THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

George C. James, Jr., Circuit Court Judge

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S.C. SUPREME COURT

Appellate Case No. 2018-000717

Larry Brand,.....Petitioner,

v.

Allstate Insurance Company,.....Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

R. Hawthorne Barrett
Turner Padget Graham & Laney, P.A.
P.O. Box 1473
Columbia, SC 29202
(803) 227-4219
tbarrett@turnerpadget.com

John S. Wilkerson
Turner Padget Graham & Laney, P.A.
P.O. Box 22129
Charleston, SC 29413
(843) 576-2801
jwilkerson@turnerpadget.com

Attorneys for the Respondent

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The Respondent Allstate Insurance Company respectfully submits this Return in opposition to Petitioner Larry Brand's Petition for Writ of Certiorari pursuant to Rule 242(f), 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 Petitioner Larry Brand ("Brand") was driving a truck owned by Evergreen Turf Corporation ("Evergreen"). Brand worked for Evergreen and was engaged in work-related activities 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, which resulted in claimed injuries to Brand.

Several different insurance companies had 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 issued by 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 sum 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 against its insured. 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 commenced 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 he denied that motion, and Brand appealed.

After the final briefs and Record on Appeal were filed, the Court of Appeals 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 circuit court's decision in full. Brand filed and served a Petition for Rehearing on February 13, 2018. The Court of Appeals denied that petition in an order filed on March 22, 2018.

ARGUMENT

I. The Court of Appeals' decision does not warrant review by this Court under the standards set forth in Rule 242, SCACR.

According to the South Carolina Appellate Court Rules, "[a] writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." Rule 242(b), SCACR (emphasis added). The rule goes on to list five situations in which the granting of a writ of certiorari usually occurs. Those situations include cases where: (1) there are novel questions of law; (2) there is a dissent in the decision of the Court of Appeals; (3) the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court; (4) substantial constitutional issues are directly involved; and (5) a federal question is included, and the Court of Appeals' decision conflicts with a decision of the United States Supreme Court. Rule 242(b), SCACR. *See also* Toal, et al., *Appellate Practice in South Carolina* (2nd Ed.) at 276. The Respondent submits that the present case does not fall into any of those categories, and no "special and important" reason exists for the Court to review the Court of Appeals' decision. Therefore, the Court should deny the petition.

Four of the factors listed in Rule 242(b) are facially inapplicable and do not require extensive discussion. There is no novel issue of law, there was no dissent in the Court of Appeals, and the case does not involve any constitutional issues or federal questions. Brand has not argued otherwise to this point. Thus, subsections (1), (2), (4), and (5) of Rule 242(b) are not at issue here.

Brand appears to contend that the present case satisfies subsection (3) of the rule ("the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court").

Brand relies on a belief that this Court's decision in *Sweetser v. S.C. Dept. of Ins. Reserve Fund*,[1] overruled the case on which the circuit court and the Court of Appeals based their decision (*State Farm Mut. Auto. Ins. Co. v. Calcutt*, 340 S.C. 231, 530 S.E.2d 896 (Ct. App. 2000)). As explained below, however, that assertion is inaccurate. The Court of Appeals' reading of the single footnote of *Sweetser* that could even potentially relate to this situation is correct, and it harmonizes the two cases. Under the Court of Appeals' proper interpretation of *Sweetser*, no conflict exists between the present case and *Sweetser* or any other decision by this Court. Therefore, subsection (3) of Rule 242(b) is also inapplicable.

Granted, the elements listed in Rule 242(b) are not the exclusive bases for granting a writ of certiorari, but no other reasons exist for this Court to review the Court of Appeals' decision. The Court of Appeals did not change or make any new law when it decided this case. An examination of all the applicable statutes and case law makes that clear, but this point finds further support in the form of the Court of Appeals' decision. The Court issued its decision as an unpublished, per curiam opinion. Certainly the Court would have released a detailed, published opinion if its decision constituted some shift in South Carolina law.

Furthermore, as discussed below, the present case does not call on this Court (or any court) to address some new issue on which South Carolina's bench and bar need guidance. Existing precedent already answers the questions posed in this case, as the Court of Appeals properly recognized when it followed the precedent in its decision.

This case does not involve the kinds of special circumstances that would warrant, let alone necessitate, review by this Court. Therefore, the Court should deny the petition and allow the Court of Appeals' unpublished decision to stand.

