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
GOVERNMENT EMPLOYEES INSURANCE COMPANY
a/k/a GEICO

Alan B. Gnapp, Esquire (VSB No. 26189)
Justin S. Gravatt, Esquire (VSB No. 65506)
DUANE, HAUCK & GNAPP, P.C.
10 East Franklin Street
Richmond, Virginia 23219
(804) 644-7400 Telephone
(804) 649-8329 Facsimile
agnapp@duanehauck.com

Counsel for Appellee

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
A Division of Lantagne Duplicating Services

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I. STATEMENT OF THE NATURE OF THE CASE

Appellant Charles Simpson ("Simpson") was injured as a result of an incident that occurred on February 12, 2004, after a police pursuit of Appellee Malcolm Robertson ("Robertson") concluded in Nottoway County. On or about February 2, 2006, Simpson filed a personal injury lawsuit against Robertson in the Nottoway County Circuit Court. Thereafter, on or about June 18, 2007, Appellee Virginia Municipal Liability Pool ("VMLP") filed a Petition for Declaratory Judgment in the Nottoway County Circuit Court to determine whether there was any liability and/or uninsured motorist coverage available for the injuries claimed by Simpson.

At the time of the incident, Robertson's vehicle was insured by a policy issued by GEICO Casualty Company (hereinafter referred to as "GEICO Policy"). The police cruiser operated by Simpson during the pursuit was insured by VMLP, and Simpson was personally insured by Appellee National Grange Mutual Insurance Company ("NGM"). Appellee Government Employees Insurance Company ("GEICO") asserted that it was not required to defend and/or indemnify Robertson as a result of the incident of February 12, 2004 because Simpson's injuries did not arise out of Robertson's "ownership, maintenance or use" of Robertson's vehicle as required by the GEICO Policy. In addition, GEICO asserted that it was not

required to defend and/or indemnify Robertson because Simpson's injuries were the result of Robertson's intentional acts. Furthermore, there were coverage issues between Simpson, NGM and VMLP that were not applicable to GEICO.

A bench trial took place before the Honorable Thomas V. Warren of the Nottoway County Circuit Court on December 12, 2008, and by a letter dated December 29, 2008, Judge Warren found that GEICO was not required to defend or indemnify Robertson since Simpson's injuries did not arise out of Robertson's "use" of Robertson's vehicle. (Appendix at pp. 489-490). Judge Warren also found that neither NGM nor VMLP owed coverage to Simpson, although he did not provide a ruling on GEICO's intentional act argument whereas that issue became moot in light of his ruling on the "use" issue. An Order was entered on December 30, 2008. (Appendix at p. 491).

Simpson appealed Judge Warren's rulings to this Court, and assigned error to the substantive rulings of the Trial Court, but not to any procedural issues of the trial.

II. QUESTION PRESENTED

1. Is GEICO required to defend and/or indemnify Robertson as a result of the incident of February 12, 2004?

A) Did Simpson's injuries arise out of Robertson's "ownership, maintenance or use" of Robertson's vehicle?

B) Did Simpson's injuries arise out of Robertson's intentional acts?

III. STATEMENT OF THE FACTS

The overriding issue as to GEICO is whether Robertson was "using" his vehicle at the time that Simpson was injured on February 12, 2004, pursuant to the GEICO Policy and Virginia law. NGM also issued a personal policy to Simpson, which would provide uninsured motorist coverage to Simpson if Robertson was "using" Robertson's vehicle at the time of the injury. Additional issues (not applicable to GEICO) also involve whether Simpson was "using" or "operating" his police cruiser at the time of the injury, which was insured by VMLP.

The trial testimony revealed that on February 12, 2004, Robertson was traveling to Altavista from his home in Dinwiddie County, and he acknowledged that he had a suspended license and that he knew that he should not have been driving. (Appendix at pp. 180-181). Trooper James Inge ("Trooper Inge") attempted to pull Robertson over for speeding, but

Robertson refused to pull over. (Appendix at p. 97). Robertson had also started to consume a beer while driving. (Appendix at p. 183). A pursuit was then established, and at some point, Simpson joined the pursuit after hearing of the same on the radio. (Appendix at pp. 99, 149).

According to testimony of Simpson and Trooper Inge, there were allegations of several impacts between Robertson's vehicle, Trooper Inge's vehicle and Simpson's vehicle during the pursuit, but no injuries were sustained by Simpson as a result of those impacts. (Appendix at pp. 100, 138). Eventually, Robertson's vehicle was forced over to the left side of Route 460 eastbound in Nottoway County. (Appendix at pp. 102-104 and 366-367). Robertson claimed that he pulled over because his vehicle would not go faster. (Appendix at p. 183). Robertson's vehicle could not move forward because his vehicle was blocked. (Appendix at pp. 151, 183). Simpson claimed no injuries up to the point when the vehicles came to rest.

