
In the
Supreme Court of Virginia
At Richmond

Record No. 081331

STEPHEN RANDOLPH SEALS,

Appellant,

– v. –

ERIE INSURANCE EXCHANGE,

Appellee.

OPENING BRIEF OF APPELLANT

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TABLE OF CONTENTS

Table of Authorities	iii
Questions Presented.....	1
Assignments of Error.....	2
Statement of Facts	3
A. Erie agrees to provide liability and UM insurance to Atlantic.....	3
B. The Erie policy extends \$500,000 in UM coverage to those who use Atlantic's autos with Atlantic's permission	3
C. The Virginia UM statute mandates certain UM coverage	5
D. The Erie policy provides \$500,000 in liability limits.....	5
E. The Erie policy excludes some of Atlantic's customers from liability coverage, as section 2205 allows	6
F. An underinsured driver hit and hurt Seals while Seals was test-driving an Atlantic auto	6
Statement of the Case.....	7
A. Erie seeks declaratory relief on UM coverage	7
B. The trial court finds no UM coverage	7
Summary of Argument	8

Argument	10
I. Erie contracted to provide UM coverage for Seals' accident	10
A. Virginia law governing policy interpretation	10
B. Erie contracted to cover Seals for the accident	11
II. The UM statute required Erie to insure Seals	12
A. Virginia law governing statutory interpretation	12
B. The UM statute required Erie to include Seals as an insured	13
C. This Court has already held nothing in section 2205 allows Erie to escape its contractual and statutory duties to provide UM coverage for Seals	14
D. The holding below conflicts with this Court's settled UM coverage principles	17
III. Erie contracted to provide Seals with \$500,000 in UM limits – not zero	18
A. The Erie policy's plain terms provide \$500,000 in both UM and liability limits	18
B. Erie cannot avoid its contractual and statutory duties to provide \$500,000 in UM coverage to Seals	19
Conclusion	21
Certificate of Service	

TABLE OF AUTHORITIES

Cases

<i>Belton v. Crudup</i> , 273 Va. 368, 641 S.E.2d 74 (2007)	15
<i>Bryant v. State Farm Mut. Auto. Ins. Co.</i> , 205 Va. 897, 140 S.E.2d 817 (1965)	13, 17, 20
<i>Commonwealth v. Brown</i> , 259 Va. 697, 529 S.E.2d 96 (2000)	13
<i>Floyd v. Northern Neck Ins. Co.</i> , 245 Va. 153, 427 S.E.2d 193 (1993)	10
<i>GEICO v. Universal Underwriters</i> , 232 Va. 326, 350 S.E.2d 612 (1986)	passim
<i>Harlow v. Nationwide Ins. Co.</i> , 69 Va. Cir. 26 (Richmond City 2005)	16
<i>Harrison & Bates, Inc. v. Featherstone Assocs.</i> , 235 Va. 364, 484 S.E.2d 883 (1997)	12
<i>Lincoln Nat. Life Ins. Co. v. Commonwealth Corrugated Container Corp.</i> , 229 Va. 132, 327 S.E.2d 98 (1985)	11
<i>Purce v. Patterson</i> , 275 Va. 190, 654 S.E.2d 885 (2008)	12
<i>St. Paul Fire & Marine Ins. Co. v. S. L. Nusbaum & Co., Inc.</i> , 227 Va. 407, 316 S.E.2d 734 (1984)	10
<i>Transcontinental Ins. Co. v. RBMW, Inc.</i> , 262 Va. 502, 551 S.E.2d 313 (2001)	10

USAA Cas. Ins. Co. v. Alexander,
248 Va. 185, 445 S.E.2d 145 (1994) 17

Rules, Statutes and Other Authorities

Va. Code Ann. § 38.2-2205..... passim

Va. Code Ann. § 38.2-2206.....1, 14, 15, 16

Va. Code Ann. § 38.2-2206.A 13, 19

Va. Code Ann. § 38.2-2206.B5, 13, 16

Va. Code Ann. § 38.2-2206.J..... 16

QUESTIONS PRESENTED

1. Erie contracted to provide Atlantic Motors with \$500,000 in uninsured-underinsured motorist ("UM") coverage. That UM contract protects "anyone . . . occupying a covered auto." And the policy covers "any auto . . . owned" by Atlantic Motors. An underinsured driver hit and injured Seals while Seals test-drove an Atlantic auto. Does the Erie policy provide him with UM coverage? [Assignment of Error 4]

2. Virginia Code section 38.2-2206 (the "UM statute") requires that all Virginia auto policies provide UM coverage to "any person who uses the motor vehicle to which the policy applies, with the expressed or implied consent of the named insured." Can Erie exclude Seals from Atlantic's UM coverage based on (1) a separate statute addressing only garagekeepers' liability insurance [Va. Code Ann. § 38.2-2205]; or (2) how the policy's liability section defines who is insured? [Assignments of Error 1 and 2]

3. The UM statute mandates that UM limits for an auto policy match liability limits for that policy, absent a waiver. Atlantic's policy says that the policy's declarations show the liability limits [\$500,000]. No endorsement changes those limits. Where in such a policy should one find what liability limits the UM coverage must match? [Assignment of Error 3]

ASSIGNMENTS OF ERROR

1. The trial court erred in using Virginia Code section 38.2-2205 (addressing liability insurance for garagekeepers)¹ to exclude Seals from UM coverage because the UM statute requires that he be insured, and no other statute modifies that requirement.

