

# In the Supreme Court of Virginia

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RECORD NO.: 091127

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PAXTON HAWTHORNE and JOSEPH ANTHONY,  
CO-ADMINISTRATORS OF THE ESTATE OF  
JOYCE HAWTHORNE,

Appellants,

v.

TIMOTHY VANMARTER,

Appellee.

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## REPLY BRIEF OF APPELLANTS

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In response to the Brief in Opposition of Appellee (“VanMarter”), the Co-Administrators of the Hawthorne estate (“Estate”) reply as follows:

### DISCUSSION OF FACTS

VanMarter argues that the Estate’s Opening Brief does not comply with Rule 5:17(c)(3)<sup>1</sup> because it lacks adequate Record cites. V-Br. 4. In this regard, Rule 5:18 provides that an opposition, such as VanMarter’s, “shall conform in all respects” with Rule 5:28, in turn mandating “[a] statement of the facts necessary to correct or amplify the statement in the brief of appellant with appropriate references to the pages of the appendix” and/or Record. Yet, VanMarter’s brief in opposition to the Estate’s Petition, though ‘amplifying’ and ‘restating’ certain facts “in the light most favorable” to himself, did not identify any fact in the Petition’s “Statement Of Facts” which was incorrect or needed a further cite. Accordingly, the Estate had a ‘green light’ to believe that few, if any, cites to the Record were required in its Opening Brief pursuant to this Court’s Rules (specifically designed to prevent a party from ‘lying in wait’ until late in the process to dispute a fact(s)). Thus, the Estate complied with Rule 5:17(c)(3) and did cite to the Record for facts noted in its subsequent

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<sup>1</sup> Cites herein to Rules are to Rules of this Court and cites to sections are to the 1950 Code of Virginia, as amended. Cites to the Estate’s Opening Brief are noted as “Op. Br. –,” to VanMarter’s response thereto as “V-Br. –,” to the Estate’s Opposition to VanMarter’s Motion To Dismiss as “Opp. –,” to the trial court Record as “R. –,” and to any Addendum hereto as “Add. –.”

arguments. VanMarter's objection here is without merit <sup>2</sup> and inappropriately diverts this Court's attention from the true facts and issues.

### ARGUMENTS AND AUTHORITIES

I. The trial court erred in granting Vanmarter sovereign immunity.

This Court conducts a *de novo* review of immunity grants, "each case [being] evaluated on its own facts," balancing for itself the "need for prompt, effective action by law enforcement officers ... with the safety of the motoring public" and deciding whether the claimant, upon whom the burden rests, provided the elements necessary to support the grant. Colby v. Boyden, 241 Va. 125, 130, 132, 400 S.E.2d 184, 187, 189 (1991). Nevertheless, VanMarter fails to point this Court to the Record facts which would allow this Court to reach a decision in his favor. Instead, he criticizes the Estate's inability to cite where he fails to claim his acts (as in Colby) involved 'special risks in an emergency situation.' The Estate cannot cite what VanMarter never claimed.

VanMarter now argues (V-Br. 12), for the first time, that his conduct involved "special risks." However, because none exists, VanMarter cites no evidence that he believed he was "embracing special risks in an emergency

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<sup>2</sup> The Estate will not squander its precious pages in a seriatim reply to each of VanMarter's untimely new fact challenges based upon his new legal theory, instead citing germane facts in specific argument sections herein and noting here only that each fact in the "Statement Of Facts" section of the Opening Brief has Record support.

situation” sufficient to require him to activate his emergency equipment.<sup>3</sup> In fact, VanMarter and his fellow officers opined that VanMarter need not have activated his emergency equipment in his overtaking (as opposed to a pursuit). *See, e.g.*, JA 140, 142, 151-75 (esp. 167), 502. VanMarter claimed that he planned to activate his emergency equipment only when he got to the straightaway (beyond the crash site), exceeded the speed limit (but he does not know whether he did), or saw the vehicle again (which never happened). *See, e.g.*, JA 152A-D, 484, 489-93, 624, 649-50. This evidence proves beyond any doubt that VanMarter perceived no emergency or special risks. VanMarter may not now rely upon his counsel’s argument to ‘prove’ that his acts embraced ‘special risks in an emergency situation.’