According to the trial testimony, Trooper Inge pulled in front of Robertson's vehicle on the side of the road to block him, and Robertson admitted that he could no longer move his vehicle after Trooper Inge's maneuver since he was "boxed in." (Appendix at pp. 101, 183). Simpson testified that he then pulled his vehicle approximately ten (10) feet behind Robertson's vehicle. (Appendix at p. 139). Thereupon, Robertson exited his

vehicle with his hands in the air, his keys in hand, and he was then taken down to the ground by Trooper Inge and Simpson. (Appendix at pp. 184-185). Trooper Inge acknowledged that he tackled Robertson into Simpson, which forced all three (3) men to the ground. (Appendix at pp. 105-106). Simpson testified that all three (3) men went to the ground, but Simpson was unclear as to whether he was touching or holding Robertson. (Appendix at pp. 152-153).

Trooper Inge and Simpson both testified that Robertson was two (2) to three (3) steps away from Robertson's vehicle when he was tackled, and Robertson testified that he was standing in one (1) spot without offering any resistance when tackled. (Appendix at pp. 132, 151, 184-186). Further, Trooper Charles Chumney, a witness called by Simpson at trial, testified that Robertson was approximately twenty (20) feet away, and moving away, from the Robertson vehicle when Robertson was tackled. (Appendix at p. 173).

Most critical is Simpson's stipulation that he was injured while he was trying to handcuff Robertson, not at any point during the police pursuit (Appendix at p. 163). Simpson has always maintained that he was injured while handcuffing, arresting and/or subduing Robertson after Robertson got out of his vehicle. (Appendix at p. 149). Simpson even noted that he was injured "trying to handcuff a suspect" in his Claim for Benefits Form as filled

out for his Workers' Compensation claim on or about March 10, 2004 (Appendix at p. 480). There was also no evidence at trial to dispute Robertson's testimony that Robertson's vehicle was turned off, that Robertson had moved away from and was not touching his vehicle, and that Robertson's keys were in his hand when Simpson was injured. (Appendix at p. 184).

Pursuant to the GEICO Policy introduced as an exhibit at trial, and which is contained in the Appendix at pages 332-365, GEICO Casualty Company issued a liability policy to Robertson as a named insured, which was applicable on February 12, 2004. (Appendix at p. 106). GEICO denied owing any coverage and a duty to defend Robertson, however, whereas the injuries to Simpson did not arise out of the "ownership, maintenance or use" of Robertson's vehicle, as required by the GEICO Policy. Robertson was not using his vehicle, and there was no nexus between Robertson's prior use of the vehicle on February 12, 2004, and Simpson's injuries at the time of the handcuffing of Robertson. Thereby, the Trial Court acknowledged that the GEICO Policy was not applicable for Simpson's injuries, and thus, GEICO had no duty to defend and/or indemnify Robertson.

In the alternative, GEICO also argued at trial that any injuries alleged by Simpson arose out of intentional acts by Robertson, and that coverage did

not apply since an exclusion in the GEICO Policy, states, "This policy does not apply under Part I:...(b) to bodily injury . . . caused intentionally by or at the direction of the insured." (Appendix at p. 356). Nevertheless, the intentional act issue was not addressed by the Trial Court as moot since the Trial Court found that the GEICO Policy at issue did not apply.

IV. PRINCIPLES OF LAW AND ARGUMENT

1. GEICO is not required to defend and/or indemnify Robertson for the incident of February 12, 2004.

A) Simpson's injuries did not arise out of Robertson's "ownership, maintenance or use" of Robertson's automobile.

i. GEICO only has a duty to defend and/or indemnify Robertson if the incident and damages at issue arose out of Robertson's "ownership, maintenance or use" of Robertson's automobile.

Robertson was the named insured on the GEICO Policy. (Appendix at pp. 333-334). The GEICO Policy applicable to Robertson's vehicle provides liability coverage for damages arising out of the "ownership, maintenance or use of the owned automobile or any non owned automobile . . .," which is also required by Virginia's Omnibus Clause (§ 38.2-2204 of the Code of Virginia). (Appendix at p. 355). Further, the term "use" is defined by the GEICO Policy to include "the loading and

unloading" of an automobile. (Appendix at p. 356). Thereby, Robertson is only entitled to liability coverage (and a defense by GEICO) if Simpson's injuries arose out of the "ownership, maintenance or use" of Robertson's vehicle on February 12, 2004.

It is noteworthy to point out that Simpson has also asked this Court to find that he is entitled to UM/UIM coverage under a VMLP policy that insured his police cruiser at the time of the incident. The issue regarding the VMLP policy concerns whether **Simpson** was "occupying" the **police cruiser** at the time of the incident. The issue regarding the GEICO Policy concerns only whether Simpson's injury arose out of **Robertson's** "ownership, maintenance or use" of **Robertson's** personal automobile. Thereby, any argument and analysis in the Brief of Appellant as to Simpson's occupancy or use of the police cruiser is irrelevant and immaterial to the issues applicable to GEICO. Likewise, Simpson's discussions of case law involving the use of specialized vehicles, such as the fire truck in Great American Ins. Co. v. Cassell, Adm., 239 Va. 421, 389 S.E.2d 476 (1990), are irrelevant to GEICO's coverage issue since Robertson was not operating or using a specialized vehicle.