2. The trial court erred in relying on exclusionary language in the seller's liability coverage terms to deny Seals UM coverage because neither the Erie UM policy terms nor the UM statute allow excluding a permissive user like him, and no other statute controls.

3. The trial court erred in finding Seals had anything other than the \$500,000 in liability limits listed in the policy's declarations because the UM statute requires that UM limits match liability limits, and no other statute controls.

4. The trial court erred in finding less UM coverage for Seals than the UM limits listed in the policy's declarations because those are the contract terms, anything less conflicts with the UM statute, and no other statute controls.

¹ Both the UM statute and section 2205 are set forth in full in the addendum at the end of this brief

STATEMENT OF FACTS

A. Erie agrees to provide liability and UM insurance to Atlantic

Erie sold auto insurance to Atlantic, which owned the auto test-driven by Seals when the accident that hurt him happened. The policy provided liability coverage under the section titled "Liability Protection."² Erie afforded UM coverage by an endorsement titled "Uninsured/Underinsured Motorists Coverage Endorsement – Virginia."³

B. The Erie policy extends \$500,000 in UM coverage to those who use Atlantic's autos with Atlantic's permission

That UM endorsement provides: "[w]e will pay . . . all sums that 'anyone we protect' is legally entitled to recover as damages from the owner or operator of an 'uninsured motor vehicle.'"⁴

And that endorsement defines the following terms:

- "An 'uninsured motor vehicle' also means an 'underinsured motor vehicle.'"
- "'anyone we protect' means . . . anyone . . . 'occupying' a 'covered auto.'"⁵
- "occupying" means "in, upon, using, getting in, on, out, or off."⁶

² The entire section is at JA 13-17

³ The entire endorsement is at JA 38-40

⁴ JA 39

⁵ JA 38

⁶ *Id.*

- "covered auto" means "a motor vehicle . . . with respect to which the 'bodily injury' or 'property damage' liability coverage of the policy applies."⁷

That policy covers any auto, including all autos owned by Atlantic.

"Autos we insure" in the liability section means "'autos' that are defined in the 'autos we insure' section of the policy."⁸ The "autos we insure" section says: "[t]he 'declarations' shows [sic] which of the following are 'autos we insure' under this policy."⁹ "Declarations" means "the form which shows [Atlantic's] coverages, limits of protection, 'autos we insure', premium charges, and other information."¹⁰ The declarations define "autos we insure" as "any auto – owned, hired & non-owned autos."¹¹ "[O]wned autos" includes "'autos you own."¹²

The UM endorsement says that the UM limits also are "shown on the 'Declarations.'"¹³ The declarations list "\$500M" in UM coverage.¹⁴ The UM

⁷ JA 38

⁸ JA 10

⁹ JA 12

¹⁰ JA 10

¹¹ JA 6

¹² JA 12

¹³ JA 39

¹⁴ JA 6

coverage has four exclusions, including one for "anyone using a 'covered auto' without a reasonable belief that the person is entitled to do so."¹⁵

C. The Virginia UM statute mandates certain UM coverage

Virginia's UM statute sets the requirements for UM coverage for policies issued in Virginia (like Erie's). It says: "[i]nsured" "means the named insured . . . and any person who uses the motor vehicle to which the policy applies, with the expressed or implied consent of the named insured. . . ." Va. Code Ann. § 38.2-2206.B. The Erie policy terms comply with the UM statute, which requires that UM limits "shall equal but not exceed the limits of the liability insurance provided by the policy" *Id.*

D. The Erie policy provides \$500,000 in liability limits

Like the UM endorsement, the policy's liability section says Erie "will pay no more than the limit(s) shown on the 'Declarations' for one 'auto' in any one 'accident'"¹⁶ The declarations list "\$500M" in limits.¹⁷ No endorsement modifies those limits.

¹⁵ JA 39

¹⁶ JA 16

¹⁷ JA 6

E. The Erie policy excludes some of Atlantic's customers from liability coverage, as section 2205 allows

Section 2205 allows carriers to exclude certain people from liability insurance. Among those exceptions, an auto seller's liability carrier need not cover a customer's liability while using the seller's car – if the customer has Virginia's minimum liability insurance. The policy's liability section here excludes such customers.¹⁸

F. An underinsured driver hit and hurt Seals while Seals was test-driving an Atlantic auto

During the policy period, Seals test drove an Atlantic truck. While he did so, an underinsured driver hit it, hurting Seals. His medical bills alone easily exceed the tortfeasor's \$100,000 in liability insurance limits. After that injury, he sought UM coverage under Erie's insurance contract with Atlantic. Erie refused to pay.

