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In The  
**Supreme Court of Virginia**

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**RECORD NO. 081331**

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**STEPHEN RANDOLPH SEALS,**

*Appellant,*

v.

**ERIE INSURANCE EXCHANGE,**

*Appellee.*

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**BRIEF OF APPELLEE**

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## **BRIEF OF APPELLEE**

COMES NOW the appellee, Erie Insurance Exchange (hereinafter "Erie"), by counsel, pursuant to Rule 5:28 of the Rules of the Supreme Court of Virginia, and respectfully submits its Brief of Appellee in the above captioned case. The Opening Brief of Appellant was filed on December 1, 2008.

### **II. STATEMENT OF THE CASE**

Pursuant to Rule 5:28 of the Rules of the Supreme Court of Virginia, the following facts are necessary to amplify the appellant's statement. Erie argued in support of its Complaint that (1) Mr. Seals is not "anyone we protect;" (2) the coverage in the Erie Policy is consistent with Va. Code § 38.2-2206; and (3) regardless of the definition of "anyone we protect," there is no UIM coverage available to Mr. Seals.

### **III. QUESTION PRESENTED**

Did the trial court err when it concluded that Mr. Seals is not afforded UIM coverage under the Erie policy consistent with the requirements of Va. Code § 38.2-2006?

### **IV. STATEMENT OF FACTS**

As stipulated by the parties (See Joint Appendix, pp 1-43), Erie issued a Pioneer Garage/Auto Insurance Policy to Atlantic Motors, Inc. ("The Policy"). The Policy has a policy period of January 5, 2006 through January 5, 2007. The Policy was attached to the Complaint and incorporated therein by reference. In pertinent part, Erie agreed to pay, in accordance with the Virginia Uninsured Motorist Insurance Law, all sums that "anyone we protect" was legally entitled to recover as damages from the owner or operator of an "uninsured motor vehicle"<sup>1</sup>. With respect to the underinsured motorist coverage, "anyone we protect" includes anyone else "occupying" a "covered auto".

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<sup>1</sup> An "uninsured motor vehicle" also means an "underinsured motor vehicle".

A "covered auto" means a motor vehicle . . . with respect to which the "bodily injury" or "property damage" liability coverage of the policy applies. The "bodily injury" and "property damage" liability coverage does not apply to "your" customer who has other available insurance with limits at least equal to those required by law in the state where the "auto" is garaged<sup>2</sup>.

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<sup>2</sup> This policy provision is in accord with Va. Code Ann. § 38.2-2205(A)(1) (1950) which states in pertinent part:

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 . . . for the purpose of demonstrating to the other person as a prospective purchaser.*** [Emphasis Added]

On or about March 19, 2006, Stephen Randolph Seals (“Seals”) was a customer of Atlantic Motors, Inc. (“Atlantic Motors”). As a customer, Seals was test driving a 2004 GMC Sierra owned by Atlantic Motors. While test driving the 2004 GMC Sierra, Seals was involved in motor vehicle accident. Seals was injured in the accident. As the result of the accident, Seals made a claim against Erie for UIM coverage.

Defendant Seals had his own insurance with limits at least equal to those required by law in the state where his auto was garaged.<sup>3</sup> As such, it is undisputed that he is not entitled to “bodily injury” or “property damage” liability coverage under the Policy should a claim be made against him.

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<sup>3</sup> Seals was insured with State Farm Mutual Insurance Company with bodily/uninsured/underinsured limits of \$50,000.00 per individual per accident.

## **V. ARGUMENT**

### **I. STEPHEN RANDOLPH SEALS WAS NOT OCCUPYING A "COVERED AUTO" AND IS NOT THEREFORE "ANYONE WE PROTECT"**

In his Brief, Mr. Seals argues that he is entitled to UM/UIM coverage under the Erie policy because he was in fact operating an "auto we insure" as the auto is listed by reference on the Amended Declarations. This argument ignores the plain language of the policy as well as the language used by the legislature in Va. Code § 38.2-2206 and as interpreted by this Court.

The policy only applies to Mr. Seals if he was operating a "covered auto" not an "auto we insure." In short, a "covered auto" means a motor vehicle to which the liability coverage of the policy applies. The fact that a vehicle is an "auto we insure" on the declarations page does not mean that the liability coverage on the policy applies to the auto and is therefore available.

Should that reading be correct, then the purpose of a garage keepers policy and Va. Code § 38.2-2205 would be defeated and liability coverage would be available for Mr. Seals when it clearly is not.

