THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jocelyn Newman, Circuit Judge

Case No. 2020-000160

Clayton M. Somers,

Appellant,

v.

Darrell W. Harper,

Respondent.

FINAL BRIEF OF APPELLANT

Graham L. Newman
W. Hugh McAngus, Jr.
James D. George, Jr.
Chappell Smith & Arden, P.A.
Post Office Box 12330
Columbia, South Carolina 29211
(803) 929-3600

Attorneys for Appellant

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STATEMENT OF ISSUES ON APPEAL

I. In the context of automobile underinsured bodily injury insurance, should a liability insurance settlement allocated to a parent's claim for reimbursement for medical bills incurred on behalf of a then minor child be utilized in the set off of a jury verdict in favor of the then adult child when the jury was instructed not to consider any minority incurred medical bills in its award?

STATEMENT OF THE CASE

This matter arises from an automobile collision between the Appellant, Clayton Somers, and the Respondent, Darrell Harper, that occurred on July 13, 2016. At the time of the collision, Somers was a minor. The Appellant made a claim against the Respondent's liability insurance policy for his personal injuries. The Appellant's mother, Stacy Somers, made a claim against the same policy for medical bills she incurred as a result of the minor Appellant's injuries. Both the Appellant's claim and his mother's claim settled presuit on a covenant not to execute. The total value of the settlement equaled the $25,000 bodily injury liability limits, allocated $10,423.92 to the Appellant for his personal injuries and $14,576.08 to the Appellant's mother for Appellant's medical expenses incurred during his minority. The circuit court approved this minor settlement and its allocation on December 14, 2016. (R. pp. 1-3)

After he became an adult, the Appellant proceeded to litigation against the Respondent on June 1, 2017, seeking compensation from the Appellant's underinsured motorist carrier for non-economic damages. (R. pp. 11-17) Appellant's mother did not file any additional claim or suit for further reimbursement of medical expenses incurred during Appellant's minority. The jury awarded damages in the amount of $60,000. (R. p. 159) In post-trial motions, Appellant requested UIM set off in the amount of $10,423.92. Appellant argued that only the settlement proceeds allocated to himself ($10,423.92) should be set off against the jury verdict. (R. p. 150, lines 6-24) The trial court ruled in favor of the Respondent and entered judgment in favor of the Appellant in

the amount of $35,000, applying a set off of the full $25,000.00 per person bodily injury liability limits. (R. p. 157, lines 5-13)

The Appellant filed a Motion to Alter or Amend the judgment on November 26, 2019. (R. pp. 163-168) This motion was granted in part and denied in part on January 14, 2020. (R. pp. 4-8) The Appellant filed the Notice of Appeal on January 31, 2020. (R. p. 214) The amount in controversy is $14,576.08.

STANDARD OF REVIEW

All issues in this appeal are questions of law, therefore the standard of review is de novo. See Citizens for Quality Rural Living, Inc. v. Greenville Cty. Planning Comm'n, 426 S.C. 97, 102, 825 S.E.2d 721, 724 (Ct. App. 2019).

STATEMENT OF FACTS

On July 13, 2016, Clayton Somers was injured in an automobile collision caused by Darrell Harper. At the time of the collision, Somers was 17 years old. Somers's parents incurred $14,576.08 of medical bills as a result of his injuries. (R. p. 2)

Darrell Harper possessed a liability insurance policy that provided bodily injury liability insurance limits of $25,000 for "each person" and $50,000 for "each accident." On December 16, 2016—and prior to filing suit—Stacy Somers, as Guardian ad Litem for her son, Clayton Somers, secured a minor settlement with Harper's liability insurance carrier for the full $25,000 available under the policy. The order approving that settlement specifically allocated the benefits as follows:

> FOURTEEN THOUSAND FIVE HUNDRED SEVNTY-SIX AND 08/100 ($14,576.08) to Stacy Somers for medical expenses past and future incurred for the treatment of her minor child . . . [and] "TEN THOUSAND FOUR HUNDRED TWENTY THREE AND 92/100 ($10,423.92) for Stacy Somers as, Guardian ad Litem for Clayton Matthew Somers, for the minor child's sole use and benefit.

(R. p. 2) Clayton Somers later reached the age of 18 on February 26, 2017.

Clayton Somers possessed underinsured motorist (UIM) insurance on the vehicle involved in the July 13, 2016 accident. After being unable to settle his claim with his UIM insurance carrier, Somers (now 18 years of age) filed suit against Darrell Harper on June 1, 2017. (R. pp. 11-17)

The case proceeded to trial on November 18, 2019. During the course of the trial, Somers did not introduce evidence of any medical bills incurred during his minority nor did he request compensation for any such bills during his attorney's closing argument. (R. pp. 107-122) In fact, Harper's attorney made light of this fact during closing argument in an attempt to minimize the damages award.

