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.

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

Did the circuit court err in holding S.C. Code § 38-77-144 precludes and invalidates an insurance policy provision providing that PIP insurance is excess over workers compensation insurance, where such a ruling is inconsistent with binding case law?

STATEMENT OF THE CASE

This action was filed on April 17, 2015 in the Spartanburg County Court of Common Pleas.[1] The Plaintiffs claim that State Farm Mutual Automobile Insurance Company ("State Farm") breached a contract of insurance and a duty of good faith and fair dealing. (R. pp. 19-20). On August 28, 2015, the parties filed a Stipulation of Facts. (R. pp. 26-27).

On November 17, 2015, Judge Manning signed an Order granting the Plaintiffs' Motion for Summary Judgment on their breach of contract claim and denying State Farm's Motion for Summary Judgment on the Plaintiffs' breach of contract claim. (R. p. 14). The parties were sent a copy of the signed Order by email from Judge Manning's office on November 18, 2015. The Order was filed with the Spartanburg County Clerk of Court on November 30, 2015. (R. p. 2).

On November 30, 2015, State Farm submitted a Motion to Reconsider pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. (R. p. 123). Counsel sent a copy of the unfiled motion to Judge Manning on November 30 and emailed a copy of the filed motion to Judge Manning on December 4, 2015. Judge Manning's Order denying the Motion to Reconsider was filed on January 26, 2016. (R. p. 16). State Farm received notice of the Order by email from the Spartanburg County Clerk of Court on January 26, 2016. State Farm's Notice of Appeal was served on the Plaintiffs on January 28, 2016 and was filed by the Court of Appeals on February 5, 2016. State Farm received the transcript of the October 29, 2015 hearing on February 5, 2016.

[1] Although Robert Tucker was listed in the caption as a defendant, he was never served with the Complaint, and is not a party to this appeal.

STATEMENT OF FACTS

By virtue of stipulation there are no material facts in dispute. Wadette Cothran was injured in a work-related motor vehicle accident, and her medical expenses were paid in full by her workers' compensation carrier. (R. p. 26). Cothran's State Farm insurance policy provided personal injury protection ("PIP") coverage with limits of $5,000. (*Id.*).

State Farm paid Cothran a portion of her unpaid lost wages under the PIP coverage,[2] but denied payment for her medical expenses as they had been fully paid through workers' compensation. *Id.* State Farm's denial was based on the following policy provision:

> **Workers' Compensation Coordination**
> Any 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.

(R. p. 40).

The parties stipulated that if the above provision did not violate S.C. Code § 38-77-144, then no remaining PIP coverage existed, and State Farm was entitled to summary judgment. (R. p. 27).[3] Therefore, the sole issue before the circuit court was whether this provision constituted a "set-off" prohibited by S.C. Code § 38-77-144.

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[2] Cothran's PIP insurance covered 85% of her lost earnings. (R. p. 38). Her workers' compensation carrier paid for 66% of her lost earnings. *See,* S.C. Code § 42-9-10. Therefore, even though PIP was excess over Cothran's workers' compensation coverage, State Farm owed 19% of Cothran's lost earnings. State Farm paid this amount, $991.00, to Cothran. (R. p. 27).

[3] Due to a typographical error, paragraph 10 of the stipulation of facts incorrectly referenced section 38-77-140 instead of section 38-77-144.

STANDARD OF REVIEW

This appeal concerns a determination of coverage under an insurance policy, and thus the action is one at law. N*ationwide Mut. Ins. Co. v. Prioleau*, 359 S.C. 238, 241, 597 S.E.2d 165, 167 (Ct. App. 2004). Additionally, "[w]hen an appeal involves stipulated or undisputed facts, an appellate court is free to review whether the trial court properly applied the law to those facts," and "the appellate court is not required to defer to the trial court's legal conclusions." *Id.* (internal quotation marks and citations omitted).

The parties have stipulated that "[t]here are no material factual issues in dispute with respect to the plaintiffs' breach of contract claim and the sole matter before the Court on that cause of action is whether the policy provision [at issue] violates section 38-77-144." (R. p. 27). Thus, the Court should review, de novo, whether the circuit court properly applied the law without deference to its findings.

ARGUMENT

There is a narrow issue before the Court— the meaning of the word "setoff" as used in S.C. Code § 38-77-144.[4] The South Carolina Supreme Court thoroughly examined this meaning in *State Farm v. Richardson*, 313 S.C. 58, 437 S.E. 2d 43 (1993). The Supreme Court considered the legislative intent behind the statute and "found 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. 437 S.E.2d at 45 (emphasis added).

