THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Op. No. 5524 (S.C. Ct. App. Filed Nov. 22, 2017)

Wadette Cothran and Chris Cothran,..... .....Petitioners,

v.

State Farm Mutual Automobile Insurance Company
and Robert Tucker, of whom State Farm Mutual Automobile
Insurance Company is the .....Respondent.

PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

This case presents three novel issues. The first is whether the Personal Injury Protection ("PIP") coverage statute, S.C. Code Ann. § 38-77-144, precludes a PIP carrier from receiving a set off for workers' compensation benefits when the statute states that the PIP coverage is "not subject to a set off." The second is whether this Court's decision in *State Farm Mut. Auto. Ins. Co. v. Richardson*, 313 S.C. 58, 437 S.E. 2d 43 (1993), which addressed stacking of PIP coverage, applies so as to allow a set off of PIP benefits in spite of the language in the PIP statute. The third issue is whether public policy forbids interpreting the PIP statute to allow a set off of PIP benefits for workers' compensation benefits that have been received. The Court of Appeals erred in reversing the trial court because the Court of Appeals failed to acknowledge that the PIP statute forbids a set off, because the Court misread *Richardson*, and because the Court misapprehends the public policy at issue. If the decision of the Court of Appeals stands, South Carolina residents who purchase PIP coverage will have purchased a coverage that is virtually meaningless.

CERTIFICATE OF COUNSEL

The Court of Appeals issued its decision on November 22, 2017. *See* (App. p. 211). Counsel for the Petitioner certifies that the Petition for Rehearing was made on December 5, 2017, *see* (App. p. 223), and denied on January 18, 2018. *See* (App. p. 227).

QUESTIONS PRESENTED

1. Did the Court of Appeals err in interpreting *Richardson* so as to allow a set off in spite of the statutory statement that PIP coverage "is not subject to a set off"?

2. Did the Court of Appeals err in concluding that public policy did not prevent interpreting the PIP statute so as to allow State Farm's PIP set off provision?

STATEMENT OF THE CASE

The facts of the case were stipulated and are as follows:

1. Wadette Cothran was injured in a motor vehicle accident on or about January 19, 2015.

2. Ms. Cothran's injuries have required medical treatment costing in excess of $5,000.00.

3. As of the date of this stipulation, the cost of Ms. Cothran's medical expenses have been paid in full by her workers' compensation carrier.

4. Ms. Cothran was insured by State Farm policy 35 6718 C23-40D (the "Policy") at the time of this accident.

5. The Policy provides personal injury protection ("PIP") coverage with limits of $5,000.00. A certified copy of the Policy is attached to this stipulation as **Exhibit A** and is by stipulation of the parties, admissible into evidence.

6. State Farm has paid $991.00 of the PIP coverage to Cothran for a portion of her lost wages.

7. State Farm has denied payment of the remaining $4,009.00 of available PIP coverage, because of a Policy provision stating its PIP coverage is excess over any benefits recovered under any workers' compensation law.

8. The plaintiff contends this provision violates South Carolina Code section 38-77 144.

9. If the provision violates section 38-77-14[4], then Cothran is entitled to the remaining $400.009 of PIP coverage. If the provision does not violate section 38-77-14[4], then Cothran is not entitled to the remaining $4,009.00 of PIP coverage.

(App. pp. 26-27).

The Circuit Court issued its Order on November 17, 2015 granting Petitioner Cothran's Motion for Summary Judgment and denying State Farm's Motion for Summary Judgment. (App. p. 3). On December 2, 2015, State Farm filed its Motion for Reconsideration, which the Circuit denied on January 21, 2016 (App. p. 17). State Farm thereafter filed its notice of appeal, and the Court of Appeals issued its Decision reversing the Circuit Court on November 22, 2017. (App. p. 211). Petitioner filed her Petition for Rehearing December 5, 2017 (App. p. 223), and it was denied on January 18, 2018. (App. p. 227).