> The Judge is going to charge you that medical expenses in this case aren't an issue. You're not to—not to consider them. You didn't hear any evidence about them. That was an expense, because he was a minor, that his parents bore and are not to be something considered.

(R. p. 124) The trial court's charge specifically instructed the jury not to award any damages for medical expenses.

> Now, generally a plaintiff is entitled to receive an award of actual damages for all medical expenses, which the Plaintiff has suffered because of the Defendant's negligence, including costs for physicians, hospitals, medicine, physical therapy, and rehabilitation. However, in this case, the Plaintiff was a minor at the time of the collision, and those medical expenses were born by his parents.
>
> Therefore, medical expenses are not being claimed as a part of this lawsuit. And you should not award damages for medical expenses in this case.

(R. p. 148) Neither party objected to the trial court's jury charge. (R. pp. 149-150) After deliberations, the jury returned a verdict in favor of Clayton Somers and awarded $60,000.00 of damages. (R. p. 159)

In post-trial motions, Clayton Somers's counsel noted the previous minor settlement and suggested a set-off of $10,423.92—the amount specifically allocated to Clayton Somers by the

order approving the settlement. (R. p. 150) Darrell Harper's counsel requested a set off of $25,000.00—the full amount of the previously approved minor settlement. (R. p. 151) The trial court ruled from the bench, granted the defendant's motion, and reduced the verdict to $35,000.[1] (R. p. 157) (R. pp. 9-10)

Clayton Somers moved the court to alter or amend its ruling on the set off issue (R. pp. 163-168) and the trial court denied that motion on January 14, 2020. (R. pp. 4-8) This appeal followed.

ARGUMENT

I. THE TRIAL COURT ERRED IN SETTING OFF THIRD PARTY SETTLEMENT PROCEEDS FROM THE VERDICT AWARDED TO THE APPELLANT

The trial court erred by reducing Clayton Somers's damages verdict by the full amount of the Respondent's liability bodily injury insurance coverage when a portion of that coverage had been paid to a third party (his mother) in pre-suit settlement. "Allowing setoff 'prevents an injured person from obtaining a double recovery for the damage he sustained, for it is almost universally held that there can be only one satisfaction for an injury or wrong.'" Riley v. Ford Motor Co., 414 S.C. 185, 195, 777 S.E.2d 824, 830 (2015); citing Rutland v. S.C. Dep't of Transp., 400 S.C. 209, 215, 734 S.E.2d 142, 145 (2012). Here, set off prevents double recovery to Clayton Somers by reducing from his verdict the settlement proceeds he enjoyed—$10,423.92—a number that the Appellant does not dispute. The trial court's judgment should be reversed, however, because its ruling further reduced the verdict by $14,576.08 paid to Stacy Somers.

The trial court's error stemmed from a mistaken belief that the Harper liability bodily injury coverage available to Clayton and Stacy Somers was $50,000 "per accident" rather than $25,000

[1] This amount was later increased to $36,366.42 after the trial court granted Somers's post-trial motion for costs. (R. p. 7)

"per person." UIM policies must "provide 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 Ann. § 38-77-160. If the liability limits are not exhausted, "the UIM carrier is entitled to a credit for any amount of liability insurance coverage not exhausted in a settlement with its insured." Cobb v. Benjamin, 325 S.C. 573, 589, 482 S.E.2d 589, 597 (Ct. App. 1997). The trial court ruled that the medical bills incurred by Stacy Somers triggered the $50,000 "per accident" coverage limits on the Harper liability policy. "…[I]t's not Allstate's fault that he didn't recover the full twenty-five thousand (25,000). Because each of them could have gotten twenty-five thousand (25,000)." (R. p. 156) Therefore, the trial court reasoned, the $25,000 of coverage available to Clayton Somers was not exhausted and the UIM carrier was entitled to a set off of the full amount of that coverage.

South Carolina courts, however, hold that consequential damages (such as a parent's medical bills or a spouse's loss of consortium) do not constitute "bodily injuries" to a second person and thus do not trigger the "per accident" coverage provision within a liability insurance policy. The Supreme Court first confronted this question in the case of Sheffield v. Am. Indem. Co., 245 S.C. 389, 140 S.E.2d 787 (1965) in which the Plaintiff—claiming loss of consortium damages stemming from his wife's automobile accident injuries—sought to increase his available liability insurance benefits from $10,000 "per person" to $20,000 "per accident." The Court rejected this argument.

> Consequential damages, such as loss of consortium, medical and hospital expenses, etc., are generally held not to constitute 'bodily injuries' within the meaning of automobile liability policies limiting liability to a stated amount for 'bodily injuries' to one person. No recovery can be had for such damages therefore if the insurer has paid the full amount of the limitation fixed by the policy to the person injured, recovery in any event being limited to the balance between the amount which the insurer has paid, either to the injured

> person or to the one claiming consequential damages, and the amount of the limitation fixed by the policy in case of 'bodily injury' to one person.

