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IN THE

Supreme Court of Virginia

RECORD NO. 181533

Joseph S. Corriveau, by his mother and next friend,
Tracey Ballagh,

Appellant,

v.

State Farm Mutual Automobile Insurance Company, *et al.*,

Appellees.

OPENING BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

I. The Circuit Court Erred by Ruling that State Farm's Motion for Summary Judgment Should be Granted and Entering Judgment on Behalf of State Farm. (Preserved at Joint Appendix "JA" 91, 100-110, 114-115, 125-126, 30-32, 45-48.)

A. The Circuit Court Erred in Ruling that the Injuries to Joseph Corriveau Did Not Arise Out of the "Ownership Maintenance or Use" of the Bedford County School Bus. (Preserved at *Id*.)

B. The Circuit Court Erred in Ruling that Joseph Corriveau's Injuries Did Not Arise Out of the Bedford County School Bus being used as a School Bus. (Preserved at *Id*.)

STATEMENT OF THE CASE

This is a case about whether an automobile policy issued by State Farm to Joseph Corriveau's ("Joseph") parents covering their personal vehicles provides uninsured/underinsured motorist's coverage for injuries Joseph received while riding on a Bedford County school bus. In a separate lawsuit, Joseph alleges a Bedford County school bus driver ("Holland") and school bus aide ("Evans") repeatedly assaulted another child in Joseph's plain view and also threatened and struck Joseph. This happened while Joseph, an autistic child of 10, was strapped into his seat on a Bedford County school bus on his way to school. (JA 59-62.)

In this declaratory judgment action, Joseph seeks UM/UIM coverage for his claims through his parents' State Farm policy. State Farm denied

coverage on several grounds, including (1) delayed notice of the claim and (2) the policy only covers an accident, not an intentional tort. (JA 18-20.)

State Farm and Joseph stipulated to the facts which formed the basis for the declaratory judgment action. Joseph filed a motion for summary judgment asking the trial court to declare he had coverage through the State Farm policy. State Farm filed a motion for summary judgment asking the trial court to deny coverage. (JA 55-89, 22-24, 50-51.)

Through the course of the case, State Farm and Joseph refined their arguments. State Farm abandoned its claim that late notice barred coverage. (JA 34.) State Farm, Joseph and the Circuit Court all agreed that an intentional act by Holland or Evans did not prevent coverage. (JA 125.) At the trial court, State Farm and Joseph argued whether Joseph's injuries arose out of the "use" of the Bedford County school bus; more specifically, whether Joseph's injuries arose out of the use of the vehicle as a vehicle. (JA 96-127.)

The Circuit Court's Opinion

The Circuit Court ruled that Joseph's injuries did not arise out of the use of the vehicle (school bus) as a vehicle (school bus). The Circuit Court agreed that the intentional acts of Holland and Evans toward Joseph and Timothy Kilpatrick ("Timothy") did not bar coverage. (JA 125.) The Circuit Court held, however, the actions of Holland and Evans, to the extent such actions were intentional torts,

played a role in what coverage State Farm and Joseph's parents expected. (JA 117-119.)

Even though the Circuit Court stated the "restraints may have made it easier to conduct the assault and batteries", the Court concluded the harness strapping Joseph onto his seat did not play an integral part in his injuries. (JA 119-120.) The Circuit Court concluded the assaults could have occurred without the restraints. (JA 120.) As a result, the Circuit Court granted State Farm's motion for summary judgment declaring State Farm did not owe coverage to Joseph and entered judgment for State Farm. (JA 90-91.)

This appeal followed.

STATEMENT OF FACTS

Joseph Corriveau was ten years old in September 2009. On September 23 and 24, Joseph's mother, Tracey Corriveau (now Tracey Ballagh) placed him on Bedford County school bus number 137 for the ride to school. Joseph is autistic. Joseph's disabilities include an inability to speak. Bedford County's school bus driver, Alice Holland and school bus aide, Mary Evans were well aware of Joseph's disability. (JA 59.)

On these two days, Holland and Evans used a special needs harness to strap and secure Joseph into his seat. They also used a special needs harness to strap a similarly afflicted child, Timothy Kilpatrick, into a bus seat directly across from

Joseph. Holland and Evans used these special needs harnesses to facilitate the abuse they carried out on Joseph and Timothy. (JA 59-60.)

