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.

Appellee, National Grange Mutual Insurance Company's
BRIEF OF APPELLEE

Brooke T. Alexander, Esquire
Virginia State Bar Number 72064
Wm. Tyler Shands, Esquire
Virginia State Bar Number 25997
Carter & Shands, P.C.
9030 Stony Point Parkway, Suite 530
Richmond, Virginia 23235
(804) 747-7470 (Telephone)
(804) 747-7977 (Facsimile)
balexander@carterandshands.com
wtshands@carterandshands.com

Counsel for Appellee,
National Grange Mutual Insurance Company

TABLE OF CONTENTS

		Page
I.	STATEMENT OF THE NATURE OF THE CASE	1
II.	QUESTION PRESENTED	3
III.	STATEMENT OF THE FACTS	3
IV.	PRINCIPLES OF LAW AND ARGUMENT	5
V.	CONCLUSION	20

TABLE OF AUTHORITIES

CASES **Page(s)**

Erie Ins. Co. Exchange v. Jones,
248 Va. 437, 448 S.E.2d 655 (1994)..... 11

Great American Ins. Co. v. Cassell,
239 Va. 421, 389 S.E.2d 476 (1990).....15, 16, 18

Hern v. Cox,
212 Va. 644, 186 S.E.2d 85 (1972).....8

Ins. Co. of North American v. Perry et al,
204 Va. 833, 134 S. E.2d 418 (1964).....16, 18, 19

Lexie v. State Farm Mut. Auto. Ins. Co.,
251 Va. 390, 469 S.E.2d 61 (1996)..... 19

Nationwide Mut. Ins. v. Futrell,
57 Va. Cir. 105 (Spotsylvania Circuit Court, 2001)..... 12

Newman v. Erie Ins. Exchange,
256 Va. 501, 507 S.E.2d 348 (1998)..... 15, 16

Slagle v. Hartford Ins. Co.,
267 Va. 629, 594 S.E.2d 582 (2004)..... 13

Smith v. Board of Supervisors,
201 Va. 87, 109 S.E.2d 501 (1959).....8

State Farm Mut. Auto. Ins. Co. v. Powell,
227 Va. 492, 319 S.E.2d 393 (1984)..... 9, 10

State Farm v. Rice,
239 Va. 646, 391 S.E.2d 71 (1990)..... 8

US Fire Ins. Co. v. Parker,
250 Va. 374, 463 S.E. 2d 464 (1995)..... 15, 17

STATUTES **Page(s)**

§38.2-2204 of the Code of Virginia.....6

§ 38.2-2206 of the Code of Virginia 5, 6

STATEMENT OF THE CASE

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

At the time of the incident, Robertson's vehicle was insured through a policy issued by GEICO Casualty Company. The police cruiser operated by Simpson during the motor vehicle pursuit was insured by VMLP. Simpson also had a personal vehicle insured by National Grange Mutual Insurance Company (hereinafter "NGM"). GEICO, NGM, and Simpson all filed Answers in response to VMLP's Petition for Declaratory Judgment. Robertson appeared by counsel

at trial. A bench trial took place before the Honorable Thomas V. Warren of the Nottoway County Circuit Court on December 12, 2008.

By letter opinion of December 29, 2008, the Honorable Thomas V. Warren found that neither of the drivers (Simpson nor Robertson) were using or occupying a vehicle when Simpson was injured. By Order of December 30, 2008, the Court found that Simpson's injuries "did not arise out of the 'use' or 'ownership' of Malcolm Robertson's vehicle pursuant to the GEICO policy or NGM policy." Further, pursuant to the same Court Order, the Court found 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 issued to Nottoway County." (Appendix 489 -490). NGM, therefore, denied coverage and had no duty to defend.

Simpson filed a Petition for Appeal with this Court on March 20, 2009. There were no assignments of error regarding procedural matters, on substantive findings of fact. NGM files this Brief in Opposition, and respectfully requests that this Honorable Court deny Simpson's Petition for Appeal.

QUESTION PRESENTED

I. Was Robertson using his vehicle at the time of Simpson's injury?

II. Was Simpson using his vehicle at the time of his own injury?

STATEMENT OF THE FACTS

The issue as to NGM is whether Robertson was "using" his vehicle at the time that Simpson was injured on February 12, 2004 pursuant to the NGM policy and Virginia law and whether Simpson was "using" or "operating" his police cruiser at the time of the injury, which was insured by VMLP.