As *Richardson* is binding authority, the circuit court should have followed it. Additionally, the reasons given by the circuit court for granting summary judgment to the plaintiffs do not survive scrutiny.

[4] The language of section 144 was previously located at 38-77-145; however, the language is substantively identical, and for consistency, it is referred to as section 144 throughout.

I. The circuit court erred in not following *Richardson*, as its determination of the Legislative intent behind section 144 was dispositive.

A. The case turns on the meaning of the word "setoff" as used in 38-77-144.

The parties stipulated the sole issue in the case is whether a policy provision providing that PIP coverage is excess over workers compensation coverage violates S.C. Code § 38-77-144's statement that PIP is not subject to setoff. Resolving that issue depends on the meaning of "setoff" as used in section 144 and whether the excess provision falls within that meaning.

B. *Richardson* dealt with this precise question.

In *State Farm v. Richardson*, an insured argued that a PIP anti-stacking policy provision violated section 144 because it was a setoff. 313 S.C. 58, 437 S.E. 2d 43 (1993). The Supreme Court examined section 144 and its legislative history to determine whether the policy provision was the type of setoff meant by section 144. *Richardson* determined the Legislature intended the word to have a single meaning—setoff referred to a *tortfeasor's* setoff of the plaintiff's PIP benefits against a verdict. The Supreme Court noted that "a Conference Committee report adopted by both Houses of the General Assembly just before [the bill] was passed" stated that PIP "may NOT be assigned or subrogated and **may not be setoff [from the tortfeasor's liability coverage.]** (Bracketed material in original)." *Richardson*, 313 S.C. at 61 n.2, 437 S.E.2d at 45 n.2 (emphasis added).

C. *Richardson's* interpretation of section 144 was not dicta.

The circuit court held that *Richardson* was "inapplicable" because it involved stacking. (Order at 8.) However, the question answered by *Richardson* was the same question before the circuit court—what did the Legislature mean by the word "setoff" in section 144? The *Richardson* opinion consists solely of the Supreme Court's asking, analyzing, and answering that

question. That the underlying facts in *Richardson* concerned a different policy provision does not change the weight of *Richardson.*

In other words, *Richardson's* determination that setoff referred only to a tortfeasor's liability was not dicta. Dicta is a statement not necessary to a court's decision. *See Nash v. Tindall Corp.*, 375 S.C. 36, 40-41, 650 S.E.2d 81, 83 (Ct. App. 2007). In *Richardson,* it was necessary for the Supreme Court to examine the meaning of "setoff" in section 144 to answer the question before it. Not only was the meaning of setoff "necessary to" the court's decision, *it was the central issue in the case.* Thus, *Richardson's* holding concerning the meaning of setoff was not dicta, and the circuit court should have followed it.[5]

D. The circuit court was bound to follow *Richardson* by *stare decisis*; the doctrine is particularly important in the construction of statutes and legislative intent.

"No rule is more deeply imbedded in Anglo-American decisional law than *stare decisis*." *McCall v. Batson*, 285 S.C. 243, 255, 329 S.E.2d 741, 747 (1985) (superseded by statute on other grounds) (Chandler, J., concurring). "*Stare decisis* exists to 'insure a quality of justice which results from certainty and stability." *State v. One Coin-Operated Video Game Mach.*, 321 S.C. 176, 467 S.E.2d 443, 446 (1996) (quoting *McCall*, 285 S.C. at 256, 329 S.E.2d at 747).

Stare decisis is particularly important where, as here, a court is construing a statute or determining legislative intent.

> Indeed, the doctrine of *stare decisis* enjoys particular efficacy in the context of challenges concerning the construction of statutes and determination of legislative intent. . . . "It is manifestly in the public interest that the law

[5] Other courts have followed *Richardson.* In *Rowzie v. Allstate Ins. Co.*, the Fourth Circuit noted that *Richardson* held setoff as used in section 144 did not "serve as a general prohibition against all reductions of automotive insurance based upon PIP/MedPay coverage." 556 F.3d 165, 168 (4th Cir. 2009). In *Mount v. Sea Pines* (which was cited favorably by the circuit court's order), this Court noted that *Richardson* "stated that the set-off prohibited by section 38-77-145 was 'the tortfeasor's reduction in liability formerly allowed by section 38-77-290(f).'" 337 S.C. 355, 358, 523 S.E.2d 464, 465 (Ct. App. 1999).

