In the

Supreme Court of Virginia

Record No. 181108

ANN ELIZABETH LLEWELLYN,

Appellant,

v.

ANN MICHELLE WHITE,

Appellee.

BRIEF OF APPELLEE IN RESPONSE TO APPELLANT'S OPENING BRIEF

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INTRODUCTION

The Appellant Ann Llewellyn ("Llewellyn") admitted liability below and the jury entered judgment against her only in the amount of $1,500,000. In one of several attempts to evade this judgment and her liability, Llewellyn now asks this Court to alter Virginia law so that tortfeasors like her may avoid the consequences of their actions through either a misinterpretation of Code § 8.01-35.1 or an alteration of Virginia's collateral source rule. The Court should reject Llewellyn's arguments and make clear that the underinsured motorist coverage purchased by the Appellee, Ann Michelle White ("White"), is not subject to the provisions of Code § 8.01-35.1, and is covered by Virginia's collateral source rule and Code § 8.01-35. The judgment of the trial court should be affirmed.

COUNTER-STATEMENT OF THE CASE AND COUNTER-STATEMENT OF THE MATERIAL PROCEEDINGS BELOW

On July 21, 2013, Llewellyn drove an Audi sports car the length of her private driveway and exited blindly into a public intersection. *See* Affidavit of Ann Michelle White (June 29, 2018) at ¶¶ 1, 2.[1] There was no evidence Llewellyn slowed her car, despite a line of trees and hedges that prevented a view down the

[1] On June 25, 2019, Llewellyn filed in this Court a motion pursuant to Rule 5:4 for an injunction and a reduction in bond. White opposed that request on June 29, 2018. *See* White's Opposition to Rule 5:4 Motion for Injunctive Relief Regarding Contemplated Appeal. White included in this opposition an affidavit pursuant to Code § 8.01-676.1(E). This affidavit is cited herein as "White Aff."

crossroad. *Id*. at ¶ 2. Llewellyn crashed broadside into an automobile operated lawfully by White, with the wheels of Llewellyn's Audi fully spinning at impact. *Id*. Llewellyn was wearing sunglasses, though it had been raining. *Id*. The force of the crash totaled Llewellyn's car. J.A. 87.

White was removed from the accident scene by ambulance. Thereafter she suffered a difficult medical course. White Aff. at ¶5. White sustained hip injuries in the accident that required bi-lateral hip revision operations, and White also had her right shoulder surgically corrected. *Id*. at ¶¶ 5, 6. The hip procedures produced a side-effect known as heterotopic ossification. *Id*. at ¶ 5. The heterotopic ossification caused boney growth resembling "sharks teeth" in White's hip tissue and these growths sliced White's muscles with movement. *Id.* In time, White required bi-lateral hip replacements because of atrophy linked to the heterotopic ossification. Trial Transcript of May 1 & 2, 2018 ("Trial Tr.") at (Jiranek) 38:14-16; 38:23-39:04; 39:8-11; White Aff. at ¶ 5. Because the replacement equipment in her hips will wear out, White's doctors predict she will need bi-lateral re-replacement within 25-30 years. White Aff. At ¶5. White will have to undergo these corrective surgeries as a septuagenarian. *Id.* In all, White incurred nearly $700,000 in medical bills and lost wages.

Before the 2013 accident, White had procured from Erie Insurance Exchange ("Erie") $1,000,000 of underinsured motorist coverage ("UIM").

Llewellyn Opening Br. at 2. White paid Erie the premiums for this UIM coverage. Despite her well-established means, Llewellyn did not elect to insure against the financial consequences of careless driving. J.A. 143. Llewellyn maintained only $250,000 of automobile indemnity coverage, issued by Progressive Insurance Company. Llewellyn Opening Br. at 3. In Virginia, all insurance policies must provide $25,000 of UIM coverage. *See* Code §38.2-2206(B); Code § 46.2-472. White elected to supplement the required coverage with an extra $975,000 of UIM indemnity.

On July 10, 2015, White filed suit against Llewellyn for personal injury. As statutorily required as a prerequisite to UIM insurance benefits, White served Erie with her suit. Neither White's Complaint nor her Amended Complaint asserted any causes of action against Erie. *See* J.A. at 1-8, 12-19. Erie answered both complaints and denied any liability for White's injuries. J.A. at 10 (¶¶ 12, 13); J.A. at 23 (¶¶ 12, 13).

Discovery in the litigation below concluded in early 2017, and the case proceeded toward a March 28, 2017 jury trial. Before this jury trial began, however, Llewellyn admitted fault, thus making the trial a proceeding to set White's damages. J.A. at 40 (¶2). Also, Erie compromised White's UIM claim, agreeing to pay White $750,000 in insurance benefits. This payment represented

the $1,000,000 proceeds of the Erie UIM coverage after subtracting the limits of Llewellyn's $250,000 Progressive policy. Llewellyn Opening Br. at 2.

