

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

George C. James, Jr., Circuit Court Judge

Case No. 2014-CP-45-00644
(Appellate Case No. 2016-002050)

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SC Court of Appeals

Larry Brand,.....Appellant,

v.

Allstate Insurance Company,.....Respondent.

RETURN TO PETITION FOR REHEARING

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The Respondent Allstate Insurance Company respectfully submits this Return in opposition to the Appellant's Petition for Rehearing pursuant to Rule 240(e), SCACR.

STATEMENT OF THE CASE

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

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

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

Brand also filed a personal injury action against the at-fault driver in the Court of Common Pleas for Williamsburg County. Brand's attorney served Westfield and Allstate as UIM carriers in that action. Progressive Insurance Company, which had liability coverage for the defendant driver, tendered its \$25,000 limits in exchange for a covenant not to execute. Later, at mediation, Brand settled with Westfield for \$450,000 of its \$1,000,000 in UIM

coverage. The resulting policy release left Allstate as the lone UIM carrier defending the case, which the trial court has stayed pending the result of the present action.

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

Both parties submitted memoranda on the legal issues, and the motion went before the Honorable George C. James, Jr. for a hearing on January 7, 2016. Judge James took Allstate's motion under advisement at the conclusion of the hearing. Several months later, on August 31, 2016, Judge James issued an Order that granted Allstate's motion in part and denied it in part. Brand filed a timely motion asking Judge James to reconsider his decision, but the judge denied that motion, and Brand appealed.

After the final briefs and Record on Appeal were filed, the Court notified the parties that it intended to decide the case without oral arguments pursuant to Rule 215, SCACR. On January 31, 2018, the Court issued a unanimous, unpublished opinion (number 2018-UP-050) in which it affirmed the trial court's decision in full. The Appellant filed and served the current Petition for Rehearing on February 13, 2018.

STANDARD OF REVIEW

Under Rule 221(a), SCACR, a party seeking rehearing of an appellate court's decision must demonstrate "with particularity the points supposed to have been overlooked or misapprehended by the court."

ARGUMENT

I. The Court did not misapprehend or overlook any point regarding the state of the law in South Carolina law following the Sweetser decision.

Brand's first argument in the rehearing petition is that the Court erred in affirming the trial court's decision allowing Allstate to offset employee-purchased UIM coverage with worker's compensation benefits.¹ As he has done throughout this case, Brand attempts to support this argument by relying on a claim that the Supreme Court's decision in *Sweetser v. S.C. Dept. of Ins. Reserve Fund*² completely overruled a provision decision by this Court allowing such a setoff.³

Brand's argument does not identify any point that the Court is supposed to have overlooked or misapprehended. The parties' appellate briefs contained extensive discussion of this issue, and the Court clearly ruled on it. Indeed, Brand acknowledges the Court's ruling by citing the portion of the opinion in which the Court stated that *Calcutt* was "overruled on other grounds" by *Sweetser* (emphasis added). This was an unambiguous decision that the specific legal conclusion from *Calcutt* quoted by the Court remains good law despite *Sweetser*. Thus, the

¹ Here, it is important to note that Allstate relies primarily on a "reduction in damages recoverable provision," rather than a set-off provision. Unlike a true setoff provision, the "reduction in damages recoverable" language does not reduce any of the UIM coverage provided to an insured. The provision in Allstate's policy merely establishes when the UIM coverage is triggered. If an insured has damages that exceed the sum of all recoveries made under the other types of policies and benefits identified in the provision, then the full UIM limits are available.

² 390 S.C. 632, 702 S.E.2d 509 (2010)

³ *State Farm Mut. Auto. Ins. Co. v. Calcutt*, 340 S.C. 231, 530 S.E.2d 896 (Ct. App. 2000)

only reasonable inference to draw is that the Court considered all the arguments presented in the briefs and sided with Allstate's position. Brand obviously disagrees with the Court's decision, but that disagreement, without more, does not provide the basis for granting a rehearing.

