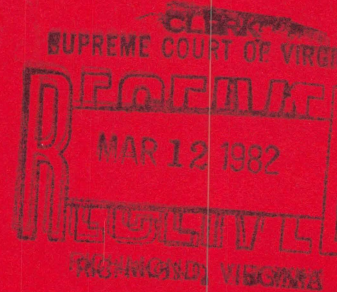


226 Va 475



IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

MICHAEL DeCHENE,
Appellant,

v.

GERALD SMALLWOOD,
Appellee.

RECORD NO. 811210

APPENDIX TO THE BRIEF
FROM THE CIRCUIT COURT OF
FAIRFAX COUNTY

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MOTION FOR JUDGMENT

COMES NOW the Plaintiff, GERALD SMALLWOOD, By Counsel, and moves this Honorable Court for judgment against the Defendant as more particularly set forth below, and in support thereof respectfully states as follows:

COUNT I

FALSE ARREST AND MALICIOUS PROSECUTION

1. Defendant, Michael DeChene, is and was at all times material hereto a Police Officer in employ of Fairfax County Police Department.

2. On or about March 29, 1979, Plaintiff, Gerald Smallwood, while driving his 1978 Plymouth Horizon Sedan, was involved in a minor automobile accident in Fairfax County.

3. As a result of the accident, Defendant, pursuant to his duties as a Fairfax County Police Officer, came to the scene of the accident.

4. The Defendant, after having inspected the vehicles involved, summoned to the scene Mr. Dallas Lunceford, a representative of Beltway Mobil, Inc.

5. Mr. Lunceford arrived on the scene driving a tow truck and pursuant to the orders of the Defendant, and over the Plaintiff's objections, attached the Plaintiff's car to his tow truck and raised the rear of Plaintiff's car while the other car involved in the accident was driven away from Mr. Smallwood's car. Mr. Smallwood's car was then lowered to the ground and returned to Mr. Smallwood's possession,

custody, and control.

6. Mr. Lunceford then demanded payment of TWENTY DOLLARS (\$20.00) from Mr. Smallwood, which payment Mr. Smallwood refused to make.

7. After said refusal, the Defendant [sic], Mr. Lunceford, and the owner of the other automobile repaired to a nearby parking lot to discuss the accident, where, after Mr. Smallwood again refused to pay Mr. Lunceford the amount of \$20.00, the Defendant was summoned to the scene and arrested Mr. Smallwood for an alleged violation of Virginia Code § 18.2-189.

8. During the course of this arrest, Mr. Smallwood was searched and handcuffed in public and held at the Fairfax County Adult Detention Center.

9. The said arrest was made unlawfully, maliciously, and without probable cause.

10. Following the said arrest, the Defendant maliciously and without probable cause, obtained a warrant charging Mr. Smallwood with the said offense, and appeared as a witness against him at trial.

11. On May 18, 1979, Mr. Smallwood was tried in the General District Court of Fairfax County on the charge stemming from the said arrest, and found not guilty.

12. As a result of the arrest and prosecution, Mr. Smallwood has suffered open public humiliation and embarrassment, damage to his reputation, loss of employment opportunities, financial losses and mental anguish, and has

incurred substantial legal expenses.

WHEREFORE, your Plaintiff prays that judgment be awarded in his favor against the said Michael DeChene in the amount of FIFTY THOUSAND DOLLARS (\$50,000.00), actual damages, and TWO HUNDRED FIFTY THOUSAND DOLLARS (\$250,000.00), punitive damages, together with his costs expended herein.

COUNT II

ASSAULT AND BATTERY

1. All allegations of Count I above are hereby incorporated by reference herein.

2. During the course of the said unlawful arrest, the Defendant assaulted and battered the Plaintiff by unlawfully searching, handcuffing, and handling his person.

3. The Defendant adjusted the said handcuffs unnecessarily tightly, causing painful injuries to the Plaintiff's wrists.

4. All of said actions were done unlawfully and maliciously.

WHEREFORE, your Plaintiff prays judgment in the amount of TEN THOUSAND DOLLARS (\$10,000.00) actual damages and ONE HUNDRED THOUSAND DOLLARS (\$100,000.00) punitive damages, together with his costs expended herein.

COUNT III

CONVERSION

1. All allegations of Count I above are hereby incorporated by reference herein.

2. When Mr. Lunceford raised the rear of Mr. Smallwood's car, he damaged the said car.

3. Both Mr. Lunceford and the Defendant knew before Mr. Lunceford raised the back of Mr. Smallwood's car that such action would damage it.

4. When the Defendant arrested Mr. Smallwood, the Defendant directed Mr. Lunceford to retake possession of Mr. Smallwood's car.

5. Mr. Lunceford did so take possession of Mr. Smallwood's car, without Mr. Smallwood's permission.

6. Upon information and belief, Mr. Lunceford towed Mr. Smallwood's car to the property of Beltway Towing and Storage, Inc.

7. Despite Mr. Smallwood's demand for the return of his car, Mr. Lunceford, Beltway Mobil and Beltway Towing and Storage, Inc. have refused to return said car unless Mr. Smallwood pays various towing and storage charges. Plaintiff has also incurred other damages by reason of the loss of his vehicle as aforesaid.

8. All of the aforesaid actions by the Defendant were done unlawfully and maliciously.

WHEREFORE, your Plaintiff prays that judgment be awarded in his favor against the said Michael DeChene in the amount of TEN THOUSAND DOLLARS (\$10,000.00) actual damages and ONE HUNDRED THOUSAND DOLLARS (\$100,000.00) punitive damages, together with his costs expended herein.