It is uncontroverted that White's UIM insurance settlement compensated White for medical treatment, including any liens imposed by her health insurers or providers. J.A. at 38. In fact, the Erie policy provided White with funds to offset White's "health insurance, ERISA, Medicare, Medicaid, attorneys' [lien] and workers compensation." *Id.* In the Erie / White Settlement Agreement and Release, Erie once again stated it "denied liability" for White's claim "arising out of the accident." J.A. at 37. In the settlement agreement, Erie agreed to release its statutory lien against the sole tortfeasor, Llewellyn. Thus, once the jury fixed a damages award, Llewellyn would never face both a recovery action from White and a subrogation action from Erie. J.A. at 38.

In an Order entered March 27, 2017, the trial court dismissed Erie from the "matter," indicating White's lawsuit "is to remain on the docket as against Ann Elizabeth Llewellyn only. . . ." J.A. at 26. Remarkably, after the trial court seated a jury on March 28, 2017, and White and Llewellyn had both presented opening statements, Llewellyn announced through counsel that she had filed a petition for bankruptcy reorganization pursuant to Chapter 13 of the United States Code. White Aff. at ¶¶ 8, 9. The stated rationale for halting the Virginia jury trial was

that Llewellyn's counsel feared the live appearance of two of White's doctors who were going to honor trial subpoenas. *Id.* at ¶ 8.

The trial court was forced to stay White's case and dismiss the empaneled jury. White Aff. at ¶ 8. The stay, however, was short-lived. Llewellyn had lodged an initial bankruptcy pleading indicating she controlled $1,000,000 to $10,000,000 in assets, but Llewellyn did not perfect her bankruptcy action with schedules or efforts at reorganization. *See* White Aff. at ¶¶ 4, 10; J.A. at 19-20. Less than 30 days after filing her bankruptcy petition, Llewellyn withdrew her "duck in" bankruptcy filing. *Id*. at ¶¶ 9, 13.

With Llewellyn released from the bankruptcy court, the trial court lifted the stay and re-set the jury trial for May 1 and 2, 2018. At trial, White introduced evidence and expert support for her extensive damages. *Id*. at ¶10. White also testified to substantial pain and suffering, and the detrimental impact of her injuries on her life, telling the jury about scar tissue and surgical screws in her hip that hurt after periods of sitting at work. White Aff. at ¶ 6. White testified she no longer is able to walk long distances. *Id.* To adjust for her new limitations, White accepted job restrictions to avoid travel that also capped her compensation, and moved to one-level lodging entered by an elevator. *Id.* White's husband testified to his wife's physical and emotional limitations, including pain during intimacy. White Aff. at ¶ 5.

Because of Virginia's prohibition on evidence of insurance, there was no indication *at the jury trial*, of course, about whether White had health insurance to offset part or all of her substantial treatment (she did). There also was no evidence whether White's health insurer had negotiated discounts to lessen the costs of the bills issued to White by her providers (they did). At the conclusion of the jury trial, the trial court correctly admonished the jurors that insurance should play no part in the jurors' determinations of White's damages. J.A. at 143. On May 2, 2018, following deliberation, the jury entered judgment for White and directed Llewellyn to pay White $1,500,000 in damages.

Even though it was White who had purchased the Erie UIM policy and Llewellyn who was the sole responsible tortfeasor in the jury's judgment, Llewellyn nevertheless attempted post-trial to alter the jury's verdict by moving to offset the $750,000 of Erie insurance proceeds against Llewellyn's $1,500,000 judgment obligation to White.

In opposition, White contended that in Virginia the UIM insurance payments are a collateral source, and the Virginia offset statute at Code §8.01-35.1 allocates settlement proceeds only among those actually "liable" for White's personal "injury." There was no evidence that Erie caused or contributed to White's injuries, and White argued that in Virginia UIM insurers such as Erie do not indemnify the tortfeasor but rather the tort victim. Thus, UIM indemnity payments

are never subject to offset. The trial court agreed with White, entering final judgment on July 2, 2018, with interest accruing from May 2, 2018. J.A. 63-65, 79-81, and 94-95.

On June 25, 2018, Llewellyn petitioned this Court, pursuant to Rule 5:4, for a reduction in the $1,500,000 bond and an injunction against any collection effort by White. Llewellyn's burden was to prove she was likely to prevail on the merits of her appeal, and to prove the trial court abused its discretion in declining the benefit of White's insurance. This Court denied Llewellyn's motion on July 3, 2018.

Because this Court refused to accept any review of the merits of the jury's verdict and award, and the sole issue on appeal arose post-trial, the jury's verdict is now final.[2] The question before the Court in Llewellyn's sole granted assignment of error is whether Virginia law regards the proceeds of a UIM policy to be a collateral source and thus immune from offset, and, if not, whether a UIM carrier is a "person" who is "liable" under Code 8.01-35.1 for an underinsured driver's personal injury liability.

