

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

S.C. SUPREME COURT

L. Casey Manning, Circuit Court Judge

Appellate Case No. 2016-000177
(Opinion No. 5524, Filed November 22, 2017)

Wadette Cothran and Chris Cothran, ... Petitioner,

v.

State Farm Mutual Automobile Insurance Company and
Robert Tucker, Defendants,

Of which State Farm Mutual Automobile Insurance
Company is the Respondent.

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 2015-CP-42-1578
Appellate Case No. 2016-000177

WADETTE COTHRAN and CHRIS COTHRAN,..... Respondents,

v.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY and ROBERT TUCKER,
Defendants,

Of which State Farm Mutual Automobile Insurance
Company is the Appellant.

RECORD ON APPEAL

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**RECORD ON APPEAL
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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	C/A No.: 2015-CP-42-1578
	)	
Wadette Cothran and	)	
Chris Cothran,	)	
	)	
Plaintiff,	)	
	)	
v.	)	ORDER
	)	
State Farm Mutual Automobile	)	
Insurance Company and	)	
Robert Tucker,	)	
	)	
Defendants.	)	

I. INTRODUCTION

This matter comes before the Court upon the Parties' cross-motions for summary judgment. The Parties have filed a Stipulation of Facts in this matter and agree that the sole issue for the Court's adjudication is the interpretation of S.C. Code Ann. § 38-77-144.¹ State Farm contends that its PIP policy is "excess" to workers' compensation benefits received by Plaintiff Wadette Cothran. Plaintiff Cothran contends that this "excess" provision constitutes a setoff and is invalid under § 38-77-144.

For the reasons stated below, Defendant State Farm's Motion for Summary Judgment is denied, and Plaintiffs' Motion for Summary Judgment is granted.

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¹ The Stipulation references Section 38-77-140 in one paragraph, but the Parties agree that this reference is a scrivener's error, and Section 38-77-144 was intended.

 **SCANNED**

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On or about January 19, 2015, Plaintiff Wadette Cothran, an insured under a State Farm Personal Injury Protection ("PIP") policy, was involved in an accident in which she sustained injuries resulting in lost wages and medical bills in monetary amounts that exceed the amount of PIP coverage available under her policy. State Farm alleges it is not required to pay the PIP limits because Mrs. Cothran's bills and lost wages, as of the date this Action was initiated, had been paid for by her employer's workers' compensation insurance carrier. Plaintiff Wadette Cothran alleges she is entitled to collect her PIP coverage because the State Farm policy provision at issue that purports to make PIP payments "excess" to any benefits paid to her by her employer's workers' compensation carrier violates § 38-77-144. The Parties agree that if the "excess" provision is invalid, State Farm would owe the full amount of the PIP benefits provided by the policy.

The Parties filed cross-motions for summary judgment on August 28, 2015. The Parties have fully briefed their motions; and, on October 29, 2015; Logan Rollins appeared to argue this motion on behalf of Plaintiffs, and Robert Whelan appeared on behalf of Defendant.

III. LEGAL STANDARD

Under Rule 56(c) of the South Carolina Rules of Civil Procedure, summary judgment shall be granted if "there is no genuine issue as to any material fact" so that the "moving party is entitled to a judgment as a matter of law." By their Stipulation, the Parties have agreed that "[t]here are no material factual issues in dispute with respect to plaintiffs' breach of contract claim, and the sole matter before the Court on that cause of action is whether the policy provision [purporting to make State Farm's PIP coverage excess] violates section 38-77-144."

Accordingly, the only question at issue is the legal question of whether the State Farm policy provision violates S.C. Code Ann. § 38-77-144. Therefore, summary judgment is appropriate.

IV. DISCUSSION

A. Defining Set-Offs And The Evolution of Current PIP Law

The dispositive issue in this case is whether Plaintiff Wadette Cothran is entitled to collect under her State Farm PIP policy when the policy provides, under its "Workers' Compensation Coordination" clause, that "[a]ny 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." 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.

(Emphasis Added).

Accordingly, as a preliminary matter, it is necessary to determine whether the policy provision at issue constitutes an attempt to assign, subrogate, or set off so that it could be violative of the Statute.

It is clear that a PIP carrier, under the law that existed before Act 148 of 1989 repealed mandatory PIP coverage, was not required to make payment if workers' compensation insurance had already made payments to the Claimant. Section 56-11-150 (later recodified as Section 38-77-290(d))², provided an "exclusive list of exceptions from the duty of a PIP insurer to pay benefits." Benat v. State Farm Mut. Ins. Co., 286 S.C. 132, 133, 333 S.E.2d 57, 58 (Ct. App.

² See Maybank et al., The Law of Automobile Insurance in South Carolina, 5th Ed., V-19 (2002).

1985). As noted in State Farm Mut. Auto. Ins. Co. v. Richardson, 313 S.C. 58, 437 S.E.2d 43 (1993), Act 148 of 1989 repealed mandatory PIP coverage and made it optional, and these "sweeping reforms in automobile insurance law" specifically included a repeal of "Section 38-77-290 [formerly the Section 56-11-150 referred to in Benat]." Richardson at 62, 45. Section 38-77-290(d) stated,

Benefits payable under the coverages *required to be offered* by section 38-77-240 must be reduced to the extent that the recipient had recovered benefits under workers' compensation laws of any state or the federal government.

(Emphasis Added). SC. Code Ann Section 38-77-290(d) (Law. Co-op. 1989 quoted in Burnet R. Maybank, et al., The Law of Automobile Insurance in South Carolina, V-19, 5th ed. 2002).

The former law did not merely allow a set-off for workers' compensation benefits for mandatory PIP coverage, it mandated a setoff ("must be reduced [. . .]"). Pre-1989 PIP law "also allowed assignments to hospitals, physicians and other medical providers, so long as the provider did not require assignment of benefits as a condition of treatment." Maybank, et al., The Law of Automobile Insurance in South Carolina, V-19 (2002). When the original, mandatory PIP law was enacted, it also allowed a "tortfeasor setoff," as analyzed below. Furthermore, the Legislature contemplated allowing the PIP carrier to subrogate against the money paid by the "tortfeasor" (i.e., the liability insurance carrier) rather than allowing the "tortfeasor" a setoff for what was paid by the PIP carrier but decided against it because the "Legislature felt that a setoff provision would be more economical and administratively feasible than a provision allowing subrogation by the first party insurance carrier [i.e., the PIP carrier]." Maybank, et al., The Law of Automobile Insurance in South Carolina, V-16 (2002). The Legislature's "sweeping reforms" in 1989 that made PIP optional clearly, in the word of the

current statute, "deleted" assignments, subrogation, and set-offs, and it also "deleted" every one of the "*exclusive list* of exceptions from the duty of a PIP insurer to pay benefits." Benat, 286 S.C. 132, 133, 333 S.E.2d 57, 58. Because the exclusive list of exceptions from the duty of the PIP carrier no longer exists, no exception to the PIP carrier's duty to pay exists.

Clearly, the former law allowed this setoff for PIP coverage that was "required to be offered" so that it was reduced by amounts paid by a workers' compensation insurance carrier. It also allowed assignment, and the Legislature considered allowing subrogation. Under South Carolina Law, "It is well settled by our decisions that the code as adopted is the general law and the omissions are lost." Independence Ins. Co. v. Independent Life & Acc. Ins. Co., 218 S.C. 22, 31 61 S.E.2d 399, 403 (1950). Accordingly, the absence of a provision allowing set off for workers' compensation benefits where one previously existed clearly evidences the legislature's intention that Section 38-77-144 was the comprehensive Legislative statement concerning the issue of when PIP must be paid and who could allege an interest as a result of the PIP payment. Under the current Statute, "no personal injury protection (PIP) coverage mandated." A insurance carrier that chooses voluntarily to sell PIP coverage must provide it with the understanding that it is not subject to assignment, subrogation, or set-off.

The only statutory provision in existence that may form the basis of duties to pay PIP coverage or rights of persons to assert an interest in PIP coverage that has been paid is the current Section 38-77-144, as the entire history of PIP coverage (and the jurisprudence interpreting it) that existed prior to the 1989 amendment has been expressly "deleted."

In light of the only existing statute regarding the definition of PIP coverage that is applicable to the facts of this case, therefore, I find that the "excess" policy provision at issue does, in fact, constitute a setoff under South Carolina Law. South Carolina law makes clear that

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denominating first party automobile coverage as "excess" to a coverage that exists outside of the insurer-insured relationship is identical to a setoff. For example, Underinsured Motorist Coverage ("UIM") is defined, under S.C. Code. Ann. Section 38-77-160, "to provide coverage in the event that damages are sustained *in excess of the liability limits* carried by an at-fault insured or underinsured motorist." As the Supreme Court held in Broome v. Watts, 319 S.C. 337, 341, 461 S.E. 2d 46, 48, this "excess" denomination constitutes a setoff: "The very definition of UIM insurance mandates a *set-off*." More importantly, the Court has determined that the credit claimed by the liability insurance company for the money paid by the PIP insurance company was, by definition, a setoff ("We termed this tortfeasor liability reduction [after the PIP carrier has paid its PIP coverage] a 'set-off' in Moultrie v. North River Ins. Co., Inc., 272 S.C 53, 249 S.E.2d 158 (1978)." State Farm Mut. Auto. Ins. Co. v. Richardson, 313 SC 58, 437 SE.2d 43 (1993). If the credit alleged by a liability insurance carrier against PIP coverage must be termed a "setoff," then the credit alleged by the PIP carrier against coverage paid by an entity other than itself must also be termed a setoff. The Moultrie Court noted in fact, that, that the PIP carrier's assertion that it could claim credit for liability payment was invalid because the statute "only requires a *setoff* by those persons who have already received benefits from their own carrier," and not by the PIP carrier who sought a setoff for the payment of liability proceeds. Moultrie at 56, 159. It is clear that the State Farm policy provision at issue in this case, on its face, constitutes a setoff under PIP law as it now exists in South Carolina.

LAW

A. Defendant's Argument Fails Under The "Plain Meaning" Rule

Section 38-77-144 states, "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 setoff." Under the terms of the State Farm Policy, "[a]ny 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." On its face, the State Farm provision constitutes a setoff and violates the plain meaning of the Statute.

As the South Carolina Supreme Court has articulated:

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature.

Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E. 2d 578, 581 (2000) (Internal Citations and Quotations Omitted). Furthermore, "[i]t is settled law that statutory provisions relating to an insurance contract are part of the contract, and that a policy provision which contravenes an applicable statute is to that extent invalid." Boyd v. State Farm Mut. Auto. Ins. Co., 260 S.C. 316, 195 S.E.2d 706 (1973). As noted above, the workers' compensation exclusion that formed a part of two versions of the former PIP law in South Carolina has been deleted, and the State Farm policy provision must be interpreted in light of the only PIP code now in existence. I find that the "excess" provision does constitute a setoff under South Carolina law and is therefore invalid under South Carolina law.

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B. State Farm v. Richardson Does Not Allow A Setoff

1. State Farm v. Richardson Addressed Only Stacking Of PIP Coverage

Defendant alleges that Richardson allows a setoff for a personal injury protection insurance carrier. In Richardson, a State Farm insured was injured in an automobile accident and claimed PIP benefits on two State Farm PIP policies. State Farm alleged that Richardson was entitled to only one; it “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 a setoff, or “excess,” provision 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. That is, the prohibition at issue was related only to the *stacking* of multiple policies within the relationship of a single PIP Insurer and PIP Insured and did not address denominating the PIP policy as excess to a policy held by a third party to the PIP Insurer—PIP Insured relationship. The Richardson Court concluded that, within the context of a single insurer—insured relationship in an automobile insurance scenario, that an insurer’s policy “may prohibit the *stacking* of non-mandatory coverage.” Id. at 61, 45 (Emphasis added).

Accordingly, as Richardson addresses only stacking of coverage, it is inapplicable, and Defendant’s argument fails.

2. The Setoff Addressed In State Farm v. Richardson Was Not For the Benefit Of The PIP Carrier

In Richardson, the plaintiff alleged that an anti-stacking provision constituted a setoff. The holding of the Court distinguished a setoff from stacking, and the Court addressed the issue of a setoff only because it was erroneously raised by the Plaintiff. The Court clarified that the distinction between a “setoff” and “stacking” was that stacking occurred when a single insurance

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carrier in a single insurer—insured relationship had multiple policies. A setoff, on the other hand, occurred when two separate insurance carriers have independent duties to pay benefits to the same injured person. When two insurance companies had independent duties to pay a single injured individual, the Richardson Court noted, “We termed this tortfeasor liability reduction a ‘set-off’ in Moultrie v. North River Ins. Co., Inc., 272 S.C 53, 249 S.E.2d 158 (1978).”

Moultrie was decided when a setoff was allowed. In Moultrie, the injured party (Moultrie) received a settlement with the liability insurance carrier for the driver who was at fault for the accident in which he was injured. That settlement included “payment of [Moultrie’s] medical expenses”. Id. at 54, 158. His PIP carrier, North River Insurance, alleged he would receive a “double recovery” if he were allowed to recoup money from his PIP policy for medical bills for which he had already received payment as a result of the liability settlement based on the statute that read, “if a claimant Recovering from his insurer the benefits for economic loss. . . shall bring action. . . against another person. . . the court shall reduce such verdict by the amounts of the benefits paid. . . by the claimant’s insurer” (Ellipses in original). The Moultrie Court held that the plain meaning of the statute was that “this section only requires a setoff by the persons who have already received benefits from their own carrier.” The Court held that “*the tortfeasor was to be given credit for payment by the first party insurer, rather than the first party insurer [i.e., the PIP carrier] getting the benefit of payment by the tortfeasor.*” Moultrie at 56, 159. Accordingly, the “old” law that allowed a setoff did make an attempt to prevent “double recovery,” but it did so by allowing the “tortfeasor” (i.e., the tortfeasor’s insurance carrier) to get credit for what the PIP carrier had already paid.

Even in its historical definition, a “setoff” required the PIP carrier to make payment prior to the entity that could claim a setoff (i.e., the “tortfeasor”). The current PIP statute was enacted

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not to give a windfall to the PIP carrier, but because the elimination of the setoff "prevented the tortfeasor from profiting in the case *where the injured party received PIP benefits.*" Mount v. Sea Pines, Inc., 337 S.C. 337, 359, 523 S.E. 2d 464, 465 (Ct. App. 1999). The interpretation of the Statute provided by the Court of Appeals presupposes, as does the text of the statute itself, that the injured party has already "received PIP benefits."

Accordingly, the current law makes PIP coverage a payor of first, rather than last, resort.

3. The "Tortfeasor" From Richardson Refers To A Third Party to the PIP Insurer—PIP Insured Relationship

As noted above, the Richardson opinion was limited to an analysis of the extent to which a single automobile insurance carrier was permitted to limit its responsibilities within the first party, PIP insurer—PIP insured context. That is, the opinion only addressed when a single insurer could limit, by the terms of its policy, what that insurer paid out among several policies between the insurer and insured. It did not address the existence or non-existence of third-party insurance coverage outside of the PIP Insurer—PIP Insured relationship and how the existence or non-existence of such coverage could absolve the PIP carrier of its responsibility to pay under the terms of its policy.

The Richardson Court did not allow an insurer to receive a setoff for payments made by a source with an obligation independent of the obligation that arose outside of the relationship between State Farm and Mr. Richardson. Contrary to the history of the PIP setoff rule as outlined above, State Farm seeks to assert that because a workers' compensation insurance carrier is not a literal "tortfeasor," State Farm can receive credit for what a third party to the first party contractual relationship (between State Farm and Wadette Cottrhan) has a legal responsibility to pay. *Read in light of Richardson, however, it would be the workers' compensation insurance*

carrier, not State Farm, that would have the right to assert a setoff when both workers' compensation and PIP coverage simultaneously exist—and, in fact, as noted below, although the workers' compensation carrier does not have the right to assert a setoff, it does have the right to assert an equitable interest in the payment of a claimant's PIP benefits.

If State Farm's interpretation were adopted, not only a workers compensation insurance carrier, but also a health insurance carrier could allege a setoff for PIP benefits, as a health insurance carrier is not a literal "tortfeasor." Furthermore, the policy provision at issue provides for State Farm PIP as excess not only to workers' compensation law but "any other similar law." The phrase "similar law" is not defined in the policy, and could be taken to signify any insurance that pays benefits in the event of injury—and State Farm could allege that this "similar" law includes health insurance. In that event, both State Farm and the injured party's health insurance could, lawfully, allege a setoff and leave the injured insured with the unenviable choice of either paying out-of-pocket for her medical bills or spending years of time and thousands of dollars in costs litigating against the two insurance companies, *to both of which she paid premiums to cover medical bills that she sustained*, over what may be only a \$1,000.00 PIP policy. It is clear that the Legislature did not intend the proscription against subrogation, assignment, and setoff to be interpreted so that an insured could be compelled to pay insurance premiums and then be forced to litigate over which of the two insurance carriers to whom she paid premiums would get the benefit of the premiums she voluntarily paid—rather than giving the benefit to the person who paid the premiums.

Accordingly, it is evident that the setoff prohibition in Section 38-77-144 that PIP coverage "is not subject to setoff" signifies what it always signifies in any context: the existence or non-existence of any third party insurance (insurance outside of the State Farm-Wadette

Cothran relationship) is irrelevant to any analysis of State Farm's contractual obligation to pay PIP benefits to its insured—Wadette Cothran. The fact that the Legislature “deleted” the former Section in two versions of the Code that contained the “exclusive list” of exceptions to the PIP carrier's duty to pay benefits is strong evidence that no such exception to payment is now allowed. (See Benat and Section 38-77-144).

If the Statute imposes only the limitation alleged by State Farm in its brief (“that a set-off of PIP benefits is prohibited in only one situation—the reduction of the tortfeasor's liability”), then State Farm could not only allege a setoff for workers' compensation benefits, there would be no bar to the PIP carrier alleging a setoff based on payments made by the health insurance carrier, the liability insurance carrier, or, for that matter, the injured party's Aunt Ethel and Uncle Fred who broke their piggy bank to pay for her hospital bill.

If, on the other hand, State Farm is not permitted to receive a setoff for mandatory liability insurance because of Section 38-77-144, then there is no argument that it can receive a setoff for another mandatory coverage system: workers' compensation. Courts must “reject a statutory interpretation when to accept it would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention.” Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000). To accept State Farm's interpretation that the current Statute prevents a setoff by “only the tortfeasor” would lead to the absurd result that only one setoff (for the tortfeasor) was eliminated *while simultaneously creating a setoff for every possible entity other than the tortfeasor*.

It is abundantly clear from the legislative history and jurisprudence surrounding PIP coverage in South Carolina that the purpose of the coverage as it now exists is to provide an immediate alleviation of the financial strain placed on a physically injured person in the absence of fault.

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liability, and coverage disputes. If the PIP carrier is permitted to be a payor of last resort that withholds payment until all sources of payment; including liability, workers' compensation, health, and, in its ambiguous policy language, "similar" systems have been located and forced to issue coverage denials; the intention of the Legislature would be undermined.

C. Public Policy Does Not Allow A Setoff

Finally, "[i]t must be presumed that the Legislature intended to achieve a consistent body of law." State v. Ramsey, 311 S.C. 555, 562 430 S.E. 2d 511, 516 (1993). The interplay between PIP coverage and workers' compensation coverage requires that PIP coverage be paid when the coverages arguably overlap in order to effect a fully coherent jurisprudence that complies with public policy. The nature of the current Workers' Compensation and Personal Injury Protection law allows the workers' compensation carrier to claim an equitable interest in the PIP proceeds paid to the injured worker. S.C. Code Ann. Section 42-1-560 outlines the "total cognizable damages" analysis available to the workers compensation insurance carrier to determine the amount of the statutory lien it is owed as a result of a Claimant's settlement with entities other than the workers' compensation carrier. The Workers' Compensation Commission has the authority to determine the amount of the lien and reduce it if "a reduction is equitable to all parties and serves the interests of justice." Id. Accordingly, when the Workers' Compensation Commission makes its determination of the proper amount of the statutory lien that the workers' compensation insurance carrier may allege, all payments received by the injured worker are at issue. That is, if the injured worker has received sufficient money to make her whole, then the workers' compensation insurance carrier has a stronger equitable argument that it is entitled to a greater lien. State Farm's refusal to pay its PIP benefits when legally due, therefore, prejudices:

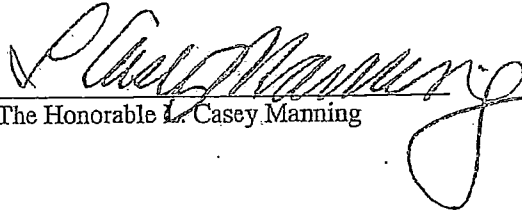
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not only Wadette Cothran but also her employer's workers' compensation insurance carrier, and its Motion is denied on this basis as well as those stated above.

For the foregoing reasons, therefore, Plaintiffs' Motion is GRANTED, and Defendant's Motion is DENIED.

IT IS THEREFORE ORDERED that Plaintiffs' Motion for Summary Judgment is Granted, and Defendant's Motion for Summary Judgment is denied. Defendant shall, therefore, pay the remaining PIP proceeds to Plaintiffs.

IT IS SO ORDERED.


The Honorable L. Casey Manning

Spartanburg, SC
Nov 17, 2015

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STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS

C/A No.: 2015-CP-42-1578

Wadette Cothran and)
Chris Cothran,)
Plaintiff,)

v.)

State Farm Mutual Automobile)
Insurance Company and)
Robert Tucker,)
Defendants.)

**ORDER DENYING
DEFENDANTS' MOTION TO
RECONSIDER**

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I. INTRODUCTION

On December 2, 2015, pursuant to Rule 59(e), Defendants filed a Motion to reconsider this Court's November 17, 2015 Order Granting Plaintiff's Motion for Summary Judgment and Denying Defendants' Motion for Summary Judgment.

Pursuant to Rule 59(f), the Court decides this motion based upon the brief submitted by Defendants and without oral argument.

II. DEFENDANTS MOTION TO RECONSIDER IS DENIED

For the reasons outlined in the November 17, 2015 Order Granting Plaintiffs' Motion For Summary Judgment and Denying Defendants' Motion for Summary Judgment, Defendant's Motion To Reconsider is denied.

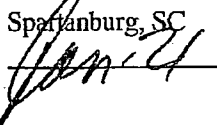
The November 17, 2015 Order addresses all of the Defendants' arguments for reconsideration except one. In their Motion to Reconsider, Defendants, for the first time, raise the doctrine of *stare decisis* as a ground for reversal of this Court's earlier Order. As noted in

Hickman v. Hickman, 301 SC 455, 456, 392 SE2d 481, 482 (1990), "[a] party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not," and therefore *stare decisis* cannot be invoked by this Motion because it was not raised prior to the judgment. Nevertheless, for the reasons outlined in the Court's November 17, 2015 Order, the *Richardson* opinion does not validate the policy provision in the State Farm policy at issue, and the doctrine of *stare decisis* would not, therefore, in any event, be applicable.

IT IS THEREFORE ORDERED that Defendants' Motion for Reconsideration is DENIED.

IT IS SO ORDERED.


The Honorable L. Casey Manning

Spartanburg, SC
, 2016

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STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS

C/A No.: 2015-CP-42-_____

Wadette Cothran and
Chris Cothran,

Plaintiff,

v.

State Farm Mutual Automobile
Insurance Company and
Robert Tucker,

Defendants.

2015-CP-42-1578

COMPLAINT

(JURY TRIAL DEMANDED)

COME NOW Plaintiffs Wadette Cothran and Chris Cothran, by and through their undersigned counsel, and allege as follows:

JURISDICTIONAL ALLEGATIONS

1. Plaintiffs are residents and citizens of the Spartanburg County, South Carolina and at all times relevant to this Complaint were married and living together as husband and wife.

2. Defendant State Farm Mutual Automobile Insurance Company (hereafter "State Farm") is a corporation organized and existing under the laws of a state other than South Carolina, but it owns real and personal property in South Carolina and regularly conducts business in the County of Spartanburg, State of South Carolina, and entered into an automobile Personal Injury Protection ("PIP") insurance policy/contract in Spartanburg County, South Carolina for an insurable interest existing in Spartanburg County, South Carolina.

3. The allegations complained of herein occurred exclusively in Spartanburg County, South Carolina, and this Court has jurisdiction over the parties and subject-matter of this Action.

4. Venue is properly before this Court.

5. The Federal Courts lack subject matter jurisdiction over this action, as there is no federal question presented; every claim arising under the Federal Constitution, treaties, or laws of the United States is expressly disclaimed; no claim of admiralty or maritime law is raised; Plaintiff does not bring any claim against any foreign state or agency; Plaintiff does not seek damages, and expressly disclaims damages, in excess of \$75,000.00.

FACTUAL ALLEGATIONS

6. On January 19, 2015 and to the date of the filing of this Complaint, Plaintiffs have had in effect with Defendant State Farm an automobile insurance policy, governed by South Carolina law, that provided \$5,000.00 in Personal Injury Protection coverage ("PIP").

7. At all times relevant to this Complaint, Plaintiffs were married, and Plaintiff Wadette Cothran was a resident relative of Plaintiff Chris Cothran.

8. On or about January 19, 2015, Plaintiff Wadette Cothran was involved in a motor vehicle collision in which she sustained serious and permanent physical injuries, including, but not limited to, injuries to her right leg; as a result of the January 19th, 2015 automobile accident, Plaintiff Wadette Cothran has incurred medical bills, lost wages, and other expenses and costs in excess of \$40,000.

9. Plaintiff's medical expenses include, but are not limited to, a medical bill in the amount of \$40,458.58 from Spartanburg Regional Medical Center.

10. Plaintiff's medical bill for the amount of \$40,458.58 from Spartanburg Regional Medical Center was provided to defendant Robert Tucker of State Farm by Plaintiff on February 23, 2015 and again by Plaintiff's counsel on March 12, 2015.

11. Defendants State Farm and Robert Tucker have willfully, wantonly, and recklessly refused to pay Plaintiff Wadette Cothran her PIP benefits as required by South Carolina law governing PIP coverage for her medical expenses for treatment she received following her January 19th, 2015 motor vehicle accident, including, but not limited to, the medical bill for \$40,458.58 submitted to them on February 23, 2015 and March 12, 2015.

**FIRST CAUSE OF ACTION
(BAD FAITH REFUSAL TO PAY INSURANCE BENEFITS)**

12. Plaintiffs reallege each and every allegation contained in Paragraphs 1 through 11 as if set forth verbatim herein.

13. Plaintiffs and Defendant State Farm were subject to a binding contract of insurance.

14. Defendant/insurer State Farm's refusal to pay benefits Plaintiff Wadette Cothran is due under her PIP policy issued by Defendant State Farm results from Defendants' bad faith or unreasonable action in breach of the law of South Carolina and in breach of a covenant of good faith and fair dealing arising from the contract, and said actions have caused damage to Plaintiffs.

15. Defendants' conduct in this regard was willful and in reckless disregard of Plaintiffs' rights.

16. As a direct proximate result of the actions engaged in by Defendants, Plaintiffs are entitled to actual, special, consequential, and punitive damages, together with prejudgment interest, attorney's fees, and costs.

SECOND CAUSE OF ACTION
(BREACH OF CONTRACT)

17. Plaintiffs reallege each and every allegation contained in Paragraphs 1 through 16 as if set forth verbatim herein.

18. Defendant breached the contract of insurance by failing to properly pay benefits due thereunder, resulting in foreseeable damages to Plaintiffs.

19. As a result of said breach, Plaintiffs are entitled to actual and special damages, together with prejudgment interest, attorney's fees, and costs.

THIRD CAUSE OF ACTION
(ATTORNEY'S FEES/ SC Code Ann. § 36-59-40)

20. Plaintiffs reallege each and every allegation contained in Paragraphs 1 through 19 as if set forth herein verbatim.

21. Defendants' unreasonable action in denying Plaintiffs' claims for insurance benefits without reasonable cause and/or in bad faith entitle Plaintiffs to reasonable attorney's fees.

WHEREFORE, Plaintiffs request that this Court declare that Plaintiffs are entitled to full benefits reimbursement for all medical costs and hospital expenses incurred as a result of Plaintiff Wadette Gothran's injuries from her January 19th, 2015 automobile

accident. Plaintiffs further request that this Court grant judgment in their favor on their claims for actual, special, treble and punitive damages, with prejudgment interest, attorney's fees, and the costs of this action, along with any other such relief the Court deems just and proper, in an amount not to exceed \$75,000.00.

Plaintiffs demand a trial by jury.

Randy Taylor for Logan Rollins

Logan Rollins
Attorney for Plaintiff
The Hawkins Law Firm
PO Box 5048
Spartanburg, SC 29304
864.574.8801
logan@hawklawfirm.com

April 17, 2015
Spartanburg, SC

CLERK OF COURT
SPARTANBURG COUNTY
2015 APR 17 PM 3:51
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
WADETTE COTHRAN and CHRIS	)	
COTHRAN,	)	Civil Action No. 2015-CP42-1578
	)	
Plaintiffs,	)	
	)	
vs.	)	<u>ANSWER TO PLAINTIFFS'</u>
	)	<u>COMPLAINT</u>
STATE FARM MUTUAL	)	
AUTOMOBILE INSURANCE	)	
COMPANY and ROBERT TUCKER,	)	Jury Trial Requested
	)	
Defendants.	)	

State Farm Mutual Automobile Insurance Company ("State Farm") answers the Plaintiffs' Complaint as set forth below. All allegations of the Complaint not specifically admitted herein are denied.

1. State Farm is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 1 and therefore denies the same.

2. By way of response to Paragraph 2, State Farm admits that it is a corporation organized and existing under the laws of a state other than South Carolina, that it regularly conducts business in Spartanburg County, and that it insures real and personal property and insurable interests existing in Spartanburg County, South Carolina. It also admits entering into an insurance contract with Wadette Cothran. State Farm refers to the policy of insurance for the coverages contained therein, and to the extent the allegations of Paragraph 2 are in conflict with the provisions of the insurance policy, Paragraph 2 is denied, and otherwise Paragraph 2 is denied.

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SPARTANBURG COUNTY
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ROA_0022

3. The allegations of Paragraph 3 contain conclusions of law to which no response is required. To the extent that a response is required, those allegations are denied.

4. The allegations of Paragraph 4 contain conclusions of law to which no response is required. To the extent that a response is required, those allegations are denied.

5. The allegations of Paragraph 5 contain conclusions of law to which no response is required. To the extent that a response is required, those allegations are denied.

6. By way of response to Paragraph 6, State Farm refers to the policy of insurance for the coverages and amounts of coverages and, to the extent Paragraph 6 is in conflict with the provisions of the insurance policy, Paragraph 6 is denied and otherwise Paragraph 6 is denied.

7. State Farm is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 7 and therefore denies the same.

8. By way of response to Paragraph 8, State Farm admits, upon information and belief, that Ms. Cothran was involved in a motor vehicle collision on or about January 19, 2015 and sustained injuries as a result. State Farm is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 8, and therefore denies the same.

9. It is admitted that Spartanburg Regional Medical Center sent the Plaintiff a medical bill in the amount of \$40,458.58, but State Farm is without knowledge or information sufficient to form a belief as to the truth of the allegation that the Plaintiffs have actually incurred this expense, and believes it has been or will be paid by the Plaintiff's workers' compensation carrier.

10. By way of response to Paragraph 10, State Farm admits receiving a medical bill in the amount of \$40,458.58 from Spartanburg Regional Medical Center from the Plaintiffs

CLERK OF COURT
SPARTANBURG COUNTY
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counsel. State Farm is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 10.

11. The allegations of Paragraph 11 are denied.

12. By way of response to Paragraph 12, State Farm refers to the previous paragraphs.

13. By way of response to Paragraph 13, State Farm admits it entered into a contractual relationship with the named insured under the policy, but State Farm refers to the policy for the coverages set forth therein.

14. The allegations of Paragraph 14 are denied.

15. The allegations of Paragraph 15 are denied.

16. The allegations of Paragraph 16 are denied.

17. By way of response to Paragraph 17, State Farm refers to the previous paragraphs.

18. The allegations of Paragraph 18 are denied.

19. The allegations of Paragraph 19 are denied.

20. By way of response to Paragraph 20, State Farm refers to the previous paragraphs.

21. The allegations of Paragraph 21 are denied.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE

22. The complaint fails to set forth facts sufficient to constitute a cause of action.

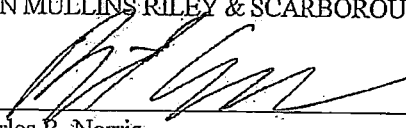
FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE

23. The contract of insurance provides that any personal injury protection coverage applies as excess over any benefits recovered under any workers' compensation law or any other similar law.

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M. HOPE BLACKLEY

WHEREFORE, having fully answered the Plaintiffs' Complaint, State Farm Mutual Automobile Insurance Company prays that the Complaint be dismissed, with costs, and for such other and further relief as this Court may deem just and proper.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Charles R. Norris

SC Bar No. 004238

E-Mail: charles.norris@nelsonmullins.com

Robert W. Whelan

SC Bar No. 71174

E-Mail: robert.whelan@nelsonmullins.com

151 Meeting Street / Sixth Floor

Post Office Box 1806 (29402-1806)

Charleston, SC 29401-2239

(843) 853-5200

Counsel for State Farm Mutual Automobile Insurance Company

Charleston, South Carolina

May 27, 2015

CLERK OF COURT
SPARTANBURG COUNTY
2015 JUN - 1 PM 1:01
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA)

COUNTY OF SPARTANBURG)

WADETTE COTHRAN and CHRIS
COTHRAN,

Plaintiffs,

vs.

STATE FARM MUTUAL
AUTOMOBILE INSURANCE
COMPANY and ROBERT TUCKER,

Defendants.

) IN THE COURT OF COMMON PLEAS
) SEVENTH JUDICIAL CIRCUIT

) Case No. 2015-CP42-1578

STIPULATION OF FACTS

The parties stipulate to the following facts for purposes of the above-captioned matter only. This stipulation is not intended to apply to any other action or forum.

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.
3. As of the date of this stipulation, the cost of Ms. Cothran's medical expenses has 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 the accident.
5. The Policy provides personal injury protection ("PIP") coverage with a limit of \$5,000. A certified copy of the policy is attached to this stipulation as Exhibit A and is by stipulation of the parties, admissible into evidence.

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SPARTANBURG COUNTY
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6. State Farm has paid \$991 of the PIP coverage to Cothran for a portion of her lost wages.

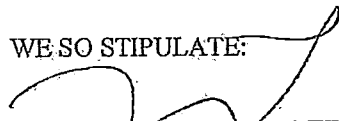
7. State Farm has denied payment of the remaining \$4,009 of available PIP coverage, because of a Policy provision stating its PIP coverage is excess over any benefits recovered under any workers' compensation law.

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

9. There are no material factual issues in dispute with respect to the plaintiffs' breach of contract claim and the sole matter before the Court on that cause of action is whether the policy provision referenced in paragraph 7, above, violates section 38-77-144.

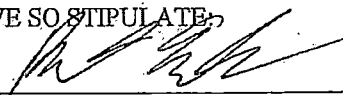
10. If the provision violates section 38-77-140, then Cothran is entitled to the remaining \$4,009 of PIP coverage. If the provision does not violate section 38-77-140, then Cothran is not entitled to the remaining \$4,009 of PIP coverage.

WE SO STIPULATE:


C. Logan Rollins, II
The Hawkins Law Firm
P.O. Box 5048
Spartanburg, SC 29304

Counsel for Plaintiff

WE SO STIPULATE:


Robert W. Whelan
Nelson Mullins Riley & Scarborough LLP
151 Meeting Street, Suite 600
Charleston, SC 29401

*Counsel for State Farm Mutual Automobile
Insurance Company*

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2015 AUG 28 AM 9:30
M. HOPE BLACKLEY

Exhibit A

Certified Copy of Policy

ROA_0028



Certified Policy Record

I, the undersigned, do hereby confirm that I am custodian of the records pertaining to the issuance of policies by State Farm Mutual Automobile Insurance Company.

I certify that the attached documents represent a true and accurate record of the terms and conditions of Policy Number 35 6718-C23-40D including any endorsements, if applicable, for the policy term(s) SEP 23 2010 to MAR 23 2011 and insuring COTHRAN, WADETTE S of 176 FOSTER RD, INMAN SC 29349-8222 based on available records.

The following endorsements are included:

6940A AMENDATORY ENDORSEMENT - EFFECTIVE DATE 09-23-11.

It is State Farm's business practice to print a new Declarations Page only when a policy issuance transaction such as a change of coverage occurs. Therefore, the included Declarations Page which was in effect at the time of loss will indicate the policy period of the last policy issuance transaction.

The policy was in effect on the loss date of January 19, 2015.

Lisa Daube

Team Manager

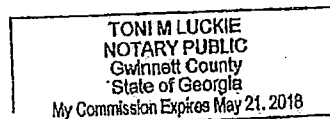
Date: 5/19/15

State of Georgia
County of Fulton

Subscribed and sworn to before me this 19th day of May, 2015.

Notary Public

My Commission Expires: May 21, 2018



State Farm



State Farm Mutual Automobile Insurance Company

11350 Johns Creek Parkway
Duluth GA 30098

NAMED INSURED

AT2

031549

40-1243-5Q7F A

COTHMAN, WADETTE S
176 FOSTER RD
INMAN SC 29349-8222

96195-6-F

MUTL VOL

DECLARATIONS PAGE

POLICY NUMBER 35 6718-C23-40D

POLICY PERIOD SEP 23 2010 to MAR 23 2011
12:01 A.M. Standard TimeSTATE FARM PAYMENT PLAN NUMBER
0391544827

AGENT

H H FOWLER INS AGCY INC
13061 ASHEVILLE HWY
INMAN, SC 29349-7687

PHONE: (864)472-9200 or (864)468-4575

DO NOT PAY PREMIUMS SHOWN ON THIS PAGE.
IF AN AMOUNT IS DUE, THEN A SEPARATE STATEMENT IS ENCLOSED.

YOUR CAR

YEAR	MAKE	MODEL	BODY STYLE	VEHICLE ID NUMBER	CLASS
2007	FORD	500	4DR	1FAHP25157G104096	1D3030H000

SYMBOLS	COVERAGE & LIMITS	PREMIUMS
A	Liability Coverage Bodily Injury Limits Each Person, Each Accident \$250,000 \$500,000 Property Damage Limit Each Accident \$100,000	\$189.39
P5	Personal Injury Protection Coverage (See Policy Schedule for Limits)	\$34.32
D	Comprehensive Coverage - \$250 Deductible	\$56.88
G	Collision Coverage - \$500 Deductible	\$122.56
H	Emergency Road Service Coverage	\$2.20
RN	Car Rental and Travel Expenses Coverage Limit - Car Rental Expense Each Day, Each Loss 80% \$1,000	\$12.10
U	Uninsured Motor Vehicle Coverage Bodily Injury Limits Each Person, Each Accident \$250,000 \$500,000 Property Damage Limit Each Accident \$100,000	\$109.45
W	Underinsured Motor Vehicle Coverage Bodily Injury Limits Each Person, Each Accident \$250,000 \$500,000 Property Damage Limit Each Accident \$100,000	\$74.63
Total premium for SEP 23 2010 to MAR 23 2011		\$505.53 (This is not a bill)

IMPORTANT MESSAGES

Replaced policy number 0356718-40C.

New Policy Form

EXCEPTIONS, POLICY BOOKLET & ENDORSEMENTS (See policy booklet & individual endorsements for coverage details.)

YOUR POLICY CONSISTS OF THIS DECLARATIONS PAGE, THE POLICY BOOKLET - FORM 9840A, AND ANY ENDORSEMENTS THAT APPLY, INCLUDING THOSE ISSUED TO YOU WITH ANY SUBSEQUENT RENEWAL NOTICE.
CREDITOR - FORD MOTOR CREDIT - LIEN INSURANCE SERVICE CENTER, PO BOX 390910, MINNEAPOLIS MN 55439-0910.

Agent: H H FOWLER INS AGCY INC

Telephone: (864)472-9200

Prepared SEP 23 2010 1243-997

01561/01458
2 04-2005 (01a025b0)
(01a025a)

See Reverse Side

(01a025a)

ROA_0030

This policy is issued by State Farm Mutual Automobile Insurance Company.

MUTUAL CONDITIONS

1. **Membership.** While this policy is in force, the first insured shown on the Declarations Page is entitled to vote at all meetings of members and to receive dividends the Board of Directors in its discretion may declare in accordance with reasonable classifications and groupings of policyholders established by such Board.
2. **No Contingent Liability.** This policy is non-assessable.
3. **Annual Meeting.** The annual meeting of the members of the company shall be held at its home office at Bloomington, Illinois, on the second Monday of June at the hour of 10:00 A.M., unless the Board of Directors shall elect to change the time and place of such meeting, in which case, but not otherwise, due notice shall be mailed each member at the address disclosed in this policy at least 10 days prior thereto.

In Witness Whereof, the State Farm Mutual Automobile Insurance Company has caused this policy to be signed by its President and Secretary at Bloomington, Illinois.

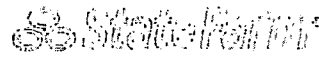
Tim M. Brunner

Secretary

Edward B. Ruff

President

ROA_0031



Please read the policy carefully. If there is an accident, contact your State Farm agent or one of our Claim Offices at once. (See "INSURED'S DUTIES" in this policy booklet.)

Georgia-South Carolina Office
11350 Johns Creek Parkway
Duluth, GA 30098-0001
Phone: (770) 418-5000

State Farm®
Car Policy
Booklet

South Carolina
Policy Form 9840A

ROA_0032

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THIS POLICY

1. This policy consists of:
 - a. the most recently issued Declarations Page;
 - b. the policy booklet version shown on that Declarations Page; and
 - c. any endorsements that apply, including those listed on that Declarations Page as well as those issued in connection with any subsequent renewal of this policy.
2. This policy contains all of the agreements between all named insureds who are shown on the Declarations Page and all applicants and:
 - a. us; and
 - b. any of our agents.
3. We agree to provide insurance according to the terms of this policy:
 - a. based on payment of premium for the coverages chosen; and
 - b. unless otherwise stated in "EXCEPTIONS, POLICY BOOKLET, & ENDORSEMENTS" on the Declarations Page, in reliance on the following statements:
 - (1) The named insured shown on the Declarations Page is the sole owner of *your car*.
 - (2) Neither *you* nor any member of *your* household has, within the past three years, had:
 - (a) vehicle insurance canceled or nonrenewed by an insurer; or
 - (b) either:
 - (i) a license to drive; or
 - (ii) a vehicle registration suspended, revoked, or refused.

3
9840A

- (3) *Your car* is used for pleasure and business.
4. All named insureds shown on the Declarations Page and all applicants agree by acceptance of this policy that:
- the statements in 3.b. above are made by such named insured or applicant and are true; and

- we provide this insurance on the basis those statements are true.
5. *Your* purchase of this policy may allow *you* to purchase certain coverages, coverage options, coverage deductibles, coverage limits, or coverage terms on other policies from the *State Farm Companies*, subject to their applicable eligibility rules.

DEFINITIONS

We define certain words and phrases below for use throughout the policy. Each coverage includes additional definitions only for use with that coverage. These definitions apply to the singular, plural, possessive, and any other form of these words and phrases. Defined words and phrases are printed in boldface italics.

Bodily Injury means bodily injury to a person and sickness, disease, or death that results from it.

Car means a land motor vehicle with four or more wheels, designed for use primarily on public roads. **Car** does not include:

- Any vehicle while located for use as a dwelling or other premises; or
- A truck-tractor designed to pull any type of trailer.

Car Business means a business or job where the purpose is to sell, lease, rent, repair, service, modify, transport, store, or park land motor vehicles or any type of trailer.

Financial Responsibility Act means the Motor Vehicle Financial Responsibility Act of South Carolina.

Fungi means any type or form of fungus or fungi and includes:

- Mold;
- Mildew; and

- Any of the following that are produced or released by fungi:

- Mycotoxins;
- Spores;
- Scents; or
- Byproducts.

Newly Acquired Car means a car newly owned by you. A car ceases to be a newly acquired car on the earlier of:

- the effective date and time of a policy, including any binder, issued by us or any other company that describes the car as an insured vehicle; or
- the end of the 14th calendar day immediately following the date the car is delivered to you.

If a newly acquired car is not otherwise afforded comprehensive coverage or collision coverage by this or any other policy, then this policy will provide Comprehensive Coverage or Collision Coverage for that newly acquired car, subject to a deductible of \$500. Any coverage provided as a result of this paragraph will apply only until the end of the 5th calendar day immediately following the date the newly acquired car is delivered to you.

Non-Owned Car means a car that is in the lawful possession of you or any resident relative and that neither:

- is owned by:
 - you;
 - any resident relative;
 - any other person who resides primarily in your household; or
 - an employer of any person described in a., b., or c. above; nor
- has been operated by, rented by, or in the possession of:
 - you; or
 - any resident relative;

during any part of each of the 31 or more consecutive days immediately prior to the date of the accident or loss.

Occupying means in, on, entering, or exiting.

Our means the Company issuing this policy as shown on the Declarations Page.

Owned By means:

- owned by;
- registered to; or
- leased, if the lease is written for a period of 31 or more consecutive days, to.

Pedestrian means a person who is not occupying:

- a motorized vehicle; or
- a vehicle designed to be pulled by a motorized vehicle.

Person means a human being.

