THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 2015-CP-42-1578

Wadette Cothran and Chris Cothran,.....Respondents,

v.

State Farm Mutual Automobile Insurance Company
and Robert Tucker, of whom State Farm Mutual Automobile
Insurance Company is the .....Appellant.

INITIAL BRIEF OF RESPONDENTS

Logan Rollins
P.O. Box 5048
Spartanburg, SC 29304
Telephone: 864-574-8801
ATTORNEY FOR RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

Did the circuit court properly hold that S.C. Code Ann. § 38-77-144 prohibits State Farm from including a personal injury protection ("PIP") set off for benefits paid by its insured's employer's workers' compensation carrier when S.C. Code Ann. § 38-77-144 prohibits a set off?

STATEMENT OF THE CASE

The Complaint for this Action was filed on April 17, 2015 in the Spartanburg County Court of Common Pleas. Plaintiffs claimed that State Farm Mutual Automobile Insurance Company ("State Farm") breached its insurance contract and duties of good faith and fair dealing by not paying to Plaintiffs the full amount of the State Farm personal injury protection ("PIP") policy after Plaintiff Wadette Cothran's medical bills and lost wages admittedly exceeded the full amount of the State Farm PIP coverage available (Stip. of Facts.)

On November 17, 2015, Judge L. Casey Manning granted Plaintiff's Motion for Summary Judgment for their breach of contract claim and denied State Farm's Motion for Summary Judgment for Plaintiffs' breach of contract claim. (Nov. 17, 2015 Order at 14). State Farm subsequently filed a Motion to Reconsider, which was denied by an order of January 26, 2016 without oral argument (Jan. 26, 2016 Order). State Farm filed its Notice of Appeal on February 5, 2016. On March 1, 2016, Counsel for Plaintiff received State Farm's Initial Brief and Designation of Matter by mail.

STATEMENT OF FACTS

By virtue of the Parties' Stipulation, there are no material facts in dispute regarding the issue before this Court, and the Parties agree that the only question before this Court is one of law. (Stip of Facts). For the purposes of the legal determination, the stipulated facts

are that Plaintiff Wadette Cothran was involved in a work-related motor vehicle accident in which her medical expenses were paid by her employer's workers' compensation insurance carrier. Cothran's State Farm automobile insurance policy provided $5,000.00 in PIP coverage (Stip. of Facts.) State Farm denied payment of medical expenses that had already been paid by Cothran's employer's workers' compensation carrier based on its policy provision that stated that personal injury protection was "excess over any benefits recovered under any workers' compensation law or any other similar law." (Policy at 16).

The sole issue before the circuit court was whether this provision constituted a "set-off" that was prohibited by S.C. Code § 38-77-144 (Stip. of Facts).

STANDARD OF REVIEW

This appeal concerns only the legal issue of the interpretation of an insurance policy. In addition, all relevant facts have been stipulated, and the only issue before this court is, therefore, a legal question for which the role of the appellate court is to determine whether the trial court properly applied the law to the stipulated facts. See, eg., Nationwide Mut. Ins. Cov. v. Prioeau 359 S.C. 238, 241, 597 S.E.2d 165, 167 (Ct. App. 2004).

ARGUMENT

I. The Plain Meaning Rule Requires That The Decision Of The Circuit Court Be Affirmed.

A. The case can be decided without looking beyond the text of S.C. Code Ann. § 38-77-144.

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).

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).

Under current PIP law, PIP coverage is "not subject to a set off." 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 injured insured. Section 56-11-150 (later recodified as Section 38-77-290(d))[1], 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. 1985) (Emphasis added). 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. The now-repealed § 38-77-290(d) stated,

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

> 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). Even when set off for workers' compensation benefits was allowed, it was for only mandatory PIP coverage—not for voluntarily purchased coverage.

The former law, therefore, mandated a PIP setoff for workers' compensation benefits that had been paid ("must be reduced [. . .]") for mandatory PIP. 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). Id. (Emphasis Added). It is important to note that, even when set off and

subrogation for PIP were allowed, the Legislature determined that it was not "feasible" and not "economical" to allow the PIP carrier to be the entity to assert subrogation and assignment rights against non-PIP coverage—the very thing that State Farm is alleging it is entitled to do in the case at bar based on the law as it exists after the "sweeping reforms" noted in Richardson eliminated subrogation and set off from PIP law.

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, including any formerly permissible instance of subrogation, assignment, or set off that was found in "*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. 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) (Emphasis Added). Because the exclusive list of exceptions from the duty of the PIP has been "deleted" by the current § 38-77-144, the PIP carrier's defense to paying benefits based on a set off that was included in that list has likewise been "deleted."

