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S.C. SUPREME COURT

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.

BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUES ON APPEAL

I. Should the Court change its interpretation of the meaning of the phrase "not subject to setoff" in South Carolina Code § 38-77-144, set forth in *State Farm v. Richardson* in 1993, which has been relied upon ever since by other courts, insurers, the public, and the General Assembly?

II. Does South Carolina Code § 38-77-144 invalidate an insurance policy provision stating that PIP insurance is excess over workers' compensation insurance?

III. Do the Plaintiffs' arguments regarding public policy, alleged illusory coverage, and alleged other controlling authorities support overturning the Court of Appeals?

ARGUMENT

I. The Court should not change its longstanding interpretation of the meaning of the phrase "not subject to setoff" in South Carolina Code § 38-77-144, which interpretation was set forth in this Court's decision in *State Farm v. Richardson.*

The parties have stipulated that the sole issue in the case is whether the excess provision in the PIP policy at issue violates section 38-77-144's statement that PIP is "not subject to setoff." Resolving that issue depends on the meaning of the phrase "not subject to setoff" as used in section 144. This Court long ago decided, in *State Farm Mut. Auto. Ins. Co. v. Richardson*, exactly what this phrase meant. 313 S.C. 58, 437 S.E.2d 43 (1993). The Court now should not revisit this decided question and opine that the statute meant something different, as there have been no intervening facts or law changes warranting such a re-visitation, and for the reasons set forth below. Notably, the Plaintiffs do not ask this Court to overturn *Richardson*, and they have not filed any motion to argue against precedent. In fact, they argue that *Richardson* was correctly decided but should be limited to cases involving stacking.[1] (Pls.' Br. 4 "...*Richardson* correctly held that the carrier could prohibit stacking of PIP policies.")

In 1993 in *Richardson*, an insured argued that a PIP anti-stacking policy provision violated section 144—specifically, the "not subject to setoff" language of the statute. This Court examined section 144 and its legislative history to determine the meaning of the phrase. After that examination and analysis, 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. This Court unanimously "found that the Legislature intended the set-off prohibition of section [144] to apply ***only to***" a tortfeasor's

[1] *Richardson* is not distinguishable because the central issue in that case was the same as the issue in this one—what did the Legislature mean by the phrase "not subject to setoff" in section 144.

setoff of a plaintiff's PIP benefits from a verdict against the tortfeasor. *Richardson*, 313 S.C. at 61, 437 S.E.2d at 45 (emphasis added). The Court noted that "a Conference Committee report adopted by both Houses of the General Assembly just before [the bill] was passed" stated that PIP "may NOT be assigned or subrogated and may not be setoff [from the tortfeasor's liability coverage.] (Bracketed material in original)." *Richardson*, 313 S.C. at 61 n.2, 437 S.E.2d at 45 n.2. Because this case turns on the interpretation of the word "setoff" in section 144 and because *Richardson* has already determined the legislative intent behind that word, the Court of Appeals should be affirmed.

A. *Richardson's* interpretation of Legislative intent is "permanently settled" absent Legislative action and should not be overturned.

This Court's role in the interpretation of statutes is extremely important, and this Court has a symbiotic relationship with the General Assembly concerning legislation and its meaning. "It is manifestly in the public interest that the law remain permanently settled. This is especially so in the construction of statutes, for if any change in the statutory law is desired, the General Assembly may readily accomplish it." *Wehle v. S. Carolina Ret. Sys.*, 363 S.C. 394, 402, 611 S.E.2d 240, 244 (2005) (quoting *Powers v. Powers*, 239 S.C. 423, 427, 123 S.E.2d 646, 647 (1962)). As a result, the South Carolina Supreme Court should interpret legislative intent only once—if the interpretation is incorrect, it is the General Assembly's job to correct it. "Legislative intent, ***once determined, is 'permanently settled'*** absent subsequent action by the General Assembly to effect a change in the statutory law." *Id.* at 403, 611 S.E.2d at 244 (emphasis added).

