THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Opinion No. 5524 (S.C. Ct. App. filed Nov. 22, 2017)
Appellate Case No. 2018-000235

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

v.

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

BRIEF OF PETITIONERS

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STATEMENT OF ISSUES ON APPEAL

Whether the Court of Appeals erred in holding that State Farm could enforce policy language that would reduce the amount of available personal injury protection ("PIP") coverage by the amount of workers' compensation benefits Petitioner Wadette Cothran received when S.C. Code Ann. Section 38-77-144 states that PIP "shall not be assigned or subrogated and is not subject to a setoff."

STATEMENT OF THE CASE

The Complaint in this case was filed April 17, 2015 in the Spartanburg County Court of Common Pleas. Petitioners claimed State Farm Mutual Automobile Insurance Company ("State Farm") breached its insurance contract and duties of good faith and fair dealing by not paying to Petitioners the full amount of the State Farm personal injury protection ("PIP") policy when it was not contested that Petitioner Wadette Cothran's medical bills and lost wages exceeded the full amount of the State Farm PIP coverage available. State Farm contended that its policy made PIP benefits "excess" to workers' compensation benefits and therefore denied payment of $4,009 of the $5,000 PIP policy after paying $991 for some of Mrs. Cothran's lost wages. (App. p. 28-29).

On November 17, 2015, Judge L. Casey Manning granted Petitioners' Motion for Summary Judgment for their breach of contract claim and denied State Farm's Motion for Summary Judgment for Petitioners' breach of contract claim. (App. pp. 3-16). State Farm subsequently filed a Motion to Reconsider, which was denied by an order of January 26,

2016 without oral argument (App. p. 17). State Farm filed its Notice of Appeal on February 5, 2016. The Court of Appeals reversed the circuit court, without conducting oral argument, in its opinion filed on November 22, 2017 (App. pp. 212-222). The Court of Appeals denied rehearing in an order indicating it believed there was no basis for rehearing (App. p. 227).

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. (App. pp. 28-29). For the purposes of the legal determination, the stipulated facts are that Petitioner 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. Mrs. Cothran's personal State Farm automobile insurance policy provided $5,000.00 in PIP coverage. (App. p. 28). State Farm denied payment of medical expenses that had already been paid by Mrs. Cothran's employer's workers' compensation carrier based on its policy provision stating personal injury protection was "excess over any benefits recovered under any workers' compensation law or any other similar law." (App. p. 28).

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. (App. p. 29).

STANDARD OF REVIEW

Under South Carolina law, "[w]hen the purpose of the underlying dispute is to determine whether coverage exists under insurance policy, the action is one at law." *S.C.*

Farm Bureau Mut. Ins. Co. v. Kennedy, 398 S.C. 604, 610, 730, S.E.2d. 862, 864 (2012). (Citation omitted). Furthermore, an "appellate court may review application of legal doctrine to undisputed facts" without the "usual deference" given to lower courts. *J. K. Const., Inc. v. Western Carolina Regional Sewer Authority*, 336 S.C. 162, 166-67, 519 S.E.2d. 561, 564 (year). (Citations omitted).

ARGUMENT

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

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

I. The Court of Appeals Erred in Holding that Richardson Abrogated the Plain Meaning of Section 38-77-144.

A. Richardson is Inapplicable.

In *State Farm Mut. Auto. Ins. Co. v. Richardson*, 313 S.C. 58, 437 S.E.2d 43 (1993),

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

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

citations and quotations omitted).

To extrapolate from *Richardson*'s limited holding related to the single issue before the *Richardson* Court—stacking of non-mandatory coverage—to the broad theory that a PIP carrier can allege a setoff for any collateral recovery an insured receives is beyond the scope of the *Richardson* opinion. Such a holding also is not supported by the other precedent cited by the Court of Appeals.

