STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	C/A No.: 2015-CP-42-1578
Wadette Cothran and Chris Cothran,	)	
Plaintiff,	)	
v.	)	**ORDER**
State Farm Mutual Automobile Insurance Company and Robert Tucker,	)	
Defendants.	)	

I. INTRODUCTION

This matter comes before the Court upon the Parties' cross-motions for summary judgment. The Parties have filed a Stipulation of Facts in this matter and agree that the sole issue for the Court's adjudication is the interpretation of S.C. Code Ann. § 38-77-144.[1] State Farm contends that its PIP policy is "excess" to workers' compensation benefits received by Plaintiff Wadette Cothran. Plaintiff Cothran contends that this "excess" provision constitutes a setoff and is invalid under § 38-77-144.

For the reasons stated below, Defendant State Farm's Motion for Summary Judgment is denied, and Plaintiffs' Motion for Summary Judgment is granted.

[1] The Stipulation references Section 38-77-140 in one paragraph, but the Parties agree that this reference is a scrivener's error, and Section 38-77-144 was intended.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On or about January 19, 2015, Plaintiff Wadette Cothran, an insured under a State Farm Personal Injury Protection ("PIP") policy, was involved in an accident in which she sustained injuries resulting in lost wages and medical bills in monetary amounts that exceed the amount of PIP coverage available under her policy. State Farm alleges it is not required to pay the PIP limits because Mrs. Cothran's bills and lost wages, as of the date this Action was initiated, had been paid for by her employer's workers' compensation insurance carrier. Plaintiff Wadette Cothran alleges she is entitled to collect her PIP coverage because the State Farm policy provision at issue that purports to make PIP payments "excess" to any benefits paid to her by her employer's workers' compensation carrier violates § 38-77-144. The Parties agree that if the "excess" provision is invalid, State Farm would owe the full amount of the PIP benefits provided by the policy.

The Parties filed cross-motions for summary judgment on August 28, 2015. The Parties have fully briefed their motions; and, on October 29, 2015; Logan Rollins appeared to argue this motion on behalf of Plaintiffs, and Robert Whelan appeared on behalf of Defendant.

III. LEGAL STANDARD

Under Rule 56(c) of the South Carolina Rules of Civil Procedure, summary judgment shall be granted if "there is no genuine issue as to any material fact" so that the "moving party is entitled to a judgment as a matter of law." By their Stipulation, the Parties have agreed that "[t]here are no material factual issues in dispute with respect to plaintiffs' breach of contract claim, and the sole matter before the Court on that cause of action is whether the policy provision [purporting to make State Farm's PIP coverage excess] violates section 38-77-144."

Accordingly, the only question at issue is the legal question of whether the State Farm policy provision violates S.C. Code Ann. § 38-77-144. Therefore, summary judgment is appropriate.

IV. DISCUSSION

A. Defining Set-Offs And The Evolution of Current PIP Law

The dispositive issue in this case is whether Plaintiff Wadette Cothran is entitled to collect under her State Farm PIP policy when the policy provides, under its "Workers' Compensation Coordination" clause, that "[a]ny personal injury protection coverage provided by this policy applies as excess over any benefits recovered under any workers' compensation law or any other similar law." Section 38-77-144 states, in its entirety,

> There is no personal injury protection (PIP) coverage mandated under the automobile insurance laws of this State. *Any reference to personal injury protection in Title 38 or 56 or elsewhere is deleted.* If an insurer sells no-fault insurance coverage which provides personal injury protection, medical payment coverage, or economic loss coverage, the coverage shall not be assigned or subrogated and is not subject to a set off.

(Emphasis Added).

Accordingly, as a preliminary matter, it is necessary to determine whether the policy provision at issue constitutes an attempt to assign, subrogate, or set off so that it could be violative of the Statute.

It is clear that a PIP carrier, under the law that existed before Act 148 of 1989 repealed mandatory PIP coverage, was not required to make payment if workers' compensation insurance had already made payments to the Claimant. Section 56-11-150 (later recodified as Section 38-77-290(d))[2], provided an "*exclusive list* of exceptions from the duty of a PIP insurer to pay benefits." Benat v. State Farm Mut. Ins. Co., 286 S.C. 132, 133, 333 S.E.2d 57, 58 (Ct. App.

[2] See Maybank et al., The Law of Automobile Insurance in South Carolina, 5th Ed., V-19 (2002).

