

NO. A08-250

State of Minnesota  
**In Supreme Court**

Nancy M. Meyer, as Trustee for the heirs of Margaret  
 Mphosi, deceased, Joshua Chairu Mphosi, deceased, Lucas  
 Mphosi, injured, Jehoshophat Mphosi, injured, and Nancy M.  
 Meyer as guardian ad litem for Lucas Mphosi injured,  
 Jehoshophat Mphosi, injured,

*Appellant,*

and

Bunmi Obembe and Christopher Obembe,

*Intervenors,*

and

North Dakota Department of Human Services,

*Intervenor,*

v.

Bibian Nwokedi

*Defendant,*

and

Enterprise Rent A Car Co. of Montana/Wyoming, d/b/a  
 Enterprise Rent a Car of the Dakotas/Nebraska,

*Respondent.*


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**REPLY BRIEF**

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## TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	ii
Argument	1
I. 49 U.S.C. § 30106 Does Not Preempt Minnesota Statute §§ 65B.49, subd. 5a(i)(2) and 169.09, subd. 5a (2006) as Applied to Enterprise	
A. The Presumption Against Preemption and <i>Russello v. United States</i> Demonstrate that Enterprise’s Reading of 49 U.S.C. § 30106’s Savings Clause is Erroneous	3
B. Enterprise Fails to Engage Meyer’s Arguments Regarding <i>Hertz Corp.</i> and the 2007 Amendments to § 65B.49, subd. 5a(i)(2), Both of Which Support Her Reading of the 2006 Version of this Provision, Which is at Issue in this appeal	7
C. Whether 49 U.S.C. § 30106 Preempts Provisions of Minnesota’s No-Fault and Safety Responsibility Acts as Applied to Enterprise, Including §65B.49, subd. 5a(i)(2)’s Liability Insurance Requirement, is the Issue Before the Court	8
Conclusion	12
Certificate of Brief Length	14

## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Conn. Nat'l Bank v. Germain</i> , 503 U.S. 249, 253-54 (1992)	4
<i>Daniel v. Am. Bd. Of Emergency Med.</i> , 428 F.3d 408, 423 (2d Cir. 2005)	4
<i>Garcia v. Vanguard Car Rental USA, Inc.</i> , 540 F.3d 1242 (11 <sup>th</sup> Cir. 2008)	4
<i>Hertz Corp. v. State Farm Mut. Ins. Co.</i> , 573 N.W.2d 686 (Minn. 1998)	2, 3, 7, 8
<i>Johnson v. Americar Rental Systems</i> , 613 N.W.2d 773 (Minn. Ct. App. 2003)	2
<i>Meyer v. Enterprise Leasing Co.</i> , 759 N.W.2d 426, 432 (Minn. Ct App. 2009)	2, 3
<i>Meyer v. Nwodeki</i> , 759 N.W.2d 426, 429 (Minn. App. 2009)	12
<i>Progressive Specialty Ins. Co. v. Widness</i> , 635 N.W.2d 516 (Minn. 2001)	2
<i>Russello v. United States</i> , 464 U.S. 16, 23 (1983)	1, 2, 3, 5, 6,
<i>United States v. McManigal</i> , 708 F.2d 276, 284, <i>vacated in part</i> , 723 F.2d 580 (7 <sup>th</sup> Cir. 1983)	5, 6
<u>Statutes</u>	<u>Page</u>
18 U.S.C. § 1963(a)(1)	5, 6
49 U.S.C. § 30106	1, 3, 4, 7, 8, 9, 10, 11
Minn. Stat. § 65B.48	7
Minn. Stat. § 65B.49	1, 2, 3, 7, 8, 9, 10, 11, 12
Minn. Stat. § 169.09, Subd. 5a (formerly Minn. Stat. § 170.54)	1, 3, 8, 9,10

## ARGUMENT

### I. 49 U.S.C. § 30106 (2006) Does Not Preempt Minnesota Statute §§ 65B.49, subd. 5a(i)(2) and 169.09, subd. 5a (2006) as Applied to Enterprise

