

No. 34861

CHARLESTON

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

GUY R. CUNNINGHAM and
BRIDGETT L. CUNNINGHAM, his wife,

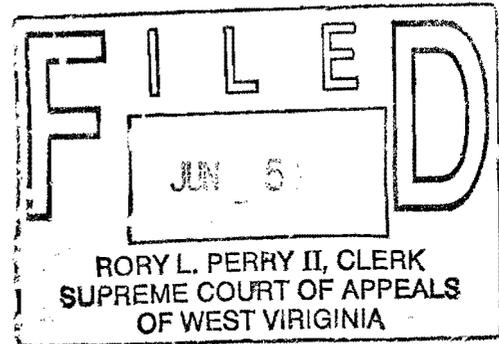
Plaintiffs,

v.

SUPREME COURT NO. 34861

WALTER LEE HILL, an individual;
ERIE INSURANCE PROPERTY AND
CASUALTY COMPANY, a Pennsylvania
corporation; B. MICHAEL BENTLEY,
an individual; ENCOMPASS INSURANCE
COMPANY OF AMERICA, an Illinois
corporation; STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY,
an Illinois corporation; and WILLIAM
WILSON, an individual,

Defendants.



ERIE INSURANCE PROPERTY AND CASUALTY COMPANY'S BRIEF UPON
CERTIFIED QUESTION

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Defendants.

ERIE INSURANCE PROPERTY AND CASUALTY COMPANY'S BRIEF UPON
CERTIFIED QUESTION

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF
WEST VIRGINIA

**I. Statement of the Kind of Proceeding and Nature of the Ruling in the Lower
Tribunal.**

On March 23, 2007, the plaintiffs, Guy Cunningham and his wife, Bridgett Cunningham, filed a Complaint against Erie Insurance Property and Casualty Company (hereinafter "Erie"), State Farm Mutual Automobile Insurance Company (hereinafter "State Farm") and others, alleging entitlement to the coverage limits from the underinsured motorist coverage (hereinafter "UIM") in policies issued to them by each insurer. Both Erie and State Farm filed Motions for

Summary Judgment which contend that the unambiguous “other insurance” provisions in the policies only entitle the plaintiffs to collect the highest limit available under the two policies.

This issue is one of first impression in West Virginia. The Circuit Court of Boone County held certified question hearings on July 24, 2008 and October 29, 2008. On December 30, 2008, the Circuit Court of Boone County, West Virginia, entered an Order, pursuant to W. Va. Code §58-5-2, which certified the following question of law:

When two insurers issue separate automobile liability insurance policies upon different vehicles containing underinsured motorist coverages which provide coverage for the same loss, is policy language which provides that the limits of underinsured motorist coverage available from all policies shall not exceed the liability limits of the policy with the highest limit of underinsured motorist coverage valid and enforceable?

The Circuit Court answered its question in the negative, and also found that the language in the Erie policy was ambiguous.

On February 25, 2009, Erie filed a Petition requesting this Court accept the Circuit Court’s certified question as stated above. The Court granted Erie’s Petition on April 30, 2009.¹

II. Statement of Facts

The following is the Statement of Facts relating to the UIM coverage limits as stipulated to by the parties and memorialized in the Circuit Court of Boone County’s Order Upon Certified Question, entered on December 30, 2008, which is included in the Designation of Record and incorporated herein as “Exhibit A.”²

On April 11, 2005, plaintiff, Guy Cunningham was operating a 2001 Mercury Grand Marquis in a southerly direction on U.S. Route 119, in Boone County, West Virginia. At the time, Guy Cunningham was in the scope and course of his employment with the United States

¹ State Farm also filed a Petition requesting this Court certify the Circuit Court’s certified question, which in turn was granted and consolidated with Erie’s Petition for the purpose of argument, consideration, decision and opinion.

² Exhibits A and C are included in the Designation of Record. Exhibit B is attached to this Petition as an Addendum.

Bureau of Alcohol, Tobacco, Firearms and Explosives and the 2001 Mercury Grand Marquis was owned by his employer, the United States government. (See Ex. A, p. 3.)