Further, many of the cases cited by Simpson in his Brief of Appellant involve claims by injured persons seeking UM/UIM coverage pursuant to

§ 38.2-2206 of the Code of Virginia, not claims by persons seeking liability coverage pursuant to § 38.2-2204 of the Code of Virginia.[1] See Slagle v. Hartford Ins. Co., 267 Va. 629, 594 S.E.2d 582 (2004); Colonial Ins. Co. v. Rainey, 237 Va. 270, 377 S.E.2d 393 (1989); Nationwide Mut. Ins. Co. v. Smelser, Exec., 264 Va. 109, 563 S.E.2d 760 (2002); Fireman's Fund Ins. Co. v. Sleigh, 267 Va. 768, 594 S.E.2d 604 (2004). Although the analysis as to use under § 38.2-2206 or § 38.2-2204 is similar, most of the cases decided by this Court that involve use have been decided in relation to § 38.2-2206, with slight differences in the policy definitions and in the application of the facts.

ii. Simpson's injuries did not arise out of Robertson's "ownership, maintenance or use" of Robertson's automobile.

The issue as to GEICO turns upon whether Simpson was injured as a result of Robertson's use of Robertson's vehicle, whereas ownership and maintenance are not applicable or at issue in this matter. In his Brief of Appellant, Simpson sets forth in great detail, the facts surrounding the police chase of Robertson. However, these facts are immaterial whereas Simpson's injury occurred after the vehicular chase concluded, with no

[1] § 38.2-2206 defines an "insured" for the purposes of the statute to be, "any person who uses the motor vehicle to which the policy applies." § 38.2-2206(B) of the Code of Virginia.

nexus between Simpson's injury and Robertson's use of his vehicle. It was stipulated at trial, and Simpson's Brief of Appellant concedes, that Simpson was not injured until he had Robertson on the ground "while attempting to get Robertson's arm behind his back to handcuff him...." (Brief of Appellant at p. 7; Appendix at pp. 162-163). Thereby, it is undisputed that Simpson was injured while handcuffing Robertson, after Robertson exited, shut down, and removed the keys from his vehicle.

Even though Virginia law is clear that a person does not necessarily have to be occupying a vehicle to be deemed to be using a vehicle, it is also clear after a review of Virginia law that Robertson was not using his vehicle when Simpson was injured. In use cases involving § 38.2-2206, the analysis often hinges on whether the **injured person** was using the "insured vehicle as a vehicle and as an integral part of his mission" at the time of injury. Slagle, supra, 267 Va. at 636, 594 S.E.2d at 586. Slagle, a case relied upon by Simpson, involved a UIM claim by a manager of a construction company, injured when struck by a vehicle while standing behind a work vehicle, directing the driver on a construction site. Slagle at 634, 594 S.E.2d at 584. The facts in Slagle differ from our fact scenario in that GEICO's liability policy concerns Robertson's use of his ordinary and

non-specialized vehicle, and he was not using the vehicle at the time of injury.

The use test pursuant to § 38.2-2204 was enunciated in State Farm Mut. Auto. Ins. Co. v. Powell, Adm., 227 Va. 492, 318 S.E.2d 393 (1984). In Powell, liability coverage was at issue after a firearm discharged from a gun rack inside of the insured vehicle, killing a person who was standing just outside an open door. This Court stated:

> [C]onsideration must be given to the intention of the parties to the insurance agreement in determining the scope of the coverage afforded.... In addition, the 'ownership, maintenance, or use' provision should be construed in the light of the subject matter with which the parties are dealing; the terms of the policy should be given their natural and ordinary meaning.... Even though ownership, maintenance, or use of the vehicle need not be the direct, proximate cause of the injury in the strict legal sense, nevertheless, **there must be a causal relationship between the accident and employment of the insured motor vehicle as a vehicle.... Furthermore, consideration must be given to what the insured 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'.... (citations omitted).

Powell, 227 Va. at 500-501, 318 S.E.2d at 397. (Emphasis added). Ultimately, this Court concluded that the death in Powell did not arise out of the use of the insured vehicle. In fact, the insured vehicle "merely was the situs for a social gathering," and was not being used "for any specific

enterprise usually associated with use of a passenger, farm utility vehicle." Powell, 227 Va. at 501, 318 S.E.2d at 398.

In the more recent case of Erie Ins. Co. Exchange v. Jones, Adm., 248 Va. 437, 448 S.E.2d 655 (1994), after a minor traffic accident, the defendant walked to another vehicle involved in the accident and tapped the barrel of a gun that he was carrying on the window. Thereby, the gun discharged and killed the plaintiff's decedent. The issue on appeal was whether "the wrongful death was caused by an accident that arose out of the use" of the defendant's vehicle. Jones, 248 Va. at 440, 448 S.E.2d at 657. The plaintiff in Jones made a "but for" argument, and argued that the wrongful death "would not have happened but for the operation or use of two motor vehicles on a public highway." Jones, 248 Va. at 441, 448 S.E.2d at 657. Nevertheless, this Court determined that use did not exist, and stated:

> Automobile insurance policies are contracts. The named insured pays consideration for the insurer's covenant to compensate victims for vehicle-caused property losses, personal injuries, and death. **Such damages are not vehicle-caused when the proximate cause is merely incidental or tangential to the ownership, maintenance, or use of the vehicle.** Here, the proximate cause of the wrongful death was a criminal assault, one related to the use of an uninsured motor vehicle only by a chronological sequence of events. Such a risk was never one within the intendment of the parties to these insurance contracts.