[2] This Court only granted Llewellyn's Assignment of Error 1, and refused Llewellyn's Assignments of Error 2, 3, and 4.

STANDARD OF REVIEW

"Armed with a jury in [her] favor, approved by the trial court, [White] is entitled to have the evidence, and all the inferences that may reasonably be drawn from it, viewed in the light most favorable to [her]." *RGR, LLC v. Settle*, 288 Va. 260, 283 (2014). In the posture in which White approaches this Court, she "occupies the most favored position known to the law." *Id.*

The party seeking to apply a statutory credit to a party's prior receipt of payment bears the burden below of proving that relief. *William H. Gordon Assocs. v. Heritage Fellowship*, 291 Va. 122, 146 (2016); *Acordia of Virginia Ins. Agency v. Genito Glenn*, L.P., 263 Va. 377, 389 (2002).

ARGUMENT

I. Virginia Does Not Permit Llewellyn to Offset the Proceeds of a UIM Policy Against the Jury's Verdict Because a UIM Distribution is a Collateral Source, and Erie is Not "Liable" for White's Injuries

Llewellyn claims the trial court erred in declining to offset the $750,000 UIM policy payment that White obtained from Erie against the $1,500,000 jury award entered in favor of White and against Llewellyn. In support of her arguments, Llewellyn cites the following portion of Code §8.01-35.1:

> When a release or covenant not to sue is given in good faith to one or more persons liable for the same injury to a person or property, or the same wrongful death:
>
> 1. It shall not discharge any other person from liability for the injury, property damage or wrongful

> death unless its terms so provide; but any amount recovered against the other person or any one of them shall be reduced by any amount stipulated by the covenant or release, or in the amount of the consideration paid for it, whichever is greater.

Code § 8.01-35.1(A). *See* Llewellyn Opening Br. at 6.

In her Opening Brief, Llewellyn draws the erroneous conclusion that White's UIM benefits are subject to offset because Erie was somehow a "person liable for the same injury" that White sustained. Llewellyn Opening Br. at 14. Erie was not. There is no evidence in the record that Erie caused or contributed in any way to White's personal injury. Llewellyn initiated no third party claim to this effect against Erie, and Erie specifically denied "liability" to White in all answers to White's lawsuit, and in the Erie / White settlement agreement. Llewellyn never proffered any evidence of Erie's liability post-trial, or even argued that Erie caused physical harm to White.

Lacking any other way to ascribe to Erie any "liability" for White's "injury," Llewellyn attempts to twist the language of Code § 8.01-35.1 and reimagine the role of a UIM insurer such as Erie in the benefits process. Accordingly, Llewellyn contends that because an "underinsured carrier effectively acts as a litigant to a tort suit," Llewellyn Opening Br. at 11, it therefore becomes a "nominal party." *Id.* at 7. Because the tortfeasor's "underinsurance coverage is…triggered by tort action," *id.* at 11, Llewellyn attempts to impute to the UIM carrier the liability a Virginia

jury imposed against an actual tortfeasor, Llewellyn. Even if the UIM carrier settled the claim before judgment (which is the fact in this case), Llewellyn would still ascribe the tortfeasor's *liability* for injury to a UIM carrier such as Erie, even if the UIM carrier is only legally obligated for *damages* established by judgment. Llewellyn asserts that Erie is not only effectually liable for White's injury, but in the instance of pre-trial settlements, Erie was also "potentially liable" by virtue of its offer of settlement. Llewellyn Opening Br. at 24. Llewellyn contends that a UIM carrier that is potentially liable is thereby actually responsible, and its payment is subject to offset. *Id.*

Llewelyn's interpretation of Code § 8.01-35.1 is incorrect. White did give a release to Erie as consideration for a pre-trial insurance payment, but for Llewellyn to reduce her own liability she ultimately must prove the strict statutory pre-requisite: that Erie was "liable for the same injury to a person." Contrary to her arguments, Llewellyn cannot do this merely because Erie was served with White's lawsuit. This Court has resolved that question. It is black letter law in Virginia that a UIM or UM carrier that was served under the authority of Code §38.2-2206 is not a party defendant in a personal injury action. *Nationwide Mutual Ins. Co. v. Hylton*, 260 Va. 56, 61-62 (2000). Virginia law is clear that the UIM carrier only stands in for the tortfeasor's *damages* – that is the whole point of UIM – but the UIM insurer is in no way a surrogate for the "liability" of the tortfeasor, and cannot

be deemed to have committed the personal injury itself. *Manu v. GEICO Cas. Co.*, 293 Va. 371, 384 (2017). Moreover, this Court has clearly held that a UIM carrier is never "liable" for anything – even a UIM policyholder's damages – until there is an actual judgment against the underinsured tortfeasor. *Id.* These clear rulings by this Court completely undermine Llewellyn's untenable interpretation of Code § 8.01-35.1.

