IN THE

Supreme Court of Virginia

RECORD NO. 090659

CITY OF ALEXANDRIA, VIRGINIA,

Appellant,

v.

J-W ENTERPRISES, INC. and WILLIAM D. TROUT,

Appellees.

BRIEF OF APPELLEE

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STATEMENT OF THE CASE

Officer Carl Stowe ("Officer Stowe"), a City of Alexandria ("City") Police Department ("Police Department") Officer, who was working security at an International House of Pancakes restaurant, in the City of Alexandria, Virginia ("IHOP" or "Restaurant"), pursued a group of people who left the restaurant without paying their bill in his capacity as a police officer. He requested that two of them stop before leaving the restaurant, without success, and then followed them into the parking lot. Officer Stowe placed himself in a well-lit spot and commanded that the vehicle containing the group stop by placing his hand up while he was in full police uniform. That vehicle, driven by Steven Smith, accelerated, swerved, spun its tires, and proceeded toward Officer Stowe, who, believing that his life was in danger, attempted to move out of the path of the vehicle and when that was not possible, shot into the vehicle causing the death of Aaron Brown.

Officer Stowe testified that he was acting as a police officer at the time he pursued the group and when he shot into the vehicle. William Trout and Maaza Henry both testified that Officer Stowe was an independent contractor at the time of the incident.

The City of Alexandria paid $1,100,000 to the Estate of Aaron Brown since Officer Stowe was acting as a police officer at the time of Brown's

death and then pursued J-W Enterprises, Inc. ("J-W") and William Trout[1] in contribution for one-half of that amount.

After a four day trial, the trial court found in favor of J-W and Trout and entered judgment in their favor.

STATEMENT OF FACTS

In addition to the facts provided by the Appellant, the Appellee provides the following relevant facts.

Appellee owned and operated an International House of Pancakes restaurant located on Duke Street in Alexandria, Virginia. (App. 344.) Officer Stowe was working at the IHOP as an extra-duty detail ("Detail") that was controlled by the City of Alexandria Police Extra-Duty Employment Agreement ("Agreement"). (App. 48.) His duties that he was performing at the IHOP were controlled by that Agreement. (App. 49.) The Agreement specifically states "all detailed officers are to enforce all state and local laws on the IHOP properties. [O]fficers will provide a law enforcement presence in the store." (App. 50.)

The IHOP did not tell Officer Stowe how to enforce all laws on the IHOP property or how to provide a law enforcement presence. (App. 75.) The IHOP owners wanted Officer Stowe inside the premises or near the

[1] William Trout was dismissed from the suit, which has not been appealed, and therefore in the brief the Appellant refers to J-W only.

door. (App. 75.) Officer Stowe relied on his training and experience to know how to enforce all state and local laws on the IHOP property. (App. 76.)

Officer Stowe used his police discretion to determine how best to effectuate or deal with fight situations (App. 66.) and situations involving drunk or rowdy people (App. 67.) while working at the IHOP. It was a known policy that the IHOP would prosecute people stealing. (App. 78-9.) IHOP never told Officer Stowe to go and collect money. (App. 79.) That would have violated police policy. (App. 79.) If Officer Stowe witnessed a crime he would determine the best method of dealing with that crime based upon his training and police directives and experience. (App. 79.) Officer Stowe's duties as a police officer were maintaining the peace, protecting property, and enforcing all laws of the Commonwealth, (App. 79.) including protecting and arresting violators of the law. (App. 80.) Officer Stowe was trained as a police officer on what means and methods to use when confronted with a crime or situation involving a crime. (App. 81.)

Prior to working the Detail, Officer Stowe had to notify Police Communications when he arrived at the job. (App. 62.) By police directive, he was required to mark on-the-job and off-the-job at the IHOP with Communications. (App. 63.) While working at the IHOP, Officer Stowe

would listen to the police radio to be available to handle any police calls requesting his police service. (App. 63.)

Officer Stowe was in full police uniform at the time of the incident (App. 50) including patches on his sleeve, a badge of authority, a patrol uniform, a garrison belt which carries his radio, ammunition, firearm, handcuffs, AFT weapon, collar pins, a police department baseball hat, and rank insignia. (App. 50-1.) What Officer Stowe wore was controlled by the police department and not J-W. (App. 52.)

