THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2016-002245

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MAY 11 2017
SC Court of Appeals

Melissa H. Jenkins,

Respondent,

v.

USAA Casualty Insurance Company,

Appellant.

INITIAL BRIEF OF RESPONDENT

Alan D. Toporek (Bar No.: 5608)
Jeff Buncher, Jr. (Bar No.: 78890)
Post Office Box 399
Charleston, South Carolina 29402
(843) 723-7491
Attorneys for Respondent

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STATEMENT OF ISSUE

Whether an employee's personal automobile underinsured motorist (UIM) carrier is entitled to a windfall by offsetting workers' compensation benefits paid solely by the employer.

STANDARD OF REVIEW

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, Respondent sought to have the trial court determine her right to underinsured motorist coverage under a contract for automobile insurance issued by Appellant. 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.*

STATEMENT OF THE CASE

This matter arises out of a motor vehicle collision that occurred on April 4, 2014, in which Respondent suffered serious and permanent bodily injuries while driving her personal automobile on the job and received workers' compensation benefits from her employer. At the time of the wreck, Respondent was 45 years old. As a result of the wreck, Respondent has undergone surgery, and has past medical expenses and lost wages that exceed $158,000.00. Respondent settled with the at-fault motorist's insurance carrier on October 20, 2014, for the bodily injury policy limits of $25,000. (Covenant Not to Execute). Thereafter, Respondent filed

suit against the at-fault motorist, and served Appellant, her underinsured motorist carrier, in the case styled *Melissa Hoener Jenkins and Benjamin Roper Jenkins, III, v. Charles Bacchus George*, Case No. 2016-CP-10-00205 which is pending in the Charleston County Court of Common Pleas.

Respondent purchased automobile insurance from Appellant for, *inter alia*, underinsured motorist coverage through policy number 005708099C7103. At the time of the underlying wreck, Respondent was a named insured and had three motor vehicles on her insurance policy with Appellant and had underinsured motorist limits of $100,000.00 for a total available coverage of $300,000.00. (Declarations Page).

Throughout the course of the underlying car wreck, Appellant contended it was entitled to an offset of workers' compensation benefits paid solely by Respondent's employer. Respondent contended that Appellant was not entitled to an offset because she was operating her personal automobile.

On May 9, 2016, Respondent filed a declaratory judgment action against Appellant asserting that Appellant's policy provision offsetting her UIM benefits by workers' compensation benefits was contrary to the central purpose of the UIM statute and was void. Appellant was served on May 17, 2016, through the South Carolina Department of Insurance. Appellant filed an answer and counterclaim on June 10, 2016. Respondent filed a reply to Appellant's counterclaim on June 20, 2016. Appellant filed a motion for summary judgment on June 16, 2016, and Respondent filed her motion for summary judgment on June 21, 2016. The matter was heard by the Honorable G. Thomas Cooper, Jr., on September 9, 2016. On September 20, 2016, Judge Cooper signed an order granting Respondent summary judgment and

denying Appellant's motion for summary judgment. Said Order was filed September 26, 2016. Appellant filed its appeal on November 3, 2016.

ARGUMENT

1. The Trial Court ruling that Appellant's policy offsetting Respondent's workers' compensation benefits was contrary to public policy and defeated the intended purposed of underinsured motorist insurance should be affirmed.

S.C. Code § 38-77-220 provides:

> The automobile policy need not insure any liability under the Workers' 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.

The Court will not construe a statute in a way 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 (2012). *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).

In *State Farm Mutual Automobile Insurance Company v. Calcutt*, 340 S.C. 231, 530 S.E.2d 896 (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, 703 S.E.2d 509 (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 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,* 390 S.C. at 636, 703 S.E.2d at 511.

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, 442 S.E.2d 587 (1994). The Court in *Williamson* 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, 442 S.E.2d at 588 (citing *Manning v. Fletcher*, 324 N.C. 513, 379 S.E.2d 854 (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. 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.

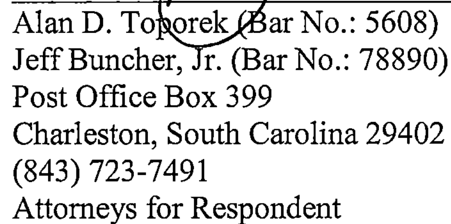
Unlike the situation in the *Williamson* case, none of the public policy implications to allow for setoff have been triggered. Instead, Respondent here purchased her own UIM coverage from Appellant, which coverage should be fully available to her, without any offset for payments made by the workers' 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. Appellant's argument asserting a set-off for workers' compensation benefits received by Respondent are contrary to the pronouncement of the Supreme Court in *Sweetser* that the Court of Appeals' holding in *Calcutt* has been overruled. Appellant's continued insistence on such a set-off is simply not plausible as Appellant should not receive the

benefit of a bargain which it did not contribute to. To allow Appellant to reduce amounts otherwise payable to Respondent 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, Respondent respectfully requests that this Court affirm the trial court's decision. To hold otherwise would result in a windfall to the UIM carrier.