ARGUMENT

State Farm insures Wadette Cothran for PIP benefits that it will not owe to her if its policy provision purporting to make those benefits excess to workers' compensation benefits received by Ms. Cothran is enforceable. State Farm alleges that it is not required to pay its benefits because it has a policy provision that states, "Any Personal Injury Protection Coverage provided by this policy applies as excess over any benefits recovered under any workers' compensation law or any other similar law." (App. p. 42). The PIP statute, South Carolina Code Section 38-77-144, states in its entirety:

> There is no personal injury protection (PIP) coverage mandated under the automobile insurance laws of this State. Any reference to personal injury protection in Title 38 or 56 or elsewhere is deleted. If an insurer sells no-fault insurance coverage which provides personal injury protection, medical payment coverage, or economic loss coverage, the coverage shall not be assigned or subrogated and is not subject to a set off.

I. The Court of Appeals Erred in Finding that Case Law Abrogated the Plain Meaning of Section 38-77-144.

A. *Richardson* is Inapplicable.

In *Richardson*, the insured sought to recover the PIP limits of more than one PIP policy she had with State Farm. State Farm alleged she was not entitled to stack her coverages, and State Farm *denied that the issue of a set off was before the Court*. Instead, in *Richardson*, State Farm "contend[ed] that its policy comprise[d] an anti-stacking clause *rather than a set-off*." *Id.* at 60, 44. (Emphasis Added). The policy provision at issue in *Richardson* was not the set off, or "excess," provision at issue in the case at bar but one stating that "the total limits of liability under all such policies shall not exceed that of the policy with the highest limit of liability." *Id.* at 58, 44. Hence, the issue before the Court was not under what circumstances a PIP carrier had an obligation to pay benefits but merely how much PIP coverage was available when an insured had multiple PIP policies.

The *Richardson* Court reaffirmed longstanding South Carolina precedent when it held that a carrier "may prohibit the ***stacking*** of non-mandatory coverage." *Richardson* at 61, 45 (Emphasis added). Because the PIP statute prohibits subrogation, assignment, and set off but does not prohibit a restriction of stacking, *Richardson* correctly held that the carrier could prohibit stacking of PIP policies. See, eg., *Ruppe v. Auto. Owners Ins. Co.*, 329 S.C. 402, 406, 496 S.E. 2d 631, 633 (1998) (holding coverage that is "not statutorily required" may lawfully be precluded from stacking by the terms of an insurance policy because parties are free to choose the terms of coverage that is "not governed by statue," and "[t]he guiding principle to be gleaned from our current stacking law is that stacking may be prohibited by contract if such a prohibition is consistent with statutory insurance requirements.") (Internal Citations and Quotations Omitted).

To extrapolate from *Richardson*'s limited holding related to the single issue before it—stacking of non-mandatory coverage—to the broad theory that a PIP carrier can allege a setoff for

anything it can imagine is beyond the scope of the *Richardson* opinion. Such a holding also is not substantiated by other precedent.

B. The Court Erred In Holding that Other Cases Support its Interpretation of *Richardson*.

The Court of Appeals held the State Farm provision was enforceable because "section 38-77-144 applies only to prevent tortfeasors from reducing their liability by the amount of PIP benefits." (App. p. 215). According to the Court of Appeals, although the policy provision at issue is a set off, the statutory statement "not subject to set off" applies in only a single circumstance—it *only* prohibits a tortfeasor from alleging a setoff after PIP benefits have been paid. That is, the Court of Appeals interprets "not subject to a set off" to mean two things. First, any entity other than a tortfeasor may, under any circumstance, allege a set off against PIP benefits a PIP insured has received. Second, and more significantly, a PIP carrier may allege a set off *under any circumstance without limitation*. This interpretation of *Richardson* is based on post-*Richardson* cases that cite *Richardson*.

The Court of Appeals supports its aforementioned conclusion in stating that, "although *Richardson* involved an anti-stacking provision, its holding was not limited or restricted only to stacking related provisions." (App. p. 227). The Court's holding that the PIP statute prevents only a reduction of tortfeasor liability requires the unstated holding that the State Farm provision at issue does, in fact, constitute a set off; *i.e.*, it is only because *Richardson* contains the term "set off" that the Court of Appeals found that it was applicable to the instant case. The court's tacit holding that the policy provision at issue is, in fact, a set off is demonstrated by the primary case upon which its interpretation of *Richardson* rests: *Rowzie v. Allstate Ins. Co.*, 556 F.3d 165 (4th Cir. 2009). In *Rowzie*, the insured's carrier paid its PIP policy limits. Subsequently, the carrier

alleged it was entitled to reduce its underinsured motorist ("UIM") payment to the extent that it had previously made PIP payments.