Moreover, Llewellyn cannot even reach the issue of whether any personal injury liability can be imputed to Erie until there is a determination of whether a UIM payment comes from a source of benefits that is collateral to the tortfeasor. In Virginia, there can be no consideration of any type of offset against a jury award until that gateway issue has been resolved. Erie's settlement payment to White is in fact a benefit from a collateral source, according to the authoritative analysis of this Court in *Acuar v. Letourneau*, 260 Va. 180 (2000).

In *Acuar*, the defendant in a personal injury action attempted to pare from the plaintiff's damages the portion of the medical bills that a health insurer had been able to write down as a discount because of the insurer's negotiating leverage over the medical provider. The question for this Court was whether the plaintiff was able to keep the benefit of the discount because it was a collateral source, given that no one actually paid the amounts as billed by the medical provider. This Court opted against any kind of offset that might benefit a defendant tortfeasor for

the part-paid medical bills. As the Court explained in discussing Virginia's articulation of the collateral source rule:

> The law seems quite well settled that damages, recovered for personal injuries inflicted through the negligence of another, are not to be reduced by reason of the fact that the injured party had been partly compensated for his loss by insurance which he has procured and for which he has paid. The reason for this rule is the defendant, who by his negligence has injured another, owes to such other compensation for the injuries he has inflicted and the payment for those injuries from a collateral source *cannot* relieve the defendant of his obligation.
>
> Pursuant to the rule, compensation or indemnity received by a tort victim from a source collateral to the tortfeasor may not be applied as a credit against the quantum of damages the tortfeasor owes. . . . A person who is negligent and injures another 'owes to the latter *full* compensation for the injury inflicted[,] and payment for such injury from a collateral source *in no way* relieves the wrongdoer of [the] obligation."

Acuar, 260 Va. at 189 (emphasis added; quotations and citations omitted).

Based on Virginia's version of the collateral source rule and Code § 8.01-35, the UIM benefits conferred to White by Erie are immune from offset under Code § 8.01-35.1 But, even if they are not, the UIM benefits that White contracted for herself still cannot be used under the plain language of Code § 8.01-35.1 to reduce the $1,500,000 damage amount awarded to White when the jury found Llewellyn solely liable for White's injuries.

A. Virginia's Collateral Source Rule Precludes the Offset of Payments Such as UIM Settlement Distributions

Llewellyn argues for a statutory offset of $750,000 without first analyzing the impact of Virginia's collateral source rule on her legal position. Llewellyn neither cites nor discusses this Court's holding in *Acuar* in her Opening Brief, and did not therefore deal with the pointed rejection by this Court of offsets of any collaterally-sourced payments. As this Court has made clear, the law of Virginia prevents an offset that is derived from collateral source benefits. Llewelyn's choice to ignore the fact does not change Virginia law.[3]

What makes Llewellyn's failure to discuss *Acuar* especially strange is her citation to this Court's decision in *Acordia.* In *Acordia,* a case concerning the express application of Code §8.01-35.1(A) to litigation settlements, this Court affirmed the resiliency of the collateral source rule, noting as it had in *Acuar* (and many previous decisions), that the collateral source rule has been a substantive principal of Virginia tort cases "for more than a century." 263 Va. at 387. This Court reiterated the blanket prohibition against offset credits for any benefits derived from a collateral source, declaring – categorically – that "indemnity

[3] White is aware that there is a case currently pending before the Court regarding the application of Virginia's collateral source rule to contract claims. *See Dominion Resources, Inc. v. Alstom Power, Inc.*, Record No. 181061. White's case is fundamentally a tort case, and falls within well-settled Virginia law regarding the collateral source rule and Code § 8.01-35.

received by a tort victim from a source collateral to the tortfeasor may *not be applied as a credit* against the quantum of damages the tortfeasor owes." *Id.* (emphasis added).

In *Acordia*, this Court also chronicled a long and diverse list of benefits that have been deemed to be collateral sources in Virginia. In addition to insurance payments, this Court's list included "social security benefits, public and private pension payments, unemployment and workers' compensation benefit, vacation and sick leave allowances, and other payments made by employers to injured employees, both contractual and gratuitous." 263 Va. at 387. Based on this robust list of benefits considered collateral by this Court, a straightforward principle of Virginia law emerges: whenever the plaintiff in a tort matter was "himself responsible for the benefit, by maintaining his own insurance…the law allows him to keep it for himself." *Id.*

The benefits conferred by a UIM policy, in particular, fit squarely within the list of benefit payments already recognized in Virginia to be collateral sources. The UIM policy is supplemental health insurance. J.A. at 38. Despite having the burden of proof below on the issue of whether there could be a UIM offset against a personal injury award, Llewellyn declined to put into the record White's UIM policy with Erie. It is clear from the release executed by Erie and White, however, (which Llewellyn *did* enter into the record), that White was expressly required to

satisfy all of her medical "liens" with proceeds from the Erie settlement. *See* J.A. at 38. The release listed without limitation "health insurance, ERISA, Medicare, [and] Medicaid." *Id.* Although Llewellyn chose not to enter the amount of White's liens into the record, it is uncontroverted that Erie's payment to White was in part to satisfy White's medical costs subject to any medical liens. *Id*.

