In The

Supreme Court of Virginia

RECORD NO. 090659

CITY OF ALEXANDRIA,

Appellant,

v.

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

Appellees.

BRIEF OF APPELLANT

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STATEMENT OF THE NATURE OF THE CASE

A private corporation hires an off-duty, uniformed police officer to work as a security guard at its restaurant. It uses the officer to deter patrons from walking out of the restaurant without paying, and to pursue and confront patrons who do walk out, to intimidate them into returning and paying their bills. The private employer never prosecutes those walking out for non-payment.

After dozens of occasions where the officer does, in fact, confront such “walk-outs” in an effort to get them to pay, and never with the purpose of arresting them in his public capacity as a police officer, he is informed by a restaurant employee that patrons have left the restaurant without paying. With the sole purpose of collecting the allegedly unpaid bill, the officer pursues the patrons out of the restaurant into the adjacent parking lot. The young patrons enter a vehicle and start to drive away. He hails the vehicle to stop but must step out of the way as it speeds past. He then runs across the parking lot through two rows of parked cars to block the exit of the vehicle. In violation of written police policy, the officer steps into the path of the car, hoping to stop the vehicle and persuade the youths to pay their bill. Then, believing that the driver is coming directly towards him, he pulls out his gun, and, in violation of police policy, shoots at the vehicle as it

approaches and passes him, killing one of the passengers. Uncertain about its own liability for the acts of its police officer, the municipality settles a wrongful death claim brought by the passenger's survivors and seeks contribution from the private employer in this lawsuit.

In that contribution action, on January 7, 2009, the trial court entered a verdict for J-W Enterprises, Incorporated, the private employer, concluding that the City of Alexandria was not entitled to contribution on alternative bases. It determined: first, as a matter of law in Virginia, that the police officer could not have been a dual agent for the City and the private employer, and so was acting solely in his public capacity; second, that the police officer was an independent contractor and so the employer could not be held vicariously liable for his acts as a matter of law; third, that the police officer could not have been negligent because he was acting in self-defense at the time he pulled the trigger; fourth, that the officer's acts and the acts of the vehicle's driver at the moment of the shooting were the sole proximate causes of the passenger's injuries; and finally, that there could be no viable contribution action either because only one party could be held vicariously liable for the officer's actions, or because the City had an immunity defense in the underlying case and, thus, necessarily settled the case as a "volunteer."

The City filed its Rule 5:17 Petition for Appeal, asserting that the trial court misinterpreted Virginia law and failed to apply correct legal principles to the undisputed facts in this case, which in turn resulted in a verdict that was incorrect as a matter of law. The Court granted the Petition on July 29, 2009 before a writ panel heard argument.

ASSIGNMENTS OF ERROR

1. The trial court erred as a matter of law in concluding that the off-duty police officer was necessarily acting solely in his public capacity when he shot the decedent and, thus, was solely the agent of the City of Alexandria. This error was based on both factual error, inasmuch as the uncontradicted evidence was that the officer's sole purpose in confronting the vehicle was to collect a bill for the private employer, and also on legal error, in that the court held that an off-duty police officer could never be acting as a dual agent at any one time.

2. The trial court erred as a matter of law when it ruled that the off-duty police officer was not the servant, but rather was an independent contractor, of defendant J-W Enterprises, and further erred in determining that any such independent contractor status must necessarily lead to the conclusion that J-W Enterprises could not be held liable for the officer's actions.

3. The trial court erred as a matter of law in determining that the sole proximate cause of injury was the combined actions of the car's driver and the officer at the precise time of the shooting, and therefore that the officer's negligent actions in moving himself into a place of danger in front of the speeding car could not constitute another proximate cause of the shooting which was foreseeable and not superseded by any other cause.

4. The trial court erred as a matter of law in concluding that the parties' stipulation that the officer acted in self-defense at the time he fired his weapon necessarily absolved him of liability for negligently causing the injury.

5. The trial court erred as a matter of law in deciding that the City had no right to seek contribution because the City had "absolute" immunity for the officer's actions and so, in settling the underlying dispute, the City acted as a "volunteer."

QUESTIONS PRESENTED

1. Did the trial court misinterpret Virginia law when it determined that, at any given point in time, an off-duty police officer can only be the agent for either a municipality or a private employer but never both, consequently forcing the court to choose between whether the officer was performing a private or public duty, and, even assuming the trial court was

correct, did the officer's act of attempting to get "walk-outs" to pay an unpaid bill, as opposed to making or attempting to make an arrest, constitute performance of a private duty as a matter of law? (Assignment of Error 1)

2. Did the trial court misinterpret and misapply Virginia law when it concluded that the officer was an independent contractor for J-W Enterprises, as opposed to a servant, and that this conclusion necessarily compelled the court to enter a verdict in favor of defendants? (Assignment of Error 2)

3. Did the trial court err in applying incorrect and unduly narrow standards of negligence and proximate causation under Virginia law when it decided that the precise moment of the shooting was the only relevant time frame for determining liability, as opposed to the officer's negligent act of pursuing on foot a moving vehicle for the sole purpose of collecting a bill, which set in motion a chain of events not broken by the officer's foreseeable act of self-defense? (Assignment of Error 3)

4. Did the trial court err in concluding that self-defense was necessarily a complete defense to a negligent shooting under Virginia law? (Assignment of Error 4)

5. Did the trial court err in concluding under Virginia law that, because the City had a potential immunity defense available to it in the underlying case, it was necessarily a "volunteer" that could not bring a contribution action to recoup part of its settlement payment? (Assignment of Error 5)

STATEMENT OF FACTS

Defendant J-W Enterprises ["J-W"] owned and ran an International House of Pancakes restaurant in Alexandria, Virginia ["IHOP" or "the restaurant"]. (App. 344.) The restaurant was open for business 24 hours a day. (App. 348.) Because customers would be more likely to become unruly or leave the restaurant without paying their bills during the early morning time period, after area nightclubs had closed, J-W decided in 1990 to enter into a contract with the City of Alexandria to have an off-duty police officer work at the restaurant as a security guard. (App. 344-45, 348-49.) While working at the restaurant, the off-duty police officer was to be fully garbed and armed as a police officer. (App. 50-52, 345-46.) According to J-W's president, William D. Trout, J-W chose to hire a fully garbed and armed police officer, rather than a member of a private security force, because he felt the general public had more respect for a police officer. (See App. 345-

46, 349-350, 385-86.) Explaining the effect of the officer's presence, Mr. Trout said, "It was basically, you might say, intimidation." (App. 361.)

By February 2006, City of Alexandria police officer Carl Stowe ("Officer Stowe") had worked off-duty at IHOP for approximately ten years and was the security guard at the restaurant the night of the incident at issue. (See App. 59, 355-56.) J-W paid Officer Stowe a flat rate of $35 per hour for his time when he worked as a security guard at the restaurant. (App. 52.) Officer Stowe testified that police department directives did not control all aspects of his extra-duty work for IHOP. (App. 49.) He specifically understood from IHOP management and wait staff that his duties included helping them get walk-outs to pay their bills. (App. 98.) IHOP had the right to dismiss an extra-duty officer assigned to work for it. (App. 56.)

Under its contract with the City, J-W was notified that extra-duty officers "may not engage in or undertake an action in their official capacity which stands to benefit or harm, the person or entity by whom they are employed during their off-duty hours." (App. 298.)

Although City of Alexandria Police Department policies for off-duty work strictly prohibited any off-duty police officer from acting as "a bill

collector, repossessor or collection agent of any kind . . ." (App. 288),[1] one of Officer Stowe's duties for J-W was to pursue and confront walk-outs in an attempt to get them to pay their unpaid bills. (App. 98, 100, 303-04.) As Officer Stowe testified, "My understanding was for the officers to be in the IHOP and be visible to deter walk-outs, disorderly customers, turf fights. And if a patron would leave the IHOP without paying, we would stop that individual to see if they could pay their bill." (App. 28-29.) To that end, restaurant managers or servers typically would inform Officer Stowe of a suspected walk-out so that he could pursue and confront the suspected party. (See App. 312-14, 316, 351, 352.) When a waiter informed IHOP owner Mr. Trout that someone was walking out without paying, he would then approve sending Officer Stowe after the customer, unless Stowe's presence was more needed inside the restaurant at that moment. (App.