Officer Stowe had his police vehicle at the IHOP at the time of the incident, which he was allowed to do by Police Department directives. (App. 67.) Expenses of that police car in Detail were paid by the Police Department. (App. 71.)

The use of his gun at the Detail at the IHOP was solely within Officer Stowe's discretion and not something that he could be told to do by the IHOP owners. (App. 72.) He used his weapon in accordance with police training and directives. (App. 73.) He did not have discretion as to whether or not he could carry a gun that evening; it was mandated by the directives. (App. 73.) The bullets used in the incident were paid for by the Police Department. (App. 73.) The supplies that he needed to do the Detail were not provided by the IHOP. (App. 73-4.)

The Agreement states that Officer Stowe was a contractor. (App. 53.) All extra-duty details, including this one, had to be approved by the Chief of Police. (App. 53.) Officer Stowe was the coordinator of the Detail. (App. 53.) He could not do it without the permission of the police department. (App. 53.) As coordinator he chose the individual officers, their schedule, and their hours. (App. 55 & 367) He also did the monthly schedule for all police officers doing the Detail and provided it to IHOP. (App. 57.) The IHOP did not have any say in it. (App. 367.) The IHOP was not able to reprimand, terminate, or replace officers (App. 368.) including Officer Stowe. The Appellee did not know who would appear to work the Detail, other than the schedule that was given to them. (App. 367.) The officers were not employees of the Appellee. (App. 369.)

Officer Stowe did not fill out an IHOP employment application, fill out a W-2, did not have IHOP withhold taxes for which he was responsible for paying, or complete employment verification or eligibility forms with IHOP, and was not covered under any IHOP benefits, including Worker's Compensation and disability insurance. (App. 61-2.) No taxes were withheld from the money police officers received. (App. 375.)

Maaza B. Henry was the General Manager of the IHOP at the time of the incident. The IHOP had employees who were servers, cooks,

dishwashers, and assistant managers; all hired by her and IHOP. (App. 573-4 & 369-370.). There was an employment application, training, interviews, decisions as to who to hire and not hire, national standards that were conveyed by IHOP, and standards of J-W pertaining to employment with IHOP. (App. 574-5.) Employees were provided with a handbook, which was given to employees when they started working that included procedures of IHOP. (App. 576.) The employee handbook was not given to police officers. (App. 376.) IHOP employees were provided with pads, cooking utensils, and ordering cards. (App. 577.) The employees wore uniforms and were provided with nametags. (App. 372.) Employees had guest checks and other equipment that they needed provided by IHOP. (App. 373-4.) The police were not provided by IHOP with any tools or equipment or anything the police officers used while working the Detail at the IHOP. (App. 373.) IHOP provided training as to how to take orders, food delivery, customer service, how to deal with an unruly customer, their employees. (App. 310.) No direction, training, instruction was given to the police officers on what means and methods to use while working at the IHOP. (App. 375, 7, 8.)

Henry did the scheduling for all employees, but she did not do it for the police officers. (App. 577-8.) Employees were paid from a payroll

company called Paycheck, while the police officers were paid in cash based upon hours worked. (App. 579.) Employee meetings did not include police officers. (App. 580.) IHOP did not direct, train, or instruct the officers on the methods or what means to use while working at the IHOP. (App. 377-8.)

Henry testified, without objection, that the police officers are independent contractors. (App. 576.) She also testified that the police were not told how to do their job, just as you hire a painter, you don't tell them how to paint. (App. 581.) Trout also testified, without objection, that the officers were independent contractors. (App. 369.)

Officer Stowe believed there was a misdemeanor committed in his presence. (App. 84.) People leaving without paying for their food commit a misdemeanor crime. (App. 87). Officer Stowe also believed that it was his police duty to try to obtain the subject's information so that a warrant could be issued for the subject at a later time. (App. 84.) Officer Stowe testified, without objection, that at the time of the incident he was undertaking a police action. (App. 84.) Officer Stowe believed in his mind, once he was notified of the group not paying the bill, and after he witnessed it, that all of the actions he took from the moment he was told about it until the moment of the shooting were as a police officer. (App. 97.)

