STATE OF SOUTH CAROLINA **COUNTY OF WILLIAMSBURG**	**IN THE COURT OF COMMON PLEAS** **THIRD JUDICIAL CIRCUIT** **Civil Action No. 2014CP4500644**
LARRY BRAND, **Plaintiff,** **vs.** **ALLSTATE INSURANCE COMPANY,** **Defendant.**	**ORDER**

THIS MATTER is before the court on Motion for Summary Judgment filed by Defendant, Allstate Insurance Company (hereinafter referred to as "Allstate" or "Defendant"). The court, having reviewed the motion, the pleadings, and the memoranda of law filed by the parties and having considered the arguments of counsel, grants Defendant's motion.

UNDISPUTED FACTS RELATED TO THE UNDERLYING TORT ACTION

On January 27, 2010, Plaintiff Larry Brand (hereinafter "Plaintiff" or "Brand") was the operator of a 2001 Volvo truck owned by his employer, Evergreen Turf Corporation (hereinafter "Evergreen"), when he was involved in a collision with Cassandra Olivia Stone (hereinafter "Stone"), who was operating a 1998 Ford vehicle owned by Stevenson M. Stone. As a result, Stone filed suit against Brand in the Williamsburg County Court of Common Pleas seeking damages for her injuries.

Stone was insured under a policy of liability insurance issued by Progressive Northern Insurance Company (hereinafter "Progressive") with applicable liability limits of $25,000.00. The vehicle Brand was operating was owned by his employer and was covered under a policy of insurance issued by Westfield which provides underinsured motorist coverage to Brand as an

insured driver, with limits of $1,000,000.00. Brand is also an insured under an Allstate policy covering his at-home vehicle. This policy provides underinsured motorist coverage in the amount of $25,000.00.

After the accident, Brand instituted a workers' compensation claim captioned Larry Brand v. Evergreen Turf Corp., (WCC# 1002789) against his employer. The workers' compensation claim has been resolved for a total payment of compensation and medical benefits of $354,750.75.

Brand also instituted a third-party lawsuit captioned Larry Brand v. Cassandra Olivia Stone (Civil Action No.: 2012-CP-45-657) in the Court of Common Pleas for Williamsburg County. Progressive paid its liability limits of $25,000.00, and Plaintiff settled with his employer's underinsured motorist coverage carrier for $450,000.00. This tort action is still pending but is stayed by consent order pending resolution of this declaratory judgment action.

DECLARATORY JUDGMENT ACTION

Plaintiff filed this declaratory judgment action claiming entitlement to Allstate's underinsured motorist coverage under the theory that Allstate, as the underinsured motorist carrier for the employee, is not entitled to reduce UIM benefits by the amount of the worker's compensation benefits as provided in the policy. Plaintiff contends that the value of his claim exceeds the total amount of his settlement with the liability carrier and the employer's underinsured carrier (for less than its limits) and that Allstate's underinsured motorist coverage should partially fund that difference. The Defendant filed an Answer and Counterclaim and an Amended Answer and Counterclaim to which Plaintiff replied.

Allstate's policy provides that all other UIM benefits available to Plaintiff must be exhausted before Plaintiff will be eligible for benefits under the policy. The policy further

provides that the damages payable will be reduced by the amount of worker's compensation benefits received by Plaintiff.

SUMMARY JUDGMENT STANDARD

A motion for summary judgment should be granted where it is clear there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP; *State Farm Fire & Cas. Co. v. Breazell*, 324 S.C. 228, 478 S.E.2d 831 (1996). A party opposing a properly supported motion for summary judgment may not rest on the mere allegations or denials of the pleading, but must set forth or point to specific facts showing that there is a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A party's response to the motion must set forth specific facts, admissible in evidence, showing there is a genuine issue for trial. If he does not so respond, summary judgment should be entered against him. *Moody v. McLellan*, 295 S.C. 157, 367 S.E.2d 449 (Ct. App. 1988). The nonmoving party need only set forth a mere scintilla of evidence in order to defeat a motion for summary judgment. *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 673 S.E. 2d 801 (2009).