Private Passenger Car means:

- a car of the private passenger type, other than a pickup truck, van, minivan, or sport utility vehicle, designed primarily to carry persons and their luggage; or
- a pickup truck, van, minivan, or sport utility vehicle;

that is not used for:

- wholesale; or
- retail.

- pickup or delivery; and
- that has a Gross Vehicle Weight Rating of 10,000 pounds or less.

Resident Relative means a person, other than you, who resides primarily with the first person shown as a named insured on the Declarations Page and who is:

- related to that named insured or his or her spouse by blood, marriage, or adoption, including an unmarried and unmancipated child of either who is away at school and otherwise maintains his or her primary residence with that named insured; or
- a ward or a foster child of that named insured, his or her spouse, or a person described in 1. above.

State Farm Companies means one or more of the following:

- State Farm Mutual Automobile Insurance Company;
- State Farm Fire and Casualty Company; and
- Subsidiaries or affiliates of either 1. or 2. above.

Temporary Substitute Car means a car that is in the lawful possession of the person operating it and that:

- replaces your car for a short time while your car is out of use due to its:
 - breakdown;
 - repair;
 - servicing;
 - damage; or
 - theft; and

neither you nor the person operating it own or have registered.

If a car qualifies as both a non-owned car and a temporary substitute car, then it is considered a temporary substitute car only.

Trailer means:

1. a trailer;
 - a. designed to be pulled by a *private passenger car*;
 - b. not designed to carry persons; and
 - c. while not used as premises for office, store, or display purposes; or
2. a farm implement or farm wagon while being pulled on public roads by a *car*.

Us means the Company issuing this policy as shown on the Declarations Page.

We means the Company issuing this policy as shown on the Declarations Page.

You or *Your* means the named insured or named insureds shown on the Declarations Page. If a named insured shown on the Declarations Page is a *person*, then "*you*" or "*your*"

includes the spouse of the first *person* shown as a named insured if the spouse resides primarily with that named insured.

Your Car means the vehicle shown under "YOUR CAR" on the Declarations Page. *Your car* does not include a vehicle that *you* no longer own or lease.

If a *car* is shown on the Declarations Page under "YOUR CAR", and *you* ask *us* to replace it with a *car* newly owned by *you*, then the *car* being replaced will continue to be considered *your car* until the earliest of:

1. the end of the 30th calendar day immediately following the date the *car* newly owned by *you* is delivered to *you*;
2. the date this policy is no longer in force; or
3. the date *you* no longer own or lease the *car* being replaced.

LIABILITY COVERAGE

This policy provides Liability Coverage if "A" is shown under "SYMBOLS" on the Declarations Page.

Additional Definition

Insured means:

1. *you* and resident relatives for:
 - a. the ownership, maintenance, or use of:
 - (1) *your car*;
 - (2) a *newly acquired car*; or
 - (3) a *trailer*; and
 - b. the maintenance or use of:
 - (1) a *non-owned car*; or
 - (2) a *temporary substitute car*;
2. the first *person* shown as a named insured on the Declarations Page and that named insured's spouse who resides primarily with that named insured for the maintenance, or

use of a *car* that is *owned by*, or furnished by an employer to, a *person* who resides primarily in *your* household, but only if such *car* is neither *owned by*, nor furnished by an employer to, the first *person* shown as a named insured on the Declarations Page or that *person's* spouse.

3. any other *person* for his or her use of:
 - a. *your car*;
 - b. a *newly acquired car*;
 - c. a *temporary substitute car*; or
 - d. a *trailer* while attached to a *car* described in a., b., or c. above.

Such vehicle must be used with the expressed or implied consent of *you*, and

4. any other *person* or organization vicariously liable for the use of a vehicle by an *insured* as defined in 1., 2., or 3. above, but only for such vicarious liability. This

provision applies only if the vehicle is neither *owned by*, nor hired by, that other *person* or organization.

Insured does not include the United States of America or any of its agencies.

Insuring Agreement

1. *We* will pay:
 - a. damages an *insured* becomes legally liable to pay because of:
 - (1) *bodily injury* to others; and
 - (2) damage to property
 caused by an accident that involves a vehicle for which that *insured* is provided Liability Coverage by this policy;
 - b. attorney fees for attorneys chosen by *us* to defend an *insured* who is sued for such damages; and
 - c. court costs charged to an *insured* and resulting from that part of a lawsuit:
 - (1) that seeks damages payable under this policy's Liability Coverage; and
 - (2) against which *we* defend an *insured* with attorneys chosen by *us*.

We have no duty to pay attorney fees and court costs incurred after *we* deposit in court or pay the amount due under this policy's Liability Coverage.

2. *We* have the right to:
 - a. investigate, negotiate, and settle any claim or lawsuit;
 - b. defend an *insured* in any claim or lawsuit, with attorneys chosen by *us*; and
 - c. appeal any award or legal decision for damages payable under this policy's Liability Coverage.

Supplementary Payments

We will pay, in addition to the damages, fees, and costs described in the Insuring Agreement

above, the interest, premiums, costs, and expenses listed below that result from such accident:

1. Interest on damages owed by the *insured* that accrues:
 - a. before a judgment, where owed by law, but only on that part of the judgment *we* pay; and
 - b. after a judgment. *We* will not pay interest on damages paid or payable by a party other than the *insured* or *us*.

We have no duty to pay interest that accrues after *we* deposit in court, pay, or offer to pay, the amount due under this policy's Liability Coverage;
2. Premiums for bonds, provided by a company chosen by *us*, required to appeal a decision in a lawsuit against an *insured*. *We* have no duty to:
 - a. pay for bonds that exceed this policy's applicable Liability Coverage limit;
 - b. furnish or apply for any bonds; or
 - c. pay premiums for bonds purchased after *we* deposit in court, pay, or offer to pay, the amount due under this policy's Liability Coverage; and
3. The following costs and expenses if related to and incurred after a lawsuit has been filed against an *insured*:
 - a. Loss of wages or salary, but not other income, up to \$200 for each day an *insured* attends, at *our* request:
 - (1) an arbitration;
 - (2) a mediation; or
 - (3) a trial of a lawsuit; and
 - b. Reasonable expenses incurred by an *insured* at *our* request other than loss of wages, salary, or other income.

The amount of any of the costs or expenses listed above that are incurred by an *insured* must be reported to *us* before *we* will pay such incurred costs or expenses.

Limits

1. The Liability Coverage limits for *bodily injury* are shown on the Declarations Page under "Liability Coverage - Bodily Injury Limits - Each Person, Each Accident."
 - a. The limit shown under "Each Person" is the most *we* will pay for all damages resulting from *bodily injury* to any one *person* injured in any one accident. "Bodily injury to any one person" includes all injury and damages to other *persons* resulting from that *bodily injury*, and all emotional distress resulting from that *bodily injury* sustained by other *persons* who do not sustain that *bodily injury*.
 - b. The limit shown under "Each Accident" is the most *we* will pay, subject to the limit for "Each Person", for all damages resulting from *bodily injury* to two or more *persons* injured in the same accident.
2. The Liability Coverage limit for damage to property is shown on the Declarations Page under "Liability Coverage - Property Damage Limit - Each Accident". The limit shown is the most *we* will pay for all damages resulting from damage to property in any one accident.
3. These Liability Coverage limits are the most *we* will pay regardless of the number of:
 - a. *insureds*;
 - b. claims made;
 - c. vehicles insured; or
 - d. vehicles involved in the accident.

Nonduplication

We will not pay any damages or expenses under Liability Coverage that have already been paid under Uninsured Motor Vehicle Coverage of any policy issued by the State Farm Companies to *you* or any *resident relative*.

Exclusions

THERE IS NO COVERAGE FOR AN *INSURED*:

1. TO THE EXTENT THE LIABILITY COVERAGE LIMITS OF THIS POLICY EXCEED THE LIABILITY COVERAGE LIMITS REQUIRED BY THE *FINANCIAL RESPONSIBILITY ACT* IF SUCH *INSURED* INTENTIONALLY CAUSES *BODILY INJURY* OR DAMAGE TO PROPERTY;
2. OR FOR THAT *INSURED*'S INSURER FOR ANY OBLIGATION UNDER ANY TYPE OF WORKERS' COMPENSATION, DISABILITY, OR SIMILAR LAW;
3. FOR *BODILY INJURY* TO THAT *INSURED*'S EMPLOYEE WHICH ARISES OUT OF THAT EMPLOYEE'S EMPLOYMENT. This exclusion does not apply to that *insured*'s household employee who is neither covered, nor required to be covered, under workers' compensation insurance;
4. FOR *BODILY INJURY* TO THAT *INSURED*'S FELLOW EMPLOYEE WHILE THE FELLOW EMPLOYEE IS IN THE COURSE AND SCOPE OF HIS OR HER EMPLOYMENT. This exclusion does not apply to *you* and *resident relatives* who are legally liable for *bodily injury* to fellow employees;
5. FOR DAMAGES ARISING OUT OF THE OWNERSHIP, MAINTENANCE, OR USE OF A VEHICLE WHILE IT IS RENTED TO OR LEASED TO OTHERS BY AN *INSURED*;
6. FOR DAMAGES ARISING OUT OF THE OWNERSHIP, MAINTENANCE, OR USE OF A VEHICLE WHILE IT IS BEING USED TO CARRY PERSONS FOR A CHARGE. This exclusion does not apply to the use of a *private passenger car* on a share-the-expense basis;
7. WHILE MAINTAINING OR USING A VEHICLE IN CONNECTION WITH

THAT *INSURED*'S EMPLOYMENT IN OR ENGAGEMENT OF ANY KIND IN A *CAR BUSINESS*. This exclusion does not apply to:

- a. *you*;
- b. any *resident relative*; or
- c. any agent, employee, or business partner of *you* or any *resident relative*; or
- d. any person other than a person described in a., b., or c. above up to the liability coverage limits required by the *Financial Responsibility Act*, while maintaining or using *your car*, a newly acquired car, a temporary substitute car, or a trailer owned by *you*;
8. WHILE THAT *INSURED* IS VALET PARKING A VEHICLE. This exclusion does not apply up to the liability coverage limits required by the *Financial Responsibility Act* while an *insured* is valet parking *your car*, a newly acquired car, a temporary substitute car, or a trailer owned by *you*;
9. WHILE MAINTAINING OR USING ANY VEHICLE OTHER THAN *YOUR CAR*, A NEWLY ACQUIRED CAR, A TEMPORARY SUBSTITUTE CAR, OR A TRAILER IN ANY BUSINESS OR OCCUPATION OTHER THAN A *CAR BUSINESS* OR VALET PARKING. This exclusion does not apply to the maintenance or use of a *private passenger car*;
10. FOR DAMAGE TO PROPERTY WHILE IT IS:
 - a. OWNED BY;
 - b. RENTED TO;
 - c. USED BY;
 - d. IN THE CARE OF; OR
 - e. TRANSPORTED BY*YOU*, A *RESIDENT RELATIVE*, OR THE PERSON WHO IS LEGALLY LIABLE FOR THE DAMAGE. This exclusion does not apply to damage to a:

a. motor vehicle owned by the employer of *you* or any *resident relative* if such damage is caused by an *insured* while operating another motor vehicle;

b. residence while rented to or leased to an *insured*; or

c. private garage while rented to or leased to an *insured*;

11. FOR LIABILITY ASSUMED UNDER ANY CONTRACT OR AGREEMENT;

12. FOR ANY ORDER OF RESTITUTION ISSUED BY A COURT IN A CRIMINAL PROCEEDING OR EQUITABLE ACTION;

13. WHILE USING A TRAILER WITH A MOTOR VEHICLE IF THAT *INSURED* IS NOT PROVIDED LIABILITY COVERAGE BY THIS POLICY FOR THE USE OF THAT MOTOR VEHICLE;

14. FOR THE OWNERSHIP, MAINTENANCE, OR USE OF ANY VEHICLE WHILE IT IS:

a. OFF PUBLIC ROADS AND BEING PREPARED FOR, USED IN PRACTICE FOR, OR OPERATED IN ANY RACING CONTEST, SPEED CONTEST, HILL-CLIMBING CONTEST, JUMPING CONTEST, OR ANY SIMILAR CONTEST; OR

b. ON A TRACK DESIGNED PRIMARILY FOR RACING OR HIGH-SPEED DRIVING. This exclusion (14.b.) does not apply if the vehicle is being used in connection with an activity other than racing, high-speed driving, or any type of competitive driving.

This exclusion (14.) does not apply to *your car* up to the liability coverage limits required by the *Financial Responsibility Act*; OR

15. WHO IS AN EMPLOYEE OF THE UNITED STATES OF AMERICA OR ANY OF ITS AGENCIES, IF THE PROVISIONS OF THE FEDERAL TORT CLAIMS ACT APPLY.

If Other Liability Coverage Applies

1. If Liability Coverage provided by this policy and one or more other Car Policies issued to you or any resident relative by the State Farm Companies apply to the same accident, then:

- a. the Liability Coverage limits of such policies will not be added together to determine the most that may be paid; and
- b. the maximum amount that may be paid from all such policies combined is the single highest applicable limit provided by any one of the policies. We may choose one or more policies from which to make payment.

2. The Liability Coverage provided by this policy applies as primary coverage for the ownership, maintenance, or use of your car or a trailer attached to it.

a. If:

- (1) this is the only Car Policy issued to you or any resident relative by the State Farm Companies that provides Liability Coverage which applies to the accident as primary coverage; and

- (2) liability coverage provided by one or more sources other than the State Farm Companies also applies as primary coverage for the same accident,

then we will pay the proportion of damages payable as primary that our applicable limit bears to the sum of our applicable limit and the limits of all other liability coverage that apply as primary coverage.

b. If:

- (1) more than one Car Policy issued to you or any resident relative by the State Farm Companies provides Liability Coverage which applies to the accident as primary coverage; and

(2) liability coverage provided by one or more sources other than the State Farm Companies also applies as primary coverage for the same accident,

then the State Farm Companies will pay the proportion of damages payable as primary that the maximum amount that may be paid by the State Farm Companies as determined in 1. above bears to the sum of such amount and the limits of all other liability coverage that apply as primary coverage.

3. Except as provided in 2. above, the Liability Coverage provided by this policy applies as excess coverage.

a. If:

- (1) this is the only Car Policy issued to you or any resident relative by the State Farm Companies that provides Liability Coverage which applies to the accident as excess coverage; and

- (2) liability coverage provided by one or more sources other than the State Farm Companies also applies as excess coverage for the same accident,

then we will pay the proportion of damages payable as excess that our applicable limit bears to the sum of our applicable limit and the limits of all other liability coverage that apply as excess coverage.

b. If:

- (1) more than one Car Policy issued to you or any resident relative by the State Farm Companies provides Liability Coverage which applies to the accident as excess coverage; and

- (2) liability coverage provided by one or more sources other than the State Farm Companies also applies as excess coverage for the same accident,

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then the State Farm Companies will pay the proportion of damages payable as excess that the maximum amount that may be paid by the State Farm Companies as determined in 1. above bears to the sum of such amount and the limits of all other liability coverage that apply as excess coverage.

Required Out-of-State Liability Coverage

If:

1. an insured is in another state of the United States of America; a territory or possession of the United States of America, the District of Columbia, or any province or territory of Canada; and as a nonresident becomes subject to its motor vehicle compulsory insurance law,

financial responsibility law, or similar law; and

2. this policy does not provide at least the minimum liability coverage required by such law for such nonresident,

then this policy will be interpreted to provide the minimum liability coverage required by such law.

This provision does not apply to liability coverage required by law for motor carriers of passengers or motor carriers of property.

Financial Responsibility Certification

When this policy is certified under any law as proof of future financial responsibility, and while required during the policy period, this policy will comply with such law to the extent required.

PERSONAL INJURY PROTECTION COVERAGE

This policy provides Personal Injury Protection Coverage if "P" with a number beside it is shown under "SYMBOLS" on the Declarations Page. "P" with a number beside it is your "coverage symbol".

Check your coverage symbol with the Schedule in the provision titled Limits for the choice of coverage you made.

Additional Definitions

Insured means:

1. you and resident relatives:
 - a. while occupying a motor vehicle other than a motorcycle; or
 - b. if struck as a pedestrian by a motor vehicle; or
2. any other person while occupying:
 - a. your car;
 - b. a newly acquired car;

- c. a temporary substitute car; or

- d. a trailer while attached to a car described in a, b., or c. above.

Such vehicle must be used with the expressed or implied consent of you.

Medical Expenses mean reasonable expenses for medical services.

Medical Services mean treatments, procedures, products, and other services that are:

1. necessary to achieve maximum medical improvement for the bodily injury;
2. rendered by a healthcare provider:
 - a. who is licensed as a healthcare provider if a license is required by law; and
 - b. within the legally authorized scope of that healthcare provider's practice;
3. commonly and customarily recognized throughout the medical profession and

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- within the United States of America as appropriate for the treatment of the *bodily injury*;
4. primarily designed to serve a medical purpose;
 5. not experimental; and
 6. not for research purposes.

Motor Vehicle means a vehicle or trailer of a kind required to be registered under South Carolina law.

Reasonable Expenses mean the lowest one of the following charges:

1. The usual and customary fees charged by a majority of healthcare providers who provide similar *medical services* in the geographical area in which the charges were incurred;
2. The fee specified in any fee schedule:
 - a. applicable to medical payments coverage, no-fault coverage, or personal injury protection coverage included in motor vehicle liability policies issued in the state where *medical services* are provided; and
 - b. as prescribed or authorized by the law of the state where *medical services* are provided;
3. The fees agreed to by both the *insured's* healthcare provider and *us*; or
4. The fees agreed upon between the *insured's* healthcare provider and a third party when we have a contract with such third party.

Insuring Agreement

Medical Expenses and Funeral Expenses apply to all Personal Injury Protection Coverages, Loss of Income and Essential Services Expenses apply only to coverages with coverage symbol P1, P2, P3, P4, P5, P6, and P7.

1. Medical Expenses

We will pay *medical expenses* incurred because of *bodily injury* that is sustained by an *insured* and caused by accident resulting from the maintenance or use of a *motor vehicle* as a vehicle if:

- a. that *insured* is first provided *medical services* within one year immediately following the date of the accident; and
- b. such *medical expenses* are for *medical services* that are provided within three years immediately following the date of the accident.

2. Funeral Expenses

We will pay funeral expenses incurred for an *insured* who dies within three years immediately following the date of a *motor vehicle* accident if the death is a direct result of *bodily injury* sustained in such accident.

3. Loss of Income

We will pay 85% of an *insured's* actual loss of earnings from work due to *bodily injury* that is sustained by an *insured* and caused by a *motor vehicle* accident. This applies only if the *insured* was receiving earnings from work at the time of the accident. The loss must be incurred within three years of the date of the accident and while the *insured* is living.

4. Essential Services Expenses

We will pay reasonable expenses incurred for needed services the *insured* would have done for his or her family, but is unable to do because of *bodily injury* that is sustained by that *insured* and caused by a *motor vehicle* accident. This benefit applies only if the *insured* was not receiving earnings from work at the time of the accident. The expense must be incurred within three years of the date of the accident and while the *insured* is living.

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Determining Medical Expenses

We have the right to:

1. obtain and use;
 - a. utilization reviews;
 - b. peer reviews; and
 - c. medical bill reviews
 to determine if the incurred charges are *medical expenses*;
2. use a medical examination of the *insured* to determine if:
 - a. the *bodily injury* was caused by a *motor vehicle* accident; and
 - b. the expenses incurred are *medical expenses*; and
3. enter into a contract with a third party that has an agreement with the *insured's* healthcare provider to charge fees as determined by that agreement.

Arbitration

1. If there is a disagreement as to:
 - a. whether incurred charges are *medical expenses*; or
 - b. the amount due under this coverage for Funeral Expenses, Loss of Income, or Essential Services Expenses
 then the disagreement will be resolved by arbitration upon written request of the *insured* or *us*.
2. The arbitration will take place in the county in which the *insured* resides unless the parties agree to another location. The *insured* and we will each select a competent arbitrator. These two arbitrators will select a third competent arbitrator. If they are unable to agree on the third arbitrator within 30 days, then either the *insured* or we may petition a court that has jurisdiction to select the third arbitrator. Each party will pay the cost of its own arbitrator, attorneys, and expert witnesses, as well as any other expenses incurred by that party. Both parties will share equally the cost of the third arbitrator.

3. The arbitrators shall only decide whether incurred charges are *medical expenses* and the amount due under this coverage for Funeral Expenses, Loss of Income, or Essential Services Expenses. Arbitrators shall have no authority to decide any other questions of fact, decide any questions of law, or conduct arbitration on a class-wide or class-representative basis.

4. A written decision that is both agreed upon by and signed by any two arbitrators, and that also contains an explanation of how they arrived at their decision, will be binding on:
 - a. *us*;
 - b. the *insured*;
 - c. any assignee of the *insured*; and
 - d. any person or organization with whom the *insured* expressly or impliedly contracts for *medical services*, funeral services, or essential services.

5. Subject to 1., 2., 3., and 4. above, state court rules governing procedure and admission of evidence will be used.
6. We do not waive any of our rights by submitting to arbitration.

Limits

1. The most we will pay is the amount shown under "Aggregate Limit" in the Schedule for your coverage symbol. This limit is the most we will pay for all loss and expense combined, incurred by or on behalf of any one *insured* as a result of any one accident, regardless of the number of:
 - a. *insureds*;
 - b. claims made;
 - c. vehicles insured; or
 - d. vehicles involved in the accident.
2. Subject to the aggregate limit shown in the Schedule for your coverage symbol, the most we will pay for funeral expenses incurred for any one *insured* is \$3,000.

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3. Schedule

Coverage Symbol	Medical Expenses	Funeral Expenses	Loss of Income	Essential Services Expenses	Aggregate Limit
P1	Yes	Yes	Yes	Yes	\$1,000
P2	Yes	Yes	Yes	Yes	\$1,500
P3	Yes	Yes	Yes	Yes	\$2,000
P4	Yes	Yes	Yes	Yes	\$2,500
P5	Yes	Yes	Yes	Yes	\$5,000
P6	Yes	Yes	Yes	Yes	\$10,000
P7	Yes	Yes	Yes	Yes	\$25,000
P8	Yes	Yes	No	No	\$1,000
P9	Yes	Yes	No	No	\$1,500
P10	Yes	Yes	No	No	\$2,000
P11	Yes	Yes	No	No	\$2,500
P12	Yes	Yes	No	No	\$5,000
P13	Yes	Yes	No	No	\$10,000
P14	Yes	Yes	No	No	\$25,000

Exclusions

THERE IS NO COVERAGE FOR AN INSURED:

- WHO INTENTIONALLY CAUSES AN ACCIDENT WHICH RESULTS IN THAT INSURED'S BODILY INJURY;
- WHILE VOLUNTARILY OCCUPYING A MOTOR VEHICLE KNOWN BY THAT PERSON TO BE STOLEN;
- WHILE COMMITTING A FELONY;
- WHILE ATTEMPTING TO ELUDE A POLICE OFFICER;
- WHILE OCCUPYING, USING, OR MAINTAINING A MOTORCYCLE;
- WHO IS EITHER OCCUPYING OR STRUCK AS A PEDESTRIAN BY A VEHICLE OWNED BY THAT INSURED, YOU, OR ANY RESIDENT RELATIVE IF IT IS NOT YOUR CAR OR A NEWLY ACQUIRED CAR;
- WHO IS OCCUPYING A VEHICLE WHILE IT IS RENTED TO OR LEASED TO OTHERS BY AN INSURED;

- WHO IS OCCUPYING A VEHICLE WHILE IT IS BEING USED TO CARRY PERSONS FOR A CHARGE. This exclusion does not apply to:
 - the use of a private passenger car on a share-the-expense basis; or
 - an insured while occupying a non-owned car as a passenger;

- WHILE MAINTAINING OR USING A VEHICLE IN CONNECTION WITH THAT INSURED'S EMPLOYMENT IN OR ENGAGEMENT OF ANY KIND IN A CAR BUSINESS. This exclusion does not apply to:
 - you;
 - any resident relative; or
 - any agent, employee, or business partner of a. or b. above.

while maintaining or using your car, a newly acquired car, a temporary substitute car, or a trailer owned by you;

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- WHILE THAT INSURED IS VALET PARKING A VEHICLE;

- WHILE MAINTAINING OR USING A NON-OWNED CAR IN ANY BUSINESS OR OCCUPATION OTHER THAN A CAR BUSINESS OR VALET PARKING. This exclusion does not apply to the maintenance or use of a private passenger car;

- WHO IS EITHER OCCUPYING OR STRUCK AS A PEDESTRIAN BY A VEHICLE THAT:
 - IS DESIGNED FOR USE PRIMARILY OFF PUBLIC ROADS WHILE OFF PUBLIC ROADS;
 - RUNS ON RAILS OR CRAWLER-TREADS; OR
 - IS LOCATED FOR USE AS A DWELLING OR OTHER PREMISES;

- WHOSE BODILY INJURY RESULTS FROM WAR OF ANY KIND;

- WHOSE BODILY INJURY RESULTS FROM:
 - NUCLEAR REACTION;
 - RADIATION OR RADIOACTIVE CONTAMINATION FROM ANY SOURCE; OR
 - THE ACCIDENTAL OR INTENTIONAL DETONATION OF, OR RELEASE OF RADIATION FROM, ANY NUCLEAR OR RADIOACTIVE DEVICE;

- WHOSE BODILY INJURY RESULTS FROM THE DISCHARGE OF A FIREARM;

- WHOSE BODILY INJURY RESULTS FROM EXPOSURE TO FUNGI; OR

- WHO IS OCCUPYING A VEHICLE WHILE IT IS:
 - BEING PREPARED FOR, USED IN PRACTICE FOR, OR OPERATED IN ANY RACING, CONTEST, SPEED CONTEST, HILL-CLIMBING CONTEST, JUMPING CONTEST, OR ANY SIMILAR CONTEST; OR

- ON A TRACK DESIGNED PRIMARILY FOR RACING OR HIGH-SPEED DRIVING. This exclusion (17.b.) does not apply if the vehicle is being used in connection with an activity other than racing, high-speed driving, or any type of competitive driving.

If Other Personal Injury Protection Coverage or Similar Vehicle Insurance Applies

- An insured shall not recover for the same expense or loss under both this coverage and other similar vehicle insurance.

- If Personal Injury Protection Coverage is provided by this policy and one or more other vehicle policies issued to you or any resident relative by the State Farm Companies apply to the same bodily injury, then:
 - the Personal Injury Protection Coverage limits of such policies shall not be added together to determine the most that may be paid; and
 - the maximum amount that may be paid from all such policies combined is the single highest applicable limit provided by any one of the policies. We may choose one or more policies from which to make payment.

- The Personal Injury Protection Coverage provided by this policy applies as primary coverage for an insured who sustains bodily injury while occupying your car or a trailer attached to it.

- If:
 - this is the only vehicle policy issued to you or any resident relative by the State Farm Companies that provides Personal Injury Protection Coverage or other similar vehicle insurance which applies to the accident as primary coverage; and
 - personal injury protection coverage or other similar vehicle insurance provided by one or more sources other than the State Farm Companies also applies as primary coverage for the same accident;

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then we will pay the proportion of expenses or loss payable as primary that our applicable limit bears to the sum of our applicable limit and the limits of all other personal injury protection coverage or similar vehicle insurance that apply as primary coverage.

b. If

(1) more than one vehicle policy issued to you or any resident relative by the State Farm Companies provides Personal Injury Protection Coverage or other similar vehicle insurance which applies to the accident as primary coverage; and

(2) personal injury protection coverage or other similar vehicle insurance provided by one or more sources other than the State Farm Companies also applies as primary coverage for the same accident,

then the State Farm Companies will pay the proportion of expenses or loss payable as primary that the maximum amount that may be paid by the State Farm Companies as determined in 2. above bears to the sum of such amount and the limits of all other personal injury protection coverage or similar vehicle insurance that apply as primary coverage.

4. Except as provided in 3. above, the Personal Injury Protection Coverage provided by this policy applies as excess coverage; but only in the amount by which the limits of this coverage exceed the primary coverage.

a. If

(1) this is the only vehicle policy issued to you or any resident relative by the State Farm Companies that provides Personal Injury Protection Coverage or other similar vehicle insurance which applies to the accident as excess coverage; and

(2) personal injury protection coverage or other similar vehicle insurance

provided by one or more sources other than the State Farm Companies also applies as excess coverage for the same accident,

then we will pay the proportion of expenses or loss payable as excess that our applicable limit bears to the sum of our applicable limit and the limits of all other personal injury protection coverage or similar vehicle insurance that apply as excess coverage.

b. If

(1) more than one vehicle policy issued to you or any resident relative by the State Farm Companies provides Personal Injury Protection Coverage or other similar vehicle insurance which applies to the accident as excess coverage; and

(2) personal injury protection coverage or other similar vehicle insurance provided by one or more sources other than the State Farm Companies also applies as excess coverage for the same accident,

then the State Farm Companies will pay the proportion of expenses or loss payable as excess that the maximum amount that may be paid by the State Farm Companies as determined in 2. above bears to the sum of such amount and the limits of all other personal injury protection coverage or similar vehicle insurance that apply as excess coverage.

Workers' Compensation Coordination

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.

Our Payment Options

We may, at our option, make payment to one or more of the following:

1. The insured;
2. The insured's surviving spouse;

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3. A parent or guardian of the insured, if the insured is a minor or an incompetent person;
4. A person authorized by law to receive such payment; or

5. Any person or organization that provides the medical services, funeral services, or other services payable under this coverage.

MEDICAL PAYMENTS COVERAGE

This policy provides Medical Payments Coverage if "C" is shown under "SYMBOLS" on the Declarations Page.

Additional Definitions

Insured means:

1. you and resident relatives;

a. while occupying:

- (1) your car;
- (2) a newly acquired car;
- (3) a temporary substitute car;
- (4) a non-owned car; or
- (5) a trailer while attached to a car described in (1), (2), (3), or (4) above; or

b. if struck as a pedestrian by a motor vehicle or any type of trailer; and

2. any other person while occupying:

- a. your car;
- b. a newly acquired car;
- c. a temporary substitute car; or
- d. a trailer while attached to a car described in a., b., or c. above.

Such vehicle must be used with the expressed or implied consent of you.

Medical Expenses mean reasonable expenses for medical services.

Medical Services mean treatments, procedures, products, and other services that are:

1. necessary to achieve maximum medical improvement for the bodily injury;

2. rendered by a healthcare provider:

a. who is licensed as a healthcare provider if a license is required by law; and

b. within the legally authorized scope of that healthcare provider's practice;

3. commonly and customarily recognized throughout the medical profession and within the United States of America as appropriate for the treatment of the bodily injury;

4. primarily designed to serve a medical purpose;

5. not experimental; and

6. not for research purposes.

Reasonable Expenses mean the lowest one of the following charges:

1. The usual and customary fees charged by a majority of healthcare providers who provide similar medical services in the geographical area in which the charges were incurred;

2. The fee specified in any fee schedule;

a. applicable to medical payments coverage, no-fault coverage, or personal injury protection coverage included in motor vehicle liability policies issued in the state where medical services are provided; and

b. as prescribed or authorized by the law of the state where medical services are provided;

3. The fees agreed to by both the insured's healthcare provider and us; or

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4. The fees agreed upon between the *insured's* healthcare provider and a third party when *we* have a contract with such third party.

Insuring Agreement

We will pay:

1. *medical expenses* incurred because of *bodily injury* that is sustained by an *insured* and caused by accident resulting from the maintenance or use of a motor vehicle as a vehicle if:
 - a. that *insured* is first provided *medical services* within one year immediately following the date of the accident; and
 - b. such *medical expenses* are for *medical services* that are provided within three years immediately following the date of the accident; and
2. funeral expenses incurred for an *insured* who dies within three years immediately following the date of a motor vehicle accident if the death is a direct result of *bodily injury* sustained in such accident.

Determining Medical Expenses

We have the right to:

1. obtain and use:
 - a. utilization reviews;
 - b. peer reviews; and
 - c. medical bill reviews
 to determine if the incurred charges are *medical expenses*;
2. use a medical examination of the *insured* to determine if:
 - a. the *bodily injury* was caused by a motor vehicle accident; and
 - b. the expenses incurred are *medical expenses*; and
3. enter into a contract with a third party that has an agreement with the *insured's* healthcare provider to charge fees as determined by that agreement.

Arbitration

1. If there is a disagreement as to whether incurred charges are *medical expenses*, then the disagreement will be resolved by arbitration upon written request of the *insured* or *us*.
2. The arbitration will take place in the county in which the *insured* resides unless the parties agree to another location.

The *insured* and *we* will each select a competent arbitrator. These two arbitrators will select a third competent arbitrator. If they are unable to agree on the third arbitrator within 30 days, then either the *insured* or *we* may petition a court that has jurisdiction to select the third arbitrator.

Each party will pay the cost of its own arbitrator, attorneys, and expert witnesses, as well as any other expenses incurred by that party. Both parties will share equally the cost of the third arbitrator.

3. The arbitrators shall only decide whether incurred charges are *medical expenses*. Arbitrators shall have no authority to decide any other questions of fact, decide any questions of law, or conduct arbitration on a class-wide or class-representative basis.

4. A written decision that is both agreed upon by and signed by any two arbitrators, and that also contains an explanation of how they arrived at their decision, will be binding on:
 - a. *us*;
 - b. the *insured*;
 - c. any assignee of the *insured*; and
 - d. any person or organization with whom the *insured* expressly or impliedly contracts for *medical services*.

5. Subject to 1.; 2., 3., and 4. above, state court rules governing procedure and admission of evidence will be used.

6. *We* do not waive any of *our* rights by submitting to arbitration.

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Limit

The Medical Payments Coverage limit is shown on the Declarations Page under "Medical Payments Coverage - Limit - Each Person". This limit is the most *we* will pay for the *medical expenses* and funeral expenses combined; incurred by or on behalf of any one *insured* as a result of any one accident, regardless of the number of:

1. *insureds*;
 2. claims made;
 3. vehicles insured; or
 4. vehicles involved in the accident.
- Subject to the limit shown on the Declarations Page, the most *we* will pay for funeral expenses incurred for any one *insured* is \$3,000.

Exclusions

THERE IS NO COVERAGE FOR AN *INSURED*:

1. WHO IS STRUCK AS A PEDESTRIAN BY A MOTOR VEHICLE OWNED BY THAT *INSURED* OR *YOU*, IF IT IS NOT *YOUR CAR* OR A *NEWLY ACQUIRED CAR*;
2. IF ANY WORKERS' COMPENSATION LAW OR ANY SIMILAR LAW APPLIES TO THAT *INSURED'S BODILY INJURY*;
3. WHO IS OCCUPYING A VEHICLE WHILE IT IS RENTED TO OR LEASED TO OTHERS BY AN *INSURED*;
4. WHO IS OCCUPYING A VEHICLE WHILE IT IS BEING USED TO CARRY PERSONS FOR A CHARGE. This exclusion does not apply to:
 - a. the use of a private passenger car on a share-the-expense basis; or
 - b. an *insured* while occupying a non-owned car as a passenger;
5. WHILE MAINTAINING OR USING A VEHICLE IN CONNECTION WITH THAT *INSURED'S* EMPLOYMENT IN

OR ENGAGEMENT OF ANY KIND IN A *CAR BUSINESS*. This exclusion does not apply to:

- a. *you*;
 - b. any resident relative; or
 - c. any agent, employee, or business partner of a. or b. above
- while maintaining or using *your car*, a newly acquired car, a temporary substitute car, or a trailer owned by *you*;
6. WHILE THAT *INSURED* IS VALET PARKING A VEHICLE;
 7. WHILE MAINTAINING OR USING A NON-OWNED CAR IN ANY BUSINESS OR OCCUPATION OTHER THAN A *CAR BUSINESS* OR VALET PARKING. This exclusion does not apply to the maintenance or use of a private passenger car;
 8. WHO IS EITHER OCCUPYING OR STRUCK AS A PEDESTRIAN BY A VEHICLE THAT IS LOCATED FOR USE AS A DWELLING OR OTHER PREMISES;
 9. WHO IS STRUCK AS A PEDESTRIAN BY A VEHICLE THAT:
 - a. IS DESIGNED FOR USE PRIMARILY OFF PUBLIC ROADS WHILE OFF PUBLIC ROADS; OR
 - b. RUNS ON RAILS OR CRAWLER-TREADS;
 10. WHOSE *BODILY INJURY* RESULTS FROM WAR OF ANY KIND;
 11. WHOSE *BODILY INJURY* RESULTS FROM:
 - a. NUCLEAR REACTION;
 - b. RADIATION OR RADIOACTIVE CONTAMINATION FROM ANY SOURCE; OR
 - c. THE ACCIDENTAL OR INTENTIONAL DETONATION OF, OR RELEASE OF RADIATION FROM, ANY NUCLEAR OR RADIOACTIVE DEVICE;

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12. WHOSE *BODILY INJURY* RESULTS FROM THE DISCHARGE OF A FIRE-ARM;

13. WHOSE *BODILY INJURY* RESULTS FROM EXPOSURE TO FUNG; OR

14. WHO IS *OCCUPYING* A VEHICLE WHILE IT IS:

- a. BEING PREPARED FOR, USED IN PRACTICE FOR, OR OPERATED IN ANY RACING CONTEST, SPEED CONTEST, HILL-CLIMBING CONTEST, JUMPING CONTEST, OR ANY SIMILAR CONTEST; OR
- b. ON A TRACK DESIGNED PRIMARILY FOR RACING OR HIGH-SPEED DRIVING. This exclusion (14.b.) does not apply if the vehicle is being used in connection with an activity other than racing, high-speed driving, or any type of competitive driving.

If Other Medical Payments Coverage or Similar Vehicle Insurance Applies

1. An *insured* shall not recover for the same *medical expenses* or funeral expenses under both this coverage and other medical payments coverage or similar vehicle insurance.
2. If Medical Payments Coverage provided by this policy and one or more other vehicle policies issued to *you* or any *resident relative* by the *State Farm Companies* apply to the same *bodily injury*, then:
 - a. the Medical Payments Coverage limits of such policies shall not be added together to determine the most that may be paid; and
 - b. the maximum amount that may be paid from all such policies combined is the single highest applicable limit provided by any one of the policies. *We* may choose one or more policies from which to make payment.
3. If other medical payments coverage, personal injury protection coverage, or similar

vehicle insurance applies, then the Medical Payments Coverage provided by this policy applies as excess coverage.

a. If

- (1) this is the only vehicle policy issued to *you* or any *resident relative* by the *State Farm Companies* that provides Medical Payments Coverage or other similar vehicle insurance which applies to the accident as excess coverage; and
- (2) medical payments coverage or other similar vehicle insurance provided by one or more sources other than the *State Farm Companies* also applies as excess coverage for the same accident.

then *we* will pay the proportion of *medical expenses* and funeral expenses payable as excess that *our* applicable limit bears to the sum of *our* applicable limit and the limits of all other medical payments coverage or similar vehicle insurance that apply as excess coverage.

b. If

- (1) more than one vehicle policy issued to *you* or any *resident relative* by the *State Farm Companies* provides Medical Payments Coverage or other similar vehicle insurance which applies to the accident as excess coverage; and
- (2) medical payments coverage or other similar vehicle insurance provided by one or more sources other than the *State Farm Companies* also applies as excess coverage for the same accident.

then the *State Farm Companies* will pay the proportion of *medical expenses* and funeral expenses payable as excess that the maximum amount that may be paid by the *State Farm Companies* as determined in 2. above

bears to the sum of such amount and the limits of all other medical payments coverage or similar vehicle insurance that apply as excess coverage.

Our Payment Options

We may, at *our* option, make payment to one or more of the following:

1. The *insured*;

2. The *insured's* surviving spouse;
3. A parent or guardian of the *insured*, if the *insured* is a minor or an incompetent person;
4. A person authorized by law to receive such payment; or
5. Any person or organization that provides the *medical services* or funeral services.

UNINSURED MOTOR VEHICLE COVERAGE

This policy provides Uninsured Motor Vehicle Coverage if "U" is shown under "SYMBOLS" on the Declarations Page.

Additional Definitions

Insured means:

1. *you*;
2. *resident relatives*;
3. any other person while *occupying* or using:
 - a. *your car*;
 - b. a *newly acquired car*; or
 - c. a *temporary substitute car*; with the expressed or implied consent of *you*; and
4. any person to the extent he or she may recover damages under a state wrongful death statute because of the death of an *insured* under 1, 2, or 3. above.

Motor Vehicle means a self-propelled vehicle or trailer designed for use on public roads, but does not include tractor engines, road rollers, farm trailers, tractor cranes, power shovels, well drillers, or electric trolleys.

Property Damage means damage to property of the *insured*.

Uninsured Motor Vehicle means a *motor vehicle*:

1. the ownership, maintenance, and use of which is:

- a. not *insured* or bonded for *bodily injury* and *property damage* liability at the time of the accident; or
- b. *insured* or bonded for *bodily injury* and *property damage* liability at the time of the accident; but
 - (1) the limits are less than required by the *Financial Responsibility Act*;
 - (2) the *insuring company*:
 - (a) denies that its policy provides liability coverage for damages that result from the accident; or
 - (b) is or becomes insolvent; or
 - (3) a cause of action for the *bodily injury* or *property damage* is barred by the South Carolina Tort Claims Act; or
2. the owner and driver of which remain unknown, but only if:
 - a. the *bodily injury* or *property damage* was caused by physical contact with the unknown vehicle, or the accident was witnessed by someone other than the owner or driver of the insured vehicle. The witness must sign an affidavit attesting to the truth of the facts of the accident contained in the affidavit; and

- b. the *insured* was not negligent in failing to determine the identity of the other vehicle and the driver of the other vehicle at the time of the accident.

Uninsured Motor Vehicle does not include a motor vehicle owned by:

1. a self-insurer in accordance with the applicable provisions of law; or
2. the State or any of its political subdivisions when the vehicle is operated by a *person* with proper authorization.

Insuring Agreement

We will pay damages for *bodily injury* and *property damage* an *insured* is legally entitled to recover from the owner or driver of an *uninsured motor vehicle*. The *bodily injury* must be sustained by an *insured*. The *bodily injury* and *property damage* must be caused by an accident that involves the operation, maintenance, or use of an *uninsured motor vehicle*.

Our Right to Defend

We have the right to appear and defend in the name of the owner and driver of the *uninsured motor vehicle* on the issues of legal liability of, and the damages owed by, such owner or driver.

Limits

1. The Uninsured Motor Vehicle Coverage limits for *bodily injury* are shown on the Declarations Page under "Uninsured Motor Vehicle Coverage - Bodily Injury Limits - Each Person, Each Accident".

- a. The most we will pay for all damages resulting from *bodily injury* to any one *person* injured in any one accident is the lesser of:

- (1) the amount of all damages resulting from that *bodily injury* reduced by the sum of all payments for damages resulting from that *bodily injury* made by or on behalf of any *person* or organization who is or may be held legally liable for that *bodily injury*; or

- (2) the limit shown under "Each Person".

"*Bodily injury* to any one *person*" includes all injury and damages to other *persons* resulting from that *bodily injury*, and all emotional distress resulting from that *bodily injury* sustained by other *persons* who do not sustain that *bodily injury*.

- b. Subject to a. above, the most we will pay for all damages resulting from *bodily injury* to two or more *insureds* injured in the same accident is the limit shown under "Each Accident".

2. The Uninsured Motor Vehicle Coverage limit for *property damage* is shown on the Declarations Page under "Uninsured Motor Vehicle Coverage - Property Damage Limit - Each Accident". The most we will pay for *property damage* is the lesser of:

- a. the amount of *property damage* reduced by the sum of all payments made by or on behalf of any *person* or organization who is or may be held legally liable for that *property damage*; or
- b. the limit shown under "Each Accident".

3. These Uninsured Motor Vehicle Coverage limits are the most we will pay regardless of the number of:

- a. *insureds*;
- b. claims made;
- c. vehicles insured; or
- d. vehicles involved in the accident.

Nonduplication

We will not pay, under Uninsured Motor Vehicle Coverage any damages:

1. that have already been paid to or for the *insured*;
- a. by or on behalf of any *person* or organization who is or may be held legally liable for the *bodily injury* to the *insured*; or

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- b. for *bodily injury* under Liability Coverage of any policy issued by the *State Farm Companies* to you or any *resident relative*;

2. that:

- a. have already been paid;
- b. could have been paid; or
- c. could be paid to or for the *insured* under any workers' compensation law, disability benefits law, or similar law; or

3. that are *property damage* paid or payable under any policy of property insurance.