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[1] 390 S.C. 632, 702 S.E.2d 509 (2010)

II. The Court of Appeals properly concluded that the trial court's ruling followed South Carolina law and did not contradict *Sweetser*.

Brand first argues that the Court of Appeals erred in affirming the trial court's decision allowing Allstate to offset employee-purchased UIM coverage with worker's compensation benefits.[2] As he has done throughout this case, Brand attempts to support this argument by relying on a claim that this Court's decision in *Sweetser v. S.C. Dept. of Ins. Reserve Fund*[3] completely overruled a previous Court of Appeals decision allowing such a setoff.[4] That argument is erroneous, as the Court of Appeals recognized.

In making his argument, Brand points to a line of cases that began with *Ferguson v. State Farm Mut. Auto. Ins. Co.*, 261 S.C. 96, 198 S.E.2d 522 (1973). There, this Court held that an offset provision for worker's compensation benefits was unenforceable when contained in a UM policy purchased by an employee.

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

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[2] 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. As the circuit court ruled, and the Court of Appeals affirmed, that statement remains true in the present case.

[3] 390 S.C. 632, 702 S.E.2d 509 (2010)

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

coverage at issue (mandatory UM vs. voluntary UIM), and (2) the party who purchased the policy (the employer vs. the employee). *Id.* at 219, 442 S.E.2d at 589.

The next case came six years after *Williamson*, when the Court of Appeals issued its decision in *State Farm Mut. Auto. Ins. Co. v. Calcutt*, 340 S.C. 231, 530 S.E.2d 896 (Ct. App. 2000). In *Calcutt*, the Court of Appeals held that a UIM carrier could lawfully enforce a setoff provision for worker's compensation benefits in an employee-purchased policy. The Court reached this conclusion after noting that such a provision does not violate any statutory provision or public policy of South Carolina.

For the statutory analysis, the Court of Appeals examined S.C. Code §38-77-30 (which defines "uninsured motor vehicle") and S.C. Code §38-77-160 (which "provides for UIM policies") and found that nothing in those statutes prohibited setoff provisions. 340 S.C. at 234-35, 530 S.E.2d at 897-98.[5] The lack of a statutory prohibition was the key factor in the Court's decision. Finding no statute that forbade setoff provisions, the Court concluded it was proper to apply the policy as written and entered into by the parties.

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

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

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

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

For its public policy analysis, the Court of Appeals contrasted this Court's decisions in *Ferguson* and *Williamson*. The Court noted that the former case invalidated the setoff provision because it involved mandatory uninsured motorist (UM) coverage, while the latter case upheld the setoff provision because it dealt with voluntary UIM coverage. Thus, the "linchpin" of *Ferguson*'s public policy rationale was the "mandatory nature of UM coverage." 340 S.C. at 235, 530 S.E.2d at 898. Since the policy at issue in *Calcutt* was not statutorily required, the same public policy concern did not apply. *Id.*

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

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

340 S.C. at 236, 530 S.E.2d at 898 (emphasis added). The holding in *Calcutt* is clear: Setoff provisions for worker's compensation benefits in all UIM policies are valid and enforceable under South Carolina law.

In an attempt to escape this conclusion, Brand relies upon a footnote in *Sweetser v. South Carolina Dept. of Ins. Reserve Fund*, 390 S.C. 632, 703 S.E.2d 509 (2010). The issue in *Sweetser* was the following:

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

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

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

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

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

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

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

First, the phrasing of the footnote supports this interpretation. Had this Court intended to overrule *Calcutt* completely, it could have used clear language to that effect. For example, the

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

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

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

not do that. Instead, the Court focused on situations covered by §38-77-220 and did not address setoff provisions in other scenarios that do not involve that statute.