GERALD SMALLWOOD

1 V I R G I N I A

2 IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX

3 - - - - -X
4 GERALD SMALLWOOD,

5 PLAINTIFF,

6 VS.

AT LAW NO. 48487

7 MICHAEL DE CHENE,

8 DEFENDANT.
9 - - - - -X

10 MONDAY, OCTOBER 20, 1980

11 FAIRFAX, VIRGINIA

12 THE ABOVE-ENTITLED CAUSE CAME ON TO BE HEARD
13 BEFORE THE HONORABLE THOMAS J. MIDDLETON, JUDGE FOR THE
14 CIRCUIT COURT OF FAIRFAX COUNTY, IN COURTROOM 5, FAIRFAX
15 COUNTY COURTHOUSE, FAIRFAX, VIRGINIA, BEGINNING AT 11:01
16 A.M., WHEN THERE WERE PRESENT ON BEHALF OF THE RESPECTIVE
17 PARTIES:

18 FOR THE PLAINTIFF:

19 CHESSE, DURRETTE & ROEDER
20 BY: WYATT B. DURRETTE, JR., ESQUIRE
3900 UNIVERSITY DRIVE
SUITE 300
21 FAIRFAX, VIRGINIA 22030

22 AND

GERALD SMALLWOOD, PLAINTIFF;

23 A-5

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FOR THE DEFENDANT:

KATHRYN M. ANDERSON
ATTORNEY AT LAW
ASSISTANT COUNTY ATTORNEY
4100 CHAIN BRIDGE ROAD
FAIRFAX, VIRGINIA 22030

AND

MICHAEL DE CHENE, DEFENDANT.

- - - - -

1 EXCERPT OF PROCEEDINGS

2 (THEREUPON, THE COURT REPORTER AND WITNESSES WERE
3 SWORN, ARGUMENTS WERE MADE BY COUNSEL FOR THE PLAINTIFF AND
4 THE DEFENDANT, AND THE TESTIMONY OF WITNESSES WAS TAKEN,
5 ALL OF WHICH WERE REPORTED BUT NOT ORDERED TRANSCRIBED BY
6 COUNSEL FOR THE PLAINTIFF.)

7 THE COURT: IN ATTEMPTING TO EVALUATE THE
8 EVIDENCE IN LIGHT OF COUNSEL'S FINAL REMARKS -- BOTH
9 COUNSEL -- AND ESPECIALLY IN LIGHT OF THE CASE OF YEATTS VS.
10 MINTON, 211VA.402, THERE ARE SEVERAL PRELIMINARY DECISIONS
11 WHICH I COULD MAKE; BUT I DON'T THINK I NEED MAKE; AND THEY
12 ALL RELATE TO WHAT HAPPENED INITIALLY WHEN OFFICER DE CHENE
13 FIRST CAME ON THE SCENE AND OBSERVED THESE PARTIES.

14 AN ACCIDENT HAD OCCURRED. THERE IS AN IMPLICATION
15 AT LEAST AND A POSSIBLE ADMISSION BY MR. SMALLWOOD THAT HE
16 CAUSED IT. HE MADE SOME STATEMENT ABOUT THE FACT THAT THE
17 OTHER PARTY -- THE LADY -- WASN'T GOING TO INCUR ANY
18 DAMAGES; AND THERE WAS SOME TALK OF WHAT HER DAMAGES
19 MIGHT BE IF PAID BY HIM; BUT I DON'T REMEMBER THE SPECIFICS
20 OF THAT TESTIMONY. I INFER FROM IT THAT HE COULD HAVE
21 CAUSED THE ACCIDENT.

22 THERE CAME A TIME WHEN THAT TOW TRUCK WAS ORDERED.
23 ACCORDING TO OFFICER DE CHENE, THERE WAS AN AGREEMENT.

A-7

1 ACCORDING TO MR. SMALLWOOD, THERE WAS NOT AN AGREEMENT. I
2 THINK I WOULD FIND THAT HE IMPLICITLY, IF FOR NO OTHER
3 REASON, JOINED IN THE ORDERING OF THAT TOW TRUCK. I THINK
4 THAT HE KNEW IT WAS BEING ORDERED AND IT WAS BROUGHT THERE;
5 BUT I DON'T THINK IT'S RELEVANT TO MY DECISION AS I VIEW THE
6 CASE.

7 I SEE OFFICER DE CHENE, AT BEST, FROM
8 MR. SMALLWOOD'S POINT AS HIS AGENT; AND, AT HIS WORST, FROM
9 MR. SMALLWOOD'S POINT AS AN OFFICER WITH A POLICE DUTY TO
10 UNDERTAKE WHEN THERE IS A TRAFFIC RUSH ON ACTING AND
11 BELIEVING WHAT HE IS DOING IS IN THE BEST INTEREST OF THE
12 CITIZEN -- IN OTHER WORDS, TO MOVE THAT TRAFFIC PROBLEM OUT
13 OF THE WAY AND RESOLVE THE ISSUE IMMEDIATELY.

14 NOW, THOSE THINGS HAPPENED; AND THE OFFICER LEFT
15 THE SCENE. THE EVENT WHICH BROUGHT ALL THE PARTIES TOGETHER
16 INITIALLY WAS CONSUMMATED. AT THAT POINT IN TIME, THE
17 PARTIES THEN ADJOURNED TO A NON-PUBLIC PLACE. IN THE SENSE
18 "NON-PUBLIC", I MEAN THEY'RE OFF THE ROAD. THEY'RE ON A
19 PARKING LOT SOMEPLACE; AND THERE, THEY ARE GOING TO, AT
20 THEIR LEISURE, EXAMINE THIS SITUATION.

21 AT THAT POINT IN TIME, THE VERBAL ALTERCATION
22 OCCURRED BETWEEN MR. SMALLWOOD AND MR. LUNCEFORD.

23 MR. SMALLWOOD REFUSED TO PAY. ACCORDING TO MR. LUNCEFORD,

A-8

1 IT WAS THE SECOND TIME HE HAD REFUSED BEFORE THEY LEFT THE
2 SCENE; BUT, IN ANY EVENT, THERE WAS A REFUSAL TO PAY; AND
3 SOMETHING HAPPENED BECAUSE OFFICER DE CHENE WAS CALLED BACK
4 TO THE SCENE. I INFER FROM THE EVIDENCE -- AND PERHAPS IT
5 WAS DIRECTLY STATED -- THAT MR. LUNCEFORD WAS UNHAPPY WITH
6 WHAT WAS GOING ON; AND HE ASKED THAT OFFICER DE CHENE BE
7 RETURNED TO THE SCENE. IN ANY EVENT, OFFICER DE CHENE
8 APPEARED ON THE SCENE.