Exclusions

THERE IS NO COVERAGE:

1. FOR AN *INSURED* WHO, WITHOUT OUR WRITTEN CONSENT, SETTLES WITH ANY *PERSON* OR ORGANIZATION WHO MAY BE LIABLE FOR THE *BODILY INJURY* OR *PROPERTY DAMAGE* AND THEREBY IMPAIRS OUR RIGHT TO RECOVER OUR PAYMENTS;
2. TO THE EXTENT THE UNINSURED MOTOR VEHICLE COVERAGE LIMITS OF THIS POLICY EXCEED THE COVERAGE LIMITS REQUIRED BY THE *FINANCIAL RESPONSIBILITY ACT*;
- a. FOR AN *INSURED* WHO SUSTAINS *BODILY INJURY* WHILE OCCUPYING A MOTOR VEHICLE OWNED BY YOU OR ANY *RESIDENT RELATIVE* IF:

- (1) THE MOTOR VEHICLE IS NOT YOUR CAR OR A NEWLY-ACQUIRED CAR; AND

- (2) IT WAS NOT INSURED FOR UNINSURED MOTOR VEHICLE COVERAGE AT THE TIME OF THE ACCIDENT;

- b. IF THE UNINSURED MOTOR VEHICLE IS OWNED BY YOU OR ANY *RESIDENT RELATIVE*; OR

- c. FOR *PROPERTY DAMAGE*:

- (1) TO A MOTOR VEHICLE; OR
- (2) IN A MOTOR VEHICLE

OWNED BY YOU OR ANY *RESIDENT RELATIVE* IF THE MOTOR VEHICLE WAS NOT INSURED FOR UNINSURED MOTOR VEHICLE COVERAGE AT THE TIME OF THE ACCIDENT;

3. FOR *PROPERTY DAMAGE* THAT WAS PROXIMATELY CAUSED BY THE DRIVER OF YOUR CAR OR A NEWLY ACQUIRED CAR;

4. FOR AN *INSURED* WHOSE *BODILY INJURY* RESULTS FROM THE DISCHARGE OF A FIREARM;

5. TO THE EXTENT IT BENEFITS:

- a. ANY WORKERS' COMPENSATION OR DISABILITY BENEFITS INSURANCE COMPANY;
- b. A SELF-INSURER UNDER ANY WORKERS' COMPENSATION LAW, DISABILITY BENEFITS LAW, OR SIMILAR LAW; OR
- c. ANY PROPERTY INSURER;

6. FOR ANY ORDER OF RESTITUTION ISSUED BY A COURT IN A CRIMINAL PROCEEDING OR EQUITABLE ACTION; OR

7. FOR THE FIRST \$200 OF *PROPERTY DAMAGE* SUSTAINED BY EACH *INSURED* IN EACH ACCIDENT.

If Other Uninsured Motor Vehicle Coverage Applies

1. The Uninsured Motor Vehicle Coverage provided by this policy applies as primary coverage for an *insured* who sustains *bodily injury* or *property damage* while occupying your car.

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2. Except as provided in item 1. above, the Uninsured Motor Vehicle Coverage provided by this policy applies as excess coverage.

3. If:

- a. *you* or any *resident relative* sustains *bodily injury* or *property damage*:

(1) while *occupying* a motor vehicle not *owned* by *you* or any *resident relative*; or

(2) while not *occupying* a motor vehicle; and

- b. Uninsured Motor Vehicle Coverage provided by this policy and one or more other vehicle policies issued to *you* or any *resident relative* by the *State Farm Companies* apply to the same *bodily injury* or *property damage*, then

the maximum amount that may be paid from all such policies combined is the single highest limit provided by any one of the policies. *We* may choose one or more policies from which to make payment.

4. If *you* or any *resident relative* sustains *bodily injury* or *property damage* while *occupying* a motor vehicle other than *your car* that is *owned* by *you* or any *resident relative*, then this coverage applies only to the extent of the uninsured motor vehicle coverage applicable to the motor vehicle that the *insured* was *occupying*.

However, if the motor vehicle that the *insured* was *occupying* was not insured for uninsured motor vehicle coverage at the time of the accident, then the maximum amount that may be paid from all policies

combined that are issued to *you* or any *resident relative* by the *State Farm Companies* is the minimum limits required by the *Financial Responsibility Act*. *We* may choose one or more policies from which to make payment.

5. Subject to items 1., 2., 3., and 4. above, if this policy and one or more other sources provide uninsured motor vehicle coverage for the same damages on a:

a. primary basis, then *we* will pay the proportion of damages payable as primary that the applicable limit of this coverage under this policy bears to the sum of such amount and the limits of all other uninsured motor vehicle coverage that apply as primary coverage; or

b. excess basis, then *we* will pay the proportion of damages payable as excess that the applicable limit of this coverage under this policy bears to the sum of such amount and the limits of all other uninsured motor vehicle coverage that apply as excess coverage.

Our Payment Options

We may, at *our* option, make payment to one or more of the following:

1. The *insured*;
2. The *insured's* surviving spouse;
3. A parent or guardian of the *insured*, if the *insured* is a minor or an incompetent person; or
4. A person authorized by law to receive such payment.

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UNDERINSURED MOTOR VEHICLE COVERAGE

This policy provides Underinsured Motor Vehicle Coverage if "W" is shown under "SYMBOLS" on the Declarations Page.

Additional Definitions

Insured means:

1. *you*;
2. *resident relatives*;
3. any other person while *occupying* or using:
 - a. *your car*;
 - b. a *newly acquired car*; or
 - c. a *temporary substitute car*;
 with the expressed or implied consent of *you*; and
4. any person to the extent he or she may recover damages under a state wrongful death statute because of the death of an *insured* under 1., 2., or 3. above.

Motor Vehicle means a self-propelled vehicle or trailer designed for use on public roads, but does not include tractor engines, road rollers, farm trailers, tractor cranes, power shovels, well-drillers, or electric trolleys.

Property Damage means damage to property of the *insured*.

Underinsured Motor Vehicle means a motor vehicle the ownership, maintenance, and use of which is either:

1. insured or bonded for bodily injury and property damage liability at the time of the accident; or
2. self-insured under any motor vehicle financial responsibility law, any motor carrier law, or any similar law

in an amount that is at least equal to the amount required by the *Financial Responsibility Act* and:

1. the amount of the insurance, bonds, and self-insurance from all sources is less than the amount of the *insured's* damages; or

2. the *insured's* damages exceed any damages cap or limitation imposed by statute.

Underinsured Motor Vehicle does not include a motor vehicle while located for use as a dwelling or other premises.

Insuring Agreement

We will pay damages for *bodily injury* and *property damage* an *insured* is legally entitled to recover from the owner or driver of an *underinsured motor vehicle*. The *bodily injury* must be sustained by an *insured*. The *bodily injury* and *property damage* must be caused by an accident that involves the operation, maintenance, or use of an *underinsured motor vehicle*.

We will pay only if all bodily injury and property damage liability bonds, policies, and self-insurance plans that apply to the *insured's bodily injury* or *property damage* have been:

1. used up by payment of judgments or settlements; or
2. paid to the extent required by any damages cap or limitation imposed by statute.

Our Right to Defend

We have the right to appear and defend in the name of the owner and driver of the *underinsured motor vehicle* on the issues of legal liability of, and the damages owed by, such owner or driver.

Limits

1. The Underinsured Motor Vehicle Coverage limits are shown on the Declarations Page under "Underinsured Motor Vehicle Coverage - Bodily Injury Limits - Each Person, Each Accident".

a. The most *we* will pay for all damages resulting from *bodily injury* to any one person injured in any one accident is the lesser of:

- (1) the amount of all damages resulting from that *bodily injury* reduced by the sum of all payments for damages resulting from that

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bodily injury made by or on behalf of any person or organization who is or may be held legally liable for that *bodily injury*; or

- (2) the limit shown under "Each Person".

"*Bodily injury* to any one person" includes all injury and damages to other persons resulting from that *bodily injury*, and all emotional distress resulting from that *bodily injury* sustained by other persons who do not sustain that *bodily injury*.

- b. Subject to a. above, the most we will pay for all damages resulting from *bodily injury* to two or more insureds injured in the same accident is the limit shown under "Each Accident".

2. The Underinsured Motor Vehicle Coverage limit for *property damage* is shown on the Declarations Page under "Underinsured Motor Vehicle Coverage - Property Damage Limit - Each Accident". The most we will pay for *property damage* is the lesser of:

- a. the amount of *property damage* reduced by the sum of all payments made by or on behalf of any person or organization who is or may be held legally liable for that *property damage*; or

- b. the limit shown under "Each Accident".

3. These Underinsured Motor Vehicle Coverage limits are the most we will pay regardless of the number of:

- a. insureds;
b. claims made;
c. vehicles insured; or
d. vehicles involved in the accident.

Nonduplication

We will not pay under Underinsured Motor Vehicle Coverage any damages:

1. that have already been paid to or for the insured;
a. by or on behalf of any person or organization who is or may be held

legally liable for the *bodily injury* to the insured; or

- b. for *bodily injury* under Liability Coverage of any policy issued by the State Farm Companies to you or any resident relative;

2. that:

- a. have already been paid;

- b. could have been paid; or

- c. could be paid

to or for the insured under any workers' compensation law, disability benefits law, or similar law; or

3. that are *property damage* paid or payable under any policy of property insurance.

Exclusions

THERE IS NO COVERAGE:

1. FOR AN INSURED WHO, WITHOUT OUR WRITTEN CONSENT, SETTLES WITH ANY PERSON OR ORGANIZATION WHO MAY BE LIABLE FOR THE *BODILY INJURY* OR *PROPERTY DAMAGE* AND THEREBY IMPAIRS OUR RIGHT TO RECOVER OUR PAYMENTS;

2. TO THE EXTENT THE UNDERINSURED MOTOR VEHICLE COVERAGE LIMITS OF THIS POLICY EXCEED THE COVERAGE LIMITS REQUIRED BY THE FINANCIAL RESPONSIBILITY ACT:

- a. FOR AN INSURED WHO SUSTAINS *BODILY INJURY* WHILE OCCUPYING A MOTOR VEHICLE OWNED BY YOU OR ANY RESIDENT RELATIVE IF:

- (1) THE MOTOR VEHICLE IS NOT YOUR CAR OR A NEWLY ACQUIRED CAR; AND

- (2) IT WAS NOT INSURED FOR UNDERINSURED MOTOR VEHICLE

COVERAGE AT THE TIME OF THE ACCIDENT;

- b. IF THE UNDERINSURED MOTOR VEHICLE IS OWNED BY YOU OR ANY RESIDENT RELATIVE; OR

- c. FOR *PROPERTY DAMAGE*:

- (1) TO A MOTOR VEHICLE; OR

- (2) IN A MOTOR VEHICLE

OWNED BY YOU OR ANY RESIDENT RELATIVE IF THE MOTOR VEHICLE WAS NOT INSURED FOR UNDERINSURED MOTOR VEHICLE COVERAGE AT THE TIME OF THE ACCIDENT;

3. FOR *PROPERTY DAMAGE* THAT WAS PROXIMATELY CAUSED BY THE DRIVER OF YOUR CAR OR A NEWLY ACQUIRED CAR;

4. FOR AN INSURED WHOSE *BODILY INJURY* RESULTS FROM THE DISCHARGE OF A FIREARM;

5. TO THE EXTENT IT BENEFITS:

- a. ANY WORKERS' COMPENSATION OR DISABILITY BENEFITS INSURANCE COMPANY;

- b. A SELF-INSURER UNDER ANY WORKERS' COMPENSATION LAW, DISABILITY BENEFITS LAW, OR SIMILAR LAW; OR

- c. ANY PROPERTY INSURER; OR

6. FOR ANY ORDER OF RESTITUTION ISSUED BY A COURT IN A CRIMINAL PROCEEDING OR EQUITABLE ACTION.

If Other Underinsured Motor Vehicle Coverage Applies

1. The Underinsured Motor Vehicle Coverage provided by this policy applies as primary coverage for an insured who sustains *bodily injury* or *property damage* while occupying your car.

2. Except as provided in item 1. above, the Underinsured Motor Vehicle Coverage provided by this policy applies as excess coverage.

3. If:

- a. you or any resident relative sustains *bodily injury* or *property damage*:

- (1) while occupying a motor vehicle not owned by you or any resident relative; or

- (2) while not occupying a motor vehicle; and

- b. Underinsured Motor Vehicle Coverage provided by this policy and one or more other vehicle policies issued to you or any resident relative by the State Farm Companies apply to the same *bodily injury* or *property damage*, then

the maximum amount that may be paid from all such policies combined is the single highest limit provided by any one of the policies. We may choose one or more policies from which to make payment.

4. If you or any resident relative sustains *bodily injury* or *property damage* while occupying a motor vehicle other than your car that is owned by you or any resident relative, then this coverage applies only to the extent of the underinsured motor vehicle coverage applicable to the motor vehicle that the insured was occupying.

However, if the motor vehicle that the insured was occupying was not insured for underinsured motor vehicle coverage at the time of the accident, then the maximum amount that may be paid from all policies combined that are issued to you or any resident relative by the State Farm Companies is the minimum limits required by the Financial Responsibility Act. We may choose one or more policies from which to make payment.

5. Subject to items 1., 2., 3., and 4. above, if this policy and one or more other sources

provide underinsured motor vehicle coverage for the same damages on a:

- primary basis, then we will pay the proportion of damages payable as primary that the applicable limit of this coverage under this policy bears to the sum of such amount and the limits of all other underinsured motor vehicle coverage that apply as primary coverage; or
- excess basis, then we will pay the proportion of damages payable as excess that the applicable limit of this coverage under this policy bears to the sum of such amount and the limits

of all other underinsured motor vehicle coverage that apply as excess coverage.

Our Payment Options

We may, at our option, make payment to one or more of the following:

- The insured;
- The insured's surviving spouse;
- A parent or guardian of the insured, if the insured is a minor or an incompetent person; or
- A person authorized by law to receive such payment.

PHYSICAL DAMAGE COVERAGES

The physical damage coverages are Comprehensive Coverage, Collision Coverage, Emergency Road Service Coverage, and Car Rental and Travel Expenses Coverage.

This policy provides:

- Comprehensive Coverage if "D";
- Collision Coverage if "G";
- Emergency Road Service Coverage if "H";
- Car Rental and Travel Expenses Coverage if "R1"

is shown under "SYMBOLS" on the Declarations Page.

If a deductible applies to Comprehensive Coverage, then it is shown on the Declarations Page. The deductible that applies to Collision Coverage is shown on the Declarations Page.

Additional Definitions

Covered Vehicle means:

- your car;

- a newly acquired car;
- a temporary substitute car;
- a camper that is designed to be mounted on a pickup truck and shown on the Declarations Page;
- a non-owned car while it is:
 - being driven by an insured; or
 - in the custody of an insured if at the time of the loss it is:
 - not being driven; or
 - being driven by a person other than an insured and being occupied by an insured;
- a non-owned trailer while it is being used by an insured; and
- a non-owned camper while it is being used by an insured;

including its parts and its equipment that are common to the use of the vehicle as a vehicle. However, parts and equipment of trailers and

campers must be securely fixed as a permanent part of the trailer or camper.

Daily Rental Charge means the sum of:

- the daily rental rate;
- mileage charges; and
- related taxes.

Insured means you and resident relatives.

Loss means:

- direct, sudden, and accidental damage to; or
- total or partial theft of

a covered vehicle. Loss does not include any reduction in the value of any covered vehicle after it has been repaired, as compared to its value before it was damaged.

Loss Caused By Collision means a loss caused by:

- a covered vehicle hitting or being hit by another vehicle or another object; or
- the overturning of a covered vehicle.

Any loss caused by missiles, falling objects, windstorm, hail, fire, explosion, earthquake, water, flood, total or partial theft, malicious mischief, vandalism, riot, civil commotion, or hitting or being hit by a bird or an animal is not a Loss Caused By Collision.

Non-Owned Camper means a camper designed to be mounted on a pickup truck that is in the lawful possession of an insured and that neither:

- is owned by:
 - an insured;
 - any other person who resides primarily in your household; or
 - an employer of any person described in a. or b. above; nor
- has been used by, rented by, or in the possession of an insured during any part of each of the 31 or more consecutive days immediately prior to the date of the loss.

Non-Owned Trailer means a trailer that is in the lawful possession of an insured and that neither:

- is owned by:
 - an insured;
 - any other person who resides primarily in your household; or
 - an employer of any person described in a. or b. above; nor
- has been used by, rented by, or in the possession of an insured during any part of each of the 31 or more consecutive days immediately prior to the date of the loss.

Insuring Agreements

1. Comprehensive Coverage

We will pay:

- for loss, except loss caused by collision, to a covered vehicle; and
- transportation expenses incurred by an insured as a result of the total theft of your car or a newly acquired car. These transportation expenses are payable:

(1) during the period that:

(a) starts on the date you report the theft to us; and,

(b) ends on the earliest of:

- the date the vehicle is returned to your possession in a drivable condition;
- the date we offer to pay for the loss if the vehicle has not yet been recovered; or
- the date we offer to pay for the loss if the vehicle is recovered, but is a total loss as determined by us; and

(2) during the period that:

(a) starts on the date the vehicle is left at a repair facility if the

stolen vehicle is recovered, returned to *your* possession in a drivable condition, and has unrepaired damage that resulted from the total theft; and

- (b) ends on the date the vehicle is repaired.

These transportation expenses must be reported to *us* before *we* will pay such incurred expenses.

2. Collision Coverage

We will pay for loss caused by collision to a covered vehicle.

3. Emergency Road Service Coverage

We will pay the fair cost incurred by an insured for:

- up to one hour of labor to repair a covered vehicle at the place of its breakdown;
- towing to the nearest repair facility where necessary repairs can be made if a covered vehicle is not drivable;
- towing a covered vehicle out of a location where it is stuck if the vehicle is on or immediately next to a public road;
- delivery of gas, oil, battery, or tire necessary to return a covered vehicle to driving condition. *We* do not pay the cost of the gas, oil, battery, or tire; and
- up to one hour of labor for locksmith services to unlock a covered vehicle if its key is lost, stolen, or locked inside the vehicle.

4. Car Rental and Travel Expenses Coverage

a. Car Rental Expense:

We will pay the daily rental charge incurred when you rent a car from a car business while your car or a newly acquired car is:

- (1) not drivable; or

- (2) being repaired

as a result of a loss which would be payable under Comprehensive Coverage or Collision Coverage.

We will pay this daily rental charge incurred during a period that:

- (1) starts on the date:

- the vehicle is not drivable as a result of the loss; or
- the vehicle is left at a repair facility if the vehicle is drivable; and

- (2) ends on the earliest of:

- the date the vehicle has been repaired or replaced;
- the date *we* offer to pay for the loss if the vehicle is repairable but *you* choose to delay repairs; or
- five days after *we* offer to pay for the loss if the vehicle is:

- a total loss as determined by *us*; or
- stolen and not recovered.

The amount of any such daily rental charge incurred by *you* must be reported to *us* before *we* will pay such amount.

b. Travel Expenses:

We will pay expenses for commercial transportation, lodging, and meals if your car or a newly acquired car is not drivable as a result of a loss which would be payable under Comprehensive Coverage or Collision Coverage. The loss must occur more than 50 miles from your home. We will only pay these expenses if they are incurred by:

- an insured during the period that:
 - starts after the loss occurs; and
 - ends on the earlier of:

- the insured's arrival at his or her destination or home if the vehicle is left behind for repairs; or

- the repair of the vehicle if the insured waits for repairs before continuing on to his or her destination or returning home; and

- you*, or any person *you* choose, to travel to retrieve the vehicle and drive it to either the original destination or *your* home if the vehicle was left behind for repairs.

These expenses must be reported to *us* before *we* will pay such incurred expenses.

c. Rental Car - Repayment of Deductible Expense

We will pay the comprehensive deductible or collision deductible an insured is required to pay the owner of a car rented from a car business.

Supplementary Payments - Comprehensive Coverage and Collision Coverage

If the covered vehicle sustains loss for which *we* make a payment under Comprehensive Coverage or Collision Coverage, then *we* will pay reasonable expenses incurred to:

- tow the covered vehicle immediately after the loss:
 - for a reasonable distance from the location of the loss to any one repair facility chosen by an insured or the owner of the covered vehicle, if the covered vehicle is not drivable; or
 - to any one repair facility or commercial storage facility, neither of which was chosen by an insured or the owner of the covered vehicle. *We* will also pay reasonable expenses incurred to tow the covered vehicle for a reasonable distance from this facility to any one repair facility chosen by an

insured or the owner of the covered vehicle, if the covered vehicle is not drivable;

- store the covered vehicle, if it is not drivable immediately after the loss, at:
 - any one repair facility or commercial storage facility, neither of which was chosen by an insured or the owner of the covered vehicle; and
 - any one repair facility chosen by the owner of the covered vehicle, and *we* determine such vehicle is a total loss.

If the owner of the covered vehicle consents, then *we* may move the covered vehicle at *our* expense to reduce storage costs. If the owner of the covered vehicle does not consent, then *we* will pay only the storage costs that would have resulted if *we* had moved the damaged covered vehicle; and

- clean up debris from the covered vehicle at the location of the loss. The most *we* will pay to clean up the debris is \$250 for any one loss.

Limits and Loss Settlement - Comprehensive Coverage and Collision Coverage

- We* have the right to choose to settle with *you* or the owner of the covered vehicle in one of the following ways:
 - Pay the cost to repair the covered vehicle minus any applicable deductible. The deductible amount does not apply to loss to safety glass.

Limits and Loss Settlement - Comprehensive Coverage and Collision Coverage

- We* have the right to choose to settle with *you* or the owner of the covered vehicle in one of the following ways:
 - Pay the cost to repair the covered vehicle minus any applicable deductible. The deductible amount does not apply to loss to safety glass.

- We* have the right to choose one of the following to determine the cost to repair the covered vehicle:
 - The cost agreed to by both the owner of the covered vehicle and *us*;
 - A bid or repair estimate approved by *us*; or
 - A repair estimate that is written based upon or adjusted to:

(i) the prevailing competitive price;

(ii) the lower of paintless dent repair pricing established by an agreement we have with a third party or the paintless dent repair price that is competitive in the market; or

(iii) a combination of (i) and (ii) above.

The prevailing competitive price means prices charged by a majority of the repair market in the area where the covered vehicle is to be repaired as determined by a survey made by us. If asked, we will identify some facilities that will perform the repairs at the prevailing competitive price. The estimate will include parts sufficient to restore the covered vehicle to its pre-loss condition.

You agree with us that the repair estimate may include new, used, recycled, and reconditioned parts. Any of these parts may be either original equipment manufacturer parts, or non-original equipment manufacturer parts.

You also agree that replacement glass need not have any insignia, logo, trademark, etching, or other marking that was on the replaced glass.

(2) The cost to repair the covered vehicle does not include any reduction in the value of the covered vehicle after it has been repaired, as compared to its value before it was damaged.

(3) If the repair or replacement of a part results in betterment of that part, then you or the owner of the

covered vehicle must pay for the amount of the betterment;

b. Pay the actual cash value of the covered vehicle minus any applicable deductible.

(1) The owner of the covered vehicle and we must agree upon the actual cash value of the covered vehicle. If there is disagreement as to the actual cash value of the covered vehicle, then the disagreement will be resolved by appraisal upon written request of the owner or us, using the following procedures:

(a) The owner and we will each select a competent appraiser;

(b) The two appraisers will select a third competent appraiser. If they are unable to agree on a third appraiser within 30 days, then either the owner or we may petition a court that has jurisdiction to select the third appraiser.

(c) Each party will pay the cost of its own appraiser, attorneys, and expert witnesses, as well as any other expenses incurred by that party. Both parties will share equally the cost of the third appraiser.

(d) The appraisers shall only determine the actual cash value of the covered vehicle. Appraisers shall have no authority to decide any other questions of fact, decide any questions of law, or conduct appraisal on a class-wide or class-representative basis.

(e) A written appraisal that is both agreed upon by and signed by any two appraisers, and that also contains an explanation of how they arrived at their appraisal, will be binding on the

owner of the covered vehicle and us.

(f) We do not waive any of our rights by submitting to an appraisal.

(2) The damaged covered vehicle must be given to us in exchange for our payment, unless we agree that the owner may keep it. If the owner keeps the covered vehicle, then our payment will be reduced by the value of the covered vehicle after the loss; or

c. Return the stolen covered vehicle to its owner and pay, as described in 1.a. above, for any direct, sudden, and accidental damage that resulted from the theft.

2. The most we will pay for transportation expenses under Comprehensive Coverage is \$25 per day subject to an aggregate limit of \$750 per loss.

3. The most we will pay for loss to a non-owned trailer or a non-owned camper is \$2,500.

Limits - Car Rental and Travel Expenses Coverage

1. Car Rental Expense

The limit for Car Rental Expense is shown on the Declarations Page under "Limit - Car Rental Expense - Each Day, Each Loss".

a. The limit shown under "Each Day" is the most we will pay for the daily rental charge. If

(1) a dollar amount is shown, then we will pay the daily rental charge up to that dollar amount;

(2) a percentage amount is shown, then we will pay that percentage of the daily rental charge.

b. Subject to the "Each Day" limit, the limit shown under "Each Loss" is the

most we will pay for Car Rental Expense incurred as a result of any one loss.

2. Travel Expenses

The most we will pay for Travel Expenses incurred by all insureds as a result of any one loss is \$500.

3. Rental Car - Repayment of Deductible Expense

The most we will pay for Rental Car - Repayment of Deductible Expense incurred as a result of any one loss is \$500.

Nonduplication

We will not pay for any loss or expense, under the Physical Damage Coverages for which the insured or owner of the covered vehicle has already received payment from, or on behalf of, a party who is legally liable for the loss or expense.

Exclusions

THERE IS NO COVERAGE FOR:

1. ANY COVERED VEHICLE THAT IS:

- a. INTENTIONALLY DAMAGED; OR
- b. STOLEN.

BY OR AT THE DIRECTION OF AN INSURED;

2. ANY COVERED VEHICLE WHILE IT IS RENTED TO OR LEASED TO OTHERS BY AN INSURED;

3. ANY COVERED VEHICLE WHILE IT IS USED TO CARRY PERSONS FOR A CHARGE. This exclusion does not apply to the use of a private passenger car on a share-the-expense basis;

4. ANY COVERED VEHICLE DUE TO:

- a. THEFT;
- b. CONVERSION;
- c. EMBEZZLEMENT; OR
- d. SECRETION

- BY AN INSURED, A CONSIGNEE, AN AGENT OF A CONSIGNEE, OR A PERSON WHO OBTAINS POSSESSION OF THE COVERED VEHICLE WITH THE PERMISSION OF A CONSIGNEE OR AGENT OF A CONSIGNEE;
5. LOSS TO YOUR CAR OR A NEWLY ACQUIRED CAR IF AN INSURED VOLUNTARILY RELINQUISHES POSSESSION OF THAT CAR TO A PERSON OR ORGANIZATION UNDER AN ACTUAL OR PRESUMED SALES AGREEMENT;
 6. ANY COVERED VEHICLE TO THE EXTENT OUR PAYMENT WOULD BENEFIT ANY CARRIER OR OTHER BAILEE FOR HIRE THAT IS LIABLE FOR LOSS TO SUCH COVERED VEHICLE;
 7. LOSS TO ANY COVERED VEHICLE DUE TO FUNGI. THIS APPLIES REGARDLESS OF WHETHER OR NOT THE FUNGI RESULT FROM A LOSS THAT IS PAYABLE UNDER ANY OF THE PHYSICAL DAMAGE COVERAGES. WE WILL ALSO NOT PAY FOR ANY TESTING OR REMEDIATION OF FUNGI, OR ANY ADDITIONAL COSTS REQUIRED TO REPAIR ANY COVERED VEHICLE THAT ARE DUE TO THE EXISTENCE OF FUNGI;
 8. LOSS TO ANY COVERED VEHICLE THAT RESULTS FROM:
 - a. NUCLEAR REACTION;
 - b. RADIATION OR RADIOACTIVE CONTAMINATION FROM ANY SOURCE; OR
 - c. THE ACCIDENTAL OR INTENTIONAL DETONATION OF, OR RELEASE OF RADIATION FROM, ANY NUCLEAR OR RADIOACTIVE DEVICE;
 9. LOSS TO ANY COVERED VEHICLE THAT RESULTS FROM THE TAKING OF OR SEIZURE OF THAT COVERED VEHICLE BY ANY GOVERNMENTAL AUTHORITY;
 10. LOSS TO ANY COVERED VEHICLE THAT RESULTS FROM WAR OF ANY KIND;
 11. YOUR CAR WHILE SUBJECT TO ANY:
 - a. LIEN AGREEMENT;
 - b. RENTAL AGREEMENT;
 - c. LEASE AGREEMENT; OR
 - d. SALES AGREEMENT
 NOT SHOWN ON THE DECLARATIONS PAGE;
 12. ANY NON-OWNED CAR WHILE IT IS:
 - a. BEING MAINTAINED OR USED BY ANY PERSON WHILE THAT PERSON IS EMPLOYED IN OR ENGAGED IN ANY WAY IN A CAR BUSINESS; OR
 - b. USED IN ANY BUSINESS OR OCCUPATION OTHER THAN A CAR BUSINESS. This exclusion (12.b.) does not apply to a private passenger car;
 13. ANY PART OR EQUIPMENT OF A COVERED VEHICLE IF THAT PART OR EQUIPMENT:
 - a. FAILS OR IS DEFECTIVE; OR
 - b. IS DAMAGED AS A DIRECT RESULT OF:
 - (1) WEAR AND TEAR;
 - (2) FREEZING; OR
 - (3) MECHANICAL, ELECTRICAL, OR ELECTRONIC BREAKDOWN OR MALFUNCTION
 OF THAT PART OR EQUIPMENT.
 This exclusion does not apply if the loss is the result of theft of the covered vehicle;
 14. ANY PART OR EQUIPMENT:
 - a. THAT IS NOT LEGAL FOR USE IN OR ON THE COVERED VEHICLE

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IN THE JURISDICTION WHERE THE COVERED VEHICLE IS REGISTERED; OR

- b. THE USE OF WHICH IS NOT LEGAL IN THE JURISDICTION WHERE THE COVERED VEHICLE IS REGISTERED BECAUSE OF HOW OR WHERE THAT PART OR EQUIPMENT IS INSTALLED IN OR ON THE COVERED VEHICLE.
- However, if there is a legal version of the part or equipment that is necessary for the safe operation of the covered vehicle, then we will pay the cost that we would otherwise have paid to repair the vehicle with the legal version of the part or equipment. We will not pay any cost necessary to modify the vehicle for installation of the legal version of the part or equipment;
15. TIRES. This exclusion does not apply if:
 - a. loss is caused by missiles, falling objects, windstorm, hail, fire, explosion, earthquake, water, flood, total or partial theft, malicious mischief, vandalism, riot, civil commotion, or hitting or being hit by a bird or an animal; or
 - b. loss caused by collision to another part of the covered vehicle causes loss to tires;
 16. REMOVABLE PRODUCTS USED FOR STORAGE OF AUDIO, VIDEO, OR OTHER DATA, INCLUDING BUT NOT LIMITED TO TAPES, DISCS, AND MEMORY CARDS, NOR IS THERE COVERAGE FOR THE RECONSTRUCTION OF DATA CONTAINED THEREIN;
 17. ANY EQUIPMENT USED TO DETECT OR INTERFERE WITH SPEED MEASURING DEVICES;
 18. A CAMPER, INCLUDING ITS PARTS AND ITS EQUIPMENT, THAT IS:
 - a. DESIGNED TO BE MOUNTED ON A PICKUP TRUCK;

- b. OWNED BY AN INSURED; AND
 - c. NOT SHOWN ON THE DECLARATIONS PAGE; OR
19. ANY COVERED VEHICLE WHILE IT IS:
 - a. BEING PREPARED FOR, USED IN PRACTICE FOR, OR OPERATED IN ANY RACING CONTEST, SPEED CONTEST, HILL-CLIMBING CONTEST, JUMPING CONTEST, OR ANY SIMILAR CONTEST; OR
 - b. ON A TRACK DESIGNED PRIMARILY FOR RACING OR HIGH-SPEED DRIVING. This exclusion (19.b.) does not apply if the vehicle is being used in connection with an activity other than racing, high-speed driving, or any type of competitive driving;
- If Other Physical Damage Coverage or Similar Coverage Applies:
1. If the same loss or expense is payable under more than one of the physical damage coverages provided by this policy, then only the one coverage that pays the most for that loss or expense applies;
 2. If any of the physical damage coverages provided by this policy and one or more other policies issued to an insured by the State Farm Companies apply to the same loss or expense, then only one policy applies. We will select a policy that pays the most for the loss or expense.
 3. The physical damage coverages provided by this policy apply as primary coverage for a loss to your car.
- If similar coverage provided by one or more sources other than the State Farm Companies also applies as primary coverage for the same loss or expense, then the State Farm Companies will pay the proportion of the loss or expense payable as primary that the maximum amount that may be paid by the State Farm Companies bears to the sum of such amount and the limits of

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all other similar coverage that applies as primary coverage.

4. Except as provided in 3. above, the physical damage coverages provided by this policy apply as excess coverage.

If similar coverage provided by one or more sources other than the *State Farm Companies* also applies as excess coverage for the same loss or expense, then the *State Farm Companies* will pay the proportion of the loss or expense payable as excess that the maximum amount that may be paid by the *State Farm Companies* bears to the sum of such amount and the limits of all other similar coverage that applies as excess coverage.

Financed Vehicle

1. If a creditor is shown on the Declarations Page, then any Comprehensive Coverage or Collision Coverage provided by this policy applies to that creditor's interest in your car. Coverage for the creditor's interest is only provided for a loss that is payable to you.

However, if this policy is cancelled or non-renewed, then we will provide coverage for the creditor's interest until we notify the creditor of the termination of such coverage. This coverage for the creditor's interest is only provided for a loss that would have been payable to you if this policy had not been cancelled or nonrenewed. The date such termination is effective will be at least 10 days after the date we mail or electronically transmit a notice of the termination to the creditor.

2. If we pay such creditor, then we are entitled to the creditor's right of recovery against you to the extent of our payment.

Our right of recovery does not impair the creditor's right to recover the full amount of its claim.

Our Payment Options

1. Comprehensive Coverage and Collision Coverage.

a. We may, at our option, make payment to one or more of the following for loss to a covered vehicle owned by you:

- (1) You;
- (2) The repairer; or
- (3) A creditor shown on the Declarations Page, to the extent of its interest.

b. We may, at our option, make payment to one or more of the following for loss to a covered vehicle not owned by you:

- (1) You;
- (2) The owner of such vehicle;
- (3) The repairer; or
- (4) A creditor, to the extent of its interest.

2. Emergency Road Service Coverage and Car Rental and Travel Expenses Coverage.

We may, at our option, make payment to one or more of the following:

- a. You;
- b. The insured who incurred the expense; or
- c. Any party that provided the service for which payment is owed.

DEATH, DISMEMBERMENT AND LOSS OF SIGHT COVERAGE

This policy provides Death, Dismemberment and Loss of Sight Coverage if "S" is shown under "SYMBOLS" on the Declarations Page.

Additional Definition

Insured means a person whose name is shown under "Death, Dismemberment and Loss of Sight Coverage - Persons Insured" on the Declarations Page.

Insuring Agreement

We will pay the highest applicable benefit shown in the following Death, Dismemberment and Loss of Sight Benefits Schedules if an insured:

1. dies; or
2. suffers dismemberment or permanent loss of sight, as described in the schedule,

as the direct result of an accident that involves the use of a land motor vehicle or any type of trailer as a vehicle, and not due to any other cause.

The insured must be occupying or be struck as a pedestrian by a land motor vehicle or any type of trailer at the time of the accident. The death, dismemberment, or permanent loss of sight must occur within 90 days immediately following the date of the accident.

Benefit

The applicable benefit shown in the schedule is the most we will pay for any one insured in any one accident. Any benefit paid or payable for dismemberment or permanent loss of sight reduces the death benefit.

The benefits shown in the schedules are doubled for an insured who at the time of the accident was occupying a private passenger car and using a seat belt in the manner recommended by the vehicle's manufacturer.

Death, Dismemberment and Loss of Sight Benefits Schedules

If the amount shown on the Declarations Page for the insured is \$5,000, then we will pay the applicable benefit shown below for death or for the described dismemberment or permanent loss of sight:

Death	\$5,000
Loss of both hands; both feet; all sight of both eyes; one hand and one foot; or one hand or one foot and all sight of one eye	\$5,000
Loss of one hand or one foot; or all sight of one eye	\$2,500
Loss of the thumb and a finger on one hand; or any three fingers	\$1,500
Loss of any two fingers	\$1,000
The hand must be cut off through or above the wrist. The foot must be cut off through or above the ankle. The whole thumb or finger must be cut off.	

If the amount shown on the Declarations Page for the insured is \$10,000, then we will pay the applicable benefit shown below for death or for the described dismemberment or permanent loss of sight:

Death	\$10,000
Loss of both hands; both feet; all sight of both eyes; one hand and one foot; or one hand or one foot and all sight of one eye	\$10,000
Loss of one hand or one foot; or all sight of one eye	\$5,000
Loss of the thumb and a finger on one hand; or any three fingers	\$3,000
Loss of any two fingers	\$2,000
The hand must be cut off through or above the wrist. The foot must be cut off through or above the ankle. The whole thumb or finger must be cut off.	

Exclusions

DEATH, DISMEMBERMENT AND LOSS OF SIGHT COVERAGE DOES NOT APPLY TO AN *INSURED*:

1. WHILE IN THE COURSE AND SCOPE OF HIS OR HER EMPLOYMENT IN A CAR BUSINESS;
2. WHILE OCCUPYING, LOADING, OR UNLOADING:

a. AN EMERGENCY VEHICLE IN THE COURSE AND SCOPE OF HIS OR HER EMPLOYMENT;

b. A VEHICLE, OTHER THAN AN EMERGENCY VEHICLE, WHILE USED IN THE:

- (1) *INSURED'S* BUSINESS; OR
- (2) COURSE AND SCOPE OF HIS OR HER EMPLOYMENT IN OTHER THAN A CAR BUSINESS.

This exclusion (2.b.) does not apply if the vehicle is a *private passenger car*;

c. A MILITARY VEHICLE; OR

d. A VEHICLE WHILE IT IS:

- (1) BEING PREPARED FOR, USED IN PRACTICE FOR, OR OFFERED IN ANY RACING CONTEST, SPEED CONTEST, HILL CLIMBING CONTEST, JUMPING CONTEST, OR ANY SIMILAR CONTEST; OR
- (2) ON A TRACK DESIGNED PRIMARILY FOR RACING OR HIGH-SPEED DRIVING. This exclusion (2.d.(2)), does not apply if the vehicle is being used in connection with an activity other than racing, high-speed driving, or any type of competitive driving;

3. WHILE OCCUPYING, LOADING, UNLOADING, OR WHO IS STRUCK AS A PEDESTRIAN BY:

a. A MOTOR VEHICLE THAT RUNS ON RAILS OR CRAWLER-TREADS;

b. A MOTOR VEHICLE THAT IS DESIGNED FOR USE PRIMARILY OFF PUBLIC ROADS WHILE OFF PUBLIC ROADS; OR

c. A MOTOR VEHICLE OR ANY TYPE OF TRAILER, EITHER OF WHICH IS LOCATED FOR USE AS A DWELLING OR OTHER PREMISES; OR

4. FOR DEATH, DISMEMBERMENT, LOSS OF SIGHT, OR TOTAL DISABILITY THAT RESULTS FROM:

a. WAR OF ANY KIND;

b. NUCLEAR REACTION, RADIATION OR RADIOACTIVE CONTAMINATION FROM ANY SOURCE, OR THE ACCIDENTAL OR INTENTIONAL DETONATION OF, OR RELEASE OF RADIATION FROM, ANY NUCLEAR OR RADIOACTIVE DEVICE;

c. THE DISCHARGE OF A FIREARM;

d. EXPOSURE TO FUNGI;

e. SUICIDE OR ATTEMPTED SUICIDE REGARDLESS OF WHETHER THE *INSURED* WAS SANE OR INSANE; OR

f. DISEASE except pus-forming infection due to *bodily injury* sustained in the accident.

Our Payment Options

We may, at our option, make payment to one or more of the following:

1. The *insured*;
2. The *insured's* surviving spouse;
3. A parent or guardian of the *insured*, if the *insured* is a minor or an incompetent person; or
4. A person or organization authorized by law to receive such payment.

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INSURED'S DUTIES

1. Notice to Us of an Accident or Loss

The *insured* must give us or one of our agents notice of the accident or loss as soon as reasonably possible. The notice must give us:

- a. your name;
- b. the names and addresses of all persons involved in the accident or loss;
- c. the hour, date, place, and facts of the accident or loss; and
- d. the names and addresses of witnesses to the accident or loss.

2. Notice to Us of a Claim or Lawsuit

a. If a claim is made against an *insured*, then that *insured* must immediately send us every demand, notice, and claim received;

b. If a lawsuit is filed against an *insured*, then that *insured* must immediately send us every summons and legal process received.

3. Insured's Duty to Cooperate With Us

a. The *insured* must cooperate with us and, when asked, assist us in:

- (1) making settlements;
- (2) securing and giving evidence;
- (3) attending, and getting witnesses to attend, depositions, hearings, and trials; and
- (4) preserving his or her right to recover damages from others.

b. The *insured* must not, except at his or her own cost, voluntarily:

- (1) make any payment to others; or
- (2) assume any obligation to others unless authorized by the terms of this policy.

c. Any person or organization making claim under this policy must, when we

require, give us proof of loss on forms we furnish.

4. Questioning Under Oath

Under:

a. Liability Coverage, each *insured*;

b. Personal Injury Protection Coverage, Medical Payments Coverage, Uninsured Motor Vehicle Coverage, Underinsured Motor Vehicle Coverage, or Death, Dismemberment and Loss of Sight Coverage, each *insured*, or any other person or organization making claim or seeking payment; and

c. Physical Damage Coverages, each *insured* or owner of a covered vehicle, or any other person or organization making claim or seeking payment;

must, at our option, submit to an examination under oath, provide a statement under oath, or do both, as reasonably often as we require. Such person or organization must answer questions under oath, asked by anyone we name, and sign copies of the answers. We may require each person or organization answering questions under oath to answer the questions with only that person's or organization's legal representative, our representatives, any person or persons designated by us to record the questions and answers, and no other person present.

5. Other Duties Under the Physical Damage Coverages

When there is a loss, you or the owner of the covered vehicle must:

- a. protect the covered vehicle from additional damage. We will pay any reasonable expense incurred to do so that is reported to us;
- b. make a prompt report to the police when the loss is the result of theft;
- c. allow us to:

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- (1) inspect any damaged property before its repair or disposal;
 - (2) test any part or equipment before that part or equipment is removed or repaired; and
 - (3) move the covered vehicle at our expense in order to conduct such inspection or testing;
- d. provide us all:
- (1) records;
 - (2) receipts; and
 - (3) invoices
- that we request and allow us to make copies; and
- e. not abandon the covered vehicle to us.
6. Other Duties Under Personal Injury Protection Coverage, Medical Payments Coverage, Uninsured Motor Vehicle Coverage, Underinsured Motor Vehicle Coverage, and Death, Dismemberment and Loss of Sight Coverage
- A person making claim under:
- a. Personal Injury Protection Coverage, Medical Payments Coverage, Uninsured Motor Vehicle Coverage, Underinsured Motor Vehicle Coverage, or Death, Dismemberment and Loss of Sight Coverage must:
 - (1) notify us of the claim and give us all the details about the death, injury, treatment, and other information that we may need as soon as reasonably possible after the injured insured is first examined or treated for the injury. If the insured is unable to give us notice, then any other person may give us the required notice;
 - (2) be examined as reasonably often as we may require by physicians chosen and paid by us. A copy of the report will be sent to the person upon written request;
 - b. Uninsured Motor Vehicle Coverage must report an accident, involving a motor vehicle whose owner and driver remain unknown, to the police and to us within a reasonable period of time; and
 - c. Uninsured Motor Vehicle Coverage and Underinsured Motor Vehicle Coverage must:
 - (1) send us immediately a copy of all lawsuit papers if the insured files a lawsuit against the party liable for the accident; and
 - (2) if making a claim for property damage:
 - (a) allow us to:
 - (i) inspect any property damage before its repair or disposal;
 - (ii) test any part of equipment before that part or equipment is removed or repaired; and
 - (iii) move the damaged property at our expense in order to conduct such inspection or testing; and
 - (b) protect the damaged property from additional damage. We will pay any reasonable expense incurred to do so that is reported to us;
 - (c) provide us all:
 - (i) records;
 - (ii) receipts; and
 - (iii) invoices;
- If an injured insured is a minor, unable to act, or dead, then his or her legal representative must provide us with the written authorization.
- If the holder of the information refuses to provide it to us despite the authorization, then at our request the person making claim or his or her legal representative must obtain the information and promptly provide it to us; and
- (4) allow us to inspect the vehicle that the insured occupied in the accident;

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GENERAL TERMS

1. When Coverage Applies

The coverages provided by this policy are shown on the Declarations Page and apply to accidents and losses that occur during the policy period. The policy period is shown on the Declarations Page and is for successive periods of six months each for which the renewal premium is paid. The policy period begins and ends at 12:01 AM Standard Time at the address shown on the Declarations Page.

2. Where Coverage Applies

The coverages provided by this policy are shown on the Declarations Page and apply to accidents and losses that occur:

- a. in the United States of America and its territories and possessions;
- b. in Canada; and
- c. while a vehicle for which coverage is provided by this policy is being

that we request and allow us to make copies;

- (d) not abandon the damaged property to us; and

- (e) give us sworn proof of claim within 60 days of the accident. This proof of claim must state:

- (i) who owns the property and how much they own;
- (ii) the amount of any claims or liens on the property;
- (iii) the value of the property at the time of the accident;
- (iv) details of the accident; and
- (v) details of any other insurance applicable to the property.

shipped between the ports of the United States of America, its territories, its possessions, and Canada.

The Liability Coverage, Personal Injury Protection Coverage, Medical Payments Coverage, and Physical Damage Coverages also apply in Mexico within 50 miles of the United States border. A Physical Damage Coverage loss in Mexico is determined on the basis of cost at the nearest United States point.

Death, Dismemberment and Loss of Sight Coverage applies anywhere in the world.

