REL: March 18, 2022

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2021-2022

2200845

Daniel B. O'Brien, in his capacity as the Standing Chapter 13 Trustee for the United States Bankruptcy Court for the Southern District of Alabama

v.

Mobile Public Library

Appeal from Mobile Circuit Court
(CV-17-902697)

EDWARDS, Judge.

Daniel B. O'Brien, in his capacity as the Standing Chapter 13 Trustee for the United States Bankruptcy Court for the Southern District

of Alabama and who was the trustee for the bankruptcy estate of Aaron A. Mosley, appeals from a judgment entered by the Mobile Circuit Court ("the trial court") in favor of the Mobile Public Library ("the library"). This court dismissed a previous appeal by Mosley and a cross-appeal by the library as having been taken from a nonfinal judgment. See Mosley v. Mobile Public Library (No. 2190979, May 28, 2021), ___ So. 3d ___ (Ala. Civ. App. 2021) (table), and Mobile Public Library v. Mosley, (No. 2200029, May 28, 2021), ___ So. 3d ___ (Ala. Civ. App. 2021) (table).

For purposes of this case, it is undisputed that, on December 4, 2015, Mosley was injured in an automobile accident that occurred during the line and scope of his employment with the library. The accident was caused by a third party, Shantell Carter. Thereafter, pursuant to the Workers' Compensation Act ("the Act"), § 25-5-1 et seq., Ala. Code 1975, Mosley commenced a workers' compensation action in the trial court against the library; that action was assigned case number CV-17-902927 ("the workers' compensation action"). Mosley also commenced an action alleging tort claims against Carter and claims for uninsured-motorist insurance benefits against GEICO Casualty Company, which was his

automobile insurer, and CNA Insurance Company, which was the library's automobile insurer; that action was assigned case number CV-17-902697 ("the tort action"). Transportation Insurance Company ("TIC") was eventually substituted as a party in lieu of CNA Insurance Company, which was then dismissed as a party to the tort action. The present appeal arises from the tort action, but it concerns the library's purported right to subrogation or reimbursement under Ala. Code 1975, § 25-5-11(a), regarding uninsured-motorist insurance proceeds paid to Mosley by TIC.

Mosley and the library agreed to settle Mosley's workers' compensation claim for a $20,000 lump-sum payment to Mosley for "past and future compensation benefits, and vocational rehabilitation benefits." The record indicates that Mosley had already been paid $17,270.14 in medical benefits and/or temporary-total-disability benefits.[1] The

[1]The library alleged in its motion to intervene in the tort action, see discussion, supra, that it had paid Mosley "$17,270.14 in workers' compensation benefits." In response to that motion, Mosley alleged that he had received no compensation and that "[t]he medical expense[s] have been approximately $17,270.14." The library later alleged that the $17,270.14 was paid "in the form of indemnity benefits and medical benefits" and that that amount included "$102.24 in temporary total disability benefits, which were suspended because [Mosley] returned to work at his regular employment."

settlement agreement left future medical benefits open. Also, the settlement agreement stated that the library "reserve[d] any rights it may have to subrogation/credit on any recovery obtained by [Mosley] against a third-party defendant or [uninsured-motorist insurance] carrier responsible for payment of damages, through settlement or judgment, as

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Mosley filed a motion in limine in the tort action indicating that he had incurred $17,159.53 in medical expenses that had been paid by the library's workers' compensation insurance carrier and conceding that "he [was] obligated to repay" those medical expenses under Ala. Code 1975, § 12-21-45. The trial court granted Mosley's motion in limine. TIC's jury charge number 7, which apparently was given, included the following:

> "There is evidence that workers' comp paid ... Mosley's medical expenses, and [TIC] asks that you reduce the amount of any award for medical expenses.
>
> "There is also evidence that ... Mosley will have to pay back from any award the money workers' comp paid Mosley for medical expenses.
>
> "You may consider all this evidence. Whether you reduce the award in any amount is up to you."

The record does not include the transcript of the trial or evidence presented in the tort action as to Mosley's claims against Carter and TIC. Thus, it is unclear whether the damages awarded to Mosley in that action included his medical expenses that had been paid pursuant to the Act.

a result of the motor vehicle accident at issue herein." The hearing in the workers' compensation action as to the approval of the settlement agreement was postponed pending the trial in the tort action. See Ala. Code 1975, § 25-5-56 (discussing settlements in workers' compensation cases).

Carter did not appear in the tort action, and GEICO was allowed to opt out for purposes of the trial in that action. Thereafter, the tort action was tried before a jury, which issued a verdict for $100,000 as damages. On October 2, 2019, the trial court entered a judgment for $100,000 in favor of Mosley and against TIC; the following day, the trial court amended its judgment to reflect that the judgment also was against Carter. The judgment, as amended, is hereinafter referred to as "the October 2019 judgment."[2]

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[2]The October 2019 judgment made no reference to the claim against GEICO, and no subsequent order purported to expressly adjudicate that claim. However, that claim is now moot. See note 4, infra. In its motion to opt out, GEICO agreed to be bound by any judgment entered on the merits in favor of Mosley in the tort action, to the extent the judgment exceeded the limits of other available uninsured- motorist insurance benefits. Although the GEICO policy is not included in the record, O'Brien states on appeal that the uninsured-motorist coverage in the

On October 7, 2019, the library filed a motion to intervene in the tort action to "preserv[e] its right to subrogation for any monies awarded to [Mosley] against any third party relating to" the automobile accident at issue. See § 25-5-11(a). The library alleged that it had a subrogation lien for $37,270.14 ($20,000 plus $17,270.14) and requested that the trial court in the tort action (1) direct "[Mosley] and his counsel to pay to [the library] the amount of its subrogation lien, less its pro rata share of attorney fees pursuant to Alabama Code [1975,] § 25-5-11(e)," and (2) enjoin Mosley and his counsel from disbursing any payments made by TIC under its policy with the library for uninsured-motorist coverage ("the TIC policy"), unless Mosley or his counsel first satisfied the library's subrogation lien. On October 8, 2019, the trial court entered an order granting the library's motion to intervene, and, on November 1, 2019, the trial court entered an

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GEICO policy was excess coverage, meaning that the TIC policy, which is also not included in the record, provided primary coverage and that the GEICO policy provided secondary coverage. See Illinois Nat'l Ins. Co. v Kelley, 764 So. 2d 1283, 1286 (Ala. Civ. App. 2000); see also Gaught v. Evans, 361 So. 2d 1027, 1030 (Ala. 1978).

order enjoining Mosley and his counsel in the tort action from disbursing any payments they received from TIC.

In the interim, on October 13, 2019, Mosley filed a motion in the workers' compensation action seeking a declaration that any proceeds paid to him under the TIC policy were exempt from the library's claim under § 25-5-11(a). He also filed a motion in the workers' compensation action requesting that the trial court reject the settlement that he purportedly had agreed to in that case. Thereafter, the library filed in the workers' compensation action a motion to enforce the settlement agreement in that action and a response opposing Mosley's attempt to have the proceeds paid under the TIC policy declared exempt from the library's claim under § 25-5-11(a).

