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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
(Appellate Case No. 2016-002050)

Larry Brand,.....Appellant,

v.

Allstate Insurance Company,.....Respondent.

FINAL RESPONDENT'S BRIEF

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STATEMENT OF THE ISSUES ON APPEAL[1]

I. Did the trial court properly grant summary judgment to Allstate, where the policy contained a valid, plainly worded provision reducing the amount of damages recoverable by the insured in order to prevent a double recovery?

II. Did the trial court properly rule that Allstate's UIM coverage is excess to the full amount of the UIM coverage provided by the carrier for Brand's employer, whose vehicle he was driving at the time of the accident?

STATEMENT OF THE CASE

The genesis of this action is a motor vehicle accident that occurred on January 27, 2010. On that date, the Appellant Larry Brand was driving a truck owned by Evergreen Turf Corporation ("Evergreen"). Brand worked for Evergreen and was on-the-job when the truck was involved in a collision with another vehicle. The driver of the other vehicle (Cassandra Olivia Stone) was at fault for the collision. Brand sustained injuries as a result of the accident.

Several different insurance companies have coverage applicable to the accident. Progressive Insurance Company provided $25,000 in liability coverage to the at-fault driver. American International South Insurance Company ("American") was Evergreen's worker's compensation carrier. Evergreen also had a policy with Westfield Insurance that provided $1,000,000 in UIM coverage for its employees. Finally, Brand had a personal automobile policy from the Respondent Allstate Insurance Company that contained $25,000 in UIM coverage.

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[1] Although the Appellant's Brief states three separate issues, Allstate will address Brand's second and third issues together under one issue/heading.

Brand first commenced a worker's compensation claim, which American accepted. Brand and American ultimately settled that claim for a total amount of $354,750.75. Of that amount, $83,173.73 constituted payment for medical bills, and $271,577.02 was for wages and related compensation.

Brand also filed a personal injury action against the at-fault driver in the Court of Common Pleas for Williamsburg County. Brand's attorney served Westfield and Allstate as UIM carriers in that action. Progressive tendered its $25,000 liability limits in exchange for a covenant not to execute. Later, at mediation, Brand settled with Westfield for $450,000 of its $1,000,000 in UIM coverage. The resulting policy release left Allstate as the lone UIM carrier defending the case, which the trial court has stayed pending the result of the present action.

In an attempt to answer questions about Brand's ability to recover UIM benefits under his Allstate policy, Brand filed a declaratory judgment action on December 15, 2014. After filing an Answer, which included counterclaims for declaratory judgment, Allstate moved for summary judgment on October 13, 2015. Allstate's motion argued, *inter alia*, that its policy contained a "reduction in damages recoverable" provision that meant Brand's damages had to exceed all other coverage available to him – including worker's compensation benefits – before he could be entitled to recover any of Allstate's UIM coverage.

Both parties submitted memoranda on the legal issues, and the motion went before the Honorable George C. James, Jr. for a hearing on January 7, 2016. Judge James took Allstate's motion under advisement at the conclusion of the hearing. Several months later, on August 31, 2016, Judge James issued an Order that granted Allstate's

motion in part and denied it in part. Brand filed a timely motion asking Judge James to reconsider his decision, but the judge denied that motion, and Brand appealed.

STANDARD OF REVIEW

"A declaratory judgment action is neither legal nor equitable, and therefore, the standard of review is determined by the nature of the underlying issue." *Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 191, 684 S.E.2d 541, 543 (2009). When the purpose of the underlying dispute is to determine whether coverage exists under an insurance policy, the action is one at law." *Id.* "In an action at law tried without a jury, the appellate court will not disturb the trial court's findings of fact unless they are found to be without evidence that reasonably supports those findings." *Auto Owners Ins. Co. v. Hamin*, 368 S.C. 536, 540, 629 S.E.2d 683, 684 (Ct. App. 2006).

ARGUMENT

The underlying declaratory judgment action was an attempt by Brand to use UIM coverage from his personal automobile liability policy as a means of double recovery for damages previously paid by other carriers under different insurance policies. Having already received total payments of $829,750.75 for claims stemming from his accident, Brand sought a declaratory judgment requiring Allstate to pay its full $25,000 in UIM coverage, despite the lack of any evidence that he had any additional damages for which he had not received compensation. Brand made this claim despite settling with the primary UIM carrier for $550,000 less than its coverage limits.

The trial court rejected Brand's attempt at a double recovery by applying the clear provisions of Allstate's policy that are designed to prevent such windfalls. That decision

not only follows the policy language as written, but also honors South Carolina public policy. Therefore, this Court should affirm the judgment in Allstate's favor.