[1] The City of Alexandria's Chief of Police, David Baker, testified that the reason for the directive is that, where an off-duty officer is performing a duty for a private employer but is wearing his uniform, it improperly "suggests that [he] can exercise [his] influence and [his] appearance . . . for nothing more than the interest of the outside employer." (App. 160, 165-66.) Plaintiff's expert witness, Lou Reiter, likewise testified that a police officer should "not use his office or the indices of his office in any way that might be interpreted as intimidating a person to resolve a business dispute," such as a party's failure to pay its bill. (App. 231-32.) Defendants' own expert agreed that, assuming Officer Stowe was acting to collect an unpaid bill, it would be "a violation of department directives." (App. 547-48.)

362.) Mr. Trout acknowledged he exercised this control over the actions of Officer Stowe. (App. 362-63.)

Officer Stowe was required to perform his duty of pursuing and confronting walk-outs, by his own estimate, between 40 and 50 times during the course of his tenure at IHOP. (App. 33, 59.) In doing so, Officer Stowe's intent was never to arrest the walk-outs;[2] he had the understanding from conversations with IHOP managers "it would be best for everyone if we could get people to pay on the scene and not have to have managers take time from their day" to testify at trial. (App. 45-46.)

Mr. Trout did not know of any occasion where an IHOP patron had been arrested for not paying a bill. (App. 353-54.) J-W wanted simply to "intimidat[e]" the walk-out, hoping that when confronted with a fully-garbed and armed police officer, the walk-out would have a change of heart and return to the restaurant to pay the unpaid bill. (App. 353-55; 361.) Mr. Trout admitted on cross-examination that while Officer Stowe himself did not collect money, the purpose of having a manager or server tell him about

[2] Officer Stowe did testify that on one occasion he requested back-up and arrested a walk-out who had also become disorderly, but ended up letting him go because "he wanted to pay his bill and he asked me to give him a break because he wanted to go into the military." (*See* App. 65-55, 102-03.)

someone leaving without paying was so that the officer could get the customer to come back in and pay the bill. (App. 355.)

In the early morning of February 25, 2006, Officer Stowe was working at the restaurant as a security guard. (App. 29-30.) An IHOP employee told Officer Stowe that a party of young people was leaving the restaurant without paying the bill. (App. 308-09.)[3] Officer Stowe "called out to them 'Hey,' and both individuals turned around" indicating to him that they had heard him calling. (App. 32.) Officer Stowe followed the last two non-payers outside and "yelled to them again and started running behind them." (App. 31, 33.) Had he wanted to make an arrest, Officer Stowe agreed he could have simply obtained the license tag number of the vehicle as it drove away, instead of attempting to confront a speeding car. (App. 105-06.) But his purpose was "to stop them and to have them take care of the tab." (App. 33.)

The two individuals got into a waiting vehicle, which "took off." (App. 34.) Officer Stowe entered the lot to try to get the vehicle to stop, as he again confirmed, "so I could have the occupants of the vehicle pay their tab." (App. 34-35.) Officer Stowe had to step back to avoid the vehicle as

[3] Officer Stowe conceded that he did not witness the entire event himself, and relied in part on the information provided by an IHOP server to determine that some members of Aaron Brown's dining party had apparently left the restaurant without paying their bill. (App. 104-05, 108.)

it went past him. (App. 34, 37). He knew that to exit the lot, the vehicle would have to make a 180-degree turn at the end of the row of parked cars and come back in his general direction. (See diagram of parking lot, App. 260.) Before placing himself in the pathway of the moving vehicle for a second time, Officer Stowe observed that "it accelerated [past him] pretty aggressively," he could "hear the tires squealing," he could "hear the revving of the engine" and, in making the turn back toward the position Officer Stowe was moving toward, he "actually thought the vehicle was going to hit the parked cars." (App. 39.) Despite these observations, Officer Stowe stepped into the pathway of the vehicle in the next lane of the parking lot, hoping to get the vehicle "to stop without any further incident," so that the occupants would "come back and pay the tab." (App. 38, 39.)

At that point, it appeared to Officer Stowe that the vehicle was accelerating "pretty aggressively" and that the driver seemed to have "no intent of stopping." (App. 39-40.) He then perceived that the car was turning without decreasing its speed and that the driver "may . . . not hav[e] the vehicle completely in his control." (App. 40.)

Realizing that he was in a potentially vulnerable position, Officer Stowe attempted to move to an area of parked cars to protect himself. (*Id.*) As he moved toward the parked cars, Officer Stowe testified that the

vehicle appeared to be "'tracking' my movement" and still did not decrease its speed. (App. 41.) He said, "At that point I felt that the driver was trying to hit me or run me down, so . . . I pulled out my weapon as I was moving" and started firing at the front of the vehicle in self-defense. (App. 41-42.)[4] As the car passed him, he shifted his aim to fire into the side of the vehicle, and one of the bullets struck Aaron Brown, who was sitting immediately behind the driver, causing his death. (App. 43.)

An internal police review of the incident determined that Officer Stowe had violated police policies, and played a role in the city's decision to reach a settlement of the case. (App. 343.)

ARGUMENT

Overview

An off-duty city police officer's loyalty to his private employer warped his professional judgment and caused him to violate police directives, with consequences that were tragic to a family and costly to the City of Alexandria, which settled the resulting lawsuit brought by the family. The issue here is whether the private employer, which knowingly used the officer over the course of years in a manner contrary to written police directives and outside the bounds of its own contract with the City for extra-

[4] At trial, the parties stipulated that Officer Stowe was acting in self-defense at the time he fired his weapon. (App. 479.)

duty employment of police officers, is insulated as a matter of law from any duty to reimburse the City for the company's share of the fault.

Standard of Review

When presented "solely with a question of law concerning the trial court's application of the law to essentially undisputed facts," this Court applies a *de novo* standard of review. *Hilton v. Martin*, 275 Va. 176, 180, 654 S.E.2d 572, 574 (2008). The Court "give[s] the findings 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 findings "will not be disturbed on appeal unless they are plainly wrong or without evidence to support them." *Collins v. First Union Nat'l Bank*, 272 Va. 744, 749, 636 S.E.2d 442, 445-46 (2006). However, for those issues that present mixed questions of law and fact, the Court gives deference to the trial court's findings of fact and views the facts in the light most favorable to the prevailing party, but reviews "the trial court's application of the law to those facts de novo." *Id.* at 749, 636 S.E.2d at 446.

While the factfinder at trial is the "judge of the weight of testimony and the credibility of the witnesses," the factfinder "cannot arbitrarily disregard the uncontradicted evidence of unimpeached witnesses which is not inherently incredible and not inconsistent with other facts and

circumstances appearing in the record." *Epperson v. DeJarnette*, 164 Va. 482, 485, 180 S.E. 412, 413 (1935).

Because this appeal presents either questions of pure law, application of law to essentially undisputed facts, or mixed questions of law and fact, this Court should apply a *de novo* standard of review. Further, because the trial court did not specify its "findings of fact" in the record (see App. 637-40), this Court should look to the undisputed facts in the record and apply the correct law to those facts. Even viewing these facts in the light most favorable to the prevailing party in this case, defendant J-W, when the correct legal principles are applied, only one conclusion is possible: The trial court made repeated, key errors in law, and in applying the law to the facts. As a matter of law, the trial court should have ruled in favor of the plaintiff on an array of conclusions of law and, accordingly, the verdict in favor of the defendant should be set aside and a verdict should be entered in favor of the plaintiff, as we now explain.