VanMarter also claims that §46.2-920 has nothing to do with immunity. However, this Court has decided that “a similar concern for balance” underlies the legislative analysis in enacting the statute and the analysis under the sovereign immunity doctrine. Colby, 241 Va. at 132, 400 S.E.2d at 189. In fact,

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<sup>3</sup> VanMarter previously denied that entitlement to sovereign immunity depends upon involvement in an emergency situation with special risks, branding the Estate’s argument on that point “irrelevant.” *See, e.g.*, Br. in Opp. to Petition at p. 8. *See also*, VanMarter’s Memo (the discussion of “the issue as to sovereign immunity” does not mention special risks; and “...pursuing a traffic offender is ...entitled to immunity without any discussion as to whether the situation is an emergency”). R. 1331 at pp. 2 & 6, respectively, *see* Add. C; and Note 8, *infra*. Now, he argues, his “overtaking” procedure involved “special risks” and, thus, is equivalent to the vehicular ‘hot pursuit’ in Colby.

Phillips (*citing Colby and Tidd*<sup>4</sup>) specifically examined the difference between the **civil standard of care** for officers whose actions were exempt and not exempt under §46.2-920. Phillips v. Comm., 25 Va. App. 144, 151-54, 487 S.E.2d 235, 238-40 (1997). Since his speeding was not exempt, VanMarter should be held negligent as a matter of law.

Further, even if he is correct that an officer who has “decided” to pursue a vehicle is automatically granted immunity, VanMarter is not such an officer. He repeatedly insisted that, although he had decided to issue the alleged speeder a summons (JA 617), he was going to decide later (past the crash site) based on subsequent events whether to begin a pursuit.

Given the statutory framework, a court deciding immunity could not logically/properly perform that “balancing” without considering the provisions of §46.2-920 and the fact of whether the officer was in a situation that embraced “special risks in an emergency situation.” Here, VanMarter repeatedly stated (*e.g.*, JA 152C) that he had not violated his Department’s General Order regarding overtaking or §46.2-920, requiring him to activate his emergency equipment when speeding. By his testimony and that of his fellow

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<sup>4</sup> In balancing the competing interests, this Court has reasoned that the legislature may be “willing to take a chance on giving violators of the law a head start rather than endanger the lives of those who rely upon the safety of [traffic laws]. Virginia Transit Co. v. Tidd, 194 Va. 418, 423-24, 73 S.E.2d 405, 409 (1952) (there, a traffic light).

officers and experts, VanMarter – exactly like the fireman in Friday-Spivey v. Collier, 268 Va. 384, 601 S.E.2d 591 (2004) – is not entitled to immunity.

II. The Estate did not waive its constitutional right to a jury trial on any issue.

Because the Estate was improperly denied its constitutional right to have a jury hear its evidence, even without more, a new trial must be awarded. VanMarter claims that “the testimony of the [Estate’s witnesses] was properly excluded by the trial court” (V-Br. 27) because their testimony “was irrelevant to the issues in the case” (*id.*) and because the Estate waived its “opportunity” (V-Br. 17) to present to a jury evidence that there was no speeding vehicle for VanMarter to “overtake.” These claims are flawed.

First, VanMarter’s premise is incorrect. He assumes that this testimony was inadmissible at trial for any purpose; but that testimony should have been admitted – at the very least – for impeachment of VanMarter’s credibility and may well have resulted in a different verdict.<sup>5</sup> No one can say that a different outcome under these circumstances is not a real possibility; and the trial court’s refusal to admit the testimony for any reason is plain error.

Second, as VanMarter acknowledges, the proponent of a plea in bar bears the burden of proof and must frame the issue. VanMarter raised the

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<sup>5</sup> Had the jury heard that 3-plus witnesses near the crash site neither saw nor heard a speeding vehicle – especially in light of VanMarter’s multiple descriptions of that vehicle to investigating officers – it may have concluded that he fabricated the speeder to shelter himself from fault.

issue broadly in his responsive pleading, claiming that he is “immune from liability...by virtue of the doctrines of sovereign, qualified, and/or governmental immunity.” (JA 28). Later, VanMarter framed the issue in his memo (JA 73-74), asserting that he “was proceeding west...in an attempt to overtake” a speeding vehicle “[without] operating his emergency equipment.” Based upon these grounds, he asked the trial court to determine that he was entitled to immunity. The trial court was not asked to rule upon (and took no evidence on) the factual issue of whether the alleged speeder actually existed. For that reason, the testimony of witnesses as to the absence of a speeder was improperly excluded on the immunity issue AND at trial. Doing so violated the Estate’s constitutional right to have the jury decide that factual issue.

Third, any waiver of a constitutional right must be voluntary and intelligent. The Estate could not waive its right to present the witnesses’ testimony before it knew what that testimony was. The plea in bar was heard before the close of discovery; and, knowledge of a witness’ identity and knowledge of that witness’ testimony are obviously not synonymous.<sup>6</sup>

Finally, the trial court should have allowed the witnesses at trial because courts must properly revise their rulings in light of subsequent trial testimony.