I.

The provisions of Allstate's policy validly reduce the amount of damages recoverable by the insured in order to prevent a double recovery.

In reaching its decision, the trial court applied Part 3, Section II of the Underinsured Motorist Insurance Coverage portion of Allstate's policy. The relevant language from that section is the following:

> 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 or 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 worker's 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.

[R. p. 69 (emphasis added).]

(A) Reduction in Damages Recoverable

Allstate argued in support of its summary judgment motion that this policy language constitutes a "reduction of damages recoverable" provision. This provision

requires that any recovery under Allstate's policy be reduced by any and all amounts received from other policies and also by all worker's compensation benefits the insured obtained. Brand tried to cast the provision in a different light, calling it a setoff for worker's compensation benefits. The trial court believed it was unnecessary to determine whether this language was a "reduction of damages recoverable" or a "setoff" because the court would reach the same legal conclusion in either case. Although Allstate agrees with the trial court's conclusion in that sense, it is more accurate to view the provision as one reducing the damages recoverable by the insured.[2] Therefore, Allstate will first discuss the provision in those terms.[3]

Unlike a true setoff provision, the policy language quoted above does not reduce any of the UIM coverage provided to an insured. The provision in Allstate's policy merely establishes when the UIM coverage is triggered. If an insured has damages that exceed the sum of all recoveries made under the other types of policies and benefits identified in the provision, then the full UIM limits are available. In the present case, for example, if Brand were to obtain a judgment in excess of $1,025,000,[4] this provision

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[2] Allstate's policy has a separate "setoff/exclusion" provision that is not involved in this case. [R. p. 68.] The setoff provision appears in the section entitled "Exclusions – What Is Not Covered." The provision actually involved in the present case appears under a section entitled "Limits of Liability" – the same section that reduces damages for all amounts received from a liability carrier and other UIM coverage. This further demonstrates the difference between a "setoff" provision and the "reduction of damages recoverable" language at issue in this appeal.

[3] This approach not only demonstrates that the trial court reached the correct legal result, but it also makes it unnecessary to examine or consider the line of cases dealing with setoff provisions in UM and UIM policies.

[4] This amount represents the total sum of the at-fault driver's liability limits ($25,000), Brand's worker's compensation benefits ($354,750.75), and the still unpaid amount of the employer's UIM limits ($645,249.25).

would require Allstate to pay any additional amount up to its UIM limits of $25,000. As this example demonstrates, the provision at issue does not eliminate, or even limit, any type or amount of coverage. The provision only clarifies the threshold for recovering any UIM coverage in situations like this one, where recoveries under other policies have previously occurred.

This trial court's application of the provision at issue serves three important functions. Each function standing alone would arguably be sufficient to justify the trial court's decision. But considered together, these three functions leave no reasonable doubt about the sound nature of that decision.

First, the result in the trial court honors the clear language of Allstate's insurance policy. Courts "must give policy language its plain, ordinary, and popular meaning. ... When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used." *B.L.G. Enters., Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999) (citations omitted). Although unclear policy language must be construed against the insurer as the drafting party, "insurers have the right to limit their liability and to impose conditions on their obligations, provided they are not in contravention of public policy or a statutory prohibition." *Id.* at 535-36, 514 S.E.2d at 330. Thus, "[c]ourts must enforce, not write, contracts of insurance." *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 655, 661 S.E.2d 791, 797 (2008) (quoting *Sloan Constr. Co. v. Central Nat'l Gen. Ins. Co. of Omaha*, 269 S.C. 183, 185, 236 S.E.2d 818, 819 (1977)).

Here, the policy language is perfectly clear in its meaning. It sets forth the point at which the UIM coverage becomes available in situations involving other coverages and

benefits for the same damages. There is no other way to read this provision. Indeed, Brand has not even attempted to argue, either in the trial court or in this appeal, that the policy language is ambiguous or unclear. Accordingly, there can be no question that the trial court followed established law by applying the parties' insurance contract as written.

Second, the trial court's decision serves the public policy against double recoveries and windfalls. "It is well settled in this state that 'there can be no double recovery for a single wrong and a plaintiff may recover his actual damages only once.'" *Collins Music Co., Inc. v. Smith*, 332 S.C. 145, 147, 503 S.E.2d 481, 482 (Ct. App. 1998) (quoting *Taylor v. Hoppin' Johns, Inc.*, 304 S.C. 471, 475, 405 S.E.2d 410, 412 (Ct. App. 1991)). *See also Williamson v. U.S. Fire Ins. Co.*, 314 S.C. 215, 218, 442 S.E.2d 587, 588 (1994) (one reason for allowing worker's compensation benefits to be offset against UIM coverage was to deny the plaintiff "the windfall of a double recovery").