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

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

The Court of Appeals supports its aforementioned conclusion in stating that, "although *Richardson* involved an anti-stacking provision, its holding was not limited or

restricted only to stacking related provisions." (App. p. 227). The Court's holding that the PIP statute prevents only a reduction of "tortfeasor" liability requires the unstated holding that the State Farm provision at issue does, in fact, constitute a set off; *i.e.*, it is only because *Richardson* contains the term "set off" that the Court of Appeals found that it was applicable to the instant case. The court's tacit holding that the policy provision at issue is, in fact, a set off is demonstrated by the primary case upon which its interpretation of *Richardson* rests: *Rowzie v. Allstate Ins. Co.*, 556 F.3d 165 (4th Cir. 2009). In *Rowzie*, a Fourth Circuit opinion, the insured's carrier paid its PIP policy limits. Subsequently, the same carrier alleged it was entitled to reduce its underinsured motorist ("UIM") payment to the extent that it had previously made PIP payments.

The Court of Appeals erred in relying on *Rowzie*'s interpretation of *Richardson* for at least two reasons.

First, in *Rowzie*, the carrier *had already paid its PIP limits*, and *Rowzie* permits a "set off" under the same policy's UIM provision. If both a UIM set off is permissible per *Rowzie* and a PIP set off is also permissible, State Farm gets a "double reduction." That is, State Farm may assign a UIM claims adjuster who will allege a UIM set off based on the existence of State Farm PIP, and it may simultaneously assign a PIP claims adjuster to allege a set off based on the existence of UIM. Thus, State Farm is able to reduce payments under *both* the UIM and PIP provisions of its insured's policy.

Second, the primary case upon which *Rowzie* relied for its reasoning has been

overruled. *Rowzie* held a UIM carrier could allege a set off against PIP benefits it had previously paid "[b]ecause [UIM] coverage is not mandatory," and this was predicated upon the decision of the Court of Appeals in *State Farm Mut. Auto. Ins. Co. v. Calcutt*, 340 S.C. 231, 530 S.E.2d 896 (Ct. App. 2000) and its distinction between voluntarily coverage and mandatory coverage. Although *Calcutt* did hold that a set off of any non-mandatory coverage (in *Calcutt*, UIM coverage) was permissible, this holding from *Calcutt* was expressly overturned by this Court in *Sweetser v. S.C. Dept. of Ins. Reserve Fund*, 390 S.C. 632, 703 S.E.2d 509, FN 4 (2010). *Sweetser* determined that the reference to "voluntary coverage is not to UIM coverage, but rather to the employer's voluntary decision to purchase bodily injury coverage" and held that the dispositive issue regarding whether a UIM carrier could claim a set off was whether the employer purchased the coverage (in which case it could allege a set off as allowed by S.C. Code Ann. § 38-77-220) or the employee purchased the coverage (in which case the UIM carrier could not allege a set off). *Sweetser* at 635, 510. This Court has, therefore, rightly overturned *Calcutt*'s "voluntary coverage" analysis. *Rowzie*'s holding was drawn from that overturned rule and is no longer valid.

And even if *Rowzie* did articulate the correct analysis, it must be noted that *Rowzie* dealt with a single insurance carrier limiting its payments based exclusively upon the terms of multiple coverages under the same insurance contract. That is, the insurer and insured agreed to cap Allstate's maximum exposure within the terms of the contract between Allstate and its insured. The insured could review the policy and, arguably, know the

maximum benefit she could receive under the terms of the policy. The policy did not allow Allstate to simply deny coverage pending some potential third party's payment. The only question in *Rowzie* was which Allstate "pocket" (*i.e.*, UIM or PIP) the payment made to the insured came from. There was no question that Allstate's insured was entitled to collect the entirety of the policy limits she purchased; the only question was determining the actual amount of the policy limits that had been purchased.

The case at bar is materially different. Here, State Farm alleges it can withhold payment of its PIP coverage altogether based on the potential liability of an entity that is not a party to State Farm's insurance contract with Ms. Cothran. State Farm concedes the amount of the policy limit ($5,000), but it alleges it may withhold payment of most of that coverage based on a set off it alleges for third party coverage. This reverses the procedure employed in *Rowzie*. In *Rowzie*, the PIP "pocket" of Allstate had already paid its limits, and the UIM "pocket" of Allstate alleged the set off under the theory that the policy limits of the policy it had sold its insured had an aggregate maximum limit that was constituted by the combination of UIM and PIP coverage. The Fourth Circuit analyzed the case as though the insured had recovered the full policy limits she had purchased and was attempting to force her carrier to pay her more money than the amount of coverage than she had elected to purchase and more money than the amount of her damages.