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<sup>6</sup> This is especially true when VanMarter’s counsel “was ‘friends’ with,” knew the statement of, and “warned” the Estate’s counsel (Thomson) about using the only witness then located (*i.e.*, Martinez). See Thomson’s discussion in reply memos (JA 278-280 and R. 1801 at p. 5, *see Add. A*).

Comm. v. Cary, 271 Va. 87, 93-94, 102, 623 S.E.2d 906, 909, 914 (2006).<sup>7</sup>

III. VanMarter's trial evidence negated the finding of sovereign immunity.

VanMarter misses the point. He is not alleged to have “waived [his] defense” (V-Br. 28), but to have put on trial evidence which negated the original basis for that defense. Since this Court will review *de novo* the plea in bar and since the burden of proof is upon VanMarter, the trial evidence pro- pounded by him is key. In any event, VanMarter should be estopped from assuming successive positions in the course of a suit which are inconsistent or mutually exclusive. Allowing VanMarter to take one position at the im- munity hearing (before a judge) and another position at trial (before a jury) gave him an unfair advantage that he effectively used to ward off liability.

VanMarter himself writes (V-Br. 29) that “none of [his witnesses] [“discuss the activation of emergency equipment”] in the context of calling them special risk or emergency conditions.” The Estate’s point is exactly that: VanMarter’s witnesses testified that he did not “need” to activate his emer- gency equipment until he was in a pursuit or presented a danger to others. The unavoidable conclusion is that he was not in an emergency situation.

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<sup>7</sup> Trial by jury was demanded. JA 11, 300. “[W]here the facts in question are operative and crucial to the issue being sued upon, no claim can be estab- lished or denied upon only an *ore tenus* hearing before the court where a jury trial has been demanded for...such issues.” Russell v. Warner, 1982 WL 215294, p. 5 (City of Richmond Cir. Ct., J. Sheffield) (immunity grant set aside and re-tried by jury after facts upon which immunity given were contradicted).

VanMarter asserts that Rule 5:25 protects him, but it does not in either theory or in fact. The theory of Rule 5:25 is to ensure that the issues are squarely before the trial court; and, here, that goal was addressed. On the very morning of trial, the Estate objected because all of the evidence relative to the immunity issue was not before the court. The trial court refused to accept additional evidence as to the plea in bar or to allow the subject testimony before the jury, finding that any additional evidence as to immunity was untimely and “wouldn’t have changed the ruling” unless it met the criteria for newly discovered evidence. JA 514. Having been rebuffed for attempting to raise additional evidence challenging the immunity ruling, the Estate need not have needled the trial court with further pleas to reconsider immunity. Any objection by the Estate here served to challenge that ruling. Further, on the first day of trial, the trial court “preserved and noted” all of the “objections (as to immunity) for purposes of appeal.” JA 514. That court’s final letter-opinion, incorporated into its final judgment order (JA 426), also preserves these objections (set forth in greater detail in post-trial motions). JA 424.

Finally, VanMarter complains (V-Br. 29) that “none of the citations” (*i.e.*, JA 767-69, 771, 787, 802, 814) listed by the Estate (Op. Br. 27) “include testimony that overtaking is not considered special risk or emergency.” The

Estate vigorously disagrees.<sup>8</sup> VanMarter's complaint is without merit.

IV. Retention of one – much less all five – of the challenged jurors, in light of the totality of each one's *voir dire* responses, is an abuse of discretion.

The Estate does not challenge VanMarter's broad statements of law. It is the application of that law that is contested. An impartial jury panel is the Estate's undeniable right. §8.01-358; Martin v. Comm., 221 Va. 436, 271 S.E.2d 123 (1980). It is not enough, as VanMarter implies, that "the answers as a whole" of "the (potential) jurors" – "equivocal and inconsistent" as he admits they are – fail to "establish bias in favor of police officers." V-Br. 31. Each juror's answers must unequivocally establish LACK of bias in favor of VanMarter – or anyone else. Further, EACH potential juror must have stood indifferent to the cause when the Estate made its choice of strikes. *See, e.g., Justus v. Comm.*, 220 Va. 971, 975-76, 266 S.E.2d 87, 90 (1980). Harris, at the very least, conceded that she was not impartial by the end of the

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<sup>8</sup> At JA 767-69 and 771, Sgt. Cromer, VanMarter's trainer, explains that overtaking procedures are safety measures meant to "reduce chances of pursuits" (JA 771) and done without emergency lights. At JA 787 and 802, Sgt. Cordle, VanMarter's expert, discusses the "standard of care" for "police officers in overtaking in Virginia." Overtaking, he explains, is a safety procedure accomplished without emergency lights and meant to obtain information and position "in case a pursuit begins...." Sgt. Cordle, at JA 814 (emphasis added), affirms that DCJS defines emergency driving for police officers as "driving in response to a life-threatening or other serious incident which **requires emergency equipment** and operation." Since overtaking, according to Sgt. Cordle and Sgt. Cromer, inter alia, does not require use of emergency equipment, it is not emergency driving.