On January 21, 2020, the trial court in the workers' compensation action entered an order denying Mosley's motion to set aside the settlement agreement and approving the settlement of the workers' compensation action ("the settlement order").[3] In the settlement order,

[3]Mosley's claimed injuries included injuries to his neck, head, left shoulder, back, and nerves. He was placed at maximum medical

the trial court stated that it was "aware of a concurrent issue regarding whether the [library's] statutory right to reimbursement and subrogation rights attach[ed] to the [October 2019] Judgment recovered against [TIC] in a third party lawsuit. This Order is not to be construed as affecting the rights of either party regarding that issue." In addition, the settlement order further stated that the library "shall reserve the right to pursue subrogation/reimbursement/credit for any and all benefits paid as the result of the [October 2019] judgment in the third party lawsuit."

On March 3, 2020, Mosley filed a satisfaction of the October 2019 judgment entered against TIC in the tort action.[4] On May 29, 2020, Mosley filed in the tort action a motion seeking a declaration that the

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improvement on November 28, 2018, after receiving a permanent-impairment rating of 6%.

[4]Neither O'Brien, Mosley, TIC, nor the library argued to the trial court, and neither O'Brien nor the library have argued to this court, that any further claim existed against GEICO in the tort action after TIC paid the damages awarded to Mosley in the October 2019 judgment. Based on O'Brien's concession on appeal regarding GEICO's policy providing excess coverage (see note 2, supra) and TIC's satisfaction of the October 2019 judgment, we conclude that Mosley's claim against GEICO became moot upon TIC's satisfaction of the October 2019 judgment. See Hasting v. Roberts, 230 So. 3d 391, 396 (Ala. 2017); Gillespie v. Safeco Life Ins. Co., 565 So. 2d 150, 152 (Ala. 1990) (Houston, J., concurring specially).

proceeds paid to him under the TIC policy were exempt from the library's claim under § 25-5-11(a). The library filed a response to Mosley's May 2020 motion, alleging, in part, that Mosley contemporaneously had filed a motion in the workers' compensation action requesting a declaration that the proceeds paid to him under the TIC policy were exempt from the library's claim under § 25-5-11(a). Attached to the library's response was a copy of an order entered on June 2, 2020, in the workers' compensation action that stated: "More than forty-two (42) days ago, the Court ruled on the issues in [Mosley's] 'Amended Motion for Order Declaring Recovered Uninsured Motorist Judgment Exempt from Subrogation.' Therefore, the Court has lost jurisdiction over this matter." The library also alleged that, on January 13, 2020, the trial court in the workers' compensation action had entered an order denying Mosley's motion to declare the proceeds paid to him under the TIC policy exempt from the library's claim under § 25-5-11(a), and, thus, the library asserted that the doctrine of res judicata precluded the trial court in the tort action from considering that issue. The record does not include a copy of any such January 13, 2020, order, however, and such a conclusion is in tension with the respective provisions

in the settlement order (which was entered on January 21, 2020), reflecting that the trial court in the workers' compensation action was aware of the subrogation issue pending in the tort action and that "[t]his Order is not to be construed as affecting the rights of either party regarding that issue."

On June 9, 2020, the library filed a motion in the tort action seeking to enforce its subrogation rights, and, on June 24, 2020, the library filed a motion seeking a determination, without a hearing, of its claim under § 25-5-11(a). The latter motion alleged that the library apparently had filed a motion in the workers' compensation action seeking an order enforcing its right to subrogation. However, no copy of the latter motion was attached to the motion filed in the tort action, and the latter motion is not in the record on appeal. Nevertheless, the record includes a copy of an order purportedly entered by the trial court in the workers' compensation action on June 10, 2020, which stated: "The MOTION TO ENFORCE SUBROGATION filed by [the library] is hereby granted." (Capitalization in original.) The library argued to the trial court in the tort action that, based on the June 2, 2020, and June 10, 2020, orders

entered in the workers' compensation action, "the issues before this Court are now res judicata ...."

On July 29, 2020, the trial court entered an order in the tort action denying Mosley's motion to declare the proceeds paid to him under the TIC policy exempt from the library's claim under § 25-5-11(a); that order is hereinafter referred to as "the July 2020 order." Specifically, the trial court concluded that precedents that supported the denial of the library's claim, see State Farm Mutual Automobile Insurance Co. v. Cahoon, 287 Ala. 462, 252 So. 2d 619 (1971); River Gas Corp. v. Sutton, 701 So. 2d 35, 39 (Ala. Civ. App. 1997); and Bunkley v. Bunkley Air Conditioning, Inc., 688 So. 2d 827 (Ala. Civ. App. 1996), were inapplicable because, it stated, Cahoon and Bunkley had been decided based on a precursor to § 25-5-11(a) that predated the 1992 amendment to that Code section, see Ala. Acts 1992, Act No. 92-537, § 8, and thus "could not have interpreted [that section] as it reads today," and because, it stated, Sutton was in conflict with more recent precedents that would support the conclusion "that an employer can subrogate against [an uninsured-motorist insurance] recovery by an injured employee up to the amount paid in comp benefits."

The more recent precedents relied on by the trial court were Watts v. Sentry Insurance, 876 So. 2d 440 (Ala. 2003), and Roblero v. Cox Pools of Southeast, Inc., 133 So. 3d 904 (Ala. Civ. App. 2013). The trial court concluded:

> "While it is true that older Alabama caselaw interpreting the issue of whether an employer can subrogate under these facts goes against the employer, and while it is also true that as of this date, none of those cases have been reversed, it is also true that more recent Alabama Supreme Court and Alabama Court of Civil Appeals cases with facts almost identical to ours have held that an employer can subrogate against [an uninsured-motorist insurance] recovery by an injured employee -- up to the amount paid in comp benefits.
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> "WHEREFORE, based on the facts and law set forth herein, and notwithstanding the conflict between the older and newer case law, Mosley's Motion for an Order Declaring Recovered Uninsured Motorist Judgment Exempt from Subrogation is DENIED."

(Capitalization in original.) The July 2020 order did not specify the amount to be paid to the library. Also, the July 2020 order stated that, because the trial court had concluded that the proceeds at issue were not exempt from the library's claim under § 25-5-11(a), the issue whether the doctrine of res judicata applied to preclude its consideration of Mosley's motion was moot.

Mosley filed a motion seeking reconsideration of the July 2020 order; the trial court denied that motion. On September 24, 2020, Mosley filed a notice of appeal to this court, and, on October 8, 2020, the library filed a contingent cross-appeal regarding the trial court's ruling on the library's res judicata defense. Thereafter, Mosley filed a Chapter 13 bankruptcy petition in the United States Bankruptcy Court for the Southern District of Alabama, and the appeal and the cross-appeal were stayed.