Appellant Nancy M. Meyer explained in her opening brief that the courts below erred in finding a conflict between 49 U.S.C. § 30106 (2006) and provisions of Minnesota's No-Fault and Safety Responsibility Acts—specifically, Minnesota Statute §§ 65B.49, subd. 5a(i)(2) (2006) and 169.09, subd. 5a (2006). In her discussion of the federal act, she demonstrated that the lower courts' overly broad reading of the act's preemption provision, § 30106(a), and unduly narrow reading of the act's savings clause, § 30106(b), which effectively renders (b)(2) a nullity, is erroneous; it is inconsistent with the federal act's plain language, the presumption against preemption, and the principles of statutory interpretation set forth in *Russello v. United States*, 464 U.S. 16 (1983). Furthermore, she explained that Congress's decision to enact, in § 30106(a), a general policy that furthers a particular goal and, in § 30106(b), a specific exception that might tend against that goal does not invariably call for the narrowest possible construction of the exception. *See* Meyer Br. 23-24; *compare* Enterprise Br. 19-20 (arguing that this Court should read (b)(2) as preserving only "financial responsibility or liability insurance requirements" that apply as a "privilege of registering and operating a motor vehicle," language which does not appear in (b)(2), but appears only in (b)(1), and that Enterprise has complied with all Minnesota financial responsibility laws that apply as a condition of registration). And such a construction is easily resistible here, she argued, because requiring Enterprise, as a self-insurer, to make available its liability coverage to Meyer, a third-party beneficiary, up to the amounts specified in Minn. Stat. § 65B.49, subd. 5a(i)(2), even though that provision does not apply as a privilege of registering or operating a vehicle, *does not* conflict with the preemption rule that rental car owners *qua* owners may not be held vicariously liable under state law, *see* 49 U.S.C. § 30106(a).

In her discussion of Minnesota's No-Fault and Safety Responsibility Acts, Meyer demonstrated that the lower courts erred in concluding that § 65B.49, subd. 5a(i)(2) does not impose any duty on a rental-car owner, such as Enterprise, to maintain residual liability coverage on their vehicles in the amounts set forth therein. *See Meyer v. Enterprise Leasing Co.*, 759 N.W.2d 426, 432 (Minn. Ct App. 2009) (rejecting Meyer's argument that "a rental-vehicle company must provide the coverage specified by Minn. Stat. § 65B.49, subd 5a(i)(2)," and concluding that this statute "acts only as a cap on vicarious liability for rental-vehicle owners."). She explained that, contrary to the conclusion of the courts below, the text and structure of § 65B.49, subd. 5a(i)(2); the history of third-party liability concepts, and the evolution of the No-Fault and Safety Responsibility Acts, as discussed in *Progressive Specialty Ins. Co. v. Widness*, 635 N.W. 2d 516 (Minn. 2001), and *Hertz Corp. v. State Farm Mut. Ins. Co.*, 573 N.W.2d 686 (Minn. 1998); and the 2007 amendments to § 65B.49, subd. 5a(i)(2), together support the view that § 65B.49, subd. 5a(i)(2) not only limits vicarious liability, but also imposes a distinct requirement on owners to maintain residual liability insurance and to extend the benefits of that coverage to third parties even where a permissive driver is solely at fault.<sup>1</sup> That reading is preferable, she explained, because it advances the No-Fault Act's remedial purposes.

Respondent Enterprise Rent-A-Car, in its answer brief, fails to respond to several of these arguments. It does not address the presumption against preemption or *Russello*. Nor does it offer a serious response to the merits of Meyer's argument that § 65B.49, subd. 5a(i)(2) requires