It is also uncontroverted that Virginia law favors the expansion, not contraction, of the collateral source rule. A good example of this expansionary principle is *Horne v. Superior Life Ins. Co.*, 203 Va. 282 (1962). This Court's decision in *Horne* was among the first cases to consider the 1958 underinsured motorist statute ("UM"), which is analogous to the UIM law added later to it by the General Assembly. This Court characterized as follows the purpose served by UM coverage, and the relationship among the UM insurer and insured:

> [The UM policy] insures [the uninsured motorists] and others protected under the policy against inadequate compensation in the event of an accident. Here, [the UM carrier] does not stand in the shoes of….the uninsured motorist. Its policy does not insure [the uninsured motorist] against liability. It insures [the purchaser of the policy] and others protected under the policy against inadequate compensation.

Horne, 203 Va. at 285.

Of note, this Court in *Horne* was the first to evaluate the question of whether UM is a collateral source in Virginia. The uninsured motorist in that case attempted to recover workers compensation benefits despite having already

procured a settlement with his UM carrier. The Commission barred the workers compensation claim as a double recovery. This Court reversed, finding the policyholder's settlement "was with his own insurance carrier, who had contracted to pay him for injuries under the uninsured motorist provision of the liability policy. Under these circumstances, a prosecution of his claim for compensation benefits would not amount to a double recovery, and we so hold." *Id*. at 288.

The reason the collateral source rule is so entrenched in Virginia (whether it be in the context of UM, UIM, or other tort situations) is that the rule comports so completely with Virginia's overall practice and policies. The purpose of compensatory damages is to make a tort victim "whole." *Acuar*, 260 Va. at 192. "[T]he injured party should be made whole by the *tortfeasor*, not by a combination of compensation from the tortfeasor and collateral sources. The wrongdoer cannot reap the benefit of a contract for which the wrongdoer paid no compensation." *Id.* (citations omitted; emphasis added); *see also Johnson v. Kellam*, 162 Va. 757, 764-765 (1934) (no reduction for personal injury awards based on plaintiff's receipt of insurance benefits).

There is no evidence in the record below that White did not purchase the Erie policy with personal funds. There also is no evidence in the record below that Llewellyn in any way contributed financially to White's UIM policy payment. White is entitled to inferences from the record below. The $750,000 Erie UIM

payment is therefore from a collateral source because White paid for the policy and Llewellyn contributed nothing to the benefit. *Acuar*, 260 Va. at 189. When a UIM carrier like Erie compensates a tort victim such as White with benefits that the policyholder herself has purchased, this furthers Virginia's policy of wholeness, especially given that White absorbed whatever costs such as co-pays, exclusions from coverage, and attorney's fees that health insurance did not alleviate.

In Virginia, when it comes to balancing the benefits of prudence, "the victim of the wrong rather than the wrongdoer should receive the windfall." *Acuar*, 270 Va. at 193 (*citing Schickling v. Aspinall*, 235 Va. 472, 475 (1988)). The collateral source rule thus re-enforces the principle that those sufficiently prudent to insure against harm will be able to preserve the benefit of their contractual bargain. In this way, the policy promotes heightened care among the operators of automobiles in the Commonwealth. The collateral source doctrine rewards foresight, and allows recovery to those injured by the carelessness of others.

Finally, the collateral source rule permits the issue of insurance to remain completely uninvolved in tort trials, which is another highly-valued and long-standing principle in Virginia. *See e.g. Simmons v. Boyd*, 199 Va. 806, 813-14 (1958); *Lombard v. Rohrbach*, 262 Va. 484 (2001). Without a collateral source rule, parties would have to put on evidence of insurance during jury trials, and prove for the factfinder the exact amounts and types of health care benefits

received by an injured plaintiff. For years, Virginia courts have warned that the intentional injection of health insurance into jury trials could lead to juror confusion and inflated jury awards. Virginia's collateral source rule curtails that prospect.

Despite its resiliency, there is a notable carve out to the collateral source rule in the Commonwealth, and this Court applied it in *Acordia*. Whenever one whose actions produced a plaintiff's injury, whether individually or as a defendant directly implicated in "combined wrongdoing," then "the credit rule" intercedes to allocate any outside benefits. Under these circumstances, the trial court may offset such payments to the credit of *all* of the wrongdoers – not just the one tortfeasor that might be backed by indemnity or insurance. *Acordia*, 263 Va. at 251. In Virginia, after *Acordia*, one who caused or participated in the injury at issue cannot contend that collateral benefits are theirs alone to enjoy.