> remain permanently settled. Especially is this so in the construction of statutes, for if any change in the statutory law is desired, the General Assembly may readily accomplish it."

Wehle v. S. Carolina Ret. Sys., 363 S.C. 394, 402, 611 S.E.2d 240, 244 (2005) (quoting *Powers v. Powers*, 239 S.C. 423, 427, 123 S.E.2d 646, 647 (1962)).

"Legislative intent, once determined, is 'permanently settled' absent subsequent action by the General Assembly to effect a change in the statutory law." *Id.* Moreover, "[w]hen a statute which has been construed by a court of last resort is included in a codification of laws thereafter adopted, without significant change in phraseology, the presumption is that the legislature intended to adopt such a construction." *Layton v. Flowers*, 243 S.C. 421, 424, 134 S.E.2d 247, 247-48 (1964). This presumption becomes even stronger with the passage of time. *Id. See also Wehle*, 363 S.C. at 405, 611 S.E.2d at 245 ("[T]he General Assembly's inaction following the entry of the final judgment [by the supreme court in interpreting a statute] is entitled to consideration.").

Here, the Supreme Court has already determined the legislative intent behind section 144. It is therefore "permanently settled" under *Wehle* and *Powers*. Moreover, following the Supreme Court's 1993 decision, the Legislature in 2000 re-codified this section at 38-77-144. Although the Legislature changed the "must" in the last sentence to "shall," every other aspect of the section was preserved. Thus, not only did *Richardson* permanently settle the meaning of section 144, the Legislature presumptively adopted *Richardson's* interpretation when it re-codified the section in 2000.

II. The circuit court erred in substituting its interpretation of legislative intent for the South Carolina Supreme Court's interpretation as set forth in *Richardson*.

A. The circuit court's determination of the legislative history and intent behind 38-77-144 was flawed.

According to the circuit court's analysis, in abolishing mandatory PIP and the no-fault system, the Legislature *increased* the PIP coverage required to be provided by insurers who voluntarily offer PIP.

The circuit court's determination of legislative intent was based on "the absence of a provision allowing setoff for workers' compensation benefits where one previously existed." (R. p. 5). Its reasoning was based on the following facts:

- Prior to 1989, PIP coverage was mandatory in South Carolina.
- Because PIP was statutorily mandated, the only exceptions to the duty to provide PIP were set forth by statute.
- The statutory exceptions for mandatory PIP included that PIP payments were to be reduced by amounts received through workers compensation.[6]
- In 1989, the Legislature ended mandatory PIP, deleting all references to PIP in Title 38 and 56, including the exceptions to mandatory PIP coverage.

From this, the circuit court extrapolated: "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." (*Id.*).

The conclusion that by abrogating mandatory PIP exceptions, the Legislature intended they become mandatory coverage in voluntary PIP policies was not supported by logic nor law. These exceptions were a fundamental component of the mandatory system—when a statute mandates coverage, the exceptions to that coverage must also be provided by statute. Their deletion, along with the rest of the mandatory PIP statutes, demonstrated nothing more than the Legislature's stated intent of ending mandatory PIP.

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[6] Other exceptions included the recovery of PIP "from more than one policy or insurer on either a duplicate or supplemental basis," or by a person intentionally causing an accident, occupying a stolen vehicle, or committing a felony. 38-77-290(a); 38-77-310.

If, as the circuit court held, each exception to mandatory PIP became required coverage under voluntary PIP, the following former exceptions would now be mandatory coverages under PIP policies:

- Injuries caused by intentional acts, S.C. Code Ann. § 38-77-310 (1976, repealed by 1989 S.C. Acts 148);
- Injuries caused while operating stolen vehicles, *Id.;*
- Injuries occurring during the commission of a felony, *Id.;*
- Injuries occurring while failing to stop for law enforcement, *Id.;*
- Finally, stacking of PIP would become mandatory. S.C. Code Ann. § 38-77-290(a) (1976, repealed by 1989 S.C. Acts 148)

The last bullet point is particularly illustrative as to the circuit court's error. Under mandatory PIP, insurers were expressly permitted to prohibit stacking of PIP and to reduce PIP by workers' compensation payments. This was accomplished by the exceptions in section 38-77-290, subsections (a) and (d), respectively. Under the circuit court's conclusion that the deletion of section 290's "exclusive list of exceptions" left "no exception to the PIP carrier's duty to pay," the anti-stacking exception of 290(a) would now be prohibited. Thus, the circuit court's reasoning is irreconcilable with *Richardson* and with the circuit court's own acknowledgment that section 144 does not prohibit anti-stacking provisions. (R. pp. 8-9).