¹⁸ JA 25

STATEMENT OF THE CASE

A. Erie seeks declaratory relief on UM coverage

Rather than pay, Erie asked the Petersburg Circuit Court to declare that Atlantic's UM coverage "does not apply and is not available to defendant Seals for the . . . accident."¹⁹

As grounds, Erie argued Seals was not "anyone we protect" – an "insured" – under the liability coverage because he had his own liability insurance for more than Virginia's minimums.²⁰ Thus, Erie claims, the liability policy provided "zero" in limits for Seals. And since the UM statute requires that the UM coverage limits match the liability limits, Erie asserted, the policy also provided "zero" UM limits for Seals.²¹

B. The trial court finds no UM coverage

The trial court found that Erie did not provide Seals with UM coverage.²² In doing so, that court does not appear to have adopted Erie's argument. Rather, it said "in terms of my understanding of statutory construction is the specific controls [the] general. The specific in a garage

¹⁹ JA 4

²⁰ JA 4

²¹ JA 135:13-21

²² JA 138

keeper's situation is [section] 2205."²³ Also, in response to Seals' argument based on the Erie insurance contract's terms and the UM statute, the court said "[y]es, but you are ignoring 2205."²⁴

Apparently because the court found the two statutes had to be read together, it held that section 2205 required Erie to exclude Seals from UM coverage. It entered judgment on April 7, 2008.²⁵ Seals appealed. This Court granted his petition on October 21, 2008.

SUMMARY OF ARGUMENT

Erie contracted to provide \$500,000 in UM coverage to anyone in a car owned by Atlantic. Likewise, Virginia's UM statute required Erie to insure Seals as a permissive user of an auto insured by Erie. Now, however, that an underinsured driver has hit and hurt Seals while Seals was test-driving an Atlantic auto, Erie would like to avoid those contractual and statutory duties.

Nothing in the policy, the UM statute, or any other statute allows Erie to escape those duties. The trial court believed that it had to read a liability insurance exclusion for garagekeepers in section 2205 into the UM statute.

²³ JA 128:22-24

²⁴ JA 129:5-7

²⁵ JA 138-139

This Court, however, has already expressly rejected that approach in *GEICO v. Universal Underwriters*, 232 Va. 326, 329, 350 S.E.2d 612, 614 (1986)(interpreting prior, substantially similar statutory text).

In trying to dodge *GEICO's* iron hand, Erie claims that the UM statute changes what it contracted to provide Seals. It argues that, because the Erie policy excludes Seals from liability coverage, it provides him with "zero" in liability limits. And because the UM statute requires UM limits match liability limits, Seals also had "zero" in UM limits.

But the UM statute never allows "zero" in UM limits. Instead, it requires all auto policies provide at least \$25,000 per person and \$50,000 per accident in UM coverage. Moreover, the Erie policy says the liability and UM limits are shown on the declarations, and the declarations list \$500,000 in limits for each coverage type – not "zero." And nothing in the record even hints that a named insured rejected the heightened, matching limits as required by the UM statute. Absent that, the Erie policy can only provide \$500,000 in UM coverage – nothing less.

Hence, Seals respectfully requests that this Court reverse the trial court and find that the Erie policy provides him with \$500,000 in UM coverage for the accident.

ARGUMENT

I. Erie contracted to provide UM coverage for Seals' accident

A. Virginia law governing policy interpretation²⁶

In interpreting policy terms, courts look first to the words. "Courts interpret insurance policies . . . in accordance with the intention of the parties gleaned from the words they have used in the document." *Floyd v. Northern Neck Ins. Co.*, 245 Va. 153, 158, 427 S.E.2d 193, 196 (1993).

Virginia law also makes clear that all ambiguities in a policy resolve against the carrier. "Insurance policies are contracts whose language is ordinarily selected by insurers rather than by policyholders." *St. Paul Fire & Marine Ins. Co. v. S. L. Nusbaum & Co., Inc.*, 227 Va. 407, 411, 316 S.E.2d 734, 736 (1984). "The courts, accordingly, have been consistent in construing the language of such policies, where there is doubt as to their meaning, in favor of that interpretation which grants coverage, rather than that which withholds it." *Id.*

If two constructions are reasonable, an ambiguity exists. Thus, coverage can be "resolved by the mere fact that reasonable men . . . may reach reasonable, but opposite, conclusions" *Id.* Indeed, "an

²⁶ Interpreting an insurance policy's undisputed terms presents a question of law and review of any such decision is *de novo*. *Transcontinental Ins. Co. v. RBMW, Inc.*, 262 Va. 502, 510, 551 S.E.2d 313,317 (2001).

ambiguity exists when language admits of being understood in more than one way or refers to two or more things at the same time." *Lincoln Nat. Life Ins. Co. v. Commonwealth Corrugated Container Corp.*, 229 Va. 132, 136-137, 327 S.E.2d 98, 101 (1985).