Clearly, the former law allowed this setoff for PIP coverage that was "required to be offered" (i.e., formerly mandatory PIP) so that it was set off by amounts paid by a workers' compensation insurance carrier. The former law also allowed assignment, and the Legislature considered allowing subrogation by the PIP carrier against other coverage. 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 [is] 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."

Accordingly, under the current state of South Carolina PIP law, any policy provision that constitutes a "set off" must be invalid. South Carolina law makes clear that denominating first party automobile coverage as "excess" to another policy of a different statutorily classified coverage is, by definition, a setoff. The form of coverage that is probably closest in kind to PIP coverage (i.e., another form of first party, automobile coverage) is underinsured motorist coverage ("UIM"). 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*." (Emphasis Added).

More importantly, the credit claimed in connection with PIP coverage itself has been called a set off. The South Carolina Supreme Court formerly determined that the credit claimed by the liability insurance company for the money paid by the PIP insurance company was, by definition, a set off ("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). That is, if the credit alleged by a third party carrier against PIP coverage is, by definition, a set off, then then the credit alleged by the PIP carrier against third party coverage must also be termed a set off.

The Moultrie Court noted, in fact, that the PIP carrier's assertion that it could claim credit for liability payment was a "setoff" that 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 insurance proceeds that exist outside of the first party PIP relationship. Moultrie at 56, 159. (Emphasis added). Despite State Farm's contention that "tortfeasor" must be read literally, the history of PIP setoff law makes clear, in every case cited above, that "tortfeasor" has traditionally signified third party insurance, and not the natural person who was the literal "tortfeasor."

State Farm goes to great lengths in its arguments not to state outright what its position in this case must be in order for it to have any semblance of consistency. State Farm states repeatedly that its policy provision is merely a permissible "excess" coverage provision. It states that the circuit court "circumvented" the question of what a setoff is by "presupposing a clear and specific definition of setoff" and applying the plain meaning rule instead of applying State Farm's asserted interpretation of Richardson. (Def. Brief at 13). The insurmountable obstacle to assenting to State Farm's position is that the word that State Farm wishes to insist applies to the policy provision at issue in this case, "excess," is not addressed in the Richardson opinion. That is, to benefit from the Richardson language that State Farm asserts must be interpreted so as to allow its "excess" policy provision requires accepting the language of the Richardson opinion that a "setoff" applies "only" to the "tortfeasor." Therefore, in order to rely on Richardson, State Farm must, if only tacitly, acknowledge that its denial of coverage in this case is based on the fact that it is alleging a "setoff" for workers' compensation payments. If it does not assert that it is alleging a "setoff," then its reliance on Richardson, however tenuous to begin with, is entirely unfounded. Its position, after all, is that Richardson allows a "setoff" for any entity other than a tortfeasor. Once State Farm is forced to admit that what it asserts is a setoff, its proposed interpretation must run smack into the inscription on the wall that is the statute: "the coverage [. . .] is not subject to set off."

II. Richardson Does Not Support State Farm's Position.

A. *Richardson* did not resuscitate the statutorily eliminated workers' compensation setoff; instead, Richardson applies only to the stacking of PIP coverage.

State Farm alleges that Richardson allows a setoff to be alleged by 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. In Richardson, State Farm denied that its policy had a set off provision, and *it denied that the issue of a set off was before the Court.* Instead, in Richardson, State Farm "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 the setoff, or "excess," provision at issue in the case at bar 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 in Richardson related only to the *stacking* of multiple policies of the same type of coverage (PIP) and did not address denominating the PIP policy as excess to a non-PIP policy held by a third party to the PIP Insurer—PIP Insured relationship. Under South Carolina law, stacking is defined as "the insured's recovery of damages under more than one policy until the insured satisfies all of his damages or exhausts the limits of all available policies." Cont'l Ins. Co. v. Shives, 328 S.C. 470, 473, 492 S.E.2d 808, 810 (Ct. App. 1997). Perhaps the most commonly stacked coverages are uninsured motorist ("UM") coverage and underinsured motorist coverage, and the stacking of those coverages

> is governed specifically by statute. See S.C. Code Ann. § 38-77-160 (Supp.1996). Construing specific statutory language, we have held an insured is entitled to stack underinsured or uninsured coverage in an amount no greater than the amount of coverage on the vehicle involved in the accident. To this extent, stacking cannot be contractually prohibited. Where none of the insured's vehicles is involved in the wreck, however, stacking of underinsured or uninsured coverage may be prohibited.