This process—the interpretation of legislative intent by this Court, and the correction (or not) of that interpretation by the General Assembly—has long been the law of the state.[2] It is well

[2] It is also the law in the federal system, as the United States Supreme Court has often noted that the doctrine of stare decisis has "special force" when a case has determined legislative intent

settled that the General Assembly is presumed to be aware of this Court's interpretation of its statutes. *See, e.g.*, *Sims v. Amisub of South Carolina, Inc.*, 414 S.C. 109, 117, 777 S.E.2d 379, 383 (2015). This Court and the public expect the General Assembly to act if it disagrees with the Court's interpretation. Indeed, this Court recently noted such. *See Machin v. Carus*, 419 S.C. 527, 547, 799 S.E.2d 468, 478 (2017) ("We trust that the General Assembly will respond to this opinion if it disagrees with our interpretation of the statutes.").

Further, after the Court has interpreted a statute and the General Assembly does not act to alter that interpretation, it is presumed that the Court's interpretation of legislative intent was correct, and that interpretation, being permanently settled, should not be altered. The passage of time only further cements this principle. *See Sims,* at 117, 777 S.E.2d at 383 (noting that "in the more than twenty years since the Court's decision in *Langley*, the Legislature has taken no action to alter [the statute at issue].").

Twenty-five sessions of the South Carolina Legislature—which were each presumed to be aware of *Richardson's* interpretation of section 144—have declined to alter that interpretation. To the contrary, eighteen years ago, the General Assembly re-codified the subject section, changing a "must" to a "shall" but not altering the six words interpreted by *Richardson* and at issue in this case. This re-codification is presumed to be an adoption of *Richardson's* interpretation of the statute. *See Layton v. Flowers*, 243 S.C. 421, 424, 134 S.E.2d 247, 247-48 (1964).

Because this Court has already established the legislative intent concerning the meaning of "not subject to setoff" in section 38-77-144, because the General Assembly has not altered that interpretation in twenty-five years, and because the General Assembly implicitly adopted

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because "Congress remains free to alter what we have done." *Patterson v. McLean Credit Union*, 491 U.S. 164, 172–173 (1989).

Richardson's interpretation when re-codifying the statute, this Court should not alter *Richardson's* interpretation of the statute. The General Assembly remains the proper body to address whether to mandate PIP coverage for expenses also covered by workers' compensation.

B. Reliance interests also militate against overturning *Richardson*. Indeed, stare decisis concerns are "at their acme" because *Richardson* concerned a question of contractual rights in addition to the interpretation of legislative intent.

Overturning *Richardson* would be inappropriate in part because of the reliance by the public on its interpretation for twenty-five years.

> Stare decisis is intended to insure that people are guided in their personal and business dealings by prior court decisions, through established and fixed principles they announce. It reflects a policy judgment that in most matters it is more important that the applicable rule of law be settled than that it be settled right.

20 Am. Jur. 2d *Courts* § 125 (2015) (citing *Agostini v. Felton*, 521 U.S. 203 (1997)). The public has the right to (1) rely upon the Court's interpretation of a statute, and (2) to seek redress through the General Assembly and the elective process where the statute or its interpretation is considered by that body to be in error. But were the interpretation of the same statutory language to change from court to court and from case to case, the public would rely upon such interpretations of the statutes at its peril.

These principles are particularly important in cases involving contractual rights because private citizens and businesses rely upon the application of established precedent. "The doctrine of stare decisis permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government." 20 Am. Jur. 2d *Courts* § 125 (2015). Concerns of stare decisis are at their acme in cases involving contract and property rights. *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014) (noting that Indian tribes "as well as entities and individuals doing business

with them, have for many years relied on [the subject precedent] negotiating their contracts and structuring their transactions against a backdrop of tribal immunity.").

For twenty-five years the insurance industry, business community, consumers, and regulatory authorities have relied upon this Court's interpretation of the statutory phrase at issue in *Richardson*. Individuals, insurance companies, and other businesses have written and agreed to contracts of insurance; made, adjusted and accepted claims; set and adjusted reserves; allocated and evaluated risk, and set pricing and premiums based on *Richardson*'s interpretation of section 38-77-144. To overrule *Richardson* would be to fundamentally change the basis on which these actions were undertaken.

Finally, as noted by the Court of Appeals, it as well as a federal court have expressly relied on *Richardson* in the past in adjudicating disputes. This Court should thus not revisit *Richardson*.