There is no support for the conclusion that the Legislature intended the mandatory no-fault system exemptions to become required coverages where PIP is provided voluntarily. Such a construction of the Legislature's intent should be rejected, as it would result in many absurdities, among them being mandatory coverage for intentional acts and injuries during the commission of a felony. *See Auto Owners Ins. Co. v. Rollison*, 378 S.C. 600, 612, 663 S.E.2d 484, 490 (2008)

(in construing a statute courts should reject an interpretation when such an interpretation leads to an absurd result that could not have been intended by the Legislature).

B. *Richardson's* interpretation of the legislative intent was correct.

1. The Legislature has had twenty-two years to amend section 144 if *Richardson* misinterpreted its intent, and has chosen not to do so.

Richardson was decided just four years after the Act at issue. The context surrounding the elimination of mandatory PIP (discussed below) would have been more apparent to the *Richardson* court than a court in 2015. Additionally, if *Richardson* had misconstrued the legislative intent, the Legislature has had twenty-two years to correct it and has chosen not to do so. In fact, in 2000, when it re-codified the section at 144, the Legislature had the opportunity to alter the language in section 144 and chose not to.[7] *See Wehle v. S. Carolina Ret. Sys.*, 363 S.C. 394, 405, 611 S.E.2d 240, 245 (2005); *Layton v. Flowers*, 243 S.C. 421, 424, 134 S.E.2d 247, 247-48 (1964).

2. Pre-1989 confusion concerning the availability of a tortfeasor's PIP setoff provide context for the legislative intent as determined by *Richardson*.

The circuit court cited *The Law of Automobile Insurance in South Carolina* four times, but did not refer to it when discussing the 1989 Legislature's intent in drafting section 144. *The Law of Automobile Insurance* notes the 1989 Act at issue was in response to "public outcry over high automobile insurance rates." (5th Ed., p. V-25).[8] It noted that PIP "had the worse [sic] loss

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[7] See, *The Law of Automobile Insurance in South Carolina*, 5th Ed., p. V-27:

> Section[] 38-77-145 was erroneously repealed by 1997 S.C. Acts 154. This repeal raised an issue about whether PIP was subject to set-off and subrogation. This was not the intent of the S.C. General Assembly, and this provision was recodified by 2000 S.C. Act. No. [344] which provided that PIP is not subject to subrogation or set-off."

[8] This pleading cites the 5th Edition of the treatise as that is the edition cited by the circuit court.

ratio of any first or third party automobile insurance coverage in South Carolina" and the "abolishment of statutory PIP coverage was one of the Legislature's "major savings items." (5th Ed., p. V-25). In other words, the Legislature's intent in 1989 was to decrease the amount of PIP insurance sold in the state, not to *increase* the coverage required.

Additionally, confusion over the existence of a tortfeasor's ability to set off PIP benefits prior to the 1989 Act explains the Legislature's decision to prohibit that setoff in section 144. *The Law of Automobile Insurance* explains that before the 1989 repeal of mandatory PIP, there was confusion over whether the Legislature intended for a tortfeasor to receive a setoff.[9] Due to the repeal of another section of the PIP code in 1978 "it was assumed the Legislature wished to do away with all right of set-off." *Id*, p. V-17. However, to what extent the right to setoff survived the 1978 amendment "was the subject of considerable debate." *Id*, p. V-18. *See also* 1981 S.C. Op. Atty. Gen. 54 (noting "some ambiguity has arisen with respect to" whether the Legislature intended to eliminate a tortfeasor's right to setoff in the 1978 amendments to the PIP statute). It was this "confusion," "debate," and "ambiguity"—over whether a tortfeasor could setoff PIP benefits at trial—that the Legislature sought to resolve when it explicitly prohibited setoff in section 144.[10]

The 6th Edition was substantively the same. The 7th Edition, published in 2015, omitted the historical discussion of this topic.

[9] It appears that the application of the statute allowing a tortfeasor's setoff of PIP was confusing and controversial from mandatory PIP's 1974 inception. *See* Joseph F. Anderson Jr., *Note, The South Carolina Insurance Reform Act Part I): No Fault and Contributory Negligence—A Synopsis and Appraisal*, 26 S.C. L. Rev. 705, 720-21 (1975) (noting, for example, confusion and ambiguity over whether a tortfeasor's setoff was allowed for PIP coverage in excess of $1,000).

