IN THE

Supreme Court of Virginia

RECORD NO. 181108

ANN ELIZABETH LLEWELLYN,

Appellant,

v.

ANN MICHELLE WHITE,

Appellee.

OPENING BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. ASSIGNMENTS OF ERROR 1

II. STATEMENT OF THE CASE 1

III. STANDARD OF REVIEW 3

IV. AUTHORITIES & ARGUMENT 6

A. The Law Applicable to this Assignment of Error 6
1. The History, Purpose, and Scheme Established by Virginia Code Section 38.2-2206 6
2. The History, Purpose, and Scheme Established by Virginia Code Section 8.01-35.1 12
3. This Court's Recent Rulings Regarding Virginia Code Section 8.01-35.1 15
4. The Double Recovery Issue 18

B. The Law Applied to the Facts in this Case 21
1. The Plain Language of the Release Governs 21
2. Llewellyn is Entitled to the Credit Pursuant to Virginia Code Section 8.01-35.1 24
3. The Equities Support Application of the Credit to Prevent Double Recovery 27

V. CONCLUSION AND STATEMENT OF RELIEF SOUGHT 28

VI. CERTIFICATE 30

TABLE OF AUTHORITIES

CASES

Acordia of Virginia Ins. Agency v. Genito Glenn, L.P., 263 Va. 377 (2002) 14

Adams v. Doughtie, 63 Va. Cir. 505 (City of Portsmouth 2003) 23

Barbara McNeal v. Kai Antonio, Circuit Court for the County of Lancaster, CL15-56, Va. Sup. Ct. Record No. 170841 (2017) 16

Boynton v. Kilgore, 271 Va. 220 (2006) 4

Conyers v. Martial Arts World of Richmond, Inc., 273 Va. 96 (2007) 3, 4

Cox v. Geary, 271 Va. 141 (2006) 17

Flippo v. Csc Assocs. Iii, 262 Va. 48 (2001) 5

Gust K. Newberg Constr. Co. v. Loven, 1993 U.S. App. LEXIS 3456 (4th Cir. 1993) 13

Harleysville Mut. Ins. Co. v. Nationwide Mut. Ins. Co., 789 F.2d 272 (4th Cir. 1986) 18

Haynes v. Yale-New Haven Hosp., 243 Conn. 17 ..... 9, 10, 11, 12

Lawson v. States Const. Co., 193 Va. 513 (1952) 23

Lemke v. Sears, Roebuck & Co., 853 F.2d 253 (4th Cir. 1988) 5

Manu v. GEICO Cas. Co., 293 Va. 371 ..... 7, 8

Midwest Mut. Ins. Co. v. Aetna Casualty & Surety Co., 216 Va. 926 (1976) 7

Montagna v. Holiday Inns, Inc., 221 Va. 336 (1980) 23

Smith v. McLaughlin, 289 Va. 241 (2015) 13

State Farm Mut. Auto. Ins. Co. v. Beng, 249 Va. 165 (1995) 7

State Farm Mut. Auto. Ins. Co. v. Cuffee, 248 Va. 11 (1994) 7

Thurston Metals & Supply Co. v. Taylor, 230 Va. 475 (1986) 13

Transp. Ins. Co. v. Womack, 284 Va. 563 (2012) 7

Va. Elec. & Power Co. v. Norfolk S. Ry. Co., 278 Va. 444 (2009) 4

Virginia-American Water Co. v. Prince William County Serv. Auth., 246 Va. 509 (1993) 4

Virginia Farm Bureau Mut. Ins. Co. v. Gibson, 236 Va. 433 (1988) 6

Wilkins v. Peninsula Motor Cars, 266 Va. 558 (2003) 18

William H. Gordon Assocs. v. Heritage Fellowship, 291 Va. 122 (2016) ..... *passim*

STATUTES

Va. Code Sec. 8.01-2 13

Va. Code Sec. 8.01-35.1 ..... *passim*

Va. Code Sec. 38.2-2206 ..... *passim*

2006 Va. HB 1797 (2007) 12

ASSIGNMENT OF ERROR

Appellant Ann Llewellyn hereby assigns error to the following rulings of the Henrico County Circuit Court:

1. **The trial court erred by refusing to apply the underinsured carrier's $750,000.00 settlement with Appellee Ann White to the final judgment order as a statutory offset pursuant to Va. Code Sec. 8.01-35.1, and by entering judgment for the entire $1,500,000 jury verdict.**
   (Error preserved by App. p. 65; App. p. 81; App. p. 95; App. p. 144)

STATEMENT OF THE CASE

The case at bar arises from a motor vehicle accident occurring on July 21, 2013 in Henrico County. The subject accident occurred at the end of Ann Llewellyn's ("Llewellyn") driveway. Ann White ("White") served Llewellyn and her underinsured motorist carrier, Erie Insurance Exchange ("Erie"), with a copy of the Complaint.