The Court's reliance of *Rowzie*'s interpretation of *Richardson* is misplaced for at least three reasons. First, *Rowzie* is not controlling authority and therefore has no precedental value. Second, in *Rowzie*, the carrier *had already paid its PIP limits*, and the *Rowzie* Court permitted set off under the carrier's UIM provision. By tacitly affirming the holding that UIM set off is permissible (per *Rowzie*) and also holding that PIP set off is also permissible, the Court of Appeals' decision allows State Farm a "double reduction." That is, State Farm may assign a UIM claims adjuster who will allege a UIM setoff based on the existence of State Farm PIP, and it may simultaneously assign a PIP claims adjuster to allege a set off based on the existence of UIM—and thereby deny payment under both the UIM and PIP policies.

Third, the primary case upon which *Rowzie* relied for its reasoning has been overruled. *Rowzie*'s reasoning regarding the permissibility of an insurance carrier to contractually limit the payments it makes was based on what it deemed the non-mandatory nature of the coverage at issue. The *Rowzie* Court's holding that a UIM carrier could allege a set off against PIP benefits it had previously paid "[b]ecause [underinsured motorist] coverage is not mandatory" was predicated upon *State Farm Mut. Auto. Ins. Co. v. Calcutt*, 340 S.C. 231, 530 S.E.2d 896 (2000). Although *Calcutt* did hold that a set off of any non-mandatory coverage was permissible, this holding from *Calcutt* was expressly overturned by this Court in *Sweetser v. S.C. Dept. of Ins. Reserve Fund*, 390 S.C. 632, 703 S.E.2d 509, FN 4 (2010). *Sweetser* determined that the reference to "voluntary coverage is not to UIM coverage, but rather to the employer's voluntary decision to purchase bodily injury coverage" and held that the dispositive issue regarding whether a UIM carrier could claim a set off was whether the employer purchased the coverage (in which case it could allege a set off) or the

employee purchased the coverage (in which case the UIM carrier could not allege a set off). Sweetser at 635, 510.

It is significant to note that *Rowzie* dealt with a single insurance carrier limiting its payments based exclusively upon the terms of a single contract of insurance with a single insured. That is, the insurer and insured agreed to cap Allstate's maximum exposure within the terms of the contract between Allstate and its insured. The insured could review the policy and, arguably, know the maximum benefit she could receive under the terms of the policy. The policy did not allow Allstate to simply deny coverage pending some third party's payment. The only question in *Rowzie* was which "pocket" (i.e., UIM or PIP) the payment made to the insured came from.

The case at bar is materially different. Here, State Farm alleges it can withhold payment altogether based on the potential liability of an entity that is not a party to State Farm's insurance contract. Accordingly, the Court of Appeals' holding in this case does not follow *Rowzie*; it reverses the procedure employed in *Rowzie*. In *Rowzie*, the PIP "pocket" of Allstate had already paid its limits, the UIM "pocket" of Allstate alleged the set off, and the Fourth Circuit analyzed the case as though the insured was attempting to recover more compensation after recovering the full amount of the damages.

In the case at bar, the PIP carrier alleges a set off based on workers' compensation payments—a source wholly independent of the State Farm-Cothran contractual relationship. To follow the holding of *Rowzie*, it would be the workers' compensation carrier, not the PIP carrier, that would allege a set off; in fact, nothing in the Court of Appeals' holding would prevent the workers' compensation carrier, in addition, to the PIP carrier, from alleging a set off—as it is not the "tortfeasor."