On April 23, 2021, the bankruptcy court entered an order that granted the library "limited relief from the automatic stay to litigate to final conclusion (including further proceedings in the Alabama Supreme Court or on remand to circuit court) appeal numbers 2190979 and 2200029 currently pending in the Alabama Court of Civil Appeals." The April 2021 order also directed O'Brien, the trustee of Mosley's bankruptcy estate, to "take steps necessary to be substituted or added as a party in interest in the pending appeal(s) ...." The April 2021 order was filed with this court, and thereafter O'Brien filed a motion requesting his substitution as a party for Mosley, which this court granted on May 5, 2021. O'Brien then filed a motion to dismiss the appeal and the cross-

appeal on the ground that the July 2020 order was not a final judgment that would support an appeal because that order did not include the amount of any award to the library.

On May 28, 2021, this court dismissed the appeal and the cross-appeal for lack of jurisdiction because they had been taken from a nonfinal judgment. Our certificate of judgment issued in both the appeal and the cross-appeal on June 16, 2021. On June 23, 2021, the library filed a motion in the trial court requesting the entry of a judgment in the amount of $24,859.18 ($37,270.14 less a pro rata portion of the attorney fees due to Mosley's attorney in the tort action) as to its claim under § 25-5-11(a). O'Brien filed a response stating that he had no disagreement as to the amount of the library's claim; he asserted, however, that the library had no right to recover under § 25-5-11(a). On July 15, 2021, the trial court entered a judgment for $24,859.18 in favor of the library ("the July 2021 judgment") and directed that the judgment be paid from the proceeds paid by TIC and held by Mosley's attorney, subject to further orders of the bankruptcy court.

On July 27, 2021, O'Brien filed a notice of appeal with this court. We have jurisdiction as to the appeal because the amount involved as to the library's claim is less than $50,000. See Ala. Code 1975, § 12-3-10.

> " '[B]ecause the underlying facts are not disputed and this appeal focuses on the application of the law to those facts, there can be no presumption of correctness accorded to the trial court's ruling.' Beavers v. County of Walker, 645 So. 2d 1365, 1373 (Ala. 1994) (citing First Nat'l Bank of Mobile v. Duckworth, 502 So. 2d 709 (Ala. 1987)). A ruling on a question of law carries no presumption of correctness, and appellate review is de novo. See Rogers Found. Repair, Inc. v. Powell, 748 So. 2d 869 (Ala. 1999); Ex parte Graham, 702 So. 2d 1215 (Ala. 1997)."

Ex parte City of Brundidge, 897 So. 2d 1129, 1131 (Ala. 2004).

According to O'Brien,

> "[t]he employer's right of reimbursement for compensation paid on account of an employee's injury is confined to the employee's recovery of 'damages' against a 'third-party tortfeasor.' It does not extend to the employee's recovery of [uninsured-motorist] benefits from an insurer, whether that insurer issued the policy to the employee or the employer."

As support for that argument, O'Brien contends that the trial court erred as to its application of § 25-5-11(a) in light of the supreme court's decision in Cahoon, which discussed the applicability of the precursor to that Code section, see Ala. Code 1940 (1958 Recomp.), tit. 26, § 312, as to a claim

involving benefits paid under an employee's uninsured-motorist insurance policy. O'Brien further notes a line of precedents that have relied on Cahoon for the proposition that § 25-5-11(a) does not authorize an employer's subrogation or reimbursement claim against proceeds an employee has received under the employer's uninsured-motorist insurance policy. See Bunkley, 688 So. 2d at 831-32 (relying on Cahoon and rejecting an employer's argument that § 25-5-11(a) authorized a credit against the proceeds Bunkley had received from his employer's uninsured-motorist insurance policy); Sutton, 701 So. 2d at 39 (relying on Bunkley and citing Cahoon in support of the conclusion that "River Gas is not entitled to subrogation of the $150,000 of underinsured motorist benefits that Sutton received from [River Gas's automobile insurance carrier,] Home Insurance, because Home Insurance was not the 'third-party wrongdoer' that caused Sutton's injuries," but approving subrogation as to Home Insurance's payment of $25,000, which represented the tortfeasor's liability limits on her personal automobile insurance); see also Maryland Cas. Co. v. Tiffin, 537 So. 2d 469 (Ala. 1988) (plurality opinion) (allowing a reimbursement claim under § 25-5-11(a) against the

settlement proceeds from a wrongful-death action, which involved parties who were at "actionable fault," see 537 So. 2d at 473, and apparently their liability insurers, see id. at 472 n.1, while distinguishing that claim from the claim in Cahoon because the latter involved uninsured-motorist insurance, see id. at 473); H&H Wood Co. v. Monticello Ins. Co., 668 So. 2d 38, 40 (Ala. Civ. App. 1995) (holding that a workers' compensation insurer could not intervene as a matter of right in an employee's action against his employer's uninsured-motorist insurance carrier because the "action is not a 'tort action for damages' under § 25-5-11"). O'Brien argues that the trial court erred by agreeing with the library's contention that the 1992 amendment to § 25-5-11(a) allowed for a distinction to be drawn as to the rationale in Cahoon and by agreeing with the library's contention that Watts and Roblero, rather than the earlier precedents, were controlling.

In response, the library argues that the July 2020 order is supported by the plain language of § 25-5-11(a), specifically in light of the 1992 amendment to that Code section. This argument makes no reference to Cahoon or to the other precedents applying § 25-5-11(a) referenced above.

In essence, the library's plain-language argument requests that this court ignore Cahoon and those precedents in determining the application of § 25-5-11(a). Alternatively, the library contends that Cahoon is distinguishable (1) because it involved issues as to an employee's uninsured-motorist insurance policy rather than that of an employer; (2) because the Act reflects a purported general intent that the employer receive "a credit against workers' compensation benefits owed in an amount equal to other benefits provided by the employer" (emphasis omitted) to the employee, as allegedly reflected, for example, in Ala. Code 1975, § 25-5-57(a)(4)h.3. and §25-5-57(c); (3) because the 1992 amendment to § 25-5-11(a) supplanted Cahoon by purportedly giving an employer an absolute right to reimbursement; and (4) because Watts and Roblero purportedly "reflect a shift in the [appellate] Courts' prevailing thought on the employer's right to reimbursement from [uninsured-motorist insurance] damages" under § 25-5-11(a).

The parties' arguments, including the library's plain-language argument, require an understanding of the rationale in Cahoon and the language used in § 25-5-11(a), in light of the precursors to that Code

section. That is so because, as the supreme court stated in Grimes v. Alfa Mutual Insurance Co., 227 So. 3d 475, 489 (Ala. 2017),

> " '[t]he Legislature is presumed to be aware of existing law and judicial interpretation when it adopts a statute,' Carson v. City of Prichard, 709 So. 2d 1199, 1206 (Ala. 1998), and 'we presume "that the legislature does not intend to make any alteration in the law beyond what it explicitly declares." ' Ware v. Timmons, 954 So. 2d 545, 556 (Ala. 2006)(quoting Duncan v. Rudulph, 245 Ala. 175, 176, 16 So. 2d 313, 314 (1944))."

Thus, this court must first determine the state of the law before the 1992 amendment to § 25-5-11(a) to determine whether that amendment made Cahoon irrelevant or substantially changed the law as to an employer's claim under § 25-5-11(a) against uninsured-motorist insurance proceeds paid to an employee.