C. *Richardson* was correctly decided.

Even putting aside the fact that twenty-five sessions of the South Carolina Legislature have agreed with *Richardson's* interpretation of section 144, review of the state of the PIP law in 1989 shows that *Richardson's* interpretation was correct. Pre-1989 confusion concerning the availability of a tortfeasor's PIP setoff provides proper context for the legislative intent as determined by *Richardson*.

Secondary sources reveal that the 1989 Act eliminating mandatory PIP was in response to "public outcry over high automobile insurance rates." Burnet R. Maybank, III et al., *The Law of Automobile Insurance in South Carolina* V-25 (5th ed. 2002).[3] It was noted that PIP "had the worse

[3] This pleading cites the 5th Edition of the treatise as that is the edition cited by the circuit court and by the Plaintiffs' brief. The 6th Edition was substantively the same. The 7th Edition, published in 2015, omitted the historical discussion of this topic.

[sic] loss ratio of any first or third party automobile insurance coverage in South Carolina" and the "abolishment of statutory PIP coverage was one of the Legislature's "major savings items." *Id.* In other words, the Legislature's intent in 1989 was to decrease the amount of PIP insurance sold in the state, not to *increase* the coverage required.

Additionally, confusion over the existence of a tortfeasor's ability to set off PIP benefits prior to the 1989 Act explains the Legislature's decision to prohibit that setoff in section 144. *The Law of Automobile Insurance* explains that before the 1989 repeal of mandatory PIP, there was confusion over whether the Legislature intended for a tortfeasor to receive a setoff.[4] Due to the repeal of another section of the PIP code in 1978 "it was assumed the Legislature wished to do away with all right of set-off." *Id*, p. V-17. However, to what extent the right to setoff survived the 1978 amendment "was the subject of considerable debate." *Id*, p. V-18. *See also* 1981 S.C. Op. Atty. Gen. 54 (noting "some ambiguity has arisen with respect to" whether the Legislature intended to eliminate a tortfeasor's right to setoff in the 1978 amendments to the PIP statute). Significantly, these secondary sources referred to the concept of reducing the tortfeasor's liability by the amount of PIP benefits as the "setoff provision." *See* Joseph F. Anderson Jr., *The South Carolina Insurance Reform Act Part I): No Fault and Contributory Negligence—A Synopsis and Appraisal*, 26 S.C. L. Rev., 715-23 (1975). It was this "confusion," "debate," and "ambiguity"—over whether a tortfeasor could setoff PIP benefits at trial—that the Legislature sought to resolve when it explicitly prohibited setoff in section 144.

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[4] It appears that the application of the statute allowing a tortfeasor's setoff of PIP was confusing and controversial from mandatory PIP's 1974 inception. *See* Joseph F. Anderson Jr. *The South Carolina Insurance Reform Act Part I): No Fault and Contributory Negligence—A Synopsis and Appraisal*, 26 S.C. L. Rev. 705, 720-21 (1975) (noting, for example, confusion and ambiguity over whether a tortfeasor's setoff was allowed for PIP coverage in excess of $1,000).

This is consistent with a Conference Committee report adopted by both Houses of the General Assembly just before Act 148 was passed which stated: "If a (sic) insurer does voluntarily sell PIP coverage . . . it may NOT be assigned or subrogated and may not be setoff [from the tortfeasor's liability coverage.]" *Richardson*, 313 S.C. at 61 n.2, 437 S.E.2d at 45 n.2 (bracketed material in original). These considerations would have been even more apparent to a Court sitting twenty-five years ago and just four years after the enactment of section 144 when it interpreted the legislative intent. This Court should therefore not attempt to now revisit the same phrase in the statute and ascribe to it a different meaning, which would overturn *Richardson's* determination of legislative intent. *Richardson* was correctly decided and, as set forth above, its interpretation of the statutory language at issue should not be changed except by the General Assembly.

II. Section 38-77-144 does not invalidate an excess provision stating that PIP is excess over workers' compensation insurance.