In addition to *Rowzie*, the Court of Appeals noted that *Mount v. Sea Pines,* 337 S.C. 355, 359, 523 S.E. 2d 464, 465 (Ct. App. 1999) was "instructive" for the case at bar to the extent that it stood for the proposition that the "application" of *Richardson* outside of a stacking context was possible. In *Mount*, the plaintiff was injured and collected from the insurer of "property owned by Sea Pines [. . .]" *Id.* at 356,464. The issue in the case was whether the collateral source rule prevented the tortfeasor from alleging a set off for benefits that its own no-fault insurance carrier had paid. Significantly, the insurance at issue was for "property." It was *not* automobile insurance—and hence the statute at issue in the case at bar was entirely inapplicable. The plaintiff did not allege that *Richardson* or the automobile PIP statute applied, she merely "compare[d] her situation to that of a passenger injured in an automobile driven by its owner" as persuasive evidence that the collateral source rule should apply. *Id.* at 357, 465. The court noted that the anti-set off provision "only applied to automobile insurance." *Id.* at 358, 465. As an aside, the court noted that the rationale for the PIP statute and *Richardson* was that the statute "prevented the tortfeasor from profiting in the case where the injured party received PIP benefits." Accordingly, *Mount* cited *Richardson* for the proposition that one policy rationale behind the Legislature's reform of South Carolina PIP law was to prevent a tortfeasor from receiving a windfall because of the existence of PIP coverage.

Overlooked by the court, and more significant, in *Mount*, the injured party had already "received benefits" from the PIP policy. It was the liability carrier (i.e., the "tortfeasor," in the language of *Richardson)* that was receiving the set off. *Mount* did not allow the PIP carrier to allege a set off. *Mount* presupposes that, under any circumstance, the injured party would have already "received benefits" from the PIP carrier, and it would be a third party to the PIP Insurer—PIP Insured relationship that would allege a set off based on the prior PIP payment that had been

made. In short, because the PIP statute applies only to automobile policies, the "tortfeasor setoff" still exists for policies insuring property, and the set off has always been alleged because the PIP carrier has made a payment—not by the PIP carrier because another entity may have a responsibility to make a payment. In sum, it is because a PIP carrier has made a payment that a set off exists. Under South Carolina law, it has never been the PIP carrier that has alleged the set off.

C. The Court of Appeals Erred in Rejecting Petitioner's Concern that State Farm's Interpretation of the PIP statute Would Lead To An Absurd Result.

Petitioner argued State Farm's interpretation of the PIP statute would lead to an absurd result because it would allow a PIP carrier to allege a set off for any payment made by any source—from an automobile liability carrier to the insured's Aunt Ethel and Uncle Fred. The Court of Appeals believed this concern was "overstated." However, the court does not note any specific instance in which *any* exclusion or set off in a PIP policy would be invalid, merely noting that "if a policy contained a PIP exclusion so broad as to render PIP benefits unobtainable, virtually meaningless, or illusory, an insured would be able to dispute the exclusion without having to rely on section 38-77-144." (App. p. 219).

The Court of Appeals further found that the excess provision in Cothran's State Farm policy is valid and that it does not, therefore, violate the principle to which a PIP insured can appeal for redress of "illusory" PIP coverage. Accordingly, in applying the court's holding, any provision in any PIP policy that states that PIP coverage "applies as excess over any benefits recovered under any workers' compensation law or any similar law" is valid. Because "any similar law" is not defined in Cothran's State Farm policy, any policy that contains this undefined provision must also be valid. Under South Carolina workers' compensation law, workers' compensation "benefits"

fall into two broad categories. First, the claimant is entitled to monetary benefits that consist of "temporary total disability benefits [. . .] from the date of injury through the date of maximum medical improvement ('MMI') and post-MMI benefits may be awarded either as a permanent total or partial disability, or as a percentage of impairment to a scheduled member." *Smith v. NCCI, Inc.* 369 S.C. 236, 255, 631 S.E.2d 268, 278 (Ct. App. 2006) (Internal citations and quotations omitted). Second, the claimant receives "medical benefits" for up to ten weeks—or longer if such additional care would "tend to lessen the period of disability." *Id.* (Internal citations and quotations omitted).

