

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
Appellate Case No. 2016-000177

WADETTE COTHRAN and CHRIS COTHRAN,..... Respondents,

v.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY and ROBERT TUCKER,
Defendants,

Of which State Farm Mutual Automobile Insurance
Company is the Appellant.

REPLY BRIEF OF APPELLANT

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SCC Court of Appeals

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REPLY

I. The plaintiffs have not supported the circuit court's reinterpretation of the Legislature's intent as determined by *Richardson*.

This appeal concerns the same issue central to *State Farm v. Richardson*—what did the Legislature mean by “set off” in S.C. Code 38-77-144? *Richardson* held that “the Legislature intended the set-off prohibition of section [144] to apply only to” a tortfeasor’s setoff of a plaintiff’s PIP benefits from a verdict against the tortfeasor. 313 S.C. 58, 61, 437 S.E.2d 43, 45 (1993). As pointed out in State Farm's initial brief, Legislative intent, once determined, is “permanently settled” absent subsequent action by the Legislature. *Wehle v. S. Carolina Ret. Sys.*, 363 S.C. 394, 402, 611 S.E.2d 240, 244 (2005); *see also, McLeod v. Starnes*, 396 S.C. 647, 655, 723 S.E.2d 198, 203 (2012) (“Stare decisis applies with full force with respect to questions of statutory interpretation because the legislature is free to correct us if we misinterpret its words.”).

When the Legislature, which is presumed to be aware of judicial interpretation of statutes, fails to take action over a period of decades, it evidences agreement with the judicial interpretation. *Sims v. Amisub of S. Carolina, Inc.*, 414 S.C. 109, 117, 777 S.E.2d 379, 383 (2015). Seven years after *Richardson*, the Legislature re-codified section 144, changing a “must” to a “shall,” and otherwise keeping the language identical. This re-codification is presumed to be an adoption of *Richardson*’s interpretation of the statute. *Layton v. Flowers*, 243 S.C. 421, 424, 134 S.E.2d 247, 247-48 (1968). The plaintiffs have not challenged this authority, distinguished these cases, or provided any rational explanation of why *Richardson*'s determination of what “the Legislature intended” would not be binding on the Court.

A. The plaintiffs offer no explanation for why the Legislature would exclude workers' compensation from PIP coverage under mandatory PIP, but would mandate PIP coverage of workers' compensation injuries under voluntary PIP.

The plaintiffs do not do not provide any explanation as to why the Legislature, in *eliminating* mandatory PIP, would have *increased* the coverage required where workers' compensation is available.¹ The plaintiffs concede that under mandatory PIP, the coverage did not apply where workers' compensation was available. *See* S.C. Code Ann. 38-77-290(d) (1976, repealed by 1989 S.C. Acts 148). Yet they offer no explanation as to why the Legislature, while eliminating mandatory PIP, would have intended to begin mandating PIP coverage for losses already covered by workers' compensation. *Parker v. Williams & Madjanik, Inc.*, 275 S.C. 65, 70, 267 S.E.2d 524, 526 (1980) (noting South Carolina's workman's compensation laws were created to provide "a *comprehensive approach* to provide compensation for employees injured ... in the course of their employment.") (emphasis added).

The plaintiffs also adopt the circuit court's conclusion that section 144's "deletion" of the "exclusive list of exceptions" for mandatory PIP—including workers compensation reduction and exclusion of felonious injuries—left no "exception to the PIP carrier's duty to pay," and therefore the exception to mandatory PIP permitting reduction of workers' compensation benefits is now mandatory coverage. (*See* Appellee Br. 7; R. p. 5.) However, they do not

¹ The plaintiffs argue "the legislative intent of [section 144] was to benefit the injured party, even if that benefit to the injured party resulted in 'double recovery.'" (Appellee Br. 16.) Actually, the intent was to eliminate mandatory PIP, as the title states. Additionally, it is difficult to see how an injured party would benefit from the change in law advocated by the plaintiffs. As explained in the public policy section of their brief, the plaintiffs contend that PIP should be paid to a party so that a "workers' compensation carrier [can] claim an equitable interest in the PIP proceeds paid to the injured worker." (Appellee Br. 22.) Thus, the injured party would be a conduit through which a PIP insurer would reimburse a workers' compensation carrier. Presumably, the practical result would be to ultimately increase the injured party's automobile insurance premiums, while reducing their employer's workers' compensation premiums—hardly a "benefit [to] the injured party."

explain why the "deletion" of the five other exceptions to mandatory PIP has not made those exceptions—injuries during the commission of felonies and intentional acts, for example—mandatory coverage under voluntary PIP. Rather than address this logical fallacy, the plaintiffs dismiss it as involving “red herrings.” (Appellee Br. 21.)

