THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 2015-CP-42-1578
Appellate Case No. 2018-000235

WADETTE COTHRAN and CHRIS COTHRAN,.....Petitioners

v.

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

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

Reply Brief

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I. The plain meaning rule requires reversing the Court of Appeals.

Under the plain meaning rule,

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

Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 580 (2000) (Internal citations and quotations omitted). The PIP statute says PIP is not subject to a set off. This language is clear and does not require further interpretation.

To try and limit this plain language, Respondent points to a Conference Committee report and argues PIP benefits "may not be setoff [from the tortfeasor's liability coverage]." (Resp. Br. at 3). Even if Respondent's assertion that the best evidence of Legislative intent is Committee Report language that was not passed by the legislature and was not enacted into law, the only inference that could be drawn from that language would be that entities other than the tortfeasor could assert a set off; it does not support an inference that the PIP carrier itself can reduce *its own* coverage. If the Legislature wished to adopt the definition of PIP coverage outlined by Respondent, a definition that created set offs instead of eliminating them, it could have made the simple and unambiguous pronouncement that "PIP coverage is excess to any other coverage" and prevented any debate. Instead, the Legislature deleted the "tortfeasor" language from the Committee Report and enacted an unambiguous statement that PIP coverage is "not subject to a setoff," without qualification. Because this statement is clear and unambiguous, the proper

construction of the statute does not require the Court to reintroduce a deleted phrase from a Committee report.

Respondent's concerns about insurance cost control are without merit. Under Section 38-77-144, "no personal injury protection (PIP) coverage is mandated." Subrogation and set off are not relevant unless a carrier makes the decision to sell PIP coverage. A carrier that does not wish to sell coverage that is "not subject to a setoff" can be completely certain to assume absolutely no risk whatsoever. It can choose not to sale such coverage, or, as is common under most such policies (such as the $5,000 policy at issue) sell policies of small limits. If, however, a carrier makes the voluntary decision to sell PIP coverage, it must sell the coverage as it is defined in the statute.

II. Respondent makes inconsistent arguments; reading *Richardson* to allow a PIP reduction because it is a "set off" but reading the PIP statute to allow such a reduction because it is *not* a "set off."

In order for Respondent's arguments about *State Farm Mut. Auto. Ins. Co. v. Richardson*, 313 S.C. 58, 437 S.E. 2d 43 (1993) to have any relevance, *Richardson* must be interpreted to control only because State Farm's policy provision at issue is a set off. As stated by Respondent, "because this case turns on the interpretation of the word 'setoff' in Section 144 and *because Richardson has already determined the legislative intent behind this word*, the court of appeals should be affirmed." (Italics Added) (Resp. Br. at 3.). Respondent says "this Court in *Richardson* determined the Legislature intended the phrase to have a single meaning—the phrase referred to a prohibition on a *tortfeasor's* right to setoff a plaintiff's PIP benefits against a verdict against a tortfeasor." (Resp. Br. at 2). In short, State Farm's arguments about *Richardson* are that nobody but a tortfeasor is barred from claiming a set off; thus, State Farm can claim a set off because State Farm is not a tortfeasor. Respondent argues that "because" *Richardson* defined set

off, this particular set off in the State Farm policy, which falls outside of that purported definition, is permissible.

But Respondent also argues "the subject policy provision provided that PIP is 'excess' over workers' compensation benefits is an *excess clause, not a setoff.*" (Italics in original) (Resp. Br. at 8). This statement admits Respondent's interpretation of *Richardson* (*i.e.*, that it addresses set off instead of stacking) is contrary to the mandate in section 38-77-144 that PIP benefits are "not subject to a setoff."

"Excess" is a distinct term from "set off," but South Carolina automobile insurance law uses the terms "set off" and "excess" interchangeably when referring to coverage that applies secondarily to one or more other coverages. The excess UM and UIM statute, for example, says UIM is "excess" coverage. See S.C. Code Ann. § 38-77-160. The statute *does not contain the term set off.* Yet, court decisions construing this statute use the term "set off" interchangeably with "excess" ("The very definition of UIM insurance mandates a set-off." *Broom v. Watts*, 319 S.C. 337, 341, 461 S.E. 2d 46, 48 (1995)). The best test of whether the term "excess" is a distinction without a difference from "set off" is to look to the practical effect substitution of the term "set off" would have. If PIP coverage is "excess" to amounts paid by a workers' compensation carrier, a health insurance plan, or an insured's Aunt Ethel and Uncle Fred; then the PIP carrier has no obligation to pay PIP benefits to an insured as long as *any* of those sources of funds exists.

The result is the same if PIP coverage is "set off" by amounts paid by a workers' compensation carrier, a health insurance plan, or an insured's Aunt Ethel and Uncle Fred. As before, the PIP carrier will have no obligation to pay benefits as long as any of those sources of

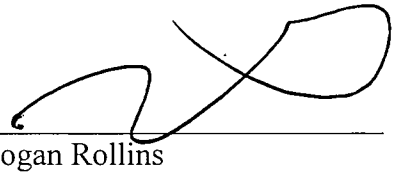
funds exists, and the insured will have no right to receive PIP. The result is the same regardless of whether PIP is deemed "excess" or "set off."

The State Farm policy provision at issue must either be or not be a setoff. In order for the rule of law to operate, a provision in a policy of insurance cannot be a set off under one (*Richardson*) analysis and simultaneously not be a setoff under another (Section 38-77-144) analysis. First, Respondent argues that *because Richardson* is a set off case, *Richardson* applies directly to State Farm in this case and allows it to assert a set off. Then, Respondent argues that its policy provision is "not a setoff" because it is an excess provision. Respondent is compelled to argue that the set off is not a set off because the unambiguous language of Section 38-77-144 forbids set off; this argument, however, comes immediately after Respondent's argument that it is *because* its provision is a set off permitted by *Richardson* that it is valid.

CONCLUSION

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

Respectfully Submitted,



August 3, 2018

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PROOF OF SERVICE

I do hereby certify, on this 3rd day of August, 2018, that a copy of the foregoing Reply Brief of Petitioners was 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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CERTIFICATE OF COUNSEL

The undersigned certified that this Reply Brief complies with Rule 211(b), SCACR.

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