When the last two of the offending party left the restaurant, Officer Stowe commanded in his large, police voice that they stop. (App. 87-8.) They turned, made eye contact with him, and then bolted out of the door. (App. 88.) Officer Stowe used his own discretion in how to proceed in pursuing them based upon his police training and directives. (App. 90.) The vehicle with the party who left the restaurant drove away from the restaurant, around the corner, swerved, spun its squealing wheels, made a hard acceleration of the engine, lurched and veered toward Officer Stowe. (App. 91.)

With a vehicle coming toward him, Officer Stowe determined that they were intentionally trying to strike him or run him down; which is a crime (App. 92.), and in an effort to defend himself decided to pull his revolver. (App. 93.) In Officer Stowe's mind he was acting as a police officer at that moment in time and not a security guard. (App. 93.) When he was pursuing those people, he believed he had a reasonable suspicion that a crime had been committed, and that he was able to stop the group to investigate that crime. (App. 94-5.) Officer Stowe raised his hand above his head showing his palms, with his fingers extended, in an effort to get the vehicle to stop, which is something that is usually accepted as an order or direction of a police officer to make a stop. (App. 96.) The Steven Smith

vehicle, by intentionally trying to run down Officer Stowe as a police officer, was committing the crime of aggravated assault or attempted murder of a police officer. (App. 135.)

David Baker, the Chief of Police of the Police Department, confirmed that all actions of extra-duty details are controlled by directives of the Police Department. The Police Department benefits in terms of staffing if they are needed in an emergency circumstance. (App. 159.)

Trout testified that Officer Stowe had discretion when a person did not pay their bill. (App. 350.) He was not aware that Officer Stowe ever collected money. (App. 355.) He wanted the officers to let their presence be known inside the establishment and they had the option of how they handled someone leaving without paying a bill. (App. 360.) The IHOP did not make any rules on how the officers handled themselves or worked on the Detail; the only requirement was that they had to be inside the Restaurant (App. 376), to keep the peace and tranquility inside the restaurant. (App. 377.) If someone did not pay their bill, all actions taken by the police officer were in their discretion, and they chose the means and methods by which they took any of the actions inside the Restaurant, or even outside the Restaurant. (App. 377.) Anything outside the Restaurant would be at the police officer's discretion. (App. 378.) No decision was

made to not prosecute people who stole from the IHOP (App. 379-80), nor was there any such policy. (App. 380.) If Trout had a problem with the police officers, he would go through the chain of command. (App. 383.)

Charles J. Key, the Appellee's credible police expert, testified that Officer Stowe had probable cause to believe that a misdemeanor had been committed in his presence and, therefore, had reason to go out and try to stop the vehicle as a police officer. He testified that Officer Stowe's actions were consistent with his police training. As to the incident, Key testified that Officer Stowe had probable cause to believe that a dangerous, felonious assault on him was occurring and in that in order to preserve his life and prevent serious injuries, he had to use lethal force. (App. 534-5.) Officer Stowe was responding in accordance to his police duty. (App. 535.) Law enforcement duties are dictated to him by law and by police policy with regard to arrest. (App. 536.) He further testified that the IHOP could not have prevented him from acting as a law enforcement officer in the incident. (App. 537.)

The Appellant admitted in a judicial admission that Officer Stowe was acting in self-defense at the time he fired his weapon. (App. 479.)

QUESTIONS PRESENTED

1. Whether the trial court correctly determined, as the trier of fact, based upon the law and the facts that Officer Stowe at the time of the Incident was engaged in a public duty as a City of Alexandria Police Officer, acting as a police officer at the time of the incident and not as an agent of J-W.

2. Whether the trial court correctly determined, as the trier of fact, based upon the law and facts, that Officer Stowe was an independent contractor and not an employee of J-W at the time of the incident.

3. Whether the trial court correctly determined, as the trier of fact, that the proximate cause of the incident was not the actions of J-W but rather the actions of Steven Smith and Officer Stowe in his capacity as a City of Alexandria Police Officer.

4. Whether the trial court, as the trier of fact, correctly concluded that the City of Alexandria was not a joint tortfeasor for which contribution could be sought.

ARGUMENT AND AUTHORITY

The appropriate standard of review for this case is not to review the trial court's statutory interpretations and legal conclusions *de novo* as the Appellant suggests. The trial court applied its findings of fact to the correct Virginia law.