B. Erie contracted to cover Seals for the accident

Seals is an insured under the UM terms. The policy's UM endorsement reads: "[w]e will pay, in accordance with the Virginia Uninsured Motorists Insurance Law, all sums that 'anyone we protect' is legally entitled to recover as damages from the owner or operator of an 'uninsured motor vehicle.'"²⁷ Under that same endorsement, "'anyone we protect' means . . . anyone . . . 'occupying' a 'covered auto.'"²⁸

"O]ccupying" in turn means "in [or] using"²⁹ And "covered auto" means "a motor vehicle . . . to which the 'bodily injury' . . . liability coverage of the policy applies."³⁰

Meanwhile, "[a]utos we insure" in the liability section means "'autos' that are defined in the autos we insure section of the policy."³¹ That section

²⁷ JA 39

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ JA 10

says look to the declarations.³² And the declarations define "autos we insure" as "any auto – owned, hired & non-owned autos."³³

Atlantic owned the auto here. And Seals was "in" that auto while test-driving it, thus he "occupied" it when the accident happened. So, as one "occupying" a "covered auto," he was "anyone we protect." Thus, Erie covers him for "all sums . . . [he] is legally entitled to recover as damages from the owner or operator" of an underinsured motor vehicle.³⁴

But even if the policy had not included Seals in its UM coverage, the UM statute would trump the policy terms and require Erie to cover him.

II. The UM statute required Erie to insure Seals

A. Virginia law governing statutory interpretation³⁵

When a statute is clear and unambiguous, a court may look only to its words to determine its meaning. *Harrison & Bates, Inc. v. Featherstone Assocs.*, 235 Va. 364, 368, 484 S.E.2d 883, 885 (1997). "[Courts] are not free to add to language, nor to ignore language, contained in statutes."

Purce v. Patterson, 275 Va. 190, 194, 654 S.E.2d 885, 886 (2008).

³² JA 12

³³ JA 6

³⁴ JA 39

³⁵ "Interpretation of a statute is a pure question of law subject to *de novo* review." *Virginia Polytechnic Institute and State University v. Interactive Return Service, Inc.*, 271 Va. 304, 309, 626 S.E.2d 436, 438 (2006).

Also, "where a statute speaks in specific terms, an implication arises that omitted terms were not intended to be included within the scope of the statute." *Commonwealth v. Brown*, 259 Va. 697, 704-705, 529 S.E.2d 96, 100 (2000).

Beyond those general rules, a special interpretive rule applies to the UM statute: "the uninsured motorist law was enacted for the benefit of injured persons" and "it is to be liberally construed so that the purpose intended may be accomplished." *Bryant v. State Farm Mut. Auto. Ins. Co.*, 205 Va. 897, 900, 140 S.E.2d 817, 819 (1965). And importantly here, "the controlling instrument is the [UM] statute and . . . provisions in [an] insurance policy that conflict the requirements of the [UM] statute, either by adding to or taking from its requirements, are void and ineffective." *Id.*

B. The UM statute required Erie to include Seals as an insured

Virginia's UM statute required Erie to cover Seals while in an Atlantic vehicle with Atlantic's permission. The UM statute mandates that all policies Virginia auto policies provide UM coverage to "insureds" as defined in that statute. Va. Code Ann. § 38.2-2206.A. Under that statute, "insureds" includes "any person who uses the motor vehicle to which the policy applies, with the expressed or implied consent of the named insured" Va. Code Ann. § 38.2-2206.B.

Nobody disputes that the UM statute applies to the car in the accident or that Seals had permission to test drive that car. Therefore, Seals must be insured under the policy's UM coverage given that statute.

C. This Court has already held nothing in section 2205 allows Erie to escape its contractual and statutory duties to provide UM coverage for Seals

Although the trial court gave no reasoning in its final order, the hearing transcript reveals its analysis. That court apparently found that because section 2205 excluded Seals from liability coverage, the UM statute did not require Erie to cover him.

At oral argument, the trial court reasoned that the "specific controls [the] general."³⁶ And the trial court objected that Seals' counsel was ignoring the section 2205's text and applying only section 2206.³⁷ The court below apparently believed that section 2205 was a specific statute and the UM statute a general one.

But in *GEICO v. Universal Underwriters*, this Court expressly held that that the garagekeeper's exclusion now in section 2205 and the UM requirements now in the UM statute should not be read together. (That case addressed a prior statute with nearly identical text.)

³⁶ JA 128:22-24

³⁷ JA 129:5-7

There, this Court noted that the UM requirements had exceptions, but none for garagekeepers. 232 Va. 326, 329, 350 S.E.2d 612, 614 (1986). "Had the General Assembly intended to create an exception to the UM mandate for the benefit of a garage keeper and its insurer, it could have done so in language such as that employed [in the garagekeepers' liability exclusion]. It did not do so. We do not assume that admission was inadvertent. Rather, we conclude that the legislature was consciously and deliberately selective." *Id.*

Without citing its Latin name, this Court in *GEICO* applied the maxim *expressio unius est exclusio alterius*. Under that maxim, "when the General Assembly sets forth specific exceptions to the general applicability of a statute, those exceptions are deemed to be the only ones the legislature intended to make available." *Belton v. Crudup*, 273 Va. 368, 373, 641 S.E.2d 74, 77 (2007).

