THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM WILLIAMSBURG COUNTY
Honorable George C. James, Jr., Circuit Court Judge

Appellate Case No. 2016-002050

Larry Brand.....Appellant,

v.

Allstate Insurance Company .....Respondent.

Unpublished Opinion No. 2018-UP-050
Submitted November 1, 2017 – Filed January 31, 2018

PETITION FOR REHEARING

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TABLE OF AUTHORITIES
IN SUPPORT OF PETITION OF REHEARING

Cases

Statutes

Appellant, Larry Brand, respectfully requests the Court rehear the above matter. Appellant believes that the Court misapprehended certain elements of the Appellant's argument as follows:

I. SOUTH CAROLINA LAW POST-*SWEETSER* PROHIBITS INSURANCE CARRIERS FROM OFFSETTING EMPLOYEE-PURCHASED UNDERINSURED MOTORIST COVERAGE WITH WORKER'S COMPENSATION BENEFITS PAID.

Brand argues that the trial court had erred 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.

In addressing this issue, the Court cites S.C. Code Ann. §38-77-160 (2015); *Broome v. Watts*, 319 S.C. 337, 461 S.E.2d 46, 48 (1995) ("The very definition of UIM insurance mandates a [setoff]."); and *State Farm Mut. Auto. Ins. Co. v. Calcutt*, 340 S.C. 231, 236, 530 S.E.2d 896, 898 (Ct. App. 2000) ("[A] setoff provision in a voluntary UIM policy would be equally enforceable whether purchased by an employer or an employee."), ***overruled on other grounds by Sweetser v. S.C. Dep't of Ins. Reserve Fund***, 390 S.C. 632, 702 S.E.2d 509 (2010), emphasis added.

The "overruled on other grounds by *Sweetser*" language above is confusing, as Brand believes the grounds for overruling the *Calcutt* finding cited by the *Sweetser* court is precisely the issue presented in this case.

Brand's argument is based on not only S.C. Code §38-77-160, but also on S.C. Code §38-77-220, specifically the current state of South Carolina law post-*Sweetser* in regards to the ability of an insurance carrier to claim an offset for worker's compensation benefits paid on an employee-purchased underinsured motorist coverage. Brand specifically laid out the history of South Carolina case law related to this issue beginning

with *Ferguson v. State Farm Mut. Auto Ins. Co.*, 261 S.C. 96, 198 S.E.2d 522 (1973) (offset not allowed for employee-purchased UM policies); through *Williamson v. United States Fire Ins. Co.*, 314 S.C. 215, 442 S.E.2d 587 (1994) (offset allowed for employer-purchased UIM policies); and *State Farm Mutual Automobile Insurance Company v. Calcutt*, 340 S.C. 231, 530 S.E.2d. 896 (Ct. App. 2000) (offset allowed for employee-purchased UIM policies); to *Sweetser.*

Brand argues that *Sweetser* 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. This finding came as the *Sweetser* court was specifically discussing S.C. Code §38-77-220 and how it "applies only to employers who are purchasing automobile policies." Sweetser at 636, 511. It is at that point, that the *Sweetser* Court inserts a footnote into their decision which reads:

> To the extent *State Farm Mut. Auto. Ins. Co. 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, 512)

The applicability of S.C. Code §38-77-220 is at the heart of this case and was at the heart of the *Sweetser* court's decision to overruling *Calcutt*. As Brand argues, if this is not the correct interpretation of *Sweetser*, S.C. Code §38-77-220 would be 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).

Thus, if left unaltered, this Court's ruling would result in ruling that leaves S.C. Code §38-77-220 meaningless.

II. REGARDLESS OF THE CLEAR AND UNAMBIGUOUS LANGUAGE OF ALLSTATE'S INSURANCE CONTRACT, TO THE EXTENT THEIR POLICY PROVISIONS CONFLICT WITH SOUTH CAROLINA LAW, SOUTH CAROLINA LAW PREVAILS.

Brand argued two additional issues: whether Allstate's underinsured motorist coverage could be considered secondary under South Carolina law and, assuming arguendo, when Allstate's underinsured motorist coverage would be triggered.

In addressing these issues, the Court cites *Williams v. Gov't Emps. Ins. Co.*, 409 S.C. 586, 594, 762 S.E.2d 705, 709 (2014) ("An insurance policy is a contract between the insured and the insurance company, and the policy's terms are to be construed according to the law of contracts."); *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009) ("Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect."); *Cobb v. Benjamin*, 325 S.C. 573, 587-89, 482 S.E.2d 589, 596-97 (Ct. App. 1997) (holding a UIM carrier was entitled to credit for the full amount of primary liability coverage before the UIM coverage became

payable, even when the plaintiff settled with the primary liability carrier for less than the policy limit); *Collins Music Co. v. Smith*, 332 S.C. 145, 147, 503 S.E.2d 481, 482 (Ct. App. 1998) ("It is well settled in this state that there can be no double recovery for a single wrong and plaintiff may recover his actual damages only once.'" (quoting *Taylor v. Hoppin' Johns, Inc.*, 304 S.C. 471, 475, 405 S.E.2d 410, 412 (Ct. App. 1991)).