Erie participated in the defense of the case until April 6, 2017 when it was released by White. App. pp. 60-62; 66-68; 82-84. The trial court also dismissed Erie from the underlying lawsuit. App. pp. 26-27**.** Erie filed an Answer to the initial Complaint, an Answer and a Demurrer to White's Amended Complaint, and fully participated in all discovery until its dismissal. App. pp. 9-11; 20-21; 22-25.

Notably, the subject Settlement Agreement and Release of All Claims ("Release") expressly states the agreement releases Erie in exchange for its entire exposed underinsured policy limits: $750,000.00. App. pp. 60-62; 66-68; 82-84. Erie had $1,000,000.00 in underinsured coverage while Defendant had $250,000.00 in underlying coverage, thus exposing Erie $750,000.00. This fact is not at issue. The Release also expressly states the settlement arises from the subject underlying lawsuit and White's injuries arising from the subject accident. Id. The Release expressly cites to the trial court's specific case number. Id. Also, Erie expressly waived any right of subrogation against Llewellyn. Id.

Trial occurred on May 1 & 2, 2018. The jury rendered a verdict for $1,500,000.00. App. pp. 63-78; 79-93. Counsel for Llewellyn specifically requested the trial court apply Erie's $750,000.00 settlement as a statutory offset pursuant to Va. Code Sec. 8.01-35.1, enter a judgment order reflecting said offset, and set the appeal bond based on the reduction afforded by the statutory offset. App. pp. 34-39; 53-62; 63-78; 79-93; 94-95. The trial court denied all motions on June 8, 2018 and entered judgment for White in the full amount of $1,500,000.00 on June 11, 2018. App. pp. 79-93; 144.

In denying Llewellyn's motion for the statutory credit, the trial court found as follows:

> As to the UM carrier and 8.01-35, the Court is not willing to make a reduction in that regard. I will tell you yes, there were changes pursuant to the statute. I think it's in the matter, you know, in terms of tortfeasors versus the word 'persons liable for the same injury,' but my reading in terms of cases I've read at this point side with regard to the aspect of plaintiff in that matter and I'm going to deny the aspect of the UM reduction.

The trial court reduced its rulings to writing by Order dated July 2, 2018 and simply adopted its rulings made on the record. App. pp. 38; 94-95.

As a result, Llewellyn stands subject to a judgment for the full $1,500,000.00 awarded by the jury. Moreover, White stands ready to receive $2,250,000.00 for a $1,500,000.00 jury verdict. Notably, Llewellyn has $250,000.00 in applicable liability coverage. Thus, Llewellyn will be personally exposed for $1,250,000.00 of the entered judgment versus $500,000.00 if the credit is applied. Llewellyn requests this Court find she is entitled to the $750,000.00 credit pursuant to Va. Code Sec. 8.01-35.1 and/or applicable Virginia law and that this Court reduce the subject jury verdict to $750,000.00.

STANDARD OF REVIEW

Issues of statutory interpretation are a pure question of law which this Court reviews *de novo*. Conyers v. Martial Arts World of Richmond,

Inc., 273 Va. 96, 104 (2007)(citations omitted). It is well-settled that where the language of a statute is unambiguous, this Court is bound by the plain meaning of that language. Id. (citations omitted). Additionally, if a statute is subject to more than one interpretation, this Court applies the interpretation that will carry out the legislative intent behind the statute. Id. Also, "…a presumption exists that a substantive change in law was intended by an amendment to an existing statute." Virginia-American Water Co. v. Prince William County Serv. Auth., 246 Va. 509, 517 (1993)(citations omitted).

Furthermore, the plain language of a statute must be applied unless the application of the same would lead to an absurd result. Boynton v. Kilgore, 271 Va. 220, 227 (2006)(citations omitted). "Absurd result" means situations in which the law would be internally inconsistent or otherwise incapable of operation. Id. at n. 9.

This Court also reviews contracts and the interpretations thereof *de novo*. Va. Elec. & Power Co. v. Norfolk S. Ry. Co., 278 Va. 444, 458 (2009)(citations omitted). Importantly, "[t]he primary goal in the construction of written contracts is to determine the intent of the contracting parties, and intent is to be determined from the language employed, surrounding circumstances, the occasion, and apparent

object of the parties." Flippo v. Csc Assocs. Iii, 262 Va. 48, 64 (2001)(citations omitted). Moreover, "[t]he polestar for the construction of a contract is the intention of the contracting parties as expressed by them in the words they have used." Id. Lastly, "[t]he effect of the release itself is controlled by the intent of the parties as expressed in the terms of the writing." Lemke v. Sears, Roebuck & Co., 853 F.2d 253, 255 (4th Cir. 1988).