Simply put, while the collateral source rule applies to nearly all types of external benefit situations, especially those rooted in insurance payments, the rule is inapplicable if the beneficiary is alleged to have actually caused the victim's injury. Erie is an insurance company that provided health and compensatory benefits to White, in the event that White was injured by someone like Llewellyn, and Llewellyn was an underinsured driver. Those UIM benefits from Erie derive from a source independent of and collateral to Llewellyn. This makes Erie's

settlement with White a collateral source, under the definition employed for a century in Virginia. The "co-defendant carve out" detailed in *Acordia* is a reasonable exception to the collateral source rule, but it in no way applies here. Erie did not cause injury to the person of White. Instead, it was *Lllewellyn* who conceded sole liability for White's injuries. That concession should end the collateral source analysis under clearly articulated and well-settled Virginia law.

B. Erie's Payment to White Cannot be Offset Against White's UIM Settlement Within the Meaning of Code § 8.01-35.1 Because Erie is Not "Liable" for White's Personal Injuries

The Commonwealth's collateral source rule is fatal to Llewellyn's appeal. Even if it was not, however, Virginia's offset statute, Code §8.01-35.1, still would provide no support to Llewellyn's position. To establish a statutory offset, Llewellyn would have to prove that Erie was somehow "liable for the same injury to a person or property" as was Llewellyn. The terms "liable" and "same injury to person" are fatal to Llewellyn's case. Erie is not now and *cannot ever be held liable* for Llewellyn's personal injury, as explained below. *See infra* at 21-25. Knowing this, Llewellyn blurs the plain language of Code § 8.01-35.1 and invents a fictional role for a UIM carrier to play in the tort recovery process. Under Virginia law, a statute must be interpreted and applied according to its plain meaning, and this Court has done so with respect to the offset and UIM statutes in

ways that completely undermine Llewellyn's appeal. Llewellyn has not proven Erie is "liable" for White's injuries, so there is no applicable offset.

A salient example of Llewellyn's effort to evade the plain meaning of Code § 8.01-35.1 is her attempt to frame UIM as "third-party coverage." By attempting to turn White from a policyholder into a third-party beneficiary, Llewellyn tries to dissociate UIM as an insurance benefit that is personal to White, and thus a collateral source. Llewellyn tries to establish UIM as third party coverage and move UIM outside that favored circle of collateral sources. To this effect, Llewellyn states the following about the status of UIM: "[T]he statutory scheme treats underinsured coverage as a third-party claim coverage and not as first-party coverage." Llewellyn Opening Br. at 21. Llewellyn also asserts: "underinsurance coverage is unlike health insurance or other first party coverage as the same is statutorily mandated and acts as an effective third-party coverage." Llewellyn Opening Br. at 19. The problem for Llewellyn is that Virginia concludes the opposite.

In *GEICO*, this Court characterized the nature of UIM coverage. In Virginia, a UIM policy is not third-party insurance but rather "characteristically similar" to *first party* coverage. 293 Va. at 386 (Emphasis added). Nowhere in its opinions does this Court analogize UIM to third-party coverage. Accordingly, this Court held that "a UIM carrier has a duty to pay, to an *insured*, damages…for

bodily injury or property damage caused by operation of an uninsured [or underinsured] motor vehicle." 293 Va. at 380 (emphasis added). Pursuant to Code §38.2-2206(K), the "insured" is the entity with which or whom the UIM carrier executes a "full release" – in this case that is White and no other. White is thus the insured of Erie, and Erie is White's first-party insurer. Llewellyn is legally apart from that insurance relationship, and is in no way a third-party beneficiary.

Llewellyn also attempts a figurative interpretation of the term "liable." To this end, Llewellyn states that Erie is "effectively…a nominal party" to White's personal injury action, Llewellyn Opening Br. at 7, and that Erie "effectively acts a litigant to a tort suit." *Id.* at 11. Llewellyn implies that effectual liability equals an offset. This is not Virginia law. To trigger a statutory offset, it is not enough that Erie was a mere "participant in the underlying lawsuit pursuant to Code §38.2-2206," as Llewellyn advocates. In Virginia, a UIM carrier that is sued in connection with a tort victim's claim against a tortfeasor is "not a party" to that action. *GEICO*, 293 Va. at 384. That ends any ability by Llewellyn to argue otherwise.

The same defect arises with respect to how Llewellyn characterizes White's settlement with Erie. To account for the fact that Erie expressly disclaimed liability in its answers and subsequent release, and was dispatched from the litigation pre-trial, Llewellyn slyly hedges that Erie was either "liable, or

potentially liable," leaving open trying to leave open the possibility that Erie could later have been proven responsible. Llewellyn Opening Br. at 24 (emphasis added.) Llewellyn thus invents and tries to peddle a type of "springing" liability, which is creative but counter to the fact that Virginia's UIM statute requires the settling party to be liable at the time of settlement for the offset statute to apply. This Court rejects the surrogate, springing, or effectual approach to UIM liability. *See* GEICO, 293 Va. at 378 ("the obligation of the uninsured motorist insurer arises *only* if it is determined that the insured is 'legally entitled to recover damages'…." (emphasis is original; citation omitted.) To receive the benefits of Code § 8.01-35.1, Llewellyn had to *prove* in the underlying trial court that Erie was *liable* for White's bodily injury. Llewellyn did not do so.

