

IN THE  
SUPREME COURT OF VIRGINIA

---

RECORD No.091156

---

KEVIN GUTHRIE

*Appellant,*

v.

TIMOTHY VANMARTER

*Appellee.*

---

**OPENING BRIEF FOR APPELLANT KEVIN GUTHRIE**

---

Paul R. Thomson, III, Esq.,  
V.S.B. #38765  
Michie Hamlett Lowry  
Rasmussen & Tweel PLLC  
120 Day Ave. SW  
Roanoke, VA 24016  
(540) 725-5192 (Telephone)  
(540) 725-5199 (Facsimile)  
Email: [pthomson@mhlrt.com](mailto:pthomson@mhlrt.com)

Kevin W. Ryan, Esq.,  
V.S.B. #21955  
Michie Hamlett Lowry  
Rasmussen & Tweel PLLC  
500 Court Square, Suite 300  
Post Office Box 298  
Charlottesville, VA 22902  
(434)951-7200 (Telephone)  
(434)951-7218 (Facsimile)  
Email: [kryan@mhlrt.com](mailto:kryan@mhlrt.com)

*Counsel for Appellant Kevin Guthrie*

**ORAL ARGUMENT REQUESTED**

**SUBJECT INDEX**

TABLE OF CITATIONS..... iii

STATEMENT OF THE CASE..... 1

ASSIGNMENTS OF ERROR..... 3

QUESTIONS PRESENTED..... 3

STATEMENT OF MATERIAL FACTS..... 4

ARGUMENT..... 9

I. The trial court erred in refusing to submit to the jury the issue of whether the Defendant was engaged in overtaking an alleged speeder at the time of the collision..... 9

II. The trial court erred in granting jury instruction number eleven as it was an incorrect statement of law. The trial court refused to include any reference to the forfeiture of the right-of-way by drivers at an unlawful speed..... 18

III. The trial court erred in granting jury instruction number three as it was an incorrect statement of law. The instruction failed to contain any reference to the requirement of emergency lights and siren when exceeding the speed limit..... 24

IV. The trial judge erred in granting the Defendant’s transfer of venue motion and moving the case to Roanoke County..... 30

A. The City of Roanoke was the proper venue as the Defendant provided no evidence that he had moved..... 30

B. The Defendant conducted substantial business in the City of Roanoke..... 36

V. The trial court erred in refusing to strike five jurors for cause, and/or refusing to allow individual voir dire or additional voir dire..... 40

|                  |    |
|------------------|----|
| CONCLUSION.....  | 48 |
| CERTIFICATE..... | 49 |

## TABLE OF CITATIONS

### CASES

|                                                                                              |        |
|----------------------------------------------------------------------------------------------|--------|
| <u>Alcoy v. Valley Nursing Homes, Inc.</u> ,<br>272 Va. 37, 630 S.E.2d 301 (2006).....       | 24     |
| <u>Allen v. Commonwealth</u> ,<br>211 Va. 805, 180 S.E.2d 513 (1971).....                    | 45     |
| <u>Barker v. Commonwealth</u> ,<br>230 Va. 370, 337 S.E.2d 729 (1985).....                   | 44     |
| <u>Bell v. Kenney</u> ,<br>181 Va. 24, 23 S.E.2d 781 (1943).....                             | 21     |
| <u>Bethel Investment Co. v. City of Hampton</u> ,<br>272 Va. 765, 636 S.E.2d 466 (2006)..... | 14, 18 |
| <u>Clohessy v. Weiler</u> ,<br>250 Va. 249, 254, 462 S.E.2d 94, 97 (1995).....               | 24     |
| <u>Commonwealth v. Hudson</u> ,<br>265 Va. 505, 578 S.E.2d 781 (2003).....                   | 17     |
| <u>Cooper Industries, Inc. v. Melendez</u> ,<br>260 Va. 578, 537 S.E.2d 580, (2000).....     | 13     |
| <u>Dandridge v. Marshall</u> ,<br>267 Va. 591, 594 S.E.2d 578 (2004).....                    | 27     |
| <u>Gray v. Graham</u> ,<br>231 Va. 1, 341 S.E.2d 153 (1986).....                             | 32     |
| <u>Green v. Commonwealth</u> ,<br>262 Va. 105, 546 S.E.2d 446 (2001).....                    | 45     |
| <u>Heider v. Clemons</u> ,<br>241 Va. 143, 400 S.E.2d 190 (1991).....                        | 12     |

|                                                                                     |          |
|-------------------------------------------------------------------------------------|----------|
| <u>Horn v. Milgrim,</u><br>226 Va. 133, 306 S.E.2d 893 (1983).....                  | 36       |
| <u>Justus v. Commonwealth,</u><br>220 Va. 971, 266 S.E.2d 87 (1980).....            | 48       |
| <u>L.E. Briley v. Commonwealth,</u><br>222 Va. 180, 279 S.E.2d 151 (1981).....      | 48       |
| <u>Martin v. Commonwealth,</u><br>221 Va. 436, 271 S.E.2d 123 (1980) .....          | 41,45,47 |
| <u>McGuire v. Hodges,</u><br>273 Va. 199, 639 S.E.2d 284 (2007).....                | 15       |
| <u>Meyer v. Brown,</u><br>256 Va. 53, 500 S.E.2d 807 (1998).....                    | 30,36,39 |
| <u>Neece v. Neece,</u><br>104 Va. 343, 51 S.E.2d 739 (1905).....                    | 32       |
| <u>Norfolk &amp; W. Ry. v. Williams,</u><br>239 Va. 390, 389 S.E.2d 714,(1990)..... | 30       |
| <u>Redd v. Ingram,</u><br>207 Va. 939,154 S.E.2d 149 (1967).....                    | 23,27    |
| <u>Shearin v. Va. Elec. &amp; P. Co.,</u><br>182 Va. 573, 29 S.E.2d 841 (1944)..... | 19,22    |
| <u>Spence v. Miller,</u><br>197 Va. 477, 90 S.E.2d 131, 135(1955).....              | 23,27    |
| <u>Talley v. Draper Constr. Co.,</u><br>210 Va. 618, 172 S.E.2d 763 (1970).....     | 20       |
| <u>Temple v. Moses,</u><br>175 Va. 320, 8 S.E.2d. 262 (1940).....                   | 41       |

|                                                                                |    |
|--------------------------------------------------------------------------------|----|
| <u>Virginia Transit Co. v. Tidd,</u><br>194 Va. 418, 73 S.E.2d 405 (1952)..... | 28 |
| <u>White v. John Doe,</u><br>207 Va. 276, 148 S.E.2d 797 (1966).....           | 28 |
| <u>Winn v. Commonwealth,</u><br>160 Va. 918, 168 S.E.2d 351(1933).....         | 44 |

**STATUTES**

|                                      |          |
|--------------------------------------|----------|
| Virginia Code § 8.01-262(3).....     | 39       |
| Virginia Code § 8.01-336(A).....     | 14       |
| Virginia Code §8.01-336 (B).....     | 18       |
| Virginia Title 46.2.....             | 25,28    |
| Virginia Code § 46.2-113.....        | 24       |
| Virginia Code § 46.2-324.....        | 31       |
| Virginia Code § 46.2-800 et.seq..... | 25       |
| Virginia Code § 46.2-801.....        | 25       |
| Virginia Code § 46.2-823.....        | 22       |
| Virginia Code § 46.2-920.....        | 25,28,29 |
| Virginia Code § 46.2-1022.....       | 26       |
| Virginia Code § 46.2-1023.....       | 26       |

**OTHER**

|                                                |    |
|------------------------------------------------|----|
| The Constitution of Virginia, art. I, §11..... | 13 |
|------------------------------------------------|----|

## STATEMENT OF THE CASE

Originally the cases of Kevin Guthrie and Paxton Hawthorne and Joseph Anthony, Co-Administrators of the Estate of Joyce Hawthorne were filed separately. App. 1-11; 12-22. The counsel for the Plaintiffs moved to consolidate the cases. Initially, the trial judge consolidated the cases for discovery and then later, consolidated the cases for trial. App. 289.