Jones, 248 Va. at 442-443, 448 S.E.2d at 658-659. (Emphasis added).

Another similar case is Travelers Ins. Co. v. LaClair, 250 Va. 368, 463 S.E.2d 461 (1995), in which, a motorist who was stopped for a traffic offense, shot at and wounded, a Deputy Sheriff. The shooter's liability insurance company denied coverage for the incident and the Deputy Sheriff pursued UM coverage. The UM carriers denied coverage, and on appeal this Court upheld the denial of coverage since the incident/injuries did not arise out of the use of the defendant vehicle. The coverage denial was upheld and did not find use "even though the vehicle was employed to 'facilitate the act which produced the injury'...," and even though the vehicle "may have been an 'accessory' to the shooting...." LaClair, 250 Va. at 372, 463 S.E.2d at 464.

Another pertinent case is Ins. Co. of North America v. Perry, Adm., 204 Va. 833, 134 S.E.2d 418 (1964). Perry involves a police officer who was struck and killed by a motorist when the officer was 164 feet away from his police cruiser, while attempting to serve a warrant. Although the Perry case involved uninsured motorist coverage, this Court determined that the officer was not using his cruiser at the time of his death. This Court stated, "Peterson met his death when he was on foot, 164 feet away from the parked cruiser, engaged in the act of serving a warrant," and thus, held that the officer's fatal injury did not result from his use of the police cruiser.

Perry, 204 Va. at 838, 134 S.E.2d at 421. Perry is similar to our case in that Simpson's injuries did not result from Robertson's use of his own vehicle, whereas Simpson was handcuffing Robertson on the ground at the time of the injury.

Finally, Nationwide Mut. Ins. Co. v. Futrell, 57 Va. Cir. 105 (2001), is a Spotsylvania Circuit Court opinion, which has some factual similarities to the case at bar, and which provides persuasive argument. In Futrell, a Virginia State Trooper sued an alleged drunk driving suspect for personal injuries that resulted from a foot pursuit that resulted after a traffic stop. The facts were summarized in the opinion as follows:

> Officer Alessi had stopped a motorist, Scott D. Carter, southbound on I-95 near the Thornburg interchange. When Officer Alessi attempted to arrest Mr. Carter for driving while intoxicated, he resisted. Officer Alessi was joined by Officer Robert Barham. Mr. Carter struggled with both officers and ran out into the southbound lanes of I-95. Over the next several minutes, Mr. Carter fought with the officers, fled, returned to fight some more, resisted the officers' efforts to keep him out of the travel lanes of I-95, and eventually ran into a wooded area on the opposite side of the highway....
>
> Not quite finished, Mr. Carter again returned to the scene, crossed the highway, and was running north in the southbound lanes of I-95 when Officer Futrell, who had answered Officer Alessi's call, spotted him.
>
> Officer Futrell had parked his vehicle on the I-95 southbound on-ramp. When he saw Mr. Carter running down the highway, he went toward him to apprehend him. Mr. Carter ran from him. Just as Officer Futrell caught Mr. Carter, a southbound

> tractor-trailer truck struck both of them. Officer Futrell was seriously injured. During this entire bizarre episode, Mr. Carter's vehicle was parked on the right shoulder of southbound I-95. Its lights and engine were off. The key was in the ignition. Officer Alessi testified that at certain points during the incident, he was concerned that Mr. Carter might head back toward his vehicle and drive away.

Futrell, 57 Va. Cir. at 105-106.

Due to his injuries, the officer attempted to submit an uninsured motorist claim through his personal policy, but was required to prove that there was "a causal relationship between the incident giving rise to the injury and the use of the [suspect's] automobile as a vehicle." Futrell, 57 Va. Cir. at 106. The Trial Court decided that the uninsured motorist coverage of the officer's policy did not apply, whereas the suspect's connection with the suspect's automobile at the time of the alleged injury was "**remote and causally unrelated**." Futrell, 57 Va. Cir. at 106 (Emphasis added). In fact, the opinion stated that the fleeing suspect "was not a motorist. He was not using a vehicle. He was a pedestrian resisting arrest, and running up and down I-95." Futrell, 57 Va. Cir. at 107. Similarly, in our case Robertson was not a motorist at the time of Simpson's injury whereas he was in the process of getting handcuffed on the ground despite the potential fear that Robertson may drive away.