I. The trial court erred in finding that J-W cannot be held liable for tortious acts of its uniformed extra-duty police officer.

A. An off-duty police officer can be a dual agent.

The trial court erroneously concluded that, under Virginia law, it was not possible for an off-duty police officer simultaneously to serve a

municipality and a private employer. Based on that premise, the court decided that Officer Stowe was acting solely within the scope of his public duties as a police officer; the court thus denied contribution by J-W. (See App. 638-39.) The court's underlying premise is wrong.

In *Clitchfield Coal Corporation v. Redd*, 123 Va. 420, 96 S.E. 83 (1918), this Court upheld a verdict in favor of a plaintiff who alleged he had been prosecuted maliciously by a coal company through a private detective/law officer the company employed.[5] That the detective was a law officer, the Court found, "did not preclude him from acting also in the capacity of an agent of the defendant." *Id.*, 123 Va. at 431. The court concluded the evidence supported the jury's verdict both on the theory that the officer acted as the defendant's servant in maliciously prosecuting the plaintiff and on the theory that the defendant company subsequently ratified his action by continuing the prosecution. *Id*.

In keeping with *Clitchfield*, *in Drake v. Norfolk Steam Laundry Corp.*, 135 Va. 354, 116 S.E. 668, 670 (1923) this Court found that the master may be held liable even where the servant is acting in part or simultaneously on his own behalf: "[W]here a servant is allowed by his

[5] The plaintiff apparently admitted at trial that the detective was a law officer, and this Court found the issue to be decided. (*Clitchfield*, 123 Va. at 431.)

master to combine his own business with that of the master, or even to attend to both at substantially the same time, no nice inquiry will be made as to which business the servant was actually engaged in when a third person was injured by his negligence . . .") (*quoting* 1 SHEARMAN & REDFIELD ON NEGLIGENCE (6th ed.) § 147, at 360).

Just as this Court ruled in *Clitchfield,* courts in other jurisdictions have applied traditional principles of agency law to conclude that an off-duty police officer can be a dual agent and can perform a given function for his public as well as his private employer at the same time. *See*, *e.g.*, *Lovelace v. Anderson*, 366 Md. 690, 716-19, 785 A.2d 726, 741-42 (2001) ("[a] worker may simultaneously be the employee of two employers") (quoting *Whitehead v. Safeway Steel Prods.*, 304 Md. 67, 79, 497 A.2d 803, 809 (1985)); *White v. Revco Discount Drug Ctrs, Inc.*, 33 S.W.3d 713, 724 (Tenn.), *reh'g denied*, 37 S.W.2d 885 (2000) ("It is . . . well settled that an agent may serve two masters simultaneously, so long as the objectives of one master are not contrary to the objectives of the other.") *White* also found that

> private employers may be held vicariously liable for the acts of an off-duty police officer employed as a private security guard under any of the following circumstances: (1) the action taken by the off-duty officer occurred within the scope of private employment; (2) the action taken by the off-duty officer occurred outside of the regular scope of employment, if the

> action giving rise to the tort was taken in obedience to orders or directions of the employer and the harm proximately resulted from the order or direction; or (3) the action was taken by the officer with the consent or ratification of the private employer and with an intent to benefit the private employer.

Id.

From his years of work for J-W, Officer Stowe knew what he was to do on behalf of the restaurant when its waiter told him that young customers had left without paying their bill. In addition to specifically directing Officer Stowe to follow nonpaying customers and bring them back to pay their bills, J-W's acceptance of its officer's course of conduct in doing so over the course of years, ratified such conduct, also making it vicariously liable for its agent's actions in helping to collect bills on its behalf.

B. Private employers also can be held liable where off-duty officers do not solely act within the scope of their public duties.

Decisions by this Court show that while companies may not be liable for negligent conduct by off-duty police officers who are acting solely within the scope of their public duties while making arrests, they can be held liable when, as here, the officers are not solely acting within that public scope.

In *Norfolk & W. Ry. Co. v. Haun*, 167 Va. 157, 187 S.E. 481 (1936), special police officers were hired to work for a private railroad corporation.

The officers witnessed men throwing coal from a railway car and then moving the coal to the side of the road; the officers finally arrested the men after they had loaded the coal into an automobile. 167 Va. at 159, 187 S.E. at 481-82. In determining that the officers were acting solely in their public capacity, this Court provided the following rationale:

> [A] special police officer for a railway company, though occupying a dual role, will be presumed to have acted in pursuance of his public duty when attempting to arrest a violator of the law. The officers, while not as clear and frank in giving their testimony as they might have been, not only stated that they made the arrest in the discharge of their duty as officers of the Commonwealth, but their conduct confirms this testimony. They saw the men an hour or more before they made the arrest, throwing coal off the car, and again when it was moved to the side of the highway. They did not stop the thieves, or attempt to recapture the property stolen. They waited until plaintiff had loaded the coal into the automobile, then made the arrest. The crime was complete. The action of the officer was not for the purpose of ejecting trespassers from the premises of the master, nor for the protection of property, or of recovering stolen property, but to apprehend the criminal so that he might be punished for the offense - the vindication of justice. This seems to be the only reasonable inference to be drawn from the uncontradicted evidence.

Id. at 485, 187 S.E. at 166 (emphasis added).

In contrast to *Haun*, Officer Stowe never made an arrest of people who did not pay their bills. Rather, in keeping with the preference and direction of J-W, he simply brought them back to IHOP to pay.

In *Godbolt v. Brawley*, 250 Va. 467, 463 S.E.2d 657 (1995), 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 officer was standing outside the entrance to the defendants' nightclub where he worked as a security officer and, as he tried to detain the plaintiffs until the police could arrive, a fight ensued between the officer and the plaintiffs. 250 Va. at 469, 463 S.E.2d at 658-59. The plaintiffs began assaulting the officer and, in response, the officer pulled out his gun and shot them. *Id.* at 469, 463 S.E.2d at 659. Plaintiffs were eventually charged with simple assault, but the officer was never charged with a crime. *Id.* The off-duty police officer apparently neither made an arrest nor attempted to arrest the bar patrons; rather he was merely attempting to detain the plaintiffs until other police officers arrived. *Id.*

In reversing a summary judgment for the private employer, the *Godbolt* court drew a distinction between an officer's "performance of a public duty such as the enforcement of the general laws" where the private

employer would have no liability, and an officer "engaged in the protection of the employer's property, ejecting trespassers or enforcing rules and regulations promulgated by the employer," where the private employer may be held liable. *Id.* at 472, 463 S.E.2d at 661 (quoting *Glenmar Cinestate, Inc. v. Farrell*, 223 Va. 728, 735, 292 S.E.2d 366, 369-70 (1982), which in turn relied on *Haun* and *Norfolk Union Bus Terminal, Inc. v. Sheldon*, 188 Va. 288, 49 S.E.2d 338 (1948)). Thus, the Court reaffirmed the legal principle originally set forth in *Haun*. The *Godbolt* court held: "The record before us contains evidence that [the officer] was acting in conjunction with other [nightclub] personnel who were ejecting the [plaintiffs] from the club. There is also evidence that the [plaintiffs] had engaged in destructive behavior . . . while they were on the . . . premises." *Id.* at 473, 463 S.E.2d at 661. The Court thus concluded that a jury could find that the officer was "acting as an employee [of the nightclub], attempting to impose order" when the injury occurred. *Id.*

The trial court's mistaken analysis in this case ties to the truism that a police officer is always "on duty," in one sense, because he can always be

called into service and owes a special duty to the public 24 hours a day.[6] The court's further assumption, however, that an off-duty police officer can act only for one employer at a time, flatly contradicts this Court's holding in *Clitchfield.* It also would render meaningless this Court's decisions in *Haun* and *Godbolt*, which expressly hold that, under certain facts and circumstances, a private employer may be held liable for the acts of its employee who happens to be an "off-duty" police officer. *See Godbolt*, 250 Va. at 472, 463 S.E.2d at 660.[7]

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[6] The agreement between the City of Alexandria and J-W addresses the question of "on duty" status by having a clear-cut rule about when an off-duty police officer, called back into public service, is no longer considered to be "on the clock" for the private employer: "[O]fficers hired for this secondary employment may be subject to being returned to on-duty status in case of emergency" and are allowed to remain on the private employer's payroll "if they are on this call for fifteen (15) minutes or less. If they are on this call for more than 15 minutes, they will be taken off" the payroll until such time that they return to "[the private employer's] property." (App. 297-298.) The events in question in this case took place in less than a minute, and there is no evidence in the record to suggest that the City paid Officer Stowe for the time he spent in the parking lot pursuing the walk-outs.

