THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM WILLIAMSBURG COUNTY
COURT OF COMMON PLEAS

George C. James, Jr., Circuit Court Judge

Case No. 2014-CP-45-00644

Larry Brand .....Appellant,

v.

Allstate Insurance Company .....Respondent.

FINAL INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF ISSUES ON APPEAL

I. WHETHER THE TRIAL COURT ERRED AS A MATTER OF LAW IN FAILING TO RECOGNIZE THAT SOUTH CAROLINA LAW DOES NOT ALLOW INSURANCE CARRIERS TO OFFSET EMPLOYEE-PURCHASED UNDERINSURED MOTORIST COVERAGE WITH WORKER'S COMPENSATION BENEFITS PAID.

II. WHETHER THE TRIAL COURT ERRED AS A MATTER OF LAW IN INTERPRETING THAT ALLSTATE'S UIM COVERAGE WAS SECONDARY UIM COVERAGE FOR THE AMOUNTS OF $25,000.01 THROUGH $354,750.75.

III. ASSUMING *ARGUENDO* THAT THE TRIAL COURT WAS CORRECT IN FINDING THAT ALLSTATE'S UIM COVERAGE WAS NOT TRIGGERED UNTIL AFTER THE EMPLOYER UIM IS EXHAUSTED, WHETHER THE TRIAL COURT ERRED IN FINDING ALLSTATE'S UIM COVERAGE WAS NOT TRIGGERED UNTIL A JUDGMENT EXCEEDING $1,025,000.

STATEMENT OF THE CASE

On January 27, 2010, Larry Brand (Appellant) was driving a truck owned by his employer, Evergreen Turf Corporation (Evergreen), when he was involved in a collision with at-fault driver Cassandra Olivia Stone (Stone).

Stone's automobile had liability coverage in the amount of $25,000 through Progressive Corporation (Progressive).

Evergreen had underinsured motorist (UIM) coverage through Westfield Insurance (Westfield) in the amount of $1,000,000.

Brand had UIM coverage through Allstate in the amount of $25,000.

A worker's compensation claim was opened on behalf of Brand, with Evergreen having workers compensation coverage through American International South Insurance Company (AIS).

A third party personal injury lawsuit seeking UIM coverage was brought by Brand versus Stone, where both Westfield and Allstate were served as UIM carriers. The liability claim in that underlying tort action was settled via a covenant not to execute between Brand and Progressive in August/September 2011. That settlement was approved by the South Carolina Worker's Compensation Commission in October 2011 via a Petition and Order for Approval of Compromise Settlement Agreement. Brand's UIM claims against Westfield were settled with Westfield tendering payment of $450,000 in UIM benefits.

On December 15, 2014, Brand brought a declaratory judgment action against Allstate in order to resolve the current coverage issue. The underlying tort action was stayed pursuant to an order issued January 7, 2015 pending resolution of this coverage issue.

Subsequent to the filing of the declaratory judgment action, Brand's worker's compensation claim, WCC File #1002789, was settled. A Form 19 filed with the S.C. Worker's Compensation Commission in February 2015 shows that Brand was paid a total amount of worker's compensation benefits of $354,750.75 ($271,577.02 in compensation and $83,173.73 in medical benefits).

Allstate filed a motion for summary judgment on October 13, 2015. Brand responded with a memorandum in opposition. A hearing was held before the Hon. George C. James, Jr. on January 7, 2016.

By order filed on August 31, 2016, the court granted in part and denied in part Allstate's motion for summary judgment. Brand timely moved for reconsideration and that motion for reconsideration was denied on August 31, 2016.

This appeal follows.

ARGUMENT

I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FAILING TO RECOGNIZE THAT SOUTH CAROLINA LAW DOES NOT ALLOW INSURANCE CARRIERS TO OFFSET EMPLOYEE-PURCHASED UNDERINSURED MOTORIST COVERAGE WITH WORKER'S COMPENSATION BENEFITS PAID.