Here, it is conceded that Ms. Cothran has not collected the full PIP policy limits she purchased. The payment of those limits was denied based not on the amount of

damages she has sustained but based only on the existence of third party workers' compensation coverage—a source wholly independent of the State Farm's contractural relationship with Ms. Cothran. If *Rowzie* were still valid, following its holding would require PIP funds to be distributed first and then UIM funds would be set off; therefore, it would be State Farm, as PIP carrier, that would make the first payment, and State Farm, as UIM carrier, would subsequently allege the set off.

In addition to *Rowzie*, the Court of Appeals noted that *Mount v. Sea Pines,* 337 S.C. 355, 359, 523 S.E. 2d 464, 465 (Ct. App. 1999) was "instructive" to the extent it stood for the proposition that the "application" of *Richardson* outside of a stacking context was possible. In *Mount*, the plaintiff was injured and collected from the insurer of "property owned by Sea Pines [. . .]" *Id.* at 356,464. The issue in the case was whether the collateral source rule prevented the tortfeasor (i.e., the liability insurance carrier) from alleging a set off for benefits that had been paid under the no-fault coverage insuring the same property. Significantly, the insurance at issue was for "property." It was *not* automobile insurance—and hence the statute at issue in the case at bar was entirely inapplicable. The plaintiff did not allege that *Richardson* or the automobile PIP statute applied; instead, she merely "compare[d] her situation to that of a passenger injured in an automobile driven by its owner" as persuasive evidence that the collateral source rule should apply so as to prohibit set off. *Id.* at 357, 465. The court noted that the anti- set off provision "only applied to automobile insurance." *Id.* at 358, 465. The court further noted that the rationale for the

PIP statute and *Richardson* was that the statute "prevented the tortfeasor from profiting in the case where the injured party received PIP benefits." Accordingly, *Mount* cited *Richardson* for the proposition that one policy rationale behind the Legislature's reform of South Carolina PIP law was to prevent a tortfeasor from receiving a windfall because of the existence of PIP coverage.

Overlooked by the court, and more significant, in *Mount*, as in *Rowzie*, the injured party had already "received benefits" from the PIP policy. It was the liability carrier (i.e., the "tortfeasor," in the language of *Richardson)* that was receiving the set off. *Mount* did not allow the PIP carrier to allege a set off. *Mount* presupposes that, under any circumstance, the injured party would have already "received benefits" from the PIP carrier, and it would be a third party to the PIP Insurer— PIP Insured relationship that would allege a set off based on the prior PIP payment that had been made. In short, because the PIP statute applies only to automobile policies, the "tortfeasor setoff" still exists for policies insuring property, and the set off has always been alleged because the PIP carrier has made a payment—not by the PIP carrier because another entity may have a responsibility to make a payment. In sum, it is *because* a PIP carrier has made a payment that the set off exists.

II. Under Pre-Reform PIP Law, an Exclusive List of Exceptions to a PIP Carrier's Duty to Pay Existed, and the Purpose of the 1989 Legislative Changes that Eliminated Set Offs Was to Reform the Former Law to the Benefit of the Injured Claimant.

A. The "Excess" Provision of the State Farm Policy Is A Set Off.

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 set off. The form of coverage that is probably closest in kind to PIP coverage (i.e., another form of first party, automobile coverage) is UIM 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 this Court held in *Broome v. Watts*, 319 S.C. 337, 341, 461 S.E. 2d 46, 48 (1995) 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. This 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)." *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.

Moultrie noted, in fact, that the PIP carrier's assertion that it could claim credit for liability payment was a "set-off" that was invalid because the statute "only requires ***a set-off*** 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 insurer-insured relationship. *Moultrie* at 56, 159. (Emphasis added).