3. Newly Owned or Newly Leased Car

If you want to insure a car newly owned by you with the State Farm Companies after that car ceases to be a newly acquired car, then you must either:

- a. request we replace the car currently shown on the Declarations Page of this policy with the car newly owned by

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9840A

you and pay us any added amount due. If you make such request while this policy is in force and:

(1) before the car newly owned by you ceases to be a newly acquired car, then that car newly owned by you will be insured by this policy as your car beginning on the date the car newly owned by you is delivered to you. The added amount due will be calculated based on that date; or

(2) after the car newly owned by you ceases to be a newly acquired car, then that car newly owned by you will be insured by this policy as your car beginning on the date and time you make the request. The added amount due will be calculated based on that date; or

b. apply to the State Farm Companies for a separate policy to insure the car newly owned by you. Such policy will be issued only if both the applicant and the vehicle are eligible for coverage at the time of the application.

4. Changes to This Policy

a. Changes in Policy Provisions

We may only change the provisions of this policy by:

(1) issuing a revised policy booklet, a revised Declarations Page, or an endorsement; or

(2) revising this policy to give broader coverage without an additional premium charge. If any coverage provided by this policy is changed to give broader coverage, then we will give you the broader coverage as of the date we make the change effective in the state of South Carolina without issuing a revised policy booklet, a revised Declarations Page, or an endorsement.

b. Change of Interest

(1) No change of interest in this policy is effective unless we consent in writing.

(2) Except under Death, Dismemberment and Loss of Sight Coverage, if a named insured shown on the Declarations Page dies, then the definition of insured under each of the coverages provided by this policy is changed to include:

(a) any person with lawful custody of your car, a newly acquired car, or a temporary substitute car until a legal representative is qualified; and then

(b) the legal representative of the deceased named insured.

This only applies while such person is maintaining or using your car, a newly acquired car, or a temporary substitute car.

Policy notice requirements are met by mailing the notice to the most recent policy address that we have on record for the deceased named insured.

c. Joint and Individual Interests

If you consists of more than one person or entity, then each acts for all to change or cancel the policy.

d. Change of Policy Address

We may change the named insured's policy address as shown on the Declarations Page and in our records to the most recent address provided to us by:

(1) you; or

(2) the United States Postal Service.

5. Premium

a. Unless as otherwise provided by an alternative payment plan in effect with the State Farm Companies with respect to the premium for this policy, the premium is due and payable in full on or before the first day of the policy period shown on the most recently issued Declarations Page or Renewal Notice.

b. The renewal premium for this policy will be based upon the rates in effect, the coverages carried, the applicable limits, deductibles, and other elements that affect the premium that apply at the time of renewal.

c. The premium for this policy may vary based upon the purchase of other insurance from the State Farm Companies.

d. The premium for this policy is based upon information we have received from you or other sources. You must inform us if any information regarding the following is incorrect or incomplete, or changes during the policy period, and you must answer questions we ask regarding the following:

(1) Your car, or its use, including annual mileage;

(2) The persons who regularly drive your car, including newly licensed family members;

(3) Your marital status; or

(4) The location where your car is primarily garaged.

If the above information or any other information used to determine the premium is incorrect, incomplete, changes during the policy period, or is not provided to us when we ask, then we may decrease or increase the premium during the policy period. If we decrease the premium during the policy period, then we will provide a refund or a credit in

the amount of the decrease. If we increase the premium during the policy period, then you must pay the amount of the increase.

6. Renewal

We agree to renew this policy for the next policy period upon payment of the renewal premium when due, unless we mail or deliver a nonrenewal notice or a cancellation notice as set forth in 7. and 8. below.

7. Nonrenewal

If we decide not to renew this policy, then, at least 30 days before the end of the current policy period, we will mail or deliver a nonrenewal notice to the most recent policy address that we have on record for the named insured who is shown on the Declarations Page.

8. Cancellation

a. How You May Cancel

You may cancel this policy by providing to us advance notice of the date cancellation is effective. We may confirm the cancellation in writing.

b. How and When We May Cancel

We may cancel this policy by mailing or delivering a written notice to the most recent policy address that we have on record for the named insured who is shown on the Declarations Page. The notice will provide the date cancellation is effective.

(1) If we mail or deliver a cancellation notice:

(a) during the first 90 days following this policy's effective date; or

(b) because the premium is not paid when due,

then the date cancellation is effective will be at least 15 days after the date we mail or deliver the cancellation notice.

Otherwise, the date cancellation is effective will be at least 20 days after the date we mail or deliver the cancellation notice.

- (2) After this policy has been in force for more than 90 days, we will not cancel this policy before the end of the current policy period unless:
- (a) the premium is not paid when due; or
 - (b) you, any resident relative, or any other person who usually drives your car has had his or her driver's license under suspension or revocation:
 - (1) during the policy period; or
 - (2) if the policy is a renewal, during its policy period or the 90 days immediately preceding the last anniversary of the effective date of the policy.
- c. Return of Unearned Premium
- If you cancel this policy, then premium may be earned on a short rate basis. If we cancel this policy, then premium will be earned on a pro rata basis.
- Any unearned premium may be returned within a reasonable time after cancellation. Delay in the return of any unearned premium does not affect the cancellation date.
9. Assignment
- No assignment of benefits or other transfer of rights is binding upon us unless approved by us.
10. Bankruptcy or Insolvency of the Insured
- Bankruptcy or insolvency of the insured or his or her estate will not relieve us of our obligations under this policy.
11. Concealment or Fraud
- There is no coverage under this policy if you or any other person insured under this

policy has made false statements with the intent to conceal or misrepresent any material fact or circumstance in connection with any claim under this policy.

12. Our Right to Recover Our Payments

- a. Personal Injury Protection Coverage, Medical Payments Coverage, Underinsured Motor Vehicle Coverage, and Death, Dismemberment and Loss of Sight Coverage payments are not recoverable by us.
- b. To the extent allowed by law, under Uninsured Motor Vehicle Coverage:
 - (1) the right of recovery of the insured passes to us, to the extent of our payments;
 - (2) we will pay our share of the reasonable costs of any recovery. Our share is the percent that our recovery bears to the total recovery. We reserve the right to select an attorney to handle the recovery; and
 - (3) an insured making claim for property damage must assign to us, to the extent of our payments, the right to any other compensation for it. We do not have to make any payment until the insured has done this.

c. Under all other coverages, the following apply:

(1) Subrogation

If we are obligated under this policy to make payment to or for a person or organization who has a legal right to collect from another person or organization, then we will be subrogated to that right to the extent of our payment.

The person or organization to or for whom we make payment must help us recover our payments by:

- (a) doing nothing to impair that legal right;

- (b) executing any documents we may need to assert that legal right; and

- (c) taking legal action through our representatives when we ask.

(2) Reimbursement

If we make payment under this policy and the person or organization to or for whom we make payment recovers, or has recovered from another person or organization, then the person or organization to or for whom we make payment must:

- (a) hold in trust for us the proceeds of any recovery; and
- (b) reimburse us to the extent of our payment.

13. Legal Action Against Us

Legal action may not be brought against us until there has been full compliance with all the provisions of this policy. In addition, legal action may only be brought against us regarding:

- a. Liability Coverage after the amount of damages an insured is legally liable to pay has been finally determined by:
 - (1) judgment after an actual trial, and any appeals of that judgment if any appeals are taken; or
 - (2) agreement between the claimant and us;
- b. Personal Injury Protection Coverage, Medical Payments Coverage, Uninsured Motor Vehicle Coverage, Underinsured Motor Vehicle Coverage, and Physical Damage Coverages if the legal action relating to these coverages is brought against us within three years immediately following the date of the accident.
- c. Underinsured Motor Vehicle Coverage if copies of the pleadings in the action

establishing liability are served upon us in the manner provided by law.

14. Choice of Law

Without regard to choice of law rules, the law of the state of:

- a. South Carolina will control, except as provided in b. below, in the event of any disagreement as to the interpretation and application of any provision in this policy; and
- b. Illinois will control in the event of any disagreement as to the interpretation and application of this policy's:
 - (1) Mutual Conditions provision found on the most recently issued Declarations Page, if this policy was issued by the State Farm Mutual Automobile Insurance Company; or
 - (2) Participating Policy provision found on the most recently issued Declarations Page, if this policy was issued by any subsidiary or affiliate of the State Farm Mutual Automobile Insurance Company.

15. Severability

If any provision of this policy is held invalid or unenforceable by a court that has jurisdiction, then:

- a. such provision will remain in full force to the extent not held invalid or unenforceable; and
- b. all other provisions of this policy will remain valid and enforceable.

16. Conformity to Law

The coverage provided by this policy is done so in accordance with South Carolina insurance law. If any provisions of this policy are in conflict with South Carolina statutes, the policy is amended to conform to the minimum requirements of the statutes.

6940A AMENDATORY ENDORSEMENT

This endorsement is a part of the policy. Except for the changes this endorsement makes, all other provisions of the policy remain the same and apply to this endorsement.

1. THIS POLICY

Item 5. is changed to read:

Your purchase of this policy may allow:

- a. *you* to purchase or obtain certain coverages, coverage options, coverage deductibles, coverage limits, or coverage terms on other products from the *State Farm Companies*, subject to their applicable eligibility rules; or
- b. the premium or price for other products or services purchased by *you*, including non-insurance products or services, to vary. Such other products or services must be provided by the *State Farm Companies* or by an organization that has entered into an agreement or contract with the *State Farm Companies*. The *State Farm Companies* do not warrant the merchantability, fitness, or quality of any product or service offered or provided by that organization.

2. LIABILITY COVERAGE

Insuring Agreement and Supplementary Payments are replaced by the following:

Insuring Agreement

1. *We* will pay damages an *insured* becomes legally liable to pay because of:
 - a. *bodily injury* to others; and
 - b. damage to propertycaused by an accident that involves a vehicle for which that *insured* is

provided Liability Coverage by this policy.

2. *We* have the right to:

- a. investigate, negotiate, and settle any claim or lawsuit;
- b. defend an *insured* in any claim or lawsuit, with attorneys chosen by *us*; and
- c. appeal any award or legal decision

for damages payable under this policy's Liability Coverage.

Supplementary Payments

We will pay, in addition to the damages described in the Insuring Agreement of this policy's Liability Coverage, those items listed below that result from such accident:

1. Attorney fees for attorneys chosen by *us* to defend an *insured* who is sued for such damages. *We* have no duty to pay attorney fees incurred after *we* deposit in court or pay the amount due under the Insuring Agreement of this policy's Liability Coverage;
2. Court costs awarded by the court against an *insured* and resulting from that part of the lawsuit:
 - a. that seeks damages payable under this policy's Liability Coverage; and
 - b. against which *we* defend an *insured* with attorneys chosen by *us*.

We have no duty to pay court costs incurred after *we* deposit in court or pay the amount due under the Insuring Agreement of this policy's Liability Coverage;

3. Interest the *insured* is legally liable to pay on damages payable under the Insuring Agreement of this policy's Liability Coverage:

a. before a judgment, but only the interest on the lesser of:

(1) that part of the damages *we* pay; or

(2) this policy's applicable Liability Coverage limit; and

b. after a judgment.

We have no duty to pay interest that accrues after *we* deposit in court, pay, or offer to pay, the amount due under the Insuring Agreement of this policy's Liability Coverage. *We* also have no duty to pay interest that accrues on any damages paid or payable by a party other than the *insured* or *us*;

4. Premiums for bonds, provided by a company chosen by *us*, required to appeal a decision in a lawsuit against an *insured*. *We* have no duty to:

a. pay for any bond with a face amount that exceeds this policy's applicable Liability Coverage limit;

b. furnish or apply for any bonds; or

c. pay premiums for bonds purchased after *we* deposit in court, pay, or offer to pay, the amount due under the Insuring Agreement of this policy's Liability Coverage; and

5. The following costs and expenses if related to and incurred after a lawsuit has been filed against an *insured*:

a. Loss of wages or salary, but not other income, up to \$200 for each day an *insured* attends, at *our* request;

(1) an arbitration;

(2) a mediation; or

(3) a trial of a lawsuit; and

b. Reasonable expenses incurred by an *insured* at *our* request other than loss of wages, salary, or other income.

The amount of any of the costs or expenses listed above that are incurred by an *insured* must be reported to *us* before *we* will pay such incurred costs or expenses.

3. GENERAL TERMS

- a. The paragraph under Where Coverage Applies that reads:

Liability Coverage, Personal Injury Protection Coverage, Medical Payments Coverage, and Physical Damage Coverages also apply in Mexico within 50 miles of the United States of America border. A Physical Damage Coverage loss in Mexico is determined on the basis of cost at the nearest United States of America point.

is deleted.

- b. The following is added:

Limited Coverage in Mexico

This policy does not provide Mexican auto insurance and does not comply with Mexican auto insurance requirements. If *you* or any other *insured* plan to drive in Mexico, then auto insurance providing

coverage in Mexico should be purchased from a Mexican insurance company.

Subject to the above paragraph, the following coverages apply in Mexico, but only for accidents and losses that occur in Mexico within 50 miles of the United States of America border and only for *insureds* as defined under each of the following coverages:

a. **Liability Coverage**

For claims brought against an *insured* in Mexico, the Supplementary Payments provision of this policy's Liability Coverage is changed to read:

We may, in addition to the damages described in item 1. of the Insuring Agreement of this policy's Liability Coverage, pay or reimburse, at our option, reasonable attorney fees for an attorney licensed in Mexico to appear for and provide advice to *insureds* as defined under this policy's Liability Coverage. The amount of such attorney fees incurred by an *insured* must be reported to *us* before *we* will make payment.

b. **Personal Injury Protection Coverage**

c. **Medical Payments Coverage**

d. **Physical Damage Coverages**

Any amount payable for the repair or replacement of the *covered vehicle* under the Limits and Loss Settlement - Comprehensive Coverage and Collision Coverage provision of this policy will be limited to the cost to repair or replace the

covered vehicle in the United States of America.

WE HAVE NO DUTY TO PROVIDE A DEFENSE FOR *YOU* OR ANY OTHER *INSURED* IN ANY CRIMINAL, CIVIL, OR OTHER ACTION.

WE HAVE NO DUTY TO PAY ANY CLAIM OR COST THAT WOULD NOT BE PAYABLE UNDER THIS POLICY IF THE ACCIDENT OR *LOSS* HAD OCCURRED IN THE STATE OF SOUTH CAROLINA IN THE UNITED STATES OF AMERICA.

All other policy provisions not in conflict with the provisions in this Limited Coverage in Mexico provision of this policy apply.

If Other Coverage Applies

Any coverage provided by this Limited Coverage in Mexico provision is excess over any other applicable insurance.

Legal Action Against Us

Any legal action against *us* arising out of an accident or *loss* occurring in Mexico must be brought in a court that has jurisdiction in the state of South Carolina in the United States of America.

c. Paragraph c. of 5. Premium is changed to read:

c. The premium for this policy may vary based upon:

- (1) the purchase of other products or services from the *State Farm Companies*;
- (2) the purchase of products or services from an organization that has entered into an agreement or contract with

the *State Farm Companies*.
The *State Farm Companies*
do not warrant the merchant-
ability, fitness, or quality of
any product or service of-
fered or provided by that or-
ganization; or

- (3) an agreement, concerning
the insurance provided by
this policy, that the *State
Farm Companies* has with
an organization of which
you are a member, employ-
ee, subscriber, licensee, or
franchisee.

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF SPARTANBURG) IN THE COMMON PLEAS COURT
3
4 Wadette Cothran and Chris)
Cothran,)
5 Plaintiffs,) TRANSCRIPT OF RECORD
-vs-) 2015-CP-42-1578
6
7 State Farm Mutual Automobile)
Insurance Company and)
8 Robert Tucker,)
Defendants.) October 29, 2015
9 Spartanburg, SC

10

11

12 B E F O R E:

13 HONORABLE L. CASEY MANNING, JUDGE
14
15

16 A P P E A R A N C E S:

17 CHARLES LOGAN ROLLINS, II, ESQUIRE
Attorney for the Plaintiff
18

19 ROBERT WILLIAM WHELAN, ESQUIRE
Attorney for the Defendant
20
21

22

23 Linda D. Moffitt
24 Circuit Court Reporter
25

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Motion -- page 3.

No sworn testimony; no exhibits entered into evidence.

1 THE COURT: This is State Farm Mutual. Charles Logan
2 Rollins, Robert William Whelan and Charles Norris.
3 Who is who?
4 MR. WHELAN: Your Honor, I'm Robert Whelan.
5 THE COURT: Whelan.
6 MR. WHELAN: Yes, sir. Charles Norris is my partner,
7 so.
8 THE COURT: And you're Mr. Norris?
9 MR. ROLLINS: I'm Logan Rollins. I represent --
10 THE COURT: Logan.
11 MR. ROLLINS: -- the plaintiff.
12 THE COURT: This says motion for summary judgment. I
13 would assume that, Mr. Norris, it's your motion.
14 MR. WHELAN: Yes, Your Honor, Mr. Whelan, and we have
15 cross motions.
16 THE COURT: Okay.
17 MR. WHELAN: So the plaintiff has a motion for summary
18 judgment. State Farm, my client --
19 THE COURT: Do you want me to go ahead and deny both
20 of them now, or do you want me to listen to you? Go ahead.
21 Who wants to go first? Do you want to go to first?
22 MR. WHELAN: Pardon?
23 THE COURT: Do you want to go first up?
24 MR. WHELAN: Yes. We agreed.
25 THE COURT: Go ahead.

1 MR. WHELAN: Your Honor, both motions turn on the same
2 issue.

3 There's a stipulation of facts. We've stimulated
4 there's no material fact in dispute. So however you answer
5 the question is going to determine what motion for summary
6 judgment is granted.

7 THE COURT: All right.

8 MR. WHELAN: The issue before you pertains to P.I.P.
9 insurance and a --

10 THE COURT: \$5,000 or more?

11 MR. WHELAN: Yes, sir, it's a \$5,000.

12 THE COURT: It's been that way forever, yes.
13 Go ahead.

14 MR. WHELAN: Well, you can have different coverages.

15 THE COURT: Yeah.

16 MR. WHELAN: But this one happens to be five thousand.

17 The plaintiff, Ms. Cothran, was a State Farm insured.
18 She was in an automobile accident. She was injured. She
19 has fairly significant injuries.

20 She was working when she had the wreck, so worker's
21 compensation covers her injuries, and they've paid for her
22 medical bills.

23 She has made a P.I.P. claim with State Farm, and the
24 State Farm policy says that P.I.P. insurance is excess over
25 worker's compensation insurance.

1 So under that provision of the policy she's not
2 entitled to any medical benefits, any medical P.I.P.
3 benefits because they've all been paid by worker's comp.
4 And there's no dispute about that.

5 THE COURT: All right.

6 MR. WHELAN: The dispute is the plaintiff contends
7 this excess provision in the policy is an improper setoff
8 under South Carolina's P.I.P statute, 38-77-144. And
9 that's a statute that came into being in 1989 when the
10 legislature got rid of mandatory P.I.P. and instituted this
11 new statute that said P.I.P. is longer mandatory but if you
12 offer it, it's not subject to a assignment, subrogation.
13 And the last six words of the statute, Your Honor, are is
14 not subject to a setoff.

15 THE COURT: Okay.

16 MR. WHELAN: So the plaintiff's position is that
17 excess provision of the policy is an improper setoff.

18 Now, the South Carolina Supreme Court heard
19 essentially the same argument in a case called Richardson
20 vs. State Farm back in 1993.

21 In that case, same situation, State Farm insured was
22 in a wreck. She made a P.I.P. claim with State Farm, and
23 she had multiple State Farm policies. State Farm's policy
24 said you can't stack P.I.P. essentially.

25 THE COURT: All right.

1 MR. WHELAN: Plaintiff said that's a setoff. Last six
2 words of the statute is not subject to a setoff, therefore
3 plaintiff wins and State Farm loses.

4 That went to the Supreme Court. The Supreme Court
5 looked at that statute, and they examined the legislative
6 history, and they looked at those six words and they
7 said --

8 THE COURT: Justice Finney didn't write that opinion.
9 Who wrote that opinion? Was it Ernest Finney?

10 MR. WHELAN: Might have been Harwell, Your Honor.

11 THE COURT: Beg your pardon?

12 MR. WHELAN: It might have been Harwell.

13 THE COURT: 1993.

14 MR. WHELAN: Yes, sir.

15 THE COURT: Harwell?

16 MR. WHELAN: Chief Justice Harwell, yes, sir.

17 THE COURT: All right. God bless his soul. He just
18 passed away like a month ago.

19 MR. WHELAN: But it was a unanimous -- unanimous
20 opinion. And they looked at the legislative history and
21 they said prior to 1999 a tortfeasor was allowed to set off
22 P.I.P. after verdict. And prior to 1999 P.I.P. was
23 mandatory.

24 And the Supreme Court said looking at the legislative
25 history those last six words of the statute meant to apply

1 only to a tortfeasor's setoff of P.I.P. It's the only
2 reason for that language.

3 And they said because the policy provision the
4 plaintiff was complaining about in Richardson did not
5 pertain to a tortfeasor, therefore the policy provision did
6 not violate the statute. It was proper and State Farm was
7 entitled to judgment as a matter of law.

8 THE COURT: Okay.

9 MR. WHELAN: And I think that this Court needs to
10 follow the same -- I think the same analysis.

11 THE COURT: Because that means you win, right?

12 MR. WHELAN: Right. But, Your Honor, it's the same
13 six words that are at issue.

14 THE COURT: I realize. Go ahead. I'm not going to
15 sstop you.

16 MR. WHELAN: It's the same six -- my only point, Your
17 Honor, it's the same six words. They said it only has one
18 application. That application is not at issue here. And
19 you're right. We win.

20 THE COURT: Okay. Thank you. Well, you may not be
21 finished.

22 MR. WHELAN: Just a couple of other things, Your
23 Honor.

24 THE COURT: Yeah.

25 MR. WHELAN: This -- the Supreme Court just touched on

1 that language again in the case of Mount vs. Sea Pines. It
2 wasn't directly at issue, but they said again by enacting
3 this statute the legislature attempted to ensure that the
4 tortfeasor pay the full amount of damages suffered by the
5 injured party.

6 So, again, the reason is to prevent a tortfeasor's
7 setoff.

8 Also, in the case of Rowzie vs. Allstate both Judge
9 Norton and the Fourth Circuit Court of Appeals looked at
10 this same language.

11 I quote from the Fourth Circuit's opinion from 2009,
12 "As the Court in Richardson made clear, the South Carolina
13 legislature drafted this section with the intention that
14 the setoff prohibition would apply only to the tortfeasor."

15 And the last thing I'll say, Your Honor, is that
16 Richardson got it wrong. The legislature has had 22 years
17 to say that they got it wrong, and they haven't. So I
18 think --

19 THE COURT: That doesn't necessarily mean --

20 MR. WHELAN: Well, the Supreme Court has said that's
21 what the statute means.

22 THE COURT: All right.

23 MR. WHELAN: Thank you, Your Honor.

24 THE COURT: Thank you, sir.

25 Yes, sir.

1 MR. ROLLINS: Thank you, Your Honor.

2 I disagree, you might be surprised to learn, but
3 our -- my position, first of all, is that the statute says
4 what it says and there's no need to look to the legislative
5 intent to rule. The statutory construction statute is
6 clear and you don't have to look legislative intent.

7 So, first of all, the statute says, quote, the
8 coverage shall not be assigned or subrogated and is not
9 subject to setoff. And it's our position that that means
10 what it says.

11 Now, if we look at the text of the statute itself a
12 couple of things are clear from the outset. The first is
13 that these three related concepts -- it shall not be
14 assigned, it shall not be subrogated and it shall not be
15 subject to a setoff -- are -- all three of those concepts
16 presume that P.I.P. has already been paid.

17 So what that means, first of all, if it's not
18 assignable, that means if you go and get medical treatment
19 from Spartanburg Regional, and Spartanburg Regional makes
20 you sign an assignment, Spartanburg Regional cannot claim
21 the P.I.P. benefits.

22 To say that it is not subject to subrogation means you
23 go to Spartanburg Regional and get treatment, your health
24 insurance pays for it, your health insurance cannot say
25 we're going to subrogate against that P.I.P. coverage.

1 The third thing to say it is not subject to setoff
2 contemplates that P.I.P. has already been paid and that a
3 different entity, a third-party insurance carrier,
4 liability insurance carrier, or some other insurance
5 carrier cannot claim a setoff against that P.I.P. that has
6 already been paid.

7 And the second thing that is clear through the text
8 and the statute itself is that all three of these
9 concepts -- it's not assignable, not subject to subrogation
10 and not subject to setoff -- are all for the benefit of the
11 insured, of the P.I.P. insured.

12 They are not for the benefit of insurance companies.
13 The purpose of P.I.P. when it -- when it was started was to
14 be a no-fault system that provided immediate benefits to a
15 claimant without a claimant having to go through what we're
16 going through here.

17 THE COURT: Let me -- that's the way I've always
18 understood it when I practiced law. That does not mean
19 I'll consider --

20 MR. ROLLINS: And that's --

21 THE COURT: It's not --

22 MR. ROLLINS: That's the purpose of --

23 THE COURT: P.I.P. is for the insured. He gets it,
24 and it doesn't matter.

25 MR. ROLLINS: No matter what. And historically P.I.P.

1 coverage has been a payor of first resort, not a payor of
2 last resort. And the statute contemplates that assumption.

3 So it does not address what rights a P.I.P insurance
4 carrier has against a -- somebody -- against -- well,
5 against its own insured because of what some third party
6 happens to have paid or not have paid.

7 So, first of all, based on the language of the statute
8 itself we have to win. Not subject to -- not subject to a
9 setoff means not subject to a setoff. And I would note
10 that State Farm's been very crafty in wording the
11 statute -- the policy.

12 THE COURT: I like that word crafty.

13 MR. ROLLINS: It does not say setoff in the policy.
14 It says excess to.

15 Well, our courts have made it very clear that in an
16 automobile insurance context the terms setoff and excess
17 are interchangeable. And I refer you to the U.I.M.
18 statute, which is 38-77-160 which says that U.I.M. provides
19 damages in excess of liability limits.

20 I've also cited in my brief Broome v. Watts which
21 says -- and distinguishing U.I.M. and P.I.P. The very
22 definition of U.I.M. insurance mandates a setoff. And it
23 cites that U.I.M. statute.

24 So South Carolina automobile coverage excess and
25 setoff are the same thing. So to establish at the outset

1 that when, as the State Farm policy says, excess it is a
2 setoff. So, you know, and I don't think Robbie's
3 necessarily conceded that anywhere in his brief, but under
4 the law this is a setoff. So the question is just is that
5 setoff permissible.

6 Now, to understand where this Richardson and State Farm
7 Bureau-Richardson opinion come from you have to go back
8 through the history P.I.P. coverage.

9 Now, P.I.P. was mandatory in South Carolina prior to
10 1989 when the legislature enacted our current statute, or it
11 was actually, I think, one word different in '89 that
12 changed the word after that. It's irrelevant.

13 So when it enacted this statute P.I.P. was mandatory.
14 And the opinion that I cite that quotes the old law is the
15 Moultrie opinion. And what it said was, "If a claimant
16 recovering from his insurer the manifest or economic loss
17 shall bring action against another person, the Court shall
18 reduce such verdict by the amounts of the benefits paid by
19 the claimant's insurer."

20 So that is the way it used to work when P.I.P. was
21 mandatory, was he would go. And when you got hurt you would
22 make a claim against your P.I.P. coverage. Again, P.I.P. is
23 payer of first resort. That's the first money you get. And
24 then the tortfeasor's liability insurance would go back and
25 get a setoff for what your P.I.P. paid. But, again, as

1 noted in the language of our current statute, P.I.P. paid
2 first, not last.

3 And then in Moultrie what happened is the insurance
4 carrier, which North River Insurance -- Moultrie went and
5 settled with the liability carrier. The liability carrier
6 failed to assert its legal right to a setoff. And the
7 P.I.P. carrier said, well, we should get the setoff since
8 the liability carrier didn't -- didn't assert it. And the
9 Court held, no, the statute is very clear, the only person
10 who can a set -- who can assert a setoff is the liability
11 insurance carrier.

12 Now, the word that the Court used to refer to the
13 liability insurance carrier was tortfeasor. So in our
14 jurisprudence when the statute -- when the texts say
15 tortfeasor setoff, it technically means a liability
16 insurance carrier and not a literal tortfeasor.

17 So even when the tortfeasor did not allege the setoff
18 that he could the P.I.P. carrier still had to pay. And
19 that's what happened in Moultrie.

20 The claimant received double recovery. He got the
21 money from the liability insurance carrier that could have
22 alleged the setoff, and then the Court forced the P.I.P.
23 carrier to pay after the liability carrier paid because the
24 statute did not contemplate P.I.P. having the right to ever
25 assert a setoff.

1 So South Carolina law has never allowed a P.I.P.
2 carrier to assert a setoff even when a setoff was allowed by
3 law.

4 Now, in 1989 the legislature enacted a version of the
5 current statute that eliminated the only setoff that ever
6 existed. And the only setoff that ever existed was by the
7 tortfeasor against the P.I.P. money that had already been
8 paid.

9 So State Farm vs. Richardson when it has this language
10 only applies to the tortfeasor, it only applies to the
11 tortfeasor because the tortfeasor is the only entity who
12 could ever allege a setoff under South Carolina law.

13 The statute is a 1-way street. It contemplates what
14 third parties to the P.I.P. insurer -- P.I.P. insured
15 relationship can claim against the P.I.P. money, not what
16 the P.I.P. insurance carrier can claim as a result of what
17 third parties have paid or have not paid. And that's been
18 consistent throughout South Carolina law.

19 Now, the Richardson vs. State Farm opinion is very
20 clearly distinguishable. The same insurance company, State
21 Farm, is at issue in Richardson and this case. And in
22 Richardson the insurance company expressly disclaimed that
23 it was a setoff.

24 In this case they admit that it's a setoff, or they
25 have to admit that it's a setoff. But in State Farm vs.

1 Richardson language is they deny that this is a setoff and
2 allege that it is instead an anti-stacking provision.

3 And the only holding in Richardson is the -- a case --
4 an insurer, quote, "May prohibit the stacking of
5 non-mandatory coverage." That's the holding of the case.

6 And then it has this language at the end that says --
7 it's -- the -- the setoff applied only to the tortfeasor.
8 Well, it did because the tortfeasor is the only one who ever
9 had a setoff.

10 The statute never contemplated that a P.I.P. carrier
11 that alleged a setoff for what another entity had paid it.

12 So if the Court accepts State Farm's contention in this
13 case and says that a P.I.P. carrier can assert a setoff, if
14 the statute is a 2-way street and gives rights to the P.I.P.
15 carrier instead of taking -- or gives rights to insurance
16 companies instead of taking them away, then the P.I.P.
17 carrier can also allege an assignment.

18 If State Farm puts into its contract that it can assign
19 or that its insured must have assigned his rights to
20 liability coverage, then State Farm can claim that liability
21 coverage if this is a 2-way street.

22 State Farm can claim subrogation rights against a
23 different insurance company. If this -- if this right gives
24 -- if this statute gives rights to an insurance company
25 instead of taking them away, then State Farm can -- the

1 P.I.P. coverage, in fact, does not exist because P.I.P.
2 coverage is a payor of last resort.

3 Now, the -- and I cited a couple of other opinions in
4 my brief that -- that reiterate that the purpose of P.I.P.
5 was in Mount vs. Sea Pines, it prevented a tortfeasor from
6 profiting in a case where the injured party receives P.I.P.
7 benefits.

8 So, again, the courts acknowledge that P.I.P. benefits
9 have already been received, and this statute contemplates
10 who can make a claim against those P.I.P. benefits or claim
11 a credit for those P.I.P. benefits.

12 So under State Farm's analysis if literally this only
13 applies to a tortfeasor, if only a tortfeasor cannot --
14 cannot receive a setoff, then a health insurance entity --
15 it could be crafty with its language in its health
16 insurance policy and say this is not subrogation, this is a
17 setoff.

18 So what we have is Acme Health Insurance Company and
19 State Farm both in here with Wadette Cothran on one side
20 and both of them on the other, and they're both saying our
21 coverage -- we have a set -- the health insurance said we
22 have a setoff for what P.I.P. pays. P.I.P. says we have a
23 setoff for what health insurance pays.

24 If you read only the tortfeasor literally both of
25 those setoff provisions are valid, and Wadette Cothran has

1 to pay her own medical bills. Clearly that is not what was
2 intended by the legislature.

3 And in the Richardson opinion it quotes what the
4 legislature says in one of the footnotes. "And it may --
5 may not" -- and not is an all caps -- "be assigned or
6 subrogated and may not be set off," and then in brackets,
7 "from the tortfeasors liability coverage."

8 The only reason that the tortfeasor's liability
9 coverage is what is referenced in the legislature history,
10 because that is the only setoff that has ever existed.

11 And finally from a public policy perspective, the fear
12 or the concern that insurance companies raise is, well, the
13 claimant's getting double recovery. And that's simply not
14 true, in particular with worker's compensation benefits.
15 In the worker's compensation system there is a statutory
16 lien that the worker's compensation carrier has against any
17 third-party settlement that an injured -- that the injured
18 worker receives.

19 So there's a total cognizable damages analysis that
20 the system is required to go through, and to determine the
21 amount of the worker's compensation insurance carrier's
22 statutory limit.

23 So every dollar that Wadette Cothran gets from a
24 source other than the worker's compensation insurance
25 company can be alleged by the worker's compensation

1 insurance carrier to drive up the amount of that worker's
2 compensation carrier's statutory limit.

3 So by not paying Wadette Cothran her benefits State
4 Farm is also injuring the worker's compensation insurance
5 carrier in this case because it's depriving it of making a
6 claim for the additional monies that Wadette Cothran has
7 received.

8 So I don't think unless you have any questions, Your
9 Honor, I don't have -- I don't think I have any.

10 THE COURT: Anything else to say? That's fine.

11 MR. ROLLINS: I don't have anything else.

12 THE COURT: Thank you, sir.

13 Yes, sir.

14 MR. WHELAN: Thank you, Your Honor.

15 I guess first I do -- Mr. Rollins said that we, that
16 State Farm, agrees that this excess provision is a setoff,
17 and we don't agreed with that at all.

18 We just say that under Richardson -- Richardson said
19 that other provision was not a setoff under this statute.
20 If you follow that same analysis, this provision isn't a
21 setoff under the statute either.

22 If you accept his position to any time you have a
23 provision saying what policy is excess that's a setoff.
24 And any setoff of P.I.P. or Med-Pay is illegal under the
25 statute, then what you're doing is you're invalidating

1 every excess policy in this state that mentions P.I.P. or
2 Med-Pay. And every policy has to say whether it's primary
3 or excess. They all do.

4 THE COURT: All right.

5 MR. WHELAN: And some policies are written
6 specifically for excess insurance.

7 And Mr. Rollins has just told you that under some
8 South Carolina law I'm unfamiliar with any excess insurance
9 is setoff. Therefore this statute says you can't set it
10 off. And if you ignore Richardson, then any setoff at all
11 is illegal. And so what he's asking the Court to do is to
12 invalidate every excess provision in this state.

13 THE COURT: Stop, stop. I've heard your arguments.
14 Don't try to make me feel bad about it.

15 If you have proposed orders, submit them. I'll be
16 happy to consider what I've heard here today. You guys
17 have been very concise and distinct. I can make the
18 decision. I don't want to make you feel bad about it.

19 MR. WHELAN: Your ruling is what it is, Your Honor.

20 THE COURT: Y'all have proposed orders for me. Take
21 your time. Turn in proposed orders.

22 Do y'all want ten days to do that? How much time do
23 y'all need? Do you want to do it right away?

24 MR. ROLLINS: Ten days is fine with me.

25 MR. WHELAN: Ten days.

1 THE COURT: This is my law clerk.
2 MR. ROLLINS: Thank you, Your Honor.
3 THE COURT: Thank you for your lively presentation,
4 gentlemen.
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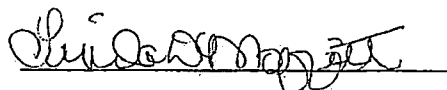
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CERTIFICATE

I, the undersigned Linda D. Moffitt, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the trial of the captioned cause, relative to appeal, in the Common Pleas Court for Spartanburg County, South Carolina, on the 29th day of October 2015.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

February 3, 2016



Linda D. Moffitt
Circuit Court Reporter

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
WADETTE COTHRAN and CHRIS	)	Civil Action No. 2015-CP42-1578
COTHRAN,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	<u>STATE FARM MUTUAL</u>
STATE FARM MUTUAL	)	<u>AUTOMOBILE INSURANCE</u>
AUTOMOBILE INSURANCE	)	<u>COMPANY'S MOTION FOR</u>
COMPANY and ROBERT TUCKER,	)	<u>SUMMARY JUDGMENT</u>
	)	
Defendants.	)	

Defendant State Farm Mutual Automobile Insurance Company ("State Farm") moves for summary judgment on the plaintiffs' claim for breach of contract. There is no issue of material fact pertaining to this motion, as demonstrated by the Stipulation of Facts filed herewith. This motion will be supported by a memorandum in support that, by agreement of the parties, will be filed within thirty days of the filing of this motion.

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August 25, 2015

FILED
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 SPARTANBURG COUNTY
 2015 AUG 28 AM 9:32
 M. HOPE BLACKKEY

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	C/A No.: 2015-CP-42-1578
	)	
Wadette Cothran and	)	
Chris Cothran,	)	
	)	
Plaintiff,	)	
	)	
v.	)	MOTION FOR SUMMARY JUDGMENT
	)	
State Farm Mutual Automobile	)	
Insurance Company and	)	
Robert Tucker,	)	
	)	
Defendants.	)	
	)	

Pursuant to Rule 56, SCRPC, Plaintiffs Wadette Cothran and Chris Cothran ("Plaintiffs") move for summary judgment on the claims they have asserted against State Farm Mutual Automobile Insurance Company and Robert Tucker ("Defendants") for State Farm's refusal to pay Personal Injury Protection ("PIP") benefits to Plaintiffs. Plaintiffs allege that Defendants' refusal is based on a policy provision in the State Farm policy that conflicts with South Carolina law.

This Motion is supported by the pleadings, discovery, and Stipulations in this case and shall be supported by Plaintiffs' Brief in Support of this Motion, which will be timely filed in the future.

WHEREFORE, for the reasons set forth above, Plaintiffs hereby respectfully request that the Court granted Plaintiffs' Motion for Summary Judgment and that this Court issue its Order finding that Plaintiffs are entitled to receipt of the entirety of their PIP policy benefits.

[SIGNATURE PAGE FOLLOWS]

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SPARTANBURG COUNTY
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J. HOPE BLACKLEY

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August 13, 2015

FILED
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SPARTANBURG COUNTY
2015 AUG 28 AM 9:32
M. HOPE BLACKLEY

ROA_0082

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

WADETTE COTHRAN and CHRIS
COTHRAN,

Civil Action No. 2015-CP42-1578

Plaintiffs,

vs.

STATE FARM MUTUAL
AUTOMOBILE INSURANCE
COMPANY and ROBERT TUCKER,

Defendants.

**STATE FARM'S MEMORANDUM IN
SUPPORT OF ITS MOTION FOR
SUMMARY JUDGMENT AND IN
OPPOSITION TO THE PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT**

Introduction

There is a single question before the Court: does S.C. Code § 38-77-144, which states that PIP insurance coverage is not subject to set-off, invalidate a policy provision stating that PIP coverage is excess over workers' compensation coverage?

This question has already been answered by the South Carolina Supreme Court. In *State Farm Mut. Auto. Ins. Co. v. Richardson*, it held that a set-off of PIP benefits is prohibited in only one situation—the reduction of a tortfeasor's liability. 437 S.E.2d 43 (S.C. 1993) Because that situation is not present here, State Farm is entitled to summary judgment.

The Stipulated Facts

The parties stipulate there are no material facts in dispute. Wadette Cothran was injured in a work-related motor vehicle accident, and her medical expenses have been paid in full by her workers' compensation carrier. (Stip. of Facts at ¶ 1-3) Ms. Cothran's State Farm insurance policy provided personal injury protection ("PIP") coverage with limits of \$5,000. (*Id.* at ¶ 5)

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State Farm paid Ms. Cothran a portion of her unpaid lost wages under the PIP coverage, but denied payment for her medical expenses as they had been fully paid through workers' compensation. *Id.* State Farm's denial was based on the following policy provision:

Workers' Compensation Coordination
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.

(Policy at p. 16). The plaintiffs argue this provision violates S.C. Code § 38-77-144, which provides that PIP coverage is not mandated in South Carolina "and is not subject to a setoff." *Id.*

The parties stipulate that if the above provision does not violate section, S.C. Code § 38-77-144, then no remaining PIP coverage exists, and State Farm is entitled to summary judgment. (Stip. of Facts, ¶ 10)¹ Therefore, the sole issue before the Court is whether this provision constitutes a "set-off" prohibited by S.C. Code § 38-77-144.

Argument

- I. The South Carolina Supreme Court has ruled that the statute at issue does not prohibit the set-off of other insurance coverage—it prohibits only a tortfeasor's set-off at trial.**

The plaintiffs' argument has been tried before, and rejected. In *State Farm Mut. Auto. Ins. Co. v. Richardson*, the plaintiff argued that an anti-stacking clause applicable to PIP benefits was an impermissible set-off under the statute. 437 S.E.2d 43, 45 (S.C. 1993) The South Carolina Supreme Court rejected this argument, analyzing the legislative history and concluding "the Legislature intended the set-off prohibition of section 38-77-145² to apply only to the tortfeasor," who, prior to the enactment of the statute, was entitled to such a set-off. *Id.* at 45 (emphasis added). The court also noted that the Legislature simultaneously decided to make PIP

¹ Due to a typographical error, paragraph 10 of the stipulation of facts incorrectly references section 38-77-140 instead of section 38-77-144.

² Section 38-77-144 was formerly located at § 38-77-145, but the language is identical.

coverage non-mandatory, which was consistent with an intent to allow insurers to reduce available PIP coverage through set-off. *Id.*³

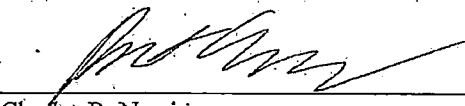
II. The ruling in *Richardson* requires that State Farm be granted summary judgment.

The Cothrans are making the same argument made in *Richardson* and asking this Court to provide a different response. In *Richardson*, the Supreme Court construed the phrase at issue to prohibit a set-off of PIP benefits in "only" one situation—the reduction of a tortfeasor's liability. To state the obvious, the defendant here is not a tortfeasor. As in *Richardson*, the defendant is the plaintiff's insurer. Thus, the set-off provision of section 38-77-144 does not apply, and as a result, State Farm is entitled to summary judgment.

Conclusion

The Court should grant judgment as a matter of law in favor of State Farm on the plaintiffs' breach of contract claim.

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September 28, 2015.

³ *Richardson* has been followed by other courts. In *Rowzie v. Allstate Ins. Co.*, the Fourth Circuit rejected a similar argument, noting that in *Richardson* the supreme court rejected the position (advanced by Cothran here) that the statute is "a general prohibition against all reductions of automotive insurance based upon PIP/MedPay coverage." 556 F.3d 165, 168 (4th Cir. 2009). See also, *State Farm Mut. Auto. Ins. Co. v. Calcutt*, 530 S.E.2d 896 (S.C. 2000) (enforcing policy provision setting-off UIM coverage based by amounts received as workers' compensation benefits).

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	C/A No.: 2015-CP-42-1578
	)	
Wadette Cothran and	)	
Chris Cothran,	)	
	)	
Plaintiff,	)	
	)	
v.	)	PLAINTIFFS' MEMORANDUM IN SUPPORT
	)	OF THEIR MOTION FOR SUMMARY
State Farm Mutual Automobile	)	JUDGMENT
Insurance Company and	)	
Robert Tucker,	)	
	)	
Defendants.	)	
_____	)	

FACTUAL BACKGROUND

All relevant facts in this matter are stipulated by the parties. -- On January 19, 2015, Wadette Cothran, an insured under a State Farm Personal Injury Protection ("PIP") policy, was involved in an accident in which she sustained injuries resulting in lost wages and medical treatment in monetary amounts that exceed the amount of coverage available under her PIP policy. State Farm alleges it is not required to pay the PIP limits because Ms. Cothran's bills were incurred in the course and scope of her employment and, to date, have been paid for by a workers' compensation insurance carrier.

Plaintiff Wadette Cothran alleges that she is entitled to collect from her PIP coverage because the State Farm policy provision at issue that purports to allow a setoff for benefits paid by a workers' compensation carrier is invalid under S.C. Code Ann. Section 38-77-144. The sole issue for determination is whether the provision in the State Farm policy is void as a result of Section 38-77-144.

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LAW

A. The State Farm Policy Provision Constitutes An Impermissible Setoff Of

PIP Benefits

Section 38-77-144 states, "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 setoff." Under the terms of the State Farm Policy, "[a]ny 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." On its face, the State Farm provision violates the plain meaning of the anti-setoff Statute.

As the South Carolina Supreme Court has articulated:

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature.

Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E. 2d 578, 581 (2000) (Internal Citations and Quotations Omitted). Furthermore, "[i]t is settled law that statutory provisions relating to an insurance contract are part of the contract, and that a policy provision which contravenes an applicable statute is to that extent invalid." Boyd v. State Farm Mutual Automobile Insurance Co., 260 S.C. 316, 195 S.E.2d 706 (1973).