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

Sweetser overruled *Calcutt* only to the extent the latter case could be construed as stating that §38-77-220 applies to non-employers. *Calcutt* never actually makes such a statement, but the Court apparently wanted to make sure no one could read that kind of statement into *Calcutt*. Taking that precautionary measure was the reason for the partial – and conditional – overruling of *Calcutt*, and that is all the footnote expresses. Any other reading of the footnote ignores the limiting phrase at its beginning and bestows a level of meaning that this Court did not intend.[6]

The purpose of the *Sweetser* footnote is merely to ward off any future arguments that *Calcutt* could affect the interpretation of §38-77-220 in any way. The conditional nature of the footnote ("To the extent [*Calcutt*] conflicts...") demonstrates the Court viewed *Calcutt* and §38-77-220 as different authorities for different situations. The footnote, therefore, served only as a

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[6] At least one court has recently interpreted *Sweetser* in this manner – i.e. that it only overruled *Calcutt* in one limited respect. *See Siron v. Allstate Fire & Cas. Ins. Co.*, 225 F. Supp. 3d 574, 579 (D.S.C. 2016) ("*Sweetser* overrules *Calcutt* only 'to the extent' it conflicts with the holding in *Sweetser* that S.C. Code §38-77-220 applies just to employers.").

preemptive strike against any parties who might argue otherwise in the future. Were this not true, the Court would have simply overruled *Calcutt in toto* without any conditional or qualifying language.

Brand further claims that the Court of Appeals' decision renders S.C. Code § 38-77-220 meaningless. This assertion is without merit because that statute continues to serve the function this 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 the Court of Appeals' 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.

The Court of Appeals did not ignore or attempt to change South Carolina law in this case. Rather, the Court applied the precedent that is truly on-point in this situation (i.e. *Calcutt*), and it recognized that *Sweetser* is not applicable here. Brand has failed to demonstrate any error in the Court of Appeals' decision, and therefore, his petition should be denied.

III. The Court of Appeals 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 the lower courts 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 the Court of Appeals' decision violates the purpose of UIM coverage by creating a "coverage gap" for any damages he sustained between $25,000.01 and $354,750.75. The Court of Appeals properly rejected Brand's arguments on this issue 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 established fact that Brand received $450,000 from Westfield's primary UIM policy. Despite having a substantial setoff, Westfield paid this large 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, 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 apparently 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 absolutely seeks 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 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 demands that 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 circuit court's affirmed 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 has received an excess verdict, without actually having to try the case and obtain one. The Court of Appeals' decision prevents that improper short cut.

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.

[Appendix, pp. 71-72 (emphasis added).] This passage 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.

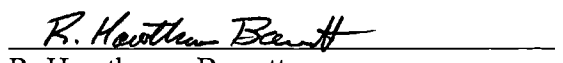
Yet, this lower threshold amount would not be the correct result in this case. Allstate's policy does contain the "reduction in damages recoverable" provision, which comports with South Carolina law and public policy. Thus, a reduction based on the worker's compensation benefits, as well as the limits of liability coverage and primary UIM coverage, is both proper and mandatory under the plainly worded language of Allstate's policy. For this reason, the Court of Appeals correctly affirmed the decision that the true threshold amount for purposes of Allstate's UIM coverage is $1,025,000.

The lower courts' decisions did not create any situation that violates South Carolina law. To the contrary, the lower courts correctly applied South Carolina law and the unambiguous terms of Allstate's policy to the facts of this case. Nothing in the Court of Appeals' opinion leads to a result that runs afoul of the law or the 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 reason why this case features the kinds of special circumstances that would warrant or necessitate review by this Court. In addition to that, Brand has failed to show any error in the Court of Appeals' decision. Therefore, this Court should deny Brand's petition and allow that decision to stand.

Respectfully submitted,



R. Hawthorne Barrett
Turner Padget Graham & Laney, P.A.
P.O. Box 1473
Columbia, SC 29202
(803) 227-4219
tbarrett@turnerpadget.com

John S. Wilkerson
Turner Padget Graham & Laney, P.A.
P.O. Box 22129
Charleston, SC 29413
(843) 576-2801
jwilkerson@turnerpadget.com

Attorneys for the Respondent

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PROOF OF SERVICE

The undersigned, an attorney in this matter for the Respondent, certifies that I have this **16th day of May, 2018**, served a copy of the **Return to Petition for Writ of Certiorari** upon counsel for the Petitioner 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.

R. Hawthorne Barrett

R. Hawthorne Barrett
Turner Padget Graham & Laney, P.A.
P.O. Box 1473
Columbia, SC 29202
(803) 227-4219
tbarrett@turnerpadget.com

John S. Wilkerson
Turner Padget Graham & Laney, P.A.
P.O. Box 22129
Charleston, SC 29413
(843) 576-2801
jwilkerson@turnerpadget.com

Attorneys for the Respondent

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