Holland and Evans dispensed both physical and verbal abuse on Timothy in plain view of Joseph. This abuse included striking the restrained Timothy with a flyswatter (Evans), multiple slapping of Timothy across the head (Evans and Holland), multiple kicking of Timothy (Evans and Holland), choking Timothy to the point of asphyxiation (Holland), elbowing Timothy (Evans), placing a hand over Timothy's mouth in an aggressive manner (Evans), pushing Timothy's head up against the side of the bus (Evans), spraying a chemical in Timothy's face (Evans) and a conditional death threat toward Timothy (Holland). During these two bus trips, Evans also struck Joseph without cause or provocation on more than one occasion. (JA 60.)

During this time period, State Farm had issued an insurance policy covering the motor vehicles owned by Joseph's parents. This policy contained UM/UIM coverage of $100,000. Joseph's parents are the named insureds. Joseph, as a child and minor resident of his parents' home is also an insured. State Farm's UM/UIM coverage is the primary coverage for Joseph's claim. (JA 55-56, 64.)

Joseph's mother did not learn of the conduct of Holland and Evans through the Bedford County School System. On October 4, 2011, Thomas Kilpatrick filed a lawsuit on behalf of his son in the Lynchburg City Circuit Court against Holland,

Evans and others. Shortly thereafter, Ms. Ballagh saw a TV news segment on Mr. Kilpatrick's lawsuit on the 6 o'clock news. The news segment contained video of Holland and Evans assaulting Timothy Kilpatrick. Ms. Ballagh recognized Joseph and the bus he rode to school, her first notice of Holland's and Evans' actions. State Farm alleges it was first notified of Joseph's claim on September 29, 2015. (JA 55.)

STANDARD OF REVIEW

"This Court interprets the provisions of an insurance contract under *de novo* standard of review." *TravCo Ins. Co. v. Ward*, 284 Va. 547 (2012) (citing *Transcontinental Ins. Co. v. RBMW, Inc*., 262 Va. 502, 510 (2001). Likewise, "[i]ssues of statutory interpretation are pure questions of law" that are reviewed *de novo. Wakole v. Barber*, 283 Va. 488, 495 (2012). Virginia courts "have been consistent in construing the language of [insurance] policies, where there is doubt as to their meaning, in favor of that interpretation which grants coverage, rather than that which withholds it." *PBM Nutritionals, LLC v. Lexington Ins. Co*., 283 Va. 633-34 (2012) [quoting *Copp v. Nationwide Mut. Ins. Co*., 279 Va. 675, 681 (2010)] (further citations omitted).

ARGUMENT & AUTHORITIES

I. The School Bus's Design for the Specific Purpose of Transporting Autistic Children Supplies the Necessary Nexus between Injury and Vehicle. (Relating to Assignment of Error I.A., I.B.)

In determining whether an accident arises from the use of an insured vehicle, "the critical inquiry is whether there was a causal relationship between the incident and the employment of the insured vehicle as a *vehicle*." *Simpson v. Virginia Mun. Liability Pool*, 279 Va. 694, 699 (2010) (emphasis original) [quoting *Slagle v. Hartford Ins. Co*., 267 Va. 629, 636 (2004)]. The actual use of a vehicle as a vehicle is not restricted to its transportation function. *Bratton v. Selective Insurance Company*, 290 Va. 314 (2015). This Court has also held that intentional acts by the tortfeasor, in this case, Holland and Evans, does not bar coverage. *Fireman's Fund Insurance Company v. Sleigh*, 267 Va. 768 (2004).

A. The Bedford County School Bus was Designed for a Specific Purpose. (Relating to AOE I.A., I.B.)

Bedford County used school buses equipped with special safety harnesses to transport its autistic students. A vehicle designed and in use for a specific purpose supplies the necessary connection between injury and vehicle required for coverage. *See State Farm Mutual Automobile Insurance Company v. Rice*, 239 Va. 646 (1990). In *Rice*, two men travelled in a Jeep to a hunting site. The driver accidentally shot his companion with his rifle. This Court found coverage even

though the passenger had already gotten out of and moved away from the vehicle. The Court stated that "the specific enterprise associated with the use of the Jeep was to transport [the two hunters], their rifles, ammunition, and other hunting equipment to the location where they intended to embark upon their hunting expedition". *Rice*, 239 Va. at 649.