9 WHAT DID HE FIND WHEN HE CAME THERE? HE FOUND
10 MR. LUNCEFORD WHO IS ALLEGING THAT HE IS GOING TO TAKE THIS
11 CAR BACK BECAUSE HE HAS A RIGHT TO IT; MR. SMALLWOOD WHO'S
12 EVIDENTLY MAKING COMMENTS ABOUT HIS CONSTITUTIONAL RIGHTS
13 OR WHATEVER MAY BE GOING TO HAPPEN. THE TWO PARTIES ARE
14 UNHAPPY. ONE WON'T PAY; AND THE OTHER ONE WANTS TO BE PAID;
15 AND OFFICER DE CHENE ATTEMPTED TO RESOLVE THAT ISSUE.

16 I THINK HE TRIED TO DO IT IN A VERY FAIR FASHION; AND
17 I FIND EVERYTHING THAT'S GONE ON THAT HE DID WAS FAIR IN
18 DEALING WITH THESE PEOPLE; BUT THEN THERE CAME A TIME WHEN
19 HE MADE A STATEMENT TO MR. SMALLWOOD. THAT STATEMENT, IN
20 EFFECT, WAS: "EITHER PAY THE MAN OR I'M GOING TO ARREST
21 YOU UNDER THIS SPECIFIC STATUTE"; AND THIS STATUTE IS THE
22 ONE WHICH IS THE SOURCE OF THE CONTROVERSY HERE. I THINK
23 IT'S 19.2-189, IF I RECALL CORRECTLY; BUT IT'S THE INTENT TO

A-9

1 DEFRAUD THE GARAGE KEEPER.

2 NOW, OFFICER DE CHENE HAS TESTIFIED THAT HE
3 BELIEVED THAT THAT STATUTE WAS OPERABLE AND EFFECTIVE AND
4 THAT HE BASED HIS ARREST OF MR. SMALLWOOD ON THAT STATUTE;
5 AND I ACCEPT THAT FACT. I BELIEVE -- I BELIEVE THAT OFFICER
6 DE CHENE BELIEVED THAT TO BE THE CASE AS HE MADE THE ARREST.

7 NOW, THAT BRINGS US, AS I VIEW IT, TO THE CASE
8 OF YEATTS VS. MINTON, WHICH WE HAVE SPENT SOME TIME
9 DISCUSSING ON BOTH SIDES. IN SUMMARY, WITHOUT GOING
10 THROUGH THIS CASE IN ITS ENTIRETY, MY VIEW OF THE CASE IS
11 THIS: THAT AN OFFICER WHO IS MAKING AN ARREST MUST LOOK AT
12 THE LAW, AND THEN HE LOOKS AT A SET OF FACTS. IF THOSE
13 FACTS COULD REASONABLY BE SEEN TO CONFORM TO THAT LAW, THEN
14 HE HAS MADE AN ARREST WHICH IS PROPER -- IT HAS PROBABLE
15 CAUSE. IF, ON THE OTHER HAND, HE LOOKS AT THE LAW AND HE
16 LOOKS AT A SET OF FACTS, AND THOSE FACTS DO NOT CONFORM TO
17 THE LAW, THEN HE HAS NOT THE RIGHT TO MAKE THE ARREST.

18 THE SITUATION HERE IS THAT OFFICER DE CHENE
19 BELIEVED THAT THE LAW ALLOWED HIM TO MAKE AN ARREST FOR
20 SERVICES RENDERED BY A GARAGEMAN WHEN, IN FACT, IT DID NOT.
21 SO, WHEN ONE LOOKS AT THE LAW AND THEN LOOKS AT THE
22 SITUATION, THE SITUATION DOES NOT, IN FACT, REFLECT THE LAW
23 BECAUSE THERE IS NOTHING IN THE LAW WHICH ALLOWS THE

A-10

1 GARAGEMAN A LIEN FOR HIS SERVICES IN A CASE OF THIS NATURE
2 DESPITE WHAT MR. LUNCEFORD THOUGHT AT THE SCENE AND DESPITE
3 WHAT THE OFFICER THOUGHT AT THE SCENE.

4 BECAUSE OF THAT, I BELIEVE THAT THE ARREST WAS
5 ILLEGAL. I DON'T THINK THAT I CAN FIND PROBABLE CAUSE.

6 THERE ARE A WHOLE -- A LAWFUL ARREST IS A LEGAL RIGHT TO
7 RESTRAIN ANOTHER'S FREEDOM OF MOVEMENT, ONE OF THE THINGS
8 THAT I HAVE CONSIDERED HERE -- A LEGAL RIGHT TO RESTRAIN
9 HIM. WHAT WAS THE LEGAL RIGHT? THERE WAS NOTHING IN THE
10 LAW. THE MISDEMEANOR UPON WHICH OFFICER DE CHENE RELIED
11 DID NOT, IN FACT, EXIST AS HE BELIEVED IT EXISTED.

12 THEREFORE, THERE WAS NOT A CRIME. THERE WAS NOT
13 A MISDEMEANOR FOR WHICH ONE COULD BE ARRESTED UNDER THESE
14 CIRCUMSTANCES.