1985). As noted in State Farm Mut. Auto. Ins. Co. v. Richardson, 313 S.C. 58, 437 S.E.2d 43 (1993), Act 148 of 1989 repealed mandatory PIP coverage and made it optional, and these "sweeping reforms in automobile insurance law" specifically included a repeal of "Section 38-77-290 [formerly the Section 56-11-150 referred to in Benat]." Richardson at 62, 45. Section 38-77-290(d) stated,

> Benefits payable under the coverages *required to be offered* by section 38-77-240 must be reduced to the extent that the recipient had recovered benefits under workers' compensation laws of any state or the federal government.

(Emphasis Added). SC. Code Ann Section 38-77-290(d) (Law. Co-op. 1989 quoted in Burnet R. Maybank, et al., The Law of Automobile Insurance in South Carolina, V-19, 5th ed. 2002).

The former law did not merely allow a set-off for workers' compensation benefits for mandatory PIP coverage, it, it mandated a setoff ("must be reduced [. . .]"). Pre-1989 PIP law "also allowed assignments to hospitals, physicians and other medical providers, so long as the provider did not require assignment of benefits as a condition of treatment." Maybank, et al., The Law of Automobile Insurance in South Carolina, V-19 (2002). When the original, mandatory PIP law was enacted, it also allowed a "tortfeasor setoff," as analyzed below. Furthermore, the Legislature contemplated allowing the PIP carrier to subrogate against the money paid by the "tortfeasor" (i.e., the liability insurance carrier) rather than allowing the "tortfeasor" a setoff for what was paid by the PIP carrier but decided against it because the "Legislature felt that a setoff provision would be more economical and administratively feasible than a provision allowing subrogation by the first party insurance carrier [i.e., the PIP carrier]." Maybank, et al., The Law of Automobile Insurance in South Carolina, V-16 (2002). The Legislature's "sweeping reforms" in 1989 that made PIP optional clearly, in the word of the

current statute, "deleted" assignments, subrogation, and set-offs, and it also "deleted" every one of the "*exclusive list* of exceptions from the duty of a PIP insurer to pay benefits." Benat, 286 S.C. 132, 133, 333 S.E.2d 57, 58. Because the exclusive list of exceptions from the duty of the PIP carrier no longer exists, no exception to the PIP carrier's duty to pay exists.

Clearly, the former law allowed this setoff for PIP coverage that was "required to be offered" so that it was reduced by amounts paid by a workers' compensation insurance carrier. It also allowed assignment, and the Legislature considered allowing subrogation. Under South Carolina Law, "It is well settled by our decisions that the code as adopted is the general law and the omissions are lost." Independence Ins. Co. v. Independent Life & Acc. Ins. Co., 218 S.C. 22, 31 61 S.E.2d 399, 403 (1950). Accordingly, the absence of a provision allowing set off for workers' compensation benefits where one previously existed clearly evidences the legislature's intention that Section 38-77-144 was the comprehensive Legislative statement concerning the issue of when PIP must be paid and who could allege an interest as a result of the PIP payment. Under the current Statute, "no personal injury protection (PIP) coverage mandated." A insurance carrier that chooses voluntarily to sell PIP coverage must provide it with the understanding that it is not subject to assignment, subrogation, or set-off.

The only statutory provision in existence that may form the basis of duties to pay PIP coverage or rights of persons to assert an interest in PIP coverage that has been paid is the current Section 38-77-144, as the entire history of PIP coverage (and the jurisprudence interpreting it) that existed prior to the 1989 amendment has been expressly "deleted."

In light of the only existing statute regarding the definition of PIP coverage that is applicable to the facts of this case, therefore, I find that the "excess" policy provision at issue does, in fact, constitute a setoff under South Carolina Law. South Carolina law makes clear that