*voir dire* (see Op. Br. 31-32); and, to be fair, the Estate must have a new trial before jurors who ALL stand neutral to the cause.

VanMarter argues that acceptable answers to the trial court's initial questions cure jurors' later evidences of bias. V-Br. 31, 37. However, where the jurors' later responses evidence bias based upon new issues brought to their attention, VanMarter's reasoning does not hold water. Again using Harris as an example, it was the later *voir dire* questions that revealed to her sources of possible bias not perceived "until now." JA 564-65. Harris, having reviewed her 'leanings,' clearly stated her bias. JA 565.

As to Tuckwiller, this harm was multiplied.<sup>9</sup> His delayed, inconsistent answers (see Op. Br. 33–35), in conjunction with a lack of candor by VanMarter's counsel (see Op. Br. 34), denied both the trial court and the Estate the ability to fairly assess his suitability to sit. That is, both the trial court – who, in any event, was facing the jurors' backs during this exchange (JA 596) – and the Estate were forced to make decisions relative to Tuckwiller without the benefit of knowing the full extent of the involvement of Tuckwiller's sister with VanMarter's counsel. Tuckwiller's sister was not just employed some-

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<sup>9</sup> VanMarter insists upon incorrectly pigeonholing the Estate's argument against Tuckwiller as a "relationship" challenge. V-Br. 30. The Estate, however, challenges NOT this juror's familial relationship with a member of VanMarter's defense team, but his untimely disclosure of the relationship and his actual bias as demonstrated by delayed/inconsistent/misleading answers to *voir dire* questions.

where in defense counsel's firm; she was, in fact, actually a paralegal on the defense team for this particular case. At a bare minimum, the Estate should have been allowed to make its strikes in the light of a fair disclosure of the circumstances. Otherwise, the process is meaningless.

V. Instructions 3 and 11 were each an incorrect statement of the law applicable to this case, confusing to the jury, and reversible error.

A. Jury Instruction 3. VanMarter's proclamation (V-Br. 40) that this Instruction was "taken directly" from the Virginia Model Jury Instructions ("MI –") is misleading, inaccurate, and irrelevant here. First, MI 11.010 specifically refers to a driver "responding to an emergency call." Instruction 3 omits reference to an emergency call because VanMarter was not on a call, but attempting (or deciding whether to attempt) to overtake an alleged speeder. Second, **all** of MI Chapter 11 applies to government agents (some entitled and some not entitled to immunity) operating emergency vehicles pursuant to §46.2-290.<sup>10</sup> The trial court agreed with the Estate's argument as to criminal trials (JA 421), without addressing the distinctions explained in the scope note accompanying the MI designed for civil cases. Since VanMarter

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<sup>10</sup> The scope note (V-Br. 40) for MI Chapter 11 begins, "Emergency vehicle is defined in §46.2-920.C. An initial determination that the vehicle in question qualifies under the statute (*i.e.*, §46.2-920) must be made" and ends, "Unless the emergency vehicle and its operator are covered by a statutory exemption, the general rules of the road rather than the specialized rules pertaining to emergency vehicles [apply]."

put on no evidence of an emergency situation, had not activated his emergency equipment, and argued that there was “no evidence” to predict his speed,<sup>11</sup> he is not protected by §46.2-920. Instruction 3 was, therefore, inappropriate here based upon VanMarter’s own evidence and arguments.

VanMarter also misstates the Estate’s bases for objecting to Instruction 3 and discloses his misconception of the duty imposed by law. V-Br. 41. Pursuant to statute, VanMarter was either subject to the duty of an ordinary driver (who cannot lawfully speed) or an exempt driver under §46.2-920 (with his emergency equipment activated). VanMarter has not claimed that he qualifies for an exemption. Thus, Instruction 3 misstates the law applicable to this case since it provides that VanMarter could lawfully “exceed the speed limit provided he is not grossly negligent,” but he could not lawfully exceed the speed limit unless he qualified for exemption under §46.2-920.