15 NOW, IF THE ARREST IS ILLEGAL, THEN I MUST TURN
16 TO THESE ALLEGATIONS AND TRY AND RELATE THEM TO THE
17 SITUATION AT HAND; AND I FIND THAT THE ARREST WAS UNLAWFUL,
18 THAT THERE WAS NO FOUNDATION IN LAW FOR IT; AND, SINCE THE
19 FACTS WHICH WERE OBSERVED DID NOT CONFORM TO ANY EXISTING
20 LAW, THERE WASN'T PROBABLE CAUSE.

21 THAT BRINGS ME TO THE QUESTION OF MALICIOUS
22 PROSECUTION. AN ILLEGAL ARREST, I BELIEVE, CREATES AN
23 INFERENCE OF MALICE -- BEAR WITH ME FOR A MOMENT, AND I'LL

A-11

1 VERIFY THAT FACT.

2 WELL, I THINK THAT I BETTER RETRACT THAT. THE
3 THING I'M CONCERNED WITH IS ASSAULT AND BATTERY, AND ANY FORCE
4 WHICH IS USED IN MAKING AN UNLAWFUL ARREST IS AN ASSAULT AN
5 BATTERY. SO, WHAT WE HAVE IS AN ASSAULT AND BATTERY.

6 THEN WE HAVE THIS QUESTION OF THE MALICIOUS
7 PROSECUTION. MALICIOUS PROSECUTION IS THE INSTIGATION OF
8 CRIMINAL PROCEEDINGS BY ONE PERSON AGAINST ANOTHER
9 MALICIOUSLY AND WITHOUT PROBABLE CAUSE IF THE PROCEEDINGS
10 ENDED IN A MANNER FAVORABLE TO THE PERSON PROSECUTED.

11 NOW, MALICE MAY BE INFERRED FROM A LACK OF
12 PROBABLE CAUSE; AND THE QUESTION THEN THAT CONCERNS ME IS
13 THIS: I FIND NO MALICE IN FACT. I THINK I'VE MADE THAT
14 CLEAR ALREADY; BUT THE QUESTION THEN IS: IF THERE IS AN
15 INFERENCE WHICH IS TO BE DRAWN, HAS THAT INFERENCE BEEN
16 REBUTTED. IT WOULD APPEAR THAT, ON ITS FACE, THAT THE
17 ILLEGAL ARREST GENERATES A MALICIOUS ACT FOR THE PURPOSE OF
18 A MALICIOUS PROSECUTION.

19 NOW, BASED SOLELY ON THAT INFERENCE, BECAUSE I
20 FIND NOTHING ELSE WHICH WOULD GIVE ME CAUSE TO FIND MALICE
21 SUFFICIENT TO DECLARE THAT A MALICIOUS PROSECUTION EXISTS
22 IN THIS CASE, I FIND THAT THE PLAINTIFF SHOULD PREVAIL ON
23 THE CAUSE OF MALICIOUS PROSECUTION AND ON THE COUNT OF

A-12

1 ASSAULT AND BATTERY.

2 THE QUESTION OF CONVERSION HAS BOTHERED ME
3 THROUGHOUT THIS TRIAL. I HAVE HEARD NOTHING TO REBUT THE
4 ISSUE. I ASKED COUNSEL FOR THE DEFENSE IF THERE WERE ANY
5 CASES KNOWN TO HER WHICH WOULD FLOW FROM A SITUATION WHERE,
6 IF THE ARREST IS UNLAWFUL, IS THE CONVERSION OR THE
7 IMPOUNDMENT UNLAWFUL; AND SHE CONCURRED THAT IT IS; AND I
8 RECOGNIZE THAT I ASKED HER THAT QUESTION WITHOUT THE
9 BENEFIT OF ANY LAW BEING AVAILABLE TO HER. I WAS TRYING TO
10 THINK THROUGH MYSELF THAT PROBLEM AT THAT TIME.

11 COUNSEL FOR THE PLAINTIFF HAS INDICATED THAT THE
12 ONLY LAW AVAILABLE IS THAT ONCE A CONVERSION OCCURS, THAT
13 THE ONLY REMEDY AVAILABLE IS TO SUE FOR THE FAIR MARKET
14 VALUE OF THE ITEM CONVERTED.

15 I FRANKLY AM CONCERNED ABOUT THAT IN THIS CASE --
16 QUITE CONCERNED ABOUT IT. THE EVIDENCE IS THAT OFFICER
17 DE CHENE HAD A VEHICLE TOW-IN AND INVENTORY RECORD PREPARED,
18 WHICH IS PLAINTIFF'S 2; AND HE SAID IN HERE THAT THE
19 VEHICLE MAY BE RELEASED TO THE OWNER UPON PROOF OF OWNERSHIP
20 AND PAYMENT OF TOWING AND STORAGE FEES.

21 NOW, MR. SMALLWOOD TAKES THE POSITION THAT HE'S
22 NOT LIABLE FOR THOSE FEES. IT'S NOT MY PROVINCE, I DON'T
23 BELIEVE, IN THIS CASE, TO DECIDE WHETHER HE'S LIABLE FOR

A-13

1 THOSE FEES. HE MAY OR MAY NOT BE.

2 I THINK THAT THERE WAS A CONDITION -- "I AM TAKING
3 THIS AUTOMOBILE AWAY FROM YOU BECAUSE YOU ARE BEING
4 ARRESTED; AND YOU MAY HAVE IT BACK UPON PAYMENT OF TOWING
5 AND STORAGE FEES AND PROOF OF OWNERSHIP, ASSUMING OWNERSHIP,
6 AND PAYMENT OF THE TOWING AND STORAGE FEES." SO THAT A
7 CONDITION HAS BEEN PLACED ON THE TAKING OF THAT AUTOMOBILE.

8 NOW, IT'S ARGUED THAT THE EXERCISE OF THE
9 DOMINION IN CONTROL OVER THAT AUTOMOBILE AND TAKING IT,
10 WITHOUT AUTHORITY, FROM ITS TRUE OWNER IS ALL THAT'S
11 SUFFICIENT TO BRING THE CASE FOR CONVERSION; AND THAT
12 NOTHING NEED BE DONE. THE OWNER NEED NOT ASK FOR IT BACK
13 AGAIN, ALTHOUGH THERE WAS EVIDENCE THAT HE DID DEMAND IT
14 BACK; AND THAT HE'S THEN ENTITLED TO RECOVER FOR THE FAIR
15 MARKET VALUE OF THE THING CONVERTED.