On February 12, 2004, Malcom E. Robertson was driving a 1988 Chevrolet SUV on Route 460 in Nottoway County, Virginia. Virginia State Police Trooper Inge attempted to pull Robertson over for speeding. (Appendix 97, lines 1-5). Robertson refused to pull over. Robertson testified that he did not pull over initially because he had a suspended license and was drinking beer at the time he was requested to pull over. (Appendix 393 lines 7-25). Trooper Inge then proceeded to chase Robertson's vehicle for some time. At one point, Robertson pulled over before continuing to flee, but at no point did he

open his door, or exit his vehicle until such time as his vehicle was forced off the left side of Route 460. At no point did he exit and return to his vehicle. (Appendix 97, lines 11-25).

Trooper, Simpson, the Appellant became involved in the chase after Trooper Inge radioed for assistance. (Appendix 135, lines 15-24). After some time, he participated in positioning his vehicle to force Robertson off the left side of the road. During the course of the pursuit, Trooper Simpson's intent was to "try and slow him down and get him stopped." (Appendix 137, lines 10 -12). Trooper Simpson's vehicle came to a stop behind Robertson's vehicle. Robertson exited his vehicle for the first and only time with his hands in the air and the keys in his hand. At the same time, Simpson exited his vehicle (Appendix 443, line 17-19).

Robertson took several steps from his vehicle when he was tackled from behind by Trooper Inge. At that same time, Trooper Simpson had also exited his vehicle and was approaching Robertson head-on. When Trooper Inge tackled Robertson, all three men went to the ground. While on the ground, Trooper Simpson was trying to handcuff Robertson when he was injured. (Appendix 147, lines 21-24 and Appendix 154 lines 17-21, see also Appendix 479, handwritten

statement from Trooper Simpson "I took him down to handcuff him. That is when I hurt my shoulder.").

PRINCIPLES OF LAW AND ARGUMENT

NGM's policy provides uninsured motorist coverage for Simpson's personal vehicle under NGM's policy number 01I98170 for the policy term 3/01/03 to 3/01/04 issued to Charles and Ann Simpson, a copy of which was introduced into evidence collectively at trial as Defendant's Exhibit 1. According to Part C – Uninsured Motorists Coverage, Insuring Agreement, A. "We will pay compensatory damages which an 'insured' is legally entitled to recover from the owner or operator of an 'uninsured motor vehicle' because of 'bodily injury', 1. Sustained by the 'insured'; and 2. Caused by an accident. The owner's or operator's liability for these damages must arise out of the ownership, maintenance or use of the 'uninsured motor vehicle.' (Appendix 301).

Furthermore, the Endorsement of the same policy states that Part C – Uninsured Motorists Coverage is replaced with the following: "We will pay, in accordance with Virginia Code § 38.2-2206, damages which an 'insured' or an 'insured's legal representative is legally entitled to recover from the owner or operator of an 'uninsured motor

vehicle' or an 'underinsured motor vehicle' because of bodily injury sustained by an insured and caused by an accident..." (Appendix 323).

Additionally, Simpson also had underinsurance coverage through NGM as listed in his declarations page. (Appendix 295). Under this coverage, Simpson had additional coverage pursuant to Virginia Code §38.2-2204 (Omnibus Clause), providing liability coverage for incidents arising out of the "ownership, maintenance or use of the owned or any non-owned automobile." In order for this coverage to apply, this Court would have to find that Robertson was using his vehicle and GEICO's policy applies.

According to Virginia Code §38.2-2206(A), the uninsured policy relates to the "ownership, maintenance, or use of a motor vehicle" and endorses 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." Simpson's injuries occurred while he was subduing and/or handcuffing Robertson. Neither Simpson nor Robertson were using their vehicles as defined by the case law at the time of Simpson's alleged injury.

The first issue then, with regard to NGM and this case is whether or not Robertson was using his vehicle when Simpson was injured. If GEICO's policy does not apply, Robertson's vehicle becomes uninsured as opposed to under insured. However, for the same reasons that GEICO has set forth in their Brief, if Robertson was not using his vehicle, then the uninsured motorist coverage does not apply either.