In Cahoon, Patrick P. Cahoon, who was an employee of White Swan Linen Rental ("White Swan"), was injured in an automobile collision caused by Norman Patrick, an uninsured motorist. Cahoon was driving a truck owned by White Swan and was acting in the line and scope of his employment with White Swan when the collision occurred. Cahoon subsequently commenced an action against State Farm Mutual

Automobile Insurance Company ("State Farm"), which insured Cahoon's personal automobile. Cahoon claimed that he was entitled to the uninsured-motorist benefits under his State Farm policy, which had policy limits of $10,000.

It was undisputed that Cahoon's damages from the accident were $33,800,

> "[t]hat White Swan ... provided coverage to Cahoon under the Alabama Workmen's Compensation Act, and that as of 11 May 1970, Cahoon ha[d] been paid $7,600 compensation, and $2,400 [in] medical expenses by White Swan's workmen's compensation insurance carrier, and [could] receive by future compensation payments a total of at least $10,000, but not more than $11,400, not including the medical benefit payments."

287 Ala. at 465, 252 So. 2d at 620. It was also undisputed that White Swan insured its truck through a policy with American Mutual Liability Insurance Company ("American Mutual"); that policy also included uninsured-motorist coverage of $10,000. Cahoon did not commence an action against American Mutual, and American Mutual had made no payments to him. Nevertheless, it was stipulated between Cahoon and State Farm that Cahoon might recover under the American Mutual policy

if "the Workmen's Compensation provisions in the State Farm and American Mutual policies ... are held by the court not to preclude Cahoon's recovery under the uninsured motorist provisions of either policy." 287 Ala. at 465, 252 So. 2d at 620. After a trial, the trial court in Cahoon entered a judgment in favor of Cahoon and against State Farm for $10,000, plus interest. State Farm appealed to the supreme court.

At trial, the trial court had rejected State Farm's attempt to enforce the excess-escape clause of its insurance policy so as to preclude Cahoon's recovery of uninsured-motorist benefits against it. The supreme court likewise rejected that defense, relying on Safeco Insurance Co. of America v. Jones, 286 Ala. 606, 243 So. 2d 736 (1970)("Safeco"), which held that the Alabama uninsured-motorist statute, currently Ala. Code 1975, § 32-7-23, " 'sets the minimum amount for recovery, but it does not place a limit on the total amount of recovery so long as that amount does not exceed the amount of actual loss[, and] ... where the loss exceeds the limits of one policy, the insured may proceed under other available policies ....' " Cahoon, 287 Ala. at 466, 252 So. 2d at 621 (quoting Safeco, 286 Ala. at 614, 243 So. 2d at 742); see also Gaught v. Evans, 361 So. 2d 1027, 1028

(Ala. 1978) (discussing the distinction between an excess-escape clause and an excess clause in the context of uninsured-motorist insurance).

The trial court in Cahoon also addressed the issue whether State Farm could enforce a provision included in its insurance policy that reduced any loss payable under the policy by " 'the amount paid and the present value of all amounts payable to [Cahoon] under any workmen's compensation law, exclusive of non-occupational disability benefits.' " 287 Ala. at 466-67, 252 So. 2d at 622 (quoting State Farm's policy). State Farm contended that because "its liability [should be] reduced or set off by any benefits paid to Cahoon as workmen's compensation," and because those benefits exceeded the policy limits under State Farm's policy, it owed Cahoon nothing. 287 Ala. at 467, 252 So. 2d at 622. The supreme court disagreed, stating that, "[a]ssuming Cahoon receive[d] the full $11,400 workmen's compensation benefits, plus the $2,400 [in] medical benefits, and the $10,000 'available' under American Mutual's policy, the total of all these sums would be $23,800, some $10,000 less than Cahoon's stipulated damages of $33,800." 287 Ala. at 467, 252 So. 2d at 622. After discussing precedents from other states that had held such setoffs to be

impermissible, the supreme concluded: "[I]t would appear that the provision now being considered was well within the influence of the enunciations in Safeco, and that such enunciations would have compelled a conclusion in harmony with the results reached in such cited cases." 287 Ala. at 467-68, 252 So. 2d at 623.

Finally, the supreme court addressed State Farm's argument that allowing Cahoon to recover from it "would inure indirectly to the benefit of the workmen's compensation carrier of White Swan, and therefore [be] contrary to the Exclusion-Insuring provision of [State Farm's] policy." 287 Ala. at 468, 252 So. 2d at 623.

> "Counsel for State Farm argue that our Workmen's Compensation Law, particularly that part which for convenience will be cited as Sec. 312, Tit. 26, Code of Alabama 1940 (pocket part), supports their contentions under these assignments of error. This section, in parts pertinent to this review, reads:
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> > " 'When the injury or death for which compensation is payable ... was caused under circumstances also creating a legal liability for damages on the part of any party other than the employer ... the employee ... may proceed against the employer to recover compensation ... and at the same time may bring an action against such other party to recover damages for such injury or death.

> ... If the injured employee[] ... recover[s] damages against such other party the amount of such damages so recovered and collected shall be credited upon the liability of the employer for compensation, ... and the employer shall be entitled to reimbursement for the amount of compensation theretofore paid on account of such injury or death. '...
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> "The statutory right of subrogation created by the above provision is in favor of the employer when compensation is due an injured employee, and the injury is caused to the employee under circumstances also creating a legal liability for damages on the part of any party other than the employer.
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> "The only action for recovery of damages for personal injuries proximately resulting from the negligence of a party other than the employer is an action on the case. In such action the basis of the liability of any party other than the employer rests in tort for negligently injuring the workman. Metropolitan Casualty Ins. Co. of New York v. Sloss-Sheffield Steel & Iron Co., 241 Ala. 545, 3 So. 2d 306 [(1941)], and cases cited therein.
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> "Thus, if Cahoon could recover anything from the uninsured motorist, [Norman] Patrick, it would be on a tort basis because of Patrick's negligence.
>
> "The present judgment was rendered in a suit by Cahoon in an action in contract based on the insurance contract entered into between Cahoon and State Farm."

287 Ala. at 468, 252 So. 2d at 623-24.

We pause here to note that the above quote from Cahoon in turn quotes from the first and second sentences of Ala. Code 1940 (1958 Recomp.), tit. 26, § 312, as amended by § 4 of Act. No. 272, Ala. Acts 1961 (Special Sess.). It is clear from the above-quoted discussion from Cahoon that the supreme court concluded that the quoted language from § 312 described an employee's claim against a third party who was at fault in causing the employee's injury and did not include a claim against a third party who was not at fault in causing such injury, such as an uninsured-motorist insurance carrier. As the supreme court has stated, although a claim for uninsured-motorist benefits " 'is dependent upon establishing the tortfeasor's fault and the certainty of damages, the claim for [uninsured-motorist] benefits is based on the contractual obligations of the insurance policy.' " Travelers Home & Marine Ins. Co. v. Gray, 171 So. 3d 3, 8 (Ala. 2014) (quoting Bailey v. Progressive Specialty Ins. Co., 72 So. 3d 587, 593 (Ala. 2011)) (emphasis omitted). In other words, "[a]n action based on the uninsured motorist provisions of a liability policy is ex contractu in nature." Howard v. Alabama Farm Bureau Mut. Cas. Ins. Co., 373 So. 2d 628, 629 (Ala. 1979); see also Ex parte Barnett, 978 So. 2d 729, 733-34