B. Jury Instruction 11. VanMarter’s argument misapprehends the point and the law. The point is not whether the instruction is true for some situation, but that the instruction was a misstatement of the law applicable here. Instruction 11 goes too far, telling the jury that Hawthorne had an unqualified

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<sup>11</sup> In objecting to instructions (JA 842), VanMarter argued that the jurors “don’t have any basis or have any evidence to predict what [VanMarter’s] speed is.” In his Memo (R. 2098 at p. 6, see Add. B), VanMarter argued that, “[i]n the instant case, there was no evidence of excessive speed.” But, MI 11.010 (Instruction 3, here) is applicable **only** where there is evidence of speed.

duty when her real duty was very much qualified, and dealt unfairly with Appellant Guthrie. In fact, this Court has more than once held that instructions worded like Instruction 11 are insufficient statements of the law where there is a driver who is not lawfully approaching.<sup>12</sup>

In attempting to counter the Estate's authorities (Op. Br. 42) and meet the rule in Spence v. Miller, 197 Va. 477, 90 S.E.2d 131 (1955), VanMarter avows (V-Br. 40) that "we can be sure that Instruction 11 was not the basis for the jury's verdict..." because "it (is) clear that the jury did not decide the case on contributory negligence." Having argued otherwise himself,<sup>13</sup> Vanmarter knows that no such avowal can fairly be made here. Thus, Instruction 11 clearly **could have** affected the result here and is not harmless error.

#### VI. Vanmarter's motion to dismiss is without legal basis.

VanMarter's inappropriately impassioned arguments here hinge on

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<sup>12</sup> See, e.g., Irvan v. Jamison Oil Co., 205 Va. 1, 135 S.E.2d 153 (1964). VanMarter was clearly not lawfully approaching, and that fact makes Instruction 11 unfair here. In any event, the trial court's failure to instruct the jury on forfeiture of the right of way when evidence of unlawful speed is presented is, itself, reversible error. Shearin v. Va. Elec. & Power Co., 182 Va. 573, 577, 29 S.E.2d 841, 843 (1944).

<sup>13</sup> He opined with equal assurance that contributory negligence by Hawthorne "of necessity" is one of three possible bases for the verdicts (R. 2098 at p. 2, see Add. B); that "[t]he jury was instructed on contributory negligence, and could well have determined that this...is what precluded [the Estate's] recovery" (R. 1331 at p. 9, see Add. C); and that "Hawthorne's negligence in entering the road was directly at issue" (Br. in Opp. to Petition at p. 22).

several misapprehensions. First, he curiously equates (V-Br. 6 - 9) a layman (Kone) and an attorney whose license is suspended or revoked (Nerri) with a reprimanded attorney (Co-Administrator Anthony) who is fully licensed (with certain conditions<sup>14</sup>) and in good standing with the Bar. Second, VanMarter wrongly equates rules/laws/precedent applicable to the filing of an wrongful death action in a trial court with those applicable to the quest of an aggrieved person(s) to seek review of that process by this Court. Third, he avers that statutes (*e.g.*, §8.01-670) and this Court's Rules based thereon for appeals to this Court were somehow amended/superseded by the later enactment of the Death By Wrongful Act statutes and the related statute of limitation.

These serious – and unfair – misapprehensions cause VanMarter's argument to stray far afield. Here, since the Co-Administrators engaged an attorney (*i.e.*, Thomson) to file and prosecute a wrongful death action, none of the problems of Nerri or Kone are relevant here at all. Here, after an adverse decision in the trial court, the Co-Administrators – each aggrieved in his own right; each having a personal financial investment in the case that would be recoverable in an outcome favorable to the primary beneficiary of the Estate (*see* §8.01-54) – have sought review of the wrongful death action

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<sup>14</sup> These conditions were imposed for rehabilitative (not punitive) purposes by the 3-judge panel (not the Bar). The conditions are scrupulously respected by Anthony (*see* Opp. pp. 11-12) despite VanMarter's unsupported rhetoric.

according to this Court's Rules, the laws of the Commonwealth, and the Constitution. See Opp. pp. 8-9. As aggrieved persons, representing themselves, they are – despite VanMarter's mantra to the contrary – not attempting to “appear *pro se* **on behalf of the Estate.**” See Opp. pp. 9-10.

However, VanMarter still insists that “[t]here is no difference between this case and Kone” and that the Estate “does not address or distinguish Kone.” V-Br. 8. Neither statement is true. The Opening Brief specifically incorporates by reference its Opposition to VanMarter's Motion to Dismiss. Op.Br. 50. The very first sentence in the “Argument And Authorities” of that incorporated Opposition cites Kone and pages 6-8 “address” and “distinguish” Kone from this case and cite the “difference” between this case and Kone and ALL of the cases cited by VanMarter in his Motion To Dismiss.

### CONCLUSION

WHEREFORE, for all of the reasons expressed in its Opening Brief and herein, the Estate prays this Court to overrule VanMarter's Motion To Dismiss, reverse the judgment of the trial court, and remand the matter for a new trial.