The second issue is if Simpson is using his vehicle, the VMLP policy would apply first, subject to their defenses not addressed here and NGM would apply after as under insured motorist coverage. However, Simpson was not using his vehicle and NGM's policy does not apply for the reasons set forth in this brief.

I. Robertson was not using his vehicle when Simpson was injured.

Simpson was injured during a fall involving Simpson, Robertson and Trooper Inge, outside of all vehicles. According to the Honorable Thomas V. Warren's opinion and as reiterated by the Petitioner, "The evidence is that after a high speed chase that the suspect Robertson stopped his vehicle and exited. The pursuing trooper and pursuing Deputy Simpson arrived almost simultaneously with each other and

with Robertson. All stopped and exited their vehicles. Seconds later, at a distance of somewhere near 10 feet from Robertson's car, the trooper and Simpson tackled Mr. Robertson to the ground. While attempting to apply cuffs to Robertson, Simpson was injured." (Appendix 489-490).

Judge Warren went on to say that "none of the three drivers were 'using or 'occupying' a motor vehicle at the time Simpson was injured." (Appendix 489). In Judge Warren's opinion, based on all the facts and evidence at trial, "[t]he pursuit was clearly over. The drivers were no longer using vehicles to escape or apprehend." (Appendix 490).

On appeal, an appellate court views the evidence in the light most favorable to the prevailing party below. The actual determination of causation is a factual finding that will not be disturbed on appeal if there is credible evidence to support the finding. In determining whether credible evidence exists, the appellate court does not retry the facts, reweigh the preponderance of the evidence, or make its own determination of the credibility of the witnesses. Hern v. Cox, 212 Va. 644, 647, 186 S.E.2d 85, 87 (1972); Smith v. Board of Supervisors, 201 Va. 87, 109 S.E.2d 501, 505 (1959). Judge

Warren's factual finding is clear, the pursuit and the use of the vehicle to escape (by Robertson) and apprehend (by Simpson and Inge) were over at the time of injury.

Petitioner cites State Farm v. Rice, 239 Va. 646, 391 S.E.2d 71 (1990) to support the proposition that the vehicles were in use at the time of Simpson's injury. However, in Rice, the vehicle's use was to transport the two men to a hunting site when the accident occurred; and according to the Court, this use was intended by the vehicle manufacturer and foreseeable to the insurance company. A Trooper falling to the ground and injuring himself while attempting to handcuff a suspect was not an intended use of either vehicle, nor could it have been foreseeable by the insurance company.

Additionally,

> Even though Rice had completely alighted from the Jeep and was walking toward a ridge where he intended to begin his hunt, a sufficient nexus existed between Rice, who was a passenger in the Jeep, and the Jeep itself, which had transported the men and their equipment to the hunting site. Vest had not completed his use of the Jeep when the rifle discharged.

Id, at 649. (emphasis added). Robertson had exited his vehicle, turned off the ignition and stepped at least three feet from the vehicle with his hands and keys in the air when he was tackled and

Simpson's injury occurred. There is no nexus between the injury and any use of the vehicle.

In another vehicle and gun shot case, this Court decided in State Farm Mut. Auto. Ins. Co. v. Powell, 227 Va. 492, 319 S.E.2d 393 (1984), that the victim's death did not arise out of the use of the insured vehicle. In this case, a firearm that was positioned on a gun rack inside the insured vehicle discharged and killed a person standing outside of the vehicle. Again, this Court discussed the intention of the parties to the insurance agreement in determining the scope of coverage afforded, and that "there must be a causal relationship between the accident and employment of the insured motor vehicle as a vehicle." Id, at 500, 397. In Powell, the vehicle was not being 'used' as a vehicle when the person was shot and killed.

As discussed in Powell, "consideration must be given to what the insured person was doing when he was injured, as well as his purpose and intent." Id, at 501, 397. Robertson's purpose at the time of Simpson's injury was to surrender. He testified during trial that his intention at the time he exited his vehicle was to surrender and "do whatever they asked me." (Appendix 185, lines 1-3). Robertson had

turned the vehicle off and was holding the keys in his hands. His testimony regarding these matters was undisputed at trial. He did not have any intent to use his vehicle when he was tackled. Even if he was escaping on foot as the Officer testified, he was no longer using his vehicle. Judge Warren declared that the facts showed his attempt to escape had been completed at the time of the injury.