Brand further argues that the Court's decision renders meaningless section 38-77-220 of the South Carolina Code. This assertion is without merit because that statute continues to serve the function the Supreme Court recognized in *Sweetser*. Section 38-77-220 specifically authorizes setoffs for UM coverage in employer-purchased policies, even if that setoff reduces the amount of available UM coverage below the statutory minimum. The statute continues to serve that purpose even after this Court's decision because the issue in the present case has nothing to do with §38-77-220. This case does not involve employer-purchased UM coverage; it involves employee-purchased UIM coverage. Thus, the statute continues to govern one type of situation, while *Calcutt* remains good law for another.

As fully discussed in the Final Respondent's Brief, the purpose of the Supreme Court's footnote in *Sweetser* is merely to ward off any future arguments that *Calcutt* could affect the Court's interpretation of §38-77-220 in any way. This is why the Supreme Court phrased the footnote the way it did.⁴ The conditional nature of the footnote ("To the extent [*Calcutt*] conflicts...") demonstrates that the Court viewed *Calcutt* and §38-77-220 as different authorities for different situations. The footnote, therefore, served only as a preemptive strike against any parties who might argue otherwise in the future. Otherwise, the Court would have simply overruled *Calcutt in toto* without any conditional or qualifying language. The fact that the

⁴ The footnote states: "To the extent *State Farm Mut. Auto. Ins. Co. v. Calcutt*, 340 S.C. 231, 530 S.E.2d 898 (Ct. App. 2000) conflicts with this interpretation, it is overruled." (emphasis added).

Supreme Court chose to make the overruling condition and limited is significant for purposes of the present case, and this Court's decision properly recognized that point.

Section 38-77-220 remains in full force and effect, and it continues to serve the specific purpose the Supreme Court recognized in *Sweetser*.⁵ This Court's decision in the current case does nothing to change that, and it certainly does not render the statute meaningless. Rather, the Court's decision acknowledges that the statute does not have any impact on the type of situation presented by this case. Brand's arguments to the contrary are incorrect, and the Court should deny his petition.

II. The Court correctly concluded that Allstate's policy does not violate any law or public policy of South Carolina.

Brand next argues that allowing Allstate to offset the full amounts of worker's compensation benefits, liability coverage and employer-purchased UIM coverage violates South Carolina law. The primary problem with this argument is that relies on the same premise as Brand's first issue – i.e. that *Sweetser* overruled *Calcutt* in its entirety and that S.C. Code §38-77-220 is the only means through which a UIM carrier can have a legal right to setoff. This is the “South Carolina law” that Brand claims Allstate's policy violates. Consequently, the two issues raised in the petition are inextricably linked. If *Sweetser* did not overrule the relevant portion of *Calcutt*, as this Court correctly concluded, then the “South Carolina law” upon which Brand bases his argument does not even exist. Thus, because Brand is incorrect about the impact of *Sweetser*, he cannot possibly be right in his second argument, either.

Brand also errs in his assertion that this Court's decision violates the purpose of UIM coverage by creating a “coverage gap” for any damages he sustained between \$25,000.01 and

⁵ This is not necessarily the only purpose the statute serves, but even just this one purpose is sufficient to defeat Brand's claim that the Court's decision makes the statute meaningless.

\$354,750.75. This Court has already rejected Brand's arguments on this issue, which were fully briefed by both parties, and that decision was correct for the following reasons.

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

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

Here, Brand is absolutely seeking to obtain a double recovery through Allstate's UIM coverage. He has already received a total of \$829,750.75 as agreed upon compensation for his

damages. As a result, Brand cannot credibly argue that he was uncompensated for any amount between the liability coverage and Westfield's post-setoff UIM coverage. The money that filled in that "coverage gap" might have been worker's compensation benefits, but it was money nonetheless. If nothing else, those benefits compensated Brand for his lost wages and medical bills. The large settlement from Westfield then compensated him for any other damages. Yet, Brand now seeks to have Allstate pay him for those other damages a second time. This is undeniably a demand for a double recovery, which violates South Carolina public policy.