The trial judge, not the Supreme Court, determines the credibility of the witnesses and the weight of the evidence. *See Southern Floors & Acoustics, Inc. v. Max-Yeboah*, 267 Va. 682, 686, 594 S.E.2d 908, 911 (2004). Additionally, if there is evidence to sustain the finding of the trial judge, the Supreme Court should not overrule it and substitute its own judgment, even if its opinion might differ from that of the jury. *Snyder v. Commonwealth*, 202 Va. 1009, 1016, 121 S.E.2d 452, 457 (1961) The prevailing party in the Circuit Court is entitled to have the evidence and all reasonable inferences viewed in the light most favorable to him. *Atrium Unit Owners Ass'n v. King*, 266 Va. 288, 293, 585 S.E.2d 545, 547 (2003).

The Court "gives the finding of fact made by a trial court that heard the evidence and evaluated the credibility of the witnesses at a bench trial the same weight as a jury verdict" and such finding "will not be disturbed on appeal unless they are plainly wrong or without evidence to support them." *Collins v. First Union National Bank*, 272 Va. 744, 749, 636 S.E.2d 442, 445-6 (2006); *Rose v. Jaques*, 268 Va. 137, 138, 597 S.E.2d 64, 70 (2004). A prevailing party "stands in the most favored position known to the law." *Bitar v. Rahman*, 272 Va. 130, 137, 630 S.E.2d 319, 323 (2006).

Appellant would have this Court believe that there are not facts in dispute, which is not the case. The trial court drew reasonable inferences

from the facts and applied them to Virginia law. It is incumbent upon this Court to respect the inferences actually drawn by the fact-finder. See *Hoar v. Great Eastern Resort Mgmt., Inc.*, 256 Va. 374, 388, 506 S.E.2d 777, 786 (1998).

I. THE TRIAL COURT PROPERLY DETERMINED, AS THE TRIER OF FACT, BASED UPON THE LAW AND FACTS THAT OFFICER STOWE WAS ACTING AS A POLICE OFFICER, ENGAGED IN A PUBLIC DUTY, AT THE TIME OF THE INCIDENT.

The trial court properly concluded that Officer Stowe was acting as a police officer at the time of the shooting. Virginia law is clear that in situations involving police officers, serving as security guards, that a determination by the finder of fact must be made as to what capacity the officer was acting at the time of the complained act (emphasis added). *Glenmar Cinestate, Inc. v. Robert T. Farrell, Administrator, et. al.* 223 Va. 728, 292 S.E.2d 366, (1982). If he is engaged in the performance of a public duty such as the enforcement of the general laws, his employer incurs no vicarious liability for his acts, even though the employer directed him to perform the duty, on the other hand, if he was engaged in the protection of the employer's property, ejecting trespassers or enforcing rules and regulations promulgated by the employer, it becomes a jury question as to whether he was acting as a public officer or as an agent,

servant, or employee. *Id. See also*, *Marks v. Crawford*, 882 F.Supp. 530 (E.D. Va., 1993); *N. & W. Ry. Co. v. Haun,* 167 Va. 157, 187 S.E. 481 (1936)(a special police officer appointed by public authority, but employed and paid by a private party, does not subject his employer to liability for his torts when the acts complained of are performed in carrying out his duty as a public officer and further stating that it is the duty of a police officer to make an arrest, without a warrant, for a misdemeanor committed in his presence.); *Norfolk Bus Term. v. Sheldon*, 188 Va. 288, 49 S.E.2d 338 (1948).

Officer Stowe was engaged in the performance of a public duty such as the enforcement of the general laws not only when he pursed the thieves, but especially when he attempted to make a police stop, when they avoided the command of a police officer, and when the driver attempted to run him over with the vehicle. Given the facts of the case, the Appellee was not legally liable, under the theory of respondeat superior, for Officer Stowe's acts.