[7] Other courts have found a strong public policy reason for holding liable private employers for the negligent acts of off-duty police officers. "[E]liminating vicarious liability for private employers who hire off-duty police officers encourages such employers to shift their risk of liability to the municipality solely because their employees are also employees of the local police department. As jurisdictions following a nature-of-the-act approach recognize, at least implicitly, the private employer would have been vicariously liable for the torts of its security guard except for the fact that the security guard is also a municipal police officer. As such, allowing liability based only upon the official status of the employee undermines the

The question to be asked under Virginia law is: assuming that police officers are in a sense always "on duty," in any given case can an off-duty officer be acting, at least in part, for the benefit of his private employer and within the scope of the private employment? See RESTATEMENT (SECOND) OF AGENCY § 226, cmt. a (1957). Based on the uncontradicted evidence in this case, the answer is that Officer Stowe acted, in the words of this Court in *Haun*, for "the protection of property, or of recovering stolen property"—an unpaid bill—and not "to apprehend the criminal so that he might be punished for the offense."

It is significant that in virtually every case that has resolved in favor of the private employer on the question of whether a given act constituted a public duty, the off-duty police officer had either made an arrest or attempted to make an arrest. *See*, *e.g.*, *Bauldock v. Davco Food, Inc.*, 622 A.2d 28, 33-34 (D.C. 1993) (holding that arrest was made pursuant to his authority as a police officer, and thus supermarket would not be held liable); *Marks v. Crawford*, 882 F. Supp. 530, 533 (E.D. Va. 1993) (restaurant not liable where arrest was made "in furtherance of their duty,

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modern rationale of vicarious liability, which . . . is the result of 'deliberate allocation of risk.'" *White*, *supra*, 33 S.W.3d at 722 (quoting W. Page Keeton, PROSSER AND KEETON ON TORTS § 69, at 500 (5th ed. 1984)); accord *Dillard Dept. Stores, Inc. v. Stuckey*, 256 Ark. 881, 883, 511 S.W.2d 154, 155 (1974); *Kusnir v. Pressed Steel Car Co*., 201 F. 146, 150-51 (S.D.N.Y. 1912).

as public officers, to enforce the general laws of Virginia"); *Norfolk Union Bus Terminal, Inc. v. Sheldon*, 188 Va. 288, 49 S.E.2d 338 (1948) (bus terminal corporation was held not liable for malicious prosecution because arrest was made in discharge of public duty to enforce criminal laws; still, relying on the reasoning in *Haun*, the court found a jury question in whether the corporation should be liable for the officer's act of ejecting trespassers from employer's premises.) Indeed, arresting a person suspected of committing a crime is a classic function of a police officer. *See State v. Affordable Bail Bonds*, 198 Ariz. 34, 38, 6 P.3d 339, 343 (Ct. App. 2000) (observing that one of the "fundamental duties" of a police department is "to arrest perpetrators"); *Leach v. Bd. of Police Comm'rs of Kan. City*, 118 S.W.3d 646, 651 n.5 (Mo. Ct. App. 2003) (making an arrest is "clearly an exclusive police function").

In this case, in contrast, no arrest was even contemplated before the shooting, and the officer was engaged in a function that was tantamount to bill collection—a far cry from a "fundamental" or "exclusive" police duty.

C. Undisputed evidence conclusively proves that Officer Stowe's negligent acts were performed within the scope of his private duties and for J-W's benefit.

The record is silent as to the factual underpinnings for the trial court's incorrect conclusion that Officer Stowe was acting solely on behalf of the

City when he fired the fatal shots, but the undisputed evidence speaks volumes in support of the opposite conclusion.

First, unlike the special police officers in *Haun* or other cases cited above, there is no evidence whatsoever that Officer Stowe at any point in time arrested, attempted to arrest, or even intended to arrest the departing patrons on that fateful night before the shooting. All the evidence is to the contrary. Officer Stowe testified that his purpose was not to arrest any walk-outs while working for IHOP and that he did not intend to arrest any members of Aaron Brown's party. (App. 45-46, 105-06.) Rather, his purpose, as he repeatedly testified, was "to stop them and to have them take care of the tab." (App. 33, 35, 39, 44.) He and Mr. Trout both testified that arrests and prosecutions were not part of the job description. (App. 28-29, 34.) Mr. Trout could not recall a single arrest or prosecution that had ever arisen from an off-duty officer confronting a customer over failure to pay a bill. (App. 354.) As a corporate entity running a commercial enterprise such as a restaurant, J-W presumably wanted to maximize its profits, which it could do by intimidating prospective walk-outs into paying their bills, but not by having its employees take time away from work to testify in a criminal proceeding. (App. 46.)

Second, Mr. Trout testified that Officer Stowe was hired to be a “visible deterrent” and a form of “intimidation” so that walk-outs would not be attempted or would be stopped and the walk-out would reconsider and pay the unpaid bill. (App. 349-50, 361.) All of the other testimony bears out that Officer Stowe believed that a significant part of his job was to pursue and confront walk-outs, and that this is precisely what he was doing at all points in time as he chased after Aaron Brown and his companions. (App. 28-29, 32, 33, 39, 44, 46, 100, 103.) He had done the same in bringing back scores of walk-outs over the course of years to the benefit and concurrence of IHOP. (App. 33, 59.)

Third, the police department’s directives expressly prohibit the type of activity in which Officer Stowe engaged on behalf of J-W that fateful night. (App. 288.) Consequently, it is impossible that Officer Stowe’s act of attempting to get walk-outs to pay a private entity money owed on a bill could have been part of his functions as a police officer. The underlying purpose for this directive, to prevent police officers from using their uniformed official appearance to exert influence in a private setting, would be frustrated if off-duty police officers were permitted to use the indicia of their public office as a means of intimidation to benefit a private employer or themselves.

Finally, even when an agent acts with mixed motives or dual purposes when performing a given act, the employer may still be held liable for that act, if the employee is acting within the scope of employment. Section 236 of the RESTATEMENT (SECOND) OF AGENCY (1957) states: "Conduct may be within the scope of employment, although done in part to serve the purposes of the servant or of a third person." Even if the "predominant motive is to benefit himself or a third person," that fact does not remove the act from the scope of employment. *Id.* at cmt. b.

Indeed, Virginia law defines scope of employment even more broadly than the Restatement. In *Gina Chin & Associates, Inc*. *v. First Union Bank*, 260 Va. 533, 537 S.E.2d 573 (2000), this Court made clear in a case involving a "willful and wrongful" act of an employee—a bank clerk's participation in a check forgery scheme—that the employee's motive may not be determinative where the function being performed by the employee itself falls with the scope of his duties. In *Gina Chin*, although the employee acted solely in his own self-interest and in violation of his employer's rules, the Court stated, nevertheless, "it is clear that in doing so he was performing a normal function of a bank teller in accepting checks for deposit." *Id.* at 545, 537 S.E.2d at 579.