In the case of Erie Ins. Co. Exchange v. Jones, 248 Va. 437, 448 S.E.2d 655 (1994), a wrongful death claim arose after the decedent was shot while sitting in a motor vehicle. The defendant and decedent had been involved in a traffic accident, and following the accident, defendant approached plaintiff's vehicle with a firearm, which discharged; killing the plaintiff. This Court determined that the vehicle was not in 'use' at the time of the death. The Court stated with regard to damages covered by auto insurance policies,

> [s]uch 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 442-43, 448 S.E.2d at 658-59 (1994). The sequence of events which led to Simpson's injury, were merely

incidental to the use of Robertson's vehicle. He had participated in a motor vehicle chase using his vehicle. However, following the end of this chase, he exited his vehicle and was then tackled. At the point of injury, there was no use of Robertson's vehicle.

The Spotsylvania Circuit Court case Nationwide Mutual Insurance v. Futrell, 57 Va. Cir. 105 (Spotsylvania, 2001) has facts very similar to the present case. Officer Futrell had exited his police cruiser and went toward the suspect on foot to apprehend him following a high speed chase and a resist of arrest. Futrell was injured when he was struck by a passing vehicle. The other officer present believed that the suspect may have attempted to return to his vehicle at certain points during the incident. Nevertheless, the Spotsylvania Circuit Court stated that the suspect, Mr. Carter, was not a motorist, was not using a vehicle, and was in fact a pedestrian resisting arrest at the time of Officer Futrell's injury. Id, at 107. Therefore, the uninsured motorist coverage in Officer Futrell's private insurance policy did not apply in these very similar circumstances to the case at hand.

II. Simpson was not using his vehicle when his injury occurred.

A. There is no nexus between the injury and the use of the vehicle.

In the 2004 Virginia Supreme Court case, Slagle v. Hartford Insurance Co., 267 Va. 629, 594 S.E.2d 582 2004), this Court did a review of prior cases and stated that the "critical inquiry is whether there was a causal relationship between the incident and the employment of the insured vehicle as a vehicle." A man providing direction to the insured vehicle was covered by the insurance when he was struck and injured by a passing vehicle. The man's actions were necessary to the completion of the task of maneuvering the vehicle he was directing. The incident of his injury occurred during the use of the vehicle he was directing.

The incident in this case involved Simpson becoming injured during a tackle as he was attempting to handcuff Robertson. (Appendix 146, lines 11-14). There is no causal relationship between the incident of Robertson being tackled and the use of Simpson's vehicle to stop Robertson's vehicle.

Appellant has declared that Simpson's "mission" was to effect an arrest of Robertson, which required physically subduing him. A vehicle, police cruiser or otherwise, cannot be used to arrest a

person. It can and was used to stop Robertson's vehicle. Simpson admitted at trial that his intent or action that he was trying to accomplish during his chase of Simpson was to "[t]ry and slow him down and get him stopped." (Appendix 137, lines 10-12). Once Robertson's vehicle had stopped, Trooper Simpson's new mission was to physically subdue Robertson by arresting him. It was during this new mission that Simpson was injured. Simpson's vehicle could no more be used to arrest than the Jeep in Rice could be used to hunt. It was the fact that Vest was still using the Jeep as a transport to the hunting site by finishing his coffee and sitting in the Jeep and placing his gun on the seat of the Jeep. The Jeep was not being used to hunt. Simpson's police cruiser was not being to used to arrest, but to stop Robertson's vehicle.

Additionally, and for the same reasons set forth in Argument I, the case law in Virginia does not support the position that Simpson was using his vehicle at the time of his injury. Neither Robertson's nor Simpson's vehicles were being used as vehicles for purposes of the arrest. In the opinion of the trial Judge, the vehicles were being used to escape and apprehend, and both these "missions" had ceased at the time of injury. (Appendix 490).