ARGUMENTS OF THE PARTIES

Allstate's arguments:

1. Plaintiff lacks standing to assert a claim to benefits under the Allstate policy because Plaintiff has not yet established entitlement to recover amounts in excess of the $25,000.00 liability coverage and the primary underinsured motorist coverage on the vehicle he was operating at the time of the accident,

2. Payment made as demanded by Plaintiff would violate the terms of the insurance contract between the parties by granting Plaintiff a double recovery. Any recovery under the

policy must be reduced by any amount recovered from another underinsured motorist policy, another liability policy, and the amount of any workers' compensation benefits received by plaintiff. The policy provides in Part 3 Section II as follows:

> However, no one will be entitled to receive duplicate benefits for the same elements of loss. Subject to the ... limits of liability, damages payable will be reduced by:
>
> 1. all amounts paid or payable by or on behalf of the owner of operator of the underinsured auto or anyone else responsible. This includes all sums paid or payable under the bodily injury liability coverage or property damage liability coverage of this or any other auto policy... and
>
> 3. all amounts payable under any workers' compensation law...
>
> * * *
>
> No injured person will recover duplicate benefits for the same elements of loss under this or any other underinsured motorists insurance, including approved plans of self-insurance.

3. Underinsured motorist benefits under the Allstate policy are only recoverable once Plaintiff has exhausted the funds available to him under all other applicable policies. Allstate asserts that the employer's underinsured motorist coverage must be fully exhausted before Allstate's coverage becomes applicable. The policy limits on the underlying employer's policy are $1,000,000.00, and Allstate contends Plaintiff must exhaust this entire amount, plus the liability limits of $25,000.00, before its policy becomes applicable. Part 3, Section II of the policy provides as follows:

> If the insured person was in... a vehicle which is insured for this coverage under another policy, coverage under this policy will be excess. This means that when the insured person is legally entitled to recover damages in excess of the other policy limit, we will pay only the amount by which the damages exceed the limit of liability of that policy up to the limit of liability of this policy.

Plaintiff's arguments:

1. South Carolina law prohibits application of the Allstate policy provisions in a manner that would limit the recovery of underinsured motorist coverage as proposed by Allstate.

2. Since the Allstate policy provisions limiting recovery are invalid as a matter of law, and since the primary underinsured motorist coverage carrier on the employer's vehicle is permitted to set off workers' compensation benefits, Allstate's coverage should "fill the doughnut hole" created by the set off, up to the limits of the Allstate policy.

DISCUSSION

After consideration of these relative positions, the court concludes that summary judgment is appropriate and accordingly declares the rights and responsibilities of the parties as set forth herein. There is no genuine issue of material fact and the pertinent issues can be resolved as a matter of law.

Ripeness

The court rejects Allstate's threshold position that the matter is not ripe. While there is not yet any judgment in the underlying action upon which to determine the total value of the tort claim, that is not an impediment to the court's power to declare the rights and obligations of the parties. Once these rights and obligations have been declared, the underlying tort action can be tried and the amount of Plaintiff's damages can be ascertained by a jury. Further, Allstate consented to an order staying the underlying action and cannot now be heard to complain that the stay prohibits resolution of the issues joined in this declaratory judgment action.

Policy Provisions

Plaintiff asserts that South Carolina law prohibits application of the Allstate policy provisions in a manner that would limit the recovery of underinsured motorist coverage.

Plaintiff cites *Ferguson v. State Farm Mut. Auto Ins. Co.*, 261 S.C. 96, 198 S.E.2d 522 (1973), *Williamson v. United States Fire Ins. Co.*, 314 S.C. 215, 442 S.E.2d 587 (1994), and *Sweetser v. S.C. Dep't of Ins. Reserve Fund*, 390 S.C. 632.703 S.E.2d 509 (2010) in support of his position. As will be discussed further, the court concludes the Allstate provisions are enforceable and are binding on Plaintiff.

In *Ferguson*, our Supreme Court struck down a provision in an employee's own automobile policy which purported to offset workers compensation benefits against the employee's uninsured motorist coverage (UM) recovery. In *State Farm Mut. Auto. Ins. Co. v. Calcutt*, 340 S.C. 231, 235-36, 530 S.E.2d 896 (Ct. App. 2000), the Court of Appeals held that when an employee purchases underinsured motorist coverage (UIM), a policy provision providing that UIM benefits can be reduced by the amount of workers' compensation benefits received does not conflict with our insurance laws. The Court also concluded that such a provision does not violate public policy.

Plaintiff contends that the Supreme Court in *Sweetser, supra,* overruled *Calcutt* in this context. Allstate does not rely upon *Calcutt* because Allstate claims its policy provision is a reduction of damages provision rather than a set-off provision. However, since Plaintiff argues *Calcutt* was overruled by *Sweetser, supra*, and since Plaintiff maintains that the overruling of Calcutt is dispositive of the issues in this case, the court must address the continuing validity of *Calcutt*. Again, in *Calcutt*, the Court of Appeals held that employee-purchased UIM is subject to a workers' compensation offset. The *Calcutt* Court determined that the public policy rationale of *Ferguson* did not apply to employee-purchased UIM coverage because UIM coverage is not mandatory. The *Calcutt* Court therefore concluded that a policy provision allowing an offset of

workers' compensation coverage violated neither §38-77-160 nor the public policy of South Carolina.