If accepted, Brand's position would necessarily lead to a double recovery for his claimed damages. Brand sustained only a single wrong – the injuries from the accident – and he has already recovered $829,750.75 as a result. There was also additional coverage still available under the primary UIM policy that Brand chose not to seek when he settled with that UIM carrier for far less than the policy limits. If Brand could recover Allstate's UIM coverage without first obtaining a judgment in excess of the amounts he has already received (and could have received), he would be compensated twice for the same damages. Preventing that type of windfall is why our law gives a UIM carrier credit for the full amount of the at-fault driver's liability coverage, regardless of how much of the coverage the plaintiff actually receives. *See Cobb v. Benjamin*, 325 S.C. 573, 589, 482 S.E.2d 589, 597 (Ct. App. 1997). The same principle applies here.

The trial court's decision guards against a double recovery, while still allowing Allstate's coverage to be available at the correct point. If Brand takes the underlying tort case to trial and gets a judgment of more than $1,025,000, Allstate must respond to the excess amount up to its UIM policy limits. If the result of a trial is a verdict lower than that threshold number, Brand recovers nothing else under the clear language of Allstate's policy. This result is not unfair to Brand, who already recovered (or had the chance to recover) the full $1,025,000 from other sources. The only unfair result would be allowing Brand to recover from Allstate's UIM policy before reaching that threshold judgment amount. In that scenario, Allstate would have to pay UIM coverage despite policy language to the contrary, and Brand would receive a windfall.

Third, the trial court's decision fully honors the purpose of UIM coverage under South Carolina law. Underinsured motorist coverage is designed to protect injured parties in situations where they have damages that exceed the amount of liability coverage carried by the at-fault motorist. *See Cobb*, 325 S.C. at 583, 482 S.E.2d at 594 (citing S.C. Code Ann. §38-77-160). Thus, UIM coverage is designed to prevent, or at least alleviate, situations in which an injured party is unable to recover his or her full damages because the at-fault driver does not have sufficient insurance.

The key concept for purposes of the current appeal is the party being unable to recover his or her full damages. That scenario, which is the *raison dêtre* of UIM coverage, does not exist here. The record plainly demonstrates that Brand has received (a) the liability limits of the at-fault driver, (b) an extensive amount of worker's compensation benefits and (c) $450,000 from the primary UIM policy. The record further shows that there was still a significant amount of coverage remaining under the

primary UIM policy that Brand effectively waived by settling with that UIM carrier for a lower amount. In total, Brand has recovered nearly $850,000, and there is nothing in the record even to suggest, let alone prove, that this amount constitutes anything less than full compensation for Brand's injuries. As a result, Brand cannot credibly claim that the lower amount of liability insurance has prevented him from being able to recover his full damages.

Even if Brand were now to argue that his damages exceed the amounts of other coverages paid and/or available to him, Allstate's UIM policy will respond to any proven excess damages at the proper time. Assuming Brand obtains an excess verdict (as described above), Allstate's UIM coverage will be available up to its limits. In that scenario, Allstate's UIM coverage will perform its intended function – i.e. protecting the insured against the inability to recover his or her full damages. Thus, nothing in the trial court's ruling violates South Carolina law or public policy relating to UIM coverage.

Although the issue involved was not exactly the same, this Court's decision in *Cobb v. Benjamin*, 325 S.C. 573, 482 S.E.2d 589 (Ct. App. 1997), is instructive. In *Cobb*, this Court had to determine whether payment of the full automobile liability limits was a condition precedent to recovering UIM coverage. The Court held that payment of the underlying liability limits was not required in order to seek UIM coverage, but that the UIM carrier was entitled to an offset credit for the full amount of the liability coverage, even if the insured settled for less than those limits. *Id.* at 587-88, 482 S.E.2d at 596. This decision allowed UIM coverage to serve its intended purpose, but it also placed the risk of a shortfall on the insured in situations where he or she settles for less than the liability policy limits. As the Court explained:

> By allowing full credit of the tortfeasor's policy limits, the insured, rather than the UIM carrier, bears the loss when there is a gap between liability limits and the amount of the settlement. The insured may only recover the difference between the liability policy limit and the damages suffered, subject to the UIM limits. *Id.*

Under the rule set forth in *Cobb*, the UIM coverage is available; the insured just has to recover more than the full liability limits in order to receive any of the UIM coverage. This is true regardless of whether the insured actually receives the full amount of the liability limits or settles for less. Here, the same rule applies. Brand has UIM coverage, and if he obtains a verdict in excess of the coverages he has already received, or could have received, he can recover it up to the UIM limits. But he cannot claim any of the UIM coverage without first exceeding that threshold. This rule, which is the holding in *Cobb*, extends to the present scenario. Brand has failed to demonstrate any legitimate reason why it does not.