B. Deputy Simpson's vehicle's "specialized use" did not affect the mechanism of injury to the Deputy.

The special safety equipment "use" of a vehicle has been discussed in the cases of Newman v. Erie Insurance Exchange, 256 Va. 501, 507 S.E.2d 348 (1998) (child struck by motor vehicle while walking across highway to board a school bus was covered); Great American Insurance Company v. Cassell, 239 Va. 421, 389 S.E.2d 476 (1990) (firefighter was standing in street writing fire report when struck and killed by hit and run driver was covered); and US Fire Insurance Company v. Parker, 250 Va. 374, 463 S.E.2d 464 (1995) (landscape gardener working on side of the road was injured when struck by passing vehicle was not covered).

In Newman, a child that was crossing the highway to board his school bus was struck and injured by a passing vehicle. The Court determined that the uninsured motorist coverage on the school bus applied to the child because the bus was in use at the time of his injury. The use of the bus was that the driver had activated the bus' warning lights and its "stop arm." A school bus driver is required by regulation to activate warning signs to warn approaching traffic to stop and allow students to cross the highway safely. Because the

use of these warning signs is for the protection of the children, the bus was considered in use by the child at the time of the child's injury. Newman v. Erie Insurance Exchange, 256 Va. 501, 507 S.E.2d 348 (1998).

In Cassell, a firefighter was standing 20-25 feet from the fire truck when he was struck and killed by an uninsured motorist. The fire truck had transported him and the firefighting equipment to the scene and was used to create a physical barrier to restrict the flow of traffic. The Court concluded that the fireman was using the fire truck at the time he was injured because the truck was an integral part of his mission. The truck was used to extinguish the fire, control traffic and protect the fire fighters. Additionally, the decedent was using a clipboard that was taken from the truck in order to complete the report. Unlike the police officer in Insurance Company of North America v. Carl Perry, Admr., etc. et. Al., 204 Va. 833, 134 S.E.2d 418 (1964) (officer struck and killed by vehicle after exiting his cruiser was not covered), the fireman was engaged in a transaction essential to the use of the fire truck when he was killed. Great American Insurance Company v. Cassell, 239 Va. 421, 389 S.E.2d 476 (1990). By his own admission, Deputy Simpson had not taken any equipment

from his vehicle in order to assist him in apprehending and/or arresting Mr. Robertson. (Appendix 157, lines 12-23).

In Parker, a landscape gardener was injured when a passing vehicle hit her as she was digging off the side of the road. She parked her employer's vehicle, which was used to transport herself, the other employees and their tools, in the road to block where they were digging from passing vehicles. However, the Court ruled that the gardener was not engaged in a transaction that involved the vehicle when she was injured. Although she parked the vehicle to protect herself and left a door of the vehicle open to hear the CB radio, the truck was nevertheless not in use at the time of her injury and she was not covered. The truck did not have special safety equipment that she was utilizing at the time of her injury and it was not part of her mission. US Fire Insurance Company v. Parker, 250 Va. 374, 463 S.E.2d 464 (1995).

Simpson argues that because his police cruiser had on active lights and sirens, it was being used for several purposes. The first, to impede Robertson from backing up and continuing his escape by vehicle. In each of the above-referenced cases, the claim of specialized use was for the purpose of protecting the individual who

was inevitably injured despite this use of the vehicle. By all accounts, Simpson was injured during a scuffle on the ground when he was attempting to handcuff Robertson. Robertson did not attempt to continue his escape by vehicle.

In Cassell, the Court noted that the firefighter was "engaged in a transaction essential to the use of the firetruck when he was killed" by a passing motorist. Id, at 424. Simpson was injured in an incident un-related to the use of his cruiser. He was not injured by Robertson attempting to leave in his vehicle. Nor was he injured by a passing motorist that Simpson may have attempted to warn. Finally, he was not injured by Robertson attempting to escape on foot; the injury occurred on the ground while he attempted to handcuff him.

In the Virginia Supreme Court case, Insurance Company of North America v. Carl Perry, Admr., etc. et. al., 204 Va. 833, 134 S.E. 2d 418 (1964), a police officer was struck and killed by an uninsured motorist after he exited his cruiser, was on foot, and walked 164 feet away to serve a warrant. The Court determined that his cruiser was not in "use" at the time of his death, and he was therefore not covered by the uninsured policy. His vehicle had transported him to where he was going to issue a warrant. He had exited his vehicle and was

attempting to serve the warrant upon his injury. Simpson had exited his own cruiser, walked away from the vehicle to approach and apprehend and/or arrest Mr. Robertson, who was also on foot outside of his vehicle. (Appendix 140-141).