In this case, whether or not he was acting partly to serve his duties as a police officer, the evidence is uncontroverted that Officer Stowe was in the process of carrying out his duties for his private employer by pursuing a party of walk-outs into the parking lot in an attempt to get them to pay an unpaid bill. It was his pursuit of his duties for J-W, contrary to police directives, that led to his taking a position of endangerment in front of the vehicle and that then led to his firing his weapon in self-defense. Officer Stowe's actions constituted a continuous course of conduct over a few moments in time; to separate out the moment of shooting and declare that to be out of the scope of his employment with J-W would make no sense: such parsing of reality would always let an employer off the hook for the negligent act of its employee, since negligence would never be within the scope of work as defined and intended by the employer.

For all these reasons, this Court should reverse the trial court's decision that Officer Stowe was acting solely in his capacity as a public police officer and instead hold that, as a matter of law and based on the uncontroverted evidence, Officer Stowe was either acting solely on behalf of J-W or was simultaneously performing both private and public duties and, thus, J-W is liable for Officer Stowe's negligent acts.

II. The trial court misinterpreted Virginia law, resulting in an incorrect determination that Officer Stowe was J-W's independent contractor.

A. The facts establish Officer Stowe was J-W's servant.

In *Clitchfield*, *supra*, the defendant, as does J-W here, argued that the detective/law officer was an independent contractor. It noted it did not pay detective/officer Thompson, but instead contracted with the detective agency, which itself employed the officer. This Court found that Thompson was not an independent contractor in that he "looked to the defendant for his instructions, and that his principal business was to carry out the wishes and the purposes and policy of the defendant company in connection with the preservation of order and the enforcement of law at the plant." *Id.*, 123 Va. at 433, 96 S.E. at 840.

Quoting THOMPSON ON NEGLIGENCE, section 598, the Court in *Clitchfield* found that

> where a private a private person or corporation, under an arrangement with the public authorities, employs a police officer or deputy sheriff for the purpose of guarding the property of such private person or corporation, or preventing disorder in the conduct of its business, or where, at the request of such a person or corporation, one of its employees is clothed with special police powers by the public authorities, to accomplish the same purpose -- the private person or corporation will be deemed the principal or master of the person so employed, and will be answerable for his torts committed upon third person, exactly as though he did not sustain the additional relation of a public officer.

Clitchfield, 123 Va. at 432.

Under this holding, J-W was Officer Stowe's master and is accountable for his torts committed as he helped the restaurant guard its property and collect bills. Even stronger than the facts in *Clitchfield*, J-W directly paid Officer Stowe for his services. Also, Stowe was subject to dismissal by his employer. (App. 56.)

Most importantly, as did the detective/officer in *Clitchfield*, Officer Stowe looked to J-W for his instructions. Officer Stowe specifically understood from J-W's president Mr. Trout and the IHOP wait staff that part of his duties "was to help them get walk-outs to pay their bills." (App. 98.) He was required to perform his duty of pursuing and confronting walk-outs, by his own estimate, between 40 and 50 times during the course of his ten years at IHOP. (App. 33, 59.) IHOP managers and servers would tell Officer Stowe of a suspected walk-out so that he could pursue and confront the suspected party. (App. 312-14, 316, 351, 352.) Mr. Trout testified to his power of control in deciding whether to send Officer Stowe out of the restaurant to help collect the unpaid bill. (App. 362-63.)

The notion that Officer Stowe was an "independent contractor" with respect to events in issue turns reality on its head. As a police officer, Stowe was required to exercise professional judgment, but always in

accord with police policies. Officer Stowe violated those policies when he followed the directions of J-W management and staff to go after customers who had walked out on their bills. (App. 288.) On the night at issue, his specific decision – to step into the path of the vehicle so as to stop it and help IHOP collect its bill – was a further violation of the specific police directive barring such unnecessarily dangerous actions which, in this instance, proximately led to Officer Stowe's use of deadly force. (App. 269.) Officer Stowe simply could not exercise "independent" judgment as a police officer and take these steps contrary to police policy.

Rather, Officer Stowe took these steps to benefit IHOP. He exercised his judgment as a J-W employee devoted to helping IHOP collect its tab, not as a police professional. Had he maintained his independent professional judgment, and accordingly followed police directives, he would never have followed the youths out of the IHOP and would have never stood in front of their vehicle in an effort to make it stop and persuade its occupants to pay their tab. The City has suffered the financial consequences of Officer Stowe's dedication to J-W that warped his judgment and caused him to violate police directives. To now prevent the City from obtaining contribution from J-W on grounds that Officer Stowe

was acting as an “independent” police professional would work an absurd injustice.

Further, just because an employee has a professional background and is capable of exercising professional judgment does not transform the employee into an independent contractor. *McDonald v. Hampton Training School for Nurses*, 254 Va. 79, 86, 486 S.E.2d 299, 303 (1997). Nor does contract language suggesting a person is an independent contractor decide the matter. *Id.* at 87, 486 S.E. 2d at 304; *Andrews v. LogistiCare Solutions*, LLC, 2008 Va. Cir. LEXIS 179, *4-5 (Va. Cir. Ct. Nov. 24, 2008).

In *McDonald*, this Court listed four factors to determine whether an individual is an employee or an independent contractor: (1) selection and engagement, (2) payment of compensation, (3) power of dismissal, and (4) power to control the work of the individual. According to the Court, the fourth factor—power to control the means and method of performing work—is “determinative.” *Id.* at 81, 486 S.E.2d at 301. But the Court made clear that the power to control does not go to every detail. Although the employee in *McDonald* was a physician, capable of exercising professional judgment, the Court stated that the exercise of professional judgment alone did not necessarily lead to a conclusion that the hospital lacked the

requisite power of control and that the physician was an independent contractor:

> [C]onsistent application of the proposition advanced by the Hospital here would require that virtually every professional who is expected to exercise independent judgment in the performance of the duties of the workplace would have to be deemed an independent contractor, regardless of the scope of his or her duties or the limitations on the employment.

Id. at 85-86, 486 S.E.2d at 303.

The power of control must be examined specifically with respect to the conduct in issue. *Glenmar Cinestate, Inc. v. Farrell*, 223 Va. 728, 292 S.E.2d 366 (1982), supports a finding in this case that J-W bears *respondeat superior* liability for Officer Stowe's actions. In *Glenmar*, the evidence in the record unequivocally showed that, with respect to the job duty at issue—direction of traffic—the theater had retained no right whatsoever to control the officer's manner and means of performance. In stark contrast, the uncontroverted evidence in this case establishes that Mr. Trout decided whether Officer Stowe and other extra-duty should stay inside the restaurant or pursue a walk-out. (App. 362, 386-88.) Thus, J-W had the power to control Officer Stowe as to actions relevant here.

The City, by contrast, did not retain the power to control Officer Stowe's performance of the duty at issue in this case, because such duties

were actually forbidden by the City's own policies.[8] Had the City's police directives controlled, Officer Stowe would not have followed the youths out of IHOP for the sole purpose of persuading them to go back and pay their bill, he would not have stood in front of their moving vehicle to stop it with the same purpose in mind, and he would not have been put in a position where he felt he had to use his gun in self-defense.

B. The trial court placed undue emphasis on the location where the shooting occurred, rather than the relevant question of whether Officer Stowe was acting within the scope of his duties as a security guard for IHOP when he was negligent.