B. Allowable PIP Set Offs Have Historically Been Statutorily Denominated.

Under pre-reform PIP law, which was repealed by Act 148 of 1989, the former S.C. Code 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). In *Benat*, State Farm alleged it should receive a set off because the claimant had received wages from a collateral source, but *Benat* determined State Farm's contract provided "less coverage than required by law" because the then-current PIP statute did not specifically denominate a set off for wages paid by a "collateral source" to the PIP Insurer-PIP insured relationship. *Benat* at 133-34, 58. The court held that the State Farm policy at issue, therefore, must be reformed to provide coverage because then-current PIP law prohibited recovery from "both PIP and Workers' Compensation, but is silent as to other collateral sources" and because the court had "no legislative authority," it could not "vary a statutory scheme [. . .] no matter how logical the basis of the variance." (Citation omitted). As noted in *Richardson*, Act 148 of 1989 repealed mandatory PIP coverage and made it optional, and these "sweeping reforms

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

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 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 [. . .]." 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 in *Richardson*. 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, set off, 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, in the word of the current statute, "deleted" assignments, subrogation, and set offs, including any formerly permissible instance of subrogation, assignment, or set off, such as the acknowledged set off for workers' compensation benefits, that was found in "*exclusive list* of exceptions from the duty of a PIP insurer to pay benefits." *Benat*, 286 S.C. at 133, 333 S.E.2d at 58. Under South Carolina Law, "[i]t 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 pre-reform law makes it abundantly clear that the Legislature was aware of the workers' compensation exception to payment of PIP benefits under pre-reform law and, in the word of the *Richardson* Court, "deleted" that exception to payment along with all others when it enacted § 38-77-144, the PIP carrier's defense to paying benefits has likewise been "deleted."

C. The 1989 Reform in PIP Law Prioritizes Simplicity Over Concern For Double Recovery.

Moultrie, which arose under pre-reform PIP law, involved an injured party who received a settlement with the liability insurance carrier for the at-fault driver. That settlement included "payment of [Moultrie's] medical expenses" for which the liability carrier could have alleged the "tortfeasor" set off but failed to do so. 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). *Moultrie* held that the plain meaning of the statute was that "this section only requires a set-off 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.

In its historical definition, therefore, 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*, 337 S.C. at 359, 523 S.E.2d at 465. 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 was not

to shift the unjust benefit from the liability insurance carrier to the PIP carrier—to the detriment of the injured party.

Even if the concern for a "double recovery" had not been disregarded by the Legislature, the "economical," "administratively feasible" (*See The Law of Automobile Insurance In South Carolina*, above), and jurisprudentially consistent *locus* of that set off would be *after* payment of PIP benefits, when the same carrier was performing its damages analysis prior to making a UIM payment. If set off had not been entirely eliminated by statute, it would be at the UIM stage, as in *Rowzie*, that the set off could be equitably alleged because it is at that *locus* that the injured party's legally cognizable damages could be evaluated and a double recovery prevented.

D. The Court of Appeals Erred in Rejecting Petitioners' Concern that State Farm's Interpretation of the PIP statute Would Lead to An Absurd Result.

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

The Court of Appeals further found that the excess provision in Cothran's State Farm policy is valid and that it does not, therefore, violate the principle to which a PIP insured can appeal for redress of "illusory" PIP coverage. Accordingly, in applying the court's holding, any provision in any PIP policy that states that PIP coverage "applies as excess over any benefits recovered under any workers' compensation law or any similar law" is valid. Because "any similar law" is not defined in Cothran's State Farm policy, any policy that contains this undefined provision must also be valid. Under South Carolina workers' compensation law, workers' compensation "benefits" fall into two broad categories. First, the claimant is entitled to monetary benefits that consist of "temporary total disability benefits [. . .] from the date of injury through the date of maximum medical improvement ('MMI') and post-MMI benefits may be awarded either as a permanent total or partial disability, or as a percentage of impairment to a scheduled member." *Smith v. NCCI, Inc.* 369 S.C. 236, 255, 631 S.E.2d 268, 278 (Ct. App. 2006) (Internal citations and quotations omitted). Second, the workers' compensation claimant receives "medical benefits" for up to ten weeks—or longer if such additional care would "tend to lessen the period of disability." *Id.* (Internal citations and quotations omitted).