Notably, this Court has held that mixed questions of law and fact require deference to the trial court's factual findings and a *de novo* review of the application of law to the facts. William H. Gordon Assocs. v. Heritage Fellowship, 291 Va. 122, 146 (2016)(citations omitted). However, Llewellyn contends the trial court made no factual findings in this case. Rather, the trial court only interpreted the statute at issue and issued a legal opinion as to the definition of "person liable" pursuant to Virginia Code Sec. 8.01-35.1. App. p. 38. Moreover, the interpretation of the subject release is reviewed *de novo*. Thus, Llewellyn contends this Court's review is *de novo* in its entirety.

AUTHORITIES & ARGUMENT

Assignment of Error No. 1: The trial court erred by refusing to apply the underinsured carrier's $750,000.00 settlement with White to the final judgment order as a statutory offset pursuant to Va. Code Sec. 8.01-35.1 and by entering judgment for the entire $1,500,000 jury verdict.

A. The Law Applicable to this Assignment of Error

1. The Purpose and Statutory Scheme Established by Virginia Code Sec. 38.2-2206

This Court has summarized the purpose of uninsured/underinsured motorist insurance coverage provided by Virginia Code Sec. 38.2-2206 as follows:

> In Virginia, uninsured motorist protection does not provide insurance for an uninsured motorist; it provides insurance to the insured motorist. In effect, it is a safety net to give an injured insured a fund from which to recover where the tort-feasor either has no insurance or has inadequate insurance. By its very nature, uninsured motorist coverage is not intended to be the ultimate source of payment where any tort-feasor liable in part for the injury to the insured has adequate resources to pay the judgment. The consent-to-settlement clause protects the insurer's power to preserve potential sources of recovery. Thus, the clause prevents an uninsured motorist carrier from paying a claim when another source of funds should pay.

Virginia Farm Bureau Mut. Ins. Co. v. Gibson, 236 Va. 433, 438 (1988).

Plaintiffs must serve the underinsured carrier with process as if a party-defendant to receive the benefit of their underinsured coverage.

See Va. Code Sec. 38.2-2206(F). Service on the underinsured carrier is a condition precedent to the benefits of the underinsured coverage. Midwest Mut. Ins. Co. v. Aetna Casualty & Surety Co., 216 Va. 926, 929 (1976)(citations omitted). Once served, an underinsured carrier has the right to file pleadings and take other action allowable by law in the name of the defendant or in the name of the company. See Va. Code Sec. 38.2-2206(F). Underinsured carriers effectively become a nominal party with all the rights of a party. Therefore, the underinsured carrier has the right to defend the tort action, and that right is independent of the named-defendant's right to defend. Transp. Ins. Co. v. Womack, 284 Va. 563, 568 (2012)(citations omitted); see also State Farm Mut. Auto. Ins. Co. v. Cuffee, 248 Va. 11, 14 (1994); State Farm Mut. Auto. Ins. Co. v. Beng, 249 Va. 165, 169 (1995).

Properly served underinsured carriers are obligated to pay insureds only when they are legally entitled to recover. Manu v. GEICO Cas. Co., 293 Va. 371, 380. Insureds become legally entitled to recover, and underinsured carriers become legally obligated to pay, only upon entry of a judgment against an underinsured defendant. Id. at 380-381. This Court has repeatedly held that underinsured carriers are not subject to a contract action by insureds until a judgment is

entered against the defendant (and presumably only if the underinsured carrier refuses to pay.) Id. at 380.

Finally, Virginia Code Sec. 38.2-2206(G) provides subrogation rights only to the underinsured carrier against the underlying tortfeasor for the amounts paid.

Therefore, Virginia Code Sec. 38.2-2206 provides an important safety net for injured parties attempting to recover against underinsured tortfeasors. The Virginia General Assembly established a very specific statutory scheme establishing the applicable framework required to afford injured parties underinsured protection. First, the underinsured carrier must be served as if a party-defendant. Second, the underinsured carrier may defend the case independent of the named-defendant. Third, underinsured carriers are required to pay only once a judgment is entered against the underinsured party and said judgment exposes the underinsured carrier. However, underinsured carriers may certainly decide to settle prior to judgment (just as a party-defendant may decide to settle prior to a judgment). Fourth, the underinsured carrier retains the right to subrogation against the tortfeasor unless waived by the underinsured carrier.