URICCHIO, HOWE, KRELL, JACOBSON,
TOPOREK, THEOS & KEITH, P.A.



Alan D. Toporek (Bar No.: 5608)
Jeff Buncher, Jr. (Bar No.: 78890)
Post Office Box 399
Charleston, South Carolina 29402
(843) 723-7491
Attorneys for Respondent

May 9, 2017
Charleston, South Carolina

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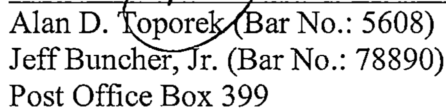
PROOF OF SERVICE

I certify that I have served Respondent's Initial Brief and Designation of Matter on Margaret M. Urbanic and The Honorable Jenny Abbott Kitchings by depositing a copy of it in the United States Mail, postage prepaid, on May 9, 2017.

URICCHIO HOWE KRELL JACOBSON
TOPOREK THEOS & KEITH, P.A.



Alan D. Toporek (Bar No.: 5608)
Jeff Buncher, Jr. (Bar No.: 78890)
Post Office Box 399

Charleston, South Carolina 29402
(843) 723-7491
Attorneys for Respondent

URICCHIO, HOWE, KRELL, JACOBSON, TOPOREK, THEOS & KEITH, P.A.

ATTORNEYS AT LAW
17 ½ Broad Street
Charleston, SC 29401

PAUL N. URICCHIO, JR. (1922-2000)
ARTHUR G. HOWE (1927-2004)
BARRY KRELL
CARL H. JACOBSON
ALAN D. TOPOREK
JERRY N. THEOS
GREGORY D. KEITH
JONATHAN F. KRELL
JEFF BUNCHER, JR.
MARGARET THEOS GUERRY
J. DEVEAUX STOCKTON

MAILING ADDRESS:
Post Office Box 399
Chas., SC 29402-0399

TELEPHONES:
(843) 723-7491
(800) 899-1683
FAX (843) 577-4179

May 9, 2017

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The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

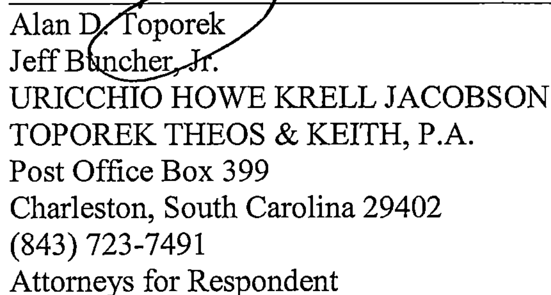
RE: Melissa H. Jenkins v. USAA Casualty Insurance Company
Appellate Case No.: 2016-002245

Dear Ms. Kitchings:

Enclosed please find the original and one (1) copy of Respondent's Initial Brief, Designation of Matter and Proof of Service to be filed in the above matter.

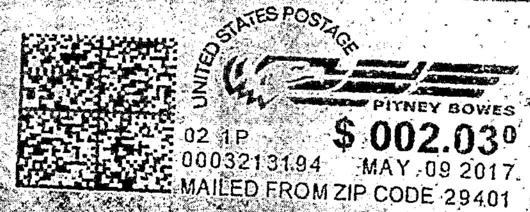
With kind regards, I am,

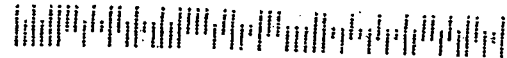
Sincerely,



Alan D. Toporek
Jeff Buncher, Jr.
URICCHIO HOWE KRELL JACOBSON
TOPOREK THEOS & KEITH, P.A.
Post Office Box 399
Charleston, South Carolina 29402
(843) 723-7491
Attorneys for Respondent

c: Margaret M. Urbanic, Esquire
Clawson & Staubes, LLC
126 Seven Farms Drive, Ste 200
Charleston, SC 29492
Attorney for Appellant





URICCHIO, HOWE, KRELL, JACOBSON, TOPOREK, THEOS & KEITH, P.A.
ATTORNEYS AT LAW
P.O. BOX 399
CHARLESTON, SC 29402-0399

The Honorable Jenny Abbott Kitchings
To: Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

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