This appeal involves a negligence action, wherein the Defendant police officer was traveling at a high rate of speed, at night, in a residential area, with no emergency lights and/or siren activated. The Defendant officer was traveling on a two lane, 25 mph speed limit road and struck and killed Joyce Hawthorne, who was pulling out from a driveway in a large Ford Expedition SUV. App. 14-15. Her passenger, Kevin Guthrie, was injured. App. 21. The officer claimed he was pursuing a speeder, but two independent witnesses denied seeing any speeder. App. 226-259. While the witnesses did not see the crash, they were in a position to see or hear the alleged vehicle that Defendant was allegedly attempting to catch. *Id.* They neither saw nor heard this alleged vehicle. App. 221-224; 215; 237-238; 252-253.

The Plaintiffs originally filed this case in the City of Roanoke. App.

12. The Defendant filed a motion to transfer the case to Roanoke County which was granted by the trial court over the plaintiffs' objections. App. 24. The trial judge heard cases in both venues and retained the case. App. 68.

Prior to the trial, the Defendant objected to the testimony of the two aforementioned witnesses being presented at trial. App. 374-375. The trial court excluded those witnesses ruling that their testimony should have been presented at the plea in bar hearing. App. 287-288; 508-514. The trial court went on to make the factual determination that the testimony of these two witnesses "would not make a difference" had the trial court been presented this testimony at the hearing. App. 513. Plaintiffs objected, stating this was a jury issue. App. 213-265; 276-286.

At the trial, Plaintiffs' counsel moved to strike five jurors for cause. App. 594-599. The trial court denied those motions and refused to allow individual voir dire or further voir dire of the witnesses. App. 596-599.

At trial, the trial court granted Defendant's jury instruction numbers three and eleven over Plaintiffs' objections. App. 837-841. Both instructions were incorrect statements of law.

## ASSIGNMENTS OF ERROR

- I. The trial court erred in refusing to submit to the jury the issue of whether the Defendant was in fact engaged in overtaking an alleged speeder at the time of the collision.
- II. The trial court erred in granting jury instruction number eleven as it was an incorrect statement of law. The trial court refused to include any reference to the forfeiture of the right-of-way by drivers at an unlawful speed.
- III. The trial court erred in granting jury instruction number three as it was an incorrect statement of law. The instruction failed to contain any reference to the requirement of emergency lights and siren when exceeding the speed limit.
- IV. The trial judge erred in granting the Defendant's transfer of venue motion.
  - A. The City of Roanoke was the proper venue as the Defendant provided no evidence that he had moved.
  - B. The Defendant conducted substantial business in the City of Roanoke.
- V. The trial court erred in refusing to strike five jurors for cause, and/or erred in refusing to allow individual voir dire or additional voir dire.

## QUESTIONS PRESENTED

1. Whether the trial court erred in refusing to submit the issue of whether the Defendant was actually engaged in the overtaking of an alleged speeder at the time of the collision to the jury. (Error I.)
2. Whether the trial court erred in granting jury instruction number eleven which was an incorrect statement of law and failed to take into account evidence produced at trial. (Error II.)
3. Whether the trial court erred in granting jury instruction number three which was an incorrect statement of law and conflicted with another

jury instruction. (Error III.)

4. Whether the trial judge erred in granting the Defendant's transfer of venue motion based solely on the Defendant's testimony that he had moved, and in spite of direct evidence that he had not moved and still conducted substantial business in the original venue. (Error IV.)
5. Whether the trial court erred in refusing to strike jurors Draper, Harris, Tuckwiller, Blankenship, and Hodges for cause when the voir dire examination disclosed that the jurors were biased. (Error V.)

### **Statement of Material Facts**

The evening of June 10, 2005, the Defendant police officer VanMarter was traveling at a high rate of speed with no emergency lights and no emergency siren activated, on a residential two lane road with a 25 mile per hour speed limit. App. 610-658. The defendant struck and killed Joyce Hawthorne who was pulling out of a driveway in a large Ford Expedition SUV. App. 14-15. Her passenger, Kevin Guthrie, was injured as well. App. 21. The officer claimed that he was pursuing a speeder. App. 610-658. However, two independent witnesses denied seeing or hearing any speeding vehicle. App. 226-259. These witnesses were not allowed to testify at trial. App. 511-514. Ms. Hawthorne's passenger, Kevin Guthrie, also denied seeing or hearing a speeding vehicle. App. 101-104; 688.

The Defendant testified that as he traveled down a residential road

that evening at 25 miles per hour, he passed a vehicle with a very loud exhaust, traveling 63 miles per hour in the opposite direction, in a 25 mile per hour zone. App. 613-614. The Defendant testified he intended to catch the alleged speeder and issue a traffic ticket for reckless driving, and admitted that he also knew he was going to have to go faster than 63 miles per hour to catch the car and stop it. App. 145; 617; 620; 626. The Defendant testified that he continued traveling in the opposite direction until he could do a U-turn and proceed after the alleged speeder. App. 615. The Defendant further testified that he had lost sight of the speeder when he turned around to go back after him. App. 620-621.

The Defendant admitted that as he attempted to catch up to the speeder, he pushed his accelerator to the floor and continued to floor the vehicle as he traveled down the two lane residential road. App. 616. He testified that he had no idea how fast he was traveling. App. 616.

Defense expert Dr. Barrett testified that the Defendant's vehicle could finish a quarter mile in 16.99 seconds, at a top speed of 84 miles per hour. App. 831. The distance traveled by the Defendant that night from where he turned around, to the point of impact, was 1,546 feet. App. 113. A quarter mile is slightly over 1,300 feet. App. 832.

Plaintiffs' expert testified that the Plaintiff's Ford Expedition had

approximately twenty-four inches of crush damage across a six-foot area. App. 753-754; 322; 327. He also testified that the police cruiser had an average of twenty-two inches of crush damage. App. 753; 321; 323-325. The Plaintiffs' Ford Expedition was knocked 62 feet after impact. App. 735; 736; 319-320. The Ford Expedition weighed approximately 5,000 pounds. App. 833. The Defendant's police interceptor traveled another 74 feet after impact. App. 734-735; 319-320.

Photographs of the vehicles exhibited at trial showed extensive damage to both. App. 321-327. The driver's side tires of the Ford Expedition were knocked off their rims. App. 318-319. All of the glass on the driver's side of the Ford Expedition was knocked out as well. App. 318 - 320; 322.

The case was originally filed in the City of Roanoke. App. 12-22. The trial judge granted the Defendant's motion to transfer venue and transferred the case to Roanoke County. App. 64-67. The trial judge sat in both venues and retained the case. App. 66. The only basis upon which the trial judge granted the transfer was the sole statement of the Defendant that he had moved to Roanoke County. App. 65. Plaintiffs' counsel produced substantial evidence to support his assertion that the

Defendant had never moved from Roanoke City and/or that the Defendant conducted substantial business within the City of Roanoke. App. 37-49; 55-60; 431-471.

Just prior to the trial of this case, the Defendant objected to the Plaintiff's witness list which identified two witnesses to the crash. App. 374-375. The Defendant asserted the trial court had previously ruled that the Defendant was entitled to sovereign immunity, therefore, the testimony of these two witnesses was irrelevant. App. 266-270; 375. Plaintiffs' counsel asserted that the sole issue posed at that Plea in Bar hearing on sovereign immunity was whether the Defendant's conduct of "overtaking" or attempting to apprehend a speeder, with no emergency lights and/or siren entitled the Defendant to sovereign immunity. App. 78-100; 213-220.

Plaintiff's counsel asserted that the determination of that issue did not prevent Plaintiffs' counsel from offering evidence at trial that the Defendant was not involved in an overtaking but was simply speeding and therefore not entitled to immunity, or a gross negligence standard. App. 213-220. Plaintiff's counsel argued that the trial jury was entitled to hear this witness evidence and make the determination as to whether the Defendant was actually involved in the pursuit of a speeder. App. 213-265;

276-286. However, the trial court ruled against the Plaintiffs, stating that the witness testimony should have been presented at the original Plea in Bar hearing and further ruled that even if the trial court had considered the testimony of these two witnesses at the Plea in Bar hearing, their testimony of the witnesses would not have made a difference in the court's original ruling. App. 287-288; 508-514. The trial court ruled that the two eyewitnesses could not testify, therefore no evidence bearing on simple negligence could be presented to the jury. App. 287-288; 508-514.