The text of sections 2205 and 2206 support applying that maxim here. Section 2205 sets forth narrow facts where liability coverage from the driver's own policy affects the liability coverage for a garagekeepers' policy. That statute does not mention UM coverage. Thus, under this maxim, section 2205 presumably does not govern UM coverage.

Likewise, the UM statute has a few exceptions to the rule that all Virginia auto policies must provide UM insurance to anyone who uses an insured auto with the named insured's consent. For example, the statute excludes excess and umbrella policies from that mandate. Va. Code Ann. § 38.2-2206.J. It also excepts those who use an auto without the named insured's consent. *Id.* § 38.2-2206.B. Thus, under the maxim, courts can presume that the legislature did not intend any exceptions to the UM requirements other than those in the UM statute.

Indeed, nothing requires courts to harmonize sections 2205 and 2206 as the trial court apparently did. They are both statutes with specific – not general – application. The trial court thus misapplied statutory interpretive rules in failing to follow *GEICO*. In fact, since this Court decided *GEICO*, the General Assembly split the garagekeepers' liability exclusion text and the UM requirements text into separate sections, further confirming that the General Assembly did not intend them to be read together. *C.f.*³⁸ *Harlow v. Nationwide Ins. Co.*, 69 Va. Cir. 26, 27 (Richmond City 2005).

³⁸ A copy of the former Virginia Code section 38.1-381 is at JA 105-109

D. The holding below conflicts with this Court's settled UM coverage principles

In finding that Erie need not cover Seals because he had his own liability insurance, the trial court also did not honor established Virginia UM jurisprudence. This Court has already held that UM coverage cannot vary depending on what other coverage might be available. "To say [an insured] is not entitled to recover anything under a policy because his father had a policy under which he has received part of the sum he is entitled to recover from the uninsured motorist is to amend the [UM] statute, not construe it." *Bryant*, 205 Va. at 902, 140 S.E.2d at 820.

Indeed, Virginia makes clear that "[i]n the case of multiple policies, each providing for UM coverage, the language of [the UM statute] mandates stacking of the UM coverage" *USAA Cas. Ins. Co. v. Alexander*, 248 Va. 185, 191, 445 S.E.2d 145, 148 (1994). In other words, the limits of all applicable UM policies are added to find the total available limits.

Thus, nothing in section 2205 allows Erie to avoid paying Seals what the insurance contract and UM statute required just because he had other liability insurance. UM coverage cannot hinge on what other UM coverage exists; all UM policies stack their limits.

**III. Erie contracted to provide Seals with \$500,000 in UM limits
– not zero**

In an effort to avoid *GEICO*, Erie invokes language in the UM statute stating what liability limits the UM limits for a specific policy must match. But it takes that language out of context and urges an absurd construction that ignores the UM statute's plain terms.

**A. The Erie policy's plain terms provide \$500,000 in
both UM and liability limits**

The UM endorsement states UM limits are "shown on the 'Declarations.'"³⁹ The Erie declarations list "\$500M" in UM coverage.⁴⁰ Likewise, the policy's liability section provides Erie "will pay no more than the limit(s) shown on the 'Declarations' for one 'auto' in any one 'accident"⁴¹ The declarations list "\$500M" in limits.⁴² No endorsement modifies either the UM or liability limits.

This complies with the UM statute, which requires UM limits match liability limits if they are higher than the minimum, absent proper rejection by a named insured. Nobody here contends that a named insured ever rejected the \$500,000 in matching limits.

³⁹ JA 39

⁴⁰ JA 6

⁴¹ JA 16

⁴² JA 6

B. Erie cannot avoid its contractual and statutory duties to provide \$500,000 in UM coverage to Seals

In trying to avoid covering Seals at it had agreed, Erie argues:

- because Seals is excluded from the policy's liability coverage, that policy provides him, personally, with "zero" in liability limits;
- the UM statute requires that UM limits match liability limits;
- because Seals personally has "zero" in liability limits, he therefore must have "zero" in UM limits, too.⁴³

That argument fails for several reasons. First, Erie's argument that a UM policy somehow could provide "zero" in limits ignores the UM statute, which never allows zero in UM limits; it requires at least \$25,000 per person and \$50,000 per accident. Va. Code Ann. § 38.2-2206.A. And the Erie policy could not have only those minimum limits here because nothing in the record even hints that any named insured ever rejected UM limits equaling the \$500,000 in liability limits.

Beyond that, the UM statute looks to whether an "auto" is covered to define whether someone in it must be insured by a UM carrier (although it does exclude non-permissive users). Erie, however, contends that *Harleysville* says the UM statute looks to a specific insured's traits to determine who is covered.⁴⁴ That misreads the case. While the case does

⁴³ Erie's Opposition to Seals' Petition for Appeal at 9-10

⁴⁴ *Id.* at 7 n. 3

say non-permissive users cannot be covered, it says nothing about garagekeepers' customers. And it does not define what a covered auto is based on who is inside it, as Erie suggests. In fact, the case does not even address what autos must be covered under the UM statute.