(Ala. 2007) ("[I]t is clear that Morales's [uninsured-motorist] insurance carrier committed no wrongful act that united with Barnett's negligence to cause a single injury, and her [uninsured-motorist] insurance carrier, therefore, was not a joint tortfeasor. Instead, [an uninsured-motorist] insurance carrier's liability to the insured is based solely on its contractual obligations as laid out in the policy." "Although we recognize that the [uninsured-motorist] insurance carrier's liability is triggered when the plaintiff establishes the tortfeasor's liability, we disagree that this means that any payment made by the insurer is made 'on behalf of the tortfeasor.' "); Continental Nat'l Indem. Co. v. Fields, 926 So. 2d 1033, 1037 (Ala. 2005) (holding that the cause of action for recovery under the uninsured-motorist statute is contractual).

The foregoing conclusion is also supported by the reliance of the Cahoon court on Metropolitan Casualty Insurance Co. of New York v. Sloss-Sheffield Steel & Iron Co., 241 Ala. 545, 3 So. 2d 306 (1941) ("Sloss-Sheffield"). In Sloss-Sheffield, the supreme court addressed an action that had been commenced pursuant to Ala. Code 1923, § 7586, which was the precursor to Ala. Code 1940, § 311. Section 7586 provided

> "Where an injury or death, for which compensation is payable under Article 2 of this Chapter, is caused under circumstances also creating a legal liability for damages on the part of any party other than the employer, such party also being subject to the provisions of Article 2 of this Chapter, the employee in case of injury, or his dependents in case of death, may, at his or their option, proceed either at law against such party to recover damages, or against the employer for compensation under Article 2 of this Chapter, but not against both. ... If the employee or his dependents shall elect to receive compensation from the employer, then the latter or his insurance carrier shall be subrogated to the right of the employee or his dependents, to recover against such other party, and may bring legal proceedings against such party and recover the aggregate amount of compensation payable by him to such employee ..., together with the costs of such action and reasonable attorney's fees expended by him therein."[5]

The injured employee at issue in Sloss-Sheffield had elected to receive compensation from his employer, which was insured by Metropolitan

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[5]Section 7587, Ala. Code 1923, was the precursor to § 312, which was at issue in Cahoon. The supreme court has described § 311 and § 312 as "companion statute[s]." Ex parte Howell, 447 So. 2d 661, 667 (Ala. 1984). Section 311 was repealed in 1947 when § 312 was amended to govern the "legal liability for damages on the part of any party other than the employer whether or not such party be subject to" the pertinent provisions of the workmen's compensation act. Act No. 635, Ala. Acts 1947 (emphasis added). Before the 1947 amendment, § 312 had addressed only the "legal liability for damages on the part of any party other than the employer, such party not being subject to" the pertinent provisions of the workmen's compensation act. (Emphasis added.)

Casualty Insurance Company of New York ("Metropolitan Casualty"), which in turn commenced an action against the alleged third-party tortfeasor. In discussing the application of § 7586, the supreme court stated that Metropolitan Casualty was

> "a volunteer who has, for consideration paid, insured the employer against a statutory liability and its right of subrogation depends entirely upon the statute. It is a statutory subrogee, and the right to which it is subrogated is the right of action arising in favor of the injured workman or his dependents, as a proximate consequence of the negligence or wrongful act of such third person. ...
>
> "... The right to which such subrogee succeeds is the right to bring 'legal proceedings' an 'action' at law, and the circumstances of the injury must create 'a legal liability for damages on the part' of the defendant. § 7586, supra.
>
> "In short, the subrogation is to the right of the injured workman or his dependents to bring an action for damages against the person or persons proximately causing the injury by negligence or wrongful act. ...
>
> "....
>
> "The appropriate action, and the only action, provided for recovery of damages for personal injuries proximately resulting from negligence is an action on the case."

241 Ala. at 547-48, 3 So. 2d at 308-09.

Returning our attention to Cahoon, the supreme court continued:

> "In Horne v. Superior Life Ins. Co., 203 Va. 282, 123 S.E.2d 401 [(1962)], the Virginia court was considering a question which in all material respects was highly similar to the one we now are considering. That court disposed of the question by concluding in effect that subrogation of the employer is against the person who was driving the other car, but not against the employee's insurance company, since the insurance company's liability arises from contract."

287 Ala. at 468, 252 So. 2d at 624 (emphasis added). We pause our Cahoon discussion again because further reflection on Horne v. Superior Life Insurance Co., 203 Va. 282, 123 S.E.2d 401 (1962), is helpful to understand the rationale in Cahoon.

Horne involved an appeal by Ellis E. Horne from the denial of his workmen's compensation claim against Superior Life Insurance Company, Horne's employer. Horne had been injured in the course of his employment, while riding as a passenger in his wife's automobile, which was insured under a policy between his wife and Aetna Insurance Company. Horne, who was considered an insured under the Aetna policy, settled his claim against Aetna for uninsured-motorist insurance benefits and also executed a release in favor of Aetna. 203 Va. at 283-84, 123

S.E.2d at 402-03. Thereafter, the Industrial Commission denied Horne's claim for workmen's compensation benefits because it concluded that the Aetna release "destroyed [Horne's] employer's (Superior's) right of subrogation against Aetna ...." 203 Va. at 284, 123 S.E.2d at 403. The Virginia Supreme Court reversed, stating:

> "Section 65-38, Code 1950, as amended, reads in part:
>
> > "'The making of a lawful claim against an employer for compensation under this Act [Workmen's Compensation] for the injury or death of his employee shall operate as an assignment to the employer of any right to recover damages which the injured employee or his personal representative or other person may have against any other party for such injury or death, and such employer shall be subrogated to any such right and may enforce, in his own name or in the name of the injured employee or his personal representative, the legal liability of such other party. ...'
>
> "Section 38.1-381(f), Code 1950, as amended, provides in part:
>
> > "'Any insurer paying a claim under the endorsement or provisions required by paragraph (b) [uninsured motor vehicle] of this section shall be subrogated to the rights of the insured to whom such claim was paid against the person causing such injury, death or damage to the extent that payment was made; ....'

"In the former section (65-38) the employer, under the Workmen's Compensation Act, is unquestionably given subrogation to the rights of the employee against a negligent third party to the extent of the payments made. In the latter section the insurer is likewise given subrogation to the rights of the insured against a negligent third party to the extent of payments made. The question arises as to whether the right of subrogation 'against any other party' given the employer in the former section includes the rights that the employee has against the insurer under the uninsured motorist provision of a liability policy which is required by statute.