Respectfully submitted,

**ESTATE OF JOYCE HAWTHORNE:**

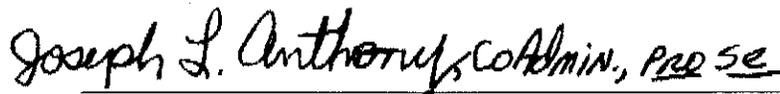
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CERTIFICATE OF SERVICE AND  
CERTIFICATE OF COMPLIANCE WITH RULE 5:26

I, Joseph L. Anthony, hereby certify that Rule 5:26 of the Rules of the Supreme Court of Virginia, as amended, has been complied with and that, in compliance with subsection (d) thereof, I have filed by hand delivery or by first-class mail 15 true and accurate paper copies and one electronic copy of the foregoing Reply Brief Of Appellants with the Clerk of this Court on this the 25<sup>th</sup> day of January, 2010. I also hereby certify that I have mailed, first-class postage prepaid, three (3) true and accurate copies of the foregoing Reply Brief Of Appellants to opposing counsel, Jim H. Guynn, Jr., Esq., at Guynn, Memmer & Dillon, P.C., 415 South College Avenue, Salem, VA 24153, as well as one (1) true and accurate copy to Paul R. Thomson, III, Esq., counsel for appellant Kevin Guthrie in Record No.: 091156, at Michie Hamlett Lowry Rasmussen & Twell PLLC, 120 Day Avenue, S.W., Roanoke, VA 24016, on or before the day on which the Reply Brief Of Appellants was filed.

  
\_\_\_\_\_  
Joseph L. Anthony, Co-Administrator, Pro Se



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**IN THE**  
**CIRCUIT COURT FOR THE COUNTY OF ROANOKE**

Case Action No.: CL06-00816

AND

Case Action No.: CL06-00886

**PAXTON HAWTHORNE AND JOSEPH ANTHONY,**  
**CO-ADMINISTRATORS OF**  
**THE ESTATE OF JOYCE HAWTHORNE,**

**AND**

**KEVIN GUTHRIE,**

**Plaintiffs,**

**V.**

**TIMOTHY VANMARTER,**

**Defendant.**

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**REPLY MEMORANDUM OF LAW**  
**TO DEFENDANT'S MEMORANDUM IN OPPOSITION**

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**Co-Administrators of The Estate**  
**Of Joyce C. Hawthorne:**

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**ADDENDUM A**

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for counsel for both sides since discovery had not been completed and the discovery cutoff date had not yet passed. In this regard, only VanMarter knew what actually took place, and he did not know, in all likelihood, how the law applied to those actions.

VanMarter's Memo makes much ado concerning the Plaintiffs' discovery of crucial evidence (supporting that there was no speeding vehicle) between the date of the sovereign immunity hearing and the close of discovery. See, e.g., p. 2 (arguing that Plaintiffs "fail to allege any contradictory facts prior to or during that (sovereign immunity) hearing"). VanMarter fails, however, to address "contradictory facts"<sup>10</sup> alleged after "that hearing." Plaintiffs' crucial discoveries immediately prior to the end of discovery, especially, should not detrimentally effect the rights of the Plaintiffs to use or benefit from those discoveries. Further, VanMarter has not proffered any authority to the contrary.

Both counsel knew about one (the "Coach") or two (the "Assistant Coach") potential scene witnesses in November of 2006. VanMarter's counsel was 'friends' with the Coach and had apparently interviewed him several times, discovering that the Coach did not see or hear a speeding vehicle. When contacted, the Coach conveyed similar information to Plaintiffs' counsel, but waffled on some specifics and refused to inform Plaintiffs' counsel of the existence of the third 'eyewitness' or of the whereabouts of the Assistant Coach and also refused to be deposed voluntarily. Plaintiffs' counsel consulted with VanMarter's counsel concerning the Assistant Coach without procuring any additional information furthering the Plaintiffs' investigation.

After Plaintiffs' counsel had identified at least one of the eyewitnesses (the Coach) as a trial witness but had not deposed him (because he refused to be voluntarily deposed), VanMarter's counsel moved the Court related to VanMarter's Plea based solely upon VanMarter's allegation as to an unidentified speeder. That Plea, however, did not inform this Court of the known witness, the Coach, who (while standing within 250 feet of Chaparral Drive for more than 30 minutes prior to the crash) did not see or hear the alleged speeding vehicle with a loud exhaust. That is, VanMarter's

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<sup>10</sup> Contradictions to the "facts" adduced at the Plea hearing came from newly d from VanMarter's own trial testimony and other evidence.



trial. Upon consideration of the entire trial of this case it is clear that plaintiffs received the fair trial to which they were entitled.