Because what is "similar" to workers' compensation benefits is not defined in the State Farm policy, it is proper to look to the ordinary definition of "similar." Merriam-Webster defines "similar" as "having characteristics in common." "*Similar.*" Merriam-Webster. 2018. https://www.merriam-webster.com/dictionary/similar. (last visited Feb 5,

2018). Accordingly, under any policy with the language of Cothran's State Farm policy, which the Court of Appeals found lawful, State Farm can allege that any "benefits" that fall under any law that "has characteristics in common" with workers' compensation benefits is subject to its set off. Therefore, any "benefits" (not merely insurance) that provide 1) money for an automobile-related injury, or any "benefits" that provide 2) medical care for an automobile-related injury would likely fall under any standard definition of "similar" under the State Farm policy. Consequently, State Farm may lawfully allege a PIP set off for any money Cothran received from any source—health insurance (which is similar because it pays for medical care), disability insurance (which is similar because it pays for lost wages), or even Mrs. Cothran's aunt and uncle who broke the piggy bank to give Mrs. Cothran funds to help her recovery—and could thereby fall under either category of "benefits" depending on whether they gave the money directly to her or to her medical providers.

There is nothing in the Court of Appeals' decision that would prevent State Farm from considering South Carolina automobile liability insurance law "similar" to workers' compensation law, as it requires payment for damages that include medical care and lost wages. Therefore, State Farm can allege that it is entitled to a set off for any PIP insured who may be able to make a claim for automobile liability limits from a driver who has liability insurance. For that matter, the uninsured motorist ("UM") statute requires UM coverage "to pay the insured all sums which he is legally entitled to recover as damages

from the owner or operator of an uninsured motor vehicle." S.C. Code. Ann. Section 38-77-150. Since UM coverage requires payment for the same damages as South Carolina liability law, State Farm can allege a set off of PIP for any UM coverage its insured receives from any UM carrier. Because the Financial Responsibility Act requires UM coverage be provided for any automobile policy sold, any PIP insured who is not at fault for an accident will be eligible to collect either liability or UM coverage—and therefore the PIP carrier will always be able to allege a set off to avoid payment when its insured is not at fault for an automobile accident. In sum, there is simply nothing in the State Farm policy or the Court of Appeals' ratification of it that would prevent the PIP carrier from alleging any set off under any definition of "similar" it wished to employ in response to any claim made.

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

Nevertheless, it is not necessary to look to what "similar" signifies in the Policy. The most illustrative consequence of the Court of Appeals' ruling is the application of its interpretation of the "workers' compensation" prong of this set off, or "excess" provision.

Nothing in the Court of Appeals' opinion would require State Farm to have paid the lost wages that it has already paid to Wadette Cothran in this case. Under the "workers' compensation" prong of the provision at issue, it is stipulated that Wadette Cothran's medical bills exceed $5,000.00. Because payments for medical care constitute workers' compensation "benefits" under South Carolina law, State Farm has the right to allege that Cothran has already received workers' compensation benefits in excess of the policy limits of the PIP policy. If Cothran's workers' compensation carrier paid for her initial emergency room visit, but later denied her claim, for example, on the basis that she was an independent contractor instead of an employee, she could be entirely without a way to pay for either medical care or lost wages. Nevertheless, if the amount of that initial emergency room payment exceeded $5,000.00; State Farm could invoke its workers' compensation "excess" provision to wholly deny her any of the coverage she purchased.

To put the case bluntly, based on the Court of Appeals' holding, State Farm was in error for paying the $991.00 it admitted it owed Cothran prior to the Court of Appeals' opinion.

In sum, the Court of Appeals does not address how the insured could invoke the claim that her coverage was "illusory." Because it affirmed the language in State Farm's policy, any policy with identical language must be valid. The language in State Farm's policy would allow it to avoid PIP liability under virtually any circumstance unless there was literally no source other than PIP that provided for any medical care or money.

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

Public policy requires giving the PIP statute its plain meaning. The strongest argument in favor of the public policy argument is that which the Court of Appeals cites in holding against the public policy argument; namely, that "South Carolina does not require any PIP coverage under its automobile insurance law and has no public policy regarding such coverage." (App. p. 221) (quoting *Smith v. Liberty Mut. Ins. Co.*, 313 S.C. 236, 239, 437 S.E.2d 142,144 (1993)). It is *because no public policy for PIP coverage exists* that the policy argument in favor of disallowing a PIP set off for workers' compensation benefits is so compelling.

