THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

Honorable George C. James, Jr., Circuit Court Judge

Unpublished Opinion No. 2018-UP-050 (S.C. Ct. App. filed January 31, 2018)

Larry Brand.....~~Appellant~~ Petitioner,

v.

Allstate Insurance Company .....Respondent.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Pursuant to Rule 242(d) (1), SCACR, Counsel for Petitioner certifies that a Petition for Rehearing was made to the Court of Appeals on February 13, 2018 and denied by Order of the South Carolina Court of Appeals on March 22, 2018.

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in erred in finding that South Carolina Law post-*Sweetser* allows insurance carriers to offset employee-purchased underinsured motorist coverage with worker's compensation benefits paid?

2. Whether the Court of Appeals erred in finding that the clear and unambiguous language of Allstate's policy prevails over South Carolina law?

STATEMENT OF THE CASE

This appeal involves an underinsured motorist (UIM) claim made by an employee against his employee-purchased UIM coverage after having received worker's compensation benefits.

On January 27, 2010, Larry Brand (Appellant) was driving a truck owned by his employer, Evergreen Turf Corporation (Evergreen), when he was involved in a collision with at-fault driver Cassandra Olivia Stone (Stone). (Appendix, p.5).

Stone's automobile had liability coverage in the amount of $25,000 through Progressive Corporation (Progressive). (Appendix, p.5).

Evergreen had underinsured motorist (UIM) coverage through Westfield Insurance (Westfield) in the amount of $1,000,000. (Appendix, p.6).

Brand had UIM coverage through Allstate (Respondent) in the amount of $25,000. (Appendix, p.6).

A worker's compensation claim was opened on behalf of Brand, with Evergreen having workers compensation coverage through American International South Insurance Company (AIS). (Appendix, p.6).

A third party personal injury lawsuit was brought by Brand versus Stone, with both Westfield and Allstate being served as UIM carriers. The liability claim in that underlying tort action was settled in exchange for the liability limits of $25,000 via a covenant not to execute between Brand and Progressive in August/September 2011. That settlement was approved by the South Carolina Worker's Compensation Commission in October 2011 via a Petition and Order for Approval of Compromise Settlement Agreement. Brand's UIM claims against Westfield were settled with Westfield tendering payment of $450,000 in UIM benefits. (Appendix, p.6).

On December 15, 2014, Brand brought a declaratory judgment action against Allstate in order to resolve the current coverage issue of whether Allstate was entitled to an offset for worker's compensation benefits paid. The underlying tort action was stayed pending resolution of this coverage issue. (Appendix, p.212).

Subsequent to the filing of the declaratory judgment action, Brand's worker's compensation claim, WCC File #1002789, was settled. A Form 19 filed with the S.C. Worker's Compensation Commission in February 2015 shows that Brand was paid a total amount of worker's compensation benefits of $354,750.75 ($271,577.02 in compensation and $83,173.73 in medical benefits). (Appendix, p.6).

Allstate filed a motion for summary judgment on October 13, 2015. Brand responded with a memorandum in opposition. A hearing was held before the Hon. George C. James, Jr. on January 7, 2016. (Appendix, p.212).

By order filed on August 31, 2016, the court granted in part and denied in part Allstate's motion for summary judgment. Brand timely moved for reconsideration and that motion for reconsideration was denied on August 31, 2016. (Appendix, p.212).

Brand timely appealed the Circuit Court's order to the South Carolina Court of Appeals arguing the following issues:

1) That the trial court had erred as a matter of law in failing to recognize that South Carolina law did not permit carriers offset employee-purchased underinsured benefits with worker's compensation benefits paid;
2) That the trial court had erred as a matter of law in holding that Allstate's UIM coverage was secondary coverage for loss amounts $25,000.01 through $354,750.75;
3) Assuming arguendo the trail court was correct in finding that Allstate's coverage is not triggered until after the employer UIM is exhausted, the trial court erred in finding Allstate's coverage was not triggered until a judgment exceeding $1,025,000.00.