While Virginia has not directly addressed this issue, in Haynes v. Yale-New Haven Hosp., 243 Conn. 17, 20, the Connecticut Supreme Court addressed the role of underinsured coverage and its application in conjunction with the Collateral Source Rule and/or the Doctrine of Double Recovery. In that case, the decedent's estate recovered $20,000 from the tortfeasor's liability policy and $630,000 from the deceased's underinsured carrier after an arbitration ($650,000 award less the $20,000 primary policy limits). Id. The settlement arose from the underlying tort action arising from the subject motor vehicle accident. Subsequently, the estate attempted to sue the emergency room doctor for medical malpractice. Id. The trial court granted summary judgment because it concluded the plaintiff had already been fully compensated and any additional award would constitute impermissible double recovery. The plaintiff appealed. Id. at 22. The plaintiff argued that the underinsured coverage arose solely by way of contract and constituted a collateral source thus not implicating the Doctrine of Double Recovery. Id.

The Connecticut Supreme Court affirmed the trial court's decision to grant summary judgment. Through its ruling, the Court noted that underinsured motorist benefits are *sui generis* – the benefits

are contractual, but they also depend upon principles of tort liability and damages, therefore making underinsured motorist insurance different than other traditional types of insurance. The Court began its analysis by stating that underinsured coverage specifically serves "…to place the insured in the same position as, but no better position than, the insured would have been had the underinsured tortfeasor been fully insured." Id. at 27. The Court also found that "…the plaintiff's putative right to recover against the defendants in the present case, for the loss that her decedent's underinsured motorist carrier has already paid depends solely on the order of litigation in this case." Id. at 29. Because of the differences, the Court stated that the question "is not whether underinsured motorist benefits are a collateral source, the question is whether they *should be* a collateral source in the present factual context." Id. at 27.

In Haynes, the Court noted that if the plaintiff's reasoning was used, the plaintiff would have recovered *more* than her full damages *solely* because of her decedent's underinsured motorist coverage. In sum, the Court found that "precluding the plaintiff from obtaining double recovery does not deprive the decedent the benefit for which she paid her underinsured motorist premium." Id. at 31. The Court also found

that the order in which the claims, *i.e.* against the tortfeasor or the underinsured carrier, are presented or resolved does not matter because the purpose of underinsured motorist coverage remains the same. The purpose is to make the plaintiff whole, but not enriched. Id. at 30-31.

The Haynes opinion aptly defines underinsured coverage, states the role of underinsured coverage, states the scheme established by underinsured coverage, and more specifically defines the role of underinsured coverage when paralleled with the Collateral Source Rule and the Double Recovery Doctrine. The Connecticut statute providing for uninsured and underinsured motorist coverage possesses stark similarities to Virginia Code Sec. 38.2-2206. Therefore, the Connecticut Supreme Court analysis in Haynes is informative and helpful in analyzing the present situation.

Simply, underinsured coverage is unique and is triggered by a tort action. The underinsured carrier effectively acts as a litigant to a tort suit. As a result, underinsured carriers are persons liable for the same injuries giving rise to the underlying tort claim. As outlined by Haynes, underinsured carriers serve

to make a plaintiff whole and not to enrich a plaintiff beyond the value of his or her claim.

Llewellyn contends the statutory scheme established by Va. Code Sec. 38.2-2206 works in conjunction with Va. Code Sec. 8.01-35.1, which is detailed below, to produce fair and equitable results that do not violate the Collateral Source Rule and serve the interests of the Double Recovery Doctrine.

2. The Applicable History and Scheme Established by Virginia Code Sec. 8.01-35.1

Va. Code Sec. 8.01-35.1, in pertinent part, provides:

> A. When a release or a covenant not to sue is given in good faith to one of two 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 the release, or in the amount of the consideration paid for it, whichever is the greater.

In 2007, the General Assembly amended Va. Code Sec. 8.01-35.1 by removing any and all language concerning "tortfeasors" and liability "in tort." The 2007 amendment replaced tortfeasor with "person" and removed the narrow scope of liability "in tort." See 2006 Va. HB 1797 (2007). Thus, the statutory offset is not restricted to

payments made by joint tortfeasors and the removal of this language must be considered as intentional. Rather, the statutory offset applies for any and all payments received from "persons liable for the same injury." As this Court is well aware, "persons" includes partnerships, associations, corporations, or any other legal or commercial entity. See Va. Code Sec. 8.01-2.

This Court noted the 2007 amendments in a recent footnote and specifically recognized the General Assembly's amendment to Virginia Code Sec. 8.01-35.1(A) to apply to "persons" liable and not strictly in a joint tortfeasor context. See Smith v. McLaughlin, 289 Va. 241, n. 3 (2015). Notably, this Court held the application of Virginia Code Sec. 8.01-35.1 was not limited to "joint-tortfeasors" even before the 2007 amendments. Id. at 257 (citing Thurston Metals & Supply Co. v. Taylor, 230 Va. 475, 483 (1986)).