This Court properly distinguished Cassell from Perry by noting that in Perry, the officer's injury was unrelated to the use of his vehicle. Similarly, Simpson's injury was also unrelated to the use of his vehicle.

According to Lexis v. State Farm Mutual Automobile Insurance Company, 251 Va. 390, 469 S.E.2d 61 (1996), (drive-by-shooting) the plaintiff's injuries resulted soley from the activities of the assailants in the uninsured vehicle and the movement of that vehicle was only an incidental factor in the injuries that occurred. Thus, the evidence failed to demonstrate a causal relationship between the injuries sustained and the "use" of the vehicle as a vehicle. Id, at 396-97, 64. The "use" of Simpson's vehicle to block traffic was not even an incidental factor in the injuries that he sustained.

In the above-referenced cases where the injured party was deemed to be covered by the policy, it was when they were struck by a passing vehicle, despite their attempt to use the vehicles and their

safety features to protect themselves from such vehicles. In the present case, Simpson testified that his reason for parking his vehicle in the position behind Robertson's vehicle was to protect himself and protect Robertson from being hit by passing vehicles. (Appendix 139-140, lines 21-25, 1-4). The safety equipment on the vehicle, the flashing lights and sirens, were also being used to alert passing vehicles of their presence. Simpson was not injured by a passing vehicle that he claims his vehicle's position was used to prevent. In fact, he was injured during a tackle of Robertson, wholly unrelated to the position of any vehicle.

CONCLUSION

For the reasons set forth above, NGM's policy on Simpson's personal vehicle should not apply as insurance in this matter and NGM respectfully requests that this Court affirm the ruling of the trial court and deny the Appeal.

NATIONAL GRANGE MUTUAL
INSURANCE COMPANY

By Brooke T. Alexander
(Counsel)

Brooke T. Alexander, Esquire
Virginia State Bar Number 72064

Wm. Tyler Shands, Esquire
Virginia State Bar Number 25997
Carter & Shands, P.C.
9030 Stony Point Parkway, Suite 530
Richmond, Virginia 23235
(804) 747-7470 (Telephone)
(804) 747-7977 (Facsimile)
balexander@carterandshands.com
wtshands@carterandshands.com

Counsel for Appellee,
National Grange Mutual Insurance Company

Certificate

Pursuant to Rule 5:17 of the Rules of the Supreme Court of Virginia, counsel for the appellee certifies as follows:

(a) The appellant Charles Simpson is represented by Kennon C. Walden, Jr., Walden & Walden, PC, 125 South Main Street, P.O. Box 278, Blackstone, Virginia 23824 telephone: (434) 292-5507, fax: (434) 292-5361, wandwpc@embarqmail.com

(b) The Appellees are: National Grange Mutual Insurance Company which is represented by William Tyler Shands, Esquire, Carter & Shands, 9030 Stony Point Parkway, Richmond, Virginia 23235, telephone: (804) 747-7470; Malcolm Robertson who is represented by Neil Kuchinsky, Esquire, Kuchinsky & Yeamans, P.C., 200 Lakeview Avenue, Colonial Heights, VA 23834-0125, telephone (540) 526-2101; Government Employees Insurance Company AKA GEICO which is represented by Alan B. Gnapp, Esquire, Duane, Hauck & Gnapp, P.C., 10 East Franklin Street, Richmond, Virginia 23219-2106, telephone (866) 334-9602 and Virginia Municipal Liability Company which is represented by Carson w. Johnson, Esquire, Harmon, Claytor, Corrigan & Wellman, P. O. Box 70280, Richmond, Virginia 23255, telephone (804) 762-8001.

(c) A copy of the foregoing Brief of Appellee was mailed, postage prepaid, by first class mail, to opposing counsel on this 21st day of September, 2009.

(d) In accordance with Rule 5:26(d) of the Rules of the Supreme Court of Virginia, I hereby certify that I have this 21st day of September, 2009 filed the required 15 copies of this Brief of Appellee in the Clerk's Office, together with an electronic copy emailed to the Court in Word in PDF format, and mailed the required 3 copies of the Brief to counsel for Appellees and counsel for the Appellant.

Brooke T. Alexander

Brooke T. Alexander, Esquire