[10] This is consistent with a Conference Committee report adopted by both Houses of the General Assembly just before Act 148 was passed which stated: "If a (sic) insurer does voluntarily sell PIP coverage . . . it may NOT be assigned or subrogated and may not be setoff [from the

3. The text of the statute is inconsistent with the circuit court's conclusion.

In addition to being contrary to *Richardson* and the legislative intent, the circuit court's interpretation of setoff was contrary to the text of section 144, because it would *mandate* the provision of PIP coverage even where the parties to an insurance contract agree the coverage is excess. It is well settled that in interpreting a word or phrase used in a statute, "[c]ourts should consider not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law." *See, e.g., Hernandez-Zuniga v. Tickle*, 374 S.C. 235, 247, 647 S.E.2d 691, 697 (Ct. App. 2007).

The statute is titled "Personal injury protection (PIP) coverage **not** mandated." Its first line reads, "There is **no** personal injury coverage mandated under the automobile insurance laws of this State." 38-77-144 (emphasis added). Thus, when considering the Legislature's meaning of setoff in 144, the circuit court should have considered that the Legislature was eliminating mandatory PIP and stating that no PIP coverage was to be mandated.

Richardson's interpretation of setoff was consistent with the statute—the elimination of a *tortfeasor's* ability to setoff PIP would not affect the availability of PIP coverage to an insured. However, the circuit court's definition would be contrary to the statute, as it would mandate certain PIP coverage and eliminate the parties' freedom to contract to, for example, the provision of excess PIP coverage.

C. The circuit court erred in ruling that PIP insurers are the payor of first resort.

The circuit court ruled that a PIP carrier may never reduce benefits by any amount paid by a third-party because it found that PIP insurance was a "payor of first [] resort." (R. p. 10).[11]

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tortfeasor's liability coverage.]" *State Farm v. Richardson*, 437 S.E.2d at 45 n.2 (bracketed material in original).

[11] It appears the circuit court based this on a statement in *Moultrie v. North River Ins. Co.*

However, the Legislature made no suggestion that PIP insurance should become a "payor of first resort" when it eliminated mandatory coverage in 1989.

Even under the mandatory scheme, PIP insurance was not a payor of first resort, as defined by the circuit court. The statutory exceptions to mandatory PIP included reducing PIP coverage by amounts paid by workers compensation, and by amounts paid by other insurance carriers. The circuit court acknowledged this. (R. p. 3). Thus, it concluded that although PIP insurance was not the payor of first resort prior to 1989, when the Legislature ended mandatory PIP and terminated South Carolina's experiment with a no-fault system, it simultaneously decided to make PIP insurance the payor of first resort. This conclusion was not supported by any legal authority and was contrary to the Legislature's intent to end mandatory PIP coverage.

III. The circuit court erred in applying the plain meaning rule to section 144 by ascribing an unspecified definition to "setoff," instead of following *Richardson*.

Again, the dispositive issue is what the Legislature meant by "setoff" in section 144. The circuit court circumvented this question by presupposing a clear and specific definition of setoff. By applying the plain meaning rule, the order skirted the question of legislative intent discussed above: "On its face, the State Farm provision constitutes a setoff and violates the plain meaning of the Statute." (R. p. 7). However, because setoff could have multiple meanings under South Carolina law, the plain meaning rule did not apply, and the circuit court could not ignore