denominating first party automobile coverage as "excess" to a coverage that exists outside of the insurer-insured relationship is identical to a setoff. For example, Underinsured Motorist Coverage ("UIM") is defined, under S.C. Code. Ann. Section 38-77-160, "to provide coverage in the event that damages are sustained *in excess of the liability limits* carried by an at-fault insured or underinsured motorist." As the Supreme Court held in Broome v. Watts, 319 S.C. 337, 341, 461 S.E. 2d 46, 48, this "excess" denomination constitutes a setoff: "The very definition of UIM insurance mandates *a set-off*." More importantly, the Court has determined that the credit claimed by the liability insurance company for the money paid by the PIP insurance company was, by definition, a setoff ("We termed this tortfeasor liability reduction [after the PIP carrier has paid its PIP coverage] a 'set-off' in Moultrie v. North River Ins. Co., Inc., 272 S.C 53, 249 S.E.2d 158 (1978)." State Farm Mut. Auto. Ins. Co. v. Richardson, 313 SC 58, 437 SE.2d 43 (1993). If the credit alleged by a liability insurance carrier against PIP coverage must be termed a "setoff," then the credit alleged by the PIP carrier against coverage paid by an entity other than itself must also be termed a setoff. The Moultrie Court noted in fact, that, that the PIP carrier's assertion that it could claim credit for liability payment was invalid because the statute "only requires *a setoff* by those persons who have already received benefits from their own carrier," and not by the PIP carrier who sought a setoff for the payment of liability proceeds. Moultrie at 56, 159. It is clear that the State Farm policy provision at issue in this case, on its face, constitutes a setoff under PIP law as it now exists in South Carolina.

LAW

A. Defendant's Argument Fails Under The "Plain Meaning" Rule

Section 38-77-144 states, "If an insurer sells no-fault insurance coverage which provides personal injury protection, medical payment coverage, or economic loss coverage, the coverage

shall not be assigned or subrogated and is not subject to a setoff." Under the terms of the State Farm Policy, "[a]ny Personal Injury Protection Coverage provided by this policy applies as excess over any benefits recovered under any workers' compensation law or any other similar law." On its face, the State Farm provision constitutes a setoff and violates the plain meaning of the Statute.

As the South Carolina Supreme Court has articulated:

> The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature.

Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E. 2d 578, 581 (2000) (Internal Citations and Quotations Omitted). Furthermore, "[i]t is settled law that statutory provisions relating to an insurance contract are part of the contract, and that a policy provision which contravenes an applicable statute is to that extent invalid." Boyd v. State Farm Mut. Auto. Ins. Co., 260 S.C. 316, 195 S.E.2d 706 (1973). As noted above, the workers' compensation exclusion that formed a part of two versions of the former PIP law in South Carolina has been deleted, and the State Farm policy provision must be interpreted in light of the only PIP code now in existence. I find that the "excess" provision does constitute a setoff under South Carolina law and is therefore invalid under South Carolina law.

B. *State Farm v. Richardson* Does Not Allow A Setoff

1. *State Farm v. Richardson* Addressed Only Stacking Of PIP Coverage

Defendant alleges that Richardson allows a setoff for a personal injury protection insurance carrier. In Richardson, a State Farm insured was injured in an automobile accident and claimed PIP benefits on two State Farm PIP policies. State Farm alleged that Richardson was entitled to only one; it "contend[ed] that its policy comprise[d] an anti-stacking clause *rather than a set-off.*" Id. at 60, 44. (Emphasis Added). The policy provision at issue in Richardson was not a setoff, or "excess," provision but one stating that "the total limits of liability under all such policies shall not exceed that of the policy with the highest limit of liability." Id. at 58, 44. That is, the prohibition at issue was related only to the *stacking* of multiple policies within the relationship of a single PIP Insurer and PIP Insured and did not address denominating the PIP policy as excess to a policy held by a third party to the PIP Insurer—PIP Insured relationship. The Richardson Court concluded that, within the context of a single insurer—insured relationship in an automobile insurance scenario, that an insurer's policy "may prohibit the ***stacking*** of non-mandatory coverage." Id. at 61, 45 (Emphasis added).

Accordingly, as Richardson addresses only stacking of coverage, it is inapplicable, and Defendant's argument fails.

2. The Setoff Addressed In State Farm v. Richardson Was Not For the Benefit Of The PIP Carrier

In Richardson, the plaintiff alleged that an anti-stacking provision constituted a setoff. The holding of the Court distinguished a setoff from stacking, and the Court addressed the issue of a setoff only because it was erroneously raised by the Plaintiff. The Court clarified that the distinction between a "setoff" and "stacking" was that stacking occurred when a single insurance

carrier in a single insurer—insured relationship had multiple policies. A setoff, on the other hand, occurred when two separate insurance carriers have independent duties to pay benefits to the same injured person. When two insurance companies had independent duties to pay a single injured individual, the Richardson Court noted, "We termed this tortfeasor liability reduction a 'set-off' in Moultrie v. North River Ins. Co., Inc., 272 S.C 53, 249 S.E.2d 158 (1978)."

