Simpson was not injured by the operator of an uninsured vehicle, and he is not entitled to UM or UIM coverage from VMLP.

IV. Even if Simpson is an "Insured," All Available UM Coverage is Set Off by Workers Compensation Payments.

The UM Endorsement of the VMLP Policy states that, except with respect to an underinsured motor vehicle, damages otherwise payable under this coverage "with respect to an employee of a self-insured employer, shall be reduced by all sums paid or payable because of bodily injury under a workers' compensation law." Appendix p. 280. To the extent this Court finds that Simpson is an "insured" and otherwise entitled to UM coverage under the VMLP Policy, any UM benefits will be reduced by the workers' compensation payments made to Simpson. The UM limit under

the VMLP Policy is $25,000. Simpson received over $126,000 in workers' compensation benefits, which is more than VMLP's UM limit. Therefore, even if Simpson is an "insured" and the Court determines that his injury arose out of the "use" of an uninsured vehicle, VMLP owes no UM benefits under the Policy. Therefore, in the event this Court reverses the trial court's findings, VMLP respectfully requests remand of the case to determine the applicability of any Policy exclusions and the priority of coverages.

CONCLUSION

Simpson cannot show that the trial court's factual findings or legal conclusions are plainly wrong or without evidence to support them as required by Virginia Code § 8.01-680. Simpson's dissatisfaction with the outcome does not entitle him to a different result. The court's conclusions are supported by the facts and are consistent with Virginia law. Simpson was no longer "occupying" the police cruiser pursuant to the language of the VMLP Policy, and, therefore, he is not an "insured." Moreover, there is no causal relationship between Simpson's injuries and the use of an uninsured vehicle. As explained in the trial court's letter opinion, even an expanded definition of "use" would not encompass the facts of this case. Accordingly,

VMLP has no duty to indemnify Charles Simpson for the injuries claimed as a result of the incident on February 12, 2004.

For the foregoing reasons, Appellee Virginia Municipal Liability Pool respectfully requests that this Court affirm the trial court's rulings.

Virginia Municipal Liability Pool

BY: _____
Counsel

David P. Corrigan
Virginia State Bar No. 26341
Carson W. Johnson
Virginia State Bar No. 66047
Harman, Claytor, Corrigan & Wellman
P.O. Box 70280
Richmond, Virginia 23255
Telephone: (804) 747-5200
Facsimile: (804) 747-6085
dcorrigan@hccw.com
cwjohnson@hccw.com
Counsel for Virginia Municipal Liability Pool

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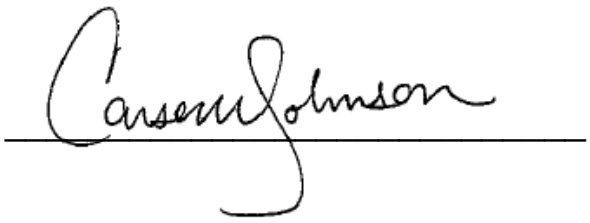
I certify that, as required by Rule 5:26(d) of the Rules of the Supreme Court of Virginia, fifteen copies of this Brief were delivered to the Clerk of the Supreme Court of Virginia; that one electronic copy of the Brief was delivered to the Clerk of the Supreme Court of Virginia; and that three copies were mailed to the following counsel this 28th day of September, 2009: Kennon C. Walden, Jr., Esq., Walden & Walden, P.C., Post Office Box 278, Blackstone, Virginia 23824, *Counsel for Charles Simpson,* Alan B. Gnapp, Esq., Duane, Hauck & Gnapp, P.C., 10 East Franklin Street, Richmond, Virginia 23219, *Counsel for GEICO,* Wm. Tyler Shands, Esq., Carter & Shands, 9030 Stony Point Parkway, Suite 530, Glen Allen, Virginia 23235, *Counsel for National Grange Mutual Insurance Company,* Neil Kuchinsky, Esq., Kuchinsky & Yeamans, Post Office Box 125, Colonial Heights, Virginia 23834, *Counsel for Malcolm Robertson*.