In *Sweetser*, the plaintiff was a passenger in his employer's vehicle when it collided with an uninsured driver. He collected workers' compensation benefits and sued the uninsured driver. His employer's carrier's policy provided UM coverage but had an offset provision for workers' compensation benefits. The Supreme Court held that the offset provision was valid under S.C. Code §38-77-220, which provides that auto policies need not insure any liability under the workers' compensation act. The *Sweetser* Court reviewed *Williamson, supra,* and *Ferguson* and noted that the statutory predecessor to §38-77-220 had no application to *Ferguson*, because §38-77-220 "applies only to employers who are purchasing automobile insurance policies." 390 S.C. at 636. In a footnote to that quote, the *Sweetser* Court stated that "[t]o the extent [*Calcutt*] conflicts with this interpretation of §38-77-220, it is overruled." In my view, the holding in *Calcutt* that employee-purchased UIM is subject to a workers' compensation offset was not overruled by *Sweetser*. The footnoted quote in *Sweetser* and the footnote itself simply clarify that §38-77-220 applies only to employers who purchase automobile coverage. Therefore, since the Allstate policy in the instant case was purchased by the employee-plaintiff, §38-77-220 does not apply. Since §38-77-220 does not apply to employee-purchased UIM, the holding in *Calcutt* remains good law as applied to employee-purchased UIM. In the instant case, the UIM coverage afforded by Allstate is employee-purchase UIM; therefore, a set-off provision would be valid.

Allstate claims that its policy provision is not a set-off provision but rather a reduction of damages payable provision. Allstate argues that the application of such a policy provision does not reduce the amount of coverage available to the insured, but simply reduces the amount of damages payable by the amount of the workers' compensation recovery. If the value of the

bodily injury claim is ultimately determined to exceed the amount of (a) liability coverage, (b) primary underinsured motorist coverage limits, and (c) workers' compensation benefits paid, the Allstate policy will respond to those damages. Whether the provision is a deemed to be a set-off provision or a reduction of damages payable provision, the court concludes the result is the same; the Allstate policy provisions are neither contrary to statute nor void as against public policy and should be enforced according to their terms. Under South Carolina law, the language of Allstate's reduction provision is clear and unambiguous and should be enforced. See *Harrington v. Edwards*, 262 S.C. 263, 203 S.E.2d 691 (1974) (upholding reduction of liability coverage by medpay coverage pursuant to policy provision). See also *Rowzie v. Allstate*, 556 F.3d 165 (2009) (upholding against a similar challenge the identical provision in an Allstate policy relating to reduction of damages by amounts recovered in personal injury protection benefits).

The Westfield UIM coverage purchased by Plaintiff's employer was also subject to a workers' compensation set-off pursuant to the terms of the Westfield policy. See, *Williamson v. United States Fire Ins. Co.*, 314 S.C. 215; 442 S.E.2d 587 (1994) The workers' compensation carrier has paid benefits totaling $354,750.75, thereby reducing by operation of law the amount of Westfield's UIM coverage payable to Plaintiff from $1,000,000.00 to $645,249.25, of which $450,000.00 has been paid to Mr. Brand.

Brand asserts that Allstate's UIM coverage should be required to fill the "doughnut hole" created by the application of the Westfield set-off. He argues that to allow Allstate to offset the Westfield coverage would result in the Allstate policy being rendered practically worthless and would result in him being "uncovered" for $354,750.75 in damages represented by his workers'

compensation recovery.[1] The court concludes that the Allstate policy will not be triggered unless Brand's damages exceed the total of the liability coverage, workers' compensation recovery, and the remaining Westfield coverage; these sums total $1,025,000.00. The Allstate coverage is not "worthless"; it has simply not yet been triggered by a judgment exceeding $1,025,000.00.

Again, Plaintiff argues he is "uncovered" for $354,750.75 in damages, but that is simply not the case. Part 3, Section III of the Allstate policy provides that the UIM from the occupied automobile is primary and that the Allstate UIM is excess. Plaintiff does not appear to dispute that Allstate's UIM coverage is secondary to Westfield's. Part 3, Section II also provides that Allstate is obligated to pay only the amount by which Plaintiff's damages exceed the limit of liability of the primary UIM policy. By operation of law, the limit of the Westfield policy is now $645,249.25. Plaintiff accepted $450,000.00 from Westfield and has released Westfield from any further UIM obligations; however, the amount of UIM set-off to which Allstate is entitled is still $645,249.25. In *Cobb v. Benjamin*, 325 S.C. 573, 482 S.E.2d 589 (1997), the Supreme Court held that when a plaintiff settles with the primary liability carrier for less than the policy limits, the UIM carrier is entitled to credit for the full amount of the liability coverage before UIM coverage becomes payable. The court concludes that such a result is warranted with regard to primary and excess UIM coverage.