Moultrie was decided when a setoff was allowed. In Moultrie, the injured party (Moultrie) received a settlement with the liability insurance carrier for the driver who was at fault for the accident in which he was injured. That settlement included "payment of [Moultrie's] medical expenses". Id. at 54, 158. His PIP carrier, North River Insurance, alleged he would receive a "double recovery" if he were allowed to recoup money from his PIP policy for medical bills for which he had already received payment as a result of the liability settlement based on the statute that read, "if a claimant Recovering from his insurer the benefits for economic loss. . . shall bring action. . . against another person. . . the court shall reduce such verdict by the amounts of the benefits paid. . . by the claimant's insurer" (Ellipses in original). The Moultrie Court held that the plain meaning of the statute was that "this section only requires a setoff by the persons who have already received benefits from their own carrier." The Court held that "*the tortfeasor was to be given credit for payment by the first party insurer, rather than the first party insurer* [i.e., the PIP carrier] getting the benefit of payment by the tortfeasor." Moultrie at 56, 159. Accordingly, the "old" law that allowed a setoff did make an attempt to prevent "double recovery," but it did so by allowing the "tortfeasor" (i.e., the tortfeasor's insurance carrier) to get credit for what the PIP carrier had already paid.

Even in its historical definition, a "setoff" required the PIP carrier to make payment prior to the entity that could claim a setoff (i.e., the "tortfeasor"). The current PIP statute was enacted,

not to give a windfall to the PIP carrier, but because the elimination of the setoff "prevented the tortfeasor from profiting in the case *where the injured party received PIP benefits.*" Mount v. Sea Pines, Inc., 337 S.C. 337, 359, 523 S.E. 2d 464, 465 (Ct. App. 1999). The interpretation of the Statute provided by the Court of Appeals presupposes, as does the text of the statute itself, that the injured party has already "received PIP benefits."

Accordingly, the current law makes PIP coverage a payor of first, rather than last, resort.

3. **The "Tortfeasor" From Richardson Refers To A Third Party to the PIP Insurer—PIP Insured Relationship**

As noted above, the Richardson opinion was limited to an analysis of the extent to which a single automobile insurance carrier was permitted to limit its responsibilities within the first party, PIP insurer—PIP insured context. That is, the opinion only addressed when a single insurer could limit, by the terms of its policy, what that insurer paid out among several policies between the insurer and insured. It did not address the existence or non-existence of third-party insurance coverage outside of the PIP Insurer—PIP Insured relationship and how the existence or non-existence of such coverage could absolve the PIP carrier of its responsibility to pay under the terms of its policy.

The Richardson Court did not allow an insurer to receive a setoff for payments made by a source with an obligation independent of the obligation that arose outside of the relationship between State Farm and Mr. Richardson. Contrary to the history of the PIP setoff rule as outlined above, State Farm seeks to assert that because a workers' compensation insurance carrier is not a literal "tortfeasor," State Farm can receive credit for what a third party to the first party contractual relationship (between State Farm and Wadette Cothran) has a legal responsibility to pay. *Read in light of Richardson, however, it would be the workers' compensation insurance*

carrier, not State Farm, that would have the right to assert a setoff when both workers' compensation and PIP coverage simultaneously exist—and, in fact, as noted below, although the workers' compensation carrier does not have the right to assert a setoff, it does have the right to assert an equitable interest in the payment of a claimant's PIP benefits.

If State Farm's interpretation were adopted, not only a workers compensation insurance carrier, but also a health insurance carrier could allege a setoff for PIP benefits, as a health insurance carrier is not a literal "tortfeasor." Furthermore, the policy provision at issue provides for State Farm PIP as excess not only to workers' compensation law but "any other similar law." The phrase "similar law" is not defined in the policy, and could be taken to signify any insurance that pays benefits in the event of injury—and State Farm could allege that this "similar" law includes health insurance. In that event, both State Farm and the injured party's health insurance could, lawfully, allege a setoff and leave the injured insured with the unenviable choice of either paying out-of-pocket for her medical bills or spending years of time and thousands of dollars in costs litigating against the two insurance companies, *to both of which she paid premiums to cover medical bills that she sustained*, over what may be only a $1,000.00 PIP policy. It is clear that the Legislature did not intend the proscription against subrogation, assignment, and setoff to be interpreted so that an insured could be compelled to pay insurance premiums and then be forced to litigate over which of the two insurance carriers to whom she paid premiums would get the benefit of the premiums she voluntarily paid—rather than giving the benefit to the person who paid the premiums.