As the preceding discussion demonstrates, there are at least three sound and logical bases for the trial court's decision. It applies the clear language of the insurance policy, it prevents a double recovery, and it honors the purpose of UIM coverage. Brand's position would serve none of those purposes and would only result in a windfall to an insured who has already been fully compensated for his damages. Therefore, the Court should affirm the trial court's decision.

(B) Setoff

Brand presents his arguments as if the policy language cited by the trial court is a "worker's compensation setoff" provision. This is a necessary tactic because Brand claims South Carolina law does not allow for any setoff of worker's compensation benefits in this context. As discussed above, this is not the kind of setoff provision

addressed in the line of cases Brand cites.[5] The language at issue in this case is a "reduction of damages recoverable" provision, and as such, it is valid and enforceable under South Carolina law. Yet, even if this case were deemed to involve a setoff provision, the end result would be the same. The trial court correctly recognized that fact in its Order, which this Court should affirm.

The line of cases upon which Brand relies began with *Ferguson v. State Farm Mut. Auto. Ins. Co.*, 261 S.C. 96, 198 S.E.2d 522 (1973). In that case, the Supreme Court held that an offset provision for worker's compensation benefits was unenforceable when contained in a UM policy purchased by an employee.

Twenty years later, the Supreme Court distinguished *Ferguson* and held that a worker's compensation setoff provision in an employer-purchased UIM policy was valid. *Williamson v. United States Fire Ins. Co.*, 314 S.C. 215, 442 S.E.2d 587 (1994). The Court concluded the situation in *Williamson* was different than that in *Ferguson* for two reasons: (1) the type of coverage at issue (mandatory UM vs. voluntary UIM), (2) the party who purchased the policy (the employer vs. the employee). *Id.* at 219, 442 S.E.2d at 589.

The next case in this line came six years after *Williamson*, when this Court issued its decision in *State Farm Mut. Auto. Ins. Co. v. Calcutt*, 340 S.C. 231, 530 S.E.2d 896 (Ct. App. 2000). In *Calcutt*, the Court held that a UIM carrier could lawfully enforce a setoff provision for worker's compensation benefits in an employee-purchased policy.

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[5] Again, Allstate's policy does contain this type of setoff provision, but that is not the provision upon which the trial court based its decision. The trial court cited and relied on the separate and distinct "reduction in damages recoverable" provision.

The Court reached this conclusion after noting that such a provision did not violate any statutory provision or public policy of South Carolina.

For the statutory analysis, the Court examined S.C. Code §38-77-30 (which defines "uninsured motor vehicle") and S.C. Code §38-77-160 (which "provides for UIM policies") and found that nothing in those statutes prohibited setoff provisions. 340 S.C. at 234-35, 530 S.E.2d at 897-98.[6] The lack of a statutory prohibition was the key factor in the Court's decision. Finding no statute that forbade setoff provisions, the Court concluded it was proper to apply the policy as written and entered into by the parties.

The Court cited *Williamson* and acknowledged that it involved an employer-purchased policy, whereas the employee purchased the policy in *Calcutt*. However, the Court found that difference was immaterial in the absence of any statutory provision specifically preventing this type of setoff provision. As the Court explained:

> In the present case, the employee purchased and paid the premiums on the policy, not the employer. However, section 38-77-160 does not prohibit a setoff provision, regardless of whether the employer or the employee purchased the UIM policy.

340 S.C. at 235, 530 S.E.2d at 898 (emphasis added). Therefore, the provision allowing for a setoff of worker's compensation benefits in an employee-purchased policy was valid.