At the trial of this case, Plaintiff moved to strike five prospective jurors for cause, which the trial court denied. App. 594-599. Four of them expressed difficulty in having to rule against a police officer. App. 540-541; 562-566; 583-586. One was related to an employee of defense counsel. App. 531-532. Despite these admissions, the trial court refused to strike these prospective jurors for cause, refused to allow individual voir dire of these jurors and refused to allow additional voir dire of these jurors. App. 596-599. Plaintiffs' counsel was forced to exercise his peremptory challenges to remove two of these jurors. App. 392-393. The remaining three sat on the seven person jury. App. 392-393.

Plaintiff's counsel asserts that the giving of two jury instructions was

error. The Plaintiffs objected to jury instruction number eleven. App. 338; 840-841. Plaintiffs' produced evidence of excessive speed by the Defendant. App. 610-658; 724-760; 828-836. This instruction failed to contain a reference to the forfeiture of the right-of-way by drivers traveling at an unlawful speed. App. 338; 358.

The Plaintiffs objected to jury instruction number three. App. 330; 838-839. This instruction, by itself, was a misstatement of the law, and allowed the jurors to conclude that emergency lights and siren were not necessary in order for the Defendant to exceed the posted speed limit. This instruction should have contained a provision with regard to the requirement for emergency lights and siren. App. 359.

### **Argument**

- I. The trial court erred in refusing to submit to the jury the issue of whether the Defendant was in fact engaged in overtaking an alleged speeder at the time of the collision.**

On December 1, 2006, the trial court held a hearing on Defendant's Special Plea in Bar of Sovereign Immunity. App. 473-505. At that time, the Defendant claimed he was attempting to "overtake" a speeding vehicle, admittedly without the use of his emergency lights or siren, when he collided with the Plaintiff's Ford Expedition and killed Joyce Hawthorne and

injured her passenger, Kevin Guthrie. App. 482-499. As noted in the trial court's letter ruling of December 29, 2006, the only issue before the trial court with respect to the Defendant's Plea in Bar filed on November 10, 2006, was whether the act of "overtaking" versus "pursuit," without emergency lights and siren, entitled the Defendant to sovereign immunity. App. 209-212. The trial court ruled on December 29, 2006 that sovereign immunity protected the Defendant, while engaged in an "overtaking". App. 209-212.

Approximately one week prior to the original trial date of January 16, 2007, after the parties exchanged witness and exhibit lists, defense counsel objected to the Plaintiffs presenting two witnesses at trial who contradicted the Defendant's account that he was in pursuit of a speeding vehicle. App. 374-376. These witnesses would have testified that they never saw or heard a vehicle being chased prior to the collision. App. 226-259. The Defendant's counsel advised verbally and in his Objections to Plaintiffs' Witnesses, filed January 10, 2007, that he objected to the testimony being presented by two of the Plaintiff's witnesses as their testimony related to simple negligence, which he asserted was prohibited by the trial court's sovereign immunity ruling. App. 374-376. The trial court

requested briefs from the parties on that issue and granted the Plaintiffs' Motion for Continuance. Subsequently, the parties briefed the issue and depositions of the witnesses were presented as exhibits to the trial court. App. 213-286. Due to the position taken by the Defendant, the Plaintiffs' filed a Motion to Amend Prior Ruling on Account of Newly Discovered Evidence, which was formally denied on May 7, 2007. App. 213-265; 276-288.

The trial court held that with regard to the witnesses, that the evidence did not meet the definitional criteria for "after discovered evidence," and the witnesses now being proffered as after discovered evidence, were not timely.<sup>1</sup> App. 512. The trial court further opined that, if it also had had the benefit of the additional witness evidence at the Plea in Bar hearing on sovereign immunity, it would not have changed its ruling. App. 509-514.

The "after discovered evidence" analysis by the trial court and defense counsel is a red herring. The crux of the matter is that the trial

---

<sup>1</sup>The trial court made reference that the witnesses were not timely disclosed. However, two witnesses were disclosed on November 16, 2006 and one on December 15, 2006, prior to the trial court's agreed discovery cut-off date of December 15, 2006 and prior to the witness list disclosure date of December 29, 2006. App. 360-364; 271-275; 366-370.

court improperly made factual findings as to the proffered evidence, and improperly excluded it from the trial. As noted in the trial court's letter ruling of December 29, 2006, the only issue before the trial court with regard to Defendant's Plea in Bar filed on November 10, 2006, was whether the act of "overtaking" versus "pursuit" without emergency lights and siren entitled the Defendant to sovereign immunity. App. 209-212. That specific issue was framed by the Defendant. App. 73-77. Therefore, the only determination that was made by the trial court was whether that conduct set forth by the Defendant involved judgment and discretion, entitling him to sovereign immunity. App. 73-100.

At the time of the Plea in Bar hearing, the Defendant's counsel himself was aware of the prospective testimony of at least one witness who would potentially testify that he did not see this phantom vehicle that the Defendant alleged he was chasing. App. 271-275. Defense counsel does not and cannot dispute this. However, this factual scenario was not placed at issue by the Defendant in his Plea in Bar Motion. App. 73-77.

**Presumably this was because it is undisputed that a police officer who is speeding, but not involved in an overtaking or pursuit, is not entitled to sovereign immunity. See *Heider v. Clemons*, 241 Va. 143,**

400 S.E.2d 190 (1991).

“A plea in bar is a defensive pleading that reduces the litigation to a single issue, which, if proven, creates a bar to the Plaintiff’s right of recovery. The party asserting a plea in bar, carries the burden of proof.” *Cooper Industries, Inc. v. Melendez*, 260 Va. 578, 594, 537 S.E.2d 580, 590 (2000). The Defendant had the burden and defined the issues with the filing of his Plea in Bar. There was no requirement that the Plaintiffs bring on the separate issue of whether the Defendant was actually involved in an overtaking or pursuit, as that separate factual issue was to be determined by a jury. If the Defendant wanted that issue determined by the trial court, it was his burden to have put it at issue in his Plea in Bar Motion. He did not.

The Plaintiffs have consistently maintained that the issue of whether the Defendant was actually involved in a pursuit or overtaking of an unknown vehicle was a disputed fact and that they were entitled to a factual determination of that issue by a jury at the trial of this case. App. 213-265.

The Constitution of Virginia, art. I, §11, provides in pertinent part:

“That in controversies respecting property, and in suits between man and

man, trial by jury is preferable to any other, and ought to be held sacred.’  
‘The Virginia Constitution guarantees that a jury will resolve disputed facts,  
and that has been the jury’s sole function from the adoption of the  
Constitution to the present time.’” *Bethel Investment Co. v. City of  
Hampton*, 272 Va. 765,769, 636 S.E.2d 466, 469 (2006)(citation omitted).  
“Code § 8.01-336(A) provides that the constitutional right of trial by jury  
‘shall be preserved inviolate to the parties.’ Subsection (B), which follows,  
provides that in any action at law for the recovery of any sum greater than  
\$100, the case may be tried without a jury ‘unless one of the parties  
demand that the case *or any issue thereof* be tried by a jury.’” *Id.* (Italics in  
original).

As the evidence was known by all parties prior to the discovery cut  
off, there was no time limit for presentation of this evidence to the jury, nor  
was there any obligation to bring this evidence forward in response to the  
Defendant’s Plea in Bar which was premised on an entirely different set of  
facts, as set forth by the Defendant. As this was a separate disputed issue  
of fact, unrelated to the Defendant’s Plea in Bar, it should have been  
presented to the jury for determination, as requested by the Plaintiff.  
However, the trial court erroneously ruled that the issue of sovereign

immunity also encompassed this issue which was not placed before the trial court at the pre-trial hearing by the Defendant.

The trial court also stated on May 8, 2007, that it had reviewed the depositions of the witnesses and that it was required to make determinations of fact. App. 511-514. The trial court also noted that, having had “the benefit” of the depositions of the additional witnesses, a factual determination could be made that the testimony of those witnesses “[would] not make a difference” to the trial court’s ruling on the Plea in Bar. App. 514. Plaintiffs respectfully submit that it was for the “province of the jury, [not the trial court], to weigh the evidence and consider the credibility of the witnesses.” See *McGuire v. Hodges*, 273 Va. 199, 290, 639 S.E.2d 284,19 (2007). The trial court should not have made that factual determination.