A. The standard of review is correction of errors of law.

In order to determine the appropriate standard of review in a declaratory judgment, this court must look to the nature of the underlying action. Barnacle Broad, Inc. v. Baker Broad, Inc., 343 S.C. 140, 146, 538 S.E.2d 672, 675 (Ct. App. 2000). Here, Brand sought to have the trial court determine his right to underinsured motorist coverage under a contract for automobile insurance issued by Allstate. An action to determine coverage under an automobile insurance policy is an action at law. Travelers Indem. Co. v. Auto World, Inc., 334 S.C. 137, 511 S.E.2d 692 (Ct. App. 1999). In an action at law tried without a jury, the standard of review extends only to the correction of errors of law. Electro-Lab of Aiken, Inc. v. Sharp Constr. Co. of Sumter, Inc., 356 S.C. 363, 367, 593 S.E.2d 170, 172 (Ct. App. 2004). "The trial judge's findings of fact will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." Id.

B. The trial court erred in holding that Allstate's employee-purchased UIM policy could offset worker's compensation benefits.

Pursuant to the South Carolina Supreme Court's ruling in Sweetser v. S.C. Dep't of Ins. Reserve Fund, 390 S.C. 632, 703 S.E.2d 509 (2010), South Carolina law does not allow for employee-purchased UIM policy to be offset by worker's compensation benefits received.

South Carolina law requires that automobile insurance carriers "shall offer" UIM coverage "to provide coverage in the event that damages are sustained in excess of the liability

limits carried by an at-fault insured." S.C. Code §38-77-160. The legislature has expressly recognized a permissible offset for UIM coverage:

> The automobile policy need not insure **any liability under the Worker's Compensation Law nor any liability on account of bodily injury to an employee** of the insured while engaged in the employment, other than domestic, of the insured, or while engaged in the operation, maintenance, or repair of the motor vehicle nor any liability for damage to property owned by, rented to, in charge of, or transported by the insured. *S.C. Code §38-77-220*, emphasis added.
> (R. p. 133)

The evolution of the South Carolina case law concerning the ability of an automobile insurance carrier to offset worker's compensation benefits is as follows:

i. *Ferguson v. State Farm* (1973): Offset not allowed for employee-purchased UM policies

In 1973, the South Carolina Supreme Court struck down policy provisions which sought to offset the amount of **uninsured motorist (UM) coverage** available to an injured employee under an **employee-purchased UM policy** by the amount of worker's compensation benefits received by the employee. Ferguson v. State Farm Mut. Auto Ins. Co., 261 S.C. 96, 198 S.E.2d 522 (1973), emphasis added.

ii. *Williamson v. U.S. Fire* (1994): Offset allowed for employer-purchased UIM policies

In 1994, the South Carolina Supreme Court held that policy provisions which sought to offset the amount of **UIM coverage** available to an injured employee under an **employer-purchased** UIM policy by the amount of worker's compensation benefits received by the employee were allowed under South Carolina law. Williamson v. United States Fire Ins. Co., 314 S.C. 215, 442 S.E.2d 587 (1994). In arriving at this conclusion, the *Williamson* court noted the following:

> In Ferguson v. State Farm Mutual Automobile Insurance Co., 261 S.C. 96, 198 S.E.2d 522 (1973), we held that an insurer **cannot offset workers' compensation benefits received by an employee**, notwithstanding policy provisions to the

contrary. *See also* 12A GEORGE J. COUCH, COUNCH ON INSURANCE 2D § 45:652 (MARK S. RHODES, ed. 1981). *Cf.* Garris v. Cincinnati Ins. Co., 280 S.C. 149, 311 S.E.2d 723 (1984) (holding it is contrary to public policy to offset amount insured can recover under underinsured motorist coverage by amount received from at-fault motorist).

Ferguson is distinguishable in that it involved a claim for uninsured benefits **by an individual who had purchased the insurance policy**. In this case, however, the policy was purchased by Williamson's employer, not by Williamson. The same statute and public policy does not operate in cases where voluntary coverage had been provided **by an employer**. Williamson at 219, 589, emphasis added.

