IN THE

Supreme Court of Virginia

RECORD NO. 181108

ANN ELIZABETH LLEWELLYN,

Appellant,

v.

ANN MICHELLE WHITE,

Appellee.

REPLY BRIEF OF APPELLANT

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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)

AUTHORITIES & ARGUMENT

A. White Misstates the Applicable Standard of Review

The subject of this appeal concerns issues of statutory construction and/or interpretation, as well as a review of a contract and the interpretation thereof. As stated in Llewellyn's Opening Brief, these issues are reviewed *de novo*. Simply, White's stated standard of review does not apply because the evidence and/or facts underlying the jury award are not at issue. The sole issue on appeal is the application of a statutory credit to the subject jury award. Therefore, Llewellyn requests this Court conduct a *de novo* review of all issues at bar.

B. The Collateral Source Rule Does Not Apply

White cites to this Court's opinion in Acuar v. Letourneau, 260 Va. 180 (2000) as support that underinsured payments constitute

payments from a collateral source. Notably, it appears the parties agree that this Court has not addressed this specific issue.

In Acuar, the collateral source at issue was health insurance. More specifically, the collateral source at issue was write-offs by the health care providers based on a contractual relationship with the plaintiff's health insurance providers. Id. at 188. The Acuar holding did not concern underinsured coverage and was limited to the issue of write-offs by the plaintiff's health care providers based on negotiations by the plaintiff's health insurance. Therefore, the facts of Acuar vary from the present case and that holding only provides blanket statements of law from past cases dealing with recognized collateral sources under Virginia law.

In Acuar, this Court applied the collateral source rationale to health insurance and expanded it further into benefits received by an insured based on his or her health insurance's negotiated rates with health care providers. The same did not in any way offend the traditional collateral source rule under the common law. Again, Llewellyn asks this Court to distinguish health insurance, which is not based on fault or litigation for its application, from underinsured coverage which is a statutory creation wholly derivative of liability and litigation.

White also cites to Acordia of Va. Ins. Agency v. Genito Glenn, L.P., 263 Va. 377 (2002) to support her collateral source rule argument. White does not cite the facts of Acordia because the same are inapposite. Rather, White cites the general statements of law restating traditional notions regarding the collateral source rule. The Acordia decision concerned joint tortfeasors and a determination as to whether a settlement from one joint tortfeasor should be credited against a verdict against the other tortfeasor. Notably, the opinion states that "…**the collateral source rule traditionally does not apply to settlement proceeds**." Id. at 388 (citations omitted).

Llewellyn maintains that underinsured coverage should not be considered a collateral source thereby making any payments rendered by an underinsured coverage immune to a credit determination. The interplay between Virginia's underinsured statutory scheme and statutory credit scheme is fully described in Llewellyn's Opening Brief. Simply, underinsured coverage is a statutory creation which is wholly derivative of liability and litigation. Underinsured coverage constitutes third-party coverage despite being procured by the plaintiff.

The classification of underinsured coverage as third-party coverage is important. As third-party coverage, the defendant does not,

and could not, receive unfettered access to the funds procured by the plaintiff. Rather, the statutory scheme permits the underinsured carrier to determine whether its payments will be subject to subrogation against the defendant. Those rights belong solely to the underinsured carrier. Moreover, a settlement by an underinsured carrier should be considered settlement proceeds thus removing the same from the scope of the collateral source rule. Simply, an underinsured carrier owes no duty to pay absent a judgment and a determination of liability and/or damages. Thus, any payment made prior to judgment constitutes a settlement within a tort action.

In addition to the statutory interplay, there are practical reasons the statutory scheme as previously-discussed will be served by the application of underinsured payments as a statutory credit. The interplay between underlying defendants and underinsured carriers has long been reliant on participation and adequate defense of the case by the underlying defendant. Named-defendants often procure all experts and incur all expenses to earn a subrogation waiver from the underinsured carrier. Llewellyn contends the statutory interplay of Va. Code Sec. 38.2-2206 and Va. Code Sec. 8.01-35.1 provides a fair and equitable result as the plaintiff is wholly compensated and receives the

benefit of his or her underinsured coverage, and the defendant does not receive the benefit of the underinsured coverage unless subrogation rights are waived by the underinsured carrier who controls its subrogation rights.

Finally, underinsured coverage extends beyond traditional collateral sources. Underinsured coverage provides for all aspects of damages claimed in personal injury cases. Therefore, a plaintiff may recover for pain and suffering, inconvenience, and other damages not known to other collateral sources. This distinction is important because traditional, first-party collateral sources recover for hard costs and not the “gray area” damages claimed in personal injury cases. Thus, underinsured coverage does not fit within traditional collateral sources and should not be considered one. The Release at issue necessarily encompasses these gray area damages associated with personal injury claims.

Again, underinsured coverage acts as third-party coverage and is wholly derivative of liability on the named-defendant. Therefore, any settlement prior to a judgment by an underinsured carrier removes the underinsured coverage from the scope of the collateral source rule pursuant to the common law. The Virginia statutory scheme also

renders underinsured coverage outside the scope of the common law collateral source rule.