Applying the holdings in Powell, Jones, LaClair, Perry, and Futrell, to the facts of this case, there is clearly no "causal relationship between the accident and employment of the insured motor vehicle as a vehicle." Powell, 227 Va. at 500, 318 S.E.2d at 397. Robertson was outside of his vehicle, keys in hand, and was getting handcuffed on the ground by Simpson at the time of Simpson's injury. Simpson was injured performing his job as a police officer, and he was not injured from the use of a vehicle by Robertson. In fact, he was injured by his own act of handcuffing Robertson. There is no testimony that disputes these facts. The insured motor vehicle was not being used for any purpose at the time of the injury, and Robertson's prior use of his vehicle during the police chase is irrelevant, and at best, only "incidental or tangential" to Simpson's injury. Jones, 248 Va. at 443, 448 S.E.2d at 659. Similar to Futrell, Robertson was a pedestrian, who after a chase was getting arrested/handcuffed when the injury occurred to Simpson. Robertson could not have used his vehicle in any further escape attempt, even had he chosen to do so, whereas he admitted that the police vehicles had his vehicle "blocked in." (Appendix at p. 183). Further, it is undisputed that Robertson's keys were in his hand, and that he had moved away from his vehicle. Thereby, Robertson was not using his vehicle at the time of injury, and Robertson would not have

been using his vehicle as a nexus to Simpson's injury even if Robertson was getting handcuffed inside the Robertson vehicle.

Furthermore and perhaps most importantly, as noted above, "consideration must be given to the intention of the parties to the insurance agreement in determining the scope of the coverage afforded." Jones, 248 Va. at 442-443, 448 S.E.2d at 658-659. The parties to the GEICO Policy, Robertson and GEICO, could never have assumed that liability coverage would apply to Simpson's injury based on the facts of the case at bar. This is reflected not only by GEICO's position in this appeal, but also by the fact that Robertson himself took the position that he was not using his vehicle at the time of Simpson's injury. (Appendix at p. 187). Thereby, the "intention of the parties to the insurance agreement" is clear and coverage does not apply. Jones, 248 Va. at 442-443, 448 S.E.2d at 658-659. To hold that Robertson was using his vehicle at the time of Simpson's injury would be in opposite to the parties' intent, not to mention a non-expected or non-anticipated expansion of the risk assumed by GEICO when GEICO decided to issue the policy to Robertson. Thereby, Robertson was not using the vehicle within the terms of the GEICO Policy, within the meaning of § 38.2-2204, or within the intent of the parties to the contract and, thus, Robertson is not entitled to a defense or indemnification from GEICO.

Finally, "the burden of proof is on the party seeking to bring himself within the omnibus-coverage clause of the policy." Hartford Fire Ins. Co. v. Davis, 246 Va. 495, 498, 436 S.E.2d 429, 431 (1993); Hartford Accident & Indemnity Co. v. Peach, 193 Va. 260, 266, 68 S.E.2d 520, 523 (1952). Simpson acknowledged at trial that Simpson had the burden of proof under the GEICO Policy. (Appendix at p. 94). In addition, the trier of fact has found that Simpson failed to meet his burden in establishing use of the vehicle, which ruling should not be disturbed unless the trier of fact was "plainly wrong or without evidence to support" any factual conclusions. § 8.01-680 of the Code of Virginia; Davis, supra, 246 Va. 495, 498, 436 S.E.2d 429, 431 (1993). Thereby, for the reasons as discussed above, the plaintiff has failed to meet the burden in establishing that Robertson should be provided liability coverage by GEICO for the injuries claimed by Simpson, and the Trial Court's finding should not be disturbed.

iii) Robertson was not on a continued "escape mission" when Simpson was injured, such that he was still using his vehicle.

The crux of Simpson's argument as to Robertson's alleged use of Robertson's vehicle is that Robertson was still engaged in an "escape mission" when Simpson was injured, and thus, was still using his vehicle. Simpson argues that "[t]he facts are that Deputy Simpson was using and/or

occupying his vehicle at the time of his injury. If the police officer's arrest mission has not concluded, then a fortiori, how can Robertson's escape mission be concluded?" (Brief of Appellant at p. 24). Simpson also argues:

> Assuming that Robertson is standing near his open driver's door with his keys in his hands, his escape mission is not over. Police officers are not so trusting and naïve as to believe that even if Robertson had his hands in the air, he intended to surrender. He could be luring the officers out of their cars...

(Brief of Appellant at pp. 24-25). Simpson's "escape mission" argument is unsupported, however, and the cases relied upon by Simpson are distinguishable on the facts.

First, the undisputed facts confirm that the so-called "escape mission" concluded prior to Simpson's injury, which is the factual conclusion of the trial court. Based upon the quote from Simpson's Brief of Appellant immediately above, one would conclude that Simpson was injured by an act of Robertson while Robertson was "standing near his open driver's door" contemplating a further use of his vehicle to elude the police. (Brief of Appellant at p. 24). Nevertheless, Robertson testified at trial that after the pursuit ended, he exited his vehicle with his hands in the air, keys in his hand, and was tackled by Trooper Inge and Deputy Simpson (Appendix at pp. 184-185). This occurred after Robertson moved away from his vehicle. No witness on behalf of Simpson disputed these facts at trial, and the parties

even stipulated that Simpson was injured while attempting to handcuff Robertson on the ground, not during the police chase. (Brief of Appellant at p. 7). In addition, the asserted and anticipated escape on foot is not a "use" of a vehicle pursuant to the GEICO Policy, or pursuant to any known case applying Virginia law. Thereby, to the extent that Robertson was actually on an "escape mission via vehicle," as Simpson asserts, that mission concluded prior to Simpson's injury, without any nexus to Simpson's injury. Even assuming *arguendo*, however, that the "escape mission" continued up to the point when Simpson was injured, Robertson still had no nexus or causal connection to his vehicle at that point. Thereby, using Simpson's argument the mission would continue even if Robertson was tackled and Simpson was injured miles away after a long foot chase. However, the mission argument as asserted overlooks the need for a nexus between the Simpson injury and the Robertson vehicle.