Because what is "similar" to workers' compensation benefits is not defined in the State Farm policy, it is proper to look to the ordinary definition of "similar." Merriam-Webster defines "similar" as "having characteristics in common." "*Similar*." Merriam-Webster. 2018. https://www.merriam-webster.com/dictionary/similar. (last visited Feb 5, 2018). Accordingly, under any policy with the language of Cothran's State Farm policy, which the Court of Appeals found lawful, State Farm can allege that any "benefits" that fall under any law "similar" to workers' compensation benefits are subject to its set off. As a further result, any "benefits" (not merely insurance) that provide 1) money for an automobile-related injury, or any "benefits" that provide 2) medical care for an automobile-related injury would likely fall under any standard definition of "similar" under the State Farm policy. Consequently, State Farm may lawfully allege a PIP set off for any money Cothran received from any source—health insurance (which is similar because it pays for medical care), disability insurance (which is similar because it pays for lost wages), or even her aunt and uncle who broke their piggy bank to help her pay lost wages or medical bills (who could theoretically pay for any kind of benefits).

There is nothing in the Court of Appeals' decision that would prevent State Farm from considering South Carolina automobile liability insurance law "similar" to workers' compensation

law, as it requires payment for medical care and lost wages. Therefore, State Farm can allege that it is entitled to a set off for any PIP insured who may be able to make a claim for automobile liability limits from a driver who has liability insurance. For that matter, South Carolina uninsured motorist coverage requires coverage "to pay the insured all sums which he is legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle." S.C. Code. Ann. Section 38-77-150. Therefore, since uninsured coverage requires payment for the same damages as South Carolina liability law, State Farm can allege a set off for any uninsured motorist coverage its insured receives from any uninsured motorist carrier. Because the Financial Responsibility Act requires uninsured motorist coverage be provided for any automobile policy sold, any PIP insured who is not at fault for an accident will be eligible to collect either liability or uninsured motorist coverage—and therefore the PIP carrier will always be able to allege a set off to avoid payment when its insured is not at fault for an automobile accident. In sum, there is simply nothing in the State Farm policy or the Court of Appeals' ratification of it that would prevent the PIP carrier from alleging any set off fell under any definition of "similar" it wished to employ in response to any claim made.

Further, neither the State Farm policy nor the Court of Appeals' decision would impose any restriction on how long a PIP carrier could wait to determine whether funds were "recovered." Presumably, if a claimant had instituted a lawsuit based on denied liability for automobile liability funds, State Farm would have the right to withhold payment pending the claimant's jury trial's final determination of whether she was entitled to an award of liability money—likely requiring her to wait until after the running of the statute of limitations against her PIP carrier before she made a claim.

Nevertheless, it is not necessary to look to what "similar" signifies in the Policy. The most illustrative consequence of the Court of Appeals' ruling is the application of its interpretation of the "workers' compensation" prong of this set off, or "excess" provision. Nothing in the Court of Appeals' opinion would require State Farm to have paid the lost wages that it has already paid to Wadette Cothran in this case. Under the "workers' compensation" prong of the provision at issue, it is stipulated that Wadette Cothran's medical bills exceed $5,000.00. Because payments for medical care constitute workers' compensation "benefits" under South Carolina law, State Farm has the right to allege that Cothran has already received workers' compensation benefits in excess of the policy limits of the PIP policy. If Cothran's workers' compensation carrier paid for her initial emergency room visit, but later denied her claim, for example, on the basis that she was an independent contractor instead of an employee, she could be entirely without a way to pay for medical care or lost wages. Nevertheless, if the amount of that initial emergency room payment exceeded $5,000.00; State Farm could invoke its workers' compensation "excess" provision to wholly deny her any of the coverage she has purchased.

To put the case bluntly, based on the Court of Appeals' holding, State Farm was in error for paying the $991.00 it admitted it owed Cothran prior to the Court of Appeals' opinion. At best, the fact that State Farm paid her $991.00 for lost wages is merely largesse. At worst, because the medical benefits she received under workers' compensation exceeded the coverage available under her PIP coverage, based on the Court of Appeals' reasoning, State Farm has the right to now sue Cothran to recoup the $991.00 in benefits she wrongfully received.

Finally, the Court of Appeals does not address how the insured could invoke the claim that her coverage was "illusory." Because it affirmed the language in State Farm's policy, any policy with identical language must be valid. The language in State Farm's policy would allow it to avoid

PIP liability under virtually any circumstance unless there was literally no source other than PIP that provided for any medical care or money.