A. The Plaintiffs are incorrect in construing the subject excess provision as a "setoff."

1. The subject policy provision is an excess clause, not a setoff.

In any event, notwithstanding the above, the subject policy provision providing that PIP is "excess" over workers' compensation benefits is an ***excess clause,*** not a setoff. An excess clause is "[a]n insurance-policy provision...that limits the insurer's liability to the amount exceeding other available coverage. This clause essentially requires other insurers to pay first." *Excess Clause*, Black's Law Dictionary (7th ed. 2014). A policy that contains an excess clause "effectively *operates* as an excess policy if other insurance is available." *Horace Mann Ins. Co. v. General Star Nat. Ins. Co.*, 514 F.3d 327, 330 (4th Cir. 2008) (emphasis in original). Here, it is important to note that there is no third party tortfeasor trying to obtain a benefit involved under the stipulated facts. Further, all of Mrs. Cothran's medical bills have been paid in full and she has received the full PIP

payment due for lost wages not covered by workers' compensation. The Plaintiffs have lost nothing except, under their theory, some supposed right to a double recovery.

2. To construe excess clauses as illegal "setoffs" would lead to the absurd result of making it illegal to insure PIP on an excess basis and *mandating* multiple recoveries for the same injuries.

To construe section 144's use of "setoff" as encompassing the relationship between primary and excess insurance would be overbroad and illogical. Such an interpretation would make it illegal for an excess insurer to write an insurance policy with excess PIP coverage. Under the Plaintiffs' argument, any excess insurance would require a "setoff" of the primary coverage and would therefore violate section 144, entitling the insured to recover under both primary and excess coverage, even where the primary coverage fully covered the loss. In fact, if an excess clause is a "setoff" forbidden by section 144, an insured would be entitled to a double recovery, triple recovery, quadruple recovery and so on, depending on the number of excess policies available. The only limitation on an insured's mandatory recovery of multiple sets of the same benefits under multiple policies would be the number of those policies.[5]

There is no support for the Plaintiffs' apparent position that the Legislature in passing section 144 intended to restrict the freedom of insureds and insurers to contract for excess PIP insurance. In fact, as discussed above, the intent behind section 144 was to lower insurance premiums, yet Plaintiffs would have this Court adopt an interpretation of the law which would dramatically increase costs.

3. The Plaintiffs' brief illustrates the difference between an excess clause and a "setoff."

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[5] This is not a matter of stacking—among other distinctions, stacking is limited by the amount of total damages. Here, the Plaintiffs admit their medical expenses were paid in full, yet argue that because the excess clause is a setoff, they can by reimbursed for the same expenses again. The same argument would apply to any number of additional excess PIP policies, since the previous recovery of benefits is irrelevant under their theory.

The difference between an excess clause and a "setoff" is illustrated by confusion within the Plaintiffs' brief on the subject. At page 20 of their brief the Plaintiffs claim that under their reading of the Court of Appeals' decision, State Farm did not owe Mrs. Cothran the $991 in covered lost wages that were unpaid by her workers' compensation carrier. This is incorrect. Mrs. Cothran had $5,000 in PIP benefits that were *excess over* her workers' compensation coverage. This means State Farm paid covered amounts unpaid for by workers' compensation up to its $5,000 policy limit—in this case $991. *Excess Insurance*, Black's Law Dictionary (7th ed. 2014) (defining "excess insurance" as "An agreement to indemnify against any loss that exceeds the amount of coverage under another policy.").

But the Plaintiffs argue that because Mrs. Cothran's medical benefits exceeded $5,000 and were paid for by workers' compensation, "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." Pls.' Br. 20. They restate this argument at page 23, stating "[u]nder 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 limit." *Id.* at 23. These arguments reveal that the Plaintiffs are reading nonexistent "setoff" language into the excess clause. In other words, the Plaintiffs read the policy as stating "Workers compensation benefits must be set off against any PIP coverage." This is not how excess coverage works and this is not how the subject clause reads (as the Plaintiffs' experience of receiving $991 in PIP benefits for Mrs. Cothran's covered, unpaid lost wages demonstrates). The primary coverage pays first, and the excess coverage pays the covered portion of the loss that exceeds the primary coverage.