In *Marks v. Crawford*, 882 F.Supp. 530 (E.D. Va., 1993), a case similar to this one, two deputy sheriffs with the City of Richmond Sheriff's Department were employed by the defendant as security guards at a Hardee's restaurant when at approximately 1:30 a.m. a Hardee's employee

complained to the deputies that the plaintiff had stolen some money. The deputies chased the plaintiff as he fled from the restaurant, fired a pistol shot at him, pursued him in a vehicle, and pulled him from a car handcuffing him and placing him under arrest. The trial judge made a factual and legal finding that the deputies were serving as public officers at the time of the complained act and that the defendants were shielded from liability **even if they were also acting, in part,** under the defendant's direction. *Id* at 533.

The Appellant has misstated the procedural history and holding in case of *Godbolt v. Brawley*, 250 Va. 467, 463 S.E.2d 657 (1995) by claiming that "the private employer of an off-duty officer was held liable where, as here, the officer was engaged in protecting the employer's property." The primary issue in that case was whether the trial court erred in admitting evidence of the plaintiff's assault convictions. *Id* at 658. The second, lesser issue, was whether the court appropriately granted summary judgment, without the decision being decided by the factfinder, on the issue of vicarious liability of the employer of the police officer. The Supreme Court did not rule on that issue other than to remand the case for further proceedings, namely decision by the factfinder, as there was evidence that the officer was acting in conjunction with the employer's

nightclub personnel in ejecting the plaintiff from the establishment. *Id* at 660.

The case of *Clitchfield Coal Corp v. Redd*, 123 Va. 420, 96 S.E. 83 (1918) is clearly distinguishable and does not stand for the proposition alleged. Additionally, no Virginia case has cited this case as precedent nor had the claimed precedence of serving two masters become the law in Virginia. In the *Clitchfield Coal* case, the admitted special officer was employed directly and primarily by the private employer, Baldwin Detective Agency, and as stated by the Court "appears to have been giving his entire time and attention to the service and interests of the defendant company" and the warrant was issued after the general superintendent of the Clitchfield Coal Corporation had been consulted and apprised of all the facts, and that thereafter the course and conduct of the case was entirely under his direction and control." *Id* at 841. The Court also stated that the employment of special agents, who are clothed with police powers, is a common and well-known practice among mining, manufacturing, and transportation companies. *Id.* The case did not involve police officers and the Virginia Supreme Court affirmed that the control of the means and methods, as cited above, were within the discretion of the company, and not the "special officer", a private detective. Additionally, the "special

officer" was not affiliated with any police force and therefore, was not subject to the duties and responsibilities as was Officer Stowe.

Even if it is assumed that Officer Stowe was engaged in the protection of the employer's property, ejecting trespassers or enforcing rules and regulations promulgated by the employer, which is contrary to the evidence, it was within the purview of the trial judge, as finder of fact, to determine whether he was acting as a public officer or as an agent, servant, or employee at the time of the alleged negligent act.

Additionally, if a police officer encounters a person while acting in a private capacity, that police officer is fully empowered by his public office to pursue an investigation, detain that person if necessary, and arrest if justified. *See DePriest v. Commonwealth*, 4 Va.App. 577, 585, 359 S.E.2d 540, 544 (1987), cert. denied, 488 U.S. 985, 109 S.Ct. 541, 102 L.Ed.2d 571 (1988).

As in the *Glenmar Cinestate* case, there was no evidence which indicated that the Appellee reserved the power to direct Officer Stowe's means of pursing a larceny committed in his presence or that he would have obeyed them if they had attempted to so instruct him. *Id* at 731, 369. In that case, the trial court carefully applied the facts, as did the trial judge in this case, to find that the officer was engaged in a public duty, even though there were facts that to support the opposite position. *Id.*

The *Glenmar Cinestate* case involved an off-duty police officer hired by a drive-in theater to direct traffic. The officer would perform his traffic-directing duties according to how he had been trained as a police officer and not on the instruction of the theater owner, even though there was evidence that the drive-in owner had reserved a right to specify how the police officer performed his job, the court observed that vicarious liability would be appropriate only if the drive-in owner had "a right to specify results rather than means or methods." *Id.* The Court concluded that, because the officer was physically standing in a public highway at the time of the incident performing a public duty, namely directing traffic on the highway, vicarious liability was not appropriate. *Id.* Just like the officer in that case, Officer Stowe had left the premises of the restaurant and was pursing fleeing suspects pursuant to his police training and as a police officer. In his mind all actions taken were as a police officer, thus he was using the means and methods dictated by his police training and police experience.