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<sup>1</sup> Enterprise reads *Johnson v Americar Rental Systems*, 613 N.W.2d 773 (Minn. Ct. App. 2003), as conclusively establishing that § 65B.49, subd. 5a(i)(2) does not impose this distinct requirement on owners/lessors but solely caps vicarious liability. Enterprise Br. 23-24. That is not a fair reading of *Johnson*. See 613 N.W.2d at 777 (concluding that the specified levels of liability coverage are not satisfied by payments from sources other than the owner or its insurer; rather, coverage specified in § 65B.49, subd. 5a(i)(2) must be satisfied by the owner's insurer). If anything, *Johnson's* statement that § 65B.49, subd. 5a(i)(2) would not be satisfied by split-limit coverage supports Meyer's view that § 65B.49, subd. 5a(i)(2) imposes a distinct duty on rental car owners to provide and extend residual liability coverage to third parties such as Meyer. See Meyer Br. 19.

insurance, an argument that is based in part on this Court's decision in *Hertz Corp.* and the 2007 amendments to § 65B.49, subd. 5a(i)(2).

Instead of responding to the merits of these arguments, Enterprise expends considerable effort trying to hamstring this Court so that it cannot consider them. The Agreement in Principle (A, 53-59), it claims, permits Meyer to argue on appeal that § 65B.49, subd. 5a(i)(2) limits vicarious liability. But the Agreement, according to Enterprise, otherwise bars Meyer from arguing that § 65B.49, subd. 5a(i)(2) also imposes an insurance requirement on Enterprise that survives preemption under the act's savings clause and that requires Enterprise to extend the benefits of its coverage to Meyer even if § 169.09, subd. 5a., considered in isolation, might be preempted. Of course, the Agreement in Principle establishes no such bar; rather, it expressly states that the parties disagree as to whether § 65B.49, subd. 5a(i)(2) requires such coverage. What is more, Meyer presented these same arguments on appeal to the Court of Appeals, without objection from Enterprise—it characterized this issue as one of first impression—and the Court of Appeals considered and rejected this view of § 65B.49, subd. 5a(i)(2) on the merits. *See Meyer v. Enterprise Leasing Co*, 759 N.W.2d at 432. Enterprise's bid to restrict this Court from considering the full scope of the preemption issue on appeal cannot be taken seriously.

**A. The Presumption Against Preemption and *Russello v. United States* Demonstrate that Enterprise's Reading of 49 U.S.C. § 30106's Savings Clause is Erroneous**

Enterprise has no response to Meyer's arguments regarding the presumption against preemption, which is applicable in each preemption case, or *Russello*, which establishes governing principles of statutory interpretation applicable here. Its inability to reconcile these controlling principles of statutory interpretation with its reading of § 30106 reinforces the view that Enterprise's reading of the federal act is flawed.

Instead, Enterprise cites *Garcia v. Vanguard Car Rental USA, Inc.*, 540 F.3d 1242 (11th Cir. 2008), in support of its conclusion that the savings act preserves a subset of financial responsibility laws—those that apply as a condition of licensure or registration. Enterprise Br. 14-15, 18. Enterprise also characterizes the federal act’s text as plain and unambiguous, Enterprise Br. 14-15, and the savings clause’s text itself as “plain,” Br. 17, and urges this Court to conclude, as did the court in *Garcia*, that the savings clause preserves only those financial responsibility laws that apply as a condition of registration.<sup>2</sup>

What Enterprise fails to grasp, however, is that the court in *Garcia* found “financial responsibility” to be ambiguous. See 540 F.3d at 1247. To resolve the purported ambiguity, *Garcia* employed the statutory interpretation canon of *noscitur a sociis*, the principle that “statutory terms, ambiguous when considered alone, should be given related meanings when grouped together,” to find that the savings clause preserves those financial responsibility laws that apply as a privilege of registering or operating a vehicle. But if § 30106’s text is “plain and unambiguous,” as Enterprise suggests, then reliance on the *noscitur a sociis* canon, as in *Garcia*, is inappropriate. See *Daniel v. Am. Bd. Of Emergency Med.*, 428 F.3d 408, 423 (2d Cir. 2005) (“Only if we discern ambiguity do we resort first to canons of statutory construction, . . . and, if the meaning remains ambiguous, to legislative history.”) (citation omitted).