The Fourth Circuit also held that

> …that [Va. Code § 8.01-35.1] establishes that the intent of the parties controls the effect of a release. In a case holding an employer vicariously liable, the Supreme Court of Virginia decided that the statute can apply to those who are not technically joint tortfeasors. This interpretation, the Court explained, furthers the purpose of the statute which is to encourage settlements.

Gust K. Newberg Constr. Co. v. Loven, 1993 U.S. App. LEXIS 3456, 8 (4th Cir. 1993)(citing Thurston Metals & Supply Co. v. Taylor) (finding

the text of statute and the case law provide for a broad interpretation in order to accomplish the remedial purpose of the statute.)

This opinion also came before the 2007 amendments and demonstrates the broad application of Virginia Code Sec. 8.01-35.1 even before the General Assembly amended the statute.

Moreover, Virginia Code Sec. 8.01-35.1 "…addresses release and liability regarding both tangible and intangible property rights, and is not limited to tort actions." William H. Gordon Assocs. v. Heritage Fellowship, 291 Va. 122, 146 (2016)(citations omitted). Further, "[a] party who wishes to obtain credit for a plaintiff's prior receipt of payment for the same injury from another co-defendant is required to make a motion, and bears the burden on that motion." Id. (citing Acordia of Virginia Ins. Agency v. Genito Glenn, L.P., 263 Va. 377, 389 (2002). The trial court must consider the credit determination after the jury renders its verdict. Id.

Therefore, Virginia Code Sec. 8.01-35.1 specifically provides a statutory offset for any payments made by persons liable for the same injuries contemplated by a subject lawsuit and a subject jury verdict. The statutory language is unambiguous. This Court and federal courts broadly interpreted the statute prior to the 2007 amendments. The 2007 amendments simply removed the limiting "tortfeasor" and "in tort"

language to effectuate a broad application of the statute. For all of the reasons stated above, Va. Code Sec. 8.01-35.1 applies to underinsured carriers because the same are "persons liable" for the same injury especially when served with the specific lawsuit which ultimately results in a jury verdict.

3. This Court's Recent Rulings Regarding Virginia Code Sec. 8.01-35.1

This Court has heard post-2007 appeals regarding Va. Code Sec. 8.01-35.1 on very few occasions. In William H. Gordon Assocs. v. Heritage Fellowship, the plaintiff brought a cause of action for negligent design of a rain tank. 291 Va. 122, 132 (2016). The plaintiff sued both the engineer and the inspector who were hired pursuant to two separate contracts with the plaintiff. Id. The plaintiff settled with the inspector for $200,000, which the parties claimed represented attorney's fees recoverable pursuant to the terms of the plaintiff's contract with the inspector. Id. at 134. The trial court refused to apply the $200,000 settlement to the judgment against the engineer because it found the claim against the engineer and the claim against the inspector arose from two separate contracts. Id. at 148. This Court held that

> …the key ‘factor to be considered in determining the applicability of the statutory provision [Code § 8.01-35.1] is whether the release or covenant not to sue given . . . was for the 'same injury or the same property damage' as that represented by the jury award…

291 Va. 122, 147 (2016)(citations and quotations omitted).

Moreover, this Court held that while the causes of action arose from two different contracts, both concerned the same injury. Id. at 147. This Court held the trial court did not properly analyze the issue of the statutory offset and remanded to the trial court to analyze the release and look behind the release language for a proper analysis. Id. at 149.

This Court recently denied an appeal from a decision from the Circuit Court of the County of Lancaster. See Barbara McNeal v. Kai Antonio, Circuit Court for the County of Lancaster, CL15-56, Va. Sup. Ct. Record No. 170841 (2017). In McNeal, the plaintiff sued Antonio, The Louise B. Reuling Trust, and Raymond Hayes for injuries sustained in an automobile accident. The insurance agent for the Louise B, Reuling Trust failed to procure the appropriate underlying coverage to trigger an applicable umbrella policy. As a result, the insurance agent’s errors and omissions carrier contributed to a settlement between McNeal, and the Trust and Hayes. Antonio went

to trial. The trial court applied the entire settlement proceeds, including the funds paid by the errors and omissions carrier, pursuant to Va. Code Sec. 8.01-35.1 finding the same was paid for the same injury. This Court denied McNeal's appeal on this issue.