It is important to recall that Brand, through his "coverage gap" argument, seeks a judgment requiring Allstate to pay its UIM policy limits now – i.e. before obtaining any kind of excess verdict in the underlying tort case. This request is what constitutes a demand for a double recovery. The same concerns do not apply under the trial court's order, which requires Brand to get a verdict in excess of \$1,025,000 before reaching Allstate's coverage. If Brand were to achieve that result, he would not be getting a double recovery because his damages would exceed the amounts of the underlying coverages and benefits. In that event, Brand would be entitled to recover under Allstate's UIM policy. Unless and until an excess verdict happens, however, Brand is only asking Allstate to compensate him a second time for damages that other coverages have already satisfied. Stated another way, Brand wants to be paid as if he had received an excess verdict, without actually having to try the case and obtain one. The Court's decision correctly prevents that unfair result.

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

If the insured person was in, or getting into or out of a vehicle which is insured for this coverage under another policy, coverage under this policy will be excess. This means that when the insured person is legally entitled to recover damages in excess of the other

policy limit, we will pay only the amount by which the damages exceed the limit of liability of that policy up to the limit of liability on this policy.

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

At a minimum, this policy language entitles Allstate to receive credit for Westfield's UIM limits. Even if Allstate's "reduction in damages recoverable" provision were not enforced, the language quoted above would still prevent any recovery of Allstate's UIM coverage unless Brand had a judgment in excess of the primary UIM limits. The trial court determined Westfield's UIM limits (after the worker's compensation setoff) to be \$645, 249.25. Brand only recovered \$450,000 of that amount through his settlement with Westfield, but Allstate gets credit for the full coverage amount. *See Cobb v. Benjamin*, 325 S.C. 573, 482 S.E.2d 589 (Ct. App. 1997). Allstate also receives credit for the at-fault driver's full liability limits of \$25,000. This means Allstate is entitled to a credit of \$670,249.25 even if the policy did not have a damages reduction provision.

Yet, this lower threshold amount would not be the correct result in this case. Allstate's policy does contain the "reduction in damages recoverable" provision, and as discussed in the Final Respondent's Brief, that provision comports with South Carolina law and public policy.


Thus, a reduction based on the worker's compensation benefits (as well as the limits of liability coverage and primary UIM coverage) is both proper and mandatory under the plainly worded language of Allstate's policy. For this reason, this Court correctly affirmed the decision that the true threshold amount for purposes of Allstate's UIM coverage is \$1,025,000.

The trial court's decision did not create any situation that violates South Carolina law. To the contrary, the trial court correctly applied South Carolina law to the facts of this case and the unambiguous terms of Allstate's policy. This Court was right to affirm that decision, and nothing in the Court's opinion leads to a result that violates the law or public policy of South Carolina. For that reason, Brand's second argument fails, and the petition should be denied.

CONCLUSION

Brand has not demonstrated any specific points that this Court overlooked or misapprehended in reaching its decision to affirm the trial court's rulings. The Court fully considered all the arguments and authorities, and Brand has not shown any basis for disturbing the Court's ultimate decision. Therefore, the Court should deny Brand's petition and allow that decision to stand.

Respectfully submitted,



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February 22, 2018

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PROOF OF SERVICE

The undersigned, an attorney in this matter for the Respondent, certifies that I have this 22nd day of February, 2018, served a copy of the **Return to Petition for Rehearing** upon counsel for the Appellant by causing it to be deposited in the United States mail with sufficient postage attached, addressed to: Patrick J. McLaughlin; Wukela Law Firm; P.O. Box 13057; Florence, SC 29504-3057.

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February 22, 2018

Via Hand Delivery

The Hon. Jenny Abbott Kitchings
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FEB 22 2018

SC Court of Appeals

Re: Larry Brand v. Allstate Insurance Company
Appellate Case No. 2016-002050
Our File No. 4313.514

Dear Ms. Kitchings:

Enclosed are the following materials: (1) the original and seven copies of the Return to Petition for Rehearing; and (2) the original and one copy of the Proof of Service. Please file the originals and necessary copies and return the extra stamped copies to our courier.

Sincerely,

TURNER PADGET GRAHAM & LANEY P.A.



R. Hawthorne Barrett

RHB
Enclosures

cc: Patrick J. McLaughlin, Esq.