Ruppe v. Auto. Owners Ins. Co., 329 S.C. 402, 405-06, 496 S.E. 2d 631, 632 (1998). (Internal Citations and Quotations Omitted). According to the Supreme Court, coverage that is "not statutorily required" may be precluded from stacking by the terms of an insurance policy because parties are free to choose the terms of coverage that is "not governed by statue," and "[t]he guiding principle to be gleaned from our current stacking law is that stacking may be prohibited by contract if such a prohibition is consistent with statutory insurance requirements." Id. at 406, 633

Accordingly, the Richardson Court merely reaffirmed this longstanding precedent that stacking of non-mandatory coverage may be lawfully prohibited *when it does not conflict with any statute* when it held that a PIP insurer's policy "may prohibit the ***stacking*** of non-mandatory coverage." Richardson. at 61, 45 (Emphasis added). Because § 38-77-144 prohibits subrogation, assignment, and set off but does not prohibit a restriction of stacking, Richardson correctly held that the carrier could prohibit stacking of PIP policies.

State Farm seeks to have this Court revive the "deleted" PIP law that allowed refusal of payment of PIP coverage prior to the enactment of § 38-77-144; instead of the "exclusive list" of exceptions to payment, however, State Farm seeks to have this Court adopt a new rule that allows any entity to allege a set off based on any payment from any source—with the single exception that the "tortfeasor" may not allege a set off for payments already made by the PIP carrier. As noted above, the position State Farm now advocates that allows the PIP carrier to receive credit for payments made by third party insurance was rejected by the Legislature as not "feasible" and not "economical" even under the former law that allowed subrogation, assignment, and set off. See Maybank, et al., The Law of Automobile Insurance in South Carolina, V-16 (2002).

Under State Farm's line of reasoning, § 38-77-144 is a "one way street." That is, the "tortfeasor" that is a third party to the PIP insurer-PIP insured cannot allege a setoff against PIP payments, but the PIP carrier may lawfully allege a setoff against any payment from any source whatsoever. Specifically, if State Farm's reasoning were adopted, the PIP carrier would be able lawfully to allege a setoff for money paid by the "tortfeasor" (i.e., the liability carrier) if the Richardson language that setoff is not allowed by "only" the "tortfeasor" is adopted literally.

That is, because the PIP carrier is not the "tortfeasor," the PIP carrier could withhold payment pending the adjudication of liablity against the tortfeasor, and, in the event that the award the PIP insured received from the tortfeasor exceeded the amount of PIP coverage,

the PIP carrier could refuse payment outright. If the PIP carrier, in its voluntarily munificence, made payment of its PIP coverage to an insured who later recovered from the tortfeasor, it could then subrogate against the liability coverage—because if the prohibition against set off is a "one way street," then so too must be the prohibition against subrogation and assignment.

Requiring the PIP insured potentially to wait years pending the full adjudication of liability against the tortfeasor before making a claim, in very possible scenarios in which the liability suit were appealed, could allow the PIP insurer to require the PIP insured to wait until after the statute of limitations against the PIP insurer had run before she could make a PIP claim that was valid under the terms of the PIP policy. In short, State Farm's interpretation of South Carolina's three sentence PIP law that replaced the series of statutes and reams of jurisprudence would be a very strange definition of "reform."

B. The current statute was not enacted to give a windfall to PIP carriers.

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 in first party coverage when there existed in the insurer-insured relationship multiple policies of the same type of statutorily defined (i.e., PIP) coverage. A setoff, on the other hand, occurred when two separate insurance carriers with different statutorily defined

types of coverage 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)." Every single case addressing the meaning of this "tortfeasor" set off addresses, literally, the set off allowed to the liability insurance carrier; no case in which the issue of the "tortfeasor set off" is addressed deals with the credit alleged by the natural person who was the literal tortfeasor, and it is therefore not possible to read "tortfeasor" literally.

Moultrie was decided when a set off 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 "set off" 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 set off "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 in Mount presupposes, as does the text of the statute itself, that the injured party has already "received PIP benefits." It also clarifies that the legislative intent of the current PIP law was to benefit the injured party, even if that benefit to the injured party resulted in "double recovery." The purpose of the change in the law clearly was not to shift the unjust benefit from the liability insurance carrier to the PIP carrier—to the detriment of the injured party.

C. 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 an automobile insurance carrier was permitted to contractually 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 set off for payments made by a source with an obligation independent 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 the history of PIP setoff, *however, it would be the workers' compensation insurance carrier, not State Farm, that would have the right to assert a set off* 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 set off, it does have the right to assert an equitable interest based on the payment of PIP benefits to a claimant. Interestingly, under State Farm's analysis, the workers' compensation carrier arguably should also be able to allege a set off against PIP coverage—as the workers' compensation carrier is not a "tortfeasor."

If State Farm's interpretation were adopted, not only could a workers' compensation carrier allege a set off, but a health insurance carrier could also allege a set off, 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 set off 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 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 set off to be interpreted so that an insured who had paid insurance premiums could 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.