In addition, the language used by Erie is similar to the language used by the legislature when it limited the availability of UM/UIM coverage to an “Insured.” Va. Code § 38.2-2206(B) defines “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 [emphasis added]***. . . .” In this case, the policy does not apply as Mr. Seals is not “anyone we protect” and the policy is not required to apply as he does not qualified as an “Insured” under Va. Code § 38.2-2206(B).

While not decided on the same issue, this Court’s ruling in Nationwide Mutual Insurance Company v. Harleysville Mutual Casualty Company, et al., 203 Va. 600, 603 (1962), is instructive. In that case, this Court held that the “policy applies” to a motor vehicle only when the operator was a permissive user. This Court declined to hold that simply because a motor vehicle is on the policy, the policy applies to the motor vehicle. If Mr.

Seals' interpretation of the "to which the policy applies" language was correct, it appears to be in direct conflict with this Court's holding regarding permissive use in Nationwide.

The language in Va. Code § 38.2-2206 and Nationwide is almost identical to the language used in the Erie policy. As such, the Erie policy should be read consistently with its intent, with a fair reading of the policy and with the reading this Court has given similar language. Consequently, Mr. Seals does not qualify as "anyone we protect" on the UIM endorsement in the Erie policy and since the policy does not apply, he does not qualify as an "Insured" under Va. Code § 38.2-2206(B).

**II. THE COVERAGES IN THE ERIE POLICY ARE CONSISTENT WITH THE REQUIREMENTS OF VA. CODE § 38.2-2206**

As mentioned above, Va. Code § 38.2-2206(A) requires Erie to provide a UIM endorsement to pay "the insured" sums he is legally entitled to recover. "'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 [emphasis added]***, 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.” Va. Code § 38.2-2206(B). As Mr. Seals is not an insured – e.g. was not using the motor vehicle to which the policy applies<sup>4</sup>, Va. Code § 38.2-2206 does not mandate UIM coverage for Mr. Seals.

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<sup>4</sup> See e.g. Nationwide Mutual Insurance Company v. Harleysville Mutual Casualty Company, et al., 203 Va. 600, 603 (1962). In Nationwide, this Court found that the UM requirements in policies are not for all policies as “issued or delivered” but should be applied to a specific insured in a given situation as National maintained in Harlow. In Nationwide, the Court found that the policy did not apply to a motor vehicle listed on the Harleysville policy due to a permissive use issue. Seals maintains that the Court in Nationwide did not find that a covered auto was defined based on who is inside it. However, that is precisely what the Court held: “[I]n order for a ‘guest’ in an automobile to qualify as an insured, such person must be a ‘guest’ in a motor vehicle ‘to which the policy applies’”. Id. The policy did not apply because the vehicle was being used without the permission of the named insured. The Court further noted that the Uninsured Motorist Act “was not enacted to provide insurance coverage upon each and every uninsured vehicle to everyone.” Id.

### **III. REGARDLESS OF THE DEFINITION OF “ANYONE WE PROTECT”, THERE IS NO UIM COVERAGE AVAILABLE TO MR. SEALS**

This Court has not addressed the specific issue of the plain language of the UM/UIM statute under these circumstances<sup>5</sup>.

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<sup>5</sup> The Court should note that the Circuit Court of the City of Richmond considered issue in Melissa L. Harlow v. Nationwide Insurance Co., National Fire & Marine Ins. Co., and Sheri L. Morris, 69 Va. Cir. 26 (2005). Erie respectfully disagrees with the Court’s analysis. For example in that opinion, the Court opined in pertinent part that:

Under Va. Code § 38.2-2206, a policy of bodily injury or property damage liability insurance relating to the use of an automobile must contain a provision insuring against damages recoverable against an unknown or underinsured owner or operator of an uninsured motor vehicle. The policy provision must equal the limits of liability coverage. National argues that since plaintiff, as a customer, is not entitled to any liability coverage she is not entitled to any UIM coverage. fails to account for the direction in § 38.2-2206 that these requirements be for policies as “issued or delivered,” not as applied to a specific insured in a given situation as National maintains here.

The Court’s interpretation of Va. Code § 38.2-2206 is not supported by any citation. It appears that the parties in Harlow failed to bring Nationwide Mutual Insurance Company v. Harleysville Mutual Casualty Company, et al., 203 Va. 600, 603 (1962) to the Court’s attention. In Nationwide, this Court found that the UM requirements in policies are not for all policies as “issued or delivered” but should be applied to a specific insured in a given situation as National maintained in Harlow. In Nationwide, this Court held that UM coverage does not exist where the driver is not afforded liability coverage by reason of non-permissive use. While the analysis is not identical, the case does suggest that analysis by specific insured is appropriate. In fact, it occurs regularly in consideration of UM coverage for Class I and Class II insureds.