The trial court relied on Officer Stowe's location at the time of the shooting—outside the building—in reaching its determination that he was an independent contractor. (App. 638.) This reliance is misplaced, particularly in light of all the facts and circumstances in this case. The law does not view the scope of employment or right of control in a vacuum. No case holds that an employee's duties to its employer or an employer's right

[8] Other indicia of a master-servant relationship that this Court has found significant also point to the conclusion that Officer Stowe was J-W's servant. *See Ross v. Schneider*, 181 Va. 931, 939, 27 S.E.2d at 157 (1943) (payment based on time and not lump sum); *Texas Co. v. Zeigler*, 177 Va. at 569, 14 S.E.2d at 709 (1941) (power to discharge). The evidence in this case demonstrates that J-W had the right to discharge Officer Stowe if it decided that he was not doing the job "he was hired to do." (See App. 383-84.) Likewise, J-W paid Officer Stowe, not a lump sum for a single job, but $35 per hour during a four-hour shift, over the course of approximately ten years.

to control its employee automatically or necessarily cease when the employee steps outside the door of the employer's premises. If that were the case, then an employer could never be held liable for the acts of its employee while running an errand, although the errand was at the employer's direction, within the scope of his job duties, and at least in part, for the employer's benefit. That is not, nor should it be, the law.

The RESTATEMENT (SECOND) OF AGENCY addresses the physical location aspect of the scope of employment in these words: "Conduct is within the scope of employment only in the authorized area or in a locality not unreasonably distant from it." RESTATEMENT (SECOND) OF AGENCY § 234 (1957) (emphasis added); *see Winward v. Rhodewalt*, 203 Pa. Super. 369, 372, 198 A.2d 623, 625 (1964); *Rigsby v. Pitner*, 334 S.W.2d 837, 843 (Tex. Ct. App. 1960). Despite the language in the agreement between the City and J-W, the evidence is uncontroverted that Officer Stowe was authorized by J-W to perform his duty of pursuing walk-outs outside the restaurant, and into the adjacent parking lot. It was in the parking lot and in the context of pursuing walk-outs that the confrontation between Officer Stowe and the driver of the vehicle took place. Accordingly, the trial court's emphasis on Officer Stowe's location outside the restaurant is misplaced. More relevant is the admission by J-W that its employees had the right to

control whether the officer stayed inside or chased the walk-outs outside. (App. 357-58, 360, 386-86.)

C. Even assuming, arguendo, that Officer Stowe was not IHOP's "servant," J-W should still be held liable for his acts that foreseeably resulted in his misuse of a dangerous instrumentality.

The trial court apparently believed that its finding of independent contractor status led necessarily to the conclusion that J-W could not be liable for Officer Stowe's acts. In doing so, the court erred as a matter of law in that it overlooked recognized exceptions to the rule of non-liability, at least one of which is supported by the undisputed facts in this case.

According to this Court, "the doctrine of *respondeat superior* may become applicable, if the independent contactor's torts arise directly out of his use of a dangerous instrumentality, arise out of work that is inherently dangerous, are wrongful per se, are a nuisance, or are such that it would in the natural course of events produce injury unless special precautions were taken." *See*, *e.g.*, *Kesler v. Allen*, 233 Va. 130, 134, 353 S.E.2d 777, 780 (1987) (citing *Broaddus v. Standard Drug Co*., 211 Va. 645, 649, 179 S.E.2d 497, 501 (1971); *Norfolk & W. Ry. v. Johnson*, 207 Va. 980, 983-84, 154 S.E.2d 134, 137, *cert. denied*, 389 U.S. 995 (1967); *Smith v. Grenadier*, 203 Va. 740, 747, 127 S.E.2d 107, 112 (1962); *Ritter Corp. v. Rose*, 200 Va. 736, 742, 107 S.E.2d 479, 483 (1959)) (emphasis in

original); *accord Southern Floors & Acoustics, Inc. v. Max-Yeboah*, 267 Va. 682, 687 n.1, 594 S.E.2d 908, 911 n.1 (2004).

A loaded pistol or gun is a "dangerous instrumentality" and is "inherently dangerous because it may discharge by misadventure, defect, accident or negligence." *Hughes v. Brown*, 36 Va. Cir. 444, 1995 WL 1055898, at *4 (1995) (distinguishing a loaded gun from an unloaded gun, the court determined that an unloaded gun was not a dangerous instrumentality); *see also Hart v. Lewis*, 187 Okla. 394, 103 P.2d 65, 67 (1940) ("[T]hat firearms are an extraordinarily dangerous instrumentality is established beyond question).

Aaron Brown would not have been killed if J-W had not knowingly hired an armed police officer to confront walk-outs. Under the uncontroverted facts in this case, the defendant should have been able to foresee the devastating injury that was caused by its agent—whether he is labeled "employee," "servant," or "independent contractor"—right outside the doors of its restaurant. *See* RESTATEMENT (SECOND) OF AGENCY § 245, cmt. a (1957) (observing that an agent's use of force in carrying out his job duties is foreseeable where the job involves repossession of property and, thus, potential for confrontation). The chain of actual or constructive knowledge is compelling: J-W wanted to hire an off-duty police officer for

the purpose of deterring and confronting walk-outs in an effort to get them to pay unpaid bills. It served J-W's twin purpose of deterrence and intimidation to have the officer fully garbed and armed. J-W knew that the officer would be armed. Nevertheless, it knowingly allowed and directed Officer Stowe to pursue walk-outs into the parking lot immediately outside the restaurant.

While a confrontation inside the restaurant carries its own set of risks, that risk is only heightened by knowingly placing the agent in a parking lot to confront a fleeing walk-out who foreseeably attempts to escape in a motor vehicle. There is no evidence that J-W took any precautions to keep this from occurring. It had the right to instruct Officer Stowe not to leave the premises in pursuit of walk-outs, but, in fact, IHOP employees encouraged him to do just the opposite. The confrontation in the parking lot between J-W's security guard, carrying a loaded gun and trying to block a motor vehicle in motion, was a foreseeable tragedy waiting to happen, and J-W should not be permitted to escape liability, even if the niceties of the definition of "employee" somehow result in a conclusion that Officer Stowe was its "independent contractor." The "dangerous instrumentality" exception is designed to prevent just such an incongruous result.

III. The trial court erred under Virginia law by applying excessively narrow and restrictive legal standards for negligence and proximate cause, resulting in its consideration of only the precise moment of the shooting and not the foreseeable chain of events caused by Officer Stowe's negligent acts.

The trial court concluded that "[t]he proximate cause of death in this matter is the concurring actions of the young man driving the vehicle and Officer Stowe." (App. 637.) The court further concluded that, because the parties stipulated that "at the time of the shooting Officer Stowe was acting in self-defense, at [sic] appears to me that he couldn't be deemed to be negligent in that shooting." (App. 639.) In reaching these conclusions, the trial court misinterpreted and misapplied well-settled legal principles of proximate causation and negligence.

Its conclusion about proximate cause contains an ambiguity. While it is clear that the court decided that it was the "concurring actions" of the driver and Officer Stowe that constituted the proximate cause of Aaron Brown's death, the court did not expressly state which of Officer Stowe's actions was a concurring proximate cause of death. As a matter of law, however, it was the totality of Officer Stowe's actions that constituted the proximate cause and not simply the last moment of a chain of events set in motion by Officer Stowe's negligent conduct.

A proximate cause of an event, such as a fatal injury, is "that act or omission which, in natural and continuous sequence, unbroken by an efficient intervening cause, produces the event, and without which that event would not have occurred." *Williams v. Le*, 276 Va. 161, 167, 662 S.E.2d 73, 77 (2008) (quoting *Beverly Enters.-Va. v. Nichols*, 247 Va. 264, 269, 441 S.E.2d 1, 4 (1994). This Court has held that an injury may have more than one proximate cause. *Holmes v. Levine*, 273 Va. 150, 639 S.E.2d 235 (2007). *See also Coleman v. Blankenship Oil Corp.*, 221 Va. 124, 131, 267 S.E.2d 143, 147 (1980). Further, circumstantial evidence may be adequate to establish proximate cause. *McGuire v. Hodges*, 273 Va. 199, 639 S.E.2d 284 (2007).