Finally, this Court has affirmatively identified a pre-2007 holding and determined it is now inapplicable based on the 2007 amendments. In William H. Gordon Assocs. v. Heritage Fellowship, 291 Va. 122 (2016), this Court specifically addressed the prior holding in Cox v. Geary, 271 Va. 141 (2006) which turned on whether the two defendants were joint tortfeasors. Id. at n. 6. This Court held

> We note that Cox was decided before the 2007 amendments to Code § 8.01-35.1 expanded its applicability beyond tort actions. Thus, the ruling in Cox that 'the protection afforded by Code § 8.01-35.1 [is] unavailable' because the '[a]ttorneys and the Commonwealth are not joint tortfeasors' has been abrogated by the removal of language in the statute limiting its application to situations where 'two or more persons [are] liable in tort for the same injury,' on which Cox turned… and replacement with the current language providing that Code § 8.01-35.1 now applies to 'persons liable for the same injury to a person or property.' However, this does not change the applicability of the injury analysis.

Id.

Therefore, this Court has specifically recognized the abrogation of the "joint tortfeasor" requirement and the limitation of "in tort." The present situation requires the same application of the amended code section as previously recognized by this Court.

Thus, it is clear that the proper Va. Code Sec. 8.01-35.1 analysis requires a judicial determination as to whether the release at issue contemplates the same injuries as the subject lawsuit and the subject jury award. It is also clear the source of duty may vary, but if the release contemplates the same injury, then Va. Code Sec. 8.01-35.1 applies. Moreover, the 2007 amendments to the code specifically removed the joint tortfeasor requirement from the statute as well as the "in tort" requirement. Therefore, the source of the subject payment does not matter under the amended code as long as the subject payment was made for the same injury.

4. The Double Recovery Issue

In Virginia, a plaintiff may receive only one satisfaction of a judgment. Harleysville Mut. Ins. Co. v. Nationwide Mut. Ins. Co., 789 F.2d 272, fn. 1 (4th Cir. 1986). Also, this Court has held that "[i]n determining whether multiple damage awards constitute impermissible double recovery, the trial court must consider the nature of the claims involved, the duties imposed and the injury sustained." Wilkins v. Peninsula Motor Cars, 266 Va. 558, 561 (2003)(citations omitted). Trial courts are charged with assuring jury verdicts do not include duplicative damages. Id. at 561.

The principle of double recovery and receiving one satisfaction of judgment underlies and/or is served by both Virginia Code Sec. 38.2-2206 and Virginia Code Sec. 8.01-35.1. Virginia Code Sec. 38.2-2206 specifically provides an additional source of coverage for injured plaintiffs, but treats the underinsured carrier as an effective defendant and imposes a duty to pay only upon a judgment. Moreover, the underinsured statute also specifically provides for subrogation rights against the underinsured defendant. Lastly, underinsured 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 also refers this Court to the summary of the Connecticut Supreme Court opinion in Haynes v. Yale-New Haven Hosp. discussed above as the same specifically addresses the double recovery issue in the context of underinsured coverage.

Virginia Code Sec. 8.01-35.1 specifically serves to promote and allow settlement prior to judgment, but grants a statutory offset for the settlement amount when the settlement contemplates the same injuries as the underlying lawsuit and/or the ultimate jury verdict.

Thus, these two code sections harmoniously work to provide additional funds and to make the injured party whole, as determined by

a jury verdict, without unjustly enriching injured parties or unfairly providing unfettered supplemental liability coverage to the underinsured party. Simply, a jury values the case, the underinsured carrier pays its exposed amount, and then the underinsured carrier may subrogate against the underinsured defendant. In that scenario, the injured plaintiff is made whole, the underinsured carrier had an opportunity to defend, and the underinsured motorist does not walk away with an added benefit of additional coverage unless the underinsured carrier waives its subrogation rights.

In the event an underinsured carrier decides to settle for its exposed limits (or a smaller amount) prior to a judgment, then the injured party receives those funds and may proceed to trial against the underinsured motorist. In that scenario, the amount paid by the underinsured carrier constitutes funds received from a person liable for the same injuries and the underinsured motorist receives a credit for the amount paid. Notably, in either the post-judgment or pre-judgment scenario, the injured party is made whole as the underinsured motorist coverage is applied to the jury verdict which represents the ultimate value of a case.

It is clear neither code section at issue supports an injured party receiving settlement funds from an underinsured carrier and having the same not be applied as funds received as a result of a lawsuit and the damages claimed therein. Underinsured coverage is available only when the underinsured carrier is served as though a party-defendant. Of course, underlying liability carriers and underinsured carriers routinely enter into global pre-litigation settlements. However, the statutory scheme treats underinsured coverage as a third-party claim coverage and not as first-party coverage. Underinsured coverage is only available if and when an injured party establishes his or her third-party claim is worth the exposed underinsured coverage. All of this occurs within the context of a tort claim. Thus, any monies paid by an underinsured carrier arise within the context of a tort claim and any amount paid by an underinsured carrier which is not applied to the jury verdict constitutes impermissible double recovery.