Id. at 395, 140 S.E.2d at 790, quoting 7 Am.Jur. (2d), Automobile Insurance, Section 195, at page 537. The Court further explained,

> …it often happens that there are consequential damages, as well as the damages suffered by the injured person himself. Thus, where a wife or child is injured, the husband or parent may also suffer consequential injuries by reason of liability for hospital and doctor bills or for loss of services or consortium. But it has been held that these different types of injuries cannot be split up, in order to bring the claim within the higher policy limits; they are regarded as essentially injuries to one person, so that the lower policy limits applicable to injuries sustained by any one person would govern.

Id. at 395, 140 S.E.2d at 790–91, quoting Appleman, Insurance Law and Practice, Vol. 8, Section 4891, page 318. As a result, the trial court in this matter erred in concluding that Stacy Somers's incurred medical bills increased the available coverage to $50,000 and, concomitantly, also erred in concluding that the $25,000 pre-suit settlement had not exhausted the underlying liability insurance.

Having established that the Harper liability insurance policy was exhausted by the pre-suit settlement, the question then becomes whether the UIM carrier is entitled to a set off of benefits paid to a third party. The answer is "no." The policy underlying the set off doctrine focuses on avoiding a windfall to the Plaintiff in the form of a double recovery for a single injury. As noted above, "[a]llowing setoff 'prevents an injured person from obtaining a double recovery for the damage he sustained, for it is almost universally held that there can be only one satisfaction for an injury or wrong.'" Riley, supra. (string citation omitted) Here, set off prevents double recovery to Clayton Somers by reducing from his verdict the settlement proceeds he enjoyed—$10,423.92. However, should Stacy Somers's settlement proceeds also be reduced from the jury verdict,

Clayton Somers would be penalized for proceeds that he did not request, did not receive, and could not legally claim.[2] During closing arguments, Respondent's counsel emphasized the unavailability of medical bill damages to Clayton Somers in an attempt to minimize Somers's damages award.

> The Judge is going to charge you that medical expenses in this case aren't an issue. You're not to—not to consider them. You didn't hear any evidence about them. That was an expense, because he was a minor, that his parents bore and are not to be something considered.

(R. p. 124) This underscores the inequity of later using such non-existent "damages" to reduce the jury verdict.

South Carolina courts—when confronted with whether to set off "consequential damages" paid to third parties by the liability insurance policy—have declined to do so. The Court of Appeals addressed this issue in the case of Kizer v. Kinard, 361 S.C. 68, 602 S.E.2d 783 (Ct. App. 2004). In Kizer, the Plaintiff brought suit against the Defendant after settling with the liability insurance carrier presuit for $50,000. The liability settlement exhausted the "per person" coverage and was split equally between the Plaintiff (for her personal injury) and her husband (for his loss of consortium). After a verdict in favor of the Plaintiff, the Defense sought a set off of the full $50,000 settlement. The Court of Appeals rejected this argument.

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[2] Any claim for medical bills incurred as a result of a minor's personal injury lies with the parent responsible for the payment of such bills, not the minor himself.

> The damages to which the father of a minor child and a husband is entitled for medical expense which he has incurred for their care and treatment are compensatory. The right of action for such damages, as is heretofore stated, is based solely on his obligation to furnish them.

Hughey v. Ausborn, 249 S.C. 470, 476, 154 S.E.2d 839, 841 (1967); see also Bridges v. Joanna Cotton Mill, 214 S.C. 319, 324, 52 S.E.2d 406, 408 (1949). Thus, Clayton Somers possessed no legal right to recovery of medical bills stemming from his injuries even if he had sought such damages at trial.

> We find that the $50,000 per person injury limit in Kinard's GEICO liability policy was exhausted by the combined payment of $25,000 to Mrs. Kizer for her physical injuries and $25,000 to Mr. Kizer for his loss of consortium due to Mrs. Kizer's injuries. Accordingly, we conclude that Horace Mann is only entitled to setoff the $25,000 GEICO paid to Mrs. Kizer.

Id. at 72, 602 S.E.2d at 785. The Kizer ruling was consistent with the policy of avoiding double recovery to the Plaintiff while declining to set off amounts paid to third parties unrelated to the jury verdict. Of course, had Stacy Somers joined the Appellant in his lawsuit and been awarded a jury verdict for her medical bills, a dollar-for-dollar set off would have been appropriate. But she did not, thus the court erred in including Stacy Somers' settlement benefits in its set off calculation.

CONCLUSION

For the reasons stated above, the trial court's ruling on set off should be reversed and the case should be remanded to the trial court with instructions to enter judgment in the amount of $50,942.50.

Respectfully submitted,

s/ Graham L. Newman
Graham L. Newman
W. Hugh McAngus, Jr.
James D. George, Jr.
CHAPPELL, SMITH & ARDEN, P.A.
2801 Devine Street, Suite 300
Columbia, South Carolina 29205
(803) 929-3600
(803) 929-3604

ATTORNEYS FOR APPELLANT

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Columbia, South Carolina