The *Williamson* court also held:

As 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 insurance recoveries by employees. We therefore hold that S.C. Code Ann. §38-77-220 (1989) allows an employer's automobile insurance carrier to offset workers' compensation benefits received by an employee. The offset shall be applied against the total of damages sustained **once the employee has been fully compensated for the injuries**. Williamson at 219, 589, emphasis added.

Therefore, after *Ferguson* and *Williamson,* the law in South Carolina was that worker's compensation offsets were allowed on UIM policies, but only for **employer-purchased** policies.

iii. *State Farm v. Calcutt* (2000): Offset allowed for employee-purchased UIM policies

Subsequent to the *Ferguson* and *Williamson* cases cited above, this Court decided State Farm Mutual Automobile Insurance Company v. Calcutt, 340 S.C. 231, 530 S.E.2d 896 (Ct. App. 2000). The *Calcutt* court held it was permissible to offset employee-purchased UIM coverage with worker's compensation benefits. The *Calcutt* court reasoned that the public policy rationale behind *Ferguson* did not apply to employee-purchased UIM coverage because such coverage was not mandatory. Id. at 898.

iv. *Sweetser v. I.R.F.* (2010): offset is only allowed for employer-purchased policies

Subsequent to *Calcutt*, the South Carolina Supreme Court decided the case of Sweetser v. S.C. Dep't of Ins. Reserve Fund, 390 S.C. 632. 703 S.E.2d 509 (2010). The *Sweetser* court specifically found that the setoff provided in S.C. Code §38-77-220 can only apply to employers who purchase automobile insurance policies, as only employers can "insure any liability under" compensation law. Sweetser at 636, 511.

In footnote 4 of the *Sweetser* opinion, the Court specifically noted that "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 at 636 and 511, n.4, emphasis added. In short, the *Sweetser* court clarified that the essential question to answer is whether the policy was purchased by an employer versus an employee, not whether the coverage is mandatory versus voluntary.

The instant trial court disagreed with the effect of *Sweetser* on *Calcutt* and current South Carolina law, reasoning:

> 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 38-77-220, which provides that auto policies need not insure any liability under the workers' compensation act. The Court reviewed *Williamson, supra*, and *Ferguson* and noted that the statutory predecessor to Section 38-77-220 had no application to *Ferguson*, because Section 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 workers' compensation offset has not been overruled by *Sweetser*. The footnoted quote in *Sweetser* and the footnote itself simply clarify that **Section 38-77-220 applies only to employers who purchase automobile coverage**. Therefore, since the Allstate policy in the instant was purchased by the employee-plaintiff, Section 38-77-220 does not apply. Since Section 38-77-220 does not apply to employee-purchased UIM, the holding in *Calcutt* remains good law as applied to employee purchased UIM. (R. p. 9), emphasis in original.

The *Sweetser* court made clear that the offset allowed by S.C. Code §38-77-220 "can only apply **to employers** as only they can 'insure liability under' compensation law or have employees." Sweetser at 636, 511, emphasis added.

That ruling in *Sweetser* supports that the permissible statutory offset provided by S.C. Code §38-77-220 is an example *expressio unius est exclusio alterius*, the statutory rule of construction that "the expression of one thing is the exclusion of others." The statute permits one (1) offset, and it is a limited one; applying only to employer-purchased insurance policies. Under the trial court's reasoning, S.C. Code §38-77-220 is meaningless – the offset would be allowed regardless of statute.