Because the text of the savings clause is indeed unambiguous, this Court should decline to decide this issue according to the *noscitur a sociis* canon of construction. See *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (“[I]n interpreting a statute a court should always

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<sup>2</sup> Enterprise also urges this Court to conclude, as did the *Garcia* court, that the savings clause preserves “penalties” but not “liability.” See Enterprise Br. 24; see *Garcia*, 540 F.3d at 1247 (“[T]he savings clause exempts from preemption laws ‘imposing financial responsibility or insurance standards,’ § 30106(b)(2), or laws *penalizing* the failure to meet the financial responsibility or liability insurance requirements under state law.’ § 30106(b)(2).” (emphasis added). This reading is contrary to the plain language of the savings clause, which preserves state laws imposing “liability.” § 30106(b)(2). Congress did not use the word “penalty” there. See *id.*

turn first to one, cardinal canon before all others. . . . [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.”). *Russello v. United States*, 464 U.S. 23 (1983), which Meyer discussed at length in her opening brief (Br. 23-25), and which Enterprise, in its answer brief, fails to discuss at all, supports this view.

In *Russello*, the Supreme Court explained, “Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” 464 U.S. at 23 (internal quotation marks and citation omitted). In accordance with this presumption, the Court refused to adopt a narrow construction of 18 U.S.C. § 1963(a)(1) (“any interest . . . acquired”) based on the language of the succeeding subsection (a)(2) (“any interest in . . . an enterprise”). *Id.* The term “any interest” in subsection (a)(1), the Court reasoned, should not be narrowly construed to mean “any interest . . . in an enterprise,” because Congress did not so qualify the term “interest” in subsection (a)(1), as it had in subsection (a)(2). *Id.* The *Russello* presumption, the Court made clear, is an application of the plain-meaning rule: Courts presume that Congress, in drafting statutes, says what it means and means what it says. *See id.* (“The short answer is that Congress did not write the statute that way.’ We refrain from concluding here that the differing language in the two subsections has the same meaning in each.”) (citation omitted).

Notably, several lower courts had narrowly construed the term “interest” in subsection (a)(1) to mean “interest in an enterprise” based on what appears to be the *noscitur a sociis* canon of construction. For example, the U.S. Court of Appeals for the Seventh Circuit reasoned that “[i]t is not really possible to determine the meaning of the word ‘interest’ simply from reading § 1963.” *United States v. McManigal*, 708 F.2d 276, 284, *vacated in part*, 723 F.2d 580

(7th Cir. 1983). It therefore resorted to the *noscitur a sociis* canon to resolve any ambiguity in the meaning of the term “interest” in § 1963(a)(1), reasoning that “it makes sense in construing the scope of the statute to read the prohibitory and penal sections in a similar way. Thus the relevant ‘interest’ under Section 1963 would be only an interest in an enterprise. . . .” *Id.* at 285.

*Russello*, however, rejected this reasoning. *See* 464 U.S. at 23; *see id.* at 18 (citing *McManigal*, 708 F.2d at 283-87). Congress’s use of the same term interest in two subsections does not create an ambiguity simply because certain qualifying language (in an enterprise) is present in one subsection but not the other. The exclusion or inclusion of qualifying language, according to *Russello*, is presumed to be intentional, and courts should refrain from concluding that “differing language in the two subsections has the same meaning in each.” *Id.* at 23.

In light of *Russello*, it is clear that Enterprise’s reading of the savings clause is incorrect. The presence of the phrase “for the privilege of registering and operating a motor vehicle” in subsection (b)(1), and its absence in subsection (b)(2), reveals Congress’s design. Had Congress intended to restrict subsection (b)(2) to those financial responsibility or liability insurance laws that apply as a condition of registration, it would have done so expressly as it did in subsection (b)(1). To read the savings clause otherwise, as suggested by Enterprise, disregards the legislative intention as “clearly manifested by the plain and unambiguous language of [the] statute.” Enterprise Br. 15.