Therefore, underinsured coverage is fundamentally different than other traditional forms of collateral sources. Va. Code Sec. 38.2-2206 and Va. Code Sec. 8.01-35.1 necessarily render underinsured coverage different. Underinsured coverage is a hybrid. It arises by way of contract and is a statutory creation. However, underinsured coverage is available only within the context of a tort suit and upon a judgment against the named-defendant. Moreover, underinsured coverage contemplates pain, suffering, inconvenience, and other damages known only to personal injury claims. This Court has repeatedly commented on the unique nature of underinsured coverage and the need for workable solutions as applied in litigation. See Transp. Ins. Co. v. Womack, 284 Va. 563 (2012)(citations omitted); see also State Farm Mut. Auto. Ins. Co. v. Cuffee, 248 Va. 11 (1994); State Farm Mut. Auto. Ins. Co. v. Beng, 249 Va. 165 (1995). Llewellyn asks for a workable solution in this case which harmonizes the subject statutes and renders the subject settlement a credit to the judgment against Llewellyn.

C. The North Carolina Case Does Not Govern

White cites to a recent North Carolina opinion as support for her position that underinsured payments constitute a collateral source and thus are not subject to a credit. See Hairston v. Harward, 821 S.E.2d 384 (N.C. 2018). Llewellyn states this case does not control nor does it apply in Virginia for the following reasons:

First, and to state the obvious, this opinion has no binding effect in Virginia. Second, it appears North Carolina does not have a credit statute akin to Va. Code Sec. 8.01-35.1. At a minimum, the Hairston decision did not turn on a credit statute. Therefore, the trial court and the North Carolina Supreme Court were analyzing the credit issue under the common law of North Carolina.

The lack of a specific credit statute is of extreme importance in differentiating between the North Carolina opinion and the issues presently before this Court. Based on the plain language of the Hairston opinion, the common law in North Carolina renders payments made by joint tortfeasors subject to a credit. Id. at 392 (citations omitted). As previously discussed, Va. Code Sec. 8.01-35.1 is not limited to joint tortfeasors based on the 2007 amendments. Thus, Virginia has a specific statutory scheme missing from North Carolina law.

The specific scheme established by Va. Code Sec. 38.2-2206 and Va. Code Sec. 8.01-35.1 renders Virginia law invariably different from North Carolina law. Thus, the analysis in Hairston does not govern or control, nor should it influence this Court's analysis.

Therefore, and even if this Court determines that underinsured payments are technically a collateral source, then Llewellyn contends that Va. Code Sec. 8.01-35.1 removes the same as an immune payment pursuant to a statutory credit analysis. Simply, the Virginia General Assembly specifically addressed the issue at bar by promulgating two harmonious statutes setting forth a statutory scheme which protects the interests of plaintiffs, defendants, and underinsured carriers. Apparently, North Carolina has no such statutory scheme. Therefore, the Hairston opinion provides limited and/or no guidance as to the issues at bar.

Llewellyn contends the Pennsylvania cases cited by White also fail to provide any support as those cases turned on very specific Pennsylvania statutes and the interpretations of the same. Llewellyn maintains the analysis by the Connecticut Supreme Court in Haynes v. Yale-New Haven Hosp., 243 Conn. 17 (1997) best analyzes and tracks the issues at bar. However, Llewellyn is not requesting this Court adopt

Connecticut law as White suggests. Virginia has a unique statutory scheme and Llewellyn asks this Court to analyze the present situation in that vacuum using other states' jurisprudence solely as guidance to the extent necessary.

D. **The Virginia Statutory Scheme is Clear**

Notably, White fails to address the Virginia statutory scheme and the harmonious nature in which it works. Again, Va. Code Sec. 38.2-2206 and Va. Code Sec. 8.01-35.1 work harmoniously to establish the applicable framework for underinsured coverage and statutory credits. In Virginia, underinsured carriers defend the tort case independent of the named-defendant. 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). Underinsured carriers act as nominal parties and have all the rights of a party during litigation. They retain subrogation rights as to the named-defendant. Therefore, an incentive exists for named-defendants to cooperate and fully defend the case as the same normally, but not necessarily, results in a subrogation waiver.

The purpose of Va. Code Sec. 38.2-2206 as it applies to underinsured coverage is to increase the total protection afforded by

insurance to claimants injured or damaged by a negligent motorist. See Nationwide Mut. Ins. Co. v. Scott, 234 Va. 573, 577 (1988)(decided under predecessor statute). The purpose is not to enrich plaintiffs, but rather make them whole as determined by the value of the case. Moreover, one purpose of Va. Code Sec. 8.01-35.1 is to prevent double recovery. See Downer v. CSX Transp., 256 Va. 590, 596 (1998).