The Workers' Compensation Act allows a workers' compensation carrier to seek subrogation in proportion to the extent to which the injured person has been made whole by the recovery she has made from other sources under the "total cognizable damages" formula found at S.C. Code Ann. § 42-1-560. To the extent a claimant recovers money from other sources, the workers' compensation carrier is entitled to assert a greater subrogation interest in the tort recovery the injured person receives from the tortfeasor. Among the "policy issues surrounding subrogation in a workers' compensation setting" is "the employer and carrier coming out even by being reimbursed for their compensation expenditure." *Breeden v. TCW, Inc./Tennessee Exp.*, 355 S.C. 112, 118, 584 S.E. 2d 379, 382 (2003). In short, the greater the recovery to the injured party, the more likely it is for the workers' compensation carrier to assert a greater subrogation interest and "come out

even."

There is no similar subrogation statute that applies to PIP coverage. The PIP statute describes PIP benefits as being no-fault coverage for personal injury, medical payments, or economic loss and that "the coverage shall not be assigned or subrogated and is not subject to a setoff." If a workers' compensation carrier can invoke an enabling statute and receive only a proportional set off, it cannot consistently follow that a PIP carrier, which has no enabling statute by which it alleges set off, could receive a complete set off.

In the end, the decision of the Court of Appeals almost certainly renders PIP coverage illusory when the PIP insured is not at fault for an accident because, if she is operating a motor vehicle and is insured, there must be either liability or uninsured motorist coverage for her to collect—and for her PIP carrier to allege a setoff against. Under the Court of Appeals' ruling, an insurance company can use any funds the plaintiff recovers from any source to reduce the PIP benefits payable—regardless of whether the other funds are sufficient to make the insured whole.

In addition, PIP coverage would be useless even when the insured is at fault if she could recover workers' compensation benefits for her injuries—or, as noted above, health insurance or short term or long-term disability insurance. Therefore, the single instance in which a PIP insured could collect under a PIP policy is when she is at fault and can prove that she does not have any health, disability, workers' compensation, or any other insurance policy that pays for any wages or medical benefits in the event of an injury. Under the

Patient Protection and Affordable Care Act, 42 U.S.C.A Section 18001 et seq. (2010), an individual is required to be "covered under minimum essential coverage [. . .]." 26 U.S.C.A. § 5000A. Therefore, for a person who abides by the law and has health insurance as she is required to, it would be impossible ever to recover PIP benefits.

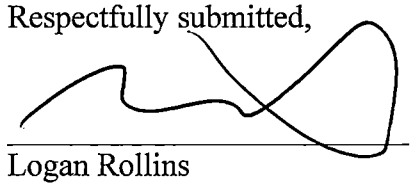
In the event of a work-related car accident for which the insured was at fault, it is particularly significant that both workers' compensation and PIP coverage are "no-fault" schemes whose interplay inherently limits overcompensating the injured claimant. The purpose of workers' compensation benefits is merely "to keep him from destitution [. . .] [It] is not designed to compensate the employee for his injury, but merely to provide him with the bare minimum of income and medical care to keep him from being a burden to others." *Wigfall v. Tideland Utilities*, 354 S.C. 100, 116, 580 S.E.2d 100, 116, 108 (2003) (Internal citations omitted). Because the amount of most PIP policies is minimal (such as the $5,000 at issue here), even if the full PIP limits were paid to the average PIP insured, she still would not begin to be made whole by receiving such a payment in conjunction with workers' compensation benefits. Under the Court of Appeals' decision, the PIP carrier has no obligation to make any payment once the workers' compensation carrier has expended funds up to the PIP limits, which means that the person who purchased PIP coverage to assist in paying his bills in the event he had to subsist on the "bare minimum" workers' compensation provides will not be able to supplement that income with the PIP benefits for which he pays premiums. The decision of the Court of Appeals has rendered

PIP coverage in South Carolina a virtually meaningless payor of last resort.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Court of Appeals.

Respectfully submitted,



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May 23, 2018

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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S.C. SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 2015-CP-42-1578

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

v.

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

PROOF OF SERVICE

I do hereby certify, on this 25th day of May, 2018, that a copy of the foregoing Brief of Petitioners and Appendix 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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