16 NOW, IF I ACCEPT THAT TO BE THE GENERAL LAW, I'M
17 STILL CONCERNED BY THE FACT THAT THE TAKING WAS, UPON PROOF
18 OF OWNERSHIP AND PAYMENT OF THESE FEES, YOU MAY HAVE IT
19 BACK. THE ARGUMENT IS -- AND THERE'S NO REBUTTAL OF IT TO
20 ME AT THIS POINT IN THIS CASE, NO REBUTTAL TO ME -- THAT
21 THE ACT OF CONVERSION IS SUBJECT TO MITIGATION BECAUSE I AM
22 TRULY CONCERNED BY THE FACT THAT, IF SOMEBODY CAN OBTAIN AN
23 AUTOMOBILE FOR \$20.00 PLUS A FEW STORAGE FEES, THAT HE HAS

A-14

1 AN ABSOLUTE RIGHT NOT TO GO CLAIM IT AND LET THE AUTOMOBILE
2 SIT AND THEN CLAIM \$4,100.00 FOR IT. THAT DOES NOT SOUND
3 FAIR; BUT, BY THE SAME TOKEN, I HAVE NO LAW EXCEPT THE LAW
4 CITED BY COUNSEL TO GO ON.

5 NOW, BECAUSE THAT IS THE LEGAL POSITION IN WHICH
6 I FIND MYSELF, I AM GOING TO RULE THAT THE CAR WAS CONVERTED.
7 I'M GOING TO ASK COUNSEL FOR THE DEFENDANT TO SUPPLY ME WITH
8 ANY LAW TO THE CONTRARY, IF SHE CAN; AND I'LL GIVE HER TEN
9 DAYS TO DO THAT; BUT I'M GOING TO RULE RIGHT NOW. AS A
10 RESULT OF ALL THIS, I FIND CONVERSION EXISTS.

11 HAVING SAID THAT, THE QUESTION IS: WHAT DAMAGES
12 SHOULD BE FOUND? IT'S BEEN ARGUED THAT THERE IS A \$300.00
13 FEE FOR ATTORNEY'S FEES WITH INTEREST FROM 3-19-80, AND I
14 THINK THAT SHOULD BE AWARDED.

15 THEN WE HAVE THE DAMAGES FOR THE MALICIOUS
16 PROSECUTION, FOR THE ASSAULT AND BATTERY, AND FOR THE
17 CONVERSION. AS FAR AS THE CONVERSION IS CONCERNED, IT'S
18 GOING TO BE \$4,100.00 MINUS \$75.00, I BELIEVE. I THINK
19 \$4,075.00 WAS THE FIGURE REQUESTED. THAT IS SUBJECT TO
20 COMPLETE REMOVAL FROM THIS FINDING SHOULD I FIND ANY LAW
21 FROM COUNSEL THAT WOULD DISALLOW THIS SITUATION OR CAUSE ME
22 TO DISALLOW THE RULING THAT I'M MAKING.

23 MR. DURRETTE: \$4,025.00.

A-15

1 THE COURT: \$4,025.00, THANK YOU. \$4.025.00.

2 MR. DURRETTE: AND MIGHT I ALSO JUST TO CORRECT
3 YOUR HONOR, YOU SAID THE INTEREST WOULD BE DUE FROM 3-19.
4 YOU MEANT THE DAY OF THE TRIAL WHICH WOULD BE 5-19.

5 THE COURT: WAS IT '80 OR '79?

6 MR. DURRETTE: '79.

7 THE COURT: ALL RIGHT, 5-19; AND I HAVE TWO OTHER
8 ALLEGATIONS THAT I HAVE TO DEAL WITH HERE. UNLAWFUL ARREST
9 AND MALICIOUS PROSECUTION ARE TIED INTO ONE; AND THE ASSAULT
10 AND BATTERY, I'M PUTTING INTO THE OTHER ONE.

11 NOW, IN MY OWN MIND, I HAVE RESOLVED THOSE
12 DAMAGES; AND IT'S ALMOST IMPOSSIBLE FOR ME TO DIVIDE THE
13 TWO OF THEM IN ANY WAY. THERE HAS BEEN A MALICIOUS
14 PROSECUTION. THERE HAS BEEN A TRIAL. I TAKE INTO ACCOUNT
15 THAT THAT TRIAL WAS ALSO A PARTIAL VINDICATION OF THE
16 PLAINTIFF. IT MAY BE A STRANGE WAY TO LOOK AT IT; BUT, BY
17 THE SAME TOKEN, HE DID TRY THE CASE. HE WAS PUT TO THE TEST.
18 HE WAS EXONERATED. TODAY, HE IS EVEN MORE EXONERATED THAN
19 HE HAS BEEN AT ANY OTHER TIME BECAUSE HE IS PREVAILING IN
20 THIS LAWSUIT; AND, ONCE AND FOR ALL, NO MATTER WHAT ANXIOUS-
21 NESS, ANXIETY, EMPLOYMENT RECORDS OR ANYTHING ELSE MAY OCCUR,
22 THE ABSOLUTE FINAL TEST OF ALL THINGS HAS BEEN REACHED IN
23 HIS FAVOR; AND I DON'T THINK THAT IT SHOULD, IN ANY WAY,

A-16

1 CAUSE ANY PROBLEM FOR HIM IN THE FUTURE. I MAY BE WRONG
2 ABOUT THAT, BUT IT WOULD SEEM TO ME THAT IT SHOULD NOT.

3 I HAVE RESOLVED UPON A FIGURE OF \$3,000.00; AND
4 I'M GOING TO DIVIDE IT \$1,500.00 BETWEEN THE MALICIOUS
5 PROSECUTION AND \$1,500.00 FOR THE ASSAULT AND BATTERY.