It is clear that the State Farm policy provision at issue in this case, on its face, constitutes a setoff that is prohibited by Section 38-77-144. No additional analysis is necessary. The authority upon which State Farm's allegation that the set-off is permissible primarily rests does not address the validity of a set-off provision under current law.

B. *State Farm Mut. Auto. Ins. Co. v. Richardson* Addressed The Setoff A Tortfeasor
Formerly Received, Not the Setoff A PIP Carrier Received

In *State Farm v. Richardson*, 313 SC 58, 437 S.E.2d 43 (1993), the South Carolina Supreme Court analyzed the now-repealed statutory provision that formerly allowed a "Tortfeasor" to received credit ("set-off") for money paid by a PIP carrier to the PIP carrier's injured insured. As noted in *Richardson*, the statute allowing the setoff for the tortfeasor has been repealed and replaced by the current statute that prohibits such a setoff. Even when a setoff was allowed, it was allowed to the *benefit of the "tortfeasor,"* not to the benefit of any PIP carrier. As stated by the *Richardson* court, Section 38-77-145¹ eliminated this "*tortfeasor liability reduction*" that "[w]e termed a 'set-off' in *Moultrie v. North River Ins. Co., Inc.*, 272 S.C 53, 249 S.E.2d 158 (1978)" (Emphasis Added).

Moultrie was decided when a tortfeasor liability reduction/setoff was allowed. In *Moultrie*, the injured party (*Moultrie*) received a settlement with the liability insurance carrier for the driver who was at fault for the accident in which he was injured. That liability settlement included "payment of [*Moultrie's*] medical expenses". *Id.* at 54, 158. His PIP carrier, North River Insurance, alleged that *Moultrie* would receive a "double recovery" if he were allowed to recoup money from his PIP policy for medical bills for which he had already received payment from the liability carrier. The former statute (the statute now proscribed by the anti-setoff language of Section 38-77-144), as quoted by the *Moultrie* court, read, "if a claimant Recovering from his insurer the benefits for economic loss. . . shall bring action. . . against another person. . . the court shall reduce such verdict by the amounts of the benefits paid. . . by the claimant's

¹ Section 38-77-145 was the version of the anti-setoff statute current when *Richardson* was decided. The language, as cited by the *Richardson* Court was virtually identical with Section 38-77-144 at issue in his matter except that Section 38-77-145 stated that the coverage "*must not* be assigned or subrogated" instead of the current statute's (Section 38-77-144) "*shall not* be assigned or subrogated." The legal effect of "must not" or "shall not" is identical.

insurer.” Id (Ellipses in original). The Moultrie Court held that the plain meaning of the statute was that “this section only requires a setoff by the persons who have already received benefits from their own carrier.” The Court held that “*the tortfeasor was to be given credit for payment by the first party insurer, rather than the first party insurer* [i.e., the PIP carrier] getting the benefit of payment by the tortfeasor.” Accordingly, the “old” law that allowed a setoff did make an attempt to prevent “double recovery,” but it did so by allowing the “tortfeasor” (i.e., the tortfeasor’s insurance carrier) to get credit for what the PIP carrier paid. It expressly and specifically did not allow a PIP carrier to allege a setoff under any circumstance. *South Carolina PIP law has never allowed a PIP carrier to receive a setoff for what another entity has paid; it formerly allowed other entities to receive a setoff for what a PIP carrier had paid, and essential to the analysis was the fact that the PIP carrier’s obligation was independent of, and, in fact, suceeded, the obligation of any other entity.*

As noted by the Richardson court, the “Legislature repealed the tortfeasor’s statutory ‘setoff’” [. . .] In our view, the Legislature intended for the ‘set-off’ prohibition in section 34 of Act 148 to refer to the statute allowing *reduction of a tortfeasor’s liability* which was repealed in section 57 of Act 148. Accordingly, we find that the ‘set-off’ prohibited by section 34 of Act 148, now codified in section 38-88-145, is the *tortfeasor’s reduction in liability* [. . .]. Richardson at 60, 45. The statute was altered, not to give a windfall to the PIP carrier, but because the elimination of the setoff “prevented the tortfeasor from profiting in the case where the injured party received PIP benefits.” Mount v. Sea Pines, Inc., 337 S.C. 337, 359, 523 S.E. 2d 464, 465 (Ct. App. 1999).

The current, statute, therefore, prevents a “tortfeasor” (i.e., liability insurance carrier) from receiving the setoff it formerly received. Neither the Statute nor Richardson intended to

diminish the right of the injured party claiming benefits. The Richardson opinion and the Statute enlarged—not diminished—the recovery available to the injured party. The old law gave a credit to the liability carrier to the detriment of the injured party. The new law was enacted to prevent this windfall to the liability carrier at the expense of the injured party. It was not enacted to move the windfall from one insurance carrier to the other at the expense of the injured party.

C. State Farm’s Contention Results In An Absurd Result That Contradicts The “Richardson Rule” Upon Which It Purports To Rely

Courts must “reject a statutory interpretation when to accept it would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention.” Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000). In State Farm v. Richardson, 313 SC 58 (1993), a State Farm insured was injured and claimed PIP benefits on two State Farm PIP policies. State Farm alleged that Richardson was entitled to only one; it “contend[ed] that its policy comprises an anti-stacking clause *rather than a set-off*.” Id. at 60, 44 (Emphasis Added). (Interestingly, in the present action, State Farm contends that its policy does contain a setoff provision; it merely contends that the setoff is permissible in spite of the statute expressly forbidding a setoff). The Richardson Court concluded that, within the context of a single insurer-insured relationship in an automobile insurance scenario, an insurer’s policy “may prohibit the *stacking* of non-mandatory coverage.” Id. at 61, 45 (Emphasis added). As noted above, the Richardson court held that the purpose of 38-77-145 was to prevent the “tortfeasor,” not the PIP carrier, from receiving the setoff resulting from arguably duplicative coverages. The opinion was also limited to an analysis of the extent to which a single automobile insurance carrier was permitted to limit its responsibilities within the first party, insurer-insured context. That is, the opinion only addressed when a single

insurer could limit, by the terms of its policy, what that single insurer paid under the terms of the insurer-insured contract.

As noted above, the Richardson opinion did not address any scenario in which a PIP carrier could claim "a setoff" because, first of all, State Farm disclaimed that the setoff issue was before the court², and, second, because no South Carolina opinion had ever allowed a PIP carrier to repudiate coverage based on payments made as a result of obligations that existed in third parties to the PIP insurer-PIP insured relationship. Plaintiff does not contend that she is entitled, as a matter of law, to stack PIP coverage if her insurance policy has an anti-stacking provision. Stacking of PIP coverage is a decided issue that is not before the Court in the case at bar. Accordingly, the portion of the Richardson holding that allowed State Farm to limit its responsibility is not before the Court in the case at bar.

The Richardson Court did not allow an insurer to receive a setoff for payments made by a source with an obligation independent of the obligation that arose in any context outside of the relationship between State Farm and Mr. Richardson. Contrary to the history of the PIP setoff rule as outlined above, State Farm seeks to assert that, because a workers' compensation insurance carrier is not a literal "tortfeasor," State Farm can receive credit for what a third party to the first party contractual relationship (between State Farm and Wadette Cothran) has a legal responsibility to pay. Read in light of Richardson and Moultrie, it would be the workers' compensation insurance carrier, not State Farm, that would have the right to assert a credit—and, in fact, as noted below, the workers' compensation carrier can, and will, assert an equitable credit for the PIP payment.

² In Richardson, "State Farm contend[ed] that that its policy comprises an *anti-stacking clause rather than a set-off*." Richardson at 60, 44 (Emphasis added).

State Farm's interpretation requires complete disregard of both the plain meaning and the legislative history of the statute. Instead, it relies on a literal reading of "tortfeasor" (which does not appear in the setoff statute), wrenched from the context it once held under decisions interpreting a now-non-existent law that allowed a tortfeasor to receive a setoff. To read a single word with such a level of literalness outside of all context held in the statutory and jurisprudential history in which the word appeared would result in a patent absurdity. In fact, such a literal reading would make impossible one of the holdings of the Richardson Court—i.e., that "tortfeasor" setoffs were abolished by statute.

That is, as a result of the Richardson opinion, if State Farm's current contention were true, State Farm could have properly received a setoff for the liability insurance coverage paid to Mr. Richardson because that money was, literally, money paid by a liability insurance company and not by a *literal* "tortfeasor." In the case at bar, the at-fault driver does not have any assets available from which a judgment against him could be satisfied. It is his liability insurance carrier that will pay any verdict received against him. To hold that the Richardson Court intended that PIP coverage could receive a setoff only by what a literal tortfeasor paid would result in the absurd result of State Farm receiving a setoff for what the at-fault driver's liability insurance carrier paid because his liability insurance carrier is not, literally, the "tortfeasor."

Presumably, State Farm concedes that, for the purpose of its PIP coverage, it does not receive a setoff for money paid in a fault-based coverage system (automobile liability insurance) due to Ms. Cothran. This concession complies with the plain meaning of Section 38-77-145. The Statute means, simply, what it clearly and unambiguously states, PIP coverage "is not subject to setoff." Not subject to setoff, in this context, means what it means always and in any context: the existence or non-existence of any third party insurance (insurance outside of the

State Farm-Wadette Cothran relationship) is irrelevant to any analysis of State Farm's contractual obligation to pay PIP benefits to its insured, Wadette Cothran, once she incurs lost wages or medical bills as a result of an automobile accident. Although State Farm must concede that it does not receive a setoff for insurance money paid in a fault-based (automobile liability) context, it somehow simultaneously contends that Section 38-77-145 does allow a setoff of insurance money paid as a result of a no-fault coverage (workers' compensation) context in spite of Section 38-77-145.

C. Workers' Compensation Law Requires that No Setoff For PIP Be

Allowed

1. PIP Coverage and Underinsured Motorist Coverage Have Entirely Different Setoff Rules

The confusion surrounding the setoff issue in the PIP context stems from the confusion that surrounds it in the context of the interrelationship between underinsured motorist coverage ("UIM") and workers' compensation benefits. That is, because first party automobile insurance carriers know there is a context in which a UIM carrier may allege a setoff, they incorrectly believe that the same principle allows them to allege that PIP may also be setoff. The statutory definitions of the two coverages, as they relate to setoffs, are polar opposites. No PIP setoff is allowed. On the other hand, by its definition, UIM coverage requires setoff. It is defined, in Section 38-77-160, "to provide coverage in the event that damages are sustained *in excess of the liability limits* carried by an at-fault insured or underinsured motorist" (Emphasis Added). As the Supreme Court held in Broome v. Watts, 319 S.C. 337, 341, 461 S.E. 2d 46, 48, "[t]he very definition of UIM insurance *mandates a set-off*" (Emphasis Added). Furthermore, the total recovery to the injured party in the UIM context is "not to exceed the damages sustained" Id.

(Citations Omitted). Finally, the statute governing UIM setoff expressly allows setoff for workers' compensation benefits if the UIM coverage at issue is purchased by the employer at

Section 38-77-220:

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.

That is, according to the Supreme Court, the phrase "in excess of" in the UIM statute (the same phrase in State Farm's PIP provision) provides the foundation of South Carolina UIM law and constitutes, by definition, a setoff. Therefore, by definition, UIM coverage requires a setoff, and PIP, by definition, cannot allow a setoff.

Although the statutory definitions of PIP and UIM are antithetical with regard to the setoff issue, to the extent that State Farm could argue that UIM and PIP coverage are similar, the absence of any exception for workers compensation coverage in the PIP statute similar to that found in the UIM statute demonstrates that no workers' compensation exception was intended. ("[W]here a section of a statute contains a given provision, *the omission of that provision from a similar section is significant to show a different intention existed*"). South Carolina Farm Bureau Mut. Ins. Co. v. Muinford, 382 S.E. 2d 11 (1989) (Internal citations omitted) (Emphasis Added).

2. Section 38-77-220 Does Not Allow A PIP Setoff For Workers'

Compensation Benefits

S.C. Code Ann. Section 38-77-220 states:

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.

(Emphasis Added). By its plain meaning, this Section applies only "to an employee of the insured while engaging in the employment." Wadette Cothran is not an employee of State Farm's Insured. Wadette Cothran is State Farm's insured, and this statute is therefore inapplicable. Two cases summarize the interpretive history of this statute and definitively establish that it applies only to employer-purchased coverage and not to employee-purchased coverage. In State Farm v. Calcutt, 340 S.C. 231, 530 S.E.2d 896 (Ct. App. 2000), the Court of Appeals sought to distinguish the Supreme Court's holding in Williamson v. United States Fire Ins. Co., 314 S.C. 215, 442 S.E. 2d 587 (1994). In Williamson, the Supreme Court held that an uninsured motorist ("UM") coverage setoff provision was invalid. The Calcutt court held that State Farm's workers' compensation setoff, in a UIM context, was valid because UIM, unlike UM, was non-mandatory coverage. The sole holding in the Calcutt case was that "section 38-77-160 does not prohibit a setoff provision, regardless of whether the employer or the employee purchased the UIM policy." Id. at 898, 235. State Farm would have this Court hold, in the case at bar, that PIP may claim a setoff because, like UIM coverage, PIP coverage is not mandatory.

The only authority holding that UIM coverage could be set off (i.e., Calcutt) was expressly overruled by Sweetser v. South Carolina Dept. of Ins. Reserve Fund, 390 S.C. 632, 703 S.E. 23 509 (2010). The Supreme Court concluded that "Section 38-77-220 can only apply to employers as only they can 'insure any liability under' compensation law or have employees." Id. at 636, 511. The Court further reaffirmed its previous holding from Williamson that the policy rationale of §38-77-220 was "to relieve the employer of paying double premiums, one to its workers' compensation carrier, one to its automobile liability policy carrier, a policy consideration which is not applicable to employees." Id. The Court expressly held that the word

"voluntary" *did not refer to UIM coverage*, but "to employers who voluntarily decide to cover their non-domestic employees despite the opt-out provision of §38-77-220 *and not, as appellant would read it, to voluntary coverages such as UIM.*" *Id.* at 637, 511. "[V]oluntarily coverages such as UIM" must include PIP coverage as well. In Footnote 4 of the Sweetser opinion, the Court specifically stated: "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.*" (Emphasis Added). This Sweetser holding is not a dictum. Because the only holding in Calcutt was "section 38-77-160 does not prohibit a setoff provision, regardless of whether the employer or the employee purchased the UIM policy," Calcutt at 898, 235, the only holding that existed to be overruled was that UIM coverage could be setoff. Accordingly, the only setoff allowed for workers' compensation benefits, in any context, is when the employer purchases the coverage. If the employee purchases the coverage, no setoff is allowed. Because it is stipulated that the coverage purchased in this case was purchased by Wadette Cothran, to the extent that any argument could be made that UIM and PIP coverages were remotely similar, South Carolina law would not allow setoff of any PIP benefits due to Wadette Cothran because she, not her employer, purchased the policy.

3. State Farm's Failure To Pay Its PIP Coverage Is Detrimental To Wadette Cothran's Employer And Her Employer's Workers' Compensation Carrier As A Matter of Public Policy

As noted above, the Sweetser Court articulated the public policy interest an employer and workers' compensation insurance carrier had in a Claimant's receipt of automobile insurance proceeds. Specifically, a workers' compensation insurance carrier has an equitable interest in ensuring that the injured employee receives all benefits to which she is entitled as a result of an

injury. Similar to the former PIP coverage system that allowed a tortfeasor to claim a setoff in the amounts paid by PIP, the current PIP coverage system (that, as noted above, does not allow any credit to be claimed by the PIP carrier) does allow a workers' compensation insurance carrier to claim an equitable interest (although not a setoff) for payments made by the employee's PIP carrier. S.C. Code Ann. Section 42-1-560 outlines the total cognizable damages analysis available to the workers' compensation insurance carrier to determine the amount of the statutory lien it is owed as a result of a claimant's third party settlement. The Workers' Compensation Commission has the authority to determine the amount of the workers' compensation carrier's lien, and, if necessary, reduce it if "a reduction is equitable to all parties and serves the interests of justice." *Id.* Accordingly, when the Commission makes its determination of the proper amount of the third party liability settlement due to the workers' compensation insurance carrier, the equitable consideration of all payments received by the injured worker from any source, *including PIP coverage*, is at issue. That is, if the injured worker has received sufficient money to make her whole, then the workers' compensation insurance carrier has a stronger equitable argument that it is entitled to a greater lien. State Farm's refusal to pay its PIP benefits when legally due, therefore, prejudices not only Wadette Cothran but also her employer's workers' compensation insurance carrier.

CONCLUSION

If State Farm is allowed to successfully allege a setoff for what a no-fault workers' compensation insurance carrier obligated to pay for medical treatment has paid, there would be no legal basis to prevent State Farm from receiving credit for what another no fault insurance carrier obligated to pay for medical treatment paid: i.e., health insurance. As noted above, if State Farm is requesting that "tortfeasor" be read literally, only payments received from a literal

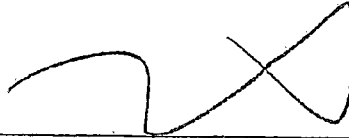
tortfeasor would not be subject to setoff. That is, PIP coverage would never apply unless the entity that caused a collision paid, out-of-pocket, for the damages sustained by the PIP insured. If workers' compensation insurance is subject to setoff because a workers' compensation insurance company is not a literal "tortfeasor," then so is health insurance, liability insurance, uninsured motorist coverage, or any other insurance.

Wadette Cothran purchased PIP coverage so that she would receive payment under that policy when she sustained an injury that resulted in medical bills or lost wages. To hold that the policy does not cover any reason she purchased it to cover results in absurdity. South Carolina law does not allow insurers to take premiums from insureds in return for a polite letter stating that no risk is covered by the policy for which they have paid the premiums. As held in Isle of Palm Pest Control Co. v. Monticello Ins. Inc., 319 S.C. 12, 19 459, S.E.2d 318, 321 (Ct. App. 1995), a case in which an insurer provided a "professional liability policy" that contained an exclusion for "professional liability" for the exterminating company that bought it, "[t]o give effect to the professional liability exclusion would render the policy virtually meaningless, because it would exclude coverage for all claims arising from Isle of Palms' exterminating services, the very risk contemplated by the parties." Allowing setoffs for PIP coverage, a coverage that is, by statutory definition, not subject to setoff, would similarly exclude coverage for "the very risk contemplated by the parties."

PIP coverage is not mandatory in South Carolina. When an automobile insurance carrier voluntarily elects to sell it, it elects to sell it as it is defined by statute, and the Statute mandates that it is not subject to setoff. If State Farm can successfully allege a setoff in this context, then it can allege a setoff in any context that could realistically occur, and PIP coverage, although

earing revenues for State Farm, does not exist to cover any statutorily defined loss that occurs to any State Farm PIP insured.

Respectfully Submitted,



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September 28, 2015
Spartanburg, SC

COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

WADETTE COTHRAN and CHRIS
COTHRAN,

Civil Action No. 2015-CP42-1578

Plaintiffs,

vs.

STATE FARM MUTUAL
AUTOMOBILE INSURANCE
COMPANY and ROBERT TUCKER,

Defendants.

RESPONSE TO PLAINTIFFS'
MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

The sole issue before the Court is whether S.C. Code § 38-77-144's provision that PIP coverage "is not subject to a setoff" invalidates a State Farm policy provision stating that PIP benefits are excess over workers' compensation benefits. This issue has been resolved by a Supreme Court decision. In *State Farm Mut. Auto. Ins. Co. v. Richardson*, the South Carolina Supreme Court held that the setoff language in section 144 only prohibits a tortfeasor from setting off PIP payments at trial. 437 S.E.2d 43 (S.C. 1993). Accordingly, the plaintiffs can prevail only if *Richardson* is disregarded.

I. The plaintiffs' attempts to distinguish *Richardson* are inapplicable; *Richardson* controls this matter.

A. The fact that *Richardson* concerned stacking does not matter.

The plaintiffs attempt to distinguish *Richardson* because it involved an attempt to use section 38-77-144 to prohibit the stacking of PIP coverage. Richardson tried to use the same six words from section 144 as the Cothrans—"is not subject to a set-off"—to argue that an alleged anti-stacking provision violated the statute. Here, the Cothrans contend these six words invalidate an excess-workers compensation coverage provision instead of an anti-stacking

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provision. The *Richardson* court rejected both arguments when it held those six words had a single application—"the Legislature intended [the six words] to apply only to the tortfeasor." 437 S.E.2d at 45 (emphasis added). Because the Cothrans are attempting to apply those words to someone other than the tortfeasor—State Farm—their argument fails under *Richardson*.

B. State Farm is not a "tortfeasor" under *Richardson*.

The plaintiffs profess confusion over the meaning of "tortfeasor." They claim that State Farm is relying upon a "literal" reading of the word. However, State Farm is unaware of any other way to construe the word, nor was State Farm aware of any confusion over the meaning of the word prior to receiving the plaintiffs' brief.¹ Additionally, to the extent the plaintiffs are claiming that State Farm—their own insurer—is the equivalent of the tortfeasor whose car she collided with, that argument was foreclosed by the South Carolina Supreme Court which held that a UIM insurer is not a "wrongdoer" for purposes of applying the collateral source rule. *Bardsley v. GEICO*, 747 S.E.2d 436, 442 (S.C. 2013).

C. Whether or not an excess insurance provision can be described as a "set-off" is irrelevant under *Richardson*.

The plaintiffs claim that State Farm "contends that its policy does contain a setoff provision." (*Id.* p. 5) This is not true. The provision at issue is an excess insurance provision, stating that PIP is excess over workers' compensation coverage. The plaintiffs, not State Farm, have claimed this provision constitutes an impermissible set-off under section 38-77-144.

As it did in the *Richardson* decision, State Farm has responded that the provision is not a set-off prohibited by section 144. However, *Richardson* did not need to consider whether an anti-

¹ Black's provides a single, concise definition: "One who commits a tort; a wrongdoer." Black's Law Dictionary (7th ed.), p. 1497.

stacking provision could be called a "set-off"—because the anti-stacking prohibition in section 144 only applied to a verdict against a tortfeasor, the question was irrelevant.

Because *Richardson* so clearly invalidates the plaintiffs' position, this Court need not reach the question of whether an excess insurance provision, by nature, is or is not a set-off. Under *Richardson*, whether or not it can be described as a set-off, section 144 does not prohibit the provision at issue.²

D. That *Richardson* cited the 1978 case of *Moultrie v. North River* does not save the plaintiffs from *Richardson*'s holding.

Moultrie v. North River Ins. Co. Inc., involved mandatory PIP coverage that was a required coverage under former law. 249 S.E.2d 158 (S.C. 1978) Although PIP was mandatory, a state statute permitted tortfeasors to set-off PIP benefits from tort verdicts against them (referred to herein as the "old-tortfeasor-statute"). In *Moultrie*, an insurer argued that the old-tortfeasor-statute could be used in reverse—that a previous payment by a tortfeasor's insurer could offset the insurer's obligation to pay mandatory PIP benefits. The court rejected this argument. It held the old-tortfeasor-statute applied only to tortfeasors. Because it did not apply to first-party insurers, they could not obtain a set-off under the statute.

Over ten years after *Moultrie*, in 1989, the state legislature abolished mandatory PIP coverage, repealed the old-tortfeasor-statute, and passed the statute at issue. *Richardson*

² The plaintiffs argue that following *Richardson* in this case "would lead to absurd results," but do not articulate what those results would be. In fact, it is the plaintiffs' theory that would lead to absurd results, as under their theory all policies providing excess PIP or medpay insurance would become invalid. First, as the plaintiffs apparently interpret excess insurance, an excess carrier is receiving a set-off from the primary insurer. Second, because, the plaintiffs argue that a set-off is per-se invalid under § 38-77-144, it must be their position that any policy providing excess PIP coverage is invalid under § 144. Therefore, under the plaintiffs' theory, all excess insurance policies or coverages in the state "which provide personal injury protection, medical payment coverage or economic loss coverage" without regard to fault — are per-se invalid under § 38-77-144.

examined the legislative history and concluded the anti-set-off language was meant "to refer to" the old-tortfeasor-statute and so only prohibited the set-off of PIP benefits by a tortfeasor. 537 S.E.2d at 45. *Moultrie* supported this holding because it held the old-tortfeasor statute applied only to tortfeasors.

The plaintiffs are now attempting to look past *Richardson* and have this case decided under *Moultrie*. They contend that because a first-party insurer was denied set-off in *Moultrie*, the Court should deny a set-off here. However, *Moultrie* is inapplicable as it was decided prior to the "sweeping reforms" that, among other things, eliminated mandatory PIP coverage. *Id.* It was decided before *Richardson* and the statute that both parties have stipulated controls this case.

Additionally, in *Moultrie*, the insurer's argument for set-off was based entirely on its interpretation of the old-tortfeasor-statute. Here, State Farm does not owe additional PIP benefits because the contract of insurance states it is excess over workers' compensation benefits. No such policy provision was at issue in *Moultrie*. The parties have stipulated this provision must be enforced unless it violates the anti-setoff prohibition of section 144. Under *Richardson*, this prohibition only applies to a verdict against a tortfeasor. State Farm is not a tortfeasor and is entitled to summary judgment.

II. The plaintiffs' other arguments are far afield from *Richardson* and section 144 and are irrelevant to this motion.

A. The collateral source rule has no bearing on this motion.

The plaintiffs appear to argue that because State Farm would not receive a PIP setoff for amounts paid to an insured under liability coverage, that supposed fact must be based on section 38-77-144 and, therefore, *Richardson* must not mean what it says. But the plaintiffs are attacking a strawman—the hypothetical they create is not present here and proves nothing. This case

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involves the plaintiffs' attempt to construe an excess policy provision as a prohibited set-off. There is no comparable policy provision relating to fault-based liability insurance.

The only policy provision at issue pertains to PIP being excess over workers compensation coverage. This provision has nothing to do with liability insurance or the collateral source rule. The parties have stipulated that unless section 38-77-144 invalidates the provision, it must be enforced, and the collateral source rule has no bearing on this question.

B. The plaintiffs' arguments concerning section 38-77-220 are inapplicable to this motion.

On page 10 of their brief, the plaintiffs admit that section 38-77-220 is "inapplicable" to this case. With this, State Farm agrees. The statute has no bearing on this motion. The motion is controlled by section 38-77-144, as the parties have stipulated, and the cases interpreting it, namely *Richardson*.

C. The plaintiffs' public policy argument is irrelevant and unavailing.

The issue of public policy is not before the Court as the parties have stipulated that this motion turns on section 38-77-144. Nevertheless, the plaintiffs argued that public policy supports allowing the plaintiffs to recover PIP coverage and workers' compensation coverage for the same loss.³ Their sole argument on public policy is that the workers' compensation carrier has the right "to claim an equitable interest (although not a setoff) for payments made by the employee's PIP carrier." (Plntff's Brief, p. 12, citing S.C. Code § 42-1-560.) This argument is unsupported by any case or law other than a vague reference to section 42-1-560 which governs suits against third-parties under the Workers' Compensation Act.

³ The plaintiffs also intimate that they are seeking recovery from the adverse drivers' liability carrier for this loss, so they must contend public policy supports a triple-recovery. (See, Plntff's Brief, p. 7 noting "It is [the at-fault driver's] liability carrier that will pay any verdict received against him.")

Incredibly, the plaintiffs' public policy argument is that a workers' compensation carrier should have the opportunity to equitably reduce the amount it owes a plaintiff for workers' compensation benefits by the amounts the plaintiff receives from her PIP insurer. In other words, insurance carrier A should be required to provide the plaintiff with a double recovery because public policy favors reduction of that double recovery in favor of insurance carrier B.⁴ The logic of favoring one type of insurance over another is left unexplained.

In fact, public policy supports State Farm's position. It is the clear public policy of this state to honor parties' freedom of contract and to apply the contractual provisions to which they agree. *See Barkley v. Int'l Mut. Ins. Co.*, 86 S.E.2d 602, 605 (S.C. 1955) ("We cannot read into the insurance contract, under the guise of public policy, provisions which are not required by law and which the parties thereto clearly and plainly have failed to include.").

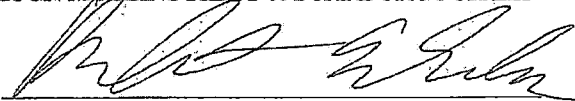
A provision is not void as against public policy "unless it is in contravention of such public policy as found either in the constitution, the statutes, or the judicial decisions of this State." *Batchelor v. Am. Health Ins. Co.*, 107 S.E.2d 36, 40 (S.C. 1959) While public policy is not rigidly defined, it is cautiously defined: [T]he subjects in which the court undertakes to make the law by mere declaration [of public policy] should not be increased in number without the clearest reasons and the most pressing necessity." *Weeks v. New York Life Ins. Co.*, 122 S.E. 586, 587 (S.C. 1924) Here, the plaintiffs have not pointed to any public policy expressed by any authority in this state sufficient to invalidate the provisions in the insurance policy to which she agreed. State Farm is entitled to summary judgment.

⁴ The plaintiffs do not explain why they conclude this is not an impermissible "set-off" but a policy provision providing that workers' compensation coverage is primary over PIP is a set-off.

CONCLUSION

The only issue before the Court is whether section 38-77-144 invalidates the State Farm policy provision providing that PIP benefits are excess over workers' compensation coverage. *Richardson* has already held this statute only prohibits a set-off of PIP benefits from a verdict against a tortfeasor. State Farm is not a tortfeasor. It is, under *Richardson*, entitled to summary judgment.

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October 23, 2015

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	C/A No.: 2015-CP-42-1578
	)	
Wadette Cothran and	)	
Chris Cothran,	)	
	)	
Plaintiff,	)	
	)	
v.	)	ORDER
	)	
State Farm Mutual Automobile	)	
Insurance Company and	)	
Robert Tucker,	)	
	)	
Defendants.	)	
_____	)	

I. INTRODUCTION

This matter comes before the Court upon the Parties' cross-motions for summary judgment. The Parties have filed a Stipulation of Facts in this matter and agree that the sole issue for the Court's adjudication is the interpretation of S.C. Code Ann. § 38-77-144.¹ State Farm contends that its PIP policy is "excess" to workers' compensation benefits received by Plaintiff Wadette Cothran. Plaintiff Cothran contends that this "excess" provision constitutes a setoff and is invalid under § 38-77-144.

For the reasons stated below, Defendant State Farm's Motion for Summary Judgment is denied, and Plaintiffs' Motion for Summary Judgment is granted.

¹ The Stipulation references Section 38-77-140 in one paragraph, but the Parties agree that this reference is a scrivener's error, and Section 38-77-144 was intended.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On or about January 19, 2015, Plaintiff Wadette Cothran, an insured under a State Farm Personal Injury Protection ("PIP") policy, was involved in an accident in which she sustained injuries resulting in lost wages and medical bills in monetary amounts that exceed the amount of PIP coverage available under her policy. State Farm alleges it is not required to pay the PIP limits because Mrs. Cothran's bills and lost wages, as of the date this Action was initiated, had been paid for by her employer's workers' compensation insurance carrier. Plaintiff Wadette Cothran alleges she is entitled to collect her PIP coverage because the State Farm policy provision at issue that purports to make PIP payments "excess" to any benefits paid to her by her employer's workers' compensation carrier violates § 38-77-144. The Parties agree that if the "excess" provision is invalid, State Farm would owe the full amount of the PIP benefits provided by the policy.

The Parties filed cross-motions for summary judgment on August 28, 2015. The Parties have fully briefed their motions; and, on October 29, 2015; Logan Rollins appeared to argue this motion on behalf of Plaintiffs, and Robert Whelan appeared on behalf of Defendant.

III. LEGAL STANDARD

Under Rule 56(c) of the South Carolina Rules of Civil Procedure, summary judgment shall be granted if "there is no genuine issue as to any material fact" so that the "moving party is entitled to a judgment as a matter of law." By their Stipulation, the Parties have agreed that "[t]here are no material factual issues in dispute with respect to plaintiffs' breach of contract claim, and the sole matter before the Court on that cause of action is whether the policy provision [purporting to make State Farm's PIP coverage excess] violates section 38-77-144."

Accordingly, the only question at issue is the legal question of whether the State Farm policy provision violates S.C. Code Ann. § 38-77-144. Therefore, summary judgment is appropriate.

IV. DISCUSSION

A. Defining Set-Offs And The Evolution of Current PIP Law

The dispositive issue in this case is whether Plaintiff Wadette Cothran is entitled to collect under her State Farm PIP policy when the policy provides, under its "Workers' Compensation Coordination" clause, that "[a]ny 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." 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.

(Emphasis Added).

Accordingly, as a preliminary matter, it is necessary to determine whether the policy provision at issue constitutes an attempt to assign, subrogate, or set off so that it could be violative of the Statute.

It is clear that a PIP carrier, under the law that existed before Act 148 of 1989 repealed mandatory PIP coverage, was not required to make payment if workers' compensation insurance had already made payments to the Claimant. Section 56-11-150 (later recodified as Section 38-77-290(d))², provided an "exclusive list of exceptions from the duty of a PIP insurer to pay benefits." Benat v. State Farm Mut. Ins. Co., 286 S.C. 132, 133, 333 S.E.2d 57, 58 (Ct. App.

² See Maybank et al., The Law of Automobile Insurance in South Carolina, 5th Ed., V-19 (2002).

1985). As noted in State Farm Mut. Auto. Ins. Co. v. Richardson, 313 S.C. 58, 437 S.E.2d 43 (1993), Act 148 of 1989 repealed mandatory PIP coverage and made it optional, and these “sweeping reforms in automobile insurance law” specifically included a repeal of “Section 38-77-290 [formerly the Section 56-11-150 referred to in Benat].” Richardson at 62, 45. Section 38-77-290(d) stated,

Benefits payable under the coverages *required to be offered* by section 38-77-240 must be reduced to the extent that the recipient had recovered benefits under workers’ compensation laws of any state or the federal government.

(Emphasis Added). SC. Code Ann Section 38-77-290(d) (Law. Co-op. 1989 quoted in Burnet R. Maybank, et al., The Law of Automobile Insurance in South Carolina, V-19, 5th ed. 2002).

The former law did not merely allow a set-off for workers’ compensation benefits for mandatory PIP coverage, it, it mandated a setoff (“must be reduced [. . .]”). Pre-1989 PIP law “also allowed assignments to hospitals, physicians and other medical providers, so long as the provider did not require assignment of benefits as a condition of treatment.” Maybank, et al., The Law of Automobile Insurance in South Carolina, V-19 (2002). When the original mandatory PIP law was enacted, it also allowed a “tortfeasor setoff,” as analyzed below. Furthermore, the Legislature contemplated allowing the PIP carrier to subrogate against the money paid by the “tortfeasor” (i.e., the liability insurance carrier) rather than allowing the “tortfeasor” a setoff for what was paid by the PIP carrier but decided against it because the “Legislature felt that a setoff provision would be more economical and administratively feasible than a provision allowing subrogation by the first party insurance carrier [i.e., the PIP carrier].” Maybank, et al., The Law of Automobile Insurance in South Carolina, V-16 (2002). The Legislature’s “sweeping reforms” in 1989 that made PIP optional clearly, in the word of the

current statute, “deleted” assignments, subrogation, and set-offs, and it also “deleted” every one of the “*exclusive list* of exceptions from the duty of a PIP insurer to pay benefits.” Benat, 286 S.C. 132, 133, 333 S.E.2d 57, 58. Because the exclusive list of exceptions from the duty of the PIP carrier no longer exists, no exception to the PIP carrier’s duty to pay exists.

Clearly, the former law allowed this setoff for PIP coverage that was “required to be offered” so that it was reduced by amounts paid by a workers’ compensation insurance carrier. It also allowed assignment, and the Legislature considered allowing subrogation. Under South Carolina Law, “It is well settled by our decisions that the code as adopted is the general law and the omissions are lost.” Independence Ins. Co. v. Independent Life & Acc. Ins. Co., 218 S.C. 22, 31 61 S.E.2d 399, 403 (1950). Accordingly, the absence of a provision allowing set off for workers’ compensation benefits where one previously existed clearly evidences the legislature’s intention that Section 38-77-144 was the comprehensive Legislative statement concerning the issue of when PIP must be paid and who could allege an interest as a result of the PIP payment. Under the current Statute, “no personal injury protection (PIP) coverage mandated.” A insurance carrier that chooses voluntarily to sell PIP coverage must provide it with the understanding that it is not subject to assignment, subrogation, or set-off.

The only statutory provision in existence that may form the basis of duties to pay PIP coverage or rights of persons to assert an interest in PIP coverage that has been paid is the current Section 38-77-144, as the entire history of PIP coverage (and the jurisprudence interpreting it) that existed prior to the 1989 amendment has been expressly “deleted.”

In light of the only existing statute regarding the definition of PIP coverage that is applicable to the facts of this case, therefore, I find that the “excess” policy provision at issue does, in fact, constitute a setoff under South Carolina Law. South Carolina law makes clear that

denominating first party automobile coverage as “excess” to a coverage that exists outside of the insurer-insured relationship is identical to a setoff. For example, Underinsured Motorist Coverage (“UIM”) is defined, under S.C. Code. Ann. Section 38-77-160, “to provide coverage in the event that damages are sustained *in excess of the liability limits* carried by an at-fault insured or underinsured motorist.” As the Supreme Court held in Broome v. Watts, 319 S.C. 337, 341, 461 S.E. 2d 46, 48, this “excess” denomination constitutes a setoff: “The very definition of UIM insurance mandates *a set-off*.” More importantly, the Court has determined that the credit claimed by the liability insurance company for the money paid by the PIP insurance company was, by definition, a setoff (“We termed this tortfeasor liability reduction [after the PIP carrier has paid its PIP coverage] a ‘set-off’ in Moultrie v. North River Ins. Co., Inc., 272 S.C 53, 249 S.E.2d 158 (1978).” State Farm Mut. Auto. Ins. Co. v. Richardson, 313 SC 58, 437 SE.2d 43 (1993). If the credit alleged by a liability insurance carrier against PIP coverage must be termed a “setoff,” then the credit alleged by the PIP carrier against coverage paid by an entity other than itself must also be termed a setoff. The Moultrie Court noted in fact, that, that the PIP carrier’s assertion that it could claim credit for liability payment was invalid because the statute “only requires *a setoff* by those persons who have already received benefits from their own carrier,” and not by the PIP carrier who sought a setoff for the payment of liability proceeds. Moultrie at 56, 159. It is clear that the State Farm policy provision at issue in this case, on its face, constitutes a setoff under PIP law as it now exists in South Carolina.

LAW

A. Defendant’s Argument Fails Under The “Plain Meaning” Rule

Section 38-77-144 states, “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 setoff." Under the terms of the State Farm Policy, "[a]ny 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." On its face, the State Farm provision constitutes a setoff and violates the plain meaning of the Statute.

As the South Carolina Supreme Court has articulated:

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature.

Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E. 2d 578, 581 (2000) (Internal Citations and Quotations Omitted). Furthermore, "[i]t is settled law that statutory provisions relating to an insurance contract are part of the contract, and that a policy provision which contravenes an applicable statute is to that extent invalid." Boyd v. State Farm Mut. Auto. Ins. Co., 260 S.C. 316, 195 S.E.2d 706 (1973). As noted above, the workers' compensation exclusion that formed a part of two versions of the former PIP law in South Carolina has been deleted, and the State Farm policy provision must be interpreted in light of the only PIP code now in existence. I find that the "excess" provision does constitute a setoff under South Carolina law and is therefore invalid under South Carolina law.

B. State Farm v. Richardson Does Not Allow A Setoff

1. State Farm v. Richardson Addressed Only Stacking Of PIP Coverage

Defendant alleges that Richardson allows a setoff for a personal injury protection insurance carrier. In Richardson, a State Farm insured was injured in an automobile accident and claimed PIP benefits on two State Farm PIP policies. State Farm alleged that Richardson was entitled to only one; it “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 a setoff, or “excess,” provision 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. That is, the prohibition at issue was related only to the *stacking* of multiple policies within the relationship of a single PIP Insurer and PIP Insured and did not address denominating the PIP policy as excess to a policy held by a third party to the PIP Insurer—PIP Insured relationship. The Richardson Court concluded that, within the context of a single insurer—insured relationship in an automobile insurance scenario, that an insurer’s policy “may prohibit the *stacking* of non-mandatory coverage.” Id. at 61, 45 (Emphasis added).

Accordingly, as Richardson addresses only stacking of coverage, it is inapplicable, and Defendant’s argument fails.

2. The Setoff Addressed In State Farm v. Richardson Was Not For the Benefit Of The PIP Carrier

In Richardson, the plaintiff alleged that an anti-stacking provision constituted a setoff. The holding of the Court distinguished a setoff from stacking, and the Court addressed the issue of a setoff only because it was erroneously raised by the Plaintiff. The Court clarified that the distinction between a “setoff” and “stacking” was that stacking occurred when a single insurance

carrier in a single insurer—insured relationship had multiple policies. A setoff, on the other hand, occurred when two separate insurance carriers have independent duties to pay benefits to the same injured person. When two insurance companies had independent duties to pay a single injured individual, the Richardson Court noted, “We termed this tortfeasor liability reduction a ‘set-off’ in Moultrie v. North River Ins. Co., Inc., 272 S.C 53, 249 S.E.2d 158 (1978).”

Moultrie was decided when a setoff was allowed. In Moultrie, the injured party (Moultrie) received a settlement with the liability insurance carrier for the driver who was at fault for the accident in which he was injured. That settlement included “payment of [Moultrie’s] medical expenses”. Id. at 54, 158. His PIP carrier, North River Insurance, alleged he would receive a “double recovery” if he were allowed to recoup money from his PIP policy for medical bills for which he had already received payment as a result of the liability settlement based on the statute that read, “if a claimant Recovering from his insurer the benefits for economic loss. . . shall bring action. . . against another person. . . the court shall reduce such verdict by the amounts of the benefits paid. . . by the claimant’s insurer” (Ellipses in original). The Moultrie Court held that the plain meaning of the statute was that “this section only requires a setoff by the persons who have already received benefits from their own carrier.” The Court held that “*the tortfeasor was to be given credit for payment by the first party insurer, rather than the first party insurer [i.e., the PIP carrier] getting the benefit of payment by the tortfeasor.*” Moultrie at 56, 159. Accordingly, the “old” law that allowed a setoff did make an attempt to prevent “double recovery,” but it did so by allowing the “tortfeasor” (i.e., the tortfeasor’s insurance carrier) to get credit for what the PIP carrier had already paid.

Even in its historical definition, a “setoff” required the PIP carrier to make payment prior to the entity that could claim a setoff (i.e., the “tortfeasor”). The current PIP statute was enacted,

not to give a windfall to the PIP carrier, but because the elimination of the setoff “prevented the tortfeasor from profiting in the case *where the injured party received PIP benefits.*” Mount v. Sea Pines, Inc., 337 S.C. 337, 359, 523 S.E. 2d 464, 465 (Ct. App. 1999). The interpretation of the Statute provided by the Court of Appeals presupposes, as does the text of the statute itself, that the injured party has already “received PIP benefits.”

Accordingly, the current law makes PIP coverage a payor of first, rather than last, resort.

**3. The “Tortfeasor” From Richardson Refers To A Third Party to the PIP Insurer—
PIP Insured Relationship**

As noted above, the Richardson opinion was limited to an analysis of the extent to which a single automobile insurance carrier was permitted to limit its responsibilities within the first party, PIP insurer—PIP insured context. That is, the opinion only addressed when a single insurer could limit, by the terms of its policy, what that insurer paid out among several policies between the insurer and insured. It did not address the existence or non-existence of third-party insurance coverage outside of the PIP Insurer—PIP Insured relationship and how the existence or non-existence of such coverage could absolve the PIP carrier of its responsibility to pay under the terms of its policy.

The Richardson Court did not allow an insurer to receive a setoff for payments made by a source with an obligation independent of the obligation that arose outside of the relationship between State Farm and Mr. Richardson. Contrary to the history of the PIP setoff rule as outlined above, State Farm seeks to assert that because a workers' compensation insurance carrier is not a literal “tortfeasor,” State Farm can receive credit for what a third party to the first party contractual relationship (between State Farm and Wadette Cothran) has a legal responsibility to pay. *Read in light of Richardson, however, it would be the workers' compensation insurance*

carrier, not State Farm, that would have the right to assert a setoff when both workers' compensation and PIP coverage simultaneously exist—and, in fact, as noted below, although the workers' compensation carrier does not have the right to assert a setoff, it does have the right to assert an equitable interest in the payment of a claimant's PIP benefits.

If State Farm's interpretation were adopted, not only a workers compensation insurance carrier, but also a health insurance carrier could allege a setoff for PIP benefits, as a health insurance carrier is not a literal "tortfeasor." Furthermore, the policy provision at issue provides for State Farm PIP as excess not only to workers' compensation law but "any other similar law." The phrase "similar law" is not defined in the policy, and could be taken to signify any insurance that pays benefits in the event of injury—and State Farm could allege that this "similar" law includes health insurance. In that event, both State Farm and the injured party's health insurance could, lawfully, allege a setoff and leave the injured insured with the unenviable choice of either paying out-of-pocket for her medical bills or spending years of time and thousands of dollars in costs litigating against the two insurance companies, *to both of which she paid premiums to cover medical bills that she sustained*, over what may be only a \$1,000.00 PIP policy. It is clear that the Legislature did not intend the proscription against subrogation, assignment, and setoff to be interpreted so that an insured could be compelled to pay insurance premiums and then be forced to litigate over which of the two insurance carriers to whom she paid premiums would get the benefit of the premiums she voluntarily paid—rather than giving the benefit to the person who paid the premiums.