The question is whether a subsequent act will be sufficient to break the causal chain and allow the original actor to escape liability for the ultimate injury. To relieve the original actor from liability, the intervening act between the original actor's negligent act and the injury "must so entirely supersede the operation of the [original actor's] negligence, that it alone, without any contributing negligence by the [original actor] in the slightest degree, causes the injury." *Williams v. Le*, *supra*, 276 Va. at 167 (quoting *Atkinson v. Scheer*, 256 Va. 448, 454, 508 S.E.2d 68, 71 (1998), in turn quoting *Jenkins v. Payne*, 251 Va. 122, 128-29, 465 S.E.2d 795, 799

(1996)) (emphasis added). Likewise, an intervening cause "does not operate to exempt a defendant from liability if that cause is put into operation by the defendant's wrongful act or omission." *Williams*, *supra*, 276 Va. at 167 (quoting *Jefferson Hosp., Inc. v. Van Lear*, 186 Va. 74, 81, 41 S.E.2d 441, 444 (1947)).

Taking at face value the trial court's conclusion of proximate cause in this case reveals that there can be no superseding cause here because of two well-settled principles of Virginia law. First, the court concluded that there were "concurrent" proximate causes. When multiple causes are concurrent, one cannot be said to supersede the other since, by definition, it is not one act alone that causes the injury. *See Williams*, *supra*, 276 Va. at 167. Secondly, a negligent act cannot be superseded by another, albeit subsequent, act of the original actor—the same person who negligently set into motion the chain of events that ended in injury. *Id.*

Later in its ruling, the trial court added that Officer Stowe could not have been negligent in the shooting because the parties stipulated that he acted in self-defense, while candidly conceding that it "could be wrong" with respect to this legal conclusion, and further conceding that it "may be mixing apples and oranges . . . because there may be a difference between the criminal law implication and civil law implications [of an act of self-

defense]." (App. 639.) In fact, the trial court was wrong in its conclusion regarding the legal effect in this case of Officer Stowe's stipulated act of self-defense.

First, the court appears to assume that the only relevant causative action is the act of pulling the trigger. As explained above, this fails to take into account the chain of negligent conduct by Officer Stowe which led up to his firing the gun. Although the court made no findings of fact on the record regarding the negligence of Officer Stowe in pursuing Aaron Brown's companions into the parking lot to collect an unpaid bill for IHOP, and positioning himself in a way that made him vulnerable to being hit by the driver of the speeding vehicle, the evidence in the record amply supports the conclusion that this act constituted a breach of the standard of care for a uniformed police officer whether on-duty or off-duty. Officer Stowe wrongly accepted the duty of acting as a bill collector, which his department's written policy expressly forbade. (See App. 288.) When he stepped in front of the moving car, he violated another written policy of the Alexandria Police Department that instructed officers to position themselves in front of moving vehicles only for the purpose of directing traffic. (App. 269, Ex. 301, at § 10.32(E)(1).) As plaintiff's expert, a retired deputy police chief, testified, Officer Stowe was further negligent in

provoking a confrontation with the driver of a vehicle who he already knew had no intent to stop. (See App. 199, 236-40.) Finally, when he fired on the vehicle, his purpose may have been self-defense, but it violated standard police training which instructs officers that firing at a moving vehicle will almost never stop the vehicle and is more likely to result in harm to innocent bystanders. As the expert testified, even if the bullet penetrates the vehicle and incapacitates the driver, then "you've got a three-thousand-pound unguided missile that not only continues to be a threat to you but to anyone in the car and anyone who might be around that location." (App. 248-49.) The expert witness called by J-W conceded that Officer Stowe's actions were "stupid." (App. 551-52.) As he testified, "If you have reasonable (sic) to believe that the person is going to run over you, it is just dumb to step out in front of a car." (App. 552.) The J-W expert further agreed that firing at a car in self-defense is "pretty stupid" for the same "unguided missile" reason that the City's expert identified. (App. 566-67.)

Secondly, Virginia criminal law does not hold that an act of self-defense—whether negligent or not—may relieve the original actor of liability. For example, in upholding a jury verdict in a criminal case before the Virginia Court of Appeals, a store owner's act of self-defense was found not to have broken the causal chain of events. *Browder v. Commonwealth*,

No. 1499-97-2, 1998 WL 886972, *2 (Va. Ct. App. Dec. 22, 1998). In that case, Browder entered the store and fired at the owner with a shotgun, which as it turned out, contained gunpowder but no pellets. *Id.* at *1. Unaware that the gun was not loaded, the owner shot back in self-defense, accidentally injuring a bystander. *Id.* at *2. Under these facts, the court found adequate evidence of proximate cause to hold Browder criminally liable for the injury to the bystander. *Id.* In other words, it was foreseeable that Browder's actions would cause the store owner to react in self-defense and cause injury to a third party. *Id.*[9]

According to this Court, the principles applicable to a finding of proximate cause are "constant whether considered in a civil or criminal context." *Gallimore v. Commonwealth*, 246 Va. 441, 447, 436 S.E.2d 421, 425 (1993) (stating the rule that "an intervening cause, even if a cause of

[9] Although *Browder* is an unpublished opinion, in reaching its decision to uphold the jury verdict, the appellate court relied on an earlier criminal case decided by this Court, *Gallimore v. Commonwealth*, *infra*, 246 Va. 441, in which the intentional act, by a person other than the defendant, of shooting and killing the victim did not relieve defendant of liability for criminal negligence. The defendant had lied to the shooter, claiming the victim had abducted his wife, and thus set in motion a chain of events that led foreseeably to a confrontation between the shooter and the victim, which ended in a death where the immediate cause (although not a superseding cause) was the shooting. In this case, the evidence showed Officer Stowe knew or should have known that his act of pursuing three patrons into a parking lot to collect an unpaid bill could easily end in a confrontation between him and a driver of a moving vehicle where he would be left with no choice but to use his gun in self-defense.

the harm, does not operate to exempt a defendant from liability if the intervening event was put into operation by the defendant's negligent acts"). In any event, the trial court apparently did not take into account the legal principle set forth above, that the subsequent act must be performed by a third party and not by the original actor.

Because the trial court erred in its interpretation and application of legal standards of negligence and proximate causation, resulting in erroneous conclusions of law, the court's verdict should be set aside and a verdict should be entered for the City of Alexandria.

IV. The trial court erred in concluding that the City could not bring a contribution action against J-W.

The trial court concluded, based on its prior ruling that Officer Stowe had acted solely in his public capacity, that the City would have had "absolute" immunity for the acts of its police officer. Therefore, the trial court continued, when the City settled with the Brown family, it did so as a "volunteer" and "I don't know how a volunteer can seek contribution from someone else." (App. 640.) This legal conclusion is not supported by the law in Virginia and should be reversed by this Court.

First, Section 8.01-34 of the Virginia Code provides that "[c]ontribution among wrongdoers may be enforced when the wrong results from negligence and involves no moral turpitude." This Court has

expressly recognized that a claim for contribution may include employers who are held liable for the acts of their employees under a theory of *respondeat superior*. *Thurston Metals & Supply Co. v. Taylor*, 230 Va. 475, 483-484, 339 S.E.2d 538, 543 (1986) (holding that contribution claims are "not limited to 'joint tort-feasors,' as that term is narrowly defined, but that the statute also applies to those vicariously liable as employers, masters, and principals"); *cf. Societa per Azioni de Navigazione Italia v. City of Los Angeles*, 21 Cal.3d 446, 461, 645 P.2d 102, 111 (*en banc*), *cert. denied*, 454 U.S. 990 (1982) ("Since [the ship's pilot] simultaneously served two employers—the City and the Shipowner—at the time of the collision, under the doctrine of *respondeat superior* both masters would be jointly and severally liable to third parties for his negligence"); *Sleasman v. Brooks*, 32 Pa. D. & C.3d 187, 194, 1984 WL 2248, at *4 (Pa. Com. Pl. 1984) (stating that co-employers who have joint control, are jointly and severally liable for injuries caused by their mutual employee and, thus, "[i]t logically and sensibly follows that they are, also like joint tortfeasors, subject to the rights and liabilities of contribution *inter se*".)