Not only is Enterprise’s artificially narrow view of “financial responsibility” without support in the savings clause’s text, that narrow view is not supported by the definition of “financial responsibility” itself. *See* Meyer Br. 8. Enterprise agrees. It offers *two* definitions of “financial responsibility,” the first of which is not limited to those laws that apply to a condition of licensure or registration. Enterprise Br. 18-19. But even if the common meaning of “financial

responsibility” itself were so limited, § 30106(b)(2) preserves “financial responsibility *or liability insurance requirements.*” And, for the reasons discussed here and in Meyer’s opening brief, it is beyond dispute that § 65B.49, subd. 5a(i)(2) concerns liability insurance requirements.

**B. Enterprise Fails to Engage Meyer’s Arguments Regarding *Hertz Corp.* and the 2007 Amendments to § 65B.49, subd. 5a(i)(2), Both of Which Support Her Reading of the 2006 Version of this Provision, Which is at Issue in this Appeal**

Nor does Enterprise discuss the implications of this Court’s decision in *Hertz Corp.*, 573 N.W.2d 686, or the 2007 Amendments to § 65B.49, subd. 5a(i)(2). Meyer explained their relevance to the preemption issue in this case in her opening brief. Meyer Br. 12, 16-17. There, she explained that the Court in *Hertz Corp.* read §§ 65B.48, subd. 1, 65B.49, subd. 3(2), which concerns residual liability coverage of owners generally, to require rental car owners to maintain such coverage whether or not the vehicle operator or lessee had insurance, even though that provision did not, on its face, require an automobile owner to maintain such coverage. Meyer Br. 27-28. That broad reading of § 65B.49, subd. 3(1), the Court in *Hertz Corp.* concluded, is preferable because it advances the Act’s remedial purposes. *See* Meyer Br. 28.

Drawing on the logic of *Hertz Corp.*, Meyer argued that this Court should similarly construe § 65B.49, subd. 5a(i)(2) as requiring rental-vehicle lessors such as Enterprise to maintain coverage as specified therein, because that interpretation advances the Act’s remedial purposes. And, to further support her argument that § 65B.49, subd. 5a(i)(2) imposes a distinct duty on motor vehicle lessors such as Enterprise, she cited the 2007 amendments to § 65B.49, subd. 5a(i)(2), which appear to alter the priority of coverage specified in § 65B.49, subd. 5a(i)(2), by shifting primary responsibility for such coverage from owners/lessors to drivers/lessees. These amendments demonstrate that the Legislature itself understood subdivision 5a(i)(2), prior to its amendment, as imposing a requirement on lessors to maintain coverage.

Rather than engage these arguments, Enterprise characterizes them as “sophistry” because *Hertz Corp.* itself did not specifically “address[] the sole [preemption] issue before this [C]ourt” in this appeal, and because the 2007 Amendments are not squarely applicable in this appeal, which concerns whether the district court erred in concluding that federal act preempts § 65B.49, subd. 5a(i)(2) (2006). These entirely unremarkable observations, i.e., *Hertz Corp.* did not resolve the precise issues in this appeal, are neither responsive to Meyer’s serious arguments, nor does it demonstrate that of the parties to this appeal, it is Meyer that seeks to obfuscate the issues.

**C. Whether 49 U.S.C. § 30106 Preempts Provisions of Minnesota’s No-Fault and Safety Responsibility Acts as Applied to Enterprise, Including §65B.49, subd. 5a(i)(2)’s Liability Insurance Requirement, is the Issue Before the Court**

As stated in Meyer’s initial brief, this Court is asked to decide “[w]hether 49 U.S.C. § 30106 (2006) preempts provisions of Minnesota’s No-Fault and Safety Responsibility Acts—specifically, Minnesota Statute §§ 65B.49, subd. 5a(i)(2) and 169.09, subd. 5a(2006)—insofar as they require rental car owners to provide residual liability coverage in the specific amounts prescribed by § 65B.49, subd. 5a(i)(2).” Meyer Br. 1. Enterprise’s construction of the issue on appeal is whether there is preemption as described when Enterprise has “satisfied the minimum insurance/self-insurance obligations imposed as a condition to vehicle registration and operation.” Enterprise Br. 1. Enterprise’s construction improperly presupposes the answer to a legal question about which both parties have continued to disagree. That question is whether Minnesota’s No-Fault and Safety Responsibility Acts require rental car owners to provide residual liability coverage in the amount of \$115,000 per person and \$350,000 per accident for bodily injury damages, as argued by Meyer, or in the amount of \$30,000/\$60,000 as argued by Enterprise. The answer to this question of state law is important to the determination of to what

extent § 65B.49, subd. 5a(i)(2) is preempted by federal law and, accordingly, to the ultimate disposition of this case.<sup>3</sup>