(Appendix, p.211).

Following submission of briefs by both parties, on January 31, 2018, the Court of Appeals issued an unpublished opinion affirming the trial court's order. In addressing Brand's argument concerning whether South Carolina law prohibits worker's compensation offsets on employee-purchased UIM policies, the Court of Appeals cited

and quoted *State Farm Mut. Auto. Ins. Co. v. Calcutt*, 340 S.C. 231, 236, 530 S.E.2d 896, 898 (Ct. App. 2000) ("[A] setoff provision in a voluntary UIM policy would be equally enforceable whether purchased by an employer or an employee."), noting that *Calcutt* had been "overruled on other grounds" by *Sweetser v. S.C. Dep't of Ins. Reserve Fund,* 390 S.C. 632, 702 S.E.2d 509 (2010). In addressing the other two issues Brand raised, the Court of Appeals cited case law discussing "clear and unambiguous" language in contracts and prohibitions against double recoveries. (Appendix, p.258-260).

Brand timely filed a Petition for Rehearing, arguing that *Sweetser* overruled *Calcutt* specifically on the issue of whether or not worker's compensation setoff provisions in voluntary UIM policies were "equally enforceable" under South Carolina law. Brand also argued that no matter how clear and unambiguous Allstate's policy language was, to the extent the policy language sought to create insurance coverage that conflicted with South Carolina law, only coverage that complied with South Carolina law was allowed. (Appendix, p.261-268).

Allstate filed a Return to Petition for Rehearing. (Appendix, p.269-280).

Brand's Petition for Rehearing was denied via order dated March 22, 2018 and this petition for writ of certiorari follows. (Appendix, p.281).

ARGUMENT

I. The Petition for Writ should be granted because the Court of Appeals erred in finding that South Carolina Law post-*Sweetser* allows insurance carriers to offset employee-purchased underinsured motorist coverage with worker's compensation benefits paid.

Brand argues that the trial court erred in failing to recognize that South Carolina law does not allow insurance carriers to offset employee-purchased underinsured motorist coverage with worker's compensation benefits paid.

In addressing this issue, the Court of Appeals cited S.C. Code Ann. §38-77-160 (2015); *Broome v. Watts*, 319 S.C. 337, 461 S.E.2d 46, 48 (1995) ("The very definition of UIM insurance mandates a [setoff]."); and *State Farm Mut. Auto. Ins. Co. v. Calcutt*, 340 S.C. 231, 236, 530 S.E.2d 896, 898 (Ct. App. 2000) ("[A] setoff provision in a voluntary UIM policy would be equally enforceable whether purchased by an employer or an employee."), ***overruled on other grounds by Sweetser v. S.C. Dep't of Ins. Reserve Fund***, 390 S.C. 632, 702 S.E.2d 509 (2010), emphasis in original cite. (Appendix, p.259).

In petitioning for a rehearing, Brand argued that the "overruled on other grounds by *Sweetser*" language above is confusing, as Brand believes the grounds for overruling the *Calcutt* finding cited by the *Sweetser* court is precisely the issue presented in this case. (Appendix, p.263).

Brand's argument is based on not only S.C. Code §38-77-160, but also on S.C. Code §38-77-220, specifically the current state of South Carolina law post-*Sweetser* in regards to the ability of an insurance carrier to claim an offset for worker's compensation benefits paid on an employee-purchased underinsured motorist coverage. Brand specifically laid out the history of South Carolina case law related to this issue beginning with *Ferguson v. State Farm Mut. Auto Ins. Co.*, 261 S.C. 96, 198 S.E.2d 522 (1973) (offset not allowed for employee-purchased UM policies); through *Williamson v. United States Fire Ins. Co.*, 314 S.C. 215, 442 S.E.2d 587 (1994) (offset allowed for employer-purchased UIM policies); and *State Farm Mutual Automobile Insurance Company v. Calcutt*, 340 S.C. 231, 530 S.E.2d. 896 (Ct. App. 2000) (offset allowed for employee-purchased UIM policies); to *Sweetser*. (Appendix, p.214-217 & p.263-264).