Similar confusion exists elsewhere in the Plaintiffs' brief, where they argue that State Farm should not be afforded protection under *Rowzie v. Allstate* or *Mount v. Sea Pines* because in those

cases the PIP insurance carrier paid first. At page 10 they argue that the lower court "overlooked" the "significant" fact that under *Rowzie* and *Mount* setoffs were only permitted because the PIP carrier paid first. Pls.' Br. 10 ("In sum, it is *because* a PIP carrier has made a payment that the set off exists."). At page 9 they argue that that "[i]f *Rowzie* were still valid, following its holding would require ... State Farm, as PIP carrier, that would make the first payment." Pls.' Br. 9. At page 15 they argue that "In its historical definition, therefore, a 'set off' required the PIP carrier to make payment prior to the entity that could claim a setoff." Pls.' Br. 15. These arguments show that the Plaintiffs have constructed a strawman-policy-provision different from the excess provision at issue. Where coverage is excess, it is the primary insurance that pays first. *Excess Clause*, Black's Law Dictionary (7th ed. 2014)("This clause essentially requires other insurers to pay first."). Thus, the Plaintiffs' attempt to impose liability on State Farm because its PIP coverage did not "pay first" only further illustrates the difference between the excess clause at issue and a "setoff."

B. The General Assembly did not intend to mandate PIP coverage for workers compensation.

Additional proof that the excess provision is not a "setoff" contemplated by section 144 is that the Plaintiffs' interpretation would mandate coverage under a statute that says no coverage is mandated. It is well settled that in interpreting a word or phrase used in a statute, "[c]ourts should consider not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law." *See, e.g., Hernandez-Zuniga v. Tickle*, 374 S.C. 235, 247, 647 S.E.2d 691, 697 (Ct. App. 2007).

The first line of the pertinent statute reads: "There is ***no*** personal injury coverage mandated under the automobile insurance laws of this State." S.C. Code Ann. § 38-77-144 (emphasis added). The Plaintiffs do not explain why the Legislature, after declaring that PIP was not mandated under

the laws of this state would, a few lines later, mandate PIP coverage for injuries already covered by workers compensation insurance. Such an interpretation would be illogical and internally inconsistent and should be rejected.

C. The General Assembly would not eliminate the statewide mandate for PIP while requiring that PIP cover injuries already covered by workers' compensation—especially when injuries covered by workers' compensation were excluded under the mandatory PIP scheme.

Under the mandatory PIP system that was repealed in 1989, PIP coverage was mandated to cover all automobile injuries with a few exceptions. One of the few exceptions was that PIP did not apply to injuries covered by workers' compensation. S.C. Code Ann. § 38-77-290(d) (1989, *repealed by* 1989 S.C. Acts 148) (stating that PIP coverage "must be reduced to the extent that the recipient has recovered benefits under workers' compensation laws of any state or the federal government."). In fact, from the advent of mandatory PIP in 1974, the Legislature consistently exempted injuries covered by workers' compensation from coverage. *See* Joseph F. Anderson Jr., *The South Carolina Insurance Reform Act Part I): No Fault and Contributory Negligence—A Synopsis and Appraisal*, 26 S.C. L. Rev. 705, 721 (1975). This was one of only a few exceptions to mandatory PIP that existed. S.C. Code Ann. § 38-77-310 (1989, *repealed by* 1989 S.C. Acts 148) (excluding from the mandate injuries: caused by intentional acts or while operating a stolen vehicle; occurring during the commission of a felony or while failing to stop for law enforcement; and occurring on a motorcycle).

It would be perverse for the Legislature to *increase* the PIP coverage *required* for work-related injuries as it was *decreasing* (indeed, eliminating) the PIP coverage *required* in this state. But the Plaintiffs argue that in "deleting" the previous exemptions to PIP coverage the previous exceptions to coverage became mandatory. Pls.' Br. 14 ("Because ... the Legislature ... "deleted" [the workers' compensation] 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."). If in deleting the few exceptions to mandatory PIP the Legislature intended to *require* insurers to cover them, then PIP is *required* to cover, not only duplicate workers' compensation benefits, but also injuries caused intentionally, during felonies, while evading police, and on motorcycles.

