

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

Melissa H Jenkins,)

Plaintiff,)

vs.)

USAA Casualty Insurance Company,)

Defendant.)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE NO.: 2016-CP-10-02388

ORDER

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SC Court of Appeals

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JULIE J. ARBUSTROM
CLERK OF COURT

This matter came before the Court on September 9, 2016, pursuant to the parties cross-motions for summary judgment. Present at the hearing for Plaintiff were Alan D. Toporek and Jeff Buncher, Jr. Present at the hearing for Defendant was Margaret M. Urbanic. After reviewing the memorandums on file, the relevant case law and the arguments of counsel, I make the following ruling.

FACTS/PROCEDURAL HISTORY

This is a declaratory judgment action which arises out of a motor vehicle collision that occurred on April 4, 2014, in which Plaintiff was injured while driving her personal automobile on the job and received workers' compensation benefits. Defendant is Plaintiff's personal automobile insurance carrier and insures Plaintiff for, *inter alia*, underinsured motorist coverage through policy number 005708099C7103. Plaintiff has three motor vehicles on her insurance policy and has underinsured motorist limits of \$100,000.00 for a total available coverage of \$300,000.00. Defendant contends that it is entitled to a set-off for the amount of workers' compensation benefits paid to Plaintiff. Plaintiff contends that Defendant is not entitled to a set-off because she was operating her personal automobile.

LAW

Pursuant to Rule 56(a), SCRPC, "A party seeking to . . . obtain a declaratory judgment may, at any time after the expiration of 30 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof."

In *State Farm Mutual Automobile Insurance Company v. Calcutt*, 340 S.C. 231 (Ct. App. 2000) the Court previously recognized set-offs for voluntary UIM policies purchased by the employee; however, this case was expressly overruled by the South Carolina Supreme Court in *Sweetser v. South Carolina Dep't of Insurance Reserve Fund*, 390 S.C. 632 (2010) in footnote 4 where Justice Pleicones stated, "to the extent *State Farm Mutual Automobile Insurance Company v. Calcutt*, 340 S.C. 231, 530 S.E.2d 896 (Ct. App.2000) conflicts with this interpretation of § 38-77-220, **it is overruled.**" *Sweetser*, 390 S.C. at 636 n.4, 703 S.E.2d at 511 n.4 (emphasis added).

Section 38-77-220 only applies to insurance policies on employer-provided automobiles, because only employers purchase workers' compensation coverage or could be liable under the Workers' Compensation Law for injuries to their employees that occur during the course and scope of their employment. *Sweetser*, 390 S.C. at 636, 703 S.E.2d at 511. Justice Pleicones's opinion in the *Sweetser* case makes it clear that set-offs for workers' compensation payments are only appropriate where the employer purchases both the workers' compensation coverage and the automobile coverage at issue.

The current case law in South Carolina only allows a set-off between workers' compensation benefits and UIM coverage when such UIM coverage is procured by the employer. *Williamson v. United States Fire Ins. Co.*, 314 S.C. 215, (1994). The Court in *Williamson*

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reached its conclusion permitting an offset of workers' compensation where the employer purchased the UIM insurance policy through a public policy analysis of S.C. Code Ann. § 38-77-220. *Williamson*, 314 S.C. at 218 (citing *Manning v. Fletcher*, 324 N.C. 513 (1989)). S.C. Code Ann. § 38-77-220 provides that automobile insurance policies need not cover "any liability under the Workers' Compensation Law nor any liability on account of bodily injury to an employee." Thus, under this statute, the Court concluded that public policy supported allowing for setoff under employer procured UIM policies because "[a]s long as the employee is able to fully recover the damages sustained, we believe the better public policy is to encourage employer voluntary coverage by not exposing employers to mandatory duplicative insurance premiums and by not allowing duplicative recoveries by employees." *Id.* at 219.

Likewise, the case of *Ferguson v. State Farm Mut. Auto. Ins. Co.*, 261 S.C. 96, 198 S.E.2d 522 (1973), also did not implicate section 38-77-220 (or its predecessor), because the policy at issue in *Ferguson* was the employee's own automobile insurance policy, not that of the employer. The *Ferguson* court refused to allow the uninsured motorist carrier to obtain a set-off for workers' compensation benefits paid to the injured employee who was driving his own vehicle in the course and scope of his employment at the time of the collision with the uninsured driver. *Id.* at 102-03, 198 S.E.2d at 525. The court stated that uninsured motorist coverage "is not subject to reduction by the amounts received by the [injured party] here under the Workmen's Compensation Law." *Id.*

The later case of *Williamson v. United States Fire Ins. Co.*, 314 S.C. 215, 442 S.E.2d 587 (1994), is not applicable here because it is readily distinguishable from the facts presented in this case. In *Williamson*, the court allowed the underinsured motorist carrier to obtain a set-off for workers' compensation payments against excess UIM benefits provided on an employer-



provided vehicle. - Significantly, the *Williamson* court distinguished *Ferguson* because the policy at issue in *Williamson* was purchased by the employer, unlike the policy at issue in *Ferguson*, which had been purchased by the employee himself. *Williamson*, 314 S.C. at 219, 442 S.E.2d at 589.

Here, the issue involves an employee's own UIM coverage on a personal automobile because her damages substantially exceed the liability coverage. The facts of this case are much more analogous to those in the *Ferguson* case, where the court refused to allow an off-set for workers' compensation benefits.

The *Sweetser* case is also distinguishable on its facts, because it involved an attempted set-off of workers' compensation proceeds against minimum uninsured motorist coverage on a vehicle owned and insured by the employer. The *Sweetser* court harmonized the holdings of *Williamson* and *Ferguson* by noting that the *Williamson* court's discussion of the "public policy . . . to encourage employer voluntary coverage" referred not to voluntary automobile coverages such as UIM or excess UM, but only to bodily injury coverages in the employer's automobile policies for injuries that also would be covered by workers' compensation. *Sweetser*, 390 S.C. at 637, 703 S.E.2d at 511-12.


Unlike the situation in the *Williamson* case, none of the public policy implications to allow for setoff have been triggered. Instead, Plaintiff here purchased her own UIM coverage from Defendant, which coverage should be fully available to her, without any offset for payments made by the workers' compensation carrier. Section 38-77-220, under which the workers' compensation set-off is permitted, does not apply here, as Justice Pleicones clearly explained in *Sweetser* footnote 4. Defendant's argument asserting a set-off for workers' compensation benefits received by Plaintiff are contrary to the pronouncement of the Supreme.

Court in *Sweetser* that the Court of Appeals' holding in *Calcutt* has been overruled. Defendant's continued insistence on such a set-off is simply not plausible as Defendant should not receive the benefit of a bargain which it did not contribute to. To allow Defendant to reduce amounts otherwise payable to Plaintiff by amounts paid under workers' compensation is contrary to public policy and would defeat the intended purpose of underinsured motorist insurance, which is to make the victims of less than adequately insured motorists as nearly whole as reasonably possible

CONCLUSION

BASED UPON THE FOREGOING, Plaintiff's motion for summary judgment is GRANTED and Defendant's motion for summary judgment is DENIED.

AND IT IS SO ORDERED on this the 20th day of September, 2016 in Georgetown County, South Carolina.



G. Thomas Cooper, Jr., Circuit Court Judge