B. <u>The Law Applied to the Facts in this Case</u>

1. <u>The Plain Language of the Release Governs</u>

As stated above, the plain language of a release and the intent of the parties to the subject release govern this Court's interpretation of the same. The subject Settlement Agreement and Release of All

Claims specifically states that the $750,000.00 settlement payment, which constituted the total exposure to Erie under Virginia Code Sec. 38.2-2206, was paid in exchange for a full and final release of all claims arising from the subject motor vehicle accident as detailed in White's Complaint. The Release even cited to the specific case number for the underlying case in the Circuit Court for the County of Henrico.

White agreed to satisfy any and all liens, including medical liens, arising from the subject lawsuit. The Release states that White would dismiss Erie from the subject lawsuit. Finally, Erie agreed to waive subrogation against Llewellyn pursuant to Virginia Code Sec. 38.2-2206.

The above-summarized plain language of the Release governs this Court's analysis of the same and its application pursuant to Virginia Code Sec. 8.01-35.1. Llewellyn states the plain language of the Release unequivocally demonstrates White released and dismissed Erie from the subject lawsuit for $750,000.00. Erie's payment was made as a participant in the underlying lawsuit pursuant to Virginia Code Sec. 38.2-2206. White released all claims made in her Complaint against Llewellyn, including her personal injury claims.

White also agreed to satisfy any and all liens, including medical liens, arising from the subject accident and lawsuit.

Thus, there is no dispute that Erie's payment was for the "same injury" to White as the subject jury verdict. Erie's subsequent dismissal from the lawsuit solidifies this position. Also, Erie would not have paid White $750,000.00 unless Erie was a "person liable" for the same injuries. Simply, there would be no consideration for the Release without Erie being a "person liable" to White.[1]

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[1] Alternatively, Llewellyn requests this Court invalidate the subject release for lack of valuable consideration. As this Court is well-aware, "[t]he essential elements of a contract are offer and acceptance, with valuable consideration." Adams v. Doughtie, 63 Va. Cir. 505, 520 (City of Portsmouth, 2003)(citing Montagna v. Holiday Inns, Inc., 221 Va. 336, 346 (1980)). Moreover, "[t]he consideration for the promise must be a direct benefit to the promisor and the primary object of making the promise, as distinguished from a benefit which is merely incidental, indirect or remote." Lawson v. States Const. Co., 193 Va. 513, 521 (1952).
Llewellyn contends that if Erie was not a person liable to White at the time it paid $750,000.00 to White, then White offered Erie nothing in exchange for the $750,000.00. In essence, White received $750,000.00 for no reason at all if Erie was not a person liable to White. Therefore, and in the alternative, Llewellyn asks this Court invalidate the agreement, enter the jury verdict for $1,500,000.00, which would then trigger Erie to pay its $750,000.00. The parties would be in the same position as they currently are with Erie's prejudgment settlement, only White could not be unjustly enriched by $750,000.00 for a $1,500,000.00 jury verdict. This alternative scenario demonstrates the absurd result created by the trial court's analysis.

2. Llewellyn is Entitled to the Credit Pursuant to Virginia Code Sec. 8.01-35.1

Llewellyn contends Erie is a "person liable" for the "same injury." White served Erie with the lawsuit and Erie participated in the defense of the suit until its dismissal. Erie did so pursuant to Virginia Code Sec. 38.2-2206. The statutory scheme for the same is fully described above.

Erie, a legal person, constitutes a person liable for the same injury. Erie had a duty to pay any judgment amount above the available insurance for Llewellyn and within its exposed amount. Erie's maximum exposure was $750,000.00. Erie decided to settle for its entire exposed amount. Erie also decided to waive its subrogation rights against Llewellyn. These subrogation rights constitute the checks and balance measure which permit the underinsured carrier to recoup any monies paid in excess of the underlying coverage. This subrogation system prevents tortfeasors from indiscriminately receiving the benefit of the underinsured coverage. Nonetheless, the subrogation rights belong solely to the underinsured carrier.

The plain language of the Release necessarily renders Erie a person liable for the same injury. Erie would not have settled unless it was liable, or potentially liable, to White nor would Erie insist that White honor any and all liens. Llewellyn contends it does not matter that Erie

was statutorily or contractually obligated to pay White at the specific moment in time that White and Erie entered into the Release. Also, Llewellyn contends it does not matter that Erie's obligations to White did not technically or necessarily arise "in tort."