For its public policy analysis, the Court contrasted the Supreme Court's decisions in *Ferguson* and *Williamson*. The Court noted that the former case has invalidated the setoff provision because it involved mandatory uninsured motorist (UM) coverage, while the latter case had upheld the setoff provision because it dealt with voluntary UIM

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[6] Significantly, the Court did not cite or discuss S.C. Code §38-77-220 in this analysis.

coverage. Thus, the "linchpin" of *Ferguson*'s public policy rationale was the "mandatory nature of UM coverage." 340 S.C. at 235, 530 S.E.2d at 898. Since the policy at issue in *Calcutt* was not statutorily required, the same public policy concern did not apply. *Id.*

The Court again acknowledged the fact that *Williamson* had involved an employer-purchased policy, but this difference was not significant. On this point, the Court stated:

> While *Williamson* only addresses setoff provisions in terms of employers' policies, we find no reason voluntary UIM coverage held by an employee should be treated differently. Accordingly, a setoff provision in a voluntary UIM policy would be equally enforceable whether purchased by an employer or an employee.

340 S.C. at 236, 530 S.E.2d at 898 (emphasis added).

The holding in *Calcutt* is clear: Setoff provisions for worker's compensation benefits in all UIM policies are valid and enforceable under South Carolina law. In an attempt to escape this conclusion, Brand relies upon a cryptic footnote in *Sweetser v. South Carolina Dept. of Ins. Reserve Fund*, 390 S.C. 632, 703 S.E.2d 509 (2010). The issue in *Sweetser* was the following:

> Can a worker's compensation offset clause be applied so as to reduce an employee's recovery under an employer's automobile policy's UM coverage below the statutory mandatory minimum?

Id. at 634, 703 S.E.2d at 510. After examining *Ferguson* and *Williamson*, the Court answered yes to that question. The Court found that S.C. Code §38-77-220 expressly permitted the kind of setoff provision at issue in situations involving UM coverage in an employer-purchased policy. Thus, the application of a setoff was permissible in that

context, even though it would take the amount of UM coverage under the mandatory minimum limit.

During its analysis, the Court stated that S.C. Code §38-77-220 "applies only to employers who are purchasing automobile insurance policies." 390 S.C. at 636, 703 S.E.2d at 511. Following that statement, the Court included the following footnote: "To the extent *State Farm Mut. Auto. Ins. Co. v. Calcutt*, 340 S.C. 231, 530 S.E.2d 898 (Ct. App. 2000) conflicts with this interpretation, it is overruled." *Id.* n. 4. The Court did not cite or discuss *Calcutt* anywhere else in the opinion, and, thus, the precise meaning of the footnote is not clear. Nevertheless, Brand cites the footnote in *Sweetser* for the proposition that *Calcutt* is no longer good law under any circumstances. The trial court rejected that assertion, and its decision in that regard was correct.

Sweetser did not even mention, let alone overrule, the fundamental holding of *Calcutt.* As previously discussed, *Calcutt* held that a worker's compensation offset provision in an employee-purchased UIM policy was enforceable because it did not violate any statute or public policy. This Court in *Calcutt* did not cite or discuss S.C. Code §38-77-220, nor did it use that statute as the basis for its decision. This Court's only focus was determining whether any South Carolina statute or policy prohibited a worker's compensation setoff in a UIM policy. The Court did not need to look to §38-77-220, which actually permits such a setoff in other circumstances. Section 38-77-220 was not relevant to the holding in *Calcutt*, and, therefore, the Supreme Court's footnote in *Sweetser*, which specifically references the statute, does not affect that holding.

This, of course, raises the question of what the Supreme Court intended to do when it included the footnote in *Sweetser*. If, as the trial court concluded, the Supreme

Court did not completely overrule *Calcutt*, then what does the footnote mean? To answer this question, it is important to recall the basis for the Supreme Court's decision. Because *Sweetser* dealt with a type of coverage that has mandatory minimum limits under South Carolina law, the Court had to examine the Insurance Code to see if it specifically authorized a setoff that would potentially reduce the insured's recovery below those limits. The Court found that authorization in §38-77-220. Under that statute, a worker's compensation setoff provision in an employer-purchased UM policy is allowed, even though setoff against a UM policy is not permitted in other contexts. This is the holding of *Sweetser*, and it necessarily depends on §38-77-220.

In that sense, *Sweetser* was very different from *Calcutt*, which did not rely on §38-77-220. *Calcutt* involved an employee-purchased policy. As the Supreme Court stated in *Sweetser*, that statute can apply only to employers. Thus, because an employer-purchased policy was not at issue in *Calcutt*, §38-77-220 did not come into play. *Calcutt* decided a similar issue as the one in *Sweetser*, but in an entirely different setting – one that did not depend on the application of §38-77-220. In short, *Calcutt* had nothing to do with that statute and vice versa.