Accordingly, it is evident that the setoff prohibition in Section 38-77-144 that PIP coverage "is not subject to setoff" signifies what it always signifies in any context: the existence or non-existence of any third party insurance (insurance outside of the State Farm-Wadette

Cothran relationship) is irrelevant to any analysis of State Farm's contractual obligation to pay PIP benefits to its insured—Wadette Cothran. The fact that the Legislature “deleted” the former Section in two versions of the Code that contained the “exclusive list” of exceptions to the PIP carrier's duty to pay benefits is strong evidence that no such exception to payment is now allowed. (See Benat and Section 38-77-144).

If the Statute imposes only the limitation alleged by State Farm in its brief (“that a set-off of PIP benefits is prohibited in only one situation—the reduction of the tortfeasor's liability”), then State Farm could not only allege a setoff for workers' compensation benefits, there would be no bar to the PIP carrier alleging a setoff based on payments made by the health insurance carrier, the liability insurance carrier, or, for that matter, the injured party's Aunt Ethel and Uncle Fred who broke their piggy bank to pay for her hospital bill.

If, on the other hand, State Farm is not permitted to receive a setoff for mandatory liability insurance because of Section 38-77-144, then there is no argument that it can receive a setoff for another mandatory coverage system: workers' compensation. Courts must “reject a statutory interpretation when to accept it would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention.” Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000). To accept State Farm's interpretation that the current Statute prevents a setoff by “only the tortfeasor” would lead to the absurd result that only one setoff (for the tortfeasor) was eliminated *while simultaneously creating a setoff for every possible entity other than the tortfeasor*.

It is abundantly clear from the legislative history and jurisprudence surrounding PIP coverage in South Carolina that the purpose of the coverage as it now exists is to provide an immediate alleviation of the financial strain placed on a physically injured person in the absence of fault,

liability, and coverage disputes. If the PIP carrier is permitted to be a payor of last resort that withholds payment until all sources of payment; including liability, workers' compensation, health, and, in its ambiguous policy language, "similar" systems have been located and forced to issue coverage denials; the intention of the Legislature would be undermined.

C. Public Policy Does Not Allow A Setoff

Finally, "[i]t must be presumed that the Legislature intended to achieve a consistent body of law." State v. Ramsey, 311 S.C. 555, 562 430 S.E. 2d 511, 516 (1993). The interplay between PIP coverage and workers' compensation coverage requires that PIP coverage be paid when the coverages arguably overlap in order to effect a fully coherent jurisprudence that complies with public policy. The nature of the current Workers' Compensation and Personal Injury Protection law allows the workers' compensation carrier to claim an equitable interest in the PIP proceeds paid to the injured worker. S.C. Code Ann. Section 42-1-560 outlines the "total cognizable damages" analysis available to the workers' compensation insurance carrier to determine the amount of the statutory lien it is owed as a result of a Claimant's settlement with entities other than the workers' compensation carrier. The Workers' Compensation Commission has the authority to determine the amount of the lien and reduce it if "a reduction is equitable to all parties and serves the interests of justice." Id. Accordingly, when the Workers' Compensation Commission makes its determination of the proper amount of the statutory lien that the workers' compensation insurance carrier may allege, all payments received by the injured worker are at issue. That is, if the injured worker has received sufficient money to make her whole, then the workers' compensation insurance carrier has a stronger equitable argument that it is entitled to a greater lien. State Farm's refusal to pay its PIP benefits when legally due, therefore, prejudices

not only Wadette Cothran but also her employer's workers' compensation insurance carrier, and its Motion is denied on this basis as well as those stated above.

For the foregoing reasons, therefore, Plaintiffs' Motion is GRANTED, and Defendant's Motion is DENIED.

IT IS THEREFORE ORDERED that Plaintiffs' Motion for Summary Judgment is Granted, and Defendant's Motion for Summary Judgment is denied. Defendant shall, therefore, pay the remaining PIP proceeds to Plaintiffs.

IT IS SO ORDERED.

The Honorable L. Casey Manning

Spartanburg, SC
_____, 2015

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
WADETTE COTHRAN and CHRIS	)	Civil Action No. 2015-CP42-1578
COTHRAN,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	<u>ORDER GRANTING DEFENDANT'S</u>
	)	<u>MOTION FOR SUMMARY JUDGMENT</u>
STATE FARM MUTUAL	)	<u>AND DENYING PLAINTIFFS' MOTION</u>
AUTOMOBILE INSURANCE	)	<u>FOR SUMMARY JUDGMENT</u>
COMPANY and ROBERT TUCKER,	)	
	)	
Defendants.	)	

On October 29, 2015, the Court heard the parties' cross motions for summary judgment. The parties filed a stipulation that the sole issue before the Court was whether an insurance policy providing that personal injury protection ("PIP") coverage is excess over workers' compensation insurance violates the portion of S.C. Code § 38-77-144 providing that PIP insurance "is not subject to a setoff."

Because the parties have stipulated to the relevant facts, this Court is presented with a question of law. One case is dispositive of the single issue before the Court. That case is *State Farm Mut. Auto Ins. Co. v. Richardson*, where the Supreme Court held the "is not subject to a setoff" language applies "only" to a tortfeasor. 437 S.E.2d 43, 45 (S.C. 1993) ("the Legislature intended the set-off prohibition of section 38-77-145 to apply only to the tortfeasor."). Here, there is no contention that State Farm is a tortfeasor; instead, it is the plaintiffs' own insurer.

The parties have stipulated the subject policy provision must be enforced unless it violates the last six words of section 38-77-144. Because *Richardson* held that these words apply to only one situation—a situation not present here—the subject policy provision does not violate

section 38-77-144. Therefore, under the parties' stipulation and the Supreme Court's decision in *Richardson*, the Court must grant State Farm's motion for summary judgment, and deny the plaintiffs' motion for summary judgment.

IT IS SO ORDERED.

The Honorable L. Casey Manning,
Presiding Judge

November ____, 2015
Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	
COUNTY OF SPARTANBURG	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
WADETTE COTHRAN and CHRIS	)	
COTHRAN,	)	Civil Action No. 2015-CP42-1578
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	<u>MOTION TO RECONSIDER</u>
STATE FARM MUTUAL	)	
AUTOMOBILE INSURANCE	)	
COMPANY and ROBERT TUCKER,	)	
	)	
Defendants.	)	

Pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, State Farm Mutual Automobile Insurance Company ("State Farm") requests that the Court reconsider, alter, and amend its November 17, 2015 order granting the plaintiffs' motion for summary judgment and denying State Farm's motion for summary judgment.

INTRODUCTION

This case turns on the meaning of the word "setoff" as used in S.C. Code section 38-77-144.¹ The South Carolina Supreme Court thoroughly examined its meaning in *State Farm v. Richardson*, 437 S.E. 2d 43 (S.C. 1993). The Supreme Court considered the legislative intent behind the statute and "found that the Legislature intended the set-off prohibition of section [144] to apply **only to**" a tortfeasor's setoff of a plaintiff's PIP benefits from a verdict against the tortfeasor. 437 S.E.2d at 45 (emphasis added).

¹ Note, the language of section 144 was previously located at 38-77-145; however the language is substantively identical, and for consistency, we refer to it as section 144, throughout.

The Court did not follow the Supreme Court's interpretation, but made its own independent interpretation of the legislative intent behind section 144. It determined that section 144 was enacted to make PIP coverage "a payor of first ... resort" and to eliminate any exception to PIP coverage existing prior to 1989. This interpretation is at odds with *Richardson* and with the intent of the Legislature, which was to end mandatory PIP and terminate South Carolina's experiment with a no-fault insurance system.

ARGUMENT

I. The Court erred in not following *Richardson*, as it answered the precise question before the Court.

A. The case turns on the meaning of the word setoff as used in 38-77-144.

The parties have stipulated the sole issue before the Court is whether a policy provision providing that PIP coverage is excess over workers compensation coverage violates section 144's statement that PIP is not subject to setoff. Resolving that issue depends on the meaning of "setoff" as used in section 144 and whether the excess provision falls within that meaning.

B. *Richardson* dealt with this precise question.

In *Richardson*, an insured argued that a PIP anti-stacking policy provision violated section 144 because it was a setoff. The Supreme Court examined section 144 and its legislative history to determine whether the policy provision was the type of setoff meant by section 144. *Richardson* determined the Legislature intended the word to have a single meaning—setoff referred to a tortfeasor's setoff of the plaintiff's PIP benefits against a verdict. The Supreme Court noted "a Conference Committee report adopted by both Houses of the General Assembly just before" the bill was passed stated PIP "may NOT be assigned or subrogated and **may not be setoff [from the tortfeasor's liability coverage.]**" (bracketed material in original). *Richardson* at 45, n. 2 (emphasis added).

C. The Court was bound to follow *Richardson* by *stare decisis*; our courts have held the doctrine is particularly important in the construction of statutes and legislative intent.

"No rule is more deeply imbedded in Anglo-American decisional law than *stare decisis*," *McCall v. Batson*, 329 S.E.2d 741, 747 (S.C. 1985) (superseded by statute on other grounds) (Chandler, concurring). "*Stare decisis* exists to 'insure a quality of justice which results from certainty and stability.'" *State v. One Coin-Operated Video Game Mach.*, 467 S.E.2d 443, 446 (1996) (quoting *McCall*).

Stare decisis is particularly important where, as here, a court is construing a statute or determining legislative intent.

Indeed, the doctrine of *stare decisis* enjoys particular efficacy in the context of challenges concerning the construction of statutes and determination of legislative intent. ... It is manifestly in the public interest that the law remain permanently settled. Especially is this so in the construction of statutes, for if any change in the statutory law is desired, the General Assembly may readily accomplish it.

Wehle v. S. Carolina Ret. Sys., 611 S.E.2d 240, 244 (S.C. 2005) (quoting *Powers v. Powers*, 123 S.E.2d 646, 647 (S.C. 1962))

D. *Richardson's* interpretation of section 144 was not dicta.

The Court held that *Richardson* is "inapplicable" because it involved stacking. (Order, p. 8) However, the legal question answered by *Richardson* was precisely the same question before this Court—what did the Legislature mean when it wrote the word "setoff" in section 144? The *Richardson* opinion consists solely of the Supreme Court's asking, analyzing, and answering that question. That the underlying facts in *Richardson* concerned a different policy provision does not change the weight of *Richardson*.

In other words, *Richardson's* determination that setoff referred only to a tortfeasor's liability was not dicta. Dicta is a statement not necessary to a court's decision. *Nash v. Tindall Corp.*, 650 S.E.2d 81, 83 (S.C. Ct. App. 2007). In *Richardson*, it was necessary for the Supreme Court to examine the meaning of "setoff" in section 144 to answer the question before it. Not only was the meaning of setoff "necessary to" the court's decision, *it was the central issue in the case*. Thus, *Richardson's* holding concerning the meaning of setoff was not dicta, and the Court should have followed it.

Other courts have followed *Richardson*. In *Rowzie v. Allstate Ins. Co.*, the Fourth Circuit noted that *Richardson* held setoff as used in section 144 did not "serve as a general prohibition against all reductions of automotive insurance based upon PIP/MedPay coverage." 556 F.3d 165, 168 (4th Cir. 2009). In *Mount v. Sea Pines* (which was cited favorably by this Court's order), the court of appeals noted *Richardson* "stated that the set-off prohibited by section 38-77-145 was the tortfeasor's reduction in liability formerly allowed by section 38-77-290(f)." 523 S.E.2d 464, 465 (S.C. Ct. App. 1999).

II. The Court erred in substituting its interpretation of legislative intent for the South Carolina Supreme Court's interpretation as set forth in *Richardson*.

A. The Court's determination of the legislative history and intent behind 38-77-144 was flawed.

According to the Court's analysis, in abolishing mandatory PIP and the no-fault system, the Legislature *increased* the PIP coverage required to be provided by insurers who voluntarily offer PIP.

The Court's determination of legislative intent is based on "the absence of a provision allowing setoff for workers' compensation benefits where one previously existed." (Order, p.5)

Its reasoning is based on the following:

- Prior to 1989, PIP coverage was mandatory in South Carolina.
- Because PIP was statutorily mandated, the only exceptions to the duty to provide PIP were set forth by statute.
- The statutory exceptions for mandatory PIP included that PIP payments were to be reduced by amounts received through workers compensation.²
- In 1989, the Legislature ended mandatory PIP, deleting all references to PIP in Title 38 and 56, including the exceptions to mandatory PIP coverage.

From this, the Court extrapolated: "Because the exclusive list of exceptions from the duty of the PIP carrier no longer exists, no exception to the PIP carrier's duty to pay exists." (Order, p. 5)

The conclusion that by deleting the mandatory PIP exceptions, the Legislature intended them to become mandatory coverage in voluntary PIP policies is not supported by logic or law. The exceptions to mandatory PIP were a fundamental component of the mandatory system.³ Their deletion, along with the rest of the mandatory PIP statutes, demonstrates nothing more than the Legislature's stated intent of ending mandatory PIP.

If, as the Court held, each exception to mandatory PIP became required coverage under voluntary PIP, the following former exceptions would now be mandatory coverages under PIP policies.

- Injuries caused by intentional acts;⁴
- Injuries caused while operating stolen vehicles;⁵
- Injuries occurring during the commission of a felony;⁶
- Injuries occurring while failing to stop for law enforcement;⁷
- Finally, stacking of PIP would become mandatory.⁸

² Other exceptions included the recovery of PIP "from more than one policy or insurer on either a duplicate or supplemental basis," or by a person intentionally causing an accident, occupying a stolen vehicle, or committing a felony. 38-77-290(a); 38-77-310.

³ When a statute mandates universal coverage, the exceptions to that coverage must also be provided for by statute.

⁴ S.C. Code Ann. § 38-77-310 (1976, repealed by 1989 S.C. Acts 148)

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ S.C. Code Ann. § 38-77-290(a) (1976, repealed by 1989 S.C. Acts 148)

The last bullet is particularly illustrative as to the Court's error. Under mandatory PIP, insurers were expressly permitted by statute to prohibit stacking of PIP and to reduce PIP by workers' compensation payments. This was accomplished by the exceptions of 38-77-290, subsections (a) and (d), respectively. Under the Court's conclusion that the deletion of section 290's "exclusive list of exceptions" left "no exception to the PIP carrier's duty to pay," the anti-stacking exception of 290(a) would now be prohibited. Thus, the Court's reasoning is irreconcilable with *Richardson* and with the Court's acknowledgment that section 144 does not prohibit anti-stacking provisions.

There is no indication that the Legislature intended for the mandatory no-fault system exemptions, to become required coverages where PIP is provided voluntarily. Such a construction of the Legislature's intent should be rejected, as it would result in many absurdities, including the mandatory provision of coverage for intentional injuries. *Auto Owners Ins. Co. v. Rollison*, 663 S.E.2d 484, 490 (S.C. 2008) (In construing a statute courts should reject an interpretation when such an interpretation leads to an absurd result that could not have been intended by the Legislature).

B. *Richardson's* interpretation of the legislative intent was correct, and that the Court's interpretation was erroneous.

- 1. The Legislature has had twenty-two years to amend section 144 if *Richardson* misinterpreted its intent, and has chosen not to do so.**

Putting aside the doctrine of *stare decisis*, *Richardson's* determination of legislative intent should be followed because it was correct, and the Court's determination was erroneous. *Richardson* was decided just 4 years after the Act at issue. This is important because the context surrounding the elimination of mandatory PIP (discussed below) would have been more apparent to the *Richardson* court than a court in 2015. It is also important because, if *Richardson* had

misconstrued the legislative intent, the Legislature has had twenty-two years to correct it and has chosen not to do so. In fact, in 2000, when it re-codified the section at 144 after it was inadvertently deleted from section 145, the Legislature had the opportunity to alter the language in section 144 and chose not to.

2. The legislative history demonstrates that *Richardson* was correctly decided.

The order cited *The Law of Automobile Insurance in South Carolina* four times, but did not refer to it when discussing the 1989 Legislature's intent in drafting section 144. *The Law of Automobile Insurance* notes the 1989 Act at issue was in response to "public outcry over high automobile insurance rates." (5th Ed., p. V-25).⁹ It noted that PIP "had the worse [sic] loss ratio of any first or third party automobile insurance coverage in South Carolina" and the "abolishment of statutory PIP coverage was one of the Legislature's "major savings items." (5th Ed., p. V-25). In other words, the Legislature's intent in 1989 was to decrease the amount of PIP insurance sold in the state, not to *increase* the coverage required.

Additionally, confusion over the existence of a tortfeasor's ability to setoff PIP benefits prior to the 1989 Act would explain the Legislature's decision to clearly prohibit that setoff in section 144. *The Law of Automobile Insurance* explains that before the 1989 repeal of mandatory PIP, there was confusion over whether the Legislature intended for a tortfeasor to receive a setoff.¹⁰ Due to the repeal of another section of the PIP code in 1978 "it was assumed the Legislature wished to do away with all right of set-off." *Id.*, p. V-17. However, to what extent the

⁹ This pleading cites the 5th Edition of the treatise as that is the edition cited by the Court. The more current versions are substantively the same.

¹⁰ It appears that the application of the statute allowing a tortfeasor's setoff of PIP was confusing and controversial from mandatory PIP's 1974 inception. Joseph F. Anderson Jr., *Note, The South Carolina Insurance Reform Act Part I: No Fault and Contributory Negligence—A Synopsis and Appraisal*, 26 S.C. L. Rev. 705, 720-21 (1975) (noting, for example, confusion and ambiguity over whether setoff was allowed for PIP coverage in excess of \$1,000).

right to set-off survived the 1978 amendment "was the subject of considerable debate." *Id.*, p. V-18. See also 1981 S.C. Op. Atty. Gen. 54 (noting "some ambiguity has arisen with respect to" whether the Legislature intended to eliminate a tortfeasor's right to setoff in the 1978 amendments to the PIP statute). It was likely this "confusion," "debate," and "ambiguity"—over whether a tortfeasor could setoff PIP benefits at trial—that the Legislature sought to resolve when it explicitly prohibited setoff in section 144.¹¹

3. The text of the statute is inconsistent with the Court's conclusion.

In addition to being contrary to *Richardson* and the legislative intent, the Court's interpretation of setoff is contrary to the text of section 144, because it would *mandate* the provision of PIP coverage even where the parties to an insurance contract agree the coverage is excess. It is well settled that in interpreting a word or phrase used in a statute, courts "should consider not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law." See, e.g., *Hernandez-Zuniga v. Tickle*, 647 S.E.2d 691, 697 (S.C. Ct. App. 2007)

The statute is titled "Personal injury protection (PIP) coverage not mandated." Its first line reads, "There is no personal injury coverage mandated under the automobile insurance laws of this State." 38-77-144 (emphasis added). Thus, when considering the Legislature's meaning of the setoff in 144, the Court should consider that the Legislature was eliminating mandatory PIP and stating that no PIP coverage was to be mandated.

¹¹ This is consistent with a Conference Committee report adopted by both Houses of the General Assembly just before Act 148 was passed which stated:

If a (sic) insurer does voluntarily sell PIP coverage ... it may NOT be assigned or subrogated and may not be setoff [from the tortfeasor's liability coverage.]
(bracketed material in original). *State Farm v. Richardson*, 437 S.E.2d at 45, n. 2.

Richardson's interpretation of setoff was consistent with the rest of the statute; the elimination of a tortfeasor's ability to setoff PIP would not affect the availability of PIP coverage to an insured. However, the Court's definition would be contrary to the remainder of the statute, as it would mandate certain PIP coverage and eliminate the parties' freedom to contract to, for example, the provision of excess PIP coverage.

C. The Court erred in ruling that PIP insurers are the payor of first resort.

The Court ruled that a PIP carrier may never reduce benefits by any amount paid by a third-party because it found that PIP insurance was a "payor of first [] resort." (Order, p. 10)¹² However, the Legislature made no suggestion that PIP insurance should become a "payor of first resort" when it eliminated mandatory coverage in 1989.

Even under the mandatory scheme, PIP insurance was not a payor of first resort, as defined by the Court. The statutory exceptions to mandatory PIP included reducing PIP coverage by amounts paid by workers compensation, and by amounts paid by other insurance carriers. The Court acknowledges this. (See, Order, p. 3) Thus, it must be its conclusion that although PIP insurance was not the payor of first resort prior to 1989, when the Legislature ended mandatory PIP and terminated South Carolina's experiment with a no-fault system, it simultaneously decided to make PIP insurance the payor of first resort. This conclusion is not supported by any legal authority and is at odds with the Legislature's intent to end mandatory PIP coverage.

¹² It appears the Court may be basing this on a statement in *Moultrie v. North River Ins. Co.* applying the first tortfeasor setoff statute, 56-11-130(b), which was repealed in 1978. In the statement, *Moultrie*, merely noted the setoff of a verdict against a tortfeasor could only occur after a plaintiff had recovered PIP benefits. The Court extrapolates from this fact that the Legislature intended PIP to be "a payor of first resort." However, even in 1978, as the Court acknowledges, PIP was not the "payor of first resort" when workers compensation coverage was available. (See, Order, p. 3: "It is clear that a PIP carrier, under the law that existed before Act 148 of 1989 repealed mandatory PIP coverage, was not required to make payment if workers' compensation insurance had already made payments to the Claimant.")

III. The Court's application of the plain meaning rule to section 144 by ascribing an unspecified definition to "setoff" was erroneous.

Again, the dispositive issue is what the Legislature meant by "setoff" in section 144. The order circumvents this question by presupposing a clear and specific definition of setoff. It could therefore apply the plain meaning rule, and avoid the question of legislative intent discussed above: "On its face, the State Farm provision constitutes a setoff and violates the plain meaning of the Statute." (Order, p. 7) However, because setoff is not a clearly defined term in South Carolina, the plain meaning rule does not apply, and the Court was required to examine what the legislature intended by it.

A. Setoff is a multi-purpose term with no clear definition in South Carolina.¹³

In South Carolina jurisprudence, setoff is a multi-purpose concept that has not been clearly defined. Black's provides two definitions for setoff: (1) A defendant's counter demand against the plaintiff, arising out of a transaction independent of the plaintiff's claim; (2) A debtor's right to reduce the amount of a debt by any sum the creditor owes the debtor; the counterbalancing sum owed by the creditor. Black's Law Dictionary, 7th Ed., p. 1376. South Carolina cases have frequently applied the term in both contexts. *See, e.g. Brasington Tile Company, Inc. v. Worley*, 491 S.E.2d 244 (S.C. 1997) (first definition); *In Re Georgetown Steel Co., LLC*, 318 B.R. 313, 320 (B.R. 2004) (second definition). Setoff is also used in South Carolina to refer to the reduction of a verdict by amounts paid to the plaintiff by a third-party, usually a settling co-defendant. *See, Riley v. Ford Motor Co.*, 757 S.E.2d 422, 429 (S.C. 2014). As noted by the Court, it has also been used to describe the amount of underinsured motorist coverage after the reduction of amounts paid by the underinsured motorist's liability carrier.

¹³ Setoff is often written as "setoff," "set off," and/or "set-off." The words appear to be used interchangeably throughout the case law.

Broome v. Watts, 461 S.E.2d 46, 48 (S.C. 1995). The term is likely used in other contexts.

Westlaw shows over 1200 South Carolina state court cases mentioning setoff, set-off, or set off.

B. The Court's definition of setoff is not supported by South Carolina jurisprudence, and is internally inconsistent.

Although it is central to its holding, nowhere in its 14 page order does the Court specifically define its use of setoff. The Court appears to have settled on the following definition:

*A setoff occurs when first party insurance benefits are reduced by an amount paid by any entity or person other than the insurance carrier providing coverage.*¹⁴ Thus, it held that setoff includes:

- Excess insurance policies receive setoffs when primary insurance policies pay first. (Order, p. 5-6)
- Health insurers receive setoffs when a different insurer or entity provides payment. (Order, p. 11)
- Workers compensation insurers receive setoffs if a different entity provides payment. (Order, p. 11)
- Additionally, if "the injured party's Aunt Ethel and Uncle Fred [] broke their piggy bank" and relieved a party from an obligation to pay, that too would constitute a setoff. (Order, p. 12)

The Court's definition is not supported by the law. In fact, the only located authority defining setoff in this context is *Richardson*. The Court incorrectly paraphrased *Richardson* as stating a setoff "occurred when two separate insurance carriers have independent duties to pay benefits to the same injured person." (Order, p. 8-9) *Richardson* said no such thing; it held that setoff, as used in section 144 referred only to the reduction of a tortfeasor's liability. *See, Rowzie v. Allstate Ins. Co.*, 556 F.3d 165, 168 (4th Cir. 2009) ("The court in *Richardson* interpreted this provision 'to apply only to the tortfeasor,' and not to serve as a general prohibition against all reductions of automotive insurance based upon PIP/MedPay coverage.")

¹⁴ The definition would apparently exclude reductions based on policies written by the same insurer to accommodate the result in *Richardson*.

Additionally, the Court's definition is logically inconsistent. According to the order, the reduction of the amount owed by Policy A by the amount paid by Policy B is *not* a setoff if both policies are issued by the same insurer, but *is* a setoff if the policies are issued by different insurers. The only authority it cites for this position is *Richardson* although, again, *Richardson* said no such thing.

Moreover, in the order's public policy discussion, it concludes that a workers' compensation carrier's reducing the amount of its payment to an insured by amounts the insured received from a different insurer is *not* a setoff. (Order, p. 13) Since the Court is in favor of a workers' compensation carrier reducing its benefits by amounts paid by PIP coverage, it apparently concludes that this reduction would not be a setoff, although it seems to fall squarely within the Court's definition.

Thus, the Court erred in concluding that "setoff" as used in section 144 had a "clear and definite meaning" that eliminated the need for statutory interpretation. (Order, p. 7) Not only is there no clear and definite meaning of setoff in South Carolina jurisprudence, even the Court's order does not set forth an internally consistent definition of setoff.

IV. The Court erred in equating workers' compensation carriers and health insurers with "tortfeasors."

Section 3 of the Order holds that "tortfeasor," as used in *Richardson*, "Refers To A Third-Party to the PIP Insurer - PIP Insured Relationship." (Order, p. 10) It stated that State Farm was construing the word tortfeasor too "literally." It explained that tortfeasor should be read to include a workers' compensation insurer, a first party health insurer, or any "third-party to the PIP insurer-PIP insured relationship" including, apparently, "the injured party's Aunt Ethel and Uncle Fred." (Order, p. 10, 12) This position is inconsistent with the clear holding in *Richardson*.

or the meaning of tortfeasor, which means "one who commits a tort." Black's Law Dictionary (7th ed.), p. 1497.

The order argues that if *Richardson* is followed and setoff as used in section 144 is limited to "a literal 'tortfeasor,'" PIP insurance could be reduced by "payments made by the health insurance carrier, the liability insurance carrier, or, for that matter, the injured party's Aunt Ethel and Uncle Fred." (Order, p. 12) This supposed parade of horrors is unjustified for several reasons. First, they are matters that are not before the Court. The stipulated facts of this case have nothing to do with health insurance, liability insurance, uncles, or aunts.

Moreover, the insurance policy is attached to the parties' stipulation of facts and is in the record before the Court. Nowhere does the policy provide for any of the plaintiffs' supposed parade of horrors. In fact, the order can only connect the policy to these issues by alleging that the policy provision at issue (below) titled "Workers' Compensation Coordination" could be construed to apply to health insurance or "any insurance that pays benefits in the event of injury" because health insurance is "similar" to workers' compensation insurance. (Order p. 11)

Workers' Compensation Coordination

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.

How a "similar law" to workers' compensation law can equate to "any insurance" paying "benefits in the event of injury" is left unexplained. Such a holding ignores the title of the provision, several basic rules of contractual construction and is not supported by any case or authority. See, *McGill v. Moore*, 672 S.E.2d 571, 574 (S.C. 2009) (One may not create an ambiguity by pointing out a single word or clause, but must read the contract as a whole). *S.C.A.N. Enters., Inc. v. S.C. Health & Human Serv. Fin. Comm'n.*, 373 S.E.2d 584, 586 (S.C. 1988)

(Common sense and good faith are the leading touchstones of construction of the provisions of a contract); *Koon v. Fares*, 666 S.E.2d 230, 233 (S.C. 2008) ("Where one interpretation of a contract makes it unusual or extraordinary and another interpretation, equally consistent with the language employed, would make it reasonable, fair, and just, the latter construction prevails." "An interpretation which establishes the more reasonable and probable agreement of the parties should be adopted while an interpretation leading to an absurd result should be avoided.").

In fact, although *Richardson* was decided twenty-two years ago the order does not point to any case, authority, or real-world example to support the argument that acceptance of *Richardson* would lead to its supposed parade of horrors.

Additionally, it is well settled that "[i]nsurers may limit their liability and impose whatever conditions they please upon their obligations, provided such conditions are not in contravention of some statutory inhibition or public policy." See, e.g., *Marchant v. S. Carolina Ins. Co.*, 316 S.E.2d 707, 709 (S.C. Ct. App. 1984); *BLG Enterprises v. First Financial Ins.*, 514 S.E.2d 327 (S.C. 1999) (same). Other than section 144, the order does not point to any statutory inhibition or public policy authority to support its holding.¹⁵

V. The Court erred in holding public policy favors mandating automobile insurers pay PIP benefits to injured workers so that workers compensation carriers can assert liens against those PIP benefits.

"South Carolina does not require any PIP coverage under its automobile insurance laws and has no public policy regarding such coverage." *Smith v. Liberty Mutual Insurance Company*, 437 S.E.2d 142, 144 (S.C. Ct. App. 1993) (emphasis added).

¹⁵ The order contains one sentence concluding "It is abundantly clear from the legislative history and jurisprudence surrounding PIP coverage in South Carolina that the purpose of the coverage as it now exists is to provide an immediate alleviation of the financial strain placed on a physically injured person in the absence of fault liability, and coverage disputes." (Order, p. 12) However, the order does not offer a citation to any such "legislative history," "jurisprudence," or any authority to support this statement. Moreover, were that the purpose of section 144, then the Legislature would have made the coverage mandatory, rather than doing precisely the opposite.

The Court, therefore, erred in holding that public policy supports its ruling.¹⁶ A provision is not void as against public policy "unless it is in contravention of such public policy as found either in the constitution, the statutes, or the judicial decisions of this State." *Batchelor v. Am. Health Ins. Co.*, 107 S.E.2d 36, 40 (S.C. 1959) While public policy is not rigidly defined, it is cautiously defined: [T]he subjects in which the court undertakes to make the law by mere declaration [of public policy] should not be increased in number without the clearest reasons and the most pressing necessity." *Weeks v. New York Life Ins. Co.*, 122 S.E. 586, 587 (S.C. 1924).

The order holds public policy favors Cothran receiving PIP benefits in addition to the workers' compensation benefits she has already received, so that Cothran can return those benefits to the workers' compensation carrier. The order notes that if State Farm's policy provision were ignored, and if PIP benefits were paid for the same loss covered by workers' compensation benefits, the workers' compensation carrier could have a lien against the PIP proceeds under S.C. Code 42-1-560. (Order p. 13) The order cites no law explaining why public policy would favor mandating the provision of benefits for the purpose of creating a workers' compensation lien. The order also provides no explanation for the conclusion that public policy would favor one type of insurance over another. Thus, "the clearest reasons and the most pressing necessity," sufficient to justify declaring a new public policy are not present, and it would be error to do so in their absence. *Weeks* at 587. That is particularly true where PIP is not required and the state "has no public policy regarding such coverage." *Smith* at 144.

¹⁶ Additionally, as the parties stipulated that the only issue before the Court was whether the subject policy provision violated section 144, the issue of public policy was not properly before the Court.

CONCLUSION

For the foregoing reasons, State Farm requests that the Court alter and amend its November 17, 2015 order, such that it denies the plaintiffs' motion for summary judgment and grants State Farm's motion for summary judgment.

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November 30, 2015

2015 DEC -2 AM 9:06
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 2015-CP-42-1578
Appellate Case No. 2016-000177

WADETTE COTHRAN and CHRIS COTHRAN,..... Respondents,

v.

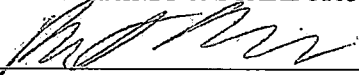
STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY and ROBERT TUCKER,
Defendants,

Of which State Farm Mutual Automobile Insurance
Company is the Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Record on Appeal contains all material
proposed to be included by any of the parties and not any other material.

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May 10, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 2015-CP-42-1578
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WADETTE COTHRAN and CHRIS COTHRAN,..... Respondents,

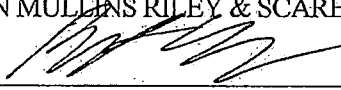
v.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY and ROBERT TUCKER, of
whom State Farm Mutual Automobile Insurance
Company is the Appellant.

PROOF OF SERVICE

I certify that I have served the Record on Appeal on Wadette Cothran and Chris Cothran by depositing a copy of it in the United States Mail, postage prepaid, on May 10, 2016, addressed to their attorney of record, C. Logan Rollins, II, The Hawkins Law Firm, P.O. Box 5048, Spartanburg, SC 29304.

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May 10, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

MAY 25 2016

SC Court of Appeals

L. Casey Manning, Circuit Court Judge

Case No. 2015-CP-42-1578
Appellate Case No. 2016-000177

WADETTE COTHRAN and CHRIS COTHRAN,..... Respondents,

v.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY and ROBERT TUCKER,
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STATEMENT OF ISSUES ON APPEAL

Did the circuit court err in holding S.C. Code § 38-77-144 precludes and invalidates an insurance policy provision providing that PIP insurance is excess over workers compensation insurance, where such a ruling is inconsistent with binding case law?

STATEMENT OF THE CASE

This action was filed on April 17, 2015 in the Spartanburg County Court of Common Pleas.¹ The Plaintiffs claim that State Farm Mutual Automobile Insurance Company ("State Farm") breached a contract of insurance and a duty of good faith and fair dealing. (R. pp. 19-20). On August 28, 2015, the parties filed a Stipulation of Facts. (R. pp. 26-27).

On November 17, 2015, Judge Manning signed an Order granting the Plaintiffs' Motion for Summary Judgment on their breach of contract claim and denying State Farm's Motion for Summary Judgment on the Plaintiffs' breach of contract claim. (R. p. 14). The parties were sent a copy of the signed Order by email from Judge Manning's office on November 18, 2015. The Order was filed with the Spartanburg County Clerk of Court on November 30, 2015. (R. p. 2).

On November 30, 2015, State Farm submitted a Motion to Reconsider pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. (R. p. 123). Counsel sent a copy of the unfiled motion to Judge Manning on November 30 and emailed a copy of the filed motion to Judge Manning on December 4, 2015. Judge Manning's Order denying the Motion to Reconsider was filed on January 26, 2016. (R. p. 16). State Farm received notice of the Order by email from the Spartanburg County Clerk of Court on January 26, 2016. State Farm's Notice of Appeal was served on the Plaintiffs on January 28, 2016 and was filed by the Court of Appeals on February 5, 2016. State Farm received the transcript of the October 29, 2015 hearing on February 5, 2016.

¹ Although Robert Tucker was listed in the caption as a defendant, he was never served with the Complaint, and is not a party to this appeal.

STATEMENT OF FACTS

By virtue of stipulation there are no material facts in dispute. Wadette Cothran was injured in a work-related motor vehicle accident, and her medical expenses were paid in full by her workers' compensation carrier. (R. p. 26). Cothran's State Farm insurance policy provided personal injury protection ("PIP") coverage with limits of \$5,000. (*Id.*).

State Farm paid Cothran a portion of her unpaid lost wages under the PIP coverage,² but denied payment for her medical expenses as they had been fully paid through workers' compensation. *Id.* State Farm's denial was based on the following policy provision:

Workers' Compensation Coordination

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.

(R. p. 40).

The parties stipulated that if the above provision did not violate S.C. Code § 38-77-144, then no remaining PIP coverage existed, and State Farm was entitled to summary judgment. (R. p. 27).³ Therefore, the sole issue before the circuit court was whether this provision constituted a "set-off" prohibited by S.C. Code § 38-77-144.

² Cothran's PIP insurance covered 85% of her lost earnings. (R. p. 38). Her workers' compensation carrier paid for 66% of her lost earnings. *See*, S.C. Code § 42-9-10. Therefore, even though PIP was excess over Cothran's workers' compensation coverage, State Farm owed 19% of Cothran's lost earnings. State Farm paid this amount, \$991.00, to Cothran. (R. p. 27).

³ Due to a typographical error, paragraph 10 of the stipulation of facts incorrectly referenced section 38-77-140 instead of section 38-77-144.

STANDARD OF REVIEW

This appeal concerns a determination of coverage under an insurance policy, and thus the action is one at law. *Nationwide Mut. Ins. Co. v. Prioleau*, 359 S.C. 238, 241, 597 S.E.2d 165, 167 (Ct. App. 2004). Additionally, “[w]hen an appeal involves stipulated or undisputed facts, an appellate court is free to review whether the trial court properly applied the law to those facts,” and “the appellate court is not required to defer to the trial court's legal conclusions.” *Id.* (internal quotation marks and citations omitted).

The parties have stipulated that “[t]here are no material factual issues in dispute with respect to the plaintiffs’ breach of contract claim and the sole matter before the Court on that cause of action is whether the policy provision [at issue] violates section 38-77-144.” (R. p. 27). Thus, the Court should review, de novo, whether the circuit court properly applied the law without deference to its findings.

ARGUMENT

There is a narrow issue before the Court— the meaning of the word “setoff” as used in S.C. Code § 38-77-144.⁴ The South Carolina Supreme Court thoroughly examined this meaning in *State Farm v. Richardson*, 313 S.C. 58, 437 S.E. 2d 43 (1993). The Supreme Court considered the legislative intent behind the statute and “found that the Legislature intended the set-off prohibition of section [144] to apply **only to**” a tortfeasor's setoff of a plaintiff's PIP benefits from a verdict against the tortfeasor. 437 S.E.2d at 45 (emphasis added).

As *Richardson* is binding authority, the circuit court should have followed it. Additionally, the reasons given by the circuit court for granting summary judgment to the plaintiffs do not survive scrutiny.

⁴ The language of section 144 was previously located at 38-77-145; however, the language is substantively identical, and for consistency, it is referred to as section 144 throughout.

I. The circuit court erred in not following *Richardson*, as its determination of the Legislative intent behind section 144 was dispositive.

A. The case turns on the meaning of the word "setoff" as used in 38-77-144.

The parties stipulated the sole issue in the case is whether a policy provision providing that PIP coverage is excess over workers compensation coverage violates S.C. Code § 38-77-144's statement that PIP is not subject to setoff. Resolving that issue depends on the meaning of "setoff" as used in section 144 and whether the excess provision falls within that meaning.

B. *Richardson* dealt with this precise question.

In *State Farm v. Richardson*, an insured argued that a PIP anti-stacking policy provision violated section 144 because it was a setoff. 313 S.C. 58, 437 S.E. 2d 43 (1993). The Supreme Court examined section 144 and its legislative history to determine whether the policy provision was the type of setoff meant by section 144. *Richardson* determined the Legislature intended the word to have a single meaning—setoff referred to a *tortfeasor's* setoff of the plaintiff's PIP benefits against a verdict. The Supreme Court noted that "a Conference Committee report adopted by both Houses of the General Assembly just before [the bill] was passed" stated that PIP "may NOT be assigned or subrogated and **may not be setoff [from the tortfeasor's liability coverage.]** (Bracketed material in original)." *Richardson*, 313 S.C. at 61 n.2, 437 S.E.2d at 45 n.2 (emphasis added).

C. *Richardson's* interpretation of section 144 was not dicta.

The circuit court held that *Richardson* was "inapplicable" because it involved stacking. (Order at 8.) However, the question answered by *Richardson* was the same question before the circuit court—what did the Legislature mean by the word "setoff" in section 144? The *Richardson* opinion consists solely of the Supreme Court's asking, analyzing, and answering that

question. That the underlying facts in *Richardson* concerned a different policy provision does not change the weight of *Richardson*.

In other words, *Richardson's* determination that setoff referred only to a tortfeasor's liability was not dicta. Dicta is a statement not necessary to a court's decision. *See Nash v. Tindall Corp.*, 375 S.C. 36, 40-41, 650 S.E.2d 81, 83 (Ct. App. 2007). In *Richardson*, it was necessary for the Supreme Court to examine the meaning of "setoff" in section 144 to answer the question before it. Not only was the meaning of setoff "necessary to" the court's decision, *it was the central issue in the case*. Thus, *Richardson's* holding concerning the meaning of setoff was not dicta, and the circuit court should have followed it.⁵

D. The circuit court was bound to follow *Richardson* by *stare decisis*; the doctrine is particularly important in the construction of statutes and legislative intent.

"No rule is more deeply imbedded in Anglo-American decisional law than *stare decisis*." *McCall v. Batson*, 285 S.C. 243, 255, 329 S.E.2d 741, 747 (1985) (superseded by statute on other grounds) (Chandler, J., concurring). "*Stare decisis* exists to 'insure a quality of justice' which results from certainty and stability." *State v. One Coin-Operated Video Game Mach.*, 321 S.C. 176, 467 S.E.2d 443, 446 (1996) (quoting *McCall*, 285 S.C. at 256, 329 S.E.2d at 747).

Stare decisis is particularly important where, as here, a court is construing a statute or determining legislative intent.

Indeed, the doctrine of *stare decisis* enjoys particular efficacy in the context of challenges concerning the construction of statutes and determination of legislative intent. . . . "It is manifestly in the public interest that the law

⁵ Other courts have followed *Richardson*. In *Rowzie v. Allstate Ins. Co.*, the Fourth Circuit noted that *Richardson* held setoff as used in section 144 did not "serve as a general prohibition against all reductions of automotive insurance based upon PIP/MedPay coverage." 556 F.3d 165, 168 (4th Cir. 2009). In *Mount v. Sea Pines* (which was cited favorably by the circuit court's order), this Court noted that *Richardson* "stated that the set-off prohibited by section 38-77-145 was 'the tortfeasor's reduction in liability formerly allowed by section 38-77-290(f).'" 337 S.C. 355, 358, 523 S.E.2d 464, 465 (Ct. App. 1999).

remain permanently settled. Especially is this so in the construction of statutes, for if any change in the statutory law is desired, the General Assembly may readily accomplish it."

Wehle v. S. Carolina Ret. Sys., 363 S.C. 394, 402, 611 S.E.2d 240, 244 (2005) (quoting *Powers v. Powers*, 239 S.C. 423, 427, 123 S.E.2d 646, 647 (1962)).

"Legislative intent, once determined, is 'permanently settled' absent subsequent action by the General Assembly to effect a change in the statutory law." *Id.* Moreover, "[w]hen a statute which has been construed by a court of last resort is included in a codification of laws thereafter adopted, without significant change in phraseology, the presumption is that the legislature intended to adopt such a construction." *Layton v. Flowers*, 243 S.C. 421, 424, 134 S.E.2d 247, 247-48 (1964). This presumption becomes even stronger with the passage of time. *Id.* See also *Wehle*, 363 S.C. at 405, 611 S.E.2d at 245 ("[T]he General Assembly's inaction following the entry of the final judgment [by the supreme court in interpreting a statute] is entitled to consideration.").

Here, the Supreme Court has already determined the legislative intent behind section 144. It is therefore "permanently settled" under *Wehle* and *Powers*. Moreover, following the Supreme Court's 1993 decision, the Legislature in 2000 re-codified this section at 38-77-144. Although the Legislature changed the "must" in the last sentence to "shall," every other aspect of the section was preserved. Thus, not only did *Richardson* permanently settle the meaning of section 144, the Legislature presumptively adopted *Richardson's* interpretation when it re-codified the section in 2000.

II. The circuit court erred in substituting its interpretation of legislative intent for the South Carolina Supreme Court's interpretation as set forth in *Richardson*.

A. The circuit court's determination of the legislative history and intent behind 38-77-144 was flawed.

According to the circuit court's analysis, in abolishing mandatory PIP and the no-fault system, the Legislature *increased* the PIP coverage required to be provided by insurers who voluntarily offer PIP.

The circuit court's determination of legislative intent was based on "the absence of a provision allowing setoff for workers' compensation benefits where one previously existed." (R. p. 5). Its reasoning was based on the following facts:

- Prior to 1989, PIP coverage was mandatory in South Carolina.
- Because PIP was statutorily mandated, the only exceptions to the duty to provide PIP were set forth by statute.
- The statutory exceptions for mandatory PIP included that PIP payments were to be reduced by amounts received through workers compensation.⁶
- In 1989, the Legislature ended mandatory PIP, deleting all references to PIP in Title 38 and 56, including the exceptions to mandatory PIP coverage.

From this, the circuit court extrapolated: "Because the exclusive list of exceptions from the duty of the PIP carrier no longer exists, no exception to the PIP carrier's duty to pay exists." (*Id.*).

The conclusion that by abrogating mandatory PIP exceptions, the Legislature intended they become mandatory coverage in voluntary PIP policies was not supported by logic nor law. These exceptions were a fundamental component of the mandatory system—when a statute mandates coverage, the exceptions to that coverage must also be provided by statute. Their deletion, along with the rest of the mandatory PIP statutes, demonstrated nothing more than the Legislature's stated intent of ending mandatory PIP.