Further, in reaching its decision, the trial court ignored evidence produced during this case which supported the witness testimony and indicated that a jury issue existed as to what the Defendant was actually doing that night. Defendant VanMarter claimed that the vehicle he was chasing was a white two door Honda with a very loud exhaust. App. 614. This testimony is inconsistent with the testimony of his fellow officer who

was putting gas into her cruiser just prior to the crash. Officer Saul (formerly Tolbert) described the vehicle as a dark vehicle. App. 260-264; 265. Officer Saul also testified that Defendant VanMarter told her that the vehicle was a Blazer. App. 260-264. Officer Saul testified that the noise of the passing vehicle was loud enough to draw her attention from her activity, some 733 feet away from Chaparral drive. App. 260-264; 265.

Glenn Hayman, one of the excluded eyewitnesses, testified that he was standing in front of the high school facing Chaparral Drive and talking with his mother and Coach Martinez. App. 244-259. He was much closer to Chaparral Drive than Officer Saul, (about 246 feet) and did not see or hear a vehicle traveling by at a high rate of speed or with a loud exhaust before Defendant's crash. App. 248; 225. Donna Hayman, the other excluded witness, testified that she and her son Glenn Hayman were standing in front of the high school for 30 minutes before the crash, talking with the Coach, and she did not see or hear a vehicle traveling by at a high rate of speed or with a loud exhaust before the crash. App. 237-238.

Plaintiff Kevin Guthrie testified at the trial of this matter that he did not see or hear a vehicle traveling by at a high rate of speed at any time as he and Ms. Hawthorne went to his SUV, got in, drove down and stopped before

making their turn onto Chaparral Drive. App. 677-679.

As a result of the cumulative effect of the testimony of these witnesses, the jury could have reasonably concluded that there was no speeding vehicle, and therefore no “overtaking” or vehicular pursuit. It is “within the province of the jury to determine what inferences are to be drawn from proved facts, provided the inferences are reasonably related to those facts.” *Commonwealth v. Hudson*, 265 Va. 505, 514, 578 S.E.2d 781,786 (2003)(internal citation omitted). Circumstantial evidence is not viewed in isolation. “While no single piece of evidence may be sufficient, the ‘combined force of many concurrent and related circumstances, each insufficient in itself, may lead a reasonable mind irresistibly to a conclusion.’” *Id.*

Clearly, the combined force of the testimony of these witnesses, coupled with the inconsistencies of the Defendant, could lead a reasonable mind to conclude that the Defendant was not involved in chasing a vehicle. Based upon this evidence, a jury issue existed as to what conduct the Defendant was engaged in the night of the crash. Had the jury been presented this testimony it could have found that the Defendant was not involved in apprehending a speeder, but was only speeding and therefore

subject to a simple negligence standard.

Defendant's counsel would not have been unfairly prejudiced by this testimony at trial, because he was aware of the substance of the testimony since November 2006 and had participated in the depositions of the witnesses on January 5, 2007. The evidence was relevant and there was no allegation by the Defendant that the witnesses were not competent. As guaranteed by the Constitution of Virginia and Virginia §8.01-336 (B), the Plaintiffs were entitled to a jury trial on this issue as they had repeatedly requested. *Bethel Investment Co. v. City of Hampton*, 272 Va. 765, 770, 636 S.E.2d 466, 469-470 (2006).

Consequently, the trial court erred in excluding the testimony of these two witnesses, and erred in refusing to submit to the jury the issue of whether the Defendant was actually attempting to overtake a speeder at the time of the crash. As guaranteed by the Constitution of Virginia and Virginia 8.01-336(B), the Plaintiff was entitled to a jury trial on this issue as had been repeatedly requested. See *Bethel Investment Co. v. City of Hampton*, 272 Va. 765, 770, 636 S.E.2d 466, 469-470 (2006).

- II. The trial court erred in granting jury instruction number eleven as it was an incorrect statement of law. The trial court refused to include any reference to the forfeiture of the right-of-way by drivers at an unlawful speed.**

The Plaintiffs objected to jury instruction number eleven. App. 840-842. Jury instruction number eleven, stated:

Immediately before entering a highway from a private driveway, the driver of a vehicle has a duty to stop and use ordinary care to yield to any vehicle that is so near the driveway that the driver cannot safely enter the highway. If the driver fails to perform this duty, then she is negligent. App. 338.

This instruction should have contained a reference to the forfeiture of the right-of-way by drivers traveling at an unlawful speed, as the Plaintiffs provided substantial evidence of unlawful speed on behalf of the Defendant at trial. See *Shearin v. Va. Elec. & P. Co.*, 182 Va. 573, 577, 29 S.E.2d 841, 843 (1944).

The Defendant's own testimony provided a basis for the Plaintiff's allegations of excessive speed. The Defendant testified that as he traveled down a residential road that evening at 25 miles per hour, he passed a vehicle traveling 63 miles per hour in the **opposite** direction, in a 25 mile per hour zone. App. 613-617; 620. The Defendant testified that he thought the driver recognized him as a police officer. App. 619.

The Defendant testified that he continued traveling in the opposite direction until he could make a U-turn and proceed after the alleged speeder. App. 614-615. The Defendant further testified that he had lost

sight of the speeder when he turned around to go after him. App. 623-624. The Defendant testified he intended to catch the person and issue a traffic ticket for reckless driving, and admitted that he also knew he was going to have to go faster than 63 miles per hour to catch the car and stop it. App. 620-623; 640-641.

The Defendant admitted that as he attempted to catch up to the speeder, he pushed his accelerator to the floor and continued to floor the vehicle as he traveled down the residential road, and testified that he had no idea how fast he was traveling. App. 615-616.

Defense expert Dr. Barrett testified that the top speed of the police interceptor operated by the Defendant was 128 miles per hour. App. 830. Dr. Barrett testified that the Defendant's vehicle could travel a quarter mile in 16.99 seconds, at a top speed of 84 miles per hour. App. 831. The distance traveled by the Defendant that night was 1,546 feet to the point of impact. App. 731. A quarter mile is slightly over 1300 feet. App. 831-832.

Skid marks and damage to a vehicle can establish excessive speed. *Talley v. Draper Constr. Co.*, 210 Va. 618, 623, 172 S.E.2d 763, 766 (1970). Although there is no oral testimony to establish that a party was exceeding the speed limit, where there is physical evidence of such, this

will be sufficient to justify instruction on speed in excess of the speed limit. *Bell v. Kenney*, 181 Va. 24, 31, 23 S.E.2d 781, 784 (1943).

Plaintiffs' expert Dave McAllister testified that the Plaintiff's Ford Expedition had approximately twenty-four inches of crush damage across a six-foot area. App. 751-754; 322, 327. He also testified that the police cruiser had an average of twenty-two inches of crush damage. App. 753; 321; 323-325. Mr. McAllister testified that the Plaintiffs' Ford Expedition was knocked 62 feet after impact. App. 735-736. The Ford Expedition weighed approximately 5,000 pounds. App. 833. Mr. McAllister testified that the Defendant's police interceptor traveled another 74 feet after impact. App. 736.

Photographs of the vehicles exhibited at trial showed extensive damage to both. App. 317-327. The driver's side tires of the Ford Expedition were knocked off their rims. App. 318-319; 322. All of the glass on the driver's side of the Ford Expedition was knocked out as well. App. 318; 322. Mr. McAllister testified that the twisted appearance of the rear of the Ford Expedition was from the actual frame of the vehicle being twisted from impact. App. 746-747.

From the evidence produced at trial, a jury could have concluded that

the Defendant was exceeding the posted speed limit of 25 miles per hour, forfeiting his right of way. However, the jury was incorrectly instructed that the Plaintiff had a statutory duty to yield to oncoming vehicles, i.e. the Defendant.