And that statute "is to be liberally construed so that the purpose intended may be accomplished." *Bryant*, 205 Va. at 900, 140 S.E.2d at 819. Erie does not heed that rule; instead it offers an acrobatic statutory construction that *reduces* what the Erie policy agrees to provide.

Moreover, Erie's hypertechnical arguments results in no UM coverage for people that the UM statute requires to be insureds. Not only does that conflict with the statute's plain terms, but it ignores that special interpretive rule construing UM coverage to benefit the injured. *Bryant*, 205 Va. at 900, 140 S.E.2d at 819.

And although this Court apparently has not addressed where to find the liability limits that the UM limits must match, the Erie policy's terms provide the answer: look at the declarations. Here, those declarations provide \$500,000 in limits, not zero. For that reason Seals asks this Court to reject Erie's efforts to evade covering Seals as it contracted and to reverse the trial court's no coverage ruling.

CONCLUSION

Erie contracted to provide Seals with \$500,000 in UM coverage, as he was a permissive user of an Atlantic auto when an underinsured driver hit and hurt him. Nothing in Erie's policy, the UM statute, or any other statute allows Erie to escape that contract. Therefore, Seals respectfully requests that this Court reverse the trial court and declare that Erie provides him with \$500,000 in UM coverage for the accident.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies the following:

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- 5) Three copies of the foregoing Brief of Appellant and of the Joint Appendix were mailed or delivered to counsel for the appellee at the above address on this the 1st day of December, 2008. This same date, 12 copies of the Brief and the Appendix were hand delivered to the clerk's office and a copy was filed electronically at scvbriefs@courts.state.va.us.

/s/ John J. Rasmussen

ADDENDUM

§ 38.2-2205. Liability insurance on motor vehicles; standard provisions; applicability of other valid and collectible insurance

A. 1. Each policy or contract of bodily injury or property damage liability insurance which provides insurance to a named insured in connection with the business of selling, leasing, repairing, servicing, storing or parking motor vehicles, against liability arising from the ownership, maintenance, or use of any motor vehicle incident thereto shall contain a provision that the insurance coverage applicable to those motor vehicles shall not be applicable to a person other than the named insured and his employees in the course of their employment if there is any other valid and collectible insurance applicable to the same loss covering the other person under a policy with limits at least equal to the financial responsibility requirements specified in § 46.2-472. Such provision shall apply to motor vehicles which are either for the purpose of demonstrating to the other person as a prospective purchaser, or which are loaned or leased to the other person as a convenience during the repairing or servicing of a motor vehicle for the other person, or leased to the other person for a period of six months or more. This provision shall apply whether such repair or service is performed by the owner of the vehicle being loaned or leased or by some other person or business.

2. If the other valid and collectible insurance has limits less than the financial responsibility requirements specified in § 46.2-472, then the coverage afforded a person other than the named insured and his employees in the course of their employment shall be applicable to the extent necessary to equal the financial responsibility requirements specified in § 46.2-472.

3. If there is no other valid and collectible insurance available, the coverage under such policy afforded a person, other than the named insured and his employees in the course of their employment, shall be applicable, but the amount recoverable in such case shall not exceed the financial responsibility requirements specified in § 46.2-472. If there is no other valid and collectible collision or upset insurance available and if such policy provides insurance to the named insured for collision or upset, it shall include any such other person as an additional insured, unless in the

case of a leased vehicle such other person receives a conspicuous written disclosure at the commencement of the lease, warning such person that he is not an additional insured under the owner's policy for collision or upset coverage.

B. 1. Any policy or contract of bodily injury or property damage liability insurance relating to the ownership, maintenance, or use of a motor vehicle shall exclude coverage to persons other than (i) the named insured, or (ii) directors, stockholders, partners, agents, or employees of the named insured, or (iii) residents of the household of either (i) or (ii), while those persons are employed or otherwise engaged in the business of selling, repairing, servicing, storing, or parking motor vehicles if there is any other valid or collectible insurance applicable to the same loss covering the persons under a policy with limits at least equal to the financial responsibility requirements specified in § 46.2-472.

2. If the other valid and collectible insurance has limits less than the financial responsibility requirements specified in § 46.2-472, then the coverage afforded a person other than the named insured while that person is employed or otherwise engaged in the business of selling, repairing, servicing, storing, or parking motor vehicles shall be applicable to the extent necessary to equal the financial responsibility requirements specified in § 46.2-472.

3. If there is no other valid and collectible insurance available, the coverage afforded a person other than the named insured while that person is employed or otherwise engaged in the business of selling, repairing, servicing, storing, or parking motor vehicles shall apply, but the amount recoverable shall not exceed the financial responsibility requirements specified in § 46.2-472.