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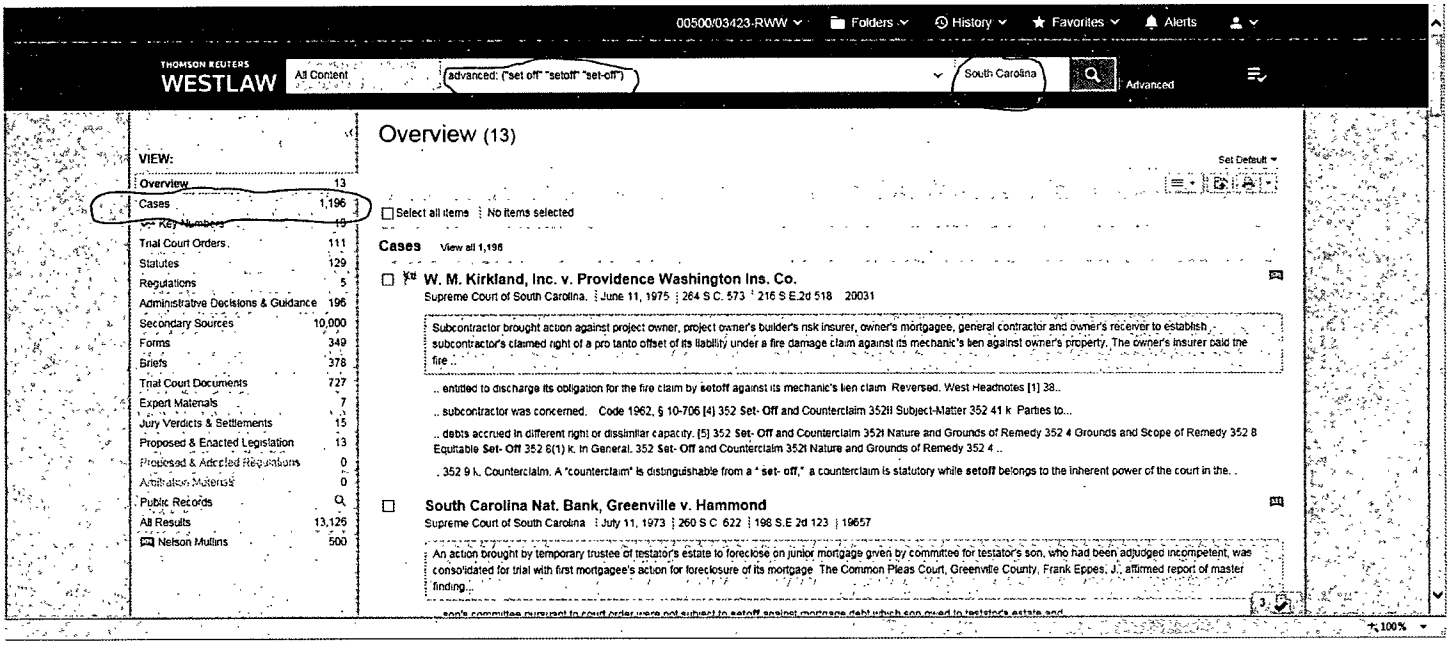
applying the first tortfeasor setoff statute, 56-11-130(b), which was repealed in 1978. In the statement, *Moultrie* merely noted the setoff of a verdict against a tortfeasor could only occur after a plaintiff had recovered PIP benefits. 272 S.C. 53, 249 S.E.2d 158, 159 (S.C. 1978) ("[T]his section only requires a setoff by those persons who have already received benefits from their own carrier."). The circuit court extrapolated from this fact that the Legislature intended PIP to be "a payor of first resort." However, even in 1978, as the circuit court acknowledged, PIP was not the "payor of first resort" when workers compensation coverage was available. (*See* Order at 3 ("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.").)

Richardson or the legislative history. *See Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (noting plain meaning rule applies where statutory language "is plain and unambiguous, and conveys a clear and definite meaning.").

A. Setoff is a multi-purpose term with no clear definition in South Carolina.[12]

In South Carolina jurisprudence, setoff is a multi-purpose concept that has not been clearly defined. Black's dictionary provides two definitions for setoff: (1) A defendant's counter demand against the plaintiff, arising out of a transaction independent of the plaintiff's claim; (2) A debtor's right to reduce the amount of a debt by any sum the creditor owes the debtor; the counterbalancing sum owed by the creditor. Black's Law Dictionary, 7th Ed., p. 1376. South Carolina cases have frequently applied the term in both contexts. *See, e.g., Brasington Tile Company, Inc. v. Worley*, 327 S.C. 280, 491 S.E.2d 244 (1997) (first definition); *In Re Georgetown Steel Co., LLC*, 318 B.R. 313, 320 (Bankr. D.S.C. 2004) (second definition). Setoff is also used in South Carolina to refer to the reduction of a verdict by amounts paid to the plaintiff by a third-party, usually a settling co-defendant. *See Riley v. Ford Motor Co.*, 414 S.C. 185, 777 S.E.2d 824 (2014). As noted by the circuit court, it has also been used to describe the amount of underinsured motorist coverage after the reduction of amounts paid by the underinsured motorist's liability carrier. *Broome v. Watts,* 319 S.C. 337, 461 S.E.2d 46, 48 (1995). The term is likely used in other contexts. Westlaw shows approximately 1,200 South Carolina state court cases mentioning setoff, set-off, or set off.

[12] Setoff is often written as "setoff," "set off," and/or "set-off." To a great extent, the words appear to be used interchangeably throughout the case law.



B. The circuit court's definition of setoff is not supported by South Carolina jurisprudence, and is internally inconsistent.