Va. Code § 46.2-823 states that "[t]he driver of any vehicle traveling at an unlawful speed shall forfeit any right-of-way which he might otherwise have under this article." Instruction number 11 given by the trial court failed to incorporate any aspect of this statute. Pursuant to Va. Code § 46.2-823, if the Defendant was speeding, then he forfeited his right of way. The Plaintiffs' decedent only had a duty to yield to those that were lawfully approaching. This pertinent provision was requested by the Plaintiffs but was refused by the trial court over Plaintiffs' objection. App. 837-841.

The instruction was a misstatement of the duty of the Plaintiffs. Failure to instruct on the forfeiture of the right of way when evidence of unlawful speed is presented constitutes reversible error. *Shearin v. Va. Elec. & P. Co.*, 182 Va. 573, 577, 29 S.E.2d 841, 843 (1944).

This instruction was critical in the jury's inquiry because it affected the degree of care required by the parties, and provided the basis for an improper contributory negligence finding, ending the plaintiff's case. From a

reading of this instruction the jury could have believed that the Defendant enjoyed a special favor of the law and had the right of way no matter how fast he was traveling.

Contrary to Defendant's assertion, instruction number 10 failed to remedy this error, as it made no mention of unlawful speed and the forfeiture of right of way. Jury instruction 10 stated:

In regard to the Defendant Tim VanMarter's claim that Joyce Hawthorne was contributorily negligent, the Court instructs the jury that Joyce Hawthorne had a right to assume that other drivers on Chaparral Drive, including the Defendant, would use ordinary care until she realized, or in the exercise of ordinary care should have realized that the Defendant was not doing so. App. 337.

At best, the combination of these two jury instructions was conflicting and inconsistent.

"[W]here the instructions are conflicting and inconsistent the jury will be as likely to follow the bad as the good, and it cannot be known which they have followed. Hence, the giving of such conflicting and inconsistent instructions is error, unless it plainly appears from the record that the jury could not have been misled by them." *Redd v. Ingram*, 207 Va. 939, 942, 154 S.E.2d 149, 152 (1967)(internal citations omitted).

A substantial error as this one "is presumed to be prejudicial unless it plainly appears that it could not have affected the result." *Spence v. Miller*, 197 Va. 477, 482, 90 S.E.2d 131, 135 (1955). It is impossible to say that

submitting this incorrect statement of the law "could not have affected the result" because it is impossible to determine on what issue the jury returned a verdict for the Defendant. "If an issue is erroneously submitted to a jury, [the Virginia Supreme Court] presume[s] that the jury decided the case upon that issue." *Clohessy v. Weiler*, 250 Va. 249, 254, 462 S.E.2d 94, 97 (1995). Therefore, a new trial is necessary.

**III. The trial court erred in granting jury instruction number three as it was an incorrect statement of law. The instruction failed to contain any reference to the requirement of emergency lights and siren when exceeding the speed limit.**

Whether the content of a jury instruction is an accurate statement of law is reviewed de novo. *Alcoy v. Valley Nursing Homes, Inc.*, 272 Va. 37,41,630 S.E.2d 301,303 (2006) The Plaintiffs objected to jury instruction number three. App. 838-839. Jury instruction number three stated: "The driver of an emergency vehicle may exceed the speed limit provided he is not grossly negligent." App. 330. This instruction, by itself, was a misstatement of the law, and allowed the jurors to conclude that emergency lights and siren **were not** necessary in order for the Defendant to exceed the posted speed limit. This instruction should have contained a provision with regard to the requirement for emergency lights and siren. At

the time of this incident, Virginia Code § 46.2-113 provided, “It shall be unlawful for any person to violate any of the provisions of this title...” This reference was to Title 46.2 of the Virginia Code dealing with motor vehicles, which included Virginia Code §§ 46.2-800 through 46.2-946 on regulation of traffic.

Virginia Code § 46.2-801 states, “The provisions of this chapter applicable to the drivers of vehicles upon the highways shall apply to the drivers of all vehicles regardless of ownership subject to such exceptions as are set forth in this chapter.” **Therefore, the General Assembly has directed that the drivers of police vehicles are subject to all traffic regulations unless a specific exception is made.**

Virginia Code § 46.2-920 included such a specific exception by providing that the operator of a police vehicle may disregard speed limits subject to certain qualifications. Specifically, Virginia Code § 46.2-920 states that:

- A. The driver of any emergency vehicle, when such vehicle is being used in the performance of public services, and when such vehicle is operated under emergency conditions, may, without subjecting himself to criminal prosecution:
  1. Disregard speed limits, while having due regard for safety of persons and property;

- B. The exemptions granted to emergency vehicles by subsection A of this section shall apply only when the operator of such vehicle displays a flashing, blinking or alternating emergency light or lights as provided in 46.2-1022 and 46.2-1023 and sounds a siren, exhaust whistle, or air horn designed to give automatically intermittent signals, as may be reasonably necessary, . . . Nothing in this section shall release the operator of any such vehicle from civil liability for failure to use reasonable care in such operation.

Therefore, in order for the Defendant to lawfully exceed the speed limit, he had to have his emergency lights and siren activated, even if he was in pursuit or attempting to overtake a speeder. Therefore, instruction number three, as proffered by the Defendant, and accepted by the trial court, was an incorrect statement of the law. Plaintiffs objected to this omission but the trial court gave it nonetheless. Although the trial court gave jury instruction number four, which the Plaintiffs offered, the correctness of instruction number four was nullified by the Defendant's instruction number three. Instruction number four stated:

“The driver of a law enforcement vehicle may disregard speed limits, while having due regard for safety of persons and property, only when the operator of such vehicle displays a flashing emergency light or lights, and sounds a siren.

Violation of this law does not, in itself, constitute gross negligence, but you may consider this together with other facts and circumstances in this case in determining whether the Defendant Tim VanMarter was grossly negligent.”

App. 331.

This instruction was contradicted by the aforementioned instruction number three, as instruction number three simply stated that a “driver of an emergency vehicle may exceed the speed limit provided he is not grossly negligent.” Defendant’s instruction number three set out no requirement for the use of emergency sirens and lights, leaving the jurors to conclude that there was no requirement to use emergency lights and siren when speeding, and that the lack of lights and siren were not to be considered in determining whether the Defendant was grossly negligent.

“[W]here the instructions are conflicting and inconsistent the jury will be as likely to follow the bad as the good, and it cannot be known which they have followed. Hence, the giving of such conflicting and inconsistent instructions is error, unless it plainly appears from the record that the jury could not have been misled by them.” *Redd v. Ingram*, 207 Va. 939, 942, 154 S.E.2d 149, 152 (1967)(internal citations omitted).

Error is presumed to be prejudicial unless it plainly appears that it could not have affected the result. *Spence v. Miller*, 197 Va. 477, 482, 90 S.E.2d 131, 135 (1955)(internal citations omitted). “There is no presumption that error is harmless.” *Dandridge v. Marshall*, 267 Va. 591, 597, 594 S.E.2d 578, 582 (2004)(internal citation omitted). As jury instruction three is an incorrect statement of law and is inconsistent and conflicting with jury

instruction number four, the error was prejudicial and a new trial is necessary.

Defendant asserts that this instruction is not error because a police officer subject to immunity has no obligation or requirement to obey the law. That was not the evidence adduced in this case, nor is it the law in Virginia. As set forth previously, the traffic regulations contained in chapter 46.2 apply to all vehicles on the road, regardless of ownership, unless a specific exception is made.

This fact has also been confirmed in several Virginia Supreme Court cases. In *Virginia Transit Co. v. Tidd*, 194 Va. 418, 73 S.E.2d 405 (1952), this Court said that in Virginia, drivers of police cars ... are subject to all traffic regulations unless a specific exemption is made. *Virginia Transit Co. v. Tidd*, 194 Va. at 422, 73 S.E.2d at 408. Likewise, in *White v. John Doe*, 207 Va. 276, 148 S.E.2d 797 (1966) this Court concluded that all statutory duties imposed by motor vehicle statutes applied to the police officer unless some statutory provision specifically exempted him from the duties.

Va. Code. § 46.2-920 allows an exception for speeding, but only when the officer displays an emergency light and siren. Instruction number three, (a model jury instruction) offered by the Defendant and accepted by

the trial court, made no reference to the use of lights and siren and was meant to cover only those situations where the Defendant law enforcement officer was obeying Va. Code. § 46.2-920 and using his emergency lights and siren for one of the covered exceptions. Only if the Defendant complied with the statute, was he given the right to speed, with the only guide being that he could not be grossly negligent.