Although this Court held in Government Employees Insurance Co. v. Universal Underwriters Insurance Co., 232 Va. 326 (1986), that the previous version of the “garage keeper’s exclusion” did not apply to UM/UIM coverage, that decision did not address the argument at issue in this case—that the plain language of the UM/UIM statute excludes the Seals from UM/UIM coverage where the policy excludes him from liability coverage. In effect, the policy does not apply. Rather, this Court in GEICO based its decision on the language of the omnibus provision of the garage keeper’s exclusion that was in effect at that time.

This Court in GEICO merely held that the garage keeper’s exclusion statute did not apply to UM/UIM coverage, due to the fact that the statute only explicitly referred to liability coverage. In this case, however, Erie does *not* argue that Va. Code § 38.2-2205 applies to UM/UIM as well as liability coverage.<sup>6</sup> Rather, it contends that Va. Code § 38.2-2206 explicitly requires that insurance policies provide UM/UIM coverage in an amount equal to, but not in excess of, the amount provided in liability

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<sup>6</sup> Erie concedes that Virginia Code § 38.2-2205, by its plain terms, applies only to garage *liability* policies.

coverage. In this case, the amount of available liability coverage to Mr. Seals is zero. Therefore Seals is not entitled to UM/UIM coverage from Erie.

The result is supported not only by the plain language of the UM/UIM statute, but also by the policy behind the garage keeper's exclusion. Virginia Code § 38.2-2205 is a manifestation of the General Assembly's intent to treat garage policies differently than typical automobile liability policies. By relieving automobile dealerships of an obligation to provide liability coverage to its customers, the General Assembly created an economic break for those dealerships—they are able to insure entire fleets of vehicles without the burden of insuring any and all persons who might drive those vehicles. If an automobile dealership were required to provide UM/UIM coverage to its customers even when it has no obligation to provide liability coverage, the benefit explicitly provided by the General Assembly in Va. Code § 38.2-2205 would be significantly reduced.

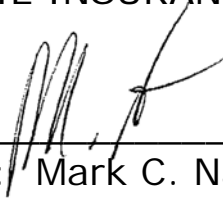
Although Va. Code § 38.2-2206 does not specifically refer to the garage policy exception found in Va. Code § 38.2-2205, its

plain language mandates that the limits of applicable UM/UIM coverage shall equal but not exceed the limits of liability coverage provided by the policy. UM/UIM coverage is predicated on the existence of applicable liability coverage in the same policy. In applying this language literally, so as to exclude Seals from coverage under the Erie UM/UIM provisions, the policy behind Virginia Code § 38.2-2205 is honored. Because the limits of liability coverage applicable to Seals under the Erie policy are zero, the limits of applicable UM/UIM coverage are likewise zero.

## **VI. CONCLUSION AND PRAYER FOR RELIEF**

For the foregoing reasons and those stated by the trial court, Erie Insurance Exchange requests that Honorable Court affirm the trial court and declare that Erie does not provide Seals with UM/UIM coverage and requests such other and further relief as this Court deems just and proper.

Respectfully submitted,  
ERIE INSURANCE EXCHANGE



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## **VII. CERTIFICATE**

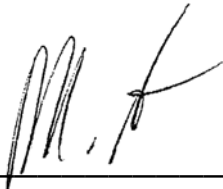
Counsel for the Appellant are John J. Rasmussen, Esquire, Insurance Recovery Law Group, PLC, Post Office Box 8049, Richmond, Virginia 23223 and Paul T. Hux, Esquire, Allen, Allen, Allen & Allen, 106 South Market Street, Petersburg, Virginia 23803. Counsel's phone numbers are 804-308-1359, facsimile 804-308-1349 and 804-733-8753, facsimile 804-733-8767, respectively.

Counsel for the Appellee is Mark C. Nanavati (VSB No. 38709), Sinnott, Nuckols & Logan, P.C., 13811 Village Mill Drive, Midlothian, Virginia 23114. Counsel's phone number is 804-378-7600 (ext. 3316), facsimile 804-378-2610.

I hereby certify that on the 29<sup>th</sup> day of December, 2008, pursuant to Rule 5:26(d) of the Rules of the Supreme Court of Virginia, twelve copies of Brief of Appellee were filed with the Office of the Clerk of Court, on the same date an electronic copy was filed with the Office of the Clerk of Court and on the same date three copies were sent, via first class mail, to:

John J. Rasmussen, Esquire  
Insurance Recovery Law Group, PLC  
Post Office Box 8049  
Richmond, Virginia 23223; and

Paul T. Hux, Esquire  
Allen, Allen, Allen & Allen  
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