Rice provides a clear parallel with the case at bar. The Bedford County school bus transported children with disabilities; Holland and Evans used a special needs harness to strap and secure Joseph. Like the Jeep in *Rice*, the Bedford County school bus was designed for and was being used for a specific enterprise--transporting special needs children to school. Thus, there is a clear causal connection between Joseph's injuries and the use of the school bus as a school bus.

B. Holland's and Evans' Intentional Acts Are No Bar to Coverage. (Relating to AOE I.A., I.B.)

Holland's and Evans' intent is irrelevant to coverage. In *Fireman's Fund*, the City of Alexandria employed plaintiff as a Parking Enforcement Officer. While on duty, she stopped her police vehicle parallel to an illegally parked car. She got out of her vehicle, walked around it and stood between her vehicle and the parked car and started to write a ticket. Before plaintiff could finish writing the ticket, a young woman (Gibson) ran out of a nearby building, got in the parked car, striking plaintiff in the arm with the driver's side door as she got in. Gibson struck

plaintiff twice more with her door, having forgotten her keys and having to go back to get them. At this point Gibson "started yelling" and "jumped out the door and slammed the door up against" plaintiff. Gibson pushed the door really hard, plaintiff turned to move and Gibson then pushed plaintiff where her left side went up against the car. Plaintiff testified that this final blow from Gibson's car drove her back into the side of her police vehicle with such force plaintiff sustained a back injury. Gibson then took off in her vehicle. Plaintiff sought UM coverage for her claim against Gibson from a Fireman's Fund policy issued to plaintiff covering her personal vehicle.

The trial court found coverage and Fireman's Fund appealed. Fireman's Fund, citing *Nationwide Mutual Insurance Co. v. Smelser*, 264 Va. 109 (2002), contended Gibson's use of her uninsured vehicle as a weapon is inconsistent with the concept of use of the vehicle as a vehicle", a prerequisite to coverage.

Plaintiff argued that Gibson's intent was irrelevant; "the true test is whether the uninsured vehicle was being employed in the ordinary manner for which it was designed and constructed rather than in a manner foreign to its designed purpose and whether such employment was casually related to the injury sustained." *Fireman's Fund*, 267 Va. 771. The Virginia Supreme Court agreed with plaintiff. The Court stated,

> . . . it is clear that in Virginia the intent of the uninsured tortfeasor is irrelevant to the question of coverage; rather, the determinative issue

> is the nature of the employment of the uninsured vehicle. When such a vehicle is employed in a manner foreign to its designed purpose, *e.g., Lexie [Lexie v. State Farm Mutual Auto Ins. Co.,* 251 Va. 390 (1996)]; *Travelers Insurance Company v. LeClair*, 250 Va. 368 (1995) (shooting from behind door of stopped car, using it as a shield), there is no coverage under the uninsured motorist provisions because the resulting injury does not arise out of the use of the uninsured vehicle as a vehicle, but instead arises from an employment in a manner contemplated neither by its designers, its manufacturer, nor the parties to the insurance contract. *Fireman's Fund*, 267 Va. 771-772.

Fireman's Fund is controlling on whether Holland's and Evans' conduct bars UM/UM coverage. Holland and Evans made use of the Bedford County school bus in the ordinary manner for which it was designed. Evans used the special needs harness as intended to secure Joseph in his seat for the trip to school. Holland drove the school bus to Joseph's school in accordance with its purpose. State Farm cannot avoid coverage just because Holland's and Evans' actions may have been intentional torts, even criminal.