However, contrary to that requirement, the Defendant admitted that he failed to display his emergency lights or use his siren. App. 619-624. Therefore, he did not fall under one of the statutory exceptions of Va. Code § 46.2-920 and he was not allowed to speed. As stated in the Plaintiffs' briefs, there was ample evidence from which a jury could conclude that the Defendant was exceeding the speed limit. Allowing instruction number three, when the Defendant admitted that he failed to display his emergency lights or use his siren was error. Such an instruction allowed the jury to conclude that the Defendant could speed at will, without the use of his emergency lights or siren. Such an instruction cannot be said to be harmless.

As instruction number three is an incorrect and misleading statement of the law, and since instruction number three and four are conflicting and

inconsistent, with said error being prejudicial, a new trial is necessary.

Therefore, Plaintiff respectfully requests that this Court grant him a new trial.

**IV. The trial judge erred in granting the Defendant's transfer of venue motion and moving the case to Roanoke County.**

**A. The City of Roanoke was the proper venue as the Defendant provided no evidence that he had moved.**

This case was originally filed by the Plaintiffs in the City of Roanoke on October 26, 2005. App. 12-22. The venue statutes permit a plaintiff the choice of where to prosecute his case. *Norfolk & W. Ry. v. Williams*, 239 Va. 390, 391, 389 S.E.2d 714, 715 (1990). A rebuttable "presumption of correctness attaches to a Plaintiff's choice of forum." *Id.* at 394, 389 S.E.2d at 717. The party objecting to venue has the burden of establishing that the chosen venue is improper. *Meyer v. Brown*, 256 Va. 53, 57, 500 S.E.2d 807, 809 (1998).

By the Defendant's own admission, he resided at the time of the incident (June 10, 2005) at the Roanoke City address on 3332 Springtree Drive. App. 444. The 3332 Springtree Drive location (hereinafter referred to as "3332 location") is located in the City of Roanoke. App. 394. The Defendant claimed that he lived at that location until mid July 2005, prior to being served with this lawsuit. App. 444-445. The sole evidence in support

of this allegation presented by the Defendant was his own testimony that he had moved to Roanoke County at the time he was served. App. 445.

Contrary to this testimony, the Defendant admitted that he continued to receive mail at the 3332 location, continued to store personal items at that 3332 location (as of the date of filing of this suit), continued to store clothes and furniture at the 3332 location and that he still had contact with the 3332 location and the occupants up to the date of December 15, 2005, venue hearing. App. 447-448; 451.

The Defendant admitted he was registered to vote with the registrar at the 3332 location, that he still had a key to the 3332 location, his loan notices on his truck were mailed to the 3332 location, his truck was still registered at the 3332 location, and his paycheck still had the address on it of the 3332 location. App. 450-454.

The Defendant admitted that his license still had his prior Roanoke City address of 4748 Showalter Road, and that he did not have that changed until after the filing of this lawsuit. App. 451-452. He admitted that 4748 Showalter Road is located in the City of Roanoke. App. 452. The Defendant, as a police officer, was required to be aware of Va. Code §46.2-324 which requires notice to the Division of Motor Vehicles within 30

days of a change of address. The Defendant admitted that his personal checking account still had a Roanoke City address of 4748 Showalter Road. App. 452-453.

**Most importantly, the Defendant did not turn in a change of address notification to his employer until October 31, 2005, five days after he was served with this lawsuit. Even more important was that the effective date of the new address, as written by the Defendant, was not until October 31, 2005. App. 49.**

Defendant VanMarter had the burden of proving that Plaintiff's chosen venue was improper. His conduct in failing to call his Roanoke County landlord or co-tenant to establish the fact and date of his alleged County residency is, in law, an admission by conduct that, conceded that the testimony would have been adverse to his position. In general, a "party's conduct, 'so far as it indicates his own belief in the weakness of his cause,' is admissible as an admission against interest," subject of course to any explanations he may be able to make removing that significance from his conduct. *Gray v. Graham* 231 Va. 1, 9-10, 341 S.E.2d 153, 158 (1986), quoting *Neece v. Neece*, 104 Va. 343, 348, 51 S.E. 739,740 (1905). Similarly, VanMarter's failure to produce any document (e.g., lease

or deed, or affidavit from a landlord) related to the alleged establishment of his Roanoke County residency is an admission by conduct that, if documents 'known' to exist had been produced, they would have been adverse to VanMarter's position. *Id.*

Since VanMarter had the burden of proof as to 'improper' venue, these admissions by conduct and/or inference of unfavorable content in documents one traditionally possesses would force a reasonable person to conclude that VanMarter did reside at the City Location and not in the County at the time these lawsuits were filed.

The Defendant's credibility was further put into serious question by several glaring inconsistencies in his testimony throughout this case, indicating that no weight should have been accorded his testimony. For instance, the Defendant was asked in the venue hearing, in reference to the 3332 Springtree, Roanoke City residence, the following exchange:

- Q. So you had a key to that residence?  
A. Her mom was usually there babysitting the child.  
Q. The question was did you have a key?  
A. Yes, sir, I did.  
Q. **Did you still as of this day maintain a key to 3332 Springtree Drive?**  
A. **No sir.**  
Q. **When did you turn that key over?**  
A. **I don't know the exact date.**  
App. 451.

This **sworn** testimony of the Defendant was contradicted by Melissa D. G. Alderman, the owner of 3332 Springtree Drive, and the former girlfriend of the Defendant, with whom he still remained friends as of the date of the venue hearing. She was asked the following exchange:

- Q. Do you know Timothy VanMarter?  
A. I do.  
Q. I guess you previously used to have a relationship with him?  
A. We did.  
Q. **Does he still maintain a key to 3332 Springtree Drive?**  
A. **Yes, he does.**  
Q. **You remain friends with Mr. Vanmarter?**  
A. **I do.**  
App. 465

Another example of the Defendant's inability to tell the truth came forward in the hearing of December 15, 2005. The Defendant was asked in the venue hearing, with regard to secondary employment, the following exchange:

- Q. Did you have a part-time job or other employment as of October 26, 2005?  
A. No, sir.  
App. 450.

This answer was not truthful. After the hearing, but before the trial court's decision, the plaintiffs confirmed that the Defendant also worked as a security guard at Kroger. App. 57-60. The Defendant could not claim that

he innocently thought this job qualified as police work, because he filled out a “Request for Secondary Employment” form that he had to have approved by his supervisor. App. 57. Clearly, the defendant deliberately concealed this facts. This is likely due to the fact that the Kroger location straddles Roanoke City and Roanoke County.

The fact that the record of this case supports that the defendant misrepresented material facts to the trial court, under oath, should have been taken into account when evaluating the defendant’s credibility. In fact, such false testimony gave the trial court, and gives this Court, reasonable grounds to totally disregard the defendant’s self serving assertions.

Defense counsel makes much of the fact that Ms. Alderman was called by plaintiffs’ counsel at the venue hearing and that the plaintiffs are bound by her testimony. Ms. Alderman was called as an adverse witness. She was the defendant’s former girlfriend and admitted that they remained friends at the time of the hearing. App. 465. Some of her testimony as seen above actually impeached the defendant, while her vague statement that the defendant had moved “sometime in the summer” was contradicted by evidence already set forth in this brief. Testimony of an adverse witness

presented during the plaintiffs' case only becomes binding upon the plaintiff to the extent it is not contradicted by his other evidence. See *Horn v. Milgrim*, 226 Va. 133, 139, 306 S.E. 2d 893, 896 (1983). Clearly, her vague testimony was contradicted by plaintiff's other evidence.

The presumption of correctness of the Plaintiffs' choice of forum, coupled with the aforementioned evidence, points to the inescapable conclusion that this case should have been retained and tried in the City of Roanoke as the defendant did not meet his burden of showing that the Plaintiffs' choice of venue was improper. The Defendant failed to provide any evidence confirming that he had moved, and in fact his actions confirmed that he did not. Thus, the trial court erred in granting the defendant's change of venue Motion, requiring that the jury verdict be stricken and the case be returned to the City of Roanoke for a new trial. *Meyer v. Brown*, 256 Va. 53, 57, 500 S.E.2d 807, 810 (1998).