Of necessity, the jury must have found one or more of the following to render its verdict:

1. Plaintiffs never proved Officer VanMarter's speed thereby failing to carry their burden of proof;
2. Ms. Hawthorne was contributorily negligent by pulling out in front of Officer VanMarter, and/or
3. Officer VanMarter was not grossly negligent.

None of Plaintiffs' arguments alleging errors by the court change these findings.

Plaintiffs discuss at great length the errors assigned to this Court's rulings, but their arguments can be distilled to a few relevant points. First, they allege that sovereign immunity was improperly granted because there was "after-discovered" evidence which challenged the factual basis for the finding of immunity, therefore the issue should have been submitted to a jury. Second, they assert jury instruction three was improperly granted because Officer VanMarter was not complying with Virginia Code Section 46.2-920 and because the instruction was confusing. Third, they argue that jury instruction number eleven improperly omitted language regarding forfeiture of right of way by one travelling at an unlawful speed. Next they assert that the court abused its discretion in transferring the case to Roanoke County despite evidence to support the court's decision. Finally, they argue that this Court erred in failing to strike some jurors based on their responses to leading questions of Plaintiffs' counsel.

**ADDENDUM B**  
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by the jury as an emergency vehicle. There was no question that Ms. Hawthorne's vehicle was not an emergency vehicle, and the definition of that term was not relevant to the factual issues to be decided by the jury.

Finally, Plaintiffs argue that Instruction Number Three conflicts with Instruction Number Four. There is no such conflict. Instruction Number Four advised the jury that VanMarter could speed if he had on his emergency equipment. Instruction Number Three establishes that in any event, VanMarter could not act in a grossly negligent manner. These instructions accurately set out Plaintiffs' claims.

### III. Jury Instruction Number Eleven

Plaintiffs assert that it was reversible error not to instruct on forfeiture of right of way where there is evidence of unlawful speed. Plaintiffs cite Shearin v. Va. Electric, 182 Va. 573 (1944), where the trial court instructed the jury that when two cars approach an intersection, the one on the left must yield to the one on the right. Shearin at 577. The error assigned was that the instruction failed to state that the person having the right of way must exercise reasonable care, meaning proceeding at a lawful speed. Id. There had been evidence of excessive speed, so it was found to be reversible error not to instruct the jury as to the potential forfeiture. Id.

In the instant case, there was no evidence of excessive speed, so failure to instruct as to the forfeiture of right of way was not error. Further, excessive speed could not serve to transfer the right of way to Ms. Hawthorne; if Officer VanMarter was speeding, then he and Ms. Hawthorne were on equal footing as they came to the intersection, and they each were required to use ordinary care. Ms. Hawthorne had a duty to see what a reasonable lookout would have disclosed, regardless of the speed of the approaching vehicle; Instruction Number Eleven is therefore a proper instruction.

ADDENDUM B

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VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF ROANOKE

PAXTON HAWTHORNE and )  
JOSEPH ANTHONY, CO-ADMINISTRATORS )  
OF THE ESTATE OF JOYCE HAWTHORNE, )  
Deceased, )

and )

KEVIN GUTHRIE, )

Plaintiffs, )

v. )

TIMOTHY VANMARTER, )

Defendant. )

Case No. CL06000816-00

and

Case No. CL06000886-00

**DEFENDANT TIMOTHY VANMARTER'S MEMORANDUM IN OPPOSITION TO  
PLAINTIFFS' MOTIONS TO VACATE JUDGMENT AND FOR A NEW TRIAL**

COMES NOW, your Defendant Timothy VanMarter, by counsel, and in opposition to the Motions to Vacate Judgment and for a New Trial of Plaintiffs Paxton Hawthorne and Joseph Anthony, Co-Executors of the Estate of Joyce Hawthorne ("Plaintiff Estate") and of Plaintiff Kevin Guthrie ("Plaintiff Guthrie"), respectfully represents as follows:

**Procedural Background**

On May 10, 2007, the jury returned verdicts in favor of Officer Timothy VanMarter, after a three day trial. Plaintiffs each filed motions to vacate the judgment and for a new trial, alleging error by the trial court on the granting of sovereign immunity, refusing to strike some jurors for cause, improper jury instructions, and for granting a change of venue.