The Supreme Court's footnote in *Sweetser* merely indicates that *Calcutt* does not – and cannot – change the plain meaning of §38-77-220. That statute applies only to employer-purchased policies, and the Supreme Court's footnote just prevents anyone from claiming that *Calcutt* says otherwise. As discussed below, this is the only reading of the footnote that makes logical sense in light of what is – and what is not – found in the *Sweetser* opinion as a whole.

First, the phrasing of the footnote supports this interpretation. Had the Supreme Court intended to overrule *Calcutt* completely, it could have used clear language to that effect. For example, the Court could have said something like the following: "In light of our holding today, we overrule *State Farm Mut. Auto. Ins. Co. v. Calcutt*." But the Court did not use that kind of broad language. Instead, the Court chose to include the limiting phrase "[t]o the extent [*Calcutt*] conflicts with this interpretation of §38-77-220 ...." 390 S.C. at 636, 703 S.E.2d at 511 n. 4. This demonstrates that the Court intended to do something other than overrule *Calcutt* in its entirety. Otherwise, there would have been no reason for the Court to begin the footnote with a qualifying phrase.

Second, the placement of the footnote is telling. The footnote that mentions *Calcutt* comes immediately after the Court's statement that §38-77-220 applies only to employers purchasing automobile insurance policies. Clearly, then, the statement about the statute's limited application must be the "this interpretation of §38-77-220" to which the footnote refers. Placed in this proper context, the meaning of the footnote becomes clear: If *Calcutt* could be construed as saying that §38-77-220 applies to non-employers, it is mistaken and overruled. The implicit corollary to this statement is that *Calcutt* remains intact to the extent it does not rely on that statute.

Third, it is significant that the body of the *Sweetser* opinion made absolutely no reference to *Calcutt*. The Court discussed *Ferguson* and *Williamson* in some detail, but never mentioned *Calcutt* outside of the footnote. If *Calcutt*'s fundamental holding was wrong – i.e. if worker's compensation setoff provisions could never be valid in employee-purchased policies – the Court had ample opportunity to say so. For example, if the Court had believed that §38-77-220 was the only allowable basis for any type of

worker's compensation setoff, the Court could have made that blanket declaration and then overruled any and all cases to the contrary. But the Court did not do that. Instead, the Court focused on situations covered by §38-77-220 and did not address setoff provisions in other scenarios that do not involve that statute.

Similarly, the *Sweetser* Court did not mention *Calcutt* when it addressed the public policy issues. The Court concluded that the setoff provision in the employer-purchased policy comported with public policy, but the Court never said, or even suggested, that setoff provisions in other types of policies violate public policy. Again, if the Court had intended to make such a sweeping pronouncement, it had every opportunity to do so. The Court could have explained why the provision at issue in that case satisfied public policy and then proceeded to state that similar provisions in other types of policies would not. The Court did not do so, however, and reading such a conclusion into the opinion would be an unwarranted and unintended expansion of *Sweetser*'s scope.

Sweetser overruled *Calcutt* only to the extent the latter case could be construed as stating that §38-77-220 applies to non-employers. *Calcutt* never actually makes such a statement, but the Supreme Court apparently wanted to make sure no one could read that kind of statement into *Calcutt*. Taking that precautionary measure was the sole purpose for the partial – and conditional – overruling of *Calcutt*, and that is all the footnote in question expresses. Any other reading of the footnote ignores the limiting phrase at its beginning and bestows a level of meaning that the Supreme Court did not intend.[7]

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[7] At least one court has recently interpreted *Sweetser* in this manner – i.e. that it only overruled *Calcutt* in one limited respect. *See Siron v. Allstate Fire & Cas. Ins. Co.*, ___ F. Supp. 3d ___, 2016 WL 7229057 at *4 (D.S.C. Dec. 14, 2016) ("*Sweetser* overrules *Calcutt* only 'to the extent' it conflicts with the holding in *Sweetser* that S.C. Code §38-77-220 applies just to employers.").

Brand appears to argue that even a limited overruling of *Calcutt* is sufficient for purposes of his position. Brand contends that if §38-77-220 does not apply to non-employer-purchased policies, then worker's compensation setoffs in such policies are never allowed. Yet, this line of reasoning is mistaken because it depends upon the wrong inquiry. Brand suggests that if no statute or policy specifically authorizes a worker's compensation setoff, then such provisions must be invalid. The proper question, however, is not whether any statute or policy allows for that type of setoff, but whether any statute or policy forbids it.[8]

"[I]nsurers have the right to limit their liability and to impose conditions on their obligations, provided they are not in contravention of public policy or a statutory prohibition." *B.L.G. Enters., Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 535-36, 514 S.E.2d 327, 330 (1999) (emphasis added). Significantly, the rule does not state that insurers have the right to limit their liability and impose conditions "as long as a statute or public policy allows it." Instead, this rule provides that insurers are free to write their policies however they wish, as long as the provisions do not violate the law of South Carolina. This might be a subtle distinction, but it is very important in the present case.