⁶ Other exceptions included the recovery of PIP "from more than one policy or insurer on either a duplicate or supplemental basis," or by a person intentionally causing an accident, occupying a stolen vehicle, or committing a felony. 38-77-290(a); 38-77-310.

If, as the circuit court held, each exception to mandatory PIP became required coverage under voluntary PIP, the following former exceptions would now be mandatory coverages under PIP policies:

- Injuries caused by intentional acts, S.C. Code Ann. § 38-77-310 (1976, repealed by 1989 S.C. Acts 148);
- Injuries caused while operating stolen vehicles, *Id.*;
- Injuries occurring during the commission of a felony, *Id.*;
- Injuries occurring while failing to stop for law enforcement, *Id.*;
- Finally, stacking of PIP would become mandatory. S.C. Code Ann. § 38-77-290(a) (1976, repealed by 1989 S.C. Acts 148)

The last bullet point is particularly illustrative as to the circuit court's error. Under mandatory PIP, insurers were expressly permitted to prohibit stacking of PIP and to reduce PIP by workers' compensation payments. This was accomplished by the exceptions in section 38-77-290, subsections (a) and (d), respectively. Under the circuit court's conclusion that the deletion of section 290's "exclusive list of exceptions" left "no exception to the PIP carrier's duty to pay," the anti-stacking exception of 290(a) would now be prohibited. Thus, the circuit court's reasoning is irreconcilable with *Richardson* and with the circuit court's own acknowledgment that section 144 does not prohibit anti-stacking provisions. (R. pp. 8-9).

There is no support for the conclusion that the Legislature intended the mandatory no-fault system exemptions to become required coverages where PIP is provided voluntarily. Such a construction of the Legislature's intent should be rejected, as it would result in many absurdities, among them being mandatory coverage for intentional acts and injuries during the commission of a felony. *See Auto Owners Ins. Co. v. Rollison*, 378 S.C. 600, 612, 663 S.E.2d 484, 490 (2008)

(in construing a statute courts should reject an interpretation when such an interpretation leads to an absurd result that could not have been intended by the Legislature).

B. *Richardson's* interpretation of the legislative intent was correct.

- 1. The Legislature has had twenty-two years to amend section 144 if *Richardson* misinterpreted its intent, and has chosen not to do so.**

Richardson was decided just four years after the Act at issue. The context surrounding the elimination of mandatory PIP (discussed below) would have been more apparent to the *Richardson* court than a court in 2015. Additionally, if *Richardson* had misconstrued the legislative intent, the Legislature has had twenty-two years to correct it and has chosen not to do so. In fact, in 2000, when it re-codified the section at 144, the Legislature had the opportunity to alter the language in section 144 and chose not to.⁷ See *Wehle v. S. Carolina Ret. Sys.*, 363 S.C. 394, 405, 611 S.E.2d 240, 245 (2005); *Layton v. Flowers*, 243 S.C. 421, 424, 134 S.E.2d 247, 247-48 (1964).

- 2. Pre-1989 confusion concerning the availability of a tortfeasor's PIP setoff provide context for the legislative intent as determined by *Richardson*.**

The circuit court cited *The Law of Automobile Insurance in South Carolina* four times, but did not refer to it when discussing the 1989 Legislature's intent in drafting section 144. *The Law of Automobile Insurance* notes the 1989 Act at issue was in response to "public outcry over high automobile insurance rates." (5th Ed., p. V-25).⁸ It noted that PIP "had the worse [sic] loss

⁷ See, *The Law of Automobile Insurance in South Carolina*, 5th Ed., p. V-27:

Section[] 38-77-145 was erroneously repealed by 1997 S.C. Acts 154. This repeal raised an issue about whether PIP was subject to set-off and subrogation. This was not the intent of the S.C. General Assembly, and this provision was recodified by 2000 S.C. Act. No. [344] which provided that PIP is not subject to subrogation or set-off."

⁸ This pleading cites the 5th Edition of the treatise as that is the edition cited by the circuit court.

ratio of any first or third party automobile insurance coverage in South Carolina" and the "abolishment of statutory PIP coverage was one of the Legislature's "major savings items." (5th Ed., p. V-25). In other words, the Legislature's intent in 1989 was to decrease the amount of PIP insurance sold in the state, not to *increase* the coverage required.

Additionally, confusion over the existence of a tortfeasor's ability to set off PIP benefits prior to the 1989 Act explains the Legislature's decision to prohibit that setoff in section 144. *The Law of Automobile Insurance* explains that before the 1989 repeal of mandatory PIP, there was confusion over whether the Legislature intended for a tortfeasor to receive a setoff.⁹ Due to the repeal of another section of the PIP code in 1978 "it was assumed the Legislature wished to do away with all right of set-off." *Id.*, p. V-17. However, to what extent the right to setoff survived the 1978 amendment "was the subject of considerable debate." *Id.*, p. V-18. *See also* 1981 S.C. Op. Atty. Gen. 54 (noting "some ambiguity has arisen with respect to" whether the Legislature intended to eliminate a tortfeasor's right to setoff in the 1978 amendments to the PIP statute). It was this "confusion," "debate," and "ambiguity"—over whether a tortfeasor could setoff PIP benefits at trial—that the Legislature sought to resolve when it explicitly prohibited setoff in section 144.¹⁰

The 6th Edition was substantively the same. The 7th Edition, published in 2015, omitted the historical discussion of this topic.

⁹ It appears that the application of the statute allowing a tortfeasor's setoff of PIP was confusing and controversial from mandatory PIP's 1974 inception. *See* Joseph F. Anderson Jr., *Note, The South Carolina Insurance Reform Act Part I: No Fault and Contributory Negligence—A Synopsis and Appraisal*, 26 S.C. L. Rev. 705, 720-21 (1975) (noting, for example, confusion and ambiguity over whether a tortfeasor's setoff was allowed for PIP coverage in excess of \$1,000).

¹⁰ This is consistent with a Conference Committee report adopted by both Houses of the General Assembly just before Act 148 was passed which stated: "If a (sic) insurer does voluntarily sell PIP coverage . . . it may NOT be assigned or subrogated and may not be setoff [from the

3. The text of the statute is inconsistent with the circuit court's conclusion.

In addition to being contrary to *Richardson* and the legislative intent, the circuit court's interpretation of setoff was contrary to the text of section 144, because it would *mandate* the provision of PIP coverage even where the parties to an insurance contract agree the coverage is excess. It is well settled that in interpreting a word or phrase used in a statute, "[c]ourts should consider not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law." *See, e.g., Hernandez-Zuniga v. Tickle*, 374 S.C. 235, 247, 647 S.E.2d 691, 697 (Ct. App. 2007).

The statute is titled "Personal injury protection (PIP) coverage not mandated." Its first line reads, "There is no personal injury coverage mandated under the automobile insurance laws of this State." 38-77-144 (emphasis added). Thus, when considering the Legislature's meaning of setoff in 144, the circuit court should have considered that the Legislature was eliminating mandatory PIP and stating that no PIP coverage was to be mandated.

Richardson's interpretation of setoff was consistent with the statute—the elimination of a *tortfeasor's* ability to setoff PIP would not affect the availability of PIP coverage to an insured. However, the circuit court's definition would be contrary to the statute, as it would mandate certain PIP coverage and eliminate the parties' freedom to contract to, for example, the provision of excess PIP coverage.

C. The circuit court erred in ruling that PIP insurers are the payor of first resort.

The circuit court ruled that a PIP carrier may never reduce benefits by any amount paid by a third-party because it found that PIP insurance was a "payor of first [] resort." (R. p. 10).¹¹

tortfeasor's liability coverage.]" *State Farm v. Richardson*, 437 S.E.2d at 45 n.2 (bracketed material in original).

¹¹ It appears the circuit court based this on a statement in *Moultrie v. North River Ins. Co.*

However, the Legislature made no suggestion that PIP insurance should become a "payor of first resort" when it eliminated mandatory coverage in 1989.

Even under the mandatory scheme, PIP insurance was not a payor of first resort, as defined by the circuit court. The statutory exceptions to mandatory PIP included reducing PIP coverage by amounts paid by workers compensation, and by amounts paid by other insurance carriers. The circuit court acknowledged this. (R. p. 3). Thus, it concluded that although PIP insurance was not the payor of first resort prior to 1989, when the Legislature ended mandatory PIP and terminated South Carolina's experiment with a no-fault system, it simultaneously decided to make PIP insurance the payor of first resort. This conclusion was not supported by any legal authority and was contrary to the Legislature's intent to end mandatory PIP coverage:

III. The circuit court erred in applying the plain meaning rule to section 144 by ascribing an unspecified definition to "setoff," instead of following *Richardson*.

Again, the dispositive issue is what the Legislature meant by "setoff" in section 144. The circuit court circumvented this question by presupposing a clear and specific definition of setoff. By applying the plain meaning rule, the order skirted the question of legislative intent discussed above: "On its face, the State Farm provision constitutes a setoff and violates the plain meaning of the Statute." (R. p. 7). However, because setoff could have multiple meanings under South Carolina law, the plain meaning rule did not apply, and the circuit court could not ignore

applying the first tortfeasor setoff statute, 56-11-130(b), which was repealed in 1978. In the statement, *Moultrie* merely noted the setoff of a verdict against a tortfeasor could only occur after a plaintiff had recovered PIP benefits. 272 S.C. 53, 249 S.E.2d 158, 159 (S.C. 1978) ("[T]his section only requires a setoff by those persons who have already received benefits from their own carrier."). The circuit court extrapolated from this fact that the Legislature intended PIP to be "a payor of first resort." However, even in 1978, as the circuit court acknowledged, PIP was not the "payor of first resort" when workers compensation coverage was available. (See Order at 3 ("It is clear that a PIP carrier, under the law that existed before Act 148 of 1989 repealed mandatory PIP coverage, was not required to make payment if workers' compensation insurance had already made payments to the Claimant.").)

Richardson or the legislative history. See *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (noting plain meaning rule applies where statutory language "is plain and unambiguous, and conveys a clear and definite meaning.").

A. Setoff is a multi-purpose term with no clear definition in South Carolina.¹²

In South Carolina jurisprudence, setoff is a multi-purpose concept that has not been clearly defined. Black's dictionary provides two definitions for setoff: (1) A defendant's counter demand against the plaintiff, arising out of a transaction independent of the plaintiff's claim; (2) A debtor's right to reduce the amount of a debt by any sum the creditor owes the debtor; the counterbalancing sum owed by the creditor. Black's Law Dictionary, 7th Ed., p. 1376. South Carolina cases have frequently applied the term in both contexts. See, e.g., *Brasington Tile Company, Inc. v. Worley*, 327 S.C. 280, 491 S.E.2d 244 (1997) (first definition); *In Re Georgetown Steel Co., LLC*, 318 B.R. 313, 320 (Bankr. D.S.C. 2004) (second definition). Setoff is also used in South Carolina to refer to the reduction of a verdict by amounts paid to the plaintiff by a third-party, usually a settling co-defendant. See *Riley v. Ford Motor Co.*, 414 S.C. 185, 777 S.E.2d 824 (2014). As noted by the circuit court, it has also been used to describe the amount of underinsured motorist coverage after the reduction of amounts paid by the underinsured motorist's liability carrier. *Broome v. Watts*, 319 S.C. 337, 461 S.E.2d 46, 48 (1995). The term is likely used in other contexts. Westlaw shows approximately 1,200 South Carolina state court cases mentioning setoff, set-off, or set off.

¹² Setoff is often written as "setoff," "set off," and/or "set-off." To a great extent, the words appear to be used interchangeably throughout the case law.

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W. M. Kirkland, Inc. v. Providence Washington Ins. Co.
Supreme Court of South Carolina June 11, 1975 | 284 S.C. 573 | 216 S.E.2d 518 | 20031

Subcontractor brought action against project owner, project owner's builder's risk insurer, owner's mortgagee, general contractor and owner's receiver to establish subcontractor's claimed right of a pro tanto offset of its liability under a fire damage claim against its mechanic's lien against owner's property. The owner's insurer sold the fire...

...entitled to discharge its obligation for the fire claim by setoff against its mechanic's lien claim. Reversed. West Headnotes [1] 38...

...subcontractor was concerned. Code 1962, § 10-706(4) 352 Set-Off and Counterclaim 3521 Subject-Matter 352 41 K Parties to...

...debts accrued in different right or disaster capacity. [5] 352 Set-Off and Counterclaim 3521 Nature and Grounds of Remedy 352 4 Grounds and Scope of Remedy 352 8

Equitable Set-Off 352 6(1) K. In General. 352 Set-Off and Counterclaim 3521 Nature and Grounds of Remedy 352 4...

352 9 K. Counterclaim. A "counterclaim" is distinguishable from a "set-off," a counterclaim is statutory while setoff belongs to the inherent power of the court in the...

South Carolina Nat. Bank, Greenville v. Hammond
Supreme Court of South Carolina July 11, 1973 | 260 S.C. 622 | 198 S.E.2d 123 | 10657

An action brought by temporary trustee of mortgaged estate to foreclose on junior mortgage given by committed for trustee's son, wife had been adjudged incompetent, was consolidated for trial with first mortgage's action for foreclosure of its mortgage. The Common Pleas Court, Greenville County, Frank Eppert, J., affirmed report of master finding...

100%

B. The circuit court's definition of setoff is not supported by South Carolina jurisprudence, and is internally inconsistent.

Although it is central to its holding, nowhere in its 14 page order did the circuit court specifically define its use of setoff. The effect of the circuit court's reasoning is to define setoff as follows: *A setoff occurs when first party insurance benefits are reduced by an amount paid by any entity or person other than the insurance carrier providing coverage.*¹³ According to the circuit court, setoff included the following.

- Excess insurers receive "setoffs" when primary insurance policies pay first. (R. pp. 5-6).
- Health insurers receive "setoffs" when a different insurer or entity provides payment. (R. p 11).
- Workers compensation insurers receive "setoffs" if a different entity provides payment. (R. p. 11).
- Additionally, if "the injured party's Aunt Ethel and Uncle Fred [] broke their piggy bank" and relieved a party from an obligation to pay, that too would constitute a "setoff". (R. p. 12.)

¹³ The definition would apparently exclude reductions based on policies written by the same insurer to accommodate the result in *Richardson*.

The circuit court's definition was not supported by the law. In fact, the only located authority defining setoff in this context is *Richardson*. The circuit court incorrectly paraphrased *Richardson* as stating a setoff "occurred when two separate insurance carriers have independent duties to pay benefits to the same injured person." (R. pp. 8-9). *Richardson* said no such thing; it held that setoff, as used in section 144, referred only to the reduction of a tortfeasor's liability. See *Rowzie v. Allstate Ins. Co.*, 556 F.3d 165, 168 (4th Cir. 2009) ("The court in *Richardson* interpreted this provision 'to apply only to the tortfeasor,' and not to serve as a general prohibition against all reductions of automotive insurance based upon PIP/MedPay coverage.").

Additionally, the circuit court's definition was logically inconsistent. According to its order, the reduction of the amount owed by Policy A by the amount paid by Policy B is *not* a setoff if both policies are issued by the same insurer, but *is* a setoff if the policies are issued by different insurers. The only authority the circuit court cited for this position was *Richardson* although, again, *Richardson* said no such thing.

Moreover, in the order's public policy discussion, it concluded that the reduction of a workers' compensation carrier's payment by amounts the payee received from a different insurer was *not* a setoff. (R. p. 13). Since the circuit court was in favor of this reduction, it apparently concluded that this reduction would not be a setoff, although it seems to fall squarely within the circuit court's apparent definition of setoff.

Thus, the circuit court erred in concluding that "setoff" as used in section 144 had a "clear and definite meaning" that eliminated the need for statutory interpretation. (R. p. 7). Not only is there no clear and definite meaning of setoff outside of *Richardson*, even the circuit court's order did not set forth an internally consistent definition of setoff.

IV. The circuit court erred in apparently attempting to reconcile *Richardson* by equating workers' compensation carriers and health insurers with "tortfeasors."

Section 3 of the Order held that "tortfeasor," as used in *Richardson*, "Refers To A Third-Party to the PIP Insurer –PIP Insured Relationship." (R. p. 10). It stated that State Farm was construing the word tortfeasor too "literally." It explained that tortfeasor should be read to include a workers' compensation insurer, a first party health insurer, or any "third-party to the PIP insurer-PIP insured relationship" including, apparently, "the injured party's Aunt Ethel and Uncle Fred." (R. pp. 10, 12). This ruling was inconsistent with the clear holding in *Richardson* and the meaning of tortfeasor, which means "one who commits a tort." Black's Law Dictionary (7th ed.) 1497.

The order stated that if *Richardson* is followed and setoff as used in section 144 is limited to "a literal 'tortfeasor,'" PIP insurance could be reduced by "payments made by the health insurance carrier, the liability insurance carrier, or, for that matter, the injured party's Aunt Ethel and Uncle Fred." (R. p. 12). These hypothetical scenarios were misplaced for several reasons. First, they were not matters before the circuit court. The stipulated facts of this case have nothing to do with health insurance, liability insurance, or voluntary payments by private individuals.

Moreover, the insurance policy was attached to the parties' stipulation of facts and was in the record before the circuit court. Nowhere does the policy provide for any of these hypothetical scenarios. In fact, the order could only connect the policy to these issues by alleging that the policy provision at issue (below) titled "Workers Compensation Coordination" could be construed to apply to health insurance or "any insurance that pays benefits in the event of injury" because health insurance is "similar" to workers' compensation insurance. (R. p. 11).

Workers' Compensation Coordination

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.

How a "similar law" to workers' compensation law could equate to "any insurance" paying "benefits in the event of injury" was left unexplained. This holding ignored the title of the provision and the rules of contractual construction, and it was not supported by any case or authority. *See, McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009) ("[O]ne may not create an ambiguity by pointing out a single word or clause," but must read the contract as a whole.); *C.A.N. Enters., Inc. v. S.C. Health & Human Serv. Fin. Comm'n.*, 296 S.C. 373, 373 S.E.2d 584, 586 (1988) ("Common sense and good faith are the leading touchstones of construction of the provisions of a contract."); *Koon v. Fares*, 379 S.C. 150, 666 S.E.2d 230, 233 (2008) ("Where one interpretation of a contract makes it unusual or extraordinary and another interpretation, equally consistent with the language employed, would make it reasonable, fair, and just, the latter construction prevails. An interpretation which establishes the more reasonable and probable agreement of the parties should be adopted while an interpretation leading to an absurd result should be avoided.") (internal citation omitted). In fact, although *Richardson* was decided twenty-two years ago, the order did not point to any case, authority, or real-world example to support the argument that acceptance of *Richardson* would lead to the hypothetical scenarios it discussed.

Additionally, it is well settled that "[i]nsurers may limit their liability and impose whatever conditions they please upon their obligations, provided such conditions are not in contravention of some statutory inhibition or public policy." *Marchant v. S. Carolina Ins. Co.*, 281 S.C. 585, 586-87, 316 S.E.2d 707, 709 (Ct. App. 1984); *see, e.g., BLG Enterprises v. First*

Financial Ins., 334 S.C. 529, 535-36, 514 S.E.2d 327, 330 (1999) (same). Other than section 144, the order did not point to any statutory inhibition or public policy authority to support its holding.¹⁴

V. The circuit court erred in considering public policy, and in holding public policy favors mandating automobile insurers pay PIP benefits to injured workers so that workers compensation carriers can assert liens against those PIP benefits.

As a preliminary matter, the circuit court erred in considering the subject of public policy as it was not before the court. The parties stipulated that the only issue before the circuit court was whether the subject policy provision violated section 144. The first page of the circuit court's order noted "the sole issue for the Court's adjudication is the interpretation of" section 144. (R. p. 1). Because its public policy discussion did not involve the interpretation of section 144, it was irrelevant to the matter before the circuit court and should not have been considered.

Regardless, the circuit court's public policy conclusion was erroneous, and not consistent with precedent. This Court has held that "South Carolina does not require any PIP coverage under its automobile insurance laws **and has no public policy regarding such coverage.**" *Smith v. Liberty Mutual Insurance Company*, 313 S.C. 236, 239, 437 S.E.2d 142, 144 (Ct. App. 1993) (emphasis added).

A provision is not void as against public policy "unless it [is] in contravention of such public policy as is found either in the constitution, the statutes or the judicial decisions of this State." *Batchelor v. Am. Health Ins. Co.*, 243 S.C. 103, 112, 107 S.E.2d 36, 40 (1959). While

¹⁴ The order contained one sentence concluding "It is abundantly clear from the legislative history and jurisprudence surrounding PIP coverage in South Carolina that the purpose of the coverage as it now exists is to provide an immediate alleviation of the financial strain placed on a physically injured person in the absence of fault, liability, and coverage disputes." (R. pp. 12-13). However, the order did not cite any such "legislative history," "jurisprudence," or other authority to support this statement. Moreover, were that the purpose of section 144, then the Legislature would have made PIP coverage mandatory, rather than doing the opposite.

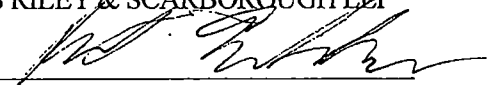
public policy is not rigidly defined, it is cautiously defined: "[T]he subjects in which the court undertakes to make the law by mere declaration [of public policy] should not be increased in number without the clearest reasons and the most pressing necessity." *Weeks v. New York Life Ins. Co.*, 122 S.E. 586, 587 (1924) (quoting *Magee v. O'Neill*, 19 S.C. 185, 45 Am. Rep. 765 (1883)).

The circuit court held public policy favors Cothran receiving PIP benefits in addition to the workers' compensation benefits she has already received, so that Cothran could return those benefits to the workers' compensation carrier. It noted that if State Farm's policy provision were ignored, and if PIP benefits were paid for the same loss covered by workers' compensation benefits, the workers' compensation carrier could have a lien against the PIP proceeds under S.C. Code 42-1-560. (R. p. 13). The order cites no law explaining why public policy would favor mandating the provision of benefits for the purpose of creating a workers' compensation lien. The order also provides no explanation for the conclusion that public policy would favor one type of insurance over another. Thus, "the clearest reasons and the most pressing necessity," sufficient to justify declaring a new public policy were not present, and it was error to do so in their absence. *Weeks* at 587. That is particularly true because PIP is not required and the state "has no public policy regarding such coverage." *Smith*, 313 S.C. at 239, 437 S.E.2d at 144.

CONCLUSION

State Farm v. Richardson is dispositive. State Farm requests that the Court reverse the circuit court's Order granting the Plaintiffs' Motion for Summary Judgment; reverse the circuit court's Order denying State Farm's Motion for Summary Judgment; and enter judgment for State Farm on the Plaintiffs' claim for breach of contract.

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May 24, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 2015-CP-42-1578
Appellate Case No. 2016-000177

RECEIVED
MAY 25 2016
SC Court of Appeals

WADETTE COTHRAN and CHRIS COTHRAN,..... Respondents,

v.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY and ROBERT TUCKER,
Defendants,

Of which State Farm Mutual Automobile Insurance
Company is the Appellant.

CERTIFICATE OF COUNSEL

The undersigned certified that this Brief of Appellant complies with Rule 211(b),
SCACR.

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WADETTE COTHRAN and CHRIS COTHRAN,.....Respondents,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE
COMPANY and ROBERT TUCKER,
Defendants,

Of whom State Farm Mutual Automobile
Insurance Company is the Appellant.

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

Did the circuit court properly hold that S.C. Code Ann. § 38-77-144 prohibits State Farm from including a personal injury protection (“PIP”) set off for benefits paid by its insured’s employer’s workers’ compensation carrier when S.C. Code Ann. § 38-77-144 prohibits a set off?

STATEMENT OF THE CASE

The Complaint for this Action was filed on April 17, 2015 in the Spartanburg County Court of Common Pleas. Plaintiffs claimed that State Farm Mutual Automobile Insurance Company ("State Farm") breached its insurance contract and duties of good faith and fair dealing by not paying to Plaintiffs the full amount of the State Farm personal injury protection ("PIP") policy after Plaintiff Wadette Cothran's medical bills and lost wages admittedly exceeded the full amount of the State Farm PIP coverage available (R. p. 26).

On November 17, 2015, Judge L. Casey Manning granted Plaintiff's Motion for Summary Judgment for their breach of contract claim and denied State Farm's Motion for Summary Judgment for Plaintiffs' breach of contract claim. (R. p. 14). State Farm subsequently filed a Motion to Reconsider, which was denied by an order of January 26, 2016 without oral argument (R. p. 15). State Farm filed its Notice of Appeal on February 5, 2016. On March 1, 2016, Counsel for Plaintiff received State Farm's Initial Brief and Designation of Matter by mail.

STATEMENT OF FACTS

By virtue of the Parties' Stipulation, there are no material facts in dispute regarding the issue before this Court, and the Parties agree that the only question before this Court is one of law. (R. p. 27). For the purposes of the legal determination, the stipulated facts are that Plaintiff Wadette Cothran was involved in a work-related motor vehicle accident in which her medical expenses were paid by her employer's workers' compensation insurance

carrier. Cothran's State Farm automobile insurance policy provided \$5,000.00 in PIP coverage (R. p. 26). State Farm denied payment of medical expenses that had already been paid by Cothran's employer's workers' compensation carrier based on its policy provision that stated that personal injury protection was "excess over any benefits recovered under any workers' compensation law or any other similar law." (R. p. 40).

The sole issue before the circuit court was whether this provision constituted a "set-off" that was prohibited by S.C. Code § 38-77-144 (R. p. 26).

STANDARD OF REVIEW

This appeal concerns only the legal issue of the interpretation of an insurance policy. In addition, all relevant facts have been stipulated, and the only issue before this court is, therefore, a legal question for which the role of the appellate court is to determine whether the trial court properly applied the law to the stipulated facts. See, eg., Nationwide Mut. Ins. Cov. v. Prioeau 359 S.C. 238, 241, 597 S.E.2d 165, 167 (Ct. App. 2004).

ARGUMENT

I. The Plain Meaning Rule Requires That The Decision Of The Circuit Court Be Affirmed.

A. The case can be decided without looking beyond the text of S.C. Code Ann. § 38-77-144.

The dispositive issue in this case is whether Plaintiff Wadette Cothran is entitled to collect under her State Farm PIP policy when the policy provides, under its "Workers' Compensation Coordination" clause, that "[a]ny 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." 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.*

(Emphasis Added).

As the South Carolina Supreme Court has articulated:

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature.

Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E. 2d 578, 581 (2000) (Internal Citations and Quotations Omitted). Furthermore, “[i]t is settled law that statutory provisions relating to an insurance contract are part of the contract, and that a policy provision which contravenes an applicable statute is to that extent invalid.” Boyd v. State Farm Mut. Auto. Ins. Co., 260 S.C. 316, 195 S.E.2d 706 (1973).

Under current PIP law, PIP coverage is “not subject to a set off.” It is clear that a PIP carrier, under the law that existed before Act 148 of 1989 repealed mandatory PIP coverage, was not required to make payment if workers’ compensation insurance had already made payments to the injured insured. Section 56-11-150 (later recodified as Section 38-77-290(d))¹, provided an “*exclusive list* of exceptions from the duty of a PIP insurer to pay benefits.” Benat v. State Farm Mut. Ins. Co., 286 S.C. 132, 133, 333 S.E.2d 57, 58 (Ct. App. 1985) (Emphasis added). As noted in State Farm Mut. Auto. Ins. Co. v. Richardson, 313 S.C. 58, 437 S.E.2d 43 (1993), Act 148 of 1989 repealed mandatory PIP coverage and made it optional, and these “sweeping reforms in automobile insurance law” specifically included a repeal of “Section 38-77-290 [formerly the Section 56-11-150 referred to in Benat].” Richardson at 62, 45. The now-repealed § 38-77-290(d) stated,

¹ See Maybank et al., The Law of Automobile Insurance in South Carolina, 5th Ed., V-19 (2002).

Benefits payable under the coverages *required to be offered* by section 38-77-240 must be reduced to the extent that the recipient had recovered benefits under workers' compensation laws of any state or the federal government. (Emphasis Added). SC. Code Ann. Section 38-77-290(d) (Law. Co-op. 1989 quoted in Burnet R. Maybank, et al., The Law of Automobile Insurance in South Carolina, V-19, 5th ed. 2002). Even when set off for workers' compensation benefits was allowed, it was for only mandatory PIP coverage—not for voluntarily purchased coverage.

The former law, therefore, mandated a PIP setoff for workers' compensation benefits that had been paid (“must be reduced [. . .]”) for mandatory PIP. Pre-1989 PIP law “also allowed assignments to hospitals, physicians and other medical providers, so long as the provider did not require assignment of benefits as a condition of treatment.” Maybank, et al., The Law of Automobile Insurance in South Carolina, V-19 (2002). When the original, mandatory PIP law was enacted, it also allowed a “tortfeasor setoff,” as analyzed below. Furthermore, the Legislature contemplated allowing the PIP carrier to subrogate against the money paid by the “tortfeasor” (i.e., the liability insurance carrier) rather than allowing the “tortfeasor” a setoff for what was paid by the PIP carrier but decided against it because the “Legislature felt that *a setoff provision would be more economical and administratively feasible than a provision allowing subrogation by the first party insurance carrier* [i.e., the PIP carrier].” Maybank, et al., The Law of Automobile Insurance in South Carolina, V-16 (2002). Id. (Emphasis Added). It is important to note that, even when set off and

subrogation for PIP were allowed, the Legislature determined that it was not “feasible” and not “economical” to allow the PIP carrier to be the entity to assert subrogation and assignment rights against non-PIP coverage—the very thing that State Farm is alleging it is entitled to do in the case at bar based on the law as it exists after the “sweeping reforms” noted in Richardson eliminated subrogation and set off from PIP law.

The Legislature’s “sweeping reforms” in 1989 that made PIP optional clearly, in the word of the current statute, “deleted” assignments, subrogation, and set-offs, including any formerly permissible instance of subrogation, assignment, or set off that was found in “*exclusive list of exceptions from the duty of a PIP insurer to pay benefits.*” Benat, 286 S.C. 132, 133, 333 S.E.2d 57, 58. Under South Carolina Law, “It is well settled by our decisions *that the code as adopted is the general law and the omissions are lost.*” Independence Ins. Co. v. Independent Life & Acc. Ins. Co., 218 S.C. 22, 31 61 S.E.2d 399, 403 (1950) (Emphasis Added). Because the exclusive list of exceptions from the duty of the PIP has been “deleted” by the current § 38-77-144, the PIP carrier’s defense to paying benefits based on a set off that was included in that list has likewise been “deleted.”

Clearly, the former law allowed this setoff for PIP coverage that was “required to be offered” (i.e., formerly mandatory PIP) so that it was set off by amounts paid by a workers’ compensation insurance carrier. The former law also allowed assignment, and the Legislature considered allowing subrogation by the PIP carrier against other coverage. Accordingly, the absence of a provision allowing set off for workers’ compensation benefits

where one previously existed clearly evidences the legislature's intention that Section 38-77-144 was the comprehensive Legislative statement concerning the issue of when PIP must be paid and who could allege an interest as a result of the PIP payment. Under the current Statute, "no personal injury protection (PIP) coverage [is] mandated." An insurance carrier that chooses voluntarily to sell PIP coverage must provide it with the understanding that it is not subject to assignment, subrogation, or set off.

The only statutory provision in existence that may form the basis of duties to pay PIP coverage or rights of persons to assert an interest in PIP coverage that has been paid is the current Section 38-77-144, as the entire history of PIP coverage (and the jurisprudence interpreting it) that existed prior to the 1989 amendment has been expressly "deleted."

Accordingly, under the current state of South Carolina PIP law, any policy provision that constitutes a "set off" must be invalid. South Carolina law makes clear that denominating first party automobile coverage as "excess" to another policy of a different statutorily classified coverage is, by definition, a setoff. The form of coverage that is probably closest in kind to PIP coverage (i.e., another form of first party, automobile coverage) is underinsured motorist coverage ("UIM"). UIM is defined, under S.C. Code. Ann. Section 38-77-160, "to provide coverage in the event that damages are sustained *in excess of the liability limits* carried by an at-fault insured or underinsured motorist." As the Supreme Court held in Broome v. Watts, 319 S.C. 337, 341, 461 S.E. 2d 46, 48, this "excess"

denomination constitutes a setoff: “The very definition of UIM insurance mandates *a set-off*.” (Emphasis Added).

More importantly, the credit claimed in connection with PIP coverage itself has been called a set off. The South Carolina Supreme Court formerly determined that the credit claimed by the liability insurance company for the money paid by the PIP insurance company was, by definition, a set off (“We termed this tortfeasor liability reduction [after the PIP carrier has paid its PIP coverage] a ‘set-off’ in Moultrie v. North River Ins. Co., Inc., 272 S.C 53, 249 S.E.2d 158 (1978).” State Farm Mut. Auto. Ins. Co. v. Richardson, 313 SC 58, 437 SE.2d 43 (1993). That is, if the credit alleged by a third party carrier against PIP coverage is, by definition, a set off, then then the credit alleged by the PIP carrier against third party coverage must also be termed a set off.

The Moultrie Court noted, in fact, that the PIP carrier’s assertion that it could claim credit for liability payment was a “setoff” that was invalid because the statute “only requires *a setoff* by those persons who have already received benefits from their own carrier,” and not by the PIP carrier who sought a setoff for the payment of insurance proceeds that exist outside of the first party PIP relationship. Moultrie at 56, 159. (Emphasis added). Despite State Farm’s contention that “tortfeasor” must be read literally, the history of PIP setoff law makes clear, in every case cited above, that “tortfeasor” has traditionally signified third party insurance, and not the natural person who was the literal “tortfeasor.”

State Farm goes to great lengths in its arguments not to state outright what its position in this case must be in order for it to have any semblance of consistency. State Farm states repeatedly that its policy provision is merely a permissible “excess” coverage provision. It states that the circuit court “circumvented” the question of what a setoff is by “presupposing a clear and specific definition of setoff” and applying the plain meaning rule instead of applying State Farm’s asserted interpretation of Richardson. (Def. Brief at 13). The insurmountable obstacle to assenting to State Farm’s position is that the word that State Farm wishes to insist applies to the policy provision at issue in this case, “excess,” is not addressed in the Richardson opinion. That is, to benefit from the Richardson language that State Farm asserts must be interpreted so as to allow its “excess” policy provision requires accepting the language of the Richardson opinion that a “setoff” applies “only” to the “tortfeasor.” Therefore, in order to rely on Richardson, State Farm must, if only tacitly, acknowledge that its denial of coverage in this case is based on the fact that it is alleging a “setoff” for workers’ compensation payments. If it does not assert that it is alleging a “setoff,” then its reliance on Richardson, however tenuous to begin with, is entirely unfounded. Its position, after all, is that Richardson allows a “setoff” for any entity other than a tortfeasor. Once State Farm is forced to admit that what it asserts is a setoff, its proposed interpretation must run smack into the inscription on the wall that is the statute: “the coverage [. . .] is not subject to set off.”

II. Richardson Does Not Support State Farm’s Position.

A. *Richardson* did not resuscitate the statutorily eliminated workers' compensation setoff; instead, Richardson applies only to the stacking of PIP coverage.

State Farm alleges that Richardson allows a setoff to be alleged by a personal injury protection insurance carrier. In Richardson, a State Farm insured was injured in an automobile accident and claimed PIP benefits on two State Farm PIP policies. State Farm alleged that Richardson was entitled to only one. In Richardson, State Farm denied that its policy had a set off provision, and *it 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 setoff, 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. That is, the prohibition at issue in Richardson related only to the *stacking* of multiple policies of the same type of coverage (PIP) and did not address denominating the PIP policy as excess to a non-PIP policy held by a third party to the PIP Insurer—PIP Insured relationship. Under South Carolina law, stacking is defined as “the insured's recovery of damages under more than one policy until the insured satisfies all of his damages or exhausts the limits of all available policies.” Cont'l Ins. Co. v. Shives, 328 S.C. 470, 473, 492 S.E.2d 808, 810 (Ct. App. 1997). Perhaps the most commonly stacked coverages are uninsured motorist (“UM”) coverage and underinsured motorist coverage, and the stacking of those coverages

is governed specifically by statute. See S.C. Code Ann. § 38-77-160 (Supp.1996). Construing specific statutory language, we have held an insured is entitled to stack underinsured or uninsured coverage in an amount no greater than the amount of coverage on the vehicle involved in the accident. To this extent, stacking cannot be contractually prohibited. Where none of the insured's vehicles is involved in the wreck, however, stacking of underinsured or uninsured coverage may be prohibited.

Ruppe v. Auto. Owners Ins. Co., 329 S.C. 402, 405-06, 496 S.E. 2d 631, 632 (1998). (Internal Citations and Quotations Omitted). According to the Supreme Court, coverage that is “not statutorily required” may 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 statute,” 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.” Id. at 406, 633

Accordingly, the Richardson Court merely reaffirmed this longstanding precedent that stacking of non-mandatory coverage may be lawfully prohibited *when it does not conflict with any statute* when it held that a PIP insurer’s policy “may prohibit the *stacking* of non-mandatory coverage.” Richardson, at 61, 45 (Emphasis added). Because § 38-77-144 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.

State Farm seeks to have this Court revive the “deleted” PIP law that allowed refusal of payment of PIP coverage prior to the enactment of § 38-77-144; instead of the “exclusive list” of exceptions to payment, however, State Farm seeks to have this Court adopt a new rule that allows any entity to allege a set off based on any payment from any source—with the single exception that the “tortfeasor” may not allege a set off for payments already made by the PIP carrier. As noted above, the position State Farm now advocates that allows the PIP carrier to receive credit for payments made by third party insurance was rejected by the Legislature as not “feasible” and not “economical” even under the former law that allowed subrogation, assignment, and set off. See Maybank, et al., The Law of Automobile Insurance in South Carolina, V-16 (2002).

Under State Farm’s line of reasoning, § 38-77-144 is a “one way street.” That is, the “tortfeasor” that is a third party to the PIP insurer-PIP insured cannot allege a setoff against PIP payments, but the PIP carrier may lawfully allege a setoff against any payment from any source whatsoever. Specifically, if State Farm’s reasoning were adopted, the PIP carrier would be able lawfully to allege a setoff for money paid by the “tortfeasor” (i.e., the liability carrier) if the Richardson language that setoff is not allowed by “only” the “tortfeasor” is adopted literally.

That is, because the PIP carrier is not the “tortfeasor,” the PIP carrier could withhold payment pending the adjudication of liability against the tortfeasor, and, in the event that the award the PIP insured received from the tortfeasor exceeded the amount of PIP coverage,

the PIP carrier could refuse payment outright. If the PIP carrier, in its voluntarily munificence, made payment of its PIP coverage to an insured who later recovered from the tortfeasor, it could then subrogate against the liability coverage—because if the prohibition against set off is a “one way street,” then so too must be the prohibition against subrogation and assignment.

Requiring the PIP insured potentially to wait years pending the full adjudication of liability against the tortfeasor before making a claim, in very possible scenarios in which the liability suit were appealed, could allow the PIP insurer to require the PIP insured to wait until after the statute of limitations against the PIP insurer had run before she could make a PIP claim that was valid under the terms of the PIP policy. In short, State Farm’s interpretation of South Carolina’s three sentence PIP law that replaced the series of statutes and reams of jurisprudence would be a very strange definition of “reform.”

B. The current statute was not enacted to give a windfall to PIP carriers.

In Richardson, the plaintiff alleged that an anti-stacking provision constituted a setoff. The holding of the Court distinguished a setoff from stacking, and the Court addressed the issue of a setoff only because it was erroneously raised by the Plaintiff. The Court clarified that the distinction between a “setoff” and “stacking” was that stacking occurred in first party coverage when there existed in the insurer-insured relationship multiple policies of the same type of statutorily defined (i.e., PIP) coverage. A setoff, on the other hand, occurred when two separate insurance carriers with different statutorily defined

types of coverage have independent duties to pay benefits to the same injured person. When two insurance companies had independent duties to pay a single injured individual, the Richardson Court noted, “We termed this tortfeasor liability reduction a ‘set-off’ in Moultrie v. North River Ins. Co., Inc., 272 S.C 53, 249 S.E.2d 158 (1978).” Every single case addressing the meaning of this “tortfeasor” set off addresses, literally, the set off allowed to the liability insurance carrier; no case in which the issue of the “tortfeasor set off” is addressed deals with the credit alleged by the natural person who was the literal tortfeasor, and it is therefore not possible to read “tortfeasor” literally.

Moultrie was decided when a set off was allowed. In Moultrie, the injured party (Moultrie) received a settlement with the liability insurance carrier for the driver who was at fault for the accident in which he was injured. That settlement included “payment of [Moultrie’s] medical expenses”. Id. at 54, 158. His PIP carrier, North River Insurance, alleged he would receive a “double recovery” if he were allowed to recoup money from his PIP policy for medical bills for which he had already received payment as a result of the liability settlement based on the statute that read, “if a claimant Recovering from his insurer the benefits for economic loss. . . shall bring action. . . against another person. . . the court shall reduce such verdict by the amounts of the benefits paid. . . by the claimant’s insurer” (Ellipses in original). The Moultrie Court held that the plain meaning of the statute was that “this section only requires a setoff by the persons who have already received benefits from their own carrier.” The Court held that “*the tortfeasor was to be given credit for payment*

by the first party insurer, rather than the first party insurer [i.e., the PIP carrier] getting the benefit of payment by the tortfeasor.” Moultrie at 56, 159. Accordingly, the “old” law that allowed a setoff did make an attempt to prevent “double recovery,” but it did so by allowing the “tortfeasor” (i.e., the tortfeasor’s insurance carrier) to get credit for what the PIP carrier had already paid.

Even in its historical definition, a “set off” required the PIP carrier to make payment prior to the entity that could claim a setoff (i.e., the “tortfeasor”). The current PIP statute was enacted, not to give a windfall to the PIP carrier, but because the elimination of the set off “prevented the tortfeasor from profiting in the case *where the injured party received PIP benefits.*” Mount v. Sea Pines, Inc., 337 S.C. 337, 359, 523 S.E. 2d 464, 465 (Ct. App. 1999). The interpretation of the Statute provided by the Court in Mount presupposes, as does the text of the statute itself, that the injured party has already “received PIP benefits.” It also clarifies that the legislative intent of the current PIP law was to benefit the injured party, even if that benefit to the injured party resulted in “double recovery.” The purpose of the change in the law clearly was not to shift the unjust benefit from the liability insurance carrier to the PIP carrier—to the detriment of the injured party.

C. The “tortfeasor” from Richardson refers to a third party to the PIP insurer—PIP insured relationship.

As noted above, the Richardson opinion was limited to an analysis of the extent to which an automobile insurance carrier was permitted to contractually limit its responsibilities within the first party, PIP insurer—PIP insured context. That is, the opinion

only addressed when a single insurer could limit, by the terms of its policy, what that insurer paid out among several policies between the insurer and insured. It did not address the existence or non-existence of third-party insurance coverage outside of the PIP Insurer—PIP Insured relationship and how the existence or non-existence of such coverage could absolve the PIP carrier of its responsibility to pay under the terms of its policy.

The Richardson Court did not allow an insurer to receive a set off for payments made by a source with an obligation independent of the relationship between State Farm and Mr. Richardson. Contrary to the history of the PIP setoff rule as outlined above, State Farm seeks to assert that because a workers' compensation insurance carrier is not a literal "tortfeasor," State Farm can receive credit for what a third party to the first party contractual relationship (between State Farm and Wadette Cothran) has a legal responsibility to pay. Read in light of the history of PIP setoff, *however, it would be the workers' compensation insurance carrier, not State Farm, that would have the right to assert a set off* when both workers' compensation and PIP coverage simultaneously exist—and, in fact, as noted below, although the workers' compensation carrier does not have the right to assert a set off, it does have the right to assert an equitable interest based on the payment of PIP benefits to a claimant. Interestingly, under State Farm's analysis, the workers' compensation carrier arguably should also be able to allege a set off against PIP coverage—as the workers' compensation carrier is not a "tortfeasor."

If State Farm's interpretation were adopted, not only could a workers' compensation carrier allege a set off, but a health insurance carrier could also allege a set off, as a health insurance carrier is not a literal "tortfeasor." Furthermore, the policy provision at issue provides for State Farm PIP as excess not only to workers' compensation law but "any other similar law." The phrase "similar law" is not defined in the policy, and could be taken to signify any insurance that pays benefits in the event of injury—and State Farm could allege that this "similar" law includes health insurance. In that event, both State Farm and the injured party's health insurance could, lawfully, allege a set off and leave the injured insured with the unenviable choice of either paying out-of-pocket for her medical bills or spending years of time and thousands of dollars in costs litigating against two insurance companies, *to both of which she paid premiums to cover medical bills that she sustained*, over what may be only a \$1,000.00 PIP policy. It is clear that the Legislature did not intend the proscription against subrogation, assignment, and set off to be interpreted so that an insured who had paid insurance premiums could then be forced to litigate over which of the two insurance carriers to whom she paid premiums would get the benefit of the premiums she voluntarily paid—rather than giving the benefit to the person who paid the premiums.