Erie, of course, could never become "liable for the same injury" to White's person, as Code §8.01-35.1(A) requires. This is so for at least five reasons.

First, as noted, a UIM carrier is never obligated for the personal *injury* of the claimant, only the resultant *damages*. By Virginia law, a UIM carrier cannot be "liable" – even for damages caused by an underinsured tortfeasor, until a jury issues a judgment against that tortfeasor. *GEICO, 293 Va.* at 381 n.3. Llewellyn admits this obstacle to her case, noting "underinsured carriers are not subject to a contact action by insureds until a judgment is entered against a defendant

(presumably only if the underinsured carrier refuses to pay)." Llewellyn Opening Br. at 7-8. This admission should end the matter.

Second, there is the fact that Llewellyn admitted full responsibility for White's accident in the trial court. At that trial, Llewellyn had a duty to submit evidence tending to prove Erie's actual liability for White's injury, if she wanted to preserve the point. Alternatively, Llewellyn had to submit evidence post-trial of Erie's liability. The record does not establish Erie was ever liable for anything. Accordingly, the trial court never found Erie "liable" for White's injuries. Llewellyn is well aware of this. She correctly states that Erie was released pre-trial from the White litigation. Llewellyn Opening Br. at 1. The Erie dismissal order, which Llewellyn never opposed and endorsed as "Agreed," does not indicate that Erie was in any way liable for White's injuries. *See* J.A. at 38. That also should resolve the offset issue.

Third, Erie paid and released White's UIM claim over a year before the trial court entered judgment against the sole tortfeasor, Llewellyn. Virginia law expressly permits a UIM carrier to settle cases. *GEICO,* 293 Va. at 371. There was no possibility that a settling UIM carrier could *ever* become "liable" for a tortfeasor's jury verdict, even one based just on damages. If UIM carriers could be "liable" for offsets arising from personal injury payments, as Llewellyn now asks this Court to conclude, then the General Assembly would have to force UIM

carriers to remain in cases until the "liability" of UIM carriers could be established by the jury. There would be no other way to apply the offset statute to UIM situations. This, of course, is not the law.

Fourth, Llewellyn's concept of springing liability or surrogate liability by the mere inclusion of a UIM carrier in a personal injury proceeding does not exist in Virginia. Once again, UM and UIM carriers "are not a party to the liability case." *GEICO*, 293 Va. at 384 (citing *Hylton*, 260 Va. at 56). Even though a UIM carrier is served with pleadings and invited to participate in a tort suit, the act of inclusion does not make the UIM carrier in any way a "defendant" to that litigation, and thus there is no cognizable concept of an "associational liability" of the type urged by Llewellyn. Obviously, a settling UIM carrier that *disclaims* liability cannot be made liable for personal injury. The UIM carrier is not a person "liable" for personal injury, for purposes of Code § 8.01-35.1. Llewellyn cannot change that by inventing inapplicable concepts of effectual, surrogate, or quasi-liability.

Fifth, Llewellyn spends several pages of her Opening Brief arguing that a 2007 amendment to Code §8.01-35.1(A) made a UIM carrier subject to offset because the General Assembly replaced the word "tortfeasor" with "person." This change was of limited import. The amendment merely included indemnitors of the tortfeasor in the category of "persons liable" and made it clear they must share

settlements with co-tortfeasors. This statutory change did not alter the fact that the offset statute is only applicable to those "liable" for "injury to a person." If anything, this amendment codified this Court's holding in *Acordia*. Contrary to Llewellyn's claims, the 2007 amendment did nothing to soften the pre-requisite of "liability" for personal injury before any offset could apply – which is liability for personal injury not damages – nor did it make UIM carriers "effectual litigants" or "surrogates of the tortfeasor." This Court's holding in *GEICO* was rendered ten years after this 2007 amendment, and it is the controlling law on this issue of the point at which a UM or UIM carrier becomes "liable," if at all. Erie cannot be determined to be "liable" for White's injuries under the current version of Code § 8.01-35.1, or under the earlier version of that Code section.