B. The plaintiffs do not explain why the plain language of the statute should be ignored.

The plaintiffs also do not explain why PIP carriers would be mandated to provide PIP coverage for workers-compensation injuries by a statute titled "Personal injury protection (PIP) coverage not mandated." The statute's first line reads, "There is no personal injury protection (PIP) coverage mandated under the automobile insurance laws of this State." S.C. Code Ann. 38-77-144 (emphasis added). As this Court has held, “South Carolina does not require *any* PIP coverage under its automobile insurance laws” *Smith v. Liberty Mutual Insurance Company*, 313 S.C. 236, 239, 437 S.E.2d 142, 144 (Ct. App. 1993) (emphasis added). The plaintiffs have chosen not to address these matters.

C. The plaintiffs' assertion that State Farm's position was rejected by the Legislature is wrong.

The plaintiffs incorrectly state that State Farm's position:

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).

(Appellee Br. 13.) Actually, the passage the plaintiff cites discusses the Legislature's 1976 decision to *disallow* subrogation—not setoff—for mandatory PIP and has nothing to do with the matter at hand. In fact, the Legislature in 1976 specifically exempted PIP coverage for injuries that are, like the plaintiffs', covered by workers' compensation. Therefore, the opposite of what the plaintiffs state is true: State Farm's policy provision—stating PIP coverage is excess over

workers compensation coverage—was endorsed (not "rejected") by the Legislature in 1976, which presumably deemed it both feasible and economical.

II. The plaintiffs' attempts to distinguish or reconcile *Richardson* fail.

A. The fact that *Richardson* upheld an anti-stacking provision does not help the plaintiffs.

The plaintiffs devote one sentence to *stare decisis*: "Because, as noted above, *Richardson* does not address the issue before the Court, *stare decisis* is not relevant." Apparently, they contend *Richardson* is not dispositive because it concerned an anti-stacking provision and did not involve "setoff," as defined by the plaintiffs. However, the plaintiffs simultaneously rely on an expansive, manufactured definition of setoff that would include stacking.

The plaintiffs argue that setoff means, essentially, any reduction in potential insurance coverage by amounts paid by another insurer. The plaintiffs attempt to remove stacking from this definition by exempting "setoffs" made within the same insurance company. However, stacking is not limited to policies of a single insurer; insureds can stack multiple policies, either by the same or by different insurers. *See Nakatsu v. Encompass Indemnity Co.*, 390 S.C. 172, 700 S.E.2d 283 (2010) (holding that insured was entitled to stack UIM benefits from different insurance companies); *Nationwide Mut. Ins. Co. v. Howard*, 288 S.C. 5, 339 S.E.2d 501 (1985) (permitting stacking of multiple UM policies from two different insurance companies); *see also Busby v. State Farm Mut. Auto. Ins. Co.*, 280 S.C. 330, 331 n.1, 312 S.E.2d 716, 717 n.1 (Ct. App. 1984) ("The term 'stacking' as used here means the adding of insurance benefits provided by separate insurance coverages, whether by different or the same insurance companies or policies of insurance.")

Thus, the plaintiffs' attempt to characterize *Richardson* as involving stacking and not setoff fails. According to the plaintiffs' own definition, an anti-stacking provision—like an

excess policy provision or a reduction by a payment made by one's uncle or aunt—is a type of "setoff." Additionally, as explained in Appellant's Initial Brief, *Richardson's* determination that section 144's use of setoff referred only to a tortfeasor's liability was not dicta because it was necessary to the court's decision—in fact it was the central issue in the case. *See Nash v. Tindall Corp.*, 375 S.C. 36, 40-41, 650 S.E.2d 81, 83 (Ct. App. 2007) (defining “dicta” as a statement not essential to the court’s decision). Thus, *Richardson's* holding was not *dicta*, concerns the same issue as this case, and should have been followed by the circuit court.