§ 38.2-2206. Uninsured motorist insurance coverage

A. Except as provided in subsection J of this section, no policy or contract of bodily injury or property damage liability insurance relating to the ownership, maintenance, or use of a motor vehicle shall be issued or delivered in this Commonwealth to the owner of such vehicle or shall be issued or delivered by any insurer licensed in this Commonwealth upon any motor vehicle principally garaged or used in this Commonwealth unless it contains an endorsement or provisions undertaking to pay the insured all sums that he is legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle, within limits not less than the requirements of § 46.2-472. Those limits shall equal but not exceed the limits of the liability insurance provided by the policy, unless any one named insured rejects the additional uninsured motorist insurance coverage by notifying the insurer as provided in subsection B of § 38.2-2202. This rejection of the additional uninsured motorist insurance coverage by any one named insured shall be binding upon all insureds under such policy as defined in subsection B of this section. The endorsement or provisions shall also obligate the insurer to make payment for bodily injury or property damage caused by the operation or use of an underinsured motor vehicle to the extent the vehicle is underinsured, as defined in subsection B of this section. The endorsement or provisions shall also provide for at least \$ 20,000 coverage for damage or destruction of the property of the insured in any one accident but may provide an exclusion of the first \$ 200 of the loss or damage where the loss or damage is a result of any one accident involving an unidentifiable owner or operator of an uninsured motor vehicle.

B. As used in this section, the term "*bodily injury*" includes death resulting from bodily injury.

"*Insured*" as used in subsections A, D, G, and H of this section means the named insured and, while resident of the same household, the spouse of the named insured, and relatives, wards or foster children of either, while in a motor vehicle or otherwise, and any person who uses the motor vehicle to which the policy applies, with the expressed or implied consent of the named insured, and a guest in the motor vehicle to which the policy applies or the personal representative of any of the above.

"*Uninsured motor vehicle*" means a motor vehicle for which (i) there is no

bodily injury liability insurance and property damage liability insurance in the amounts specified by § 46.2-472, (ii) there is such insurance but the insurer writing the insurance denies coverage for any reason whatsoever, including failure or refusal of the insured to cooperate with the insurer, (iii) there is no bond or deposit of money or securities in lieu of such insurance, (iv) the owner of the motor vehicle has not qualified as a self-insurer under the provisions of § 46.2-368, or (v) the owner or operator of the motor vehicle is immune from liability for negligence under the laws of the Commonwealth or the United States, in which case the provisions of subsection F shall apply and the action shall continue against the insurer. A motor vehicle shall be deemed uninsured if its owner or operator is unknown.

A motor vehicle is "*underinsured*" when, and to the extent that, the total amount of bodily injury and property damage coverage applicable to the operation or use of the motor vehicle and available for payment for such bodily injury or property damage, including all bonds or deposits of money or securities made pursuant to Article 15 (§ 46.2-435 et seq.) of Chapter 3 of Title 46.2, is less than the total amount of uninsured motorist coverage afforded any person injured as a result of the operation or use of the vehicle.

"Available for payment" means the amount of liability insurance coverage applicable to the claim of the injured person for bodily injury or property damage reduced by the payment of any other claims arising out of the same occurrence.

If an injured person is entitled to underinsured motorist coverage under more than one policy, the following order of priority of policies applies and any amount available for payment shall be credited against such policies in the following order of priority:

1. The policy covering a motor vehicle occupied by the injured person at the time of the accident;
2. The policy covering a motor vehicle not involved in the accident under which the injured person is a named insured;
3. The policy covering a motor vehicle not involved in the accident under which the injured person is an insured other than a named insured.

Where there is more than one insurer providing coverage under one of the payment priorities set forth, their liability shall be proportioned as to their respective underinsured motorist coverages.

Recovery under the endorsement or provisions shall be subject to the conditions set forth in this section.

C. There shall be a rebuttable presumption that a motor vehicle is uninsured if the Commissioner of the Department of Motor Vehicles certifies that, from the records of the Department of Motor Vehicles, it appears that: (i) there is no bodily injury liability insurance and property damage liability insurance in the amounts specified by § 46.2-472 covering the owner or operator of the motor vehicle; or (ii) no bond has been given or cash or securities delivered in lieu of the insurance; or (iii) the owner or operator of the motor vehicle has not qualified as a self-insurer in accordance with the provisions of § 46.2-368.

D. If the owner or operator of any motor vehicle that causes bodily injury or property damage to the insured is unknown, and if the damage or injury results from an accident where there has been no contact between that motor vehicle and the motor vehicle occupied by the insured, or where there has been no contact with the person of the insured if the insured was not occupying a motor vehicle, then for the insured to recover under the endorsement required by subsection A of this section, the accident shall be reported promptly to either (i) the insurer or (ii) a law-enforcement officer having jurisdiction in the county or city in which the accident occurred. If it is not reasonably practicable to make the report promptly, the report shall be made as soon as reasonably practicable under the circumstances.