**ADDENDUM C**

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I. THE TRIAL COURT PROPERLY GRANTED OFFICER VANMARTER'S PLEA OF SOVEREIGN IMMUNITY

The issue of sovereign immunity is one of law. Because the issue often turns on what actions a given individual was engaged in at the time of the alleged wrongdoing, this legal determination is necessarily predicated on a set of facts, whether stipulated or otherwise. Although Plaintiffs allege that the trial court improperly decided this issue on the facts as they were presented at the hearing on Officer VanMarter's Plea in Bar ("Plea"), they failed to allege any contradictory facts prior to or during that hearing. The trial court properly evaluated the claim of sovereign immunity based on the facts before it at the hearing. Therefore, the issue as to sovereign immunity is whether a police officer is entitled to that protection when he has decided to pursue a speeding reckless driver, has begun that pursuit, but has not yet engaged his emergency lights and/or siren.

A. The Court Properly Concluded that Plaintiffs' Proffer of Allegedly After-Discovered Evidence was not Timely

Plaintiffs argue that the hearing on the Plea was to address "the one issue addressed in the Plea" (Plaintiff Estate's Memorandum of Law in Support of the Estate's Motion to Vacate Verdict and Motion for a New Trial ("Plaintiff Estate's Memo"), 11), namely, whether sovereign immunity applied under the set of facts set forth by Officer VanMarter. Plaintiffs contend that they had evidence which would call into question whether Officer VanMarter had been pursuing a speeding vehicle at the time of the accident. They assert that the court's ruling went only to the facts set forth by Officer VanMarter, and would therefore not be applicable if the jury found that he had not been pursuing a speeding vehicle. This interpretation is in error, as the issue asserted in the Plea was whether sovereign immunity applied to Officer VanMarter's actions, not, as

Plaintiffs distinguish Colby by asserting that the officer in that case had activated his emergency lights, a requirement under the guidelines and regulations of the Roanoke County Police Department when an officer is effectuating a traffic stop. Whether or not the officer complies with the regulations of the department by activating his emergency equipment is irrelevant to the determination of whether the activity involves the judgment and discretion required in a sovereign immunity analysis. The police department in Colby also had guidelines for what actions their officers should take in emergency situations, but the existence of these guidelines did not and could not "eliminate the requirement that a police officer, engaged in the delicate, dangerous, and potentially deadly job of vehicular pursuit, must make prompt, original, and crucial decisions in a highly stressful situation." Colby, 241 Va. at 129, 400 S.E.2d at 187. The Colby court specifically held that even the decision of the officer to pursue an offender requires discretion that implicates sovereign immunity. Colby, 241 Va. at 130, 400 S.E.2d at 187.

This holding comports with the Supreme Court case of Friday-Spivey v. Collier, 268 Va. 384, 601 S.E.2d 591 (2004), which established that an operator of an emergency vehicle is not *per se* entitled to sovereign immunity due to the specialized training required to operate such vehicles. In Friday-Spivey a fire truck had been responding to a call regarding an infant locked in an automobile when the accident occurred. The Court held that the call was not an emergency, not because the operator had not activated his lights, but because the call was specifically classified as non-emergency when it was received by dispatch. The instant case is distinguishable based on the analysis of Colby. Colby clearly establishes that pursuing a traffic offender is an activity entitled to immunity without any discussion as to whether the situation is an emergency.

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not.

Plaintiff Estate also asserts that law enforcement must be engaged in an emergency situation in order for immunity to apply. There are many non-emergency decisions which could qualify for sovereign immunity protection, such as whether or not to pursue an investigation based on initial allegations or whether or not to issue a citation in a given situation. Emergencies may always require discretion and special risk, but that does not mean that *only* emergencies implicate these qualities. Plaintiffs argue that the lights and sirens are required in order for there to be an emergency situation, and that an emergency situation is the only time when a police officer uses his discretion and takes a special risk. Both assertions are false and Plaintiffs cannot cite any authority for these propositions.

Even if the court was in error, it was harmless error, as there is neither principal of law nor any statute which alleviates a driver entering a roadway of her duty to take proper care; even if an oncoming vehicle forfeits his right of way by traveling at an unlawful speed, this does not serve to transfer the right of way to any other party. Pistolesi v. Staton, 481 F.2d 1218, 1222 (1973). The jury was instructed on contributory negligence, and could well have determined that this, rather than any particular standard for Officer VanMarter's acts, is what precluded Plaintiffs' recovery. See, Swisher v. Swisher, 223 Va. 499, 503, 290 S.E.2d 856, 858 (1982) ("The jury could well conclude that he failed in this duty [to take reasonable care when entering highway] because he did not see what a reasonable lookout would have disclosed"). This court also properly noted that the testimony of those witnesses did not appear to weigh heavily on the issue of whether the speeder existed, especially as there were two witnesses to state that there was a speeding vehicle, as Plaintiffs would be attempting to "prove a nullity."

Transcript of Proceeding, Vol. I, May 8, 2007 ("Vol. I"), 10 (Excerpts of Vol. 1 are attached

**ADDENDUM C**

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