The Court will not construe a statute in a way that which leads to an absurd result or renders it meaningless. Florence Cnty. Dem. Party v. Florence Cnty. Rep. Party, 398 S.C. 124, 128, 727 S.E.2d 418, 420. *See* Lancaster Cnty. Bar Ass'n v. S.C. Comm'n on Indigent Defense, 380 S.C. 219, 670 S.E.2d 371 (2008) (in construing a statute, this Court will reject an interpretation which leads to an absurd result that could not have been intended by the General Assembly); Gordon v. Phillips Utils., Inc., 362 S.C. 403, 608 S.E.2d 425 (2005) (it is presumed that the General Assembly intended to accomplish something by its choice or words and would not do a futile thing); Denene, Inc. v. City of Charleston, 352 S.C. 208, 574 S.E.2d 196 (2002) (this Court must presume the General Assembly did not intend a futile act, but rather intended its statutes to accomplish something); Hinton v. S.C. Dep't of Probation, Parole and Pardon Servs., 357 S.C. 327, 592 S.E.2d 335 (Ct. App. 2004) (the Court should seek a construction that gives effect to every word of a statute rather than adopting an interpretation that renders a portion meaningless).

The trial court below agreed with *Sweetser*'s interpretation that S.C. Code §38-77-220 could only apply to employer-purchased UIM, stating as much in the emphasized language of its order above. However, the trial court then went on to allow an **employee-purchased** UIM policy a worker's compensation offset that South Carolina law strictly limits to employer-purchased policies.

> 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. (R. p.11)

This was error, and as such, the trial court's granting of summary judgment should be reversed and judgment should be declared in favor of Brand.

C. The trial court erred in interpreting what South Carolina Law requires of UIM coverage.

The trial court's ruling fails to recognize that UIM coverage is defined by statute. South Carolina law requires automobile insurance carriers to offer UIM coverage that will "provide coverage in the event that damages are sustained in excess of the liability limits carried by an at-fault insured or underinsured motorist." S.C. Code §38-77-160. This means that in order for an automobile insurance carrier to comply with South Carolina law, the coverage they offer as "UIM coverage," must be effective when the injured party suffers damages in excess of the at-fault driver's liability policy limits.

The same statute that requires the offer of and defines UIM coverage, also proscribes the limitations that may be placed on it. For example, while South Carolina law requires that the insured be offered "up to the limits of the insured liability coverage," if the insured purchases UIM coverage in excess of the basic limits, the law limits the amount of UIM coverage to the extent of the coverage the insured has on the vehicle in the accident. S.C. Code §38-77-160. Also, if none of the insured's vehicles are involved in the accident, the law limits the ability of the insured to stack his UIM coverage, only allowing the insured to get to the UIM coverage on one vehicle. S.C. Code §38-77-160. Finally, as described above, South Carolina law allows insurance carriers providing UIM coverage to an employer to claim an offset for any benefits paid by worker's compensation. S.C. Code §38-77-220. However, these enumerated exceptions are the extent to which the law allows any deviation from the statutorily-proscribed requirement

that UIM coverage must provide "coverage in the event that damages are sustained in excess of the liability limits carried by an at-fault insured or underinsured motorist."

The trial court's interpretation of the law allows insurance carriers to offer something less than the UIM coverage as defined by S.C. Code §38-77-160. It allows for UIM coverage that is narrower than South Carolina's statutory definition of UIM coverage.

The UIM section of ALLSTATE's policy states the following:

> Exclusions – What Is Not Covered
> We will not pay any damages an insured person is legally entitled to recover because of:
> ...
>
> 3. bodily injury or property damage to the extent that benefits are paid, payable or required to be provided under any workers' compensation or disability benefits law.
>
> (R. p. 153)

To allow this exclusion to apply to non-employers, would be to ignore *Sweetser*'s specific finding that S.C. Code §38-77-220 "can only apply **to employers** as only they can 'insure liability under' compensation law or have employees." Sweetser at 636, 511, emphasis added. Therefore, pursuant to *Sweetser*, this exclusion violates South Carolina law.

The coverage created by Allstate's illegal policy exclusion and the trial court's decision does not become effective when the injured party suffers damages in excess of the at-fault driver's liability policy limits. Instead, the coverage created by this policy and interpretation does not actually provide any coverage until a Plaintiff's damages exceed the at-fault policy limits plus the amount of any benefits paid by a worker's compensation carrier.