II. The Court of Appeals Erred in Holding that Public Policy Did Not Forbid The Set Off.

Public policy requires giving the PIP statute its plain meaning. The strongest argument in favor of public policy is that which the Court of Appeals cites in holding against the public policy argument; namely, that "South Carolina does not require any PIP coverage under its automobile insurance law and has no public policy regarding such coverage." (quoted from *Smith v. Liberty Mut. Ins. Co.*, 313 S.C. 236, 239, 437 S.E.2d 142,144 [1993]). It is because no public policy for PIP coverage exists that the policy argument in favor of workers' compensation law is compelling.

The Workers' Compensation Act allows a workers' compensation carrier to seek subrogation in proportion to the extent to which the injured person has been made whole by the recovery she has made from other sources. S.C. Code Ann. § 41-1-560. To the extent a claimant recovers money from other sources, the workers' compensation carrier is entitled to assert a greater subrogation interest in the tort recovery the injured person receives from the tortfeasor. Among the "policy issues surrounding subrogation in a workers' compensation setting" is "the employer and carrier coming out even by being reimbursed for their compensation expenditure." *Breeden v. TCW, Inc./Tennessee Exp.*, 355 S.C. 112, 118, 584 S.E. 2d 379, 382 (2003). In short, the greater the recovery to the injured party is, including PIP recovery, the more likely it is for the workers' compensation carrier to assert a greater subrogation interest so as to "come out even."

There is no similar subrogation statute that applies to PIP coverage. The PIP statute describes PIP benefits as being no-fault coverage insuring for personal injury, medical payments, or economic loss and that "the coverage shall not be assigned or subrogated and is not subject to a set off." There is no reason to give a PIP provider a full set off in the absence of an

enabling statute when the workers' compensation carrier has such an enabling statute and gets only a proportional set off.

In the end, the decision of the Court of Appeals renders PIP coverage virtually useless unless the insured caused the accident (meaning there is no tortfeasor from whom to recover) because an insurance company can use any funds the plaintiff recovers from any source to reduce the PIP benefits payable—regardless of whether the other funds are sufficient to make the insured whole. In addition, PIP coverage would be useless even when the insured is at fault if she could recover workers' compensation benefits for her injuries. In the event of a work-related car accident for which the insured was at fault, it is particularly significant that both workers' compensation and PIP coverage are "no-fault" schemes whose interplay inherently limits overcompensating the injured claimant. The purpose of workers' compensation benefits is merely "to keep him from destitution [. . .] [It] is not designed to compensate the employee for his injury, but merely to provide him with the bare minimum of income and medical care to keep him from being a burden to others." *Wigfall v. Tideland Utilities*, 354 S.C. 100, 116, 580 S.E.2d 100, 116, 108 (2003) (Internal Citations Omitted). Because the amount of most PIP policies is minimal (such as the $5,000 at issue here), even if the full PIP limits were paid to the average PIP insured, she still would not begin to be made whole by receiving such a payment in conjunction with workers' compensation benefits. Under the Court of Appeals's decision, the PIP carrier has no obligation to make any payment once the workers' compensation carrier has expended funds up to the PIP limits, which means that the person who purchased PIP coverage to assist in paying his bills in the event he had to subsist on the "bare minimum" workers' compensation provides will not be able to supplement that income with the PIP benefits for which he pays premiums. The decision of the Court of Appeals has rendered PIP coverage in South Carolina a virtually meaningless payor of last resort.

CONCLUSION

For the foregoing reasons, this Court should grant this petition for a writ of certiorari and reverse the decision of the Court of Appeals.

Respectfully Submitted,

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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PROOF OF SERVICE

I do hereby certify, on this 15th day of February, 2018, that a copy of the foregoing Petition for A Writ of Certiorari, Appendix and Proof of Service were served by depositing a copy of the same in the United States Mail, first-class, postage prepaid, addressed to: Charles R. Norris and Robert W. Whelen at Nelson Mullins Riley & Scarborough LLP, PO Box 1806, Charleston, SC 29402-1806.

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FEB 20 2018
S.C. SUPREME COURT