The question here is not whether S.C. Code §38-77-220 or any other statute allows a worker's compensation setoff provision to be in Brand's UIM policy. The question is whether any South Carolina law prohibits such a provision. This was precisely the issue in *Calcutt*, and this Court answered the question in the negative. That

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[8] The analysis is arguably different in the UM setting because UM coverage is mandatory and has minimum required limits. Thus, it is logical that an insurer would need express permission or authorization to include a provision that might take the insured's recovery under those limits. However, the same concern does not arise in the UIM context.

holding remains intact despite the footnote in *Sweetser*, and the trial court properly followed it.

(C) Conclusion

The provision at issue in this appeal reduces the damages that are recoverable under the UIM portion of the policy. In that sense, it is not a true setoff provision. It is, instead, a means of establishing when the UIM coverage becomes available. The provision is clearly stated, and it does not violate any South Carolina law. It also guards against double recoveries by an insured, which South Carolina's public policy disfavors. Therefore, the trial court properly upheld and applied the provision.

In addition, even if the provision is viewed as a "setoff," the trial court's decision is still correct. *Calcutt* expressly upholds this type of provision, and *Calcutt* remains good law even after *Sweetser* because the footnote in *Sweetser* overruled *Calcutt* only in one very limited respect that is not applicable here.

For these reasons, the Court should affirm the result in the trial court and allow the judgment in Allstate's favor to stand.

II.

The trial court properly ruled that Allstate's UIM coverage is, at a minimum, excess to the full amount of coverage provided by the carrier for Brand's employer.

As discussed above, Brand's primary argument on appeal is that Allstate should not receive any reduction in damages payable under its UIM policy for the worker's compensation benefits that Brand received. However, Brand also argues the trial court should have ruled that Allstate was the primary UIM carrier for any damages falling in between the at-fault driver's liability limits and the worker's compensation setoff to

which the employer's UIM carrier was entitled. In essence, Brand contends Allstate is not entitled to any reduction of damages payable for the amounts of UIM coverage Brand received from his employer's carrier. This assertion is contrary to the language of the policy and the law of South Carolina, and the trial court properly rejected it.

According to Brand, a "gap" in UIM coverage exists in this case due to the worker's compensation setoff provision in the UIM policy issued by his employer's carrier (Westfield). Pursuant to that provision, and S.C. Code §38-77-220, Brand argues (with no supporting documentation) that Westfield received a setoff of $354,750.75, which was the amount of worker's compensation benefits Brand received. As a result, Westfield owed nothing to Brand until his damages exceeded that amount, plus the $25,000 he received from the liability carrier (for a total of $379,750.75). Citing that "fact," Brand claims his damages were "uncovered" from the point immediately after the liability limits to the end of the worker's compensation amount (i.e. $25,000.01 to $354,750.75) and that Allstate's UIM should be required to fill that "gap." Brand's position fails, however, for several reasons.

First, Brand's argument ignores the actual settlement he reached with Westfield. Brand suggests he was somehow prejudiced by Westfield receiving a setoff for the amount of his worker's compensation benefits. But this assertion is difficult to square with the fact that Brand received $450,000 from Westfield's primary UIM policy. Despite having a substantial setoff, Westfield paid an even larger amount of UIM coverage to Brand. Thus, Brand received a significant sum of UIM coverage, and any claimed "coverage gap" was illusory.

The second reason Brand's argument fails, which is related to the first, is Brand's focus on the concept of UIM "coverage" rather than on compensation for his damages. As previously discussed, the acknowledged purpose of UIM coverage is to provide some protection for insureds against being undercompensated for their damages. Brand's situation must be viewed with this goal in mind. Although Westfield was entitled to and allegedly received a setoff for the amount of the worker's compensation benefits, that did not cause Brand to be undercompensated. To make such a claim is to ignore the fact that worker's compensation is, as its name indicates, a form of compensation for an injured party. Westfield did not receive a setoff for no good reason. It received the alleged setoff because Brand had already recovered $354,750.75 in damages. Granted, as Brand has argued, worker's compensation does not include all the same elements of damages as a tort claim, but there is a significant amount of overlap between the two forms of recovery. This is precisely why the setoff exists – to prevent a double recovery for an insured.