The trial court specifically found that Brand's employee-purchased UIM policy through Allstate is not triggered until there is "a judgment exceeding $1,025,000.00." (R. p. 11)

This interpretation results in Brand getting no underinsured motorist coverage until his damages exceed $379,750.75 ($25,000 in at-fault liability + $354,750.75 in comp benefits offset).

South Carolina law, as interpreted in *Sweetser*, makes it clear that the **only** time a carrier is allowed to reduce their UIM coverage in this way and not immediately "provide coverage in the event that damages are sustained in excess of the liability limits carried by an at-fault insured", is when S.C. Code §38-77-220 applies, and that §38-77-220 "can only apply to employers." Any policy attempting to define UIM coverage as anything else, violates South Carolina law and must be reformed to comply and provide coverage pursuant to the law.

To interpret S.C. Code §38-77-220 as the trial court has in this case, would render it meaningless. Insurance companies do not need a statute to offset employer-purchased UIM. Insurance companies could already do that because UIM is optional. While the decision to purchase UIM coverage is voluntary, how UIM coverage operates in South Carolina is not. Insurance carriers cannot water UIM coverage down. It is defined by law.

As such, the trial court's ruling was error, and the granting of summary judgment should be reversed and judgment should be declared in favor of Brand.

II. THE TRIAL COURT ERRED AS A MATTER OF LAW IN HOLDING THAT ALLSTATE'S UIM COVERAGE WAS SECONDARY COVERAGE FOR LOSS AMOUNTS OF $25,000.01 THROUGH $354,750.75.

In the present case, Westfield was the only Employer-purchased UIM coverage. As such, only Westfield is allowed under the law to exclude/offset UIM coverage for the amounts paid by worker's compensation. *See Section I above.* The UIM Endorsement of WESTFIELD's policy states:

C. Exclusions

This coverage does not apply to any of the following:

1. The direct or indirect benefit of any insurer or self-insurer under any workers' compensation, disability benefits or similar law.

(R. p.149)

That UIM Endorsement goes on to state:

D. Limit of Insurance

...

We will not pay for any element of "loss" if a person is entitled to receive payment from the same element of loss under any workers' compensation, disability benefits or similar law.

(R. p.149)

The above language combined with S.C. Code §38-77-220 and case law results in Westfield providing no UIM coverage in this matter until the amount legally due Brand is $379,750.76 (a figure which represents the $25,000 paid in liability coverage plus the $354,750.75 paid in total workers compensation benefits). Since Westfield is the only UIM carrier allowed to utilize S.C. Code §38-77-220, that means there is no other coverage available to Brand for the amounts from $25,000.01 through $379,750.76 other than the Allstate UIM coverage.

The UIM section of ALLSTATE's policy states the following:

Exclusions – What Is Not Covered
We will not pay any damages an insured person is legally entitled to recover because of:

...

3. bodily injury or property damage to the extent that benefits are paid, payable or required to be provided under any workers' compensation or disability benefits law.

(R. p. 153)

As explained above, given that Brand is not an employer purchasing UIM coverage, this exclusion violates South Carolina as such, is not valid.

The ALLSTATE UIM section also states:

Limits of Liability

...

Subject to the above limits of liability, damages payable will be reduced by:

...

3. all amounts payable under any workers' compensation law, disability benefits law, or similar law, Medical Expense Benefits Coverage of this policy, or any similar automobile medical payments coverage.

4. all amounts **paid or payable under any Underinsured Motorists Coverage applicable to a vehicle**, other than your insured auto, which the insured person was in, on, or getting into, or out of at the time of the accident.

(R. p. 154) emphasis added.

The ALLSTATE UIM section also states:

If There Other Insurance
If the insured person was in, on, getting into or out of 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 on this policy.