6 SO, I HAVE \$300.00 WITH INTEREST, PLUS \$3,000.00,
7 PLUS \$4,025.00. THOSE WILL BE THE AMOUNTS AWARDED.

8 IS THERE ANY COMMENT WITH RESPECT TO ANYTHING I
9 HAVE SAID IN ORDER THAT AN ORDER MAY BE PREPARED?

10 MS. ANDERSON: JUST NOTE MY OBJECTION, YOUR HONOR.

11 THE COURT: I WILL NOTE YOUR OBJECTION.

12 MR. DURRETTE: YOUR HONOR, I DID HAVE JUST ONE
13 REQUEST; AND THAT IS -- ONE COMMENT AND ONE REQUEST. THE
14 REQUEST IS THAT, IF MS. ANDERSON FINDS ANYTHING, I WOULD
15 LIKE AN OPPORTUNITY TO SUBMIT --

16 THE COURT: I'LL GIVE YOU AN OPPORTUNITY TO DO
17 THAT. I'M GOING TO ASK YOU TO PREPARE THE FINAL ORDER,
18 MR. DURRETTE.

19 MR. DURRETTE: CAN I WAIT UNTIL I GET THE
20 TRANSCRIPT?

21 THE COURT: YES, SIR.

22 MR. DURRETTE: OKAY.

23 THE COURT: I'LL GIVE HER TEN DAYS, AND I'LL GIVE

A-17

1 YOU TEN DAYS BEYOND THAT; AND, IF THERE'S ANY PROBLEM, YOU
2 COME SEE ME; AND I WANT TO GET THE ORDER ENTERED AND NOT
3 LEAVE THE CASE OPEN, ALL RIGHT.

4 MR. DURRETTE: MAY I JUST STATE ONE OTHER THING,
5 YOUR HONOR? IN COMMENTING ON MY REPRESENTATION TO THE COURT
6 ON THE LAW OF CONVERSION, SINCE THIS SEEMS TO BE A
7 CONTINUING ISSUE, YOU INDICATED THAT I HAD REPRESENTED TO
8 YOU THAT THE ONLY REMEDY MR. SMALLWOOD HAD AT THE TIME OF
9 CONVERSION WAS TO SUE FOR THE REASONABLE MARKET VALUE.

10 IF I SAID THAT, I DID NOT INTEND TO. I MEANT TO
11 SAY AND THOUGHT I SAID THAT HE HAD THE OPTION. HE COULD
12 TAKE THE PIECE OF PROPERTY BACK OR HE COULD TREAT IT AS A
13 CASE OF CONVERSION AND SUE FOR THAT. I THINK HE HAS EITHER
14 ONE.

15 THE COURT: I DIDN'T UNDERSTAND THAT. LET ME
16 THINK THAT THROUGH AGAIN. YOU'RE SAYING THAT HE HAS THE
17 OPTION OF TAKING THE PROPERTY BACK, BUT HE HAS NO DUTY TO
18 TAKE IT BACK; IS THAT RIGHT?

19 MR. DURRETTE: RIGHT.

20 THE COURT: IN OTHER WORDS, YOU SAY IT'S HIS
21 OPTION?

22 MR. DURRETTE: THAT'S CORRECT.

23 THE COURT: AND HE ELECTED, IN THIS CASE, TO SUE

A-18

1 FOR FAIR MARKET VALUE?

2 MR. DURRETTE: THAT'S CORRECT, YOUR HONOR; AND
3 THAT'S WHY I BELIEVE THE LAW IN THAT CASE DOESN'T APPLY; AND
4 I THINK --

5 THE COURT: WELL, I WILL ACCEPT THAT STATEMENT.
6 AT THE SAME TIME, IT DOES NOT CHANGE MY RULING IF IT'S
7 CORRECT.

8 MR. DURRETTE: I SEE.

9 THE COURT: BUT, ON THE OTHER HAND, IN MY OWN
10 HEART AND SOUL, I BELIEVE MITIGATION LIES IN HERE SOMEPLACE;
11 BUT, IF IT'S NOT HERE, IT'S NOT HERE; AND THAT'S ALL THERE
12 IS TO IT.

13 MR. DURRETTE: ALL RIGHT.

14 MS. ANDERSON: YOUR HONOR, ONE FURTHER COMMENT.
15 THE DAMAGES YOU HAVE AWARDED ARE COMPENSATORY DAMAGES ONLY?

16 THE COURT: THERE WILL BE NO FINDING OF PUNITIVE
17 DAMAGES.

18 MS. ANDERSON: THANK YOU, YOUR HONOR.

19 (THEREUPON, AT 6:20 P.M., THE HEARING IN THE
20 ABOVE-ENTITLED MATTER WAS CONCLUDED.)
21
22
23

1 CERTIFICATE OF REPORTER

2 I, LORI J. NIQUETTE, DO HEREBY CERTIFY THAT I TOOK
3 THE AUDIOGRAPHIC NOTES OF THE FOREGOING PROCEEDINGS AND THE
4 SAME WAS REDUCED TO TYPEWRITING BY ME; THAT THE FOREGOING
5 IS A TRUE RECORD OF SAID PROCEEDINGS; THAT I AM NEITHER
6 RELATED TO NOR EMPLOYED BY ANY OF THE PARTIES TO THE ACTION
7 HEREIN; AND, FURTHER, THAT I AM NOT A RELATIVE OR EMPLOYEE
8 OF ANY ATTORNEY OR COUNSEL EMPLOYED BY THE PARTIES HERETO,
9 NOR FINANCIALLY OR OTHERWISE INTERESTED IN THE ACTION.