Enterprise, based on a tortured reading of the Agreement in Principle, claims, for the first time in this litigation, that Meyer is permitted to argue on appeal only that § 65B.49, subd. 5a(i)(2) limits vicarious liability. The Agreement, according to Enterprise, otherwise bars Meyer from arguing that § 65B.49, subd. 5a(i)(2) also imposes an insurance requirement on Enterprise that survives preemption under the act's savings clause and that requires Enterprise to extend the benefits of its coverage to Meyer even if § 169.09, subd. 5a., considered in isolation, might be preempted.

The Agreement in Principle imposes no such bar. Rather, the Agreement expressly notes the parties' disagreement about Minnesota's insurance requirements. Under "RECITALS" it states: "5. Claimants contend that Minnesota imposes financial responsibility upon Enterprise for vicarious liability for bodily injury beyond the level of \$30,000/\$60,000 such that Enterprise should have insurance/self-insurance of \$115,000 per person/\$350,000 per accident for bodily injury damages for its alleged vicarious liability." (A, 54) (Agreement in Principle); *see also* Recital 6.

These recitals notwithstanding, Enterprise emphasizes subsection 1. of the "AGREEMENT" portion:

1. Claimants intend and agree to dismiss with prejudice and without costs to any party *any and all claims in this lawsuit* against any and all parties, persons or entities for bodily injury damages arising out of the Accident, *with the exception that the claim of vicarious liability against Enterprise will not be dismissed*, upon Enterprise's payment of the sum of \$60,000

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<sup>3</sup> This issue was joined when Enterprise raised 49 U.S.C. § 30106 as a defense to Meyer's claim against it and claimed to be in compliance with any financial responsibility laws applicable to it, thus making dismissal pursuant to § 30106 appropriate.

into court. Agreement in Principle (emphasis from Enterprise's Brief).

Enterprise Br. 8 (citing Agreement in Principle) (emphasis from Enterprise's Brief). But what Enterprise conveniently overlooks is that the Agreement defines "vicarious liability" for purposes of that document as follows: "'Vicarious liability' means claims or responsibility based upon Minn. Stat. 65B.49, subd. 5a, Minn. Stat. 169.09, subd. 5a and/or Subsection b of 49 U.S.C. 30106 (the 'Graves Amendment')." (A, 54) (Agreement in Principle). This definition clearly encompasses Meyer's arguments for the higher level of residual liability coverage. This definition also reflects Enterprise's understanding of the argument *in the same document* where it commits that, "as self insurer, it was obligated to defend and indemnify the renter and/or driver for bodily injury claims under the laws of North Dakota or Minnesota," and states that it is Enterprise's position is that it "has *no further vicarious liability* for bodily injury claims resulting from the Accident" having paid "\$60,000 in settlement for claims of bodily injuries." (A, 54-55) (Agreement in Principle). Furthermore, this understanding of the term "vicarious liability" in the Agreement in Principle negates Enterprise's position that Enterprise would only have to pay the additional \$290,000 requested by Meyer if the Court finds that amount necessary to satisfy Enterprise's "vicarious liability." Enterprise's Brief 5 n.4. It is clear that under the language of the agreement and the understanding of the parties as reflected by the agreement, Enterprise would have to pay the additional \$290,000 if this Court found that § 65B.49 subd. 5a(i)(2) required the higher amounts of residual liability insurance: "7. Claimants and Enterprise further agree that in the event of a final determination on appeal holding Enterprise vicariously liable for the accident despite the Graves Amendment, Enterprise will tender, deposit and pay into this Court an additional \$290,000 in full satisfaction of such vicarious liability claim against Enterprise." (A, 56) (Agreement in Principle). The \$60,000 paid into court simply reflects the

amount that both sides could agree Enterprise was required to provide; but the parties plainly disagreed as to whether Enterprise, in light of 49 U.S.C. § 30106, was required to provide coverage in the amounts specified in § 65B.49, subd. 5a(i)(2).