Also on April 11, 2005, Walter Hill was operating a 1997 Chevrolet truck, owned by Beaury Cochran, in a northerly direction on U.S. Route 119. Walter Hill turned the 1997 Chevrolet truck across U.S. Route 119 to enter Big Ugly Road and struck the vehicle operated by Guy Cunningham. Guy Cunningham was injured as a result of the collision. Id.

The vehicle operated by Walter Hill was insured under an automobile liability insurance policy issued by West Virginia National Auto Insurance Company. West Virginia National Auto Insurance Company paid its per person liability policy limits of \$20,000.00 to Guy Cunningham.

There was no underinsured motorist coverage upon the 2001 Mercury Grand Marquis operated by Guy Cunningham at the time of the accident. Id., p. 3-4.

On April 11, 2005, Guy Cunningham and his wife, Bridgett Cunningham, were the named insureds under an automobile liability insurance policy issued by Erie which provided coverage upon a 2001 Chevrolet Silverado and a 2003 Cadillac Escalade. Erie policy number Q01-6203856 was in full force and effect on April 11, 2005, and contained underinsured motorist coverage with limits of \$100,000 per person and \$300,000 per accident. Id., p. 4.

On April 11, 2005, Guy Cunningham also was the named insured under a liability insurance policy issued by State Farm, which covered a 1995 Harley Davidson motorcycle. State Farm policy number 243 1264-D26-48A contained underinsured motorist coverage with limits of \$50,000.00 per person and \$100,000 per accident. Id.

Both the Erie policy and the State Farm policy contained policy language which, when more than one policy provided underinsured motorist coverage, limited recovery to the highest liability limit available. Id.

Specifically, the Erie policy provided in the uninsured/underinsured endorsement,

Other Insurance:

If “**anyone we protect**” has other similar insurance that applies to the accident, “**we**” will pay “**our**” share of the loss, subject to the other terms and conditions of the policy and this endorsement. “**Our**” share will be the proportion of the Limit of Protection of this insurance bears to the total Limit of Liability of all applicable insurance. Recovery will not exceed the highest limit available among the applicable policies. Id., p 4-5.

The State Farm policy provided:

If There is Other Coverage – Coverage W

1. If underinsured motor vehicle coverage for **bodily injury** is available to an **insured** from more than one policy provided by us or any other insurer, the total limit of liability available from all policies provided by all insurers shall not exceed the limit of liability of the single policy providing the highest limit of liability. This is the most that will be paid regardless of the number of policies involved, **persons** covered, claims made, vehicles insured, premiums paid or vehicles involved in the accident.
2. Subject to item 1 above, any coverage applicable under this policy shall apply:
...
b. on an excess basis if the **insured** sustained **bodily injury** while **occupying** or otherwise using a vehicle not owned by or leased to **you, your spouse, or any relative**.
3. Subject to items 1 and 2 above, if this policy and one or more other policies provide coverage for **bodily injury**:
...
b. on an excess basis, we are liable only for our share. Our share is that percent of the damages payable on an excess basis that the limit of liability of this policy bears to the total of all applicable underinsured motor vehicle coverage provided on an excess basis.

The total damages payable from all policies that apply on an excess basis shall not exceed the amount by which the limit of liability of the single policy providing the highest limit of liability on an excess basis exceeds the limit of liability of the single policy providing the highest limit of liability on a primary basis. Id., p. 5-6.

Consistent with the “other insurance” provision, Erie paid Guy Cunningham \$66,667.66 in underinsured motorist coverage benefits and State Farm paid Guy Cunningham \$33,333.34 in

underinsured motorist coverage benefits, so that he has already received \$100,000.00 in underinsured motorist coverage benefits. Id., p. 6.

III. Assignment of Error

The Boone County Circuit Court erred in its answer to the Certified Question. Erie's UIM endorsement is not ambiguous, nor does it violate West Virginia public policy.

IV. Points and Authority Relied Upon by the Petitioner

West Virginia Statutes

W. Va. Code §58-5-2

W. Va. Code §33-6-31(b)

W.Va. § 33-2-3(a)

W. Va. Code §33-6-31(k)

West Virginia Case Law

Smith v. State Consol. Pub. Ret. Bd., 664 S.E.2d 686, 689 (W.Va. 2008)

Gallapoo v. Wal-Mart Stores, Inc., 475 S.E.2d 172, 174 (W.Va. 1996)

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National Mut. Insurance Co. v. McMahon & Son, Inc., 356 S.E.2d 488 (W.Va. 1987)

Payne v. Weston, 466 S.E.2d 161, 166 (W.Va. 1995).