If the Legislature intended in 1989 to reverse course and *require* PIP carriers to do what they had never done before—cover injuries covered by the workers' compensation system along with intentional acts, felonious injuries, and motorcycle injuries—it would have said so. Such a law would have had far-reaching consequences, making all insurance policies written in accordance with the prior law (excluding coverage for intentional acts or benefits paid by workers compensation, for example) in violation of the statute. Additionally, it would have been inconsistent with the workers' compensation system already in place, which the Legislature deemed to be a *comprehensive* system for addressing work-related injuries. *Parker v. Williams & Madjanik, Inc.*, 275 S.C. 65, 70, 267 S.E.2d 524, 526 (1980) (noting South Carolina's workman's compensation laws were created to provide "a *comprehensive approach* to provide compensation for employees injured ... in the course of their employment.") (emphasis added).

III. The Plaintiffs' arguments regarding public policy, alleged illusory coverage, and inapposite cases should be rejected.

A. The practical effects of the Court of Appeals' decision are not as claimed by the Plaintiffs.

The Plaintiffs continue to overstate the meaning of the excess clause and the results of the Court of Appeals' decision, arguing State Farm can now "avoid PIP liability under virtually any circumstance unless there was literally no source other than PIP that provided for any medical care or money." Pls.' Br. 20. A fourth of the Plaintiffs' argument focuses on unrelated "setoffs" they have created from whole cloth. Pls.' Br. 16-20. The Plaintiffs allege that PIP coverage will now

exclude payments involving (1) liability insurance; (2) uninsured or underinsured insurance; (3) health insurance; (4) disability insurance; or (5) monies from aunts, uncles, or any other individual. Pls.' Br. 16-19

They conclude that payments from any of these sources would preclude payment of PIP benefits under the excess clause because they contend all are *similar laws* to workers' compensation law. They support this argument by defining "similar" as having common characteristics, and then concluding that simply because workers' compensation laws result in payment of benefits, "any money Cothran received from any source" would be similar to workers' compensation laws. Pls' Br. 18; Pls' Br. 16 (concluding the subject excess clause allows for "a set off for any payment made by any source—from an automobile liability carrier to the insured's Aunt Ethel and Uncle Fred.")

However, this Court has recognized many times that words must be considered in context. *See McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009) ("[O]ne may not create an ambiguity by pointing out a single word or clause," but must read the contract as a whole.). Outside of context, words may be distorted such that, for example, a payment from "Aunt Ethel's ... piggy bank" somehow becomes similar to a workers' compensation law. Pls' Br. 16-18. Here, "similar" should not be considered out of context. It should not be separated from the word that follows—law—nor from the "workers' compensation law" that precedes it, nor from the title of the clause: "Workers' Compensation Coordination." App. 42. There is no reason to consider an absurd reading of the subject excess clause when it is clear from the title and the text that it relates to workers' compensation laws, not liability insurance, UIM insurance, health insurance, aunts or uncles. *C.A.N. Enters., Inc. v. S.C. Health & Human Serv. Fin. Comm'n.*, 296 S.C. 373, 373 S.E.2d 584, 586 (1988) ("Common sense and good faith are the leading touchstones of construction of

the provisions of a contract."); *Koon v. Fares*, 379 S.C. 150, 666 S.E.2d 230, 233 (2008) ("Where one interpretation of a contract makes it unusual or extraordinary and another interpretation, equally consistent with the language employed, would make it reasonable, fair, and just, the latter construction prevails. An interpretation which establishes the more reasonable and probable agreement of the parties should be adopted while an interpretation leading to an absurd result should be avoided.")

Regardless, this argument is irrelevant to the stipulated facts of this case. It is undisputed that the subject PIP benefits were excess to benefits recovered under a workers' compensation law. No contention has been made that Mrs. Cothran's PIP benefits were excess over her liability insurance coverage, underinsured motorist coverage, health insurance coverage, disability insurance coverage, or other source of benefits.[6]

B. The Court of Appeals did not err in "relying" upon *Rowzie* or *Mount v. Sea Pines*.

Contrary to the Plaintiffs' contention, the Court of Appeals did not "rely" on *Rowzie* and *Mount*. Rather, it noted that both cases cited and relied upon *Richardson*. The Plaintiffs' attempt to distinguish the facts of *Mount* and *Rowzie* from this case is irrelevant to whether section 144 invalidates the subject excess provision.[7] The Plaintiffs first criticize *Rowzie* because they claim

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[6] It is ironic that despite making these arguments Mrs. Cothran has, as a result of the subject accident, received benefits from (1) her workers' compensation coverage; (2) her PIP coverage (for $991 in covered wage loss not paid for by workers' compensation); (3) the adverse party's liability coverage; and (4) her UIM coverage. Her brief also implies that she received money from her relatives and health and/or disability insurance. Pls.' Br. 18.