**B. The Defendant conducted substantial business in the City of Roanoke.**

Alternatively, Defendant VanMarter's testimony indicated that he conducted substantial business activity in the City of Roanoke. As of the filing of the suit, Defendant VanMarter admitted that he still had personal items in storage in the City of Roanoke and that he would still come by the

city location to retrieve “stuff” he had stored there. App. 447-448; 451. As stated previously, the Defendant was still getting his mail and bills at the Roanoke City address as well. App. 447. The Defendant admitted that his travel to work took him through Roanoke City<sup>2</sup>, when he worked he would get meals at one of two places, one of which was located in the City of Roanoke, that his dentist was located in the City of Roanoke, and that he came to Roanoke City to do shopping. App. 454-461. Defendant VanMarter admitted that he shopped at Valley View Mall, and saw movies there as well. App. 459. These are all located in the City of Roanoke. The Defendant also admitted that a couple times a month he would travel to the City of Roanoke on Market Street to restaurants.

The Defendant admitted that he was taking college courses at Virginia Western which was located in the City of Roanoke. App. 460. Obviously this required travel into the City of Roanoke for classes; payment to a City business for course work and then sitting in the City of Roanoke for several hours while attending these classes. App. 397.

Moreover, VanMarter’s ‘job requirements’ for the Roanoke County

---

<sup>2</sup>As Roanoke County forms a crescent almost entirely surrounding Roanoke City, it is difficult to imagine that defendant’s patrols, while on duty as a police officer, did not regularly take him through Roanoke City.

Police Department obligated him to perform police functions in the city of Roanoke pursuant to the Roanoke City/Roanoke County reciprocal law enforcement agreement just as if he were “working a tour of duty in [Roanoke County].” Roanoke City Ordinance No. 32843-030496 (1996), adopting a cooperative agreement between Roanoke County and Roanoke City. That is, by virtue of his employment, VanMarter had “substantial business activity” in the City because Roanoke City and Roanoke County police officers were authorized to, and did, participate in law enforcement functions in each other’s jurisdictions by local enactments. Agreement, effective 04/01/1999, between Roanoke County and Roanoke City, referenced in Roanoke City Ordinance No. 32843-030496 (1996). When an extraterritorial arrest was made by a County officer in Roanoke City, that County officer was responsible for personally filing paperwork in Roanoke City in the Police Department and Roanoke City General District Court, as well as appearing in court in Roanoke City. *Id.* Accordingly, VanMarter could not reasonably have expected to perform his law enforcement functions for Roanoke County without going into Roanoke City. Clearly, VanMarter “regularly conducts substantial business activity” in the City of Roanoke, making the City a proper venue.

Effective July 1, 2004, the Va. Code §8.01-262(3) was amended. The statute previously allowed venue “[w]herein the Defendant regularly conducts affairs or business activity,” and afterward the amendment reads “[w]herein the Defendant regularly conducts substantial business activity...”. This Plaintiff can find no cases interpreting or applying this change, but argues that the Defendant’s numerous contacts and transactions in the City of Roanoke satisfy this requirement.

The Virginia Supreme Court has said that “regular action is more frequent than casual or occasional action.” *Meyer v. Brown*, 256 Va. 53, 57, 500 S.E.2d 807, 810 (1998). In *Meyer*, the court held that seven visits per year by the Defendant to an insurance brokerage firm and three appearances per year at business seminars did not qualify as “regular” activity. *Id.* at 57-58.

In contrast to those minimal visits, here the Defendant conducted substantial business within the City of Roanoke. He continued to receive mail at the city address. App. 446-447. The Defendant’s truck was still registered with the City of Roanoke, so he was paying personal property taxes on that. App. 448. The Defendant still kept personal belongings in the City of Roanoke and admitted to still traveling there to retrieve the

items and/or visit with the residents. App. 447-448; 451. The Defendant admitted to traveling through the City of Roanoke on his way to work. App. 455. The Defendant admitted any time he worked he only ate at one of two places, one of which was in the City of Roanoke. App. 459. The Defendant admitted that several times a month, he was shopping, seeing movies or eating at restaurants all located in the City of Roanoke. App. 459-460. Further, the Defendant was enrolled at Virginia Western, located in the City of Roanoke, taking college courses. App. 460-461. Obviously, these classes brought him to/through the City of Roanoke and were presumably an effort to increase his marketability with the police department or in furtherance of finding other employment. These facts clearly support that substantial business activity was conducted within the City of Roanoke by the Defendant, and thus supporting that venue was proper in the City of Roanoke. The trial judge erred in transferring the case to Roanoke County. Therefore, Plaintiff respectfully requests that this Court grant him a new trial.

**V. The trial court erred in refusing to strike five jurors for cause, and/or refusing to allow individual voir dire or additional voir dire.**

“The right to a fair and impartial trial in a civil case is as fundamental

as it is in a criminal case. The civil courts constantly strive to protect this right. It lies as the very basis of organized society and confidence in our judicial system.” *Temple v. Moses*, 175 Va. 320, 336, 8 S.E.2d 262, 26 (1940). “The Constitutional and statutory guarantee of an impartial jury is no mere ‘legal technicality,’ but a substantive right scrupulously to be observed in the day-to day administration of justice.” *Martin v. Commonwealth*, 221 Va. 436, 445, 271 S.E.2d 123, 129 (1980).

In voir dire, juror Mrs. Draper stated that her daughter was a police officer for Virginia Tech and her son in law was a police officer for the City of Blacksburg. App. 540. David, the son in law, had been with Blacksburg Police Department for 20 years and Christy, her daughter, had been with the Virginia Tech Police Department for about 4 years. App. 540.

Juror Ms. Harris stated that she had two nephews who were both out-of-state police officers and admitted that she knew the Roanoke County chief of police, as she also used to work with his wife. App. 541. Ms. Harris admitted that she saw two police officers at her church every Sunday. App. 564.

When asked if it was going to bother her to sit on this jury, she said “I don’t know. I know a lot of policeman. Maybe I shouldn’t.” App. 564.

When Plaintiffs' counsel asked about this, she said, "I hadn't thought about them; I see them every Sunday at church." App. 564. When asked, "you think that the fact that you know so many police officers it would be a little difficult to sit on this case" she replied, "I think it might." App. 564-565. She further admitted that she came into contact with them "every week at church. I haven't thought about them until now." App. 565. When asked "if the evidence came out in favor of the Plaintiff and you were having to render a verdict against the police officer, would that cause you some concern because you would have to be facing all of these police officers on a weekly basis as you said?" App. 565. Ms. Harris answered, "I think it would. I hadn't thought about that." App. 565.

When the rest of the jury was asked if anybody else felt the same way as Ms. Harris, if anyone was leaning a little bit toward the way Ms. Harris felt, Ms. Draper said "I probably am." App. 565. When asked to tell more about that, Ms. Draper said, "I don't really know. Like I said, my son in law, my daughter— I know less about what happened at Virginia Tech than anybody here, other than what I read in the paper. But I do realize they have a hard job and — I don't know." App. 565-566. She went on to say, "I don't like to do anything wrong." App. 566.

When the Plaintiff explained the Plaintiff's burden of proof, and asked if the jurors felt that was unfair, Ms. Harris stated that she "wish[ed] it were more, but if that is the law." App. 583. Ms. Draper, when asked if she had a little bit of a problem with that, she responded, "probably". App. 583. Ms. Draper went on to explain that she thought "a person [was] innocent until proven guilty. If they are going to be proven guilty it has to be 100 percent, I would have to feel it in my mind. If it was malicious or whatever." App. 583-584.

Ms. Blankenship said that "if [the Defendant] was doing his job, I would have a problem with finding him personally liable." App. 585. Mrs. Harris and Ms. Bennett then said that they also agreed with Ms. Blankenship. App. 585-586.