State Farm alleges that these issues of entities other than the PIP carrier alleging a set off are not relevant because they were "not matters before the circuit court" (Record on Appeal pp. 0083). The issue before the circuit court was one of statutory interpretation, and a court must "reject a statutory interpretation when to accept it would lead to a result so

plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention.” Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000). State Farm cannot rebut the arguments that demonstrate the natural consequences of limiting the prohibition against set off to only a literal tortfeasor. It cannot rebut those arguments because the natural results, although absurd, would be the consequence of adopting State Farm’s position. State Farm alleges that the circuit court’s holding that the “similar law” language in the circuit court order could “equate to ‘any insurance’ paying ‘benefits in the event of injury’ was left unexplained.” (Record on Appeal pp. 0083). The reason it was left unexplained is because the term “similar law” is undefined and unexplained in the State Farm policy at issue. It was not necessary for the circuit court to create the ambiguity already in the policy. What law is determined as “similar” to workers compensation law under the terms of the policy at issue is solely within the discretion of State Farm. As health insurance, like workers’ compensation insurance, is a system of benefits that pays for medical care irrespective of fault, the health insurance analogy is the most apposite possible definition of “similar law” that could be gleaned from a reading of the State Farm policy.

The legislative prohibition found in S.C. Code Ann. § 38-77-144 that PIP coverage “is not subject to setoff” signifies what it always signifies in any context: the existence or non-existence of any third party insurance (insurance outside of the State Farm-Wadette Cothran relationship) is irrelevant to any analysis of State Farm’s contractual obligation to

pay PIP benefits to Wadette Cothran. The fact that the Legislature “deleted” the former Code that contained the “exclusive list” of exceptions to the PIP carrier’s duty to pay benefits and replaced it with the current Code in which PIP is, simply, “not subject to a set off” is strong evidence that the Legislature was aware of the potential issue of workers’ compensation set off and intentionally omitted the right of the PIP carrier to assert the set off under the current Code. (See Benat and Section 38-77-144).

If the Statute imposes only the limitation alleged by State Farm in its brief (“that setoff referred only to the tortfeasor’s liability” Record on Appeal pp. 0083), then State Farm could not only allege a setoff for workers’ compensation benefits, there would be no bar to the PIP carrier alleging a setoff based on payments made by the health insurance carrier, the liability insurance carrier, or, for that matter, the injured party’s Aunt Ethel and Uncle Fred who broke their piggy bank to pay for her hospital bill.

If, on the other hand, State Farm is not permitted to receive a setoff for mandatory liability insurance because of Section 38-77-144, then there is no argument that it can receive a set off for another mandatory coverage system: workers’ compensation. Courts must “reject a statutory interpretation when to accept it would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention.” Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000). To accept State Farm’s interpretation that the current Statute prevents a set off by “only the tortfeasor” would lead to the absurd result that only one set off (for the tortfeasor) was

eliminated *while simultaneously creating a set off for every possible entity other than the tortfeasor.*

If the PIP carrier is permitted to be a payor of last resort that withholds payment until all sources of payment; including liability insurance, workers' compensation, health, and, in its ambiguous policy language, any "other similar" systems have been located and forced to issue coverage denials; the intention of the Legislature would be undermined.

D. *Stare Decisis* is inapplicable.

Because, as noted above, Richardson does not address the issue before the Court, *stare decisis* is not relevant.

E. State Farm's laundry list is inapplicable.

Exclusions for injuries resulting from the insured's intentional acts, injuries incurred during the commission of a felony, and injuries resulting from failing to stop for law enforcement are irrelevant. None of these exclusions is addressed in the three sentence PIP law of South Carolina, and they are therefore valid. None of these exclusions has any relationship whatsoever to the statutorily prohibited subrogation, assignment, or set off at issue and are therefore red herrings.

III. Public Policy Does Not Allow A Setoff.

Finally, "[i]t must be presumed that the Legislature intended to achieve a consistent body of law." State v. Ramsey, 311 S.C. 555, 562 430 S.E. 2d 511, 516 (1993). The interplay between PIP coverage and workers' compensation coverage requires that PIP coverage be

paid when the coverages arguably overlap in order to effect a fully coherent jurisprudence that complies with public policy. The nature of the current Workers' Compensation and Personal Injury Protection law allows the workers' compensation carrier to claim an equitable interest in the PIP proceeds paid to the injured worker. S.C. Code Ann. Section 42-1-560 outlines the "total cognizable damages" analysis available to the workers compensation insurance carrier to determine the amount of the statutory lien it is owed as a result of a Claimant's settlement with entities other than the workers' compensation carrier. The Workers' Compensation Commission has the authority to determine the amount of the lien and reduce the lien if "a reduction is equitable to all parties and serves the interests of justice." Id. Accordingly, when the Workers' Compensation Commission makes its determination of the proper amount of the statutory lien that the workers' compensation insurance carrier may allege, all payments received by the injured worker are at issue. That is, if the injured worker has received sufficient money to make her whole, then the workers' compensation insurance carrier has a stronger equitable argument that it is entitled to a greater lien. State Farm's refusal to pay its PIP benefits when legally due, therefore, prejudices not only Wadette Cothran but also her employer's workers' compensation insurance carrier. The public policy at issue is not the interpretation of PIP law; it is the right of the employer's workers' compensation insurance carrier to reimbursement for the expenses it accrues as a result of a work-related injury.

The workers' compensation carrier is not allowed to assert a set off. It is allowed to assert a greater lien against the liability settlement on the basis of PIP coverage received by the PIP insured.

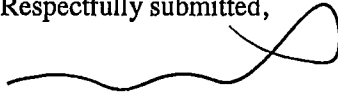
CONCLUSION

Adoption of State Farm's position requires adoption of two mutually exclusive propositions. First, the Court must rule that State Farm's "excess" provision is not a set off. Second, and in direct conflict with the first proposition, the Court must rule that State Farm's not-setoff provision is permissible because Richardson allows "set off" by a PIP carrier on the basis that the PIP carrier is not a literal "tortfeasor."

State Farm cannot have it both ways; the "excess" provision either is or is not a set off. If it is not a set off, then State Farm has no basis to allege that Richardson, which it alleges is a "set off" case, is in any way relevant. Because the entire jurisprudential history of PIP coverage in South Carolina, in fact, refers to the credit one automobile insurance policy takes for payments by another insurance policy a set off, however, the "excess" provision must be deemed a set off, and it must be prohibited by § 38-77-144, which states that PIP is "not subject to set off." Richardson holds only that PIP stacking may be prohibited by the terms of the policy. To expand Richardson to stand for the proposition that the phrase "not subject to set off" means, in fact, "always subject to set off in every circumstance by every entity save one" would brazenly ignore the import of the three clear, unambiguous sentences that constitute the whole of current South Carolina PIP law. If the

PIP carrier is allowed to allege a set off in spite of the clear prohibition against a set off, it would also be allowed to require an assignment against any other coverage collected, and it could subrogate against payments made by other coverages, and the sweeping “reforms” enacted by the Legislature will have reverted to an even more byzantine series of denials, assignments, subrogations, and set offs than existed before the reform—leaving the PIP insured in the unhappy middle of the pointing fingers of her every insurance policy.

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May 20, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 2015-CP-42-1578
Appellate Case No. 2016-000177

WADETTE COTHRAN and CHRIS COTHRAN,.....Respondents,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE
COMPANY and ROBERT TUCKER,
Defendants,

Of whom State Farm Mutual Automobile
Insurance Company is the Appellant.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.
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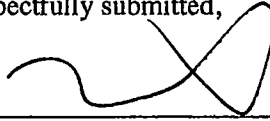
Of whom State Farm Mutual Automobile
Insurance Company is the Appellant.

PROOF OF SERVICE

I CERTIFY THAT I HAVE SERVED THE Respondents Final Brief to be Included in the
Record on Appeal on Appellant by depositing a copy of the same in the United States Mail, postage
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SCC Court of Appeals

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REPLY

I. The plaintiffs have not supported the circuit court's reinterpretation of the Legislature's intent as determined by *Richardson*.

This appeal concerns the same issue central to *State Farm v. Richardson*—what did the Legislature mean by “set off” in S.C. Code 38-77-144? *Richardson* held that “the Legislature intended the set-off prohibition of section [144] to apply only to” a tortfeasor’s setoff of a plaintiff’s PIP benefits from a verdict against the tortfeasor. 313 S.C. 58, 61, 437 S.E.2d 43, 45 (1993). As pointed out in State Farm’s initial brief, Legislative intent, once determined, is “permanently settled” absent subsequent action by the Legislature. *Wehle v. S. Carolina Ret. Sys.*, 363 S.C. 394, 402, 611 S.E.2d 240, 244 (2005); *see also, McLeod v. Starnes*, 396 S.C. 647, 655, 723 S.E.2d 198, 203 (2012) (“Stare decisis applies with full force with respect to questions of statutory interpretation because the legislature is free to correct us if we misinterpret its words.”).

When the Legislature, which is presumed to be aware of judicial interpretation of statutes, fails to take action over a period of decades, it evidences agreement with the judicial interpretation. *Sims v. Amisub of S. Carolina, Inc.*, 414 S.C. 109, 117, 777 S.E.2d 379, 383 (2015). Seven years after *Richardson*, the Legislature re-codified section 144, changing a “must” to a “shall,” and otherwise keeping the language identical. This re-codification is presumed to be an adoption of *Richardson*’s interpretation of the statute. *Layton v. Flowers*, 243 S.C. 421, 424, 134 S.E.2d 247, 247-48 (1968). The plaintiffs have not challenged this authority, distinguished these cases, or provided any rational explanation of why *Richardson*’s determination of what “the Legislature intended” would not be binding on the Court.

A. The plaintiffs offer no explanation for why the Legislature would exclude workers' compensation from PIP coverage under mandatory PIP, but would mandate PIP coverage of workers' compensation injuries under voluntary PIP.

The plaintiffs do not do not provide any explanation as to why the Legislature, in *eliminating* mandatory PIP, would have *increased* the coverage required where workers' compensation is available.¹ The plaintiffs concede that under mandatory PIP, the coverage did not apply where workers' compensation was available. *See* S.C. Code Ann. 38-77-290(d) (1976, repealed by 1989 S.C. Acts 148). Yet they offer no explanation as to why the Legislature, while eliminating mandatory PIP, would have intended to begin mandating PIP coverage for losses already covered by workers' compensation. *Parker v. Williams & Madjanik, Inc.*, 275 S.C. 65, 70, 267 S.E.2d 524, 526 (1980) (noting South Carolina's workman's compensation laws were created to provide "a *comprehensive approach* to provide compensation for employees injured ... in the course of their employment.") (emphasis added).

The plaintiffs also adopt the circuit court's conclusion that section 144's "deletion" of the "exclusive list of exceptions" for mandatory PIP—including workers compensation reduction and exclusion of felonious injuries—left no "exception to the PIP carrier's duty to pay," and therefore the exception to mandatory PIP permitting reduction of workers' compensation benefits is now mandatory coverage. (*See* Appellee Br. 7; R. p. 5.) However, they do not

¹ The plaintiffs argue "the legislative intent of [section 144] was to benefit the injured party, even if that benefit to the injured party resulted in 'double recovery.'" (Appellee Br. 16.) Actually, the intent was to eliminate mandatory PIP, as the title states. Additionally, it is difficult to see how an injured party would benefit from the change in law advocated by the plaintiffs. As explained in the public policy section of their brief, the plaintiffs contend that PIP should be paid to a party so that a "workers' compensation carrier [can] claim an equitable interest in the PIP proceeds paid to the injured worker." (Appellee Br. 22.) Thus, the injured party would be a conduit through which a PIP insurer would reimburse a workers' compensation carrier. Presumably, the practical result would be to ultimately increase the injured party's automobile insurance premiums, while reducing their employer's workers' compensation premiums—hardly a "benefit [to] the injured party."

explain why the "deletion" of the five other exceptions to mandatory PIP has not made those exceptions—injuries during the commission of felonies and intentional acts, for example—mandatory coverage under voluntary PIP. Rather than address this logical fallacy, the plaintiffs dismiss it as involving “red herrings.” (Appellee Br. 21.)

B. The plaintiffs do not explain why the plain language of the statute should be ignored.

The plaintiffs also do not explain why PIP carriers would be mandated to provide PIP coverage for workers-compensation injuries by a statute titled "Personal injury protection (PIP) coverage not mandated." The statute's first line reads, "There is no personal injury protection (PIP) coverage mandated under the automobile insurance laws of this State." S.C. Code Ann. 38-77-144 (emphasis added). As this Court has held, “South Carolina does not require *any* PIP coverage under its automobile insurance laws” *Smith v. Liberty Mutual Insurance Company*, 313 S.C. 236, 239, 437 S.E.2d 142, 144 (Ct. App. 1993) (emphasis added). The plaintiffs have chosen not to address these matters.

C. The plaintiffs' assertion that State Farm's position was rejected by the Legislature is wrong.

The plaintiffs incorrectly state that State Farm's position:

was rejected by the Legislature as not 'feasible' and not 'economical' even under the former law that allowed subrogation, assignment, and set off. See Maybank, et al., *The Law of Automobile Insurance in South Carolina*, V-16 (2002).

(Appellee Br. 13.) Actually, the passage the plaintiff cites discusses the Legislature's 1976 decision to *disallow* subrogation—not setoff—for mandatory PIP and has nothing to do with the matter at hand. In fact, the Legislature in 1976 specifically exempted PIP coverage for injuries that are, like the plaintiffs', covered by workers' compensation. Therefore, the opposite of what the plaintiffs state is true: State Farm's policy provision—stating PIP coverage is excess over

workers compensation coverage—was endorsed (not "rejected") by the Legislature in 1976, which presumably deemed it both feasible and economical.

II. The plaintiffs' attempts to distinguish or reconcile *Richardson* fail.

A. The fact that *Richardson* upheld an anti-stacking provision does not help the plaintiffs.

The plaintiffs devote one sentence to *stare decisis*: "Because, as noted above, *Richardson* does not address the issue before the Court, *stare decisis* is not relevant." Apparently, they contend *Richardson* is not dispositive because it concerned an anti-stacking provision and did not involve "setoff," as defined by the plaintiffs. However, the plaintiffs simultaneously rely on an expansive, manufactured definition of setoff that would include stacking.

The plaintiffs argue that setoff means, essentially, any reduction in potential insurance coverage by amounts paid by another insurer. The plaintiffs attempt to remove stacking from this definition by exempting "setoffs" made within the same insurance company. However, stacking is not limited to policies of a single insurer; insureds can stack multiple policies, either by the same or by different insurers. *See Nakatsu v. Encompass Indemnity Co.*, 390 S.C. 172, 700 S.E.2d 283 (2010) (holding that insured was entitled to stack UIM benefits from different insurance companies); *Nationwide Mut. Ins. Co. v. Howard*, 288 S.C. 5, 339 S.E.2d 501 (1985) (permitting stacking of multiple UM policies from two different insurance companies); *see also Busby v. State Farm Mut. Auto. Ins. Co.*, 280 S.C. 330, 331 n.1, 312 S.E.2d 716, 717 n.1 (Ct. App. 1984) ("The term 'stacking' as used here means the adding of insurance benefits provided by separate insurance coverages, whether by different or the same insurance companies or policies of insurance.")

Thus, the plaintiffs' attempt to characterize *Richardson* as involving stacking and not setoff fails. According to the plaintiffs' own definition, an anti-stacking provision—like an

excess policy provision or a reduction by a payment made by one's uncle or aunt—is a type of "setoff." Additionally, as explained in Appellant's Initial Brief, *Richardson's* determination that section 144's use of setoff referred only to a tortfeasor's liability was not dicta because it was necessary to the court's decision—in fact it was the central issue in the case. *See Nash v. Tindall Corp.*, 375 S.C. 36, 40-41, 650 S.E.2d 81, 83 (Ct. App. 2007) (defining "dicta" as a statement not essential to the court's decision). Thus, *Richardson's* holding was not *dicta*, concerns the same issue as this case, and should have been followed by the circuit court.

B. The plaintiffs' attempt to reconcile *Richardson* by redefining "tortfeasor" should be rejected.

Recognizing that *Richardson* must be dealt with, the plaintiffs argue that *Richardson's* use of the word tortfeasor should not be read too "literally."² According to the plaintiffs, when *Richardson* said that section 144's use of setoff was meant by the Legislature "to apply only to the tortfeasor," what the Court meant was "to apply only to" *any person or entity other than a person's own insurance company, regardless of whether a tort has been committed*.

What the plaintiffs stop just short of saying, but what they must mean, is that a person's own workers' compensation insurer is a "tortfeasor" under South Carolina law and therefore that *Richardson's* definition of setoff is no barrier to them.³ This despite the facts that (1) workers' compensation is first party insurance; (2) no tort need be committed for workers' compensation

² The plaintiff supports this argument by the fact that *Moultrie v. North River Ins. Co., Inc.*, 272 S.C. 53, 249 S.E.2d 158 (1978), involved a tortfeasor—who under the pre-1989 law was entitled to a PIP setoff—with liability insurance. Of course, the liability carrier was responsible to pay on behalf of the tortfeasor, and if the amount the tortfeasor was responsible to pay were reduced by a setoff in the tortfeasor's favor, it would reduce the amount the liability carrier had to pay. The plaintiffs do not explain how they extrapolate from these commonplace facts a new meaning for the word tortfeasor.

³ See p. 17, criticizing State Farm's assertion that "a workers' compensation insurance carrier is not a literal 'tortfeasor'"

to apply; and (3) in all of tort jurisprudence, the plaintiffs can find no support for the position that a victim's insurer is a tortfeasor—literally, figuratively, or in any other sense of the word. Additionally, if State Farm is interpreting *Richardson's* use of tortfeasor too literally, so too has this Court and the Fourth Circuit Court of Appeals. See *Rowzie v. Allstate Ins. Co.*, 556 F.3d 165, 168 (4th Cir. 2009) and *Mount v. Sea Pines*, 337 S.C. 355, 358, 523 S.E.2d 464, 465 (Ct. App. 1999).⁴

III. The plaintiffs' focus on fictionalized policy provisions is misdirected.

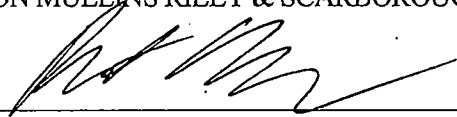
The plaintiffs argue that under *Richardson* “there would be no bar to the PIP carrier alleging a setoff based on payments made by the health insurance carrier, the liability insurance carrier, or, for that matter, the injured party’s Aunt Ethel and Uncle Fred who broke their piggy bank to pay for her hospital bill.” (Appellee Br. 20.) Respectfully, the “bar” to these positions is the insurance contract. The plaintiffs cite no policy provision supporting any of these theoretical “setoffs.”

As with other voluntary insurance coverage, the parties have freedom to contract with respect to that coverage, subject to the laws and public policy of the state. Thus, the plaintiffs’ ability to posit theoretical policy provisions is limited only by their imaginations. That they can.

⁴ The plaintiffs also mischaracterized *Richardson's* holding. They incorrectly paraphrased *Richardson* as stating a setoff “occurred when two separate insurance carriers have independent duties to pay benefits to the same injured person.” (Appellee Br. 14-15.) *Richardson* said no such thing; it held that setoff, as used in section 144, referred only to the reduction of a tortfeasor’s liability. See *Rowzie v. Allstate Ins. Co.*, 556 F.3d 165, 168 (4th Cir. 2009) (“The court in *Richardson* interpreted this provision ‘to apply only to the tortfeasor,’ and not to serve as a general prohibition against all reductions of automotive insurance based upon PIP/MedPay coverage.”).

invent hypothetical problems stemming from hypothetical policy provisions is not relevant to the matter before the Court.⁵

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May 24, 2016

⁵ It is noteworthy that despite the passage of nearly thirty years since mandatory PIP was eliminated, the plaintiffs cannot point to any real-world example to support their theoretical parade of horrors, which they claim "although absurd, would be the consequence of adopting State Farm's position." (Appellee Br. 19.)

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 2015-CP-42-1578
Appellate Case No. 2016-000177

RECEIVED

MAY 25 2016

SC Court of Appeals

WADETTE COTHRAN and CHRIS COTHRAN,..... Respondents,

v.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY and ROBERT TUCKER,
Defendants,

Of which State Farm Mutual Automobile Insurance
Company is the Appellant.

CERTIFICATE OF COUNSEL

The undersigned certified that this Reply Brief of Appellant complies with Rule 211(b),
SCACR.

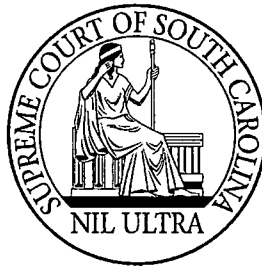
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May 24, 2016



**OPINIONS
OF
THE SUPREME COURT
AND
COURT OF APPEALS
OF
SOUTH CAROLINA**

**ADVANCE SHEET NO. 44
November 22, 2017
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Wadette Cothran and Chris Cothran, Respondents,

v.

State Farm Mutual Automobile Insurance Company and
Robert Tucker, Defendants,

Of which State Farm Mutual Automobile Insurance
Company is the Appellant.

Appellate Case No. 2016-000177

Appeal From Spartanburg County
L. Casey Manning, Circuit Court Judge

Opinion No. 5524
Heard September 8, 2017 – Filed November 22, 2017

REVERSED

Charles R. Norris and Robert W. Whelan, of Nelson
Mullins Riley & Scarborough LLP, of Charleston, for
Appellant.

Charles Logan Rollins, II, of The Hawkins Law Firm, of
Spartanburg, for Respondents.

THOMAS, J.: Appellant State Farm Mutual Automobile Insurance Company (State Farm) appeals the circuit court's grant of summary judgment to Respondents Wadette and Chris Cothran. The Cothrans brought this action against State Farm alleging breach of an insurance contract and breach of the duty of good faith and fair dealing. State Farm argues the circuit court erred by granting summary judgment in the Cothrans' favor because our supreme court's precedent was controlling and by holding public policy prohibited insurers offering personal injury protection (PIP) benefits from reducing those benefits by the amount an insured receives from a workers' compensation policy. We reverse.

FACTS/PROCEDURAL HISTORY

The Cothrans filed this action in April 2015, alleging bad faith refusal to pay insurance benefits and breach of contract. In August 2015, the parties entered a stipulation of facts. Wadette Cothran was injured in a motor vehicle accident and incurred medical expenses in excess of \$5,000. Wadette's employer's workers' compensation carrier paid her medical expenses in full. Wadette was also covered by her automobile policy issued by State Farm (the Policy), which provided PIP coverage with a limit of \$5,000. State Farm paid \$991 to the Cothrans for a portion of Wadette's lost wages but denied payment of the remaining PIP coverage because a provision (Excess Provision) in the Policy provided its PIP coverage was excess to any benefits the policyholder recovered under workers' compensation law. The Cothrans claimed the Excess Provision violated section 38-77-144 of the South Carolina Code (2015)¹ and they should recover the PIP benefits in addition to the workers' compensation benefits. Both parties moved for summary judgment and agreed there were no material facts in dispute. The sole matter before the circuit court was whether the Excess Provision violated section 38-77-144.

The Policy in its entirety is included in the record on appeal and was presented to the circuit court. The Excess Provision stated, "Any [PIP] Coverage provided by [the Policy] applies as excess over any benefits recovered under any workers' compensation law or any other similar law."

¹ See § 38-77-144 ("There is no [PIP] coverage mandated under the automobile insurance laws of this State. . . . If an insurer sells no-fault insurance coverage which provides [PIP], medical payment coverage, or economic loss coverage, the coverage shall not be assigned or subrogated and is not subject to a setoff.").

State Farm argued our supreme court essentially decided this issue in *Richardson*² by finding section 38-77-144's prohibition against setoffs applied only to a possible setoff for a tortfeasor's liability. It claimed it was entitled to summary judgment because section 38-77-144 did not apply to the situation in this case. Alternatively, the Cothrans argued the plain meaning of section 38-77-144 did not allow a setoff of PIP benefits. They also argued *Richardson* did not address this situation and was only meant to prevent a liability carrier from receiving a windfall. Finally, the Cothrans asserted allowing a setoff of PIP benefits under these circumstances would violate public policy because a workers' compensation carrier would be prevented from claiming an equitable interest in the PIP benefits.

The circuit court granted summary judgment in favor of the Cothrans. The circuit court found the Excess Provision constituted a setoff under South Carolina law. The court then found the Excess Provision violated the plain meaning of section 38-77-144. With regard to *Richardson*, the circuit court determined it "addresse[d] only stacking of coverage," rather than a setoff provision. Further, the circuit court found if State Farm's argument was correct "there would be no bar to the PIP carrier alleging a setoff based on payments made by the health insurance carrier, the liability insurance carrier, or, for that matter, the injured party's Aunt Ethel and Uncle Fred who broke their piggy bank to pay for her hospital bill." The circuit court believed an interpretation permitting such a finding would lead to an "absurd result." Finally, the circuit court declared public policy would not allow a setoff under these circumstances because it would prevent the workers' compensation carrier from claiming an equitable interest in the PIP benefits. Subsequently, the circuit court denied State Farm's motion to reconsider. This appeal followed.

ISSUES ON APPEAL

1. Did the circuit court err by finding section 38-77-144 invalidates the Excess Provision?
2. Did the circuit court err by finding public policy prohibits a setoff of PIP benefits because it prevents workers' compensation carriers from asserting an equitable lien against PIP benefits?

² *State Farm Mut. Auto. Ins. Co. v. Richardson*, 313 S.C. 58, 437 S.E.2d 43 (1993).

STANDARD OF REVIEW

The circuit court should grant a motion for summary judgment when the evidence shows "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. An appellate court "reviews the grant of a summary judgment motion under the same standard as the [circuit] court." *Montgomery v. CSX Transp., Inc.*, 376 S.C. 37, 47, 656 S.E.2d 20, 25 (2008). "When the purpose of the underlying dispute is to determine if coverage exists under an insurance policy, the action is one at law." *Nationwide Mut. Ins. Co. v. Rhoden*, 398 S.C. 393, 398, 728 S.E.2d 477, 479 (2012). "[W]hen an appeal involves stipulated or undisputed facts, an appellate court is free to review whether the [circuit] court properly applied the law to those facts." *Id.* at 398, 728 S.E.2d at 480 (quoting *In re Estate of Boynton*, 355 S.C. 299, 301, 584 S.E.2d 154, 155 (Ct. App. 2003)).

SECTION 38-77-144

State Farm argues the circuit court erred by granting summary judgment in the Cothrans' favor because our supreme court's ruling on section 38-77-144 in *Richardson* was controlling. Specifically, State Farm argues *Richardson* held section 38-77-144's prohibition against a setoff applied only to prevent a tortfeasor from receiving a setoff against an insured's PIP benefits. State Farm claims the circuit court erred by substituting its interpretation of legislative intent for our supreme court's interpretation. Also, State Farm asserts it was entitled to limit its liability by including the Excess Provision in the Policy.

The Cothrans argue the circuit court properly granted summary judgment in their favor based on the plain meaning rule because the text of section 38-77-144 is clear. The Cothrans claim "any policy provision that constitutes a [setoff] [of PIP benefits] must be invalid." The Cothrans contend *Richardson* does not apply to this case and addressed only whether an insurance policy may prohibit stacking of coverages.

We find the circuit court erred by finding section 38-77-144 invalidated the Excess Provision because the setoff prohibition in section 38-77-144 applies only to prevent tortfeasors from reducing their liability by the amount of PIP benefits

recovered by a claimant. "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." *Williams v. Gov't Emps. Ins. Co. (GEICO)*, 409 S.C. 586, 594, 762 S.E.2d 705, 709 (2014). "As a general rule, 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 some statutory inhibition." *Id.* at 598, 762 S.E.2d at 712. Although not absolute, parties to an insurance contract "are generally permitted to contract as they see fit." *Id.* However, "[s]tatutes governing an insurance contract are part of the contract as a matter of law, and to the extent a policy provision conflicts with an applicable statute, the provision is invalid." *Id.*

"There is no [PIP] coverage mandated under the automobile insurance laws of this State. . . . If an insurer sells no-fault insurance coverage which provides [PIP], medical payment coverage, or economic loss coverage, the coverage shall not be assigned or subrogated and is not subject to a setoff." S.C. Code Ann. § 38-77-144 (2015).

The primary rule of statutory construction is to ascertain and give effect to the intent of the General Assembly. In construing statutory language, the statute must be read as a whole, and sections which are a part of the same general statutory law must be construed together and each one given effect. Unless there is something in the statute requiring a different interpretation, the words used in a statute must be given their ordinary meaning. When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning.

Anderson v. S.C. Election Comm'n, 397 S.C. 551, 556–57, 725 S.E.2d 704, 706–07 (2012) (citations omitted).

In *Richardson*, our supreme court considered the meaning of a "setoff" as used in section 38-77-144.³ 313 S.C. at 60–61, 437 S.E.2d at 45. The insureds incurred

³ At the time our supreme court decided *Richardson*, section 38-77-144 was numbered section 38-77-145. However, the wording of the current section

medical expenses following a motor vehicle accident, and they filed a claim for PIP benefits under two policies with the same insurer. *Id.* at 59, 437 S.E.2d at 44. The insurer paid the PIP benefits for one policy but denied payment on the other policy based on a policy provision that prevented the insureds from stacking their policies' PIP benefits. *Id.* The insureds brought a declaratory judgment action claiming the insurer's refusal to pay both policies' PIP benefits amounted to a setoff in violation of section 38-77-144. *Id.* The insurer argued the disputed provision was an "anti-stacking" provision, rather than a setoff as that term is used in section 38-77-144. *Id.* at 60, 437 S.E.2d at 44. Our supreme court analyzed the legislative history of section 38-77-144 and agreed with the insurer. *Id.* at 60, 437 S.E.2d at 45. The court noted the statute, prior to 1989, "allowed a tortfeasor to reduce his liability to a claimant by the amount of PIP benefits received by the claimant." *Id.* (citing S.C. Code Ann. § 38-77-290(f) (1989)). The court explained the legislature changed automobile insurance law in 1989, repealed the tortfeasor's statutory setoff, and "expressly provided that PIP coverage was not subject to a [setoff]." *Id.*

Considering this legislative history, the *Richardson* court found the legislature "intended for the [setoff] prohibition in [section 38-77-144] to refer to the statute allowing reduction of a tortfeasor's liability[,] which was repealed" in 1989. *Id.* Thus, our supreme court found the setoff in section 38-77-144 "is the tortfeasor's reduction in liability formerly allowed" by statute. *Id.* The court concluded the legislature "intended the [setoff] prohibition of section 38-77-14[4] to apply *only* to the tortfeasor." *Id.* at 61, 437 S.E.2d at 45 (emphasis added). Thus, although *Richardson* involved an anti-stacking provision, its holding was not limited or restricted only to stacking related provisions.

Additionally, this court has relied on *Richardson* to find section 38-77-144 "prevented [a] tortfeasor from profiting in the case where the injured party received PIP benefits." *Mount v. Sea Pines Co.*, 337 S.C. 355, 358, 523 S.E.2d 464, 465 (Ct. App. 1999) (per curiam). "By enacting section 38-77-14[4], the legislature attempted to insure that the tortfeasor paid the full amount of damages suffered by the injured party." *Id.* Based on these findings, the *Mount* court determined the

38-77-144 is identical to the statute at the time of *Richardson* except for changing "must" to "shall" in one instance. *Compare* § 38-77-144 (noting PIP coverage "shall" not be assigned), *with* S.C. Code Ann. § 38-77-145 (Supp. 1992) (noting PIP coverage "must" not be assigned).

setoff prohibition in section 38-77-144 did not apply to prevent a tortfeasor from reducing a jury award in the plaintiff's favor by the amount the tortfeasor paid prior to trial toward the plaintiff's medical expenses. *Id.* Although the setoff at issue in *Mount* did not involve PIP benefits, the *Mount* court's interpretation and application of *Richardson* in a situation other than one involving an anti-stacking provision is instructive.

Further, the Fourth Circuit has considered whether the setoff prohibition in section 38-77-144 prohibits an insurer from reducing the amount of underinsured motorist (UIM) benefits by the amount of PIP benefits. *Rowzie v. Allstate Ins. Co.*, 556 F.3d 165, 166 (4th Cir. 2009). In *Rowzie*, the plaintiff was involved in a motor vehicle accident with an underinsured motorist, and she received PIP benefits from her insurer. *Id.* The plaintiff also sought to recover UIM benefits from her insurer, but the insurer, based on express language in the policy, reduced the UIM award by the amount of PIP benefits it paid the plaintiff. *Id.* The plaintiff claimed the setoff prohibition in section 38-77-144 prohibited the insurer from reducing UIM benefits based on the amount it paid in PIP benefits. *Id.* The *Rowzie* court relied on *Richardson* to determine the setoff prohibition in section 38-77-144 applied "'only to the tortfeasor,' and not to serve as a general prohibition against all reductions of automotive insurance based on upon PIP/MedPay coverage." *Id.* at 168. The court emphasized "the specific finding in *Richardson* that the [setoff] prohibition applies 'only to the tortfeasor.'" *Id.* at 169. Subsequently, the court declared, "As the court in *Richardson* made clear, the South Carolina legislature drafted [section] 38-77-144 with the intention that the setoff prohibition would 'apply only to the tortfeasor.'" *Id.*

Thus, despite the language of section 38-77-144 appearing to prohibit any setoff of PIP benefits, our supreme court declared the legislative intent of that section was to prohibit tortfeasors from reducing their liability by the amount of PIP benefits. *See Richardson*, 313 S.C. at 61, 437 S.E.2d at 45 (finding the legislature "intended the [setoff] prohibition of section 38-77-14[4] to apply *only* to the tortfeasor" (emphasis added)). As discussed above, this court and the Fourth Circuit have followed *Richardson*'s holding.

In this case, the circuit court erred by finding section 38-77-144 prohibited the parties from contracting to setoff PIP benefits by the amount the Cothrans received under workers' compensation law. As discussed above, the setoff prohibition in

section 38-77-144 applies only to prevent tortfeasors from reducing their liability by the amount a claimant receives in PIP benefits. Section 38-77-144 does not prohibit an insured and insurer from contracting to reduce PIP benefits by the amount the insured receives under workers' compensation law. Because the Excess Provision allows a setoff only for what the insured receives under workers' compensation law and does not involve any setoff for tortfeasor liability, section 38-77-144 does not prohibit or invalidate the Excess Provision. Therefore, the parties were entitled to include the Excess Provision in the Policy. *See Williams*, 409 S.C. at 598, 762 S.E.2d at 712 (noting parties to an insurance contract "are generally permitted to contract as they see fit").

With regard to the Cothrans' argument that State Farm's interpretation of section 38-77-144 would lead to an absurd result because it would allow an insurer to essentially reduce PIP benefits by any payment an insured received, we believe the concern is overstated. South Carolina courts refuse to enforce insurance policy exclusions that render the coverage "virtually meaningless." *See Isle of Palms Pest Control Co. v. Monticello Ins. Co.*, 319 S.C. 12, 19, 459 S.E.2d 318, 321 (Ct. App. 1994) (refusing to interpret an exclusion in a way that "would render the policy virtually meaningless, because it would exclude coverage for . . . the very risk contemplated by the parties"); *see also Bell v. Progressive Direct Ins. Co.*, 407 S.C. 565, 580, 757 S.E.2d 399, 407 (2014) (explaining courts may use the doctrine of reasonable expectations to interpret a policy if the terms "are ambiguous or conflicting, or if the policy contains a hidden trap or pitfall, or if the fine print takes away that which has been given by the large print"); *S.C. Farm Bureau Mut. Ins. Co. v. Kennedy*, 398 S.C. 604, 615, 730 S.E.2d 862, 867 (2012) (noting "the literal interpretation of policy language will be rejected whe[n] its application would lead to unreasonable results and the definitions as written would be so narrow as to make coverage merely 'illusory'"); *B.L.G. Enters., Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 537 n.5, 514 S.E.2d 327, 537 n.5 (1999) (recognizing an "illusory" exclusion is unenforceable). Thus, 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.

Accordingly, we find the circuit court erred by invalidating the Excess Provision based on section 38-77-144 because the setoff prohibition in that section only prohibits tortfeasors from reducing their liability to a claimant by the amount of

PIP benefits the claimant receives. Because section 38-77-144 does not prohibit the type of exclusion contained in the Excess Provision, the parties were free to contract as they wished. We reverse the circuit court's holding on this issue.

PUBLIC POLICY

State Farm argues the circuit court erred by invalidating the Excess Provision based on public policy. First, State Farm claims the issue of public policy was not before the circuit court and it erred by considering the issue. Second, State Farm contends PIP coverage is not required and our case law expressly disclaims any public policy regarding such coverage.

The Cothrans argue the circuit court correctly found public policy prohibits a setoff of PIP benefits by the amount of workers' compensation benefits received. The Cothrans claim the "public policy at issue . . . is the right of the employer's workers' compensation insurance carrier to reimbursement for the expenses it accrues as a result of a work-related injury." Specifically, the Cothrans argue public policy prohibits a setoff of PIP benefits because a workers' compensation carrier may have an equitable interest in the PIP benefits.

Here, the circuit court erred by finding public policy prohibits a policy exclusion that reduces the amount of PIP benefits by the amount the insured receives under workers' compensation law. "Whether a particular provision in an insurance policy violates the public policy of the state is a question of law that is reviewed [de novo] by an appellate court." *Williams*, 409 S.C. at 599, 762 S.E.2d at 712. "It is axiomatic that freedom of contract is subordinate to public policy, and agreements that are contrary to public policy are void." *Rhoden*, 398 S.C. at 398, 728 S.E.2d at 480 (internal quotation marks omitted) (brackets removed). However, "[w]e cannot read into an insurance contract, under the guise of public policy, provisions which are not required by law and which the parties thereto clearly and plainly have failed to include." *Smith v. Liberty Mut. Ins. Co.*, 313 S.C. 236, 239, 437 S.E.2d 142, 144 (Ct. App. 1993) (per curiam) (quoting *Barkley v. Int'l Mut. Ins. Co.*, 227 S.C. 38, 45, 86 S.E.2d 602, 605 (1955)).

Public policy considerations include not only what is expressed in state law, such as the constitution and statutes, and decisions of the courts, but also a

determination whether the agreement is capable of producing harm such that its enforcement would be contrary to the public interest or manifestly injurious to the public welfare.

Williams, 409 S.C. at 599, 762 S.E.2d at 712. "South Carolina does not require any PIP coverage under its automobile insurance laws and has no public policy regarding such coverage." *Smith*, 313 S.C. at 239, 437 S.E.2d at 144.

Public policy in this state does not prohibit a reduction of PIP benefits by the amount an insured receives in workers' compensation benefits. Our legislature has determined PIP coverage in this state is voluntary. *See* § 38-77-144 (stating "[t]here is no [PIP] coverage mandated under the automobile insurance laws of this State"). Because the legislature has deemed PIP coverage voluntary and not required for the public good, there is no prohibition on the parties' ability to limit the recovery of PIP benefits to certain situations. Thus, there is no public policy prohibition on the parties' ability to contract for a reduction in PIP benefits when the insured receives benefits from another source, e.g., under workers' compensation law. Furthermore, this type of exclusion, which reduces PIP benefits in only a very limited circumstance, does not produce harm "such that its enforcement would be contrary to the public interest or manifestly injurious to the public welfare." *See Williams*, 409 S.C. at 599, 762 S.E.2d at 712 ("Public policy considerations include . . . a determination whether the agreement is capable of producing harm such that its enforcement would be contrary to the public interest or manifestly injurious to the public welfare.").

With regard to the circuit court's specific finding that public policy prohibits the type of policy exclusion at issue in this case because it prevents the workers' compensation carrier from obtaining a lien on the PIP benefits, we disagree. As noted above, our legislature declared PIP coverage is not required. *See* § 38-77-144 ("There is no [PIP] coverage mandated under the automobile insurance laws of this [s]tate."). Because PIP coverage is voluntary, public policy does not require payment of PIP benefits so that a workers' compensation carrier may obtain a lien against those benefits. If our public policy was such that payment of PIP benefits was needed or desired for the benefit of workers' compensation carriers, the legislature could have mandated that PIP coverage be included with all automobile policies. Also, we find nothing in the relevant statutes to indicate the legislature

intended to favor workers' compensation carriers at the expense of automobile insurance carriers. Accordingly, we reverse the circuit court on this issue and find public policy does not prohibit a policy exclusion that reduces PIP benefits by the amount the insured recovers under workers' compensation law.

CONCLUSION

Based on the foregoing, we reverse the circuit court's grant of summary judgment in the Cothrans' favor because neither section 38-77-144 nor public policy prohibits the type of exclusion contained in the Excess Provision. Thus, the parties were free to include it in the Policy.

REVERSED.⁴

WILLIAMS and MCDONALD, JJ., concur.

⁴ We decide this case without oral argument pursuant to Rule 215, SCACR.

 **COPY**

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

DEC 08 2017
SC Court of Appeals

L. Casey Manning, Circuit Court Judge

Case No. 2015-CP-42-1578

Wadette Cothran and Chris Cothran,.....Respondents,

v.

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

RESPONDENTS' PETITION FOR REHEARING
AND MEMORANDUM IN SUPPORT

Pursuant to Rules 221 and 240, SCACR, respondents Wadette Cothran and Chris Cothran file this Petition for Rehearing with respect to this Court's decision in Wadette Cothran and Chris Cothran v. State Farm Mutual Automobile Insurance Company and Robert Tucker, 2016-000177 (S.Ct. App. filed Nov. 22, 2017).

Respondents respectfully resubmit all arguments from their briefs and, additionally, respectfully submit that the Court may have overlooked or misapprehended points in its decision:

First, State Farm Mut. Auto Ins. Co. v. Richardson, 313 S.C. 58, 437 S.E. 2d 43 (1993), upon which the Court relies in reaching its decision, does not address the application of the setoff provision under review in the case at bar but applies instead only to the stacking of multiple policies of personal injury protection ("PIP") coverage. The Richardson opinion makes it clear that the sole issue within the review of the court was the validity of PIP setoff, and therefore Richardson cannot be controlling authority with regard to the validity of a setoff provision. In its reliance on Rowzie v. Allstate Ins. Co., 556 F.3d 165, 166 (4th Cir. 2009), the Court overlooks that Rowzie's reasoning is of questionable validity because one case upon which it was based (State Farm Mut. Auto. Ins. Co. v. Calcutt, 530 S.E. 2d 896 (S.C. Ct. App. 2000)) was subsequently overturned by Sweetser v. S.C. Dept. of Ins. Reserve Fund, 703 SE.2d 509 (S.C. 2010).

Second, the Court does not define whether the policy provision within review is, by definition, a setoff and concomitantly, if the provision is a setoff, whether it thereby violates the plain meaning of the statutory setoff prohibition.

Third, by the Court's holding that Respondents' argument that allowing the "excess" provision to stand would lead to an absurd result are overstated, the Court fails to address the fact that State Farm could invoke the setoff provision to refuse payment in nearly any

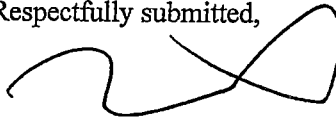
circumstance in which a claimant has received any money from any source, and the court thereby allows State Farm to take the position that literally any payment received by a claimant from any source falls within the exclusion of State Farm's policy, hence requiring any policyholder with a denied claim to litigate and meet the high burden of proving that the coverage she purchased was completely illusory.

Finally, the Court states that public policy does not warrant affirming the circuit court's ruling, but the Court does not address the fact that the public policy at issue is not the rights of the PIP carrier but the rights of the workers' compensation insurance carrier that is entitled to reimbursement for payments it has made if the Claimant has been made whole by payments from other sources.

CONCLUSION

Respondents' respect that the court has considered its arguments and denied them; Respondents nevertheless believe the Court should grant a rehearing and modify the opinion to reverse.

Respectfully submitted,



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Attorneys for Respondent

Dec. 5, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

RECEIVED

DEC 08 2017

L. Casey Manning, Circuit Court Judge

SC Court of Appeals

Case No. 2015-CP-42-1578

Wadette Cothran and Chris Cothran,.....Respondents,

v.

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

PROOF OF SERVICE

I do hereby certify, on this 5th day of December, 2017, that a copy of the foregoing Respondents' Petition for Rehearing and Memorandum in Support 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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The South Carolina Court of Appeals

Wadette Cothran and Chris Cothran, Respondents,

v.

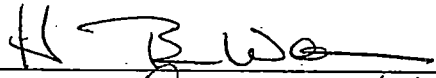
State Farm Mutual Automobile Insurance Company and
Robert Tucker, Defendants,

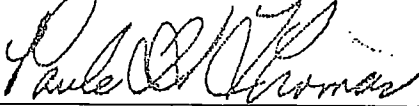
Of which State Farm Mutual Automobile Insurance
Company is the Appellant.

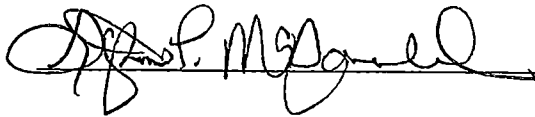
Appellate Case No. 2016-000177

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

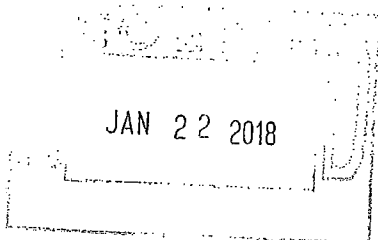
 J.

 J.

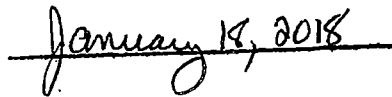
 J.

Columbia, South Carolina

cc:



FILED

A handwritten date "January 18, 2018" in cursive script, underlined with a single horizontal line.

Charles R. Norris, Esquire
Charles Logan Rollins, II, Esquire
Robert William Whelan, Esquire
The Honorable L. Casey Manning