[7] For example, the Plaintiffs make much of the fact that in *Rowzie* the PIP "pocket" paid before any UIM reduction and discussing the fact that the PIP policy limits were paid in *Rowzie*. Pls.' Br. 7-9. The point of this argument is apparently that "[i]f *Rowzie* were still valid, following its holding would require ... State Farm, as PIP carrier, that would make the first payment, and State Farm, as UIM carrier, would subsequently allege the set off." Pls.' Br. 9. Again, this argument is entirely

that it entitles insurers to a "double reduction" for both PIP and UIM benefits. However, *Rowzie* says no such thing, and the Plaintiffs have not pointed (and cannot point) to any policy provision that would support this "double reduction" theory.

Second the Plaintiffs claim *Rowzie* was undermined by *Sweetser v. S.C. Dept. of Ins. Reserve Fund.* Essentially, they argue that *Richardson* should not be followed because a case that followed *Richardson—Rowzie*—also cited a different case—*Calcutt*—that was potentially overruled in part in *Sweetser*. A variant of this same argument was recently made and rejected in *Siron v. Allstate Fire & Cas. Ins. Co.*, 225 F. Supp. 3d 574 (D.S.C. 2016). In *Siron*, a litigant argued that *Rowzie v. Allstate* should not be followed because *Calcutt* had been overruled by *Sweetser*. The district judge rejected this argument because *Calcutt* was not "central to the reasoning in *Rowzie*" and because "*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." 225 F. Supp. 3d at 579–80. This same logic applies with more force here, as the controlling case here is *Richardson*—which has not been overturned.

Moreover, the Plaintiffs' interpretation of *Sweetser* is wrong. They claim *Sweetser* "expressly overturned" *Caclutt's* holding "that a set off of any non-mandatory coverage ... was permissible." Pls.' Br. 7. This is incorrect. *Sweetser* did not overturn *Calcutt,* but merely noted in a footnote that *Calcutt* was overruled "to the extent [it] conflicts with the Court's determination that S.C. Code § 38-77-220 applies only to employers. *Sweetser v. S.C. Dep't of Ins. Reserve Fund,* 390 S.C. 632, 636 n.4, 703 S.E.2d 509, 511 n.4 (2010). *Calcutt's* holding—that the statute

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disconnected from the facts of this appeal. This case concerns a single excess clause pertaining to workers compensation insurance that was not at issue *Rowzie.*

controlling UIM coverage, section 38-77-160, does not prohibit a setoff of workers' compensation benefits—remained good law.

C. Public policy does not support the Plaintiffs' position.

The parties have stipulated that the "sole matter before the Court" is whether the excess clause "violates section 38-77-144." App. 29. But the public policy arguments advanced by the Plaintiffs do not go to the question of whether the excess clause violates the statute. As a result, they are outside of the stipulated facts and the narrow question before this Court and they should not be considered.

Regardless, a provision is not void as against public policy "unless it [is] in contravention of such public policy as is found either in the constitution, the statutes or the judicial decisions of this State." *Batchelor v. Am. Health Ins. Co.*, 234 S.C. 103, 112, 107 S.E.2d 36, 40 (1959). While public policy is not rigidly defined, it is cautiously defined: "[T]he subjects in which the court undertakes to make the law by mere declaration [of public policy] should not be increased in number without the clearest reasons and the most pressing necessity." *Weeks v. New York Life Ins. Co.*, 128 S.C. 223, 122 S.E. 586, 587 (1924) (quoting *Magee v. O'Neill*, 19 S.C. 185, 45 Am. Rep. 765 (1883)). Here, the public policy reasoning advanced by the Plaintiffs is unavailing.