The jurors were asked if they knew either the Plaintiff or Defense counsel. Mr. Tuckwiller stated that his sister, Chris [sic] Counts, "works for one of you, but I don't remember which one." App. 531. Mr. Tuckwiller stated that he did not know what she did for the firm, and Defense counsel stated "neither do I." App. 531. Defense counsel volunteered that she worked for his firm<sup>3</sup>. App. 531.

---

<sup>3</sup> After the trial, Plaintiff's counsel reviewed his correspondence file for this case. It contained fourteen letters signed or typed by Ms. Counts.

Plaintiffs' counsel moved to strike for cause Draper, Harris, Tuckwiller, Blankenship, and Hodges. App. 594-599. These strikes were denied by the trial court. App. 594-599. Plaintiffs' counsel then moved for individual voir dire outside of the presence of the rest of the jury, which was denied. App. 597. Plaintiffs then inquired if the trial court was denying his request to continue voir dire, which the trial court affirmed. App. 598. Plaintiff's counsel was then required to exercise his peremptory challenges to remove two of those jurors. App. 392-393.

Where voir dire examination discloses that the juror is leaning one way or the other and will not act with entire impartiality, the juror is biased and must be removed. *Winn v. Commonwealth*, 160 Va. 918, 924, 168 S.E.2d 351, 353 (1933) "If there be reasonable doubt whether the juror [is impartial and free from prejudice], that doubt is sufficient to insure his exclusion. For . . . it is not only important that justice should be impartially administered, but it should also flow through channels as free from suspicion as possible." *Barker v. Commonwealth*, 230 Va. 370, 374-375,

---

App. 378-391. This includes the Defendant's discovery responses. Clearly, she had been intimately involved in this case. Defense counsel's statement "neither do I" incorrectly suggested that Ms. Counts had nothing to do with him or this case.

337 S.E.2d 729, 733 (1985).

It is the duty of the trial court, through the legal machinery provided for that purpose, to procure an impartial jury to try every case.” *Id.* When a juror has expressed a disqualifying view during voir dire, the clarification or absence of disqualification must emanate from the juror in order to establish that the juror is impartial and is free of bias. *Martin v.*

*Commonwealth*, 221 Va. 436, 444-45, 271 S.E.2d 123, 129 (1980).

“A [party] is entitled to a trial by jurors who stand indifferent in the cause. Even though circuit courts have wide latitude in the seating of jurors, **courts must be mindful that if any reasonable doubt exists regarding whether a juror stands indifferent in the cause, that doubt must be resolved in favor of the [party]. A juror’s ability to give a [party] a fair and impartial trial must not be left to inference or doubt.**” *Green v. Commonwealth*, 262 Va. 105, 117-118, 546 S.E.2d 446, 452 (2001). (emphasis added).

The Supreme Court of Virginia has explained reasonable doubt in the criminal context to “exclude every reasonable hypothesis except that of guilt.” *Allen v. Commonwealth*, 211 Va. 805, 808, 180 S.E.2d 513, 515 (1971). Clearly, based on the totality of the comments made by the aforementioned jurors, a reasonable doubt existed as to whether any one of these jurors could stand indifferent in the cause. As there was no clarifying comment adduced by the Defendant or the trial court, reasonable

doubt existed as to these jurors and they should have been stricken for cause.

While defense counsel makes much of the length of voir dire, there is no time limit on voir dire and in many cases throughout the Commonwealth, voir dire has lasted for many days. This trial was about the wrongful death of a child's mother and certainly that is no less important than a person's freedom. Further, the responses of the prospective jurors came late into plaintiffs counsel's voir dire, as would be expected. Defense counsel is unable to cite this Court to a single case asserting that the lateness in voir dire of a potential juror's responses are to be accorded any less weight than his or her responses initially. In fact, common sense would dictate that the prospective juror's answers later in voir dire would be the most honest and candid answers, given that the juror is more relaxed and familiar with the process and has developed a dialog with the attorneys and Court.

Lastly, defense counsel makes much of the fact that plaintiffs counsel did not ask the jurors whether "their feelings and opinions would inhibit their ability to render a fair and impartial verdict", after plaintiffs' counsel raised reasonable doubt as to the impartiality of the jurors and/or

that they were leaning one way. Having raised reasonable doubt, it was the obligation of defense counsel or the trial judge to elicit rehabilitative evidence. Neither the trial judge nor defense counsel even attempted this. Therefore, defense counsel should not be allowed to profit from this omission. Secondly, as seen in the transcript, once the trial court denied Plaintiffs' challenges, Plaintiffs' counsel requested additional voir dire but was denied. App. 597-598. Plaintiffs' counsel was therefore unable to ask any additional questions. The Plaintiffs should not be penalized by the trial court's error.

When a juror has expressed a disqualifying view during voir dire, the clarification or absence of disqualification must emanate from the juror in order to establish that the juror is impartial and is free of bias. *Martin v. Commonwealth*, 221 Va. 436, 444-445, 271 S.E.2d 123,128-129 (1980) (emphasis added). Since no "clarification or absence of disqualification" emanated from these jurors, the presumption of these jurors impartiality and/or bias was not overcome. Accordingly, these jurors should have been struck for cause.

The Plaintiffs exercised their peremptory challenges to remove jurors Ms. Harris, Ms. Downs and Ms Draper. App. 392-393. However, the

removal by peremptory challenge is irrelevant to [the Virginia Supreme Court's] decision if the [trial] court erred in refusing to strike him for cause. *L.E. Briley v. Commonwealth*, 222 Va. 180, 181 n. 1, 279 S.E.2d 151, 152 n.1 (1981). “[I]t is prejudicial error . . . to force a [party] to use the peremptory strike . . . to exclude a venireman who is not free from exception.” *Justus v. Commonwealth*, 220 Va. 971, 975, 266 S.E.2d 87, 90 (1980). The trial court erred in failing to remove any one of these five (5) jurors for cause. Therefore, Plaintiff respectfully requests this Court to grant him a new trial.

#### Conclusion

On the basis of these arguments and facts presented by the record, the appellant respectfully requests that this Court find that the trial court erred in refusing to permit the two witnesses from testifying at trial and in making the factual findings regarding the two witnesses testimony; in transferring the trial of this case to Roanoke County; in failing to grant the Plaintiff's challenges for cause of the foregoing jurors and in granting the use of jury instructions three and eleven which misstate the law; and for the Court to reverse the jury verdict and remand the case to the trial court in the City of Roanoke for a new trial.

Respectfully Submitted,

KEVIN GUTHRIE

By   
(Counsel)

Kevin W. Ryan, Esq.  
V.S.B. # 21955  
Michie Hamlett Lowry  
Rasmussen & Tweel PLLC  
500 Court Square, Suite 300  
Post Office Box 298  
Charlottesville, VA 22902  
(434) 951-7200 (Telephone)  
(434) 951-7218 (Facsimile)  
Email: [kryan@mhlrt.com](mailto:kryan@mhlrt.com)

Paul R. Thomson, Esq.  
V.S.B. #38765  
Michie Hamlett Lowry  
Rasmussen & Tweel PLLC  
120 Day Ave. SW  
Roanoke, VA 24016  
(540) 725-5192 (Telephone)  
(540) 725-5199 (Facsimile)  
Email: [pthomson@mhlrt.com](mailto:pthomson@mhlrt.com)

### **CERTIFICATE**

I hereby certify that on December 16, 2009, Rule 5:26(d) of the Supreme Court of Virginia has been complied with and pursuant to the Rule, fifteen (15) copies of this Opening Brief of Appellant have been filed with the Clerk of the Supreme Court of Virginia, one electronic copy was filed in PDF format by disk and one copy each has been mailed postage prepaid to:

Joseph Anthony  
Liberty Trust Building, Suite 700,  
100 South Jefferson Street,  
Roanoke, Virginia 24011

*Pro se, Co-Administrators of the Estate of Joyce Hawthorne,  
Deceased*

Paxton Hawthorne  
7533 Fernway Dr.  
Roanoke, VA 24018

*Pro se, Co-Administrators of the Estate of Joyce Hawthorne,  
Deceased*

On the same day, three copies have been mailed to:

Jim Guynn,  
Guynn Memmer & Dillion, P.C.  
415 South College Avenue  
Salem, VA 24153

*Counsel for Appellee*



Paul R. Thomson, III, Esq.