First, Virginia Code Sec. 8.01-35.1 no longer restricts the application of the same to liable "in tort" and to "joint tortfeasors." In fact, this Court has found the same applies to contractual and statutory obligations. Second, the Release specifically released Erie from all obligations from the underlying lawsuit. Therefore, the subject release and payment contemplated only obligations and duties arising from the subject lawsuit. Third, any and all duties owed by Erie to White necessarily hinge on liability in tort of Llewellyn.

Llewellyn contends Erie is unequivocally a person liable to White. Also, Llewellyn states Erie's settlement with White arose solely from the same injuries to White. The plain language of the Release undoubtedly establishes the $750,000.00 settlement with Erie arose from the specific accident, was caused by the specific lawsuit, and was for the specific injuries for which White later received a jury verdict. Moreover, the circumstances surrounding the subject settlement leave no doubt that Erie settled with White because of the subject accident and the subject lawsuit. As such, the clear and unambiguous language of the Release, as well as the circumstances surrounding the execution

of the Release, firmly establish White received Erie's settlement funds solely for the injuries claimed in the subject lawsuit and later represented by the jury verdict.

In sum, the plain language of the Release and the intent of the parties to the Release render Erie a person liable for the same injuries as contemplated by the subject jury verdict. This Court simplified the analysis for the application of Virginia Code Sec. 8.01-35.1 to only whether the subject payment was for the same injury as that represented by the jury verdict. The General Assembly and this Court removed any analysis as to whether the subject release and payment came from a joint tortfeasor for liability in tort. The amended statute expressly concerns itself only with the reason for the subject release and payment.

In this case, it is clear Erie's payment was for the same injuries as the subject jury verdict. The Release itself says so. Moreover, the facts surrounding the settlement necessarily indicate White received the $750,000.00 from Erie for the same injuries as the underlying lawsuit. Thus, Llewellyn contends the trial court erred in refusing to apply the $750,000.00 credit to the $1,500,000.00 jury verdict. Llewellyn requests this Court find she is entitled to the credit and reduce the subject judgment to $750,000.00.

3. **The Equities Support Application of the Credit to Prevent Double Recovery**

Llewellyn contends her entire argument above serves the plain language and the legislative intent of Virginia Code Sec. 38.2-2206 and Virginia Code Sec. 8.01-35.1. Llewellyn contends the two code sections work harmoniously and there is no conflict between the two. In addition to the plain language and intent of all relevant statutes and the Release supporting Llewellyn's receipt of the credit, Llewellyn also contends the equities and the potential for an absurd result also support her receiving the $750,000.00 credit.

First, and if this Court agrees with the trial court, then White will receive $2,250,000.00 for a $1,500,000.00 jury verdict. White requested a jury value her case. The jury did so. White's lawsuit also implicated Erie. Without filing the lawsuit, Erie would have never participated or been subject to a verdict triggering its obligation to pay. The General Assembly certainly did not intend for White to be able collect $2,250,000.00 for a jury verdict totaling $1,500,000.00 by way of an underinsured carrier who decided to settle based upon a pending jury verdict and a likely verdict requiring it to pay.

Second, the trial court's interpretation of Virginia Code Sec. 8.01-35.1 obliterates the doctrines of double recovery and/or unjust

enrichment. The trial court's judgment order permits White to receive an additional $750,000.00 to which she had no access without the subject lawsuit and her injuries claimed therein. White will be unjustly enriched at the expense of Llewellyn if the trial court's judgment order stands.

Therefore, Llewellyn contends that in addition to the plain language of Virginia Code Sec. 8.01-35.1, Virginia Code Sec. 38.2-2206, and the Release, as well as the intentions of the same, that general notions of fairness and equity support Llewellyn's argument that she is entitled to the $750,000.00 statutory credit. Llewellyn contends her equitable argument necessarily permeates her statutory interpretation arguments expressed above because the issues of fairness, double recovery, unjust enrichment, and a potentially absurd result certainly underlie the legislative intent for the subject statutes.

CONCLUSION AND STATEMENT OF RELIEF SOUGHT

The trial court erred by denying Petitioner the statutory offset pursuant to Va. Code Sec. 8.01-35.1. The trial court erred by entering judgment for the entire $1,500,000.00.

Wherefore Llewellyn requests this Court find the trial court erred as stated above, reduce the judgment amount to $750,000.00, and require the return of any and all assets

collected during the pendency of this appeal as necessary, as well as any other relief this Court deems just. Petitioner requests oral argument pursuant to Rule 5:33.

Respectfully submitted,

/s/ E. Brandon Ferrell

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CERTIFICATE

I certify that the forgoing Opening Brief was hand-filed with the Clerk of the Supreme Court of Virginia on this 25th day of January, 2019. On this same day, a copy was served, via USPS First Class Mail and electronic mail to:

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I also certify compliance with Rule 5:26 of the Rules of the Supreme Court of Virginia.

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