Keffer v. Prudential Ins. Co., 172 S.E.2d 714 (W.Va. 1970)

Shamblin v. Nationwide Mut. Ins. Co., 332 S.E.2d 639, 642 (W.Va.1985).

Jenkins v. State Farm Mut. Automobile Ins., 632 S.E.2d 346 (W.Va.2006)

State Auto Mut. Ins. Co. v. Youler, 396 S.E.2d 737, 750 (W.Va. 1990)

Deel v. Sweeney, 383 S.E.2d 92, 95 (W.Va 1989)

Thomas v. Nationwide Mut. Insurance Co., 425 S.E.2d 595, 600-01 (W.Va. 1992)

State ex rel. State Auto Insurance Co. v. Risovich, 511, S.E.2d 498, 505 (W.Va. 1998)

Imgrund v. Yarborough, 483 S.E.2d 533, 539-40 (W.Va. 1997)

Persuasive Authority

State Automobile Mutual Insurance Co. v. Progressive Casualty Insurance Co., 180 Ohio App. 3d 139 (December 26, 2008).

V. Note of Argument

Erie prays this Court answer the proposed question in the affirmative for two reasons. First, the UIM provisions in question are unambiguous and should be applied as written. Second, Erie's "Other Insurance" provision, which limits the amount of UIM coverage to the highest available limit of liability under all policies in the event two or more policies both provide UIM coverage, has the endorsement of the West Virginia Insurance Commission. The plaintiffs and the lower court misapply W. Va. Code §33-6-31(b) to support their argument that Erie's "other insurance" provision violates public policy. However, Erie asserts that its interpretation of the "other insurance" provision is consistent with the Court's application of the statutory provision. This Court's interpretation of §33-6-31(b) clearly allows for a reduction of UIM coverage when the reduction is consistent with the premiums charged, pursuant to W. Va. Code §33-6-31(k).

A. Standard of Review

The Court reviews certified questions from a circuit court de novo. Smith v. State Consol. Pub. Ret. Bd., 664 S.E.2d 686, 689 (W.Va. 2008); Galapoo v. Wal-Mart Stores, Inc., 475 S.E.2d 172, 174 (W.Va. 1996). This Court also stated in Dairyland Ins. Co. v. Conley, 624 S.E.2d 599, 602 (W.Va. 2005), that it will "review a circuit court's interpretation of an insurance policy de

novo.” See also, Tennant v. Smallwood, 568 S.E.2d 10, 14 (W.Va. 2002) (“Determination of the proper coverage of an insurance contract when the facts are not in dispute is a question of law. The interpretation of an insurance contract is a legal determination which is reviewed de novo on appeal.”)³

B. The Language in Erie’s UIM Policy is unambiguous.

This Court should find the language in Erie’s UIM coverage unambiguous, and as such, should apply the UIM coverage provisions as written.

When analyzing an insurance policy, this Court has stated that “a court should read policy provisions to avoid ambiguities and not torture the language to create them.” Payne v. Weston, 466 S.E.2d 161, 166 (W.Va. 1995). This Court has stated that “[i]t is well settled law in West Virginia that ambiguous terms in insurance contracts are to be strictly construed against the insurance company and in favor of the insured.” Tennant, 568 S.E.2d at 13; *quoting* Syl. Pt. 4 of National Mut. Insurance Co. v. McMahon & Son, Inc., 356 S.E.2d 488 (W.Va. 1987). However, it is also a “well-settled principal of law” that courts should “apply, and not interpret, the plain and ordinary meaning of an insurance contract in the absence of ambiguity or some other compelling reason.” Payne, 466 S.E.2d at 166. This Court defines ambiguous language as “reasonably susceptible of two different meanings” or “of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning[.]” Id.; Shamblin v. Nationwide Mut. Ins. Co., 332 S.E.2d 639, 642 (W.Va.1985). The “primary concern” of the Court “is to give effect to the plain meaning of the policy, and in doing so,” the Court will “construe all parts of the document together.” Id. Courts are instructed to “not rewrite the terms of the policy,” but “enforce it as written.” Id.; See also Keffer v. Prudential Ins. Co., 172 S.E.2d 714, 715 (W.Va.

