THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No.: 2016-002245

Melissa H. Jenkins.....Respondent

v.

USAA Casualty Insurance Company.....Appellant

Appellant's Initial Brief

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STATEMENT OF THE CASE

This case arises out of a motor vehicle accident that occurred on April 4, 2014 in Charleston County. Appellant has filed suit styled *Melissa Hoener Jenkins and Benjamin Roper Jenkins, III and Charles Bacchus George* and that suit is currently pending in Charleston County. Appellant has collected the liability carrier's $25,000 insurance coverage on a covenant not to execute. Appellant has made a claim against the underinsured motorist coverage under USAA's policy 005708099C7103. Appellant is a named insured under USAA's policy. The USAA policy provides for $100,000 of UIM coverage with three vehicles listed on the policy. The workers' compensation carrier paid out $176,458.02 in benefits ($14,598.10 of temporary total benefits, $9,479.34 of temporary partial benefits, $37,480.58 of medical benefits and $114,900 to clincher the case). (Form 19).

Respondent filed a declaratory judgment action from which this appeal arises alleging that the Appellant is not entitled to an offset for the workers' compensation benefits that the Respondent received. Appellant timely filed an answer and counterclaim. Both parties subsequently filed cross motions for summary judgment. On September 9, 2016, a hearing was held on the parties' cross motions for summary judgment. On September 26, 2016, the circuit court issued an order finding that the Respondent was not entitled to an offset for workers' compensation benefits. This appeal then followed.

ARGUMENTS

THE CIRCUIT COURT ERRED IN DENYING THE APPELLANT AN OFFSET UNDER THE RESPONDENT'S PERSONAL UNDERINSURED MOTORIST COVERAGE FOR WORKERS' COMPENSATION BENEFITS PAID TO THE RESPONDENT.

The circuit court's ruling that an offset is not permitted for UIM benefits is a clear error of law. The clear language of the Respondent's policy allows for an offset. The relevant portion of the policy states:

"No **covered person** will be entitled to receive duplicate payments under this coverage for the same elements of loss which were:

A. Paid because of the **BI** or **PD** by or on behalf of persons or organizations who may be legally responsible.

B. Paid or payable under any workers' compensation law or similar disability benefits law. (This does not apply to UM Coverage.) (USAA policy).

The plain and ordinary meaning of USAA's policy is that there is clearly an offset when workers' compensation benefits have been paid out. Any other interpretation of this policy is an incorrect reading of this policy. The first principle in construing insurance contracts is to ascertain the parties' intent. Poston v. National Fidelity Life Insurance Co., 303 S.C. 182, 399 S.E.2d 770 (1990). The court must enforce, not write, contracts of insurance and must give policy language its plain, ordinary and popular meaning. Gambrell v. Travelers Insurance Companies, 280 S.C. 69, 310 S.E.2d 814 (1983). State Auto Property & Casualty Co. v. Brannon, 310 S.C. 388, 391, 426 S.E.2d 810, 811, (S.C. Ct. App. 1992). Respondent is clearly a covered person and has already been paid workers' compensation for her medical bills and permanent partial disability so there is no question that this policy language applies to the case at bar. Furthermore,

the case law in South Carolina clearly supports a set off for workers' compensation benefits when the **UIM** policy has this language.

The circuit court misconstrues Ferguson v. State Farm Mutual Automobile Ins. Co., 261 S.C. 96, 198 S.E.2d 522 (1970), to allege that there is no authority in South Carolina to allow for an offset of workers' compensation benefits. In Ferguson, the issue was whether the **uninsured** motorist (UM) carrier could set off workers' compensation benefits. The Ferguson court found **UM** coverage was not subject to a reduction of workers' compensation benefits.

However, since the Ferguson case, the appellate courts have since issued several decisions clearly enforcing set off provisions for **UIM** coverage. The circuit court's order that the facts in this case are more analogous to Ferguson is wrong as the courts have clearly stated that there is a different in how setoffs are handled between UM coverage and UIM coverage.

State Farm Mut. Auto, Ins. Co. v. Calcutt, 340 S.C. 231, 530 S.E. 2d 896 (Ct. App. 2000), found that,4 a set off provision in a voluntary **underinsured** motorist policy was enforceable. In Calcutt, respondent was injured in a motor vehicle accident while operating his employer's vehicle within the course and scope of his employment. Caulcutt sued the at fault driver and pursued his personal UIM coverage with State Farm. The Calcutt court noted that the State Farm policy neither conflicts with the insurance statutes nor violates public policy, therefore a set off is allowed. The court upheld the ability of State Farm to claim the offset citing South Carolina Code § 38-77-160 which makes UIM coverage an optional coverage. The Court contrasted this with uninsured motorist coverage which is mandatory. The Calcutt opinion cited, quoted and

interpreted Ferguson v. State Farm Mutual Automobile Ins. Co., 198 S.E.2d 522 (S.C. 1973) which contained broad language suggesting worker's compensation offsets were void for all uninsured coverage. The Calcutt court distinguished the Ferguson case as Ferguson pertained to **UM** benefits that are mandatory.