1. Public policy related to subrogation liens does not justify mandating PIP coverage of expenses covered by workers' compensation coverage.

The Plaintiffs first argue that workers compensation subrogation principles justify nullifying the excess clause. State Farm's excess clause, they argue, deprives workers' compensation carriers of a potential source of subrogation. However, the workers' compensation subrogation statute does not provide a right of subrogation for first party contractual benefits like PIP. Rather, it provides subrogation rights where "injury or death is caused under circumstances creating a legal liability in some person ... to pay damages therefor, the person so liable being

hereinafter referred to as the third party." S.C. Code Ann. § 42-1-560. Thus, the section refers to tort liability involving causation and "damages," not contractual liability for benefits under an insurance policy. *See Todd v. Cary's Lake Homeowners Ass'n*, 315 F.R.D. 453, 458 (D.S.C. 2016) (in the procedural misjoinder context, collecting cases holding that breach of contract actions against insurance companies arise from the contract of insurance as opposed to related tort actions concerning automobile accidents).

In fact, the South Carolina Workers' Compensation Commission has expressly ruled that "first-party insurance policies-including ... personal injury protection ... are outside the purview of this Commission and the Workers' Compensation Act" and are not subject to subrogation under section 42-1-560. *Bass v. Bass Law Firm, P.A.,* WCC 9530598, 2000 WL 33152229, at *2 (S.C. Work. Comp. Comm. June 28, 2000). The Plaintiffs in their brief seem to acknowledge this as they discuss "subrogation interest in the *tort recovery* the injured person receives from the *tortfeasor*." Pls.' Br. 21 (emphasis added). Hence, Plaintiffs' argument is inapplicable to these facts.

Regardless, the Plaintiffs cannot cite to any authority suggesting that public policy favors providing a double recovery to the Plaintiffs solely to increase the ability of one insurance company to subrogate against another. In any event, the General Assembly would be best suited to address whether public policy supports mandating PIP coverage for benefits covered by workers' compensation. *Gov't Employees Ins. Co. v. Poole*, Op. No. 27821, 2018 WL 3300235, at *4 (S.C. Sup. Ct. filed July 5, 2018) (declining to determine public policy with respect to pro rata apportionment of punitive damages because "this concern is best addressed by the General Assembly, which is in the proper position to make such policy determinations given its ability to

conduct studies, collect information about insurance rates, and weigh the various courses of action.")

2. The Plaintiffs' illusory coverage arguments should be rejected.

The Plaintiffs next argue that the excess clause is void under public policy because PIP insurance would not be collectible if an insured were at fault, would not be collectible if an insured were not at fault, and would not be collectible if an insured had health, disability, or any other insurance policy. Thus, she concludes "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." Pls.' Br. 23. She reiterates her misunderstanding that "[u]nder 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." *Id.* Again, this misunderstands the concept of excess insurance as already discussed above.

The enforcement of the excess clause and the holding in *Richardson* simply do not render PIP coverage "virtually meaningless" as the Plaintiffs claim. Pls.' Br. 24. The excess PIP policy in fact paid benefits in this very matter. The Court of Appeals' treatment of Plaintiffs' arguments regarding alleged illusory coverage and supposed violations of public policy is thorough, correct, and should be affirmed.

CONCLUSION

The parties have stipulated that the sole issue before the Court is whether the excess provision violates section 38-77-144's statement that PIP is "not subject to setoff." Because this Court determined in *Richardson* that the phrase had a limited application not present here, because that determination was supported by the state of PIP law in 1989, because the General Assembly

has accepted this Court's interpretation of the statute for twenty-five years, and because the public has relied upon that interpretation, the Court of Appeals' decision should be affirmed.

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July 16, 2018

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.

PROOF OF SERVICE

I certify that I have served the Respondent's Brief on Wadette Cothran and Chris Cothran by depositing a copy of it in the United States Mail, postage prepaid, on July 16, 2018, addressed to their attorney of record, C. Logan Rollins, II, The Hawkins Law Firm, P.O. Box 5048, Spartanburg, SC 29304.

[SIGNATURE PAGE FOLLOWING]

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