Additionally, a review of the cases that Simpson relies upon to support his "escape mission" argument shows that they are distinguishable from the facts of the case at bar. Most importantly, in every case relied upon by Simpson, the person found to be using a vehicle still had a causal connection to the vehicle, and was engaged in some act (or mission) **related to the vehicle**. Here, Robertson had no causal connection to his vehicle when

Simpson was injured, nor was Robertson engaged in any act (or mission) related to his vehicle.

Simpson first relies upon State Farm Mut. Auto. Ins. Co. v. Rice, 239 Va. 646, 391 S.E.2d 71 (1990), in which a Jeep passenger (Rice), who was walking to a hunt site, was accidentally shot when his hunting companion (Vest) accidentally discharged a rifle from within the Jeep when he went to pick it up. Rice, 239 Va. at 647-648, 391 S.E.2d at 71-72. This Court found that a "sufficient nexus existed between Rice...and the Jeep," since, "Vest had not completed his use of the Jeep when the rifle discharged." Rice, 239 Va. at 650, 391 S.E.2d at 73. Unlike Vest, however, Robertson had completed his use of his vehicle when Simpson was injured handcuffing him which is a separate act with no causal connection to the use of a vehicle.

Another case relied upon by Simpson to support his "escape mission" argument is Rainey, supra. In Rainey, a motorist had a tire blowout, and then found his spare tire to be under inflated, so he decided to carry the spare tire to a service station so that it could be inflated. When the motorist was approximately 200 feet from his vehicle, he accidentally dropped the spare tire, which rolled down an embankment and struck the windshield of a bus injuring a bus occupant. Rainey, 237 Va. at 271-272, 377 S.E.2d at 394. On those facts, this Court held that injured party was entitled to uninsured

motorist coverage because the injury occurred "reasonably close in point of time" to the tortfeasor's "departure from the vehicle and at a reasonably close distance from the uninsured vehicle." Rainey, 237 Va. at 275, 377 S.E.2d at 396. Thus, Simpson argues that "under the Court's holding in Rainey, infra, Robertson was still 'operating' his vehicle.'" (Brief of Appellant at 24).

Simpson fails to consider, however, that the tortfeasor in Rainey was still "engaged in a transaction essential to the use of" his vehicle when he dropped the spare tire, which cannot be said about Robertson. See Cassell, supra, 239 Va. at 424, 389 S.E.d at 477; see also United States Fire Ins. Co. v. Parker, 250 Va. 374, 378, 463 S.E.2d 464, 466 (1995). In particular, the tortfeasor in Rainey intended to inflate a spare tire and then return to his vehicle to install it. In the case at hand Robertson had already exited his vehicle, keys in hand, and was getting handcuffed on the ground when Simpson's injury occurred. Further, the mere possibility that Robertson may return to his vehicle would have no nexus or relationship to the injury suffered by Simpson. Thereby, there was no "causal connection" between Robertson's use of his vehicle and Simpson's injury. Rainey, 237 Va. at 275, 377 S.E.2d at 396.

Finally, Simpson cites Slagle, supra, which refers to the injured party's "mission" of coming to a job site on the day that he was injured. (Brief of

Appellant at p. 12). In Slagle, the vice president of a construction company traveled to the site of a road widening project, and stood behind a tractor-trailer that another employee was backing up, in order to unload construction equipment. The vice president was in the process of giving the driver hand signals, and the emergency flashers of the tractor-trailer were being utilized, along with the audible backup alarm. During the backup process, the vice president was struck and injured by a third-party vehicle. Slagle, 267 Va. at 631-632, 594 S.E.2d at 583.

At issue in Slagle was whether the injured vice president was using the tractor-trailer, such that he would be entitled to underinsured motorist coverage from the policy that insured the tractor-trailer. In the opinion, this Court stated, "the critical inquiry is whether there was a causal relationship between the incident and the employment of the insured vehicle as a vehicle." Slagle, 267 Va. at 636, 594 S.E.2d at 586. Since the injured party's "hand signals to the driver effectively determined the direction and movement of the tractor-trailer...there was a causal connection." Slagle, 267 Va. at 637, 594 S.E.2d at 587. Unlike Robertson, who had been subdued and was getting handcuffed on the ground when Simpson was injured, the vice president in Slagle was still actively engaged in his "mission to locate the construction equipment at a particular place on his

company's construction site." Slagle, 267 Va. at 637-638, 594 S.E.2d at 587.

In light of the above, it is clear that Simpson's "escape mission" argument is not supported by the facts or case law.

iv) Robertson was not "alighting from" his vehicle at the time of Simpson's injury, such that the use requirement is fulfilled.