Accordingly, it is evident that the setoff prohibition in Section 38-77-144 that PIP coverage "is not subject to setoff" signifies what it always signifies in any context: the existence or non-existence of any third party insurance (insurance outside of the State Farm-Wadette

Cothran relationship) is irrelevant to any analysis of State Farm's contractual obligation to pay PIP benefits to its insured—Wadette Cothran. The fact that the Legislature "deleted" the former Section in two versions of the Code that contained the "exclusive list" of exceptions to the PIP carrier's duty to pay benefits is strong evidence that no such exception to payment is now allowed. (See Benat and Section 38-77-144).

If the Statute imposes only the limitation alleged by State Farm in its brief ("that a set-off of PIP benefits is prohibited in only one situation—the reduction of the tortfeasor's liability"), then State Farm could not only allege a setoff for workers' compensation benefits, there would be no bar to the PIP carrier alleging a setoff based on payments made by the health insurance carrier, the liability insurance carrier, or, for that matter, the injured party's Aunt Ethel and Uncle Fred who broke their piggy bank to pay for her hospital bill.

If, on the other hand, State Farm is not permitted to receive a setoff for mandatory liability insurance because of Section 38-77-144, then there is no argument that it can receive a setoff for another mandatory coverage system: workers' compensation. Courts must "reject a statutory interpretation when to accept it would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention." Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000). To accept State Farm's interpretation that the current Statute prevents a setoff by "only the tortfeasor" would lead to the absurd result that only one setoff (for the tortfeasor) was eliminated *while simultaneously creating a setoff for every possible entity other than the tortfeasor.*

It is abundantly clear from the legislative history and jurisprudence surrounding PIP coverage in South Carolina that the purpose of the coverage as it now exists is to provide an immediate alleviation of the financial strain placed on a physically injured person in the absence of fault,

liability, and coverage disputes. If the PIP carrier is permitted to be a payor of last resort that withholds payment until all sources of payment; including liability, workers' compensation, health, and, in its ambiguous policy language, "similar" systems have been located and forced to issue coverage denials; the intention of the Legislature would be undermined.

C. Public Policy Does Not Allow A Setoff

Finally, "[i]t must be presumed that the Legislature intended to achieve a consistent body of law." State v. Ramsey, 311 S.C. 555, 562 430 S.E. 2d 511, 516 (1993). The interplay between PIP coverage and workers' compensation coverage requires that PIP coverage be paid when the coverages arguably overlap in order to effect a fully coherent jurisprudence that complies with public policy. The nature of the current Workers' Compensation and Personal Injury Protection law allows the workers' compensation carrier to claim an equitable interest in the PIP proceeds paid to the injured worker. S.C. Code Ann. Section 42-1-560 outlines the "total cognizable damages" analysis available to the workers compensation insurance carrier to determine the amount of the statutory lien it is owed as a result of a Claimant's settlement with entities other than the workers' compensation carrier. The Workers' Compensation Commission has the authority to determine the amount of the lien and reduce it if "a reduction is equitable to all parties and serves the interests of justice." Id. Accordingly, when the Workers' Compensation Commission makes its determination of the proper amount of the statutory lien that the workers' compensation insurance carrier may allege, all payments received by the injured worker are at issue. That is, if the injured worker has received sufficient money to make her whole, then the workers' compensation insurance carrier has a stronger equitable argument that it is entitled to a greater lien. State Farm's refusal to pay its PIP benefits when legally due, therefore, prejudices

not only Wadette Cothran but also her employer's workers' compensation insurance carrier, and its Motion is denied on this basis as well as those stated above.

For the foregoing reasons, therefore, Plaintiffs' Motion is GRANTED, and Defendant's Motion is DENIED.

IT IS THEREFORE ORDERED that Plaintiffs' Motion for Summary Judgment is Granted, and Defendant's Motion for Summary Judgment is denied. Defendant shall, therefore, pay the remaining PIP proceeds to Plaintiffs.

IT IS SO ORDERED.

The Honorable L. Casey Manning

Spartanburg, SC
November 17, 2015