"The precise issue is one of first impression. It is not the purpose of the uninsured motorist law to provide coverage for the uninsured vehicle, but its object is to afford the insured additional protection in event of an accident. Here, Aetna does not stand in the shoes of [James T.] Washington, the uninsured motorist. Its policy does not insure Washington against liability. It insures Mrs. Horne and others protected under the policy against inadequate compensation. Aetna's liability to its insured is contractual, even though it is based upon the contingency of a third party's tort liability, and Horne's employer, Superior, does not become a third party beneficiary under the insurance contract. In fact, the policy specifically provided that it was not to inure directly or indirectly to the benefit of any workmen's compensation carrier or self-insurer under the Act. Mrs. Horne chose to provide, at her expense, additional protection under the uninsured motorist provision for herself and others protected thereby and not for Superior or its compensation carrier. Neither Superior nor its compensation carrier acquired any more rights under Mrs. Horne's automobile liability policy than they would have acquired under a policy issued the insured providing for health and accident benefits. Certainly the Workmen's Compensation Act does not contemplate that

> the employer can be subrogated to the rights of the insured in such a policy. See Commissioners of the State Insurance Fund v. Miller, 4 App. Div. 2d 481, 482, 483, 166 N.Y.S.2d 777, 779 [(1957)].
>
> "Moreover, the uninsured motorist law (§ 38.1-381) was first enacted by the General Assembly in 1958, years after the enactment of the Workmen's Compensation Act. It is reasonable to conclude that it was not contemplated or intended by the General Assembly that the employer's right of subrogation under the Workmen's Compensation Act should extend to the employee's rights under the uninsured motorist coverage of a liability policy.[6]
>
> "In the absence of a statutory provision giving the employer or its compensation carrier a right of subrogation against an insurer of the employee under the uninsured motorist provision of a liability policy, such a right does not exist. ... We hold that § 65-38, supra, does not give that right, and the insurer in the present case is not 'any other party' within the contemplation of the statute."[7]

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[6]The precursor to the Act likewise predated the enactment of the precursor to § 32-7-23, the uninsured-motorist statute. See Safeco, 286 Ala. at 608, 243 So. 2d at 737 ("The first [uninsured-motorist] statute was enacted in New Hampshire in 1957. Ours became effective January 1, 1966.").

[7]The Virginia Legislature subsequently enacted a subrogation statute regarding uninsured-motorist insurance benefits, expressly including an employer's right to subrogation as to an uninsured-motorist insurance policy "carried by and at the expense of the employer." Va. Code Ann. § 65.2-309.1.

203 Va. at 285-86, 123 S.E.2d at 403-04 (emphasis added); see also Gray, supra; Ex parte Barnett, supra; Howard, 373 So. 2d at 629 ("An action based on the uninsured motorist provisions of a liability policy is ex contractu in nature."). The Virginia Supreme Court concluded: "Superior's rights of subrogation are against Washington, the alleged third party tortfeasor, who has not been released from liability. Since Superior was subrogated to no rights against Aetna, Horne has not prejudiced or destroyed any rights of Superior by releasing Aetna from liability on its policy." 203 Va. at 287, 123 S.E.2d at 405.

Returning to Cahoon, the supreme court continued:

> "To the same effect are the conclusions reached in Motors Ins. Corp. v. Surety Ins. Co., 243 S.C. 487, 134 S.E.2d 631 [(1964)]; Lumbermens Mutual Casualty Co. v. Harleysville Mutual Casualty Co., ... 367 F.2d 250 [(4th Cir. 1966)]; and Southeast Furniture Co. v. Barrett, 24 Utah 2d 24, 465 P.2d 346 [(1970)]."

287 Ala. at 468-69, 252 So. 2d at 624. We again pause to note that, in Motors Insurance Corp. v. Surety Insurance Co., 243 S.C. 487, 134 S.E.2d 631 (1964), which did not involve workmen's compensation, the South Carolina Supreme Court reversed a judgment that had held that "a

collision insurance carrier, which ha[d] paid a loss caused by the actionable negligence of the operator of an uninsured vehicle, [wa]s subrogated to the rights of its insured to uninsured motorist coverage" of another insurance carrier. 243 S.C. at 489, 134 S.E.2d at 631. The South Carolina Supreme Court stated that the collision-insurance carrier

> "discharged its contractual obligation by payment to its insured. Having paid what it contracted to pay and retaining the benefits of its contract, it now seeks indemnity from another insurance company which did not cause or contribute to the loss and with which it has no privity of contract.
>
> "....
>
> "The purpose of the [uninsured-motorist] Act was to relieve insured motorists, within specified limits, of the risk of injury from the tortious conduct of financially irresponsible, uninsured motorists. ... Nothing in the terms of the [uninsured-motorist] Act indicates an intention to relieve other insurers of primary responsibility for their own contractual obligations or to benefit them in any way."

243 S.C. at 490-91, 134 S.E.2d at 632. Likewise, in Lumbermens Mutual Casualty Co. v. Harleysville Mutual Casualty Co., 367 F.2d 250 (4th Cir. 1966), the United States Court of Appeals for the Fourth Circuit concluded that, "under the Virginia uninsured motorist statute as construed by her courts, the indemnity furnished by the [uninsured-motorist] endorsement

on [the injured-insured Gertrude Southern's] policy with Harleysville [Mutual Casualty Company] did not inure to the benefit of anyone other than Gertrude Southern." Id. at 255. As to Southeast Furniture Co. v. Barrett, 24 Utah 2d 24, 465 P.2d 346 (1970), the supreme court explained in Cahoon:

> "In the last case just cited, the Utah Supreme Court refused to permit the subrogation provision in that state's Workmen's Compensation Act, Sec. 35-1-62, [Utah Code Ann.] 1953, to cause a diminution of uninsured motorist coverage, and set forth its conclusion in this regard as follows:
>
> > " 'We think that under the language of 35-1-62, [Utah Code Ann.] 1953 ..., a breadwinner has the right to supplement any benefits to which he may be entitled under the workmen's compensation act, by procuring and paying whatever premium he can squeeze out of his budget for an independent policy with an independent carrier in as large an amount as he can afford, without giving up any workmen's compensation benefits.' "

287 Ala. at 469, 252 So. 2d at 624.

The Cahoon court continued:

> "In argument in support of [the assignments of error at issue], counsel for appellants have cited and relied upon two cases, Hackman v. American Mutual Liability Ins. Co., 110 N.H. 87, 261 A.2d 433 [(1970)], and Ullman v. Wolverine Ins. Co., 105 Ill. App. 2d 408, 244 N.E.2d 827 [(1969)]."

287 Ala. at 469, 252 So. 2d at 624. In Hackman v. American Mutual Liability Insurance Co., 110 N.H. 87, 261 A.2d 433 (1970), the New Hampshire Supreme Court held that American Mutual Liability Insurance Co., which had issued Paul L. Hackman's employer both the workers' compensation insurance policy and the uninsured-motorist insurance policy at issue, could deduct the workers' compensation payments it had made from the uninsured-motorist insurance benefits awarded to Hackman because such deduction "does not reduce Hackman's recovery below the amount he would have recovered if injured by an insured operator." 110 N.H. at 91, 261 A.2d at 436.[8] In Ullman v.