The trial court, acting as the finder of fact, concluded that Officer Stowe at the time of the shooting was acting solely in his capacity as a City of Alexandria Police Officer. Officer Stowe's private duty Detail did not relieve him of the responsibility or authority to maintain the peace, protect property, and enforce the laws of the Commonwealth. Officer Stowe had all indicia of a

police officer, including wearing his full uniform and displaying his badge of authority, when he attempted to stop the fleeing group.

The overwhelming evidence was that Officer Stowe was acting as a police officer at that time all events took place and not as an agent of J-W. Officer Stowe was clear in his mind that he was acting as a police officer at all relevant times and not as a security guard and that he was employing his police training and experiences in pursing a crime of larceny and then the crime of attempting to strike or kill a police officer. The evidence, including Officer Stowe's own testimony, clearly shows that Officer Stowe believed there was a misdemeanor committed in his presence (App. 84) as people were leaving without paying for their food. (App. 87.). Officer Stowe testified that he also believed that it was his police duty to try to obtain the subject information so that a warrant could be issued for the subjects at a later time. (App. 84.) Officer Stowe testified, without objection, that at the time of the incident he was undertaking a police action. (App. 84.) Officer Stowe, once he was notified of the group not paying the bill and then after witnessing it, in his mind, was acting as a police officer. (App. 97.)

Police Expert Key testified that Officer Stowe was engaged in the performance of his public duty as a police officer at the time he attempted to stop the fleeing individuals. (App. 534.) He also stated that he had probable

cause to believe that a misdemeanor was committed in his presence (App. 534), that he had reason to go out and try to stop that vehicle consistent with his police training, holding his hand up to stop the vehicle (App. 534.), and that when he realized that the car was coming towards him, consistent with his police training, tried to get out of the way of the vehicle (App. 535), had probable cause to believe that a dangerous felony assault on him was occurring and that in order to preserve his life and to prevent serious injury had to use lethal force (App. 535). His testimony was compelling, credible, and relied upon by the trial court in making its' findings.

Virginia law is clear that when police officers are involved, a determination by the trier of fact must be made to whether the officer is engaged in a public or private function at the time of the complained act. *See Glenmar Cinestate, Inc. at* 728, 366. Even if there exists a dual employment situation, which is expressly denied in situations involving police officers, the coincidence of Officer Stowe's private and public duties during the encounter did not eclipse his authority and responsibility as a law enforcement officer. *See Key v. Com.,* 21 Va.App. 311, 464 S.E.2d 171, (Va. App., 1995) (police officer acting as a security guard questioned a person without authority to be in a private hotel determined to be a police officer at that time)

Police officers are not capable of serving two masters at the same time. They are entrusted with enormous power and authority. No other government official has the breadth of authority as does a police officer. Police forces and police officers are responsible for the prevention and detection of crime, the apprehension of criminals, the safeguard of life and property, the preservation of peace and the enforcement of state and local laws, regulations, and ordinances. Va. Code § 15.2-1704. Private duty employers are unable to determine how a police officer completes his public duties given the uniqueness of this relationship. To find otherwise would make all private employers in all situations responsible for all actions of police officers; which is not the law in Virginia.

The uncontroverted evidence, determined by the trial judge as the finder of fact, is that the evidence in this case was sufficient to prove that Officer Stowe was engaged in the performance of public duties at the time of the incident. It was the trial judge's judgment that Officer Stowe was clearly acting within the scope of his duties to enforce the general public laws, apprehend criminals, and preserve the peace when he pursued the thieves. That finding of the trial court, as fact finder, in and of itself, was sufficient basis for the court to find in the Appellee's favor without addressing any of the other legal issues raised by the Appellant.

II. THE TRIAL COURT CORRECTLY DETERMINED, AS TRIER OF FACT, BASED UPON THE LAW AND FACTS, THAT OFFICER STOWE WAS AN INDEPENDENT CONTRACTOR AND NOT AN EMPLOYEE OF J-W AT THE TIME OF THE INCIDENT.

The trial court correctly determined, as the trier of fact, that Officer Stowe was an independent contractor and not an employee of J-W Enterprises at the time of the Incident. The overwhelming facts are that Officer Stowe, while pursuing individuals who left without paying for their food, i.e. committing petite larceny, and in attempting to make a stop or arrest, and in shooting into the vehicle that was accelerating toward him, while executing self-defense, was acting as an independent contractor.