The circuit court's ruling that that the current case law in South Carolina only allows a set-off between workers' compensation benefits and UIM coverage when such coverage is procured by an employer is incorrect. In Williamson v. United States Fire Ins. Co., 314 S.C. 215, 442. S.E.2d 587 (1994), the court addressed the issue of whether an offset was permitted when the employer purchased the UIM coverage. Plaintiff in Williamson tried to argue that S.C. Code Ann. § 38-77-160 would bar an offset. The Williamson Court found that § 38-77-160 does not prevent an offset. The Williamson court addressed S.C. Code § 38-77-220 which states:

> [t]he automobile policy need not insure any liability under Workers' Compensation Law nor any liability on account of bodily injury to an employee of the an insured while engaged in employment, other than domestic, of the insured, or while engaged in the operation, maintenance, or repair of the motor vehicle not any liability for damage to property owned by, rented to, in charge of, or transported by the insured.

The court found that this statute clearly allowed for an employer UIM policy to set off workers' compensation benefits. The Williamson court distinguished Ferguson because Ferguson dealt with UM benefits. The Williamson court noted that the as Ferguson was a personal policy, S.C. Code § 38-77-220 did not apply. Additionally, there is nothing in Williamson that prevents an offset when the UIM coverage is personal coverage. Therefore, the circuit court's finding that set offs are limited to employer purchased UIM coverage is incorrect and should be overturned.

Furthermore, although S.C. Code § 38-77-220 applies to insurance policies

purchased by employers, it does not prohibit set offs for automobile policies purchased by individuals. The case at bar pertains to an offset provision for voluntary UIM coverage not UM coverage. Appellant's policy contains the same language found in Calcutt and so a setoff for workers' compensation benefits is proper.

In Sweetser v. S.C. Dept. of Ins. Reserve Fund, 390 S.C. 632, 703 S.E.2d 509 (2010), the plaintiff was a passenger in his employer's vehicle and was involved in an accident with an **uninsured** driver. A declaratory judgment action was filed seeking an offset against the UM coverage. Sweetser claimed the uninsured motorist carrier should not receive any offset for workers' compensation benefits paid. The trial court disagreed and determined an offset was appropriate.

Sweetser appealed. Sweetser took the position that per Calcutt offsets were allowed for UIM policies which are voluntary, but not for any uninsured motorist coverage. The court rejected this for employer provided uninsured motorist coverage which is not mandatory coverage for employers to have for their employees while covered by worker's compensation pursuant to S.C. Code § 38-77-220. The question in Sweetser was when an employer chooses to cover its employee under an automobile liability policy could the employee's recovery under the policy's mandatory UM coverage can be reduced by, or offset against, the workers compensation benefits received by its employee even if the recovery was reduced to below the statutory mandatory minimum. The Sweetser Court noted in footnote 4 that it was overruling Calcutt to the extent it conflicts with Sweetser's interpretation of S.C. Code § 38-77-220. In other words, Calcutt should only be overruled to the extent that the Appellant argued it meant offset was never allowed for uninsured motorist coverage, as that interpretation would be

inconsistent with Sweetser's interpretation of S.C. Code § 38-77-220. The circuit court's ruling that Sweetser overruled Calcutt in its entirety is a misinterpretation of the Sweetser case.

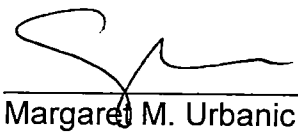
Another way of stating this is that Calcutt contained two concepts: (A) that offset is allowed for UIM polices which are voluntary (B) but offsets are never allowed for UM policies which are mandatory. The reasonable interpretation of the Sweetser case is that the court overruled concept (B) as Sweetser raised one such exception. However, Sweetser did not overrule concept (A). It is important to note that no party in Sweetser argued that Calcutt should be overruled with respect to personal UIM coverage. Thus, it would make no sense to interpret footnote 4 in Sweetser as to having overruled Calcutt in its entirety. As Calcutt is still good law as it pertains to set offs for workers' compensation benefits when there is a personal UIM involved, the circuit court clearly erred in denying the Appellant's offset for workers' compensation benefits.

CONCLUSION

Therefore, the ruling of the circuit court should be reversed as there is clear policy language allowing for a set off for payment of workers' compensation benefits, a set off of the workers' compensation benefits received by the Appellant should be allowed as a matter of law.

Respectfully submitted,

CLAWSON and STAUBES, LLC



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March 13, 2017