[8]Hackman was eventually superseded. In Merchants Mutual Insurance Group v. Orthopedic Professional Ass'n, 124 N.H. 648, 655, 480 A.2d 840, 843 (1984), the New Hampshire Supreme Court stated that

> "[t]he result in Hackman was predicated on the rationale that the uninsured motorist statute was not designed to provide greater insurance protection than the statutory minimum. The rationale underlying that decision, however, has been seriously undermined by amendments to the uninsured motorist statute and by the recent emergence of a substantial body of case law construing the statute; thus, the decision no longer has validity."

The New Hampshire Supreme Court concluded that New Hampshire's uninsured-motorist statute "did not provide for any reduction because of

Wolverine Insurance Co., 105 Ill. App. 2d 408, 244 N.E.2d 827 (1969), the Appellate Court of Illinois held that "the deduction of workmen's compensation benefits provision [included in the employee's uninsured-motorist insurance policy] [wa]s valid because its effect places the insured in an equivalent position to that which he would have occupied had the tort feasor been insured with minimum coverage." 105 Ill. App. 2d at 414, 244 N.E.2d at 830. As to State Farm's reliance on Hackman and Ullman, the Cahoon court stated:

> "Both New Hampshire and Illinois are among those jurisdictions construing their uninsured motorists statutes as limiting recovery to the statutory limit provided in their uninsured motorists statutes. (See Safeco.) We therefore

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the possibility of duplicated benefits from another source" and that "any policy provision which requires an uninsured motorist to suffer a reduction in the coverage paid for, by the amounts of workmen's compensation received by the insured, is an invalid restriction of the statutory scope of coverage." 124 N.H. at 655, 480 A.2d at 844. The court also noted that its "holding [was] in accord with the conclusion of a majority of jurisdictions[] that have held worker's compensation set-off clauses invalid as repugnant to their uninsured motorist statutes." 124 N.H. at 656, 480 A.2d at 844. Merchants Mutual Insurance Group was, in turn, superseded by "the 1985 amendment to the workers' compensation statute (currently codified at [N.H. Rev. Stat. Ann. §] 281-A:13, I (Supp.1993)) that expressly provide[d] for a carrier's right to assert a lien against uninsured motorist benefits." Rooney v. Fireman's Fund Ins. Co., 138 N.H. 637, 640, 645 A.2d 52, 54 (1994).

> consider these two cases inapposite. This for the reason that in Safeco such limitation on recovery was repudiated, and the opinion of the Court of Civil Appeals which had adopted such view was reversed."

287 Ala. at 469, 252 So. 2d at 624.

Having reviewed the rationale in Cahoon, we turn our attention to the post-Cahoon legislative treatment of § 312. When Cahoon was decided, § 312 stated:

> "When the injury or death for which compensation is payable under article 2 of this chapter was caused under circumstances also creating a legal liability for damages on the part of any party other than the employer whether or not such party be subject to the provisions of article 2 of this chapter the employee, or his dependents in case of his death, may proceed against the employer to recover compensation under article 2 of this chapter, or may agree with the employer upon the compensation payable under article 2 of this chapter and at the same time may bring an action against such other party to recover damages for such injury or death, and the amount of such damages shall be ascertained and determined without regard to article 2 of this chapter. If the injured employee, or in the case of his death his dependents, recover damages against such other party the amount of such damages so recovered and collected shall be credited upon the liability of the employer for compensation, and if such damages so recovered and collected should be in excess of the compensation payable under article 2 of this chapter there shall be no further liability on the employer to pay compensation on account of such injury or death, and the employer shall be entitled to reimbursement for the amount of

> compensation theretofore paid on account of such injury or death. In the event the injured employee, or in the case of his death, his dependents, do not file suit against such other party to recover damages within the time allowed by law, the employer or the insurance carrier for the employer shall be allowed an additional period of six months within which to bring suit against such other party for damages on account of such injury or death ...."

Act No. 272, § 4, Ala. Acts 1961 (Special Sess.).

Section 312 was amended in 1973, without substantive change to the language that the supreme court relied upon in Cahoon. See Act No. 1062, § 26, Ala. Acts 1973. Likewise, § 312 was again amended in 1975, see Act No. 86, § 10, Ala. Acts 1975 (4th Special Sess.), and recodified as § 25-5-11, again without substantive change to the language that the supreme court relied upon in Cahoon. As the supreme court stated in Ex parte Howell, 447 So. 2d 661, 667 (Ala. 1984), § 312

> "exists in essentially the same form presently as § 25-5-11. Under it, the employee is given a cause of action against his tortfeasor, and any damages collected therein are 'credited upon the liability of the employer for compensation.' If he recovers damages in excess of compensation payable, the employer has no further liability to pay compensation, and the employer is entitled to reimbursement for compensation theretofore paid."

Section 25-5-11 was reorganized into several subparagraphs and amended in 1984. See Act No. 85-41, § 3, Ala. Acts 1984 (2nd Special Sess., which occurred in 1985). The corresponding language to the language of § 312 quoted in Cahoon was carried forward, without substantive change, in § 25-5-11(a). The last sentence quoted above from § 312, as carried forward in subsequent amendments, which authorized the employer or its workers' compensation insurance carrier to maintain a civil action if the injured employee failed to do so, was placed in § 25-5-11(d) by Act No. 85-41.

The current version of § 25-5-11 is the result of Act. No. 92-537, § 8, Ala. Acts 1992. The underlined portion below reflects the language corresponding to the language of § 312 quoted in Cahoon, as it now appears in § 25-5-11(a):

> "If the injury or death for which compensation is payable under Articles 3 or 4 of this chapter was caused under circumstances also creating a legal liability for damages on the part of any party other than the employer, whether or not the party is subject to this chapter, the employee, or his or her dependents in case of death, may proceed against the employer to recover compensation under this chapter or may agree with the employer upon the compensation payable under this chapter, and at the same time, may bring an action against the

> other party to recover damages for the injury or death, and the amount of the damages shall be ascertained and determined without regard to this chapter. ... If the injured employee, or in case of death, his or her dependents, recovers damages against the other party, the amount of the damages recovered and collected shall be credited upon the liability of the employer for compensation. If the damages recovered and collected are in excess of the compensation payable under this chapter, there shall be no further liability on the employer to pay compensation on account of the injury or death. To the extent of the recovery of damages against the other party, the employer shall be entitled to reimbursement for the amount of compensation theretofore paid on account of injury or death. ... For purposes of this amendatory act, the employer shall be entitled to subrogation for medical and vocational benefits expended by the employer on behalf of the employee; however, if a judgment in an action brought pursuant to this section is uncollectible in part, the employer's entitlement to subrogation for such medical and vocational benefits shall be in proportion to the ratio the amount of the judgment collected bears to the total amount of the judgment."

The pertinent part of § 25-5-11(d) remains unchanged from Act No. 85-41.