E. If the owner or operator of any vehicle causing injury or damages is unknown, an action may be instituted against the unknown defendant as "John Doe" and service of process may be made by delivering a copy of the motion for judgment or other pleadings to the clerk of the court in which the action is brought. Service upon the insurer issuing the policy shall be made as prescribed by law as though the insurer were a party defendant. The provisions of § 8.01-288 shall not be applicable to the service of process required in this subsection. The insurer shall have the right to file pleadings and take other action allowable by law in the name of John Doe.

F. If any action is instituted against the owner or operator of an uninsured or underinsured motor vehicle by any insured intending to rely on the uninsured or underinsured coverage provision or endorsement of this policy under which the insured is making a claim, then the insured shall serve a copy of the process upon this insurer in the manner prescribed by law, as though the insurer were a party defendant. The provisions of [§ 8.01-288](#) shall not be applicable to the service of process required in this subsection. The insurer shall then have the right to file pleadings and take other action allowable by law in the name of the owner or operator of the uninsured or underinsured motor vehicle or in its own name. Notwithstanding the provisions of subsection A, the immunity from liability for negligence of the owner or operator of a motor vehicle shall not be a bar to the insured obtaining a judgment enforceable against the insurer for the negligence of the immune owner or operator, and shall not be a defense available to the insurer to the action brought by the insured, which shall proceed against the named defendant although any judgment obtained against an immune defendant shall be entered in the name of "Immune Defendant" and shall be enforceable against the insurer and any other nonimmune defendant as though it were entered in the actual name of the named immune defendant. Nothing in this subsection shall prevent the owner or operator of the uninsured motor vehicle from employing counsel of his own choice and taking any action in his own interest in connection with the proceeding.

G. Any insurer paying a claim under the endorsement or provisions required by subsection A of this section shall be subrogated to the rights of the insured to whom the claim was paid against the person causing the injury, death, or damage and that person's insurer, although it may deny coverage for any reason, to the extent that payment was made. The bringing of an action against the unknown owner or operator as John Doe or the conclusion of such an action shall not bar the insured from bringing an action against the owner or operator proceeded against as John Doe, or against the owner's or operator's insurer denying coverage for any reason, if the identity of the owner or operator who caused the injury or damages becomes known. The bringing of an action against an unknown owner or operator as John Doe shall toll the statute of limitations for purposes of bringing an action against the owner or operator who caused the injury or damages until his identity becomes known. In no event shall an action be brought against an owner or operator who caused the injury or damages, previously filed against as John Doe, more than three years from the commencement of the action against the unknown owner or operator as

John Doe in a court of competent jurisdiction. Any recovery against the owner or operator, or the insurer of the owner or operator shall be paid to the insurer of the injured party to the extent that the insurer paid the named insured in the action brought against the owner or operator as John Doe. However, the insurer shall pay its proportionate part of all reasonable costs and expenses incurred in connection with the action, including reasonable attorney's fees. Nothing in an endorsement or provisions made under this subsection nor any other provision of law shall prevent the joining in an action against John Doe of the owner or operator of the motor vehicle causing the injury as a party defendant, and the joinder is hereby specifically authorized. No action, verdict or release arising out of a suit brought under this subsection shall give rise to any defenses in any other action brought in the subrogated party's name, including res judicata and collateral estoppel.

H. No endorsement or provisions providing the coverage required by subsection A of this section shall require arbitration of any claim arising under the endorsement or provisions, nor may anything be required of the insured except the establishment of legal liability, nor shall the insured be restricted or prevented in any manner from employing legal counsel or instituting legal proceedings.

I. Except as provided in [§ 65.2-309.1](#), the provisions of subsections A and B of [§ 38.2-2204](#) and the provisions of subsection A of this section shall not apply to any policy of insurance to the extent that it covers the liability of an employer under any workers' compensation law, or to the extent that it covers liability to which the Federal Tort Claims Act applies. No provision or application of this section shall limit the liability of an insurer of motor vehicles to an employee or other insured under this section who is injured by an uninsured motor vehicle; provided that in the event an employee of a self-insured employer receives a workers' compensation award for injuries resulting from an accident with an uninsured motor vehicle, such award shall be set off against any judgment for damages awarded pursuant to this section for personal injuries resulting from such accident.

J. Policies of insurance whose primary purpose is to provide coverage in excess of other valid and collectible insurance or qualified self-insurance may include uninsured motorist coverage as provided in subsection A of this section. Insurers issuing or providing liability policies that are of an excess or umbrella type or which provide liability coverage incidental to a

policy and not related to a specifically insured motor vehicle, shall not be required to offer, provide or make available to those policies uninsured or underinsured motor vehicle coverage as defined in subsection A of this section.

K. A liability insurance carrier providing coverage under a policy issued or renewed on or after July 1, 1988, may pay the entire amount of its available coverage without obtaining a release of a claim if the claimant has underinsured insurance coverage in excess of the amount so paid. Any liability insurer making a payment pursuant to this section shall promptly give notice to its insured and to the insurer which provides the underinsured coverage that it has paid the full amount of its available coverage.