There is no dispute that Allstate is entitled to an offset of the $25,000.00 paid by Progressive, the liability carrier. As noted above, the court concludes that the workers' compensation reduction provision in the Allstate policy is valid; consequently, Allstate is entitled to a credit in the amount of $354,750.75. Even though Plaintiff settled with Westfield for less than the maximum amount of UIM coverage remaining on the Westfield policy, Allstate is also

[1] In fact, recovery of Allstate's UIM coverage for damages for which the Plaintiff has already been compensated in workers' compensation benefits would offend Allstate's policy provision and sound public policy prohibiting a double recovery.

entitled to a credit of $645,249.25 in the remaining Westfield UIM coverage before its underinsured motorist coverage becomes applicable to this loss.

Allstate does not assert that its UIM coverage is not applicable simply because the Plaintiff has recovered workers' compensation benefits in an amount in excess of its UIM policy limits. In the event the Plaintiff's claim is ultimately resolved in an amount sufficient to trigger Allstate's UIM coverage as set forth herein, the UIM coverage will be recoverable to the extent Plaintiff's damages exceed this threshold. This is consistent with Allstate's policy language, public policy, and applicable law.

Allstate cites a portion of Part 3, Section II of its policy, entitled "Limits of Liability." This part of the policy states that with regard to UIM coverage, no one will be entitled to receive duplicate benefits for the same elements of loss, and that subject to the limits of liability, damages payable will be reduced by (a) amounts paid or payable on behalf of the owner or operator of the underinsured auto or anyone else responsible and (b) all amounts payable under any workers' compensation law. The court agrees. In the instant case, (a) is the sum of $25,000.00 in liability coverage paid by Progressive, and (b) is the sum of "payable" workers' compensation coverage, i.e., $354,750.75.

Allstate cites another part of Part 3, Section II of the policy entitled "Non-Duplication of Benefits. This section provides that no injured person will recover duplicate benefits for the same elements of loss under this or any other underinsured motorist insurance. Allstate argues that any payment of its UIM would violate the terms of its contract unless and until the plaintiff demonstrates entitlement to recover in excess of the primary UIM coverage. The court agrees. The sum contemplated by this section of the policy and by the "other insurance" provision in Part 3, Section II of the policy is $645,249.25.

Whether considered in terms of reduction of benefits or a set-off, the pertinent policy provisions are not prohibited by statute and do not violate any public policy of this state. The provisions are enforceable. Otherwise, Plaintiff would conceivably be permitted to obtain double recovery, which is certainly contrary to public policy and in violation of these clear and unambiguous policy provisions.

CONCLUSION

THEREFORE, it is ORDERED and ADJUDGED that:

As a matter of law, Defendant Allstate Insurance Company's UIM coverage is payable only to the extent that Plaintiff Brand receives a verdict in the underlying action exceeding $1,025,000.00.

END OF ORDER-ELECTRONIC SIGNATURE PAGE TO FOLLOW

Williamsburg Common Pleas

Case Caption: Larry Brand VS Allstate Insurance Company

Case Number: 2014CP4500644

Type: Order/Summary Judgment

SO ORDERED

s/ George C. James, Jr. 2143

STATE OF SOUTH CAROLINA **COUNTY OF WILLIAMSBURG** **LARRY BRAND,** **Plaintiff,** **vs.** **ALLSTATE INSURANCE COMPANY,** **Defendant.**	**IN THE COURT OF COMMON PLEAS** **THIRD JUDICIAL CIRCUIT** **Civil Action No. 2014CP4500644** **ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION**

By order filed on August 31, 2016, this court granted in part and denied in part the defendant's motion for summary judgment. The plaintiff timely moved for reconsideration. The court has reviewed the motion and has considered the arguments raised by the plaintiff. Based on this review, the court respectfully denies the motion.

END OF ORDER. TO BE ELECTRONICALLY SIGNED AND FILED.

gcj

Williamsburg Common Pleas

Case Caption: Larry Brand VS Allstate Insurance Company

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Type: Order/Other

SO ORDERED

s/ George C. James, Jr. 2143