As the foregoing reflects, since Cahoon was decided, the legislature has continued, with slight variation, to include the exact language from § 312 that the supreme court relied on in Cahoon. No substantive change has occurred to that language since the supreme court concluded in Cahoon that the phrase a "party other than the employer" in § 312, which phrase has been carried forward in § 25-5-11(a), references a party whose

fault caused the personal injury to the employee and does not include a party whose liability to the employee is based on a contract. See Gray, supra; Ex parte Barnett, supra; Howard, 373 So. 2d at 629 ("An action based on the uninsured motorist provisions of a liability policy is ex contractu in nature."). The subrogation provision for medical and vocational benefits that now appears in the last sentence of § 25-5-11(a) does not alter that conclusion; similar provisions as to reimbursement for compensation or subrogation have been a part of the workers' compensation statutory scheme since the enactment of Act No. 661, Ala. Acts 1939 (amending § 7587, Ala. Code 1923, the precursor to § 312). Such provisions must be construed in light of the language describing the type of third-party claim to which § 25-5-11(a) applies, which was discussed in Cahoon. Further, any reading of Cahoon that would attempt to distinguish that case on the ground that the employee's uninsured-motorist insurance policy -- rather than the employer's uninsured-motorist insurance policy -- was at issue cannot square with the rationale of Cahoon that the pertinent language still appearing in § 25-5-11(a) refers to a claim against a tortfeasor, not a contract claim seeking insurance

obtained for purposes of the addressing the risks of collection as to the tortfeasor. Although we understand that some language in Cahoon, and some of the language in the cases relied on in Cahoon, might support drawing a distinction between employee-purchased and employer-purchased uninsured-motorist insurance policies for purposes of reimbursement or subrogation, it would be purely arbitrary to conclude that an action as to the former is a contract action, but an action as to the latter is a tort action. In other words, if such a distinction validly may be drawn, it requires ignoring the rationale in or overruling Cahoon, which this court cannot do.

Based on the foregoing, this court must reject the library's argument that the plain language of § 25-5-11(a) supports its claim, including its argument that it has an absolute right to reimbursement. The 1992 amendment to § 25-5-11(a) does not reflect a legislative decision to supersede Cahoon, see Grimes, supra, and any plain-language approach to § 25-5-11(a) that requires the overruling of Cahoon is for the consideration of the supreme court.

Turning to the remaining arguments, this court has consistently followed the rationale in Cahoon and rejected parties' attempts to pursue a claim under § 25-5-11(a) against uninsured-motorist insurance proceeds paid to an injured employee pursuant to the employer's uninsured-motorist insurance policy. See Bunkley and Sutton, supra. Contrary to the library's argument and the trial court's conclusion, Roblero does not conflict with that approach; the majority opinion in Roblero concluded that the employee at issue had waived on appeal the issue whether the trial court had erred by allowing the employer's claim under of § 25-5-11(a) regarding the proceeds from the employer's uninsured-motorist insurance policy. 133 So. 3d at 910 ("Roblero has not presented that argument to this court on appeal; therefore, it is waived."). Importantly, however, this court noted that it had been asked by the employer,

> "Cox Pools[,] ... to overrule Bunkley, supra. ... The trial court in this case agreed with Cox Pools, stating that it disagreed with the holding in Bunkley and refusing to apply that holding when it determined that Cox Pools was entitled to subrogation of the money Roblero had received from Penn National. Because Cox Pools did not receive an adverse ruling, it cannot seek to have Bunkley overruled by this court. ... Moreover, we note that, in deciding Bunkley, this court applied our supreme court's holding in State Farm Mutual Automobile Insurance

> Co. v. Cahoon, 287 Ala. 462, 252 So. 2d 619 (1971). This court and the trial court are bound by the decisions of our supreme court. TenEyck v. TenEyck, 885 So. 2d 146, 158 (Ala. Civ. App. 2003); and § 12-3-16, Ala. Code 1975. We are not at liberty to overrule or modify those decisions. Thompson v. Wasdin, 655 So. 2d 1058 (Ala. Civ. App. 1995). Thus, this court declines Cox Pools' invitation to overrule Bunkley."

Roblero, 133 So. 3d at 910. Thus, Roblero supports the conclusion that this court has continued to consider itself bound by Cahoon.

We also note that the trial court agreed with the library's argument that Bunkley could be distinguished on the ground that it involved consideration of the pre-1992-amendment version of § 25-5-11(a). As we have discussed above, however, that is a distinction that makes no difference in regard to the pertinent language at issue in § 25-5-11(a). And, importantly, the library does not discuss Sutton on appeal, which involved the application of the post-1992-amendment version of § 25-5-11(a). Thus, as O'Brien has argued, this court has controlling precedent on the issue that we have not been asked to overrule. "Stare decisis commands, at a minimum, a degree of respect from this Court that makes it disinclined to overrule controlling precedent when it is not invited to do

so." Moore v. Prudential Residential Servs. Ltd. P'ship, 849 So. 2d 914, 926 (Ala. 2002).

Further, we reject the library's argument referencing Code sections such as § 25-5-57(c) as supporting the conclusion that some general intent of the Act may be gleaned from other provisions and read into § 25-5-11(a). As noted above, since the decision in Cahoon, the legislature has amended and recodified § 312 without making any pertinent change to the language at issue, which now appears in § 25-5-11(a). This court must presume that the legislature was aware of Cahoon and the interpretation of the supreme court as to the meaning of that language when it made those amendments. See Grimes, supra. We cannot agree with the argument that the legislature intended to supersede Cahoon and effectively amend § 25-5-11(a) through some other section of the Act that makes no reference to subrogation or reimbursement as to uninsured-motorist insurance proceeds. Specifically, we note that § 25-5-57(c) was added as part of the 1992 amendments to the Act and includes specific categories of funds or benefits for purposes of reimbursement to or setoff by the employer, none of which include proceeds received under an

employer's uninsured-motorist insurance policy. In any event, it is well settled that this court must "'presume "that the legislature does not intend to make any alteration in the law beyond what it explicitly declares."' Ware v. Timmons, 954 So. 2d 545, 556 (Ala. 2006) (quoting Duncan v. Rudulph, 245 Ala. 175, 176, 16 So. 2d 313, 314 (1944))." Grimes, 227 So. 3d at 489. Likewise, as noted above, this court cannot "'read into the statute something which the legislature did not include although it could have easily done so.' Noonan v. East-West Beltline, Inc., 487 So. 2d 237, 239 (Ala. 1986)." Grimes, 227 So. 3d at 489.

The final argument that we must consider is whether Watts sub silentio overruled in dicta or authorized this court to distinguish Cahoon. This court's discussion of Cahoon in Roblero does not support that conclusion, particularly since the dicta in Watts was mentioned in a special writing by Judge Moore, and thus was known to the majority of the court when we discussed Cahoon in Roblero. 133 So. 3d at 913 (Moore, J., concurring in the result). As for the dicta in Watts, in that case, Michael Raymond Watts was injured in an automobile accident while driving a motor vehicle owned by his employer, Johnson Controls, Inc.

("Johnson Controls"). The vehicle Watts was driving was struck by a utility trailer that was owned by Dwight's Lawn & Garden Equipment, Inc. ("Dwight's Lawn"), and that had come loose from a vehicle driven by William J. Rupe, who was an employee of Dwight's Lawn. Johnson Controls paid Watts workers' compensation benefits and expenses for medical and surgical treatment he received pursuant to