II. This Court Should Reject Llewellyn's Invitation to Adopt Connecticut Law

Because Llewellyn cannot craft an argument to avert Virginia's clear-cut collateral source rule, her first approach is to entirely ignore it. Because Llewellyn's back-up plan to establish that Erie is "liable" because it is some sort of "effectual litigant" (with some kind of "springing liability") also is without merit, Llewellyn pivots to yet a third approach. As a last gasp, she attempts to convince this Court to replace settled Virginia law with the law of Connecticut. Llewellyn asks this Court to subordinate Virginia's collateral source rule (by which White gets to use the benefits of her personal UIM insurance to offset her medical liens),

to the "double recovery" principle, recognized in Virginia as a guideline in tort matters but not as superior to the collateral source rule. Under the double recovery principle, when a tort victim is fully paid for a jury award by sources that are not collateral to a claim, that tort victim cannot continue to collect from other entities, such as doctors who provided surgery or lawyers who might have committed legal malpractice. *See, e.g. Cox v. Geary*, 271 Va. 141 (2006). The point of this precaution is to permit a litigant to be made whole, but not unjustly enriched by compensatory damages from non-collateral sources.

In *Haynes v. Yale-New Haven Hospital*, 243 Conn. 17 (1997), a UIM offset case, the Supreme Court of Connecticut rejected the approach of elevating the protection of collateral sources above concerns for double recovery. The court took the huge leap of analogizing the relationship of the underinsured carrier and the personal injury defendant as "analogous to that of joint tortfeasors…." *Id*. at 27. The Connecticut court called the UIM carrier a "surrogate for the tortfeasor's liability coverage." *Id*. at 26. The *Haynes* court, accordingly, termed the UIM payment as "compensation of the underlying tort injury." *Id*. The *Haynes* court conceded that its holding was purely "a policy choice," acknowledging that it could have elected to prioritize permitting UIM policyholders to shield collateral source benefits over its expressed concerns for double recovery. *Id.* at 31-32. In taking this policy position, the Supreme Court of Connecticut knowingly embraced

a rule that the dissent notes was rejected by "the overwhelming weight of authority of the jurisdictions that have considered whether underinsured/uninsured motorist benefits are a collateral source…." *Id*. at 49 (Berdon, J., dissenting).

The *Haynes* opinion reflected a house divided. It attracted three dissenters, who spotlighted the legal fiction crafted by the majority. The dissenters quoted Connecticut law in arguing that the "insurer is not the alter ego of the tortfeasor," and pointed to the truth that with respect to UIM insurance proceeds the tort victim and tortfeasor "do not share the same legal right." *Id*. at 48 (Berdon, J., dissenting) (citing *Mazziotti v Allstate Ins. Co*., 240 Conn. 799, 817 (1997)). The dissent convincingly summarized the decisions in support of their view from authoritative courts in Florida, Illinois, Kansas, Missouri, Oklahoma, South Carolina, Vermont, West Virginia, and Indiana. *Id*. at 49-54 (Berdon, J., dissenting).

The decision by the Supreme Court of Connecticut in *Haynes* did not signal a national trend away from the primacy of the collateral source rule in UIM offset cases. For example, on December 7, 2018, the Supreme Court of North Carolina embraced the majority rule that UIM benefits are a collateral source. *Hairston v. Harward*, 821 S.E.2d 384 (N.C. 2018). Courts in Pennsylvania have also reversed lower court rulings and elected to regard UIM payments to be protected from offset. *See Smith v. Rohrbach*, 54 A. 3d. 892 (Pa. Super. 2012); *Tannenbaum v. Nationwide Ins. Co*. 992 A.2d 859 (Pa. 2010).

In advocating for *Haynes* to become the law of Virginia, Llewellyn does not cite or discuss this Court's decisions in *Horne* and *Acuar*. Both of these decisions make clear that the law of Virginia gives primary effect to the collateral source rule. Virginia has already balanced the "collateral source rule" and the "one recovery principle," and come up with an application to be utilized in the Commonwealth:

> The collateral source rule is designed to strike a balance between two competing principles of tort law (1) a plaintiff is entitled to compensation sufficient to make him whole, but no more; and (2) a defendant is liable for all damages that proximately result from his wrong. A plaintiff who receives a double recovery from a single tort enjoys a windfall; a defendant who escapes, in whole or in part, liability for his wrong enjoys a windfall. Because the law must sanction one windfall and deny the other, if favors the victim of the wrong rather than the wrongdoer.

Acuar, 260 Va. at 193 (citations and quotations omitted).

Llewellyn states no basis for this Court to disturb settled Virginia law in favor of a fringe Connecticut approach that elevates tortfeasors over victims. This Court should reject Llewellyn's invitation to alter Virginia tort law.

CONCLUSION

For the foregoing reasons, Appellee Ann Michelle White respectfully asks this Court to affirm the judgment of the trial court.

Dated: February 19, 2018

Respectfully submitted,

/s Scott C. Oostdyk

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CERTIFICATE

The undersigned hereby certifies that the foregoing complies with Rules 5:26 and 5:28, and further certifies as follows:

(1) The Appellee is Ann Michelle White.

(2) Counsel for the Appellee are:

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(5) On this 19th day of February, 2019, I caused the foregoing to filed with the Clerk's Office of the Supreme Court of Virginia, and served on counsel of record, in accordance with the Court's VACES Guidelines.

/s Robert W. Loftin

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Robert W. Loftin