³ Additionally, plaintiffs raise the argument that Erie’s policy provision violates public policy, and according to this court, “A determination of the existence of public policy in West Virginia is a question of law.” Syllabus point 1 in part, Cordle v. General Hugh Mercer Corp., 325 S.E.2d 111 (W.Va. 1984).

1979) (“where the provisions of an insurance policy contract are clear and unambiguous they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended.”)

Erie’s UIM coverage provisions are clear and unambiguous. The lower court wrongfully concluded otherwise in its Order because it misinterpreted two of the UIM provisions as conflicting with one another.

The first provision, found under the “Limits of Protection” section, states:

if **“anyone we protect”** insures more than one **“auto”** and none of the **“autos”** are involved in the accident, the highest limit of Uninsured/Underinsured Motorist coverage applicable to any one **“auto”** will apply.⁴

The second provision states:

If **“anyone we protect”** has other similar insurance that applies to the accident, **“we”** will pay **“our”** share of the loss, subject to the other terms and conditions of the policy and this endorsement. **“Our”** share will be the proportion of the Limit of Protection of this insurance bears to the total Limit of Liability of all applicable insurance. Recovery will not exceed the highest limit available among the applicable policies.

At the hearing below, the lower court did not amplify on why it considered Erie’s policy to be ambiguous, but simply chose to adopt the plaintiffs’ argument of ambiguity. The plaintiffs’ argument is unavailing. The plaintiffs provide no authority or reasoning to support their ambiguity argument beyond the mere allegation that the Erie provisions are in conflict. They argue that Erie ignored one provision and applied the other. These provisions in no way conflict, to the contrary, both are in perfect harmony and consistent with Erie’s payment to the plaintiffs. The first provision states that the “highest limit” of UIM coverage “will apply,” (not “will be paid.”) Webster’s Dictionary defines the meaning of apply as “to put into operation or effect.” Here, the highest limit of UIM coverage was “put into effect”, which was the

⁴ This provision was not included in the stipulated Statement of Facts as set forth in the Circuit Court’s Order Upon Certified Question.

\$100,000.00 limit from the Erie policy. Since the plaintiffs were also covered by a State Farm UIM policy for their motorcycle, the scenario also covered by the second provision kicked in, so the \$100,000 was paid on a pro rata basis. Erie paid two-thirds (\$66,667.66), and State Farm, the other insurer, paid one-third (\$33,333.34). Payment was made in strict conformity with the policy provisions.

Erie's UIM provisions are neither "susceptible of two different meanings," nor are the provisions "of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning." Since no ambiguity exists in the Erie UIM coverage, this Court may find that the provisions should be applied as written and enforced accordingly.

C. Erie's UIM Coverage Does Not Violate West Virginia Public Policy.

Erie's "Other Insurance" provision, which prorates the highest available limit amongst the applicable UIM policies, is a valid and enforceable insurance contract that fully indemnifies the plaintiffs and does not violate the public policy of this state.

First, Erie's UIM coverage policy was approved by the West Virginia Insurance Commission (hereinafter "the Commission"), which found the provisions to be compliant with West Virginia law and public policy. It is the role of the Commission to ensure insurance carriers are compliant with the insurance laws of this State. See W.Va. § 33-2-3(a). Guidance and approval from the Commission is relied upon, and required of, insurance carriers doing business here. Erie took the proper steps to vet its UIM policy language with the Commission, and relied on the Commissions' approval of this language when it issued the policy to the plaintiffs. Both the plaintiffs and the lower court have misapplied statutory authority and case law in an effort to support a conclusion contrary to that of the Commission concerning this

policy. Erie's formal filings with the West Virginia Insurance Commission and the Commissions' responses are attached hereto and incorporated herein as "Exhibit B."