Both the District Court and the Court of Appeals disagreed with Meyer on these points. For instance, Meyer argued unsuccessfully before the district court that § 65B.49 subd. 5a(i)(2) required Enterprise to maintain and extend the coverage specified therein. See Meyer's Brief Opposing Enterprise's Summary Judgment Motion at 7 ("The Minnesota financial responsibility scheme required Enterprise, as the owner of a rented vehicle involved in an accident in Minnesota, to have in effect liability insurance or self-insurance up to the amounts set forth in Section § 65B.49 Subd. 5a(h)(2),<sup>4</sup> namely \$100,000 per accident and \$300,000 per person . . . ."). The district court understood this position, and indeed it rejected this understanding of Minnesota law. See Order Granting Motion for Summary Judgment and Memorandum, 7-8 ("[I]t is Plaintiff's contention that Defendant Enterprise was required to have in effect liability insurance or self-insurance in the amounts set forth in Minnesota Statutes § 65B.49, subdivision 5a(h)(2) [sic] (i.e. \$100,000.00/person & \$300,000.00/person per automobile accident (or \$115,000.00 and \$350,000.00 respectively))").

Meyer pressed this view of § 65B.49, subd. 5a(i)(2) in the Court of Appeals, when it argued that § 65B.49, subd. 5a(i)(2) was preserved from preemption under the federal act's savings clause. See Meyer Court of Appeals Brief, 7, 15, 16-17, 18, 20, 21, 22-23. Enterprise disagreed with this view of § 65B.49, subd. 5a(i)(2). See Enterprise's Court of Appeals Brief 7, 15, 17, 18. It did not argue, however, that this issue was not properly before the Court of Appeals. In fact, Enterprise even noted that this was an issue of first impression. *Id.* at 19. It is

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<sup>4</sup> The memorandum misidentified the pertinent subdivision as 5a(h)(2) rather than 5a(i)(2).

thus unsurprising that the Court of Appeals addressed this issue on its merits. *Meyer*, 759 N.W.2d at 429.

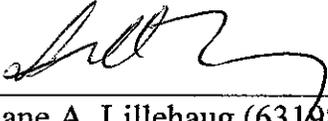
For these reasons, Enterprise's bid to restrict this Court from considering the full scope of the preemption issue on appeal cannot be taken seriously. Whether § 65B.49, subd. 5a(i)(2) imposes liability insurance requirements that escape preemption through the federal act's savings clause is a question that has been an integral part of Meyer's argument from the district court onward and is now properly before this Court for its determination.

### **CONCLUSION**

For the reasons discussed here and in Meyer's opening brief, this Court should reverse the judgment of the lower court.

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Dated: June 17, 2009

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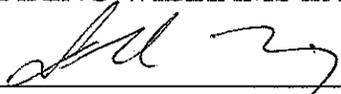
STATE OF MINNESOTA  
IN COURT OF APPEALS

<p>Nancy M. Meyer, as trustee for the heirs of Margaret Mphosi, deceased, et al., and Nancy M. Meyer, as guardian ad litem for Lucas Mphosi, injured, et al., Appellant, and Bunmi Obembe, et al., Intervenors,  vs.  Bibian Nwokedi, Defendant,  Enterprise Rent A Car Co. of Montana/Wyoming, d/b/a Enterprise Rent A Car of the Dakotas/Nebraska, Respondent.</p>	<p>CERTIFICATION OF BRIEF LENGTH  APPELLATE COURT CASE NUMBER: <b>A08-250</b></p>
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I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds.1 and 3, for a brief produced with a proportional font. The length of this brief is 4,057 words. This brief was prepared using Microsoft Word 2002.

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