State Farm alleges that these issues of entities other than the PIP carrier alleging a set off are not relevant because they were "not matters before the circuit court" (Def. Brief at 16). The issue before the circuit court was one of statutory interpretation, and a court 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). State Farm cannot rebut the arguments that demonstrate the natural consequences of limiting the prohibition against set off to only a literal tortfeasor. It cannot rebut those arguments because the natural results, although absurd, would be the consequence of adopting State Farm's position. State Farm alleges that the circuit court's holding that the "similar law" language in the circuit court order could "equate to 'any insurance' paying 'benefits in the event of injury' was left unexplained.". (Def. Brief at 17). The reason it was left unexplained is because the term "similar law" is undefined and unexplained in the State Farm policy at issue. It was not necessary for the circuit court to create the ambiguity already in the policy. What law is determined as "similar" to workers compensation law under the terms of the policy at issue is solely within the discretion of State Farm. As health insurance, like workers' compensation insurance, is a system of benefits that pays for medical care irrespective of fault, the health insurance analogy is the most apposite possible definition of "similar law" that could be gleaned from a reading of the State Farm policy.

The legislative prohibition found in S.C. Code Ann. § 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 Wadette Cothran. The fact that the Legislature "deleted" the former

Code that contained the "exclusive list" of exceptions to the PIP carrier's duty to pay benefits and replaced it with the current Code in which PIP is, simply, "not subject to a set off" is strong evidence that the Legislature was aware of the potential issue of workers' compensation set off and intentionally omitted the right of the PIP carrier to assert the set off under the current Code. (See Benat and Section 38-77-144).

If the Statute imposes only the limitation alleged by State Farm in its brief ("that setoff referred only to the tortfeasor's liability" [Def. Brief at 5]), 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 set off 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 set off by "only the tortfeasor" would lead to the absurd result that only one set off (for the tortfeasor) was

eliminated *while simultaneously creating a set off for every possible entity other than the tortfeasor.*

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

D. *Stare Decisis* is inapplicable.

Because, as noted above, Richardson does not address the issue before the Court, *stare decisis* is not relevant.

E. State Farm's laundry list is inapplicable.

Exclusions for injuries resulting from the insured's intentional acts, injuries incurred during the commission of a felony, and injuries resulting from failing to stop for law enforcement are irrelevant. None of these exclusions is addressed in the three sentence PIP law of South Carolina, and they are therefore valid. None of these exclusions has any relationship whatsoever to the statutorily prohibited subrogation, assignment, or set off at issue and are therefore red herrings.

III. 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 the lien 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. The public policy at issue is not the interpretation of PIP law; it is the right of the employer's workers' compensation insurance carrier to reimbursement for the expenses it accrues as a result of a work-related injury.

The workers' compensation carrier is not allowed to assert a set off. It is allowed to assert a greater lien against the liability settlement on the basis of PIP coverage received by the PIP insured.

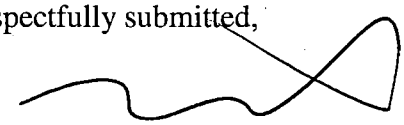
CONCLUSION

Adoption of State Farm's position requires adoption of two mutually exclusive propositions. First, the Court must rule that State Farm's "excess" provision is not a set off. Second, and in direct conflict with the first proposition, the Court must rule that State Farm's not-setoff provision is permissible because Richardson allows "set off" by a PIP carrier on the basis that the PIP carrier is not a literal "tortfeasor."

State Farm cannot have it both ways; the "excess" provision either is or is not a set off. If it is not a set off, then State Farm has no basis to allege that Richardson, which it alleges is a "set off" case, is in any way relevant. Because the entire jurisprudential history of PIP coverage in South Carolina, in fact, refers to the credit one automobile insurance policy takes for payments by another insurance policy a set off, however, the "excess" provision must be deemed a set off, and it must be prohibited by § 38-77-144, which states that PIP is "not subject to set off." Richardson holds only that PIP stacking may be prohibited by the terms of the policy. To expand Richardson to stand for the proposition that the phrase "not subject to set off" means, in fact, "always subject to set off in every circumstance by every entity save one" would brazenly ignore the import of the three clear, unambiguous sentences that constitute the whole of current South Carolina PIP law. If the

PIP carrier is allowed to allege a set off in spite of the clear prohibition against a set off, it would also be allowed to require an assignment against any other coverage collected, and it could subrogate against payments made by other coverages, and the sweeping "reforms" enacted by the Legislature will have reverted to an even more byzantine series of denials, assignments, subrogations, and set offs than existed before the reform—leaving the PIP insured in the unhappy middle of the pointing fingers of her every insurance policy.

Respectfully submitted,



Logan Rollins
The Hawkins Law Firm
P.O. Box 5048
Spartanburg, SC 29304
(864) 574-8801
Attorneys for Respondent

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