Second, the lower court was wrong to suggest that the absence of a multi-vehicle discount on Erie's UIM coverage is tantamount to a public policy violation. This Court has applied and enforced language limiting UIM coverage when one insurer issued four separate policies to family members and provided a multi-vehicle discount. Jenkins v. State Farm Mut. Automobile Ins., 632 S.E.2d 346 (W.Va. 2006). However, the issue before the Court was whether the plaintiff should be entitled to the highest available limit of the four State Farm policies (\$100,000), or whether he was only entitled to the \$25,000 UIM limit that covered the vehicle involved in the accident. The Court ruled the plaintiff was only entitled to the \$25,000, and pointed to the fact that they received a multi-vehicle discount from the insurer. Id. 632 S.E.2d at 351.

This Court has not ruled on a case where two different insurers provide for the same loss and thus limit coverage to the highest liability limits. The lower court assigned significance to the fact that neither Erie nor State Farm were aware of the other's policy with the plaintiffs, yet provides no insight into the significance of this conclusion. (See Ex. A, p. 8.) The lower court acknowledged that "there is no dispute that a general discount may have been applied or given by either insurer to the plaintiffs," but still held that "the plaintiffs received no benefit of buying two separate automobile policies." Id. This finding is inconsistent on its face and with the record. There is no public policy in West Virginia that requires that insurers provide a multi-vehicle discount. Here, what is necessary is that the coverage be consistent with the premiums charged. The benefits provided in the Erie policy were and are consistent with the premiums charged. The approval of the coverage forms by the Commission confirms this. In addition, the

premiums on the policy are, in fact, lower by operation of the “other insurance” clause, although such an outcome is not by law required to support the “other insurance” provision. The sworn affidavit of Roger Harrington, an Erie Personal Lines Supervisor, supports this finding. In the Affidavit, he states, “Because of this history of uninsured and underinsured motorist claim payments where other applicable insurance exists, Erie’s uninsured/underinsured motorist premiums are lower than they otherwise would be were Erie require to pay such uninsured or underinsured motorist claims at the per person limit of liability.” The Affidavit of Robert D. Harrington, a Personal Lines Supervisor in the Actuarial Division of Erie Insurance Group is included in the Designation of Record and incorporated herein as “Exhibit C.” This is the “general discount” alluded to by the lower court.

It is unclear why the lower court would expect Erie to provide a specific discount to the plaintiffs when they have opted to insure their other vehicle with another company. Erie did not know, nor should it need to know, that the plaintiffs had been issued UIM coverage by State Farm on another vehicle, in this case a motor cycle. The lower court’s finding would require all insureds to report all policies in the application process and such information has no bearing on the issuance of the “other insurance” provision. A carrier should not be expected to take into account policies from other insurers and provide a specific discount for a vehicle owned by the plaintiffs but insured with another company.

The lower court also misapplied W.Va. Code §33-6-31(b). (See Ex. A, pp. 8.) Erie’s application of the “other insurance” provision is consistent with the Court’s interpretation of the statutory provision. The Court has found that W. Va. Code §33-6-31(b) allows for a reduction of uninsured or UIM coverage when the reduction is consistent with the premiums charged, pursuant to W. Va. Code §33-6-31(k).

W.Va. Code §33-6-31(b) in part states, “No sums payable as a result of underinsured motorists' coverage shall be reduced by payments made under the insured's policy or any other policy.” First, this case centers on the management of two UIM policies when applied to the same loss. The statutory provision governs the amount of “sums payable.” Here, the plaintiffs are entitled to recover the amount “not to exceed the highest limit available among the applicable policies.” That amount is \$100,000 from Erie’s UIM coverage, and pro rated, Erie paid \$66,666.67, which is the “sum payable.” Erie is not contesting or attempting to reduce this sum payment.⁵

Provisions that completely exclude UIM coverage when the insured’s loss was sustained while in an automobile covered by another insurer without UIM coverage have been found unambiguous and enforceable by this Court. In Deel v. Sweeney, the Court found that such a provision did not violate W.Va. Code §33-6-31(b), because unlike uninsured motorist coverage, the statute does not mandate the insurer to provide UIM coverage. Deel v. Sweeney, 383 S.E.2d 92, 95 (W.Va 1989)(“The insurer must offer underinsured motorist coverage; the insured has the option of taking it; and the terms, conditions, and exclusions can be included in the policy as may be consistent with the premiums charged. Clearly an insurer can limit its liability so long as limitations are not in conflict with the spirit and intent of the statute and the premium charged is consistent therewith.”) The Deel Court permitted Progressive’s limits on UIM coverage, so long as the limitations did not conflict with the statute. Here, as previously discussed, Erie’s UIM coverage does not off set liability insurance coverage or reduce the “sum payable.” It simply limits coverage to the highest available limit.