Under the current system, plaintiffs are made whole and receive the benefit of their bargain with their underinsured carriers. The goal is not to enrich plaintiffs, but to make them whole based on the value of the case. Underinsured carriers are not required to pay until a judgment and a named-defendant is deemed underinsured. However, as a nominal party, they may settle just as any other party. Again, underinsured carriers have no duty to pay until a judgment is rendered that establishes liability. In sum, the liability triggers its duties.

As a result, underinsured carriers are persons “liable” for the injuries to the plaintiff. Liability is not solely based on tortious action as implied by White. That position is not tenable under the statutory scheme. Liability also concerns damages. Certainly, underinsured carriers are liable for damages and White does not dispute the same.

Thus, the statutory scheme permits plaintiffs to be made whole and to receive the benefit of their bargain, permits underinsured carriers to litigate as if a party, permits underinsured carriers to enforce a proper defense under threat of subrogation, and permits defendants to earn a subrogation waiver, which belongs solely to the underinsured carrier. This scheme necessarily renders underinsured coverage invariably different than other traditional forms of collateral sources. Moreover, this scheme necessarily renders underinsured coverage wholly within the scope of Va. Code Sec. 8.01-35.1.

E. The Lack of an Insurance Policy in the Record is a Non-Issue

White loosely and quickly references the lack of the Erie insurance policy in the record. Llewellyn assumes White does so to invite this Court to find the record is incomplete. Llewellyn requests this Court deny this request.

Va. Code Sec. 38.2-2206 represents the ultimate law in Virginia regarding underinsured coverage. The Erie policy at issue must contain and/or adopt Va. Code Sec. 38.2-2206. See Va. Code Sec. 38.2-2204 & Va. Code Sec. 38.2-2206(A); see also Marriott v. Harris, 235 Va. 199, 215 (1988). Also, Va. Code 8.01-35.1 operates outside the scope of the subject policy and/or is adopted by the same.

Therefore, the subject insurance policy does not constitute necessary materials for the issue at bar. The current record is complete and the statutes control.

F. White's References to Other Collateral Sources Should Be Ignored

White references that her health insurance negotiated discounts to lessen the costs of the bills issued to White. White seemingly attempts to tie in these facts, which are not in the record, to somehow undermine Llewellyn's argument that Erie's payment constitutes a payment for amounts less than, or different than, the amount awarded by the jury. This argument should be ignored.

First, White's argument exceeds the scope of the record. Second, White claimed the amounts charged to her and submitted the same to the jury. Presumably, White submitted the entire amount of the medical bills to the jury as White's counsel has indicated an acute understanding of the Acuar opinion. Thus, White's reference to Llewellyn's failure to enter the amount of medical liens owed by White into the record is a nonissue. The language of the subject Release clearly indicates the subject payment by Erie constituted a settlement for all claims asserted by White in the underlying litigation.

The relevancy of any liens mentioned in the Release does not stem from how much they were, but rather that they potentially existed, were contemplated by the subject release, and were for the same injuries and/or treatment claimed in the subject lawsuit. See William H. Gordon Assocs. v. Heritage Fellowship, 291 Va. 122 (2016)(requiring an analysis as to whether the settlement amount was for the same injury suffered by Plaintiff). Therefore, White's reference to alleged missing information is misplaced.

CONCLUSION AND STATEMENT OF RELIEF SOUGHT

Llewellyn requests this Court accept this Reply Brief in addition to her Opening Brief. Llewellyn contends Va. Code Sec. 38.2-2206 and Va. Code 8.01-35.1 work harmoniously and dictate that an underinsured carrier's settlement is subject to a statutory credit against any judgment entered. The collateral source rule does not apply to underinsured coverage because the same is unlike traditional collateral sources. Moreover, and in this case, the settlement by the underinsured carrier removes it from the scope of the collateral source rule.

Even if underinsured coverage is technically a collateral source, then Va. Code Sec. 8.01-35.1 removes the payment from the underinsured carrier from the traditional immunity afforded to collateral sources under the common law.

Lastly, Llewellyn contends the application of the subject credit results in the only equitable result which reinforces the effective nature of the statutory scheme put into place by the General Assembly. If this Court agrees with Llewellyn, then White is fully compensated based on the value assigned to her case by the jury which she requested to value her claim.

If this Court agrees with White, then White will receive $2,250,000.00 for a $1,500,000.00 verdict. White will have received $750,000.00 from Erie for the injuries claimed in the subject tort action and solely because of the tort action without the same applying to the $1,500,000.00 jury verdict. Moreover, and had Erie not waived subrogation, Llewellyn could have been liable for $1,500,000.00 to White and also $750,000.00 to Erie. That result certainly is not intended nor is it supported by the law.

Therefore, Llewellyn requests this Court hear oral argument on these issues, 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.

Respectfully submitted,

/s/ E. Brandon Ferrell

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CERTIFICATE

I certify that the forgoing Reply Brief complies with with Rule 5:29 of the Rules of the Supreme Court of Virginia and was hand-filed with the Clerk of the Supreme Court of Virginia on this 1st day of March, 2019. Llewellyn does not waive oral argument. On this same day, a copy was served, via USPS First Class Mail and electronic mail to:

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