Brand argues that *Sweetser* specifically found that the setoff provided in S.C. Code §38-77-220 can only apply to employers who purchase automobile insurance

policies, as only employers can "insure any liability under" compensation law. This finding came as the *Sweetser* court was specifically discussing S.C. Code §38-77-220 and how it "applies only to employers who are purchasing automobile policies." Sweetser at 636, 511. It is at that point, that the *Sweetser* Court inserted a footnote into their decision which reads:

> To the extent *State Farm Mut. Auto. Ins. Co. v. Calcutt*, 340 S.C. 231, 530 S.E.2d 896 (Ct. App. 2000) conflicts with this interpretation of §38-77-220, it is overruled. Sweetser at 636, 512)
> (Appendix, p.216-220 & 264).

The applicability of S.C. Code §38-77-220 is at the heart of this case and was at the heart of the *Sweetser* court's decision overruling *Calcutt*. If this is not the correct interpretation of *Sweetser*, S.C. Code §38-77-220 would be meaningless -- the offset would be allowed regardless of statute. The Court will not construe a statute in a way that which leads to an absurd result or renders it meaningless. Florence Cnty. Dem. Party v. Florence Cnty. Rep. Party, 398 S.C. 124, 128, 727 S.E.2d 418, 420. *See* Lancaster Cnty. Bar Ass'n v. S.C. Comm'n on Indigent Defense, 380 S.C. 219, 670 S.E.2d 371 (2008) (in construing a statute, this Court will reject an interpretation which leads to an absurd result that could not have been intended by the General Assembly); Gordon v. Phillips Utils., Inc., 362 S.C. 403, 608 S.E.2d 425 (2005) (it is presumed that the General Assembly intended to accomplish something by its choice or words and would not do a futile thing); Denene, Inc. v. City of Charleston, 352 S.C. 208, 574 S.E.2d 196 (2002) (this Court must presume the General Assembly did not intend a futile act, but rather intended its statutes to accomplish something); Hinton v. S.C. Dep't of Probation, Parole and Pardon Servs., 357 S.C. 327, 592 S.E.2d 335 (Ct. App. 2004) (the Court should seek a construction that gives effect to every word of a statute rather than adopting an interpretation that renders a portion meaningless).

Thus, if left unaltered, this Court's ruling would result in ruling that leaves S.C. Code §38-77-220 meaningless.

II. The Petition for Writ should be granted because the Court of Appeals erred in finding that the clear and unambiguous language of Allstate's policy prevails over South Carolina law.

Brand argued two additional issues: whether Allstate's underinsured motorist coverage could be considered secondary under South Carolina law and, assuming arguendo, when Allstate's underinsured motorist coverage would be triggered. (Appendix, p.220-224 & 265-268).

In addressing these issues, the Court of Appeals cite *Williams v. Gov't Emps. Ins. Co.*, 409 S.C. 586, 594, 762 S.E.2d 705, 709 (2014) ("An insurance policy is a contract between the insured and the insurance company, and the policy's terms are to be construed according to the law of contracts."); *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009) ("Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect."); *Cobb v. Benjamin*, 325 S.C. 573, 587-89, 482 S.E.2d 589, 596-97 (Ct. App. 1997) (holding a UIM carrier was entitled to credit for the full amount of primary liability coverage before the UIM coverage became payable, even when the plaintiff settled with the primary liability carrier for less than the policy limit); *Collins Music Co. v. Smith*, 332 S.C. 145, 147, 503 S.E.2d 481, 482 (Ct. App. 1998) ("It is well settled in this state that there can be no double recovery for a single wrong and plaintiff may recover his actual damages only once.'" (quoting *Taylor v. Hoppin' Johns, Inc.*, 304 S.C. 471, 475, 405 S.E.2d 410, 412 (Ct. App. 1991)). (Appendix, p.259-260).