Second, it was by no means a sure thing that the City would have been relieved of *respondeat superior* liability based on an "absolute immunity" defense. In Virginia, sovereign immunity does not apply where a

government agent, such as a police officer, is liable for gross negligence. *See Green v. Ingram*, 269 Va. 281, 290, 608 S.E.2d 917, 922 (2005); *Colby v. Boyden*, 241 Va. 125, 128, 400 S.E.2d 184, 186 (1991). Here, a finding of gross negligence would be reasonable given Officer Stowe's own violation of police safety directives while he sought to help J-W collect its bills by moving in front of an accelerating car that he already knew had shown every indication that it would not stop.

Likewise, a municipality such as the City of Alexandria is not necessarily protected under the doctrine of sovereign immunity. When the governmental entity at issue is a municipality, the question to be asked is whether it is performing a "governmental" or "proprietary" function. If the city or town is performing a "proprietary" function, then there is no immunity from suit. *See Woods v. Town of Marion*, 245 Va. 44, 425 S.E.2d 487 (1993) (holding that the town was not protected by "governmental immunity" where a motorist was hit and injured by a truck that skidded on an icy street due to the town's negligent operation of its water works).

This Court most recently examined sovereign immunity in the context of a police officer in *Niese v. City of Alexandria*, 264 Va. 230, 564 S.E.2d 127 (2002). In that case, the Court stated that "a municipality is immune from liability for a police officer's negligence in the performance of his

duties as a police officer." *Id.* at 239, 564 S.E.2d at 132 (emphasis added). The police officer in *Niese* had allegedly raped the plaintiff repeatedly over the course of his investigation of plaintiff's complaint regarding her son. *Id.* at 239-40, 564 S.E.2d at 133. Accordingly, the Court determined that because the "investigation of a citizen's complaint is certainly part of the governmental function of a police force," the City could not be held liable. *Id.* at 240, 564 S.E.2d at 133. In contrast, Officer Stowe's pursuit and confrontation of walk-outs to get them to pay a debt owed to his private employer fell outside the purview of a "governmental function of a police force."[10]

In light of this Court's decisions, there really is no such thing as an "absolute" immunity for municipalities under Virginia law, as the trial court presumed. Accordingly, the trial court's assumption of absolute immunity constitutes a misinterpretation of Virginia law. When it settled the underlying lawsuit, the City was exposed to liability for Officer Stowe's acts to the extent that they amounted to gross negligence[11] and to the extent

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[10] This Court has never examined the question presented here, of whether a municipality is immune from liability for the acts of its off-duty police officer under an extra-duty employment agreement between the city and a private employer.

[11] Gross negligence is defined as "that degree of negligence which shows indifference to others as constitutes an utter disregard of prudence

that a court may have concluded that his act of attempting to collect a debt on behalf of a private employer was not "governmental" in nature. Whether the City would have ultimately prevailed in the claim brought by the decedent's survivors is not the point. It was a concern about the City's potential liability, and not certain liability, for Officer Stowe's acts that led the City to settle with the victim's family.

Third, the trial court's use of the legal term "volunteer" is entirely misplaced. That term has been used in Virginia in the context of insurance companies who seek to recover payment from one another under a theory of equitable subrogation, or in the context of a contract claim, but not where one tortfeasor is seeking contribution from another tortfeasor, pursuant to Virginia statutory law. *See Amica Mut. Ins. Co. v. Liberty Mut. Fire Ins. Co*., 72 Va. Cir. 154, 2006 WL 3012866, *5-6 (2006) (excess insurance carrier

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amounting to a complete neglect of the safety of [another]. It must be such a degree of negligence as would shock fair minded [people] although something less than willful recklessness." *Meagher v. Johnson*, 239 Va. 380, 383, 389 S.E.2d 310, 311 (1990) (*quoting Ferguson v. Ferguson*, 212 Va. 86, 92, 181 S.E.2d 648, 53 (1971)). "Several acts of negligence which separately may not amount to gross negligence, when combined may have a cumulative effect showing a form of reckless or total disregard for another's safety." *Chapman v. City of Virginia Beach*, 252 Va. 186, 190, 475 S.E.2d 798, 800-801(1996). Officer Stowe's ongoing conduct in this case of violating police directives to help a restaurant collect bills, and of unnecessarily endangering his own life and then the life of the vehicle's passengers to collect a small unpaid bill bordered on recklessness and could have easily fallen within the legal standard for "gross" negligence.

was found to have voluntarily paid on a personal injury claim, barring a claim for equitable subrogation against the primary carrier where the excess carrier failed to file a declaratory judgment action regarding coverage and based on the equities of that particular case); *McComb v. McC*omb, 226 Va. 271, 276, 307 S.E.2d 877, 880 (1983) (contract dispute regarding allegedly joint obligation).

Finally, the trial court's ruling regarding immunity, which was essentially *sua sponte* since the issue was not squarely raised by the parties, and was added at the end of the court's conclusions almost as an afterthought, does not take into account the considerable public policy implications. Sovereign immunity ultimately benefits the public at large because, among other things, it "protect[s] the public purse." *Messina v. Burden*, 228 Va. 301, 307-08, 321 S.E.2d 657, 660 (1984), quoted in *Niese v. City of Alexandria*, 264 Va. 230, 240, 564 S.E.2d 127, 133 (2002). In this case, the public policy would be served by allowing the City to recoup part of the settlement amount that it has already paid out of the "public purse."[12] It would be unjust if the trial court's musings about immunity in the

[12] The trial court did find that the amount of settlement was "reasonable," in light of the loss of a young man's life. (App. 636-37.) Indeed, part of the purpose of Virginia's contribution statute is to "encourage settlements" such as the City's settlement with the Brown family. *See Thurston Metals & Supply Co. v. Taylor*, 230 Va. 475, 485, 339 S.E.2d 538, 544 (1986).

underlying dispute allowed J-W to escape completely from liability while Virginia taxpayers foot the entire bill for Officer Stowe's negligence, which J-W spurred. *Cf. Hoggard v. City of Richmond*, 172 Va. 145, 154, 200 S.E. 610, 614 (1939) ("'Generally [the exception for proprietary functions] is applied to escape difficulties, in order that injustice may not result from the recognition of technical defenses based upon the governmental character of [municipal] corporations") *(quoting Trenton v. New Jersey*, 262 U.S. 182, 192 (1923)). It would stand the doctrine of governmental immunity on its head to use it, in effect, as a sword, to prohibit the City from recovering in this case.

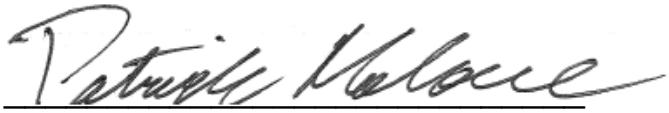
CONCLUSION

For the foregoing reasons, petitioners respectfully request that the court set aside the verdict for the defendant and enter judgment for the City of Alexandria as plaintiff.

Respectfully Submitted,

CITY OF ALEXANDRIA, VIRGINIA

By Counsel



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CERTIFICATE OF SERVICE

Pursuant to Rule 5:26(d), I HEREBY CERTIFY that:

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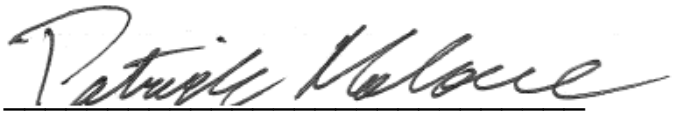
3. Fifteen paper copies and one electronic copy on CD of the foregoing Brief of Appellant and Appendix have been hand-filed with the Clerk of the Supreme Court of Virginia on this 2nd day of September, 2009, and three paper copies of the same have been served, via U.S. Mail, postage prepaid, upon Counsel for Appellee.



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