Here, Brand is absolutely seeking to obtain a double recovery through Allstate's UIM coverage. He has already received a total of $829,750.75 as agreed upon compensation for his damages (the total amount of which, or even the basis for which, does not appear in the record).[9] As a result, Brand cannot credibly argue that he was uncompensated for any amount between the liability coverage and Westfield's post-setoff UIM coverage. The money that filled in that "coverage gap" might have been worker's

[9] Brand is incorrect when he refers to Allstate's UIM coverage as "meaningless" under the trial court's order. That coverage is still available to compensate Brand if he obtains a verdict in excess of the coverages he has already received (or could have received). If Allstate's UIM coverage could be seen as "meaningless," it would only be because Brand has already recovered such a substantial amount of money for his claimed damages.

compensation benefits, but it was money nonetheless. If nothing else, those benefits compensated Brand for his lost wages and medical bills. The large settlement from Westfield then compensated him for any other damages. Yet, Brand now seeks to have Allstate pay him for those other damages a second time. This is undeniably a demand for a double recovery, which violates South Carolina public policy.

It is important to recall that Brand, through his "coverage gap" argument, seeks a judgment requiring Allstate to pay its UIM policy limits now – i.e. before obtaining any kind of excess verdict in the underlying tort case. This request is what constitutes a demand for a double recovery. The same concerns do not apply under the trial court's order, which requires Brand to get a verdict in excess of $1,025,000 before reaching Allstate's coverage. If Brand were to achieve that result, he would not be getting a double recovery because his damages would exceed the amounts of the underlying coverages and benefits. In that event, Brand would be entitled to recover under Allstate's UIM policy. Unless and until an excess verdict happens, however, Brand is only asking Allstate to compensate him a second time for damages that other coverages have already satisfied.

The third problem with Brand's position stems from the actual language of Allstate's UIM policy. As relevant to this issue, the policy states:

> If the insured person was in, or 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.

[R. pp. 69-70 (emphasis added).] This passage plainly demonstrates that Allstate's UIM coverage is excess to any UIM coverage on the vehicle involved in the accident.[10] It further shows that Allstate is not obligated to pay any UIM coverage unless and until Brand is "legally entitled to recover damages in excess of the other policy limit." Obviously that condition has not yet occurred in the present case. Thus, in light of this plainly worded policy language, Brand's "coverage gap" theory is incorrect. It is not any sort of setoff for the primary UIM coverage that triggers Allstate's excess UIM coverage. Only a judgment in excess of the primary UIM limits can do that. The policy is unambiguous on that point, and the trial court correctly enforced the applicable provision.

At a minimum, this policy language entitles Allstate to receive credit for Westfield's UIM limits. Even if Allstate's "reduction in damages recoverable" provision were not enforced, the language quoted above would still prevent any recovery of Allstate's UIM coverage unless Brand had a judgment in excess of the primary UIM limits. The trial court determined Westfield's UIM limits (after the worker's compensation setoff) to be $645, 249.25. Brand only recovered $450,000 of that amount through his settlement with Westfield, but Allstate gets credit for the full coverage amount. *See Cobb v. Benjamin, supra.* Allstate also receives credit for the at-fault driver's full liability limits of $25,000. This means Allstate is entitled to a credit of $670,249.25 even if the policy did not have a damages reduction provision. Therefore, even if the Court were to reverse as to that provision, there would still be a threshold verdict amount Brand would have to reach in order to recover from Allstate's policy.

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[10] Nothing in the record suggests that either Westfield or Brand disputed Westfield's status as the primary UIM carrier during the process that led to the $450,000 settlement.

Yet, this lower threshold amount is not the correct result in this case. Allstate's policy does contain the "reduction in damages recoverable" provision, and as previously discussed, that provision comports with South Carolina law and public policy. Thus, a reduction based on the worker's compensation benefits is both proper and mandatory under the plainly worded language of Allstate's policy. For this reason, the trial court correctly held that the true threshold amount for purposes of Allstate's UIM coverage is $1,025,000.

CONCLUSION

The trial court's decision applies the unambiguous terms of Allstate's policy. The result does not violate any South Carolina statute or public policy, and it prevents Brand from receiving a windfall through a double recovery. Therefore, the trial court's order is correct in all respects, and this Court should affirm the result below.

Respectfully submitted,

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RULE 211(b) CERTIFICATION

The undersigned, an attorney for the Respondent, certifies that this Final Respondent's Brief complies with the requirements of Rule 211(b), SCACR.

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