Brand argues these findings result in Allstate being allowed to provide "underinsured" motorist coverage limitations that conflict with South Carolina's statutory

requirements for underinsured motorist coverage. In order for a carrier to comply with South Carolina law, the carrier must offer underinsured motorist coverage that provides coverage "in the event that damages are sustained in excess of the liability limits carried by an at-fault insured or underinsured motorist." S.C. Code §38-77-160. South Carolina law further imposes restrictions on underinsured motorist coverage, such as the amount of coverage that must be offered, limits on stacking (both through S.C. Code §38-77-160) and the ability to offset benefits paid by worker's compensation (through S.C. Code §38-77-220). Through statutory scheme, South Carolina has defined the underinsured motorist coverage which must be provided to South Carolinians. (Appendix, p.220-224 & 266-268).

Therefore any policy provision of Allstate's that allows them to write coverage/limitations different than that prescribed by South Carolina law would be invalid. In this case, Allstate's policy provision that claims an offset for worker's compensation benefits paid on a policy that was not purchased by an employer conflicts with South Carolina law. Likewise, any policy provision that allows Allstate to claim they are the secondary underinsured carrier, when South Carolina law allows another carrier to exclude coverage for an element of damages "in excess of the liability limits carried by an at-fault insured" would similarly conflict with South Carolina law. (Appendix, p.220-224 & 266-268).

Allstate's policy acknowledges their coverage is intended to be in full compliance with South Carolina law and any provision conflicting with that law is amended or eliminated to comply with the law. (Appendix, p.157).

The trial court's rulings allow insurance carriers to offer something less than the underinsured motorist coverage defined by South Carolina law in that it allows non-

employers to enjoy the benefits South Carolina law strictly limits to employer-purchased underinsured motorist coverage. To allow Allstate's coverage to not trigger until the full amount of both the liability coverage and the employer-purchased underinsured motorist coverage is exhausted would be to allow Allstate the benefit of S.C. Code §38-77-220, which South Carolina courts have specifically interpreted is strictly limited to employers, which Allstate is not in this case.

When read in conjunction with South Carolina law, Allstate's policy language is not "clear and unambiguous." Specifically, by South Carolina law, there is no other underinsured motorist coverage for loss suffered from $25,000.01 through $354,750.75. Allstate's policy reads:

> If the insured person was in, on, 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, p.156-157).

This policy provision conflicts with South Carolina law, as it allows an employee-purchased policy to enjoy the benefit of a worker's compensation offset reserved solely for employer-purchased underinsured motorist coverage. S.C. Code §38-77-220 and Sweetser at 636, 511. Statutory provisions relating to an insurance contract are part of the contract as a matter of law. To the extent a policy provision conflicts with an applicable statutory provision, the statute prevails. Kay v. State Farm Mut. Auto. Ins. Co., 349 S.C. 446, 450, 562 S.E.2d 676, 678 (Ct. App. 2002).

If left unaltered, the Court of Appeals ruling would allow an insurance carrier's policy language to trump South Carolina law.

CONCLUSION

Based on the argument above, Brand respectfully requests that the Court grant this petition for writ of certiorari.

Respectfully submitted,

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April 18, 2018

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In The Supreme Court

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Honorable George C. James, Jr., Circuit Court Judge

Civil Action No. 2014-CP-45-644
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Unpublished Opinion No. 2018-UP-050 (S.C. Ct. App. Filed January 31, 2018)_

Larry Brand.....Appellant,

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Allstate Insurance Company .....Respondent.

CERTIFICATE OF SERVICE

The undersigned, Kathleen Sue Cox, of the Wukela Law Firm, hereby certifies that on the 18th day of April, 2018 she did serve copies of Appellant's Petition for Writ of Certiorari and Appendix on the Respondents counsel, along with a Certificate of Service with first class postage prepaid, regarding Re: Larry Brand vs. Allstate Insurance Company, Civil Action No. 2014-CP-45-644, Appellate Case No. 2016-002050, Unpublished Opinion No. 2018-UP-050 (S.C. Ct. App. Filed January 31, 2018). Said envelopes being addressed to the following person(s):

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