Simpson spends several pages in Part E. of the Brief of Appellant arguing that Robertson was using his vehicle at the time of Simpson's injury since he was "alighting from" his vehicle. (Brief of Appellant at pp. 25-28). However, the term "alighting from" is irrelevant to the issue of GEICO's liability coverage for Robertson, whereas liability coverage is only owed to Robertson for damages arising out of the "ownership, maintenance or use" of Robertson's vehicle. (Appendix at p. 355). Further, the term "use" is only defined by the GEICO Policy to include "the loading and unloading" of an automobile. (Appendix at p. 356). Simpson draws the term "alighting from" out of the definition of "occupying," which is found in the uninsured motorist endorsement in the GEICO Policy. (Appendix at p. 351). Simpson also applies GEICO's definition of "occupying" by including additional terms "employed by the **carriers**." (Brief of Appellant at p. 27) (Emphasis added).

Again, the term "alighting from" is irrelevant to GEICO's coverage issue, whereas that term is only applicable to uninsured motorist coverage in the GEICO Policy. However, Simpson argues that this Court can include the term "alighting from" within the meaning of use, since the term "alighting from" is an "ordinary and plain" meaning of the term "use." (Brief of Appellant at p. 27). Nevertheless, even if the term "alighting from" is relevant and part of the definition of "use," Simpson was still injured while Robertson was pinned to the ground getting handcuffed, not while he was "alighting from" his vehicle. Thereby, once again there is no nexus between the injury and the vehicle, even if Robertson is considered as "alighting from" the vehicle.

Simpson cites Pennsylvania Nat'l Mut. Casualty Ins. Co. v. Bristow, 207 Va. 381, 150 S.E.2d 125 (1966) to support his "alighting from" argument, although Bristow involved the interpretation of the term "occupying" in a policy. Simpson presumably cites Bristow to show that one can be deemed to be "occupying" a vehicle without physically being present inside of the vehicle, which is not contested but also is not relevant in light of the lack of nexus between the Robertson vehicle and the Simpson injury.

Finally, Simpson relies upon Roberts v. GEICO, 686 F.Supp. 135 (W.D. Va. 1988). In that case, the Western District Court held that a passenger, who had just exited a vehicle, and who was standing next to the vehicle in the street talking to its driver, was still "alighting from" it, such that uninsured motorist coverage applied. However, Roberts, stands for the proposition that one can still be "alighting from" a vehicle without being in the process of actively getting out of it, which is immaterial to the use issue involving Robertson as noted above.

The only relevant issue as to use as it concerns GEICO herein is whether there was a causal connection between Simpson's injury and Robertson's use of his vehicle. For all of the reasons as noted above, there was no causal connection and Simpson's "alighting from" analysis is immaterial. Thereby, Simpson has failed to meet his burden and the Trial Court should be affirmed.

B. GEICO is not required to defend and/or indemnify Malcolm Robertson for the incident of February 12, 2004 whereas the incident at issue arose out of Malcolm Robertson's intentional act.

The Trial Court provided no ruling on the intentional act issue raised by GEICO, whereas the intentional act issue was moot in light of the decision. Nevertheless, even assuming *arguendo* that Robertson was

using his vehicle when Simpson was injured, there is still no liability coverage for Robertson due to his intentional act.

In the GEICO Policy, under "Part I - LIABILITY," the policy states, "This policy does not apply under Part I:...(b) to bodily injury . . . caused intentionally by or at the direction of the insured." (Appendix at p. 356). This Court has previously held that "reasonable exclusions not in conflict with statute in an insurance contract will be enforced," so long as they are "clear and unambiguous." Jones v. State Farm Mut. Auto. Ins. Co., 268 Va. 396, 400, 601 S.E.2d 645, 647 (2004). Additionally, this Court has also held that insurance policies only provide coverage for damages caused by an "occurrence" or by an "accident", which are terms that this Court has deemed to be synonymous. An intentional act is neither an "occurrence" nor an "accident," and therefore is not covered by the standard policy. Utica Mut. Ins. Co. v. Travelers Indem. Co., 223 Va. 145, 147, 286 S.E.2d 225, 226 (1982). Thereby, if Simpson were injured by the intentional acts of Robertson, liability coverage would not apply for Robertson due to the valid exclusion in the GEICO Policy.

In Utica Mut. Ins. Co., supra, the claimant was injured when the automobile that she was a passenger in was intentionally forced off the highway by an automobile owned by Tivis Gilbert. Utica Mut. Ins. Co., 223

Va. at 146, 286 S.E.2d at 225-226. Travelers insured Mr. Gilbert, and denied coverage for the accident in light of Mr. Gilbert's intentional act, and a coverage action was then filed. On appeal, this Court held, "that the policy issued by Travelers did not afford coverage for the intentional acts of its insured," and it did not matter that the Travelers policy issue to Mr. Gilbert was certified pursuant to the Virginia Motor Vehicle Safety Responsibility Act. Utica Mut. Ins. Co., 223 Va. at 147-148, 286 S.E.2d at 226. Thereby, the forcing off a highway resulting in injuries is an intentional act subject to exclusion.