If more than one policy applies to the accident on a primary basis, the total benefits payable will not exceed the amount the insured person is legally entitled to recover. We will bear our proportionate share with other underinsured motorists benefits.

...

Conformity To Statute
This coverage is intended to be in full compliance with the South Carolina Uninsured Motorists Law. If any provision of this endorsement conflicts with that law, it is amended or eliminated to comply with the law.

(R. pp. 154-155) emphasis added.

Brand argued below that pursuant to South Carolina law, there was no other UIM coverage for any loss suffered from $25,000.01 through $354,750.75 and that as such, Allstate was the primary UIM coverage for those amounts. The trial court disagreed, finding:

> Again, Plaintiff argues he is "uncovered" for $345,750.75 in damages, but that is simply not the case. Part3, Section III of the Allstate policy provides that the UIM from the occupied automobile is primary and that the Allstate UIM is excess. 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. (R. p. 11) emphasis added.

The emphasized language above reveals the error with this finding by the trial court: **by operation of law**, there is no other UIM coverage available to Brand for the amounts from $25,000.01 through $379,750.76 except for Allstate's UIM coverage. There is no other policy insuring UIM coverage for these amounts. Therefore, Allstate's "other insurance" policy provision does not apply. They are not "excess." By operation of South Carolina law, Allstate is first in line, they are the primary UIM coverage for damage amounts from $25,000.01 through $379,750.76. Not allowing Brand to access his own personal UIM coverage to provide coverage when he has sustained damages in excess of the liability limits carried by an at-fault insured or underinsured motorist, violates S.C. Code §38-77-160.

III. ASSUMING ARGUENDO THAT THE TRIAL COURT WAS CORRECT IN FINDING THAT ALLSTATE'S COVERAGE IS NOT TRIGGERED UNTIL AFTER THE EMPLOYER UIM IS EXHAUSTED, THE TRIAL COURT ERRED IN FINDING ALLSTATE'S UIM COVERAGE WAS NOT TRIGGERED UNTIL A JUDGMENT EXCEEDING $1,025,000.00.

In its order, the trial court found:

> Again, Plaintiff argues he is "uncovered" for $345,750.75 in damages, but that is simply not the case. Part3, Section III of the Allstate policy provides that the UIM from the occupied automobile is primary and that the Allstate UIM is excess. 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**. (R. p11) emphasis added.

Assuming the trial court was correct that Allstate's UIM coverage is not triggered after the liability coverage is exhausted but before Westfield's coverage is triggered under South Carolina

law (after the worker's compensation benefits are offset pursuant to S.C. Code §38-77-220), then by the findings within the order, Allstate's UIM coverage should be triggered for amounts over $670,249.30. This figure represents the trial court's finding that Westfield's UIM policy is now, by operation of law, $645,249.25 ($1,000,000 minus the $354,750.75 in comp benefits paid) plus the liability limits of $25,000.

However, despite making the finding that Westfield's UIM limits are now only $645,249.25, the trial court found that Allstate's coverage is not triggered until Brand obtains "a judgment exceeding $1,025,000."[1] Such a ruling is inconsistent and allows Allstate to enjoy the exact same offset Westfield enjoyed, despite the fact that the *Sweetser* court specifically found that offset "can only apply to employers." This is error and should result in the granting of summary judgment being reversed and, at a minimum, the triggering amount for Allstate's coverage being declared as $670,249.30 instead of $1,025,000.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court and/or declare judgment stating the correct order and triggers for UIM coverage in this case.

Respectfully submitted,

April 19, 2017

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[1] Brand would not concede that a judgment is necessary for Allstate's coverage to be triggered, as Brand is in a first-party contract with Allstate and as such, Allstate owes Brand a duty of good faith and fair dealing. Brand believes such duties would require Allstate to tender coverage even when there is no judgment in the underlying case, if a good faith and fair evaluation of his claim placed a value on the claim above the triggering amount. See Myers v. State Farm, 950 F.Supp. 148 (D.S.C. 1997)(interpreting South Carolina law).