In Virginia, whether one acts as an employee or as an independent contractor is a question of fact for the fact finder. *Emmerson v. Fay*, 94 Va. 60, 64, 26 S.E. 386, 387 (1896). One who employs an independent contractor is not liable for injuries to third parties resulting from the contractor's negligence. *Craig v. Doyle*, 179 Va. 526, 531, 19 S.E.2d 675, 677 (1942) "An independent contractor is one who undertakes to produce a given result without being controlled as to the method by which he attains that result." *Id* at 531, 677. If under the contract the party for whom the work is being done may prescribe not only what the result shall be, but also direct the means and methods by which the other shall do the work, the former is an employer, and the latter an employee. *Id.* But if the former

may specify the result only, and the latter may adopt such means and methods as he chooses to accomplish that result, then the latter is not an employee, but an independent contractor. *Id. See also, Glenmar Cinestate, Inc. at* 728, 369, 731; *Todd W. Maccoy, et al. v. Colony House Builders, Inc., et al.*, 239 Va. 64, 387 S.E.2d 760 (1990). For a person to be an employee, the means and methods of control need to be significant. *See Todd W. MacCoy at 64, 760* (1990)(despite a great level of control on the subcontractor, that contractor was free to adopt and employ the means and methods necessary to accomplish the prescribed results).

There are numerous facts, some of which are stated in the statement of facts above, to support the finding of the trial judge on this issue. Officer Stowe testified that he was acting as a police officer at the time he pursued the group and when he shot into the vehicle. William Trout and Maaza Henry both testified without objection that Officer Stowe was an independent contractor. The contract was clear that he was a contractor. The methods and means of functioning as a security guard were determined by Officer Stowe. He was not trained by the Appellee, he did not complete any of their formal employment requirements, he choose how to pursue problems with unruly people in the restaurant and how to pursue those committing larceny, and he certainly choose the means and

methods of pursing the specific individuals involved in the incident. As a police officer, the Appellee had no ability to control the means and methods employed by Officer Stowe. Additionally, the trial court properly concluded that once Officer Stowe left the premises of the restaurant by going outside that the Appellant did not have any control over the means and methods employed by Officer Stowe.

Even if the relationship was an employment one, then clearly the actions taken by Officer Stowe would have been outside the scope of employment once he left the restaurant, attempted to stop a moving vehicle, and shooting at the driver in an effort to protect himself. As further evidence, the Appellant's dangerous instrumentality argument is additional proof that the use of a gun by Officer Stowe, given the evidence, had to have been outside the scope of his employment.

The overwhelming evidence was that Officer Stowe was acting as an independent contract and that the Appellant did not have the power, ability, or desire, to control the means and methods of Officer Stowe's actions; especially when he left the premises of the Restaurant. The proper finding by the trial court that Officer Stowe was an independent contractor should not be disturbed as the trial judge correctly applied the law and fact, including weighing the credibility of witnesses, to reach its' decision. That

finding of the trial court, as fact finder, in and of itself, was sufficient basis for the court to find in the Appellee's favor without addressing any of the other legal issues raised by the Appellant.

III. WHETHER THE TRIAL COURT CORRECTLY DETERMINED, AS THE TRIER OF FACT, THAT THE PROXIMATE CAUSE OF THE INCIDENT WAS NOT THE ACTIONS OF J-W BUT RATHER THE ACTIONS OF STEVEN SMITH AND OFFICER STOWE IN HIS CAPACITY AS A CITY OF ALEXANDRIA POLICE OFFICER.

The trial court, as the finder of fact, properly concluded that it was the actions of Steven Smith driving the vehicle toward Officer Stowe and the actions taken by Officer Stowe as a police officer in reacting thereto and in self-defense, and not any actions of J-W, was the proximate cause of the incident and resulting damages. A finding on the issue of proximate cause rested solely within the discretion of the trial court to make this factual finding and thus should not be disturbed.

Additionally, the actions of Officer Stowe could not have been found to be the proximate cause of this incident since the Appellant admitted by stipulation that he was acting in self-defense at the time of the shooting. That alone defeats the Appellant's negligence claim and arguments against the proximate cause finding sought by the Appellant.