In this case, Robertson intended to elude law enforcement, and he is alleged to have intentionally caused his vehicle to impact the law enforcement vehicles throughout the pursuit. In fact, Simpson states that Robertson slammed his vehicle's "passenger side into Simpson's driver side about three times," and that Robertson's vehicle later "slammed into the Trooper's driver door." (Brief of Appellant at pp. 4-5). If Simpson claimed any injury from the impacts between the vehicles (which he has not claimed subject to stipulation and testimony), the actions of Robertson would have been intentional and excluded from coverage. Robertson specifically acknowledged that he should not have been driving (Appendix

at p. 181), that he should have pulled over (Appendix at p. 182), and that he knew he was wrong during the "whole ordeal" (Appendix at p. 185).

Furthermore, the crux of Simpson's use argument as to Robertson is that Robertson was engaged in a continuous "escape mission," which had not concluded when Simpson was injured. Although disputed above, if Simpson's argument is accepted, then all of Robertson's actions during that "escape mission" were intentional whereas Robertson knew he was wrong during the "whole ordeal." (Appendix at p. 185). Thereby, although GEICO denies that Robertson was using his vehicle when Simpson was injured, it follows in argument that if this Court finds that Robertson was using his vehicle at the time of Simpson's injury due to a continued and deliberate "escape mission," then Robertson's actions were also intentional due to the continued and deliberate actions of Robertson. Thus, all of Robertson's actions were intentional and as such, Robertson's actions would be excluded from coverage.

Finally, Simpson may attempt to rely upon Sleigh and Smelser, supra, to argue that GEICO owes liability coverage to Robertson, notwithstanding Robertson's intentional acts. Nevertheless, there is the major distinction between GEICO's coverage and the coverage in those cases, in that, Sleigh and Smelser both involved uninsured motorist

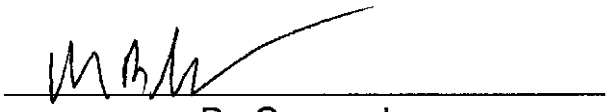
coverage for the injured parties, not liability coverage. In Sleigh, where the tortfeasor slammed a car door on a parking enforcement officer, coverage only turned upon whether the officer was injured by an uninsured motorist's "use of such motor vehicle," without reference to the operator's intent. Sleigh, 267 Va. at 771, 594 S.E.2d 605. In Smelser, supra, the issue was identical. In that case, a woman was dragged about ten feet by a passing car when a passenger in the car grabbed the woman's purse as the car drove by. Smelser, 264 Va. at 112, 563 S.E.2d at 761. Thereby, the intentional act exclusion was not applicable in either Sleigh or Smelser, whereas the coverage disputes involved uninsured motorist coverage, not liability coverage as in the issues which involve GEICO.

V. CONCLUSION

For the reasons set forth above, Robertson was not using his vehicle when Simpson was injured, and thus, Robertson is not entitled to a defense and/or indemnification from GEICO under the GEICO Policy at issue. In the alternative, if Robertson was using his vehicle, Simpson's injuries were caused by Robertson's intentional acts and coverage would be excluded. Therefore, GEICO respectively requests that this Court affirm the Trial

Court's ruling that GEICO does not owe a defense and coverage to Robertson.

GOVERNMENT EMPLOYEES
INSURANCE COMPANY a/k/a GEICO



By Counsel

Alan B. Gnapp, Esquire
Virginia State Bar Number 26189
Justin S. Gravatt, Esquire
Virginia State Bar Number 65506
DUANE, HAUCK & GNAPP, P.C.
10 East Franklin Street
Richmond, Virginia 23219
Telephone: (804) 644-7400; Facsimile: (804) 649-8329
Email: agnapp@duanehauck.com

Counsel for Appellee, Government Employees Insurance Company a/k/a GEICO

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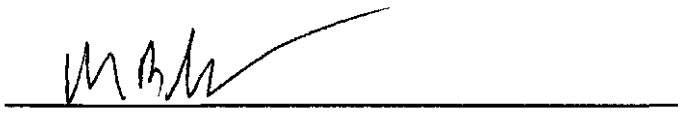
I certify that as required by Rule 5:26(d) of the Rules of the Supreme Court of Virginia, fifteen (15) copies of the foregoing Brief of Appellee were hand delivered to the Clerk of the Supreme Court of Virginia; that one (1) electronic copy of the Brief of Appellee was emailed to the Clerk of the Supreme Court of Virginia in PDF format; and that three (3) copies were also mailed this 24th day of September, 2009, to: Kennon C. Walden, Jr., Esquire, WALDEN & WALDEN, P.C., P. O. Box 288, 125 S. Main Street, Blackstone, Virginia 23824-1841 (Counsel for Appellant, Charles Simpson); Carson W. Johnson, Esquire, HARMAN, CLAYTOR, CORRIGAN & WELLMAN, P.C., P. O. Box 70280, Richmond, Virginia 23255 (Counsel for Appellee, Virginia Municipal Liability Pool); William Tyler Shands, Esquire, CARTER & SHANDS, 9030 Stony Point Parkway, Suite 530, Richmond, Virginia 23235 (Counsel for Appellee, National Grange Mutual Insurance Company); Neil Kuchinsky, Esquire, KUCHINSKY & YEAMANS, P.C., 200 Lakeview Avenue, Colonial Heights, Virginia 23834-0125 (Counsel for Appellee, Malcolm Robertson).