C. State Farm's Reliance on *Jane Doe* is Misplaced.
(Relating to AOE I.A., I.B)

In the trial court, State Farm relied on *Jane Doe v. State Farm and Fire and Casualty Company*, 878 F. Supp. 862 (E.D. Va. 1995). In *Jane Doe*, a federal district court in the Eastern District of Virginia held that a sexual assault in a stolen vehicle lacked the requisite nexus between the injury and the use of the employed vehicle as a vehicle. In distinguishing *Rice*, the federal district court in *Jane Doe* noted, "the fact that the injured party was taking part in a special use of the vehicle

(hunting) and that the injury resulted from that use, created a sufficient nexus between the accident and the use of the vehicle" to provide coverage. *Jane Doe* at 866.

Authorities from other jurisdictions support finding coverage for Joseph's injuries. In *Roe v. Lawn*, 34 Mass. App. Ct. 726, 615 N.E. 2nd 944 (1993), aff'd 418 Mass. 66, 634 N.E. 2d 117 (1994) the driver of a school bus sexually assaulted a special needs student while driving the student to school. The Massachusetts Appeals Court resolved the central issue of the case--whether the assault by the driver arose out of the "ownership, maintenance or use" of the school bus in favor of the student. The court cited with approval another coverage case involving a school bus driver assaulting a student. *Dotts v. Taressa, J.A.*, 182 W.Va. 586, 390 S.E. 2d 568 (1990).

The federal district court in *Jane Doe* distinguished both of these cases from its decision denying coverage. The court in *Jane Doe* emphasized the "heightened duty of a common carrier towards its passengers and the foreseeable contact between driver and passenger" as well as use of a vehicle designed for a particular task as key factors driving coverage. *Jane Doe*, 878 F. Supp. at 866-868. The facts show the school bus was designed for a specific purpose and interaction between Holland, Evans and the students was not only anticipated, but required. Thus, State Farm owes UM/UIM coverage to Joseph.

D. The School Bus' Safety Harnesses Played an Integral Role. (Relating to AOE I.A., I.B.)

The safety harnesses played a critical part in the injuries inflicted on Joseph. The Circuit Court stated that Joseph's injuries could have occurred even without the harness securing Joseph. (JA 120.) Maybe so. But that is not what happened. The injuries occurred while Joseph was strapped in. And being strapped in played a critical role. Being strapped in made Joseph an easier target. Being strapped in made it more difficult for Joseph to defend himself. And being strapped in compelled Joseph to witness the attacks on Timothy across the aisle who was also secured to his seat. Even the Circuit Court admitted the restraints may have made the attacks on Joseph easier. (JA 119.) Carrying autistic children to school secure in their seats supplies the causal connection between Joseph's injuries and use of the school bus as a school bus.

Holland and Evans used other implements, in addition to the special needs harnesses, in the assaults on Joseph and his seat-mate, Timothy. These included a flyswatter and a spray can. These items, however, do not diminish the importance of the special needs harnesses to the attacks on the two autistic children.

An analogy demonstrates the integral role the harnesses played. Assume a man attacks another man with the help of a companion. In this attack, the companion holds the victim while the other man strikes him repeatedly with his

fists. The companion serves as the special needs harness, holding the victim in place while the other man carries out the assault. Like the companion holding the victim, the special needs harnesses are an integral part of the attack. In no way is the harness (or the companion) incidental to the assault. Both play a critical role. This supplies the nexus between vehicle and injuries. Thus, State Farm owes UM/UIM coverage to Joseph.

CONCLUSION

Joseph Corriveau asks for the judgment of the Circuit Court below be reversed and this case remanded for further proceedings consistent with this Court's opinion. In the alternative, Joseph Corriveau asks this Court to rule, as a matter of law, that State Farm owes Joseph Corriveau coverage for his injuries and judgment be entered in favor of Joseph Corriveau.

Respectfully submitted,

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by his mother and next friend
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By: *<u>/s/William B. Hopkins, Jr.</u>*
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CERTIFICATE

The undersigned counsel for Appellant hereby certifies as follows:

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3. On July 17, 2019, under Rule 5:26 of the Rules of the Supreme Court of Virginia, the correct number of copies of this Opening Brief of Appellant have been hand-filed with the Clerk of the Supreme Court of Virginia, and true copies have been emailed to Appellees' counsel.

4. The Opening Brief of Appellant is under the 50 page limit and is otherwise in compliance with Rule 26 of the Rules of the Supreme Court of Virginia.

*/s/ William B. Hopkins, Jr.*
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