Although it is central to its holding, nowhere in its 14 page order did the circuit court specifically define its use of setoff. The effect of the circuit court's reasoning is to define setoff as follows: *A setoff occurs when first party insurance benefits are reduced by an amount paid by any entity or person other than the insurance carrier providing coverage.*[13] According to the circuit court, setoff included the following.

- Excess insurers receive "setoffs" when primary insurance policies pay first. (R. pp. 5-6).
- Health insurers receive "setoffs" when a different insurer or entity provides payment. (R. p 11).
- Workers compensation insurers receive "setoffs" if a different entity provides payment. (R. p. 11).
- Additionally, if "the injured party's Aunt Ethel and Uncle Fred [] broke their piggy bank" and relieved a party from an obligation to pay, that too would constitute a "setoff". (R. p. 12.)

[13] The definition would apparently exclude reductions based on policies written by the same insurer to accommodate the result in *Richardson.*

The circuit court's definition was not supported by the law. In fact, the only located authority defining setoff in this context is *Richardson.* The circuit court incorrectly paraphrased *Richardson* as stating a setoff "occurred when two separate insurance carriers have independent duties to pay benefits to the same injured person." (R. pp. 8-9). *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.").

Additionally, the circuit court's definition was logically inconsistent. According to its order, the reduction of the amount owed by Policy A by the amount paid by Policy B is *not* a setoff if both policies are issued by the same insurer, but *is* a setoff if the policies are issued by different insurers. The only authority the circuit court cited for this position was *Richardson* although, again, *Richardson* said no such thing.

Moreover, in the order's public policy discussion, it concluded that the reduction of a workers' compensation carrier's payment by amounts the payee received from a different insurer was *not* a setoff. (R. p. 13). Since the circuit court was in favor of this reduction, it apparently concluded that this reduction would not be a setoff, although it seems to fall squarely within the circuit court's apparent definition of setoff.

Thus, the circuit court erred in concluding that "setoff" as used in section 144 had a "clear and definite meaning" that eliminated the need for statutory interpretation. (R. p. 7). Not only is there no clear and definite meaning of setoff outside of *Richardson*, even the circuit court's order did not set forth an internally consistent definition of setoff.

IV. The circuit court erred in apparently attempting to reconcile *Richardson* by equating workers' compensation carriers and health insurers with "tortfeasors."

Section 3 of the Order held that "tortfeasor," as used in *Richardson*, "Refers To A Third-Party to the PIP Insurer –PIP Insured Relationship." (R. p. 10). It stated that State Farm was construing the word tortfeasor too "literally." It explained that tortfeasor should be read to include a workers' compensation insurer, a first party health insurer, or any "third-party to the PIP insurer-PIP insured relationship" including, apparently, "the injured party's Aunt Ethel and Uncle Fred." (R. pp. 10, 12). This ruling was inconsistent with the clear holding in *Richardson* and the meaning of tortfeasor, which means "one who commits a tort." Black's Law Dictionary (7^{th} ed.) 1497.

The order stated that if *Richardson* is followed and setoff as used in section 144 is limited to "a literal 'tortfeasor,'" PIP insurance could be reduced by "payments made by the health insurance carrier, the liability insurance carrier, or, for that matter, the injured party's Aunt Ethel and Uncle Fred." (R. p. 12). These hypothetical scenarios were misplaced for several reasons. First, they were not matters before the circuit court. The stipulated facts of this case have nothing to do with health insurance, liability insurance, or voluntary payments by private individuals.

Moreover, the insurance policy was attached to the parties' stipulation of facts and was in the record before the circuit court. Nowhere does the policy provide for any of these hypothetical scenarios. In fact, the order could only connect the policy to these issues by alleging that the policy provision at issue (below) titled "Workers Compensation Coordination" could be construed to apply to health insurance or "any insurance that pays benefits in the event of injury" because health insurance is "similar" to workers' compensation insurance. (R. p. 11).

Workers' Compensation Coordination

Any 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.

How a *"similar law" to workers' compensation law* could equate to *"any insurance" paying "benefits in the event of injury"* was left unexplained. This holding ignored the title of the provision and the rules of contractual construction, and it was not supported by any case or authority. *See, McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009) ("[O]ne may not create an ambiguity by pointing out a single word or clause," but must read the contract as a whole.); *C.A.N. Enters., Inc. v. S.C. Health & Human Serv. Fin. Comm'n.*, 296 S.C. 373, 373 S.E.2d 584, 586 (1988) ("Common sense and good faith are the leading touchstones of construction of the provisions of a contract."); *Koon v. Fares*, 379 S.C. 150, 666 S.E.2d 230, 233 (2008) ("Where one interpretation of a contract makes it unusual or extraordinary and another interpretation, equally consistent with the language employed, would make it reasonable, fair, and just, the latter construction prevails. An interpretation which establishes the more reasonable and probable agreement of the parties should be adopted while an interpretation leading to an absurd result should be avoided.") (internal citation omitted). In fact, although *Richardson* was decided twenty-two years ago, the order did not point to any case, authority, or real-world example to support the argument that acceptance of *Richardson* would lead to the hypothetical scenarios it discussed.