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12 *Lori J. Niquette*

13 LORI J. NIQUETTE
14 CERTIFIED VERBATIM REPORTER
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A-20

January 20, 1981

Kathryn M. Anderson, Esq.
Office of the County Attorney
4100 Chain Bridge Road

Wyatt B. Durette, Jr., Esq.
3900 University Drive
Fairfax, Virginia 22030

Re: Smallwood vs. DeChene
Law No. 48487

Dear Counsel:

This case was tried on October 20, 1980. At that time the matter was taken under advisement. The memoranda submitted and arguments of counsel have been considered. It is the conclusion of the Court that the Defendant is liable for conversion as well as for false imprisonment.

Plaintiff, Gerald Smallwood, was involved in an automobile accident on March 29, 1979, in Fairfax County. The Defendant, Michael DeChene, an officer of the Fairfax County Police, arrived to investigate the accident. A tow truck was called to the scene by the Defendant to assist in separating the automobile. When they had been separated, the Defendant and the operator of the vehicle which the Plaintiff had struck left the scene.

An argument arose between the Plaintiff and the tow truck operator concerning the fee for separating the vehicles. The Plaintiff insisted that he had not summoned the tow truck and would not pay for it. The Defendant was recalled to the scene. The disagreement continued. The Defendant arrested the Plaintiff for a violation of Section 18.2-189 of the Code of Virginia and impounded his automobile. The Plaintiff was acquitted in the General District Court and then brought this action for false imprisonment and conversion of the automobile.

This Court has ruled that the Plaintiff was falsely imprisoned by the Defendant and took under advisement the question of Plaintiff's recovery for conversion.

It appears to the Court that a conversion of Plaintiff's vehicle took place.

A conversion is any unauthorized dealing with the goods of another by one in possession whereby the nature or quality of the goods is essentially altered, or by which one having the right of possession is deprived of all substantial use of the goods, permanently or temporarily. Eastern Lunatic Asylum v. Garrett, 68 Va. (27 Gratt) 163 (1876). "Any act of dominion wrongfully exerted over property in denial of the owner's right, or inconsistent with it, amounts to a conversion." Buckeye National Bank v. Huff, 114 Va. 1, 11 (1912). Credit Corp. v. Kaplan, 198 Va. 67, 75 (1956) (emphasis added)

The Defendant "wrongfully" impounded the Plaintiff's vehicle, there being no legal basis for the arrest of the Plaintiff. The impoundment deprived the Plaintiff of possession of his vehicle, however temporarily that deprivation was intended to continue. The Defendant did not actually take the vehicle himself, but he did direct the tow truck operator to do so.

"A plaintiff in execution procuring a levy to be made on a stranger's goods is guilty of conversion, whether he takes possession or not." Buckeye National Bank, supra; and in Credit Corp., supra, the Court stated in reference to conversion that "it is not necessary that the wrongdoer apply the property to his own use." Id. at 76.

The Plaintiff has had the capacity to regain possession of his vehicle since shortly after it was converted. He was, however, under no legal duty to attempt to do so since "proof of demand and refusal is never necessary in trover, where there is proof of an actual conversion." Eastern Lunatic Asylum, supra.

The Court believes that the Defendant was acting in good faith and was attempting to the best of his ability to effect a reasonable solution to the dispute between the operator of the tow truck and the Plaintiff. However, good faith is not an excuse for conversion. "When ... conversion is proved, the Plaintiff is entitled to recover, irrespective of good or bad faith, care or negligence, knowledge or ignorance." Credit Card Corp., supra, citing 19 Michie's Jur., Trover and Conversion, Sec. 4, p. 27. See also, 89 C.J.S., Trover and Conversion, Sec. 48 (b), p. 554; 53 Am. Jur., Trover and Conversion, Sec. 36, p. 832.

The Court has read with interest the case of Mustola v. Toddy, 456 P. 2d 1004 (1969), supplied by the

Plaintiff, in which the Oregon Supreme Court adopted the conversion definition of Sec. 222A of the Restatement (Second) of Torts and wherein that Court expressed the view that the strong public policy favoring vigorous action by police officers compelled the creation of an altered standard in conversion cases against policemen acting in emergency situations. Mustola has not been embraced outside of Oregon and there is some question about its effect there. See, Remington v. Landholt, 541 P. 2d 472, 580, 582 (1975). (O'Connell, Chief Judge, specially concurring).

This Court must apply what is believed to be the law of Virginia as it exists at this time and as set forth above. It may be desirable that police officers should be afforded protection against actions for conversion in instances such as this one. Such an issue is a matter for the General Assembly to act upon, not this Court.

Having determined the Defendant's liability, there remains the question of damages. "The measure of damages, in an action of trover for the conversion of personal property, is the fair value of the property at the time of the conversion...." Eastern Lunatic Asylum, supra, at 168; Stroley v. Fisher, 176 Va. 163, 167 (1940). "When the conversion is complete, the injury suffered, of course, is the value of what is converted." Buckeye National Bank, supra, at 11.

The appropriate measure of damages is then, the value of the Plaintiff's vehicle on March 29, 1979. It is irrelevant, in this regard, that the Plaintiff could have recovered his vehicle shortly after impoundment. "Where the conversion has taken place, the owner is not bound to receive back the property if tendered, either before or after suit...." Id. at 10.

The Plaintiff has argued that the Defendant is also liable for the loss of use of the vehicle in question in the amount of \$532.00. While it is true that the Plaintiff had no duty to mitigate his damages, the Court is not aware of any precedent in Virginia for awarding damages in a conversion action for the loss of use of the item converted. Plaintiff's request for damages for loss of use will be denied.

Mr. Durette will please draft an appropriate Order and submit it to Ms. Anderson for approval as to form.

Very truly yours,

/s/ Thomas J. Middleton

April 1, 1981

Robert Lyndon Howell, Esq.
Assistant County Attorney
4100 Chain Bridge Road
Fairfax, Virginia 22030

Wyatt B. Durette, Jr., Esq.
Maloney & Chess
3900 University Drive
Fairfax, Virginia 22030

Re: Smallwood vs. DeChene
Law No. 48487

Gentlemen:

It is the opinion of the Court that the Defendant Michael DeChene is not liable for malicious prosecution.