Brand argues these findings result in Allstate being allowed to provide "underinsured" motorist coverage limitations that conflict with South Carolina's statutory requirements for underinsured motorist coverage. In order for a carrier to comply with South Carolina law, the carrier must offer underinsured motorist coverage that provides 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. South Carolina law further imposes restrictions on underinsured motorist coverage, such as the amount of coverage that must be offered, limits on stacking (both through S.C. Code §38-77-160) and the ability to offset benefits paid by worker's compensation (through S.C. Code §38-77-220). Through statutory scheme, South Carolina has defined the underinsured motorist coverage which must be provided to South Carolinians.

Therefore any policy provision of Allstate's that allows them to write coverage/limitations different than that prescribed by South Carolina law would be invalid. In this case, Allstate's policy provision that claims an offset for worker's compensation benefits paid on a policy that was not purchased by an employer conflicts with South Carolina law. Likewise, any policy provision that allows Allstate to claim they are the secondary underinsured carrier, when South Carolina law allows another carrier to exclude coverage for an element of damages "in excess of the liability limits carried by an at-fault insured" would similarly conflict with South Carolina law.

Allstate's policy acknowledges, their coverage is intended to be in full compliance with South Carolina law and any provision conflicting with that law is amended or eliminated to comply with the law. (R. pp. 155).

The trial court's rulings allow insurance carriers to offer something less than the underinsured motorist coverage defined by South Carolina law in that it allows non-employers to enjoy the benefits South Carolina law strictly limits to employer-purchased underinsured motorist coverage. To allow Allstate's coverage to not trigger until the full amount of both the liability coverage and the employer-purchased underinsured motorist coverage is exhausted would be to allow Allstate the benefit of S.C. Code §38-77-220, which South Carolina courts have specifically interpreted is strictly limited to employers, which Allstate is not.

When read in conjunction with South Carolina law, Allstate's policy language is not "clear and unambiguous." Specifically, by South Carolina law, there is no other underinsured motorist coverage for loss suffered from $25,000.01 through $354,750.75. Allstate's policy reads:

> 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. (R. pp. 154-155).

This policy provision conflicts with South Carolina law, as it allows an employee-purchased policy to enjoy the benefit of a worker's compensation offset reserved solely for employer-purchased underinsured motorist coverage. S.C. Code §38-77-220 and Sweetser at 636, 511. Statutory provisions relating to an insurance contract are part of the contract as a matter of law. To the extent a policy provision conflicts with an applicable

statutory provision, the statute prevails. Kay v. State Farm Mut. Auto. Ins. Co., 349 S.C. 446, 450, 562 S.E.2d 676, 678 (Ct. App. 2002).

If left unaltered, this Court's ruling would allow an insurance carrier's policy language to trump South Carolina law.

CONCLUSION

Based on the argument above, Brand respectfully requests that the Court grant this petition for rehearing.

Respectfully submitted,

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February 13, 2018

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CERTIFICATE OF SERVICE

The undersigned, Kathleen Sue Cox, of the Wukela Law Firm, hereby certifies that on the 13th th day of February, 2018 she did serve copies of Appellant's Petition for Rehearing on the Respondents counsel, along with a Certificate of Service with first class postage prepaid, regarding Re: Larry Brand vs. Allstate Insurance Company, Civil Action No. 2014-CP-45-644, Appellate Case No. 2016-002050. Said envelopes being addressed to the following person(s):

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February 13, 2018

HAND DELIVERY

The Honorable Jenny Abbott Kitchings
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Re: Larry Brand vs. Allstate Insurance Company
Civil Action No. 2014-CP-45-644
Appellate Case No. 2016-002050

Dear Ms. Kitchings:

Please find enclosed herewith for filing with the Court the following:

1. Original and six (6) copies of Petition for Rehearing;
2. Proof of Service of the Petition for Rehearing on the Respondent's counsel John S. Wilkerson and R. Hawthorne Barrett; and
3. A filing fee of Twenty-Five ($25.00) Dollars.

Your assistance in this matter is kindly appreciated.

Yours truly,

WUKELA LAW FIRM

PATRICK J. MCLAUGHLIN
S.C. Bar No. 73675

PJM:ksc
Enclosures
cc:
John S. Wilkerson
R. Hawthorne Barrett