Additionally, it is well settled that '[i]nsurers may limit their liability and impose whatever conditions they please upon their obligations, provided such conditions are not in contravention of some statutory inhibition or public policy." *Marchant v. S. Carolina Ins. Co.*, 281 S.C. 585, 586-87, 316 S.E.2d 707, 709 (Ct. App. 1984); *see, e.g., BLG Enterprises v. First*

Financial Ins., 334 S.C. 529, 535-36, 514 S.E.2d 327, 330 (1999) (same). Other than section 144, the order did not point to any statutory inhibition or public policy authority to support its holding.[14]

V. The circuit court erred in considering public policy, and in holding public policy favors mandating automobile insurers pay PIP benefits to injured workers so that workers compensation carriers can assert liens against those PIP benefits.

As a preliminary matter, the circuit court erred in considering the subject of public policy as it was not before the court. The parties stipulated that the only issue before the circuit court was whether the subject policy provision violated section 144. The first page of the circuit court's order noted "the sole issue for the Court's adjudication is the interpretation of" section 144. (R. p. 1). Because its public policy discussion did not involve the interpretation of section 144, it was irrelevant to the matter before the circuit court and should not have been considered.

Regardless, the circuit court's public policy conclusion was erroneous, and not consistent with precedent. This Court has held that "South Carolina does not require any PIP coverage under its automobile insurance laws **and has no public policy regarding such coverage.**" *Smith v. Liberty Mutual Insurance Company*, 313 S.C. 236, 239, 437 S.E.2d 142, 144 (Ct. App. 1993) (emphasis added).

A provision is not void as against public policy "unless it [is] in contravention of such public policy as is found either in the constitution, the statutes or the judicial decisions of this State." *Batchelor v. Am. Health Ins. Co.*, 243 S.C. 103, 112, 107 S.E.2d 36, 40 (1959). While

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[14] The order contained one sentence concluding "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." (R. pp. 12-13). However, the order did not cite any such "legislative history," "jurisprudence," or other authority to support this statement. Moreover, were that the purpose of section 144, then the Legislature would have made PIP coverage mandatory, rather than doing the opposite.

public policy is not rigidly defined, it is cautiously defined: "[T]he subjects in which the court undertakes to make the law by mere declaration [of public policy] should not be increased in number without the clearest reasons and the most pressing necessity." *Weeks v. New York Life Ins. Co.*, 122 S.E. 586, 587 (1924) (quoting *Magee v. O'Neill*, 19 S.C. 185, 45 Am. Rep. 765 (1883).

The circuit court held public policy favors Cothran receiving PIP benefits in addition to the workers' compensation benefits she has already received, so that Cothran could return those benefits to the workers' compensation carrier. It noted that if State Farm's policy provision were ignored, and if PIP benefits were paid for the same loss covered by workers' compensation benefits, the workers' compensation carrier could have a lien against the PIP proceeds under S.C. Code 42-1-560. (R. p. 13). The order cites no law explaining why public policy would favor mandating the provision of benefits for the purpose of creating a workers' compensation lien. The order also provides no explanation for the conclusion that public policy would favor one type of insurance over another. Thus, "the clearest reasons and the most pressing necessity," sufficient to justify declaring a new public policy were not present, and it was error to do so in their absence. *Weeks* at 587. That is particularly true because PIP is not required and the state "has no public policy regarding such coverage." *Smith*, 313 S.C. at 239, 437 S.E.2d at 144.

CONCLUSION

State Farm v. Richardson is dispositive. State Farm requests that the Court reverse the circuit court's Order granting the Plaintiffs' Motion for Summary Judgment; reverse the circuit court's Order denying State Farm's Motion for Summary Judgment; and enter judgment for State Farm on the Plaintiffs' claim for breach of contract.

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May 24, 2016

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.

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CERTIFICATE OF COUNSEL

The undersigned certified that this Brief of Appellant complies with Rule 211(b), SCACR.

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