B. The plaintiffs' attempt to reconcile *Richardson* by redefining "tortfeasor" should be rejected.

Recognizing that *Richardson* must be dealt with, the plaintiffs argue that *Richardson's* use of the word tortfeasor should not be read too "literally."² According to the plaintiffs, when *Richardson* said that section 144's use of setoff was meant by the Legislature "to apply only to the tortfeasor," what the Court meant was “to apply only to” *any person or entity other than a person’s own insurance company, regardless of whether a tort has been committed*.

What the plaintiffs stop just short of saying, but what they must mean, is that a person's own workers' compensation insurer is a “tortfeasor” under South Carolina law and therefore that *Richardson's* definition of setoff is no barrier to them.³ This despite the facts that (1) workers' compensation is first party insurance; (2) no tort need be committed for workers' compensation

² The plaintiff supports this argument by the fact that *Moultrie v. North River Ins. Co., Inc.*, 272 S.C. 53, 249 S.E.2d 158 (1978), involved a tortfeasor—who under the pre-1989 law was entitled to a PIP setoff—with liability insurance. Of course, the liability carrier was responsible to pay on behalf of the tortfeasor, and if the amount the tortfeasor was responsible to pay were reduced by a setoff in the tortfeasor's favor, it would reduce the amount the liability carrier had to pay. The plaintiffs do not explain how they extrapolate from these commonplace facts a new meaning for the word tortfeasor.

³ See p. 17, criticizing State Farm's assertion that "a workers' compensation insurance carrier is not a literal 'tortfeasor'"

to apply; and (3) in all of tort jurisprudence, the plaintiffs can find no support for the position that a victim's insurer is a tortfeasor—literally, figuratively, or in any other sense of the word. Additionally, if State Farm is interpreting *Richardson's* use of tortfeasor too literally, so too has this Court and the Fourth Circuit Court of Appeals. See *Rowzie v. Allstate Ins. Co.*, 556 F.3d 165, 168 (4th Cir. 2009) and *Mount v. Sea Pines*, 337 S.C. 355, 358, 523 S.E.2d 464, 465 (Ct. App. 1999).⁴

III. The plaintiffs' focus on fictionalized policy provisions is misdirected.

The plaintiffs argue that under *Richardson* “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.” (Appellee Br. 20.) Respectfully, the “bar” to these positions is the insurance contract. The plaintiffs cite no policy provision supporting any of these theoretical “setoffs.”

As with other voluntary insurance coverage, the parties have freedom to contract with respect to that coverage, subject to the laws and public policy of the state. Thus, the plaintiffs’ ability to posit theoretical policy provisions is limited only by their imaginations. That they can.

⁴ The plaintiffs also mischaracterized *Richardson's* holding. They incorrectly paraphrased *Richardson* as stating a setoff “occurred when two separate insurance carriers have independent duties to pay benefits to the same injured person.” (Appellee Br. 14-15.) *Richardson* said no such thing; it held that setoff, as used in section 144, referred only to the reduction of a tortfeasor’s liability. See *Rowzie v. Allstate Ins. Co.*, 556 F.3d 165, 168 (4th Cir. 2009) (“The court in *Richardson* interpreted this provision ‘to apply only to the tortfeasor,’ and not to serve as a general prohibition against all reductions of automotive insurance based upon PIP/MedPay coverage.”).

invent hypothetical problems stemming from hypothetical policy provisions is not relevant to the matter before the Court.⁵

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May 24, 2016

⁵ It is noteworthy that despite the passage of nearly thirty years since mandatory PIP was eliminated, the plaintiffs cannot point to any real-world example to support their theoretical parade of horrors, which they claim "although absurd, would be the consequence of adopting State Farm's position." (Appellee Br. 19.)

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Of which State Farm Mutual Automobile Insurance
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The undersigned certified that this Reply Brief of Appellant complies with Rule 211(b),

SCACR.

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