IV. WHETHER THE TRIAL COURT, AS THE TRIER OF FACT, CORRECTLY CONCLUDED THAT THE CITY OF ALEXANDRIA WAS NOT A JOINT TORTFEASOR FOR WHICH CONTRIBUTION COULD BE SOUGHT.

Pursuant to Code § 8.01-34 "[C]ontribution among wrongdoers may be enforced when the wrong results from negligence and involves no moral turpitude." Before contribution may be had it is essential that a cause of action by the person injured lie against the alleged wrongdoer from whom contribution is sought. *Bartlett v. Roberts Recapping, Inc.,* 207 Va. 789, 792-93, 153 S.E.2d 193, 196 (1967). The right of contribution is based on the equitable principle that when two or more persons are subject to a common burden, their responsibility shall be borne equally. *Sullivan v. Robertson Drug Co., Inc.,* 273 Va. 84, 639 S.E.2d 250, 255 (2007)(the party seeking contribution has the burden of proving that the concurring negligence of the other parties was a proximate cause of the injury for which damages were paid). A right of contribution against a **joint** tortfeasor lies when one wrongdoer has paid or settled a claim not involving moral turpitude for which other wrongdoers also are liable. *Id.* The party seeking contribution has the burden of proving that the concurring negligence of the other parties was a proximate cause of the injury for which damages were paid. *Id.* The right of contribution by one joint tortfeasor against another only arises when one tortfeasor pays or discharges a common obligation.

Nationwide Mutual Insurance Co. v. Jewel Tea Co., 202 Va. 527, 532, 118 S.E.2d 646, 649 (1961).

In this case, the Estate of Aaron Brown ("Estate") settled with the City of Alexandria as compensation for his death caused by Officer Stowe for the amount of $1,100,000. The Estate entered into a settlement agreement with the City and the Estate released J-W, Trout, and Officer Stowe. When a tortfeasor enters into a settlement agreement with a claimant that also releases other tortfeasors, the settling tortfeasor is entitled to obtain contribution from the remaining tortfeasors for reasonable amounts paid to settle the claim. Virginia Code § 8.01-35.1.

This contribution case does not involve joint tortfeasors and, therefore, fails as a cause of action. As required, there is no concurring negligence of the City and J-W. Officer Stowe is either an agent within the scope of his employment with the City or an agent within the scope of his employment with J-W at the time of the shooting incident but not both. There is no joint or shared or co-employees law in Virginia.

If Officer Stowe was found to be an employee of J-W or if Officer Stowe was determined to be an agent of the City, then in either case, the City would not have a contribution cause of action against J-W. The trial court properly recognized this in the findings of the court. The defense of

sovereign immunity by the Appellant to any cause of action by the Estate would have barred such a negligence action such as this against the Appellant and thus they could not be joint tortfeasors. Additionally, the Appellant admitted that Officer Stowe was acting in self-defense at the time of the shooting, also causing the Appellant's cause of action to fail as the parties hereto could not be joint tortfeasors.

CONCLUSION

All of the following stand alone as reasons why the Appellant prevailed at trial and should prevail in this appeal:

1. this contribution action was procedurally and legally barred and was not a valid cause of action as the parties can never be joint tortfeasors;

2. Officer Stowe was clearly in his capacity as a police officer at the time of the shooting;

3. it was equally clear from the evidence that Officer Stowe was an independent contractor and not a servant of J-W;

4. Officer Stowe's actions were outside the scope of his employment; and

5. the proximate cause of this incident is the driving of the vehicle toward Officer Stowe while acting in self-defense and was an appropriate use of lethal force pursuant to his police training.

WHEREFORE, the Appellee, by counsel, respectfully requests that this Honorable Court affirm the trial court decision and rule in favor of the Appellee for the reasons set forth herein.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 5:26(d), I hereby certify that fifteen (15) copies of the foregoing Brief of Appellee have been filed with the Clerk of the Supreme Court of Virginia, one electronic copy in PDF format via email to the Clerk of the Supreme Court of Virginia, and three (3) copies have been mailed, via U. S. Mail, postage prepaid, to all opposing counsel this 28th day of September, 2009, to:

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