The statements contained in the transcript of Monday, October 20, 1980 beginning at line 9 on page 5 and ending at line 1 on page 9 do not support a finding of malicious prosecution. The statements included from line 11 on page 8 through line 1 on page 9 indicate to me that I concluded that the inference of malice was to be found as a matter of law and not of fact. At line 19 on page 8 I made the statement: "Now, based solely on that inference, because I find nothing else which would give me cause to find malice sufficient to declare that a malicious prosecution exists in this case" indicates to me that a finding of malice was not made.

The finding of malicious prosecution is set aside.

On January 20, 1981, a letter was written to counsel by me. The first paragraph of that letter states: "It is the conclusion of the Court that the Defendant is liable for conversion as well as for false imprisonment." Upon a review of the law and the facts of this case, it is the opinion of the Court that the Defendant is liable to the Plaintiff for false imprisonment. Further, the sum of \$1,500.00 is awarded to the Plaintiff as damages resulting from the false imprisonment.

It is requested that Mr. Durette prepare an Order to be presented to the Court after endorsement by Mr. Howell.

Very truly yours,

/s/ Thomas J. Middleton

FINAL ORDER

On October 20, 1980, this case came on for trial, at which time the parties appeared with their counsel.

Each counsel made an opening statement following which evidence was presented on behalf of both parties.

Both parties rested their case and the Court heard arguments on the law.

The Court's rulings were made on this date and in a letter opinion issued on January 20, 1981, a Motion to Reconsider was filed by the Defendant and the ruling of the Court was set forth in a letter opinion dated April 1, 1981.

The rulings of the Court ore tenus and in both letter opinions are incorporated herein by reference, and the final rulings are set forth as follows:

(1) The Defendant unlawfully arrested the Plaintiff;

(2) The Defendant used force in making the arrest and the use of such force constitutes an assault and battery;

(3) The Defendant falsely imprisoned the Plaintiff;

(4) The Defendant converted the automobile of the Plaintiff;

(5) The Defendant did not maliciously prosecute the Plaintiff.

WHEREFORE, for the reasons stated orally on October 20, 1980, and contained in the written opinions of January 20, 1981 and April 1, 1981, all of which are incorporated by reference herein, it is hereby

ORDERED, ADJUDGED and DECREED that judgment is entered for the Plaintiff in the following amounts for the reasons indicated:

(1) For conversion of Plaintiff's automobile--\$4,025.00 with interest at 8% from March 29, 1979;

(2) For false imprisonment--\$1,500.00 with interest at 8% from October 20, 1980, and

(3) For assault and battery--\$1,500.00 with interest at 8% from October 20, 1980.

Plaintiff's request for damages for malicious prosecution, attorneys' fees for defending the criminal charge, punitive damages and charge for loss of use are denied.

It is further ORDERED that the transcript of the proceedings held on October 20, 1980 are hereby made a part of the record in this cause pursuant to Rule 5:9 of the Rules of the Supreme Court of Virginia.

THIS ORDER IS FINAL.

ENTERED this 22nd day of April, 1981.

/s/ Thomas J. Middleton, Judge

PRESENTED AND EXCEPTION NOTED AS TO
THE DENIAL OF ADDITIONAL DAMAGES AND
THE FAILURE TO FIND MALICIOUS PROSECUTION

MALONEY & CHESSE
3900 University Drive
Fairfax, Virginia 22030

By /s/ Wyatt B. Durette, Jr.
Counsel for Plaintiff

SEEN AND EXCEPTION NOTED TO ALL RULINGS
EXCEPT THE DENIAL OF DAMAGES FOR MALICIOUS
PROSECUTION, ATTORNEYS' FEES FOR DEFENDING
THE CRIMINAL CHARGE, PUNITIVE DAMAGES
AND CHARGE FOR LOSS OF USE

Robert Lyndon Howell
Assistant County Attorney
4100 Chain Bridge Road
Fairfax, Virginia 22030
Counsel for Defendant

ASSIGNMENTS OF ERROR

- I. The trial court erred in holding a police officer liable for damages for false imprisonment, assault and battery, and conversion, where the police officer reasonably believed that a violation of Va. Code § 18.2-189 had occurred, and where a special magistrate acting on the same information issued a warrant charging a violation of that same statute.

- II. The trial court erred in holding that conversion of an automobile occurred in circumstances where a police officer was merely providing for the safety of the vehicle at the time of the arrest, and did not do or intend any act inconsistent with another's ownership of the car.

ASSIGNMENTS OF CROSS-ERROR

- I. The trial court erred in holding there was no actual malice by DeChene in his treatment of Smallwood beginning with his extortion threat to Smallwood, and then his false arrest, his assault and battery, his false imprisonment, his conversion of Smallwood's automobile, his swearing to a complaint charging Smallwood with a crime involving fraud, his participation in the criminal prosecution of Smallwood, and his making of false statements under oath concerning Smallwood's conduct before, during and after Smallwood's arrest in the subsequent criminal prosecution and in the discovery and trial of this case.
- II. The trial court erred in not finding DeChene guilty of malicious prosecution in view of the clear showing of actual malice of DeChene.
- III. The trial court erred in making an affirmative finding of a lack of actual malice on the part of DeChene.
- IV. The trial court erred in not finding DeChene guilty of malicious prosecution even if no actual malice was found in view of the general situation which negates the rebuttal of the inference of malice based on the lack of probable cause to prosecute Smallwood for fraud.

V. The trial court erred in not ordering more substantial damages including punitive damages and attorney's fees based on DeChene's intentional misconduct including his own criminal acts which were not retracted or rectified at the time or at any time subsequent thereto as would be expected of a reasonable clear-thinking person in DeChene's position.