⁵ The Court has interpreted W.Va. Code §33-6-31(b) as a public policy aimed at ensuring that the insured is fully indemnified, and thus prohibits offsets against UIM coverage. State Auto Mutual Insurance Co. v. Youler, 396 S.E.2d 737, 750 (W.Va. 1990). When this Court applied this statute in the Youler case, it stated that “the policy language clearly requires tortfeasor's liability insurance coverage to be set off against damages, not against the underinsured motorist coverage limits.”⁵ Id. The case at bar is not about offsets.

In Thomas v. Nationwide Mutual Insurance Co., 425 S.E.2d 595, 600-01 (W.Va. 1992), the Court applied as valid Nationwide's "family use exclusion," after a husband and wife were in a single car accident in which the husband was negligent. The wife was covered under her husband's liability coverage, but because of the "family use exception" she was not covered under the UIM coverage.⁶ Although the limitations served to completely exclude UIM coverage, this Court ruled "such exclusion is valid and not against the public policy of this state." Id. 425 S.E.2d at 601.

Provisions excluding punitive damages have been enforced by the Supreme Court. In State ex rel. State Auto Insurance Co. v. Risovich, 511, S.E.2d 498, 504 (W.Va. 1998), the Court disagreed with the Ohio County Circuit Court, and determined that so long as the insurer "expressly excludes" coverage for punitive damages, the exclusion of punitive damages is valid and does not violate either W.Va. Code §33-6-31(b) or public policy.

This Court has found that even certain limits on uninsured coverage, for which there is a \$20,000 mandatory minimum limit, is permissible. The Court reversed the Berkeley County Circuit Court's decision and held that the exclusionary "owned but not insured" provision "was valid and enforceable above the mandatory limits of uninsured motorist coverage required." Imgrund v. Yarborough, 483 S.E.2d 533, 539-40 (W.Va. 1997).

Recently, a sister state asserted in its opinion that "an 'other insurance' clause can limit liability when other insurance is available to cover the loss." See Generally State Automobile Mutual Insurance Co. v. Progressive Casualty Insurance Co., 180 Ohio App. 3d 139 (December 26, 2008)

⁶ The "family use exclusion" excluded from UIM coverage "any vehicle owned by or furnished for the regular use of you or a relative." Thomas, 425 S.E.2d at 598.

Clearly the West Virginia Supreme Court of Appeals has not precluded insurers from placing limits on UIM coverage, or excluding coverage completely under certain circumstances. Erie respects the public policy goal of full indemnification where UIM coverage is concerned. Under Erie's policy, the plaintiffs are fully indemnified because they received the highest limit available to them, which was \$100,000. Erie tendered to the plaintiffs their portion of that benefit which totaled \$66,666.67, and there were no attempts made to off set or reduce the sum payment in anyway. Clearly case law supports the application of Erie's unambiguous UIM coverage policy because it does not "conflict with the spirit and intent of the statute." Deel, 383 S.E.2d at 95.

D. Conclusion

Therefore, this Court should answer the Certified Question affirmatively and apply Erie's unambiguous UIM policy language as written because it conforms to the public policy of this State.

IV. Prayer for Relief

WHEREFORE, for the foregoing reasons, the Defendant, Erie Insurance Property and Casualty Company, respectfully prays the question presented by the Boone County Circuit Court be answered in the affirmative, because Erie's underinsured motorist coverage is unambiguous and compliant with the public policy of West Virginia, and thus should be enforced as written.

Respectfully submitted,

Of Counsel for Petitioner Erie Insurance Property
and Casualty Company and B. Michael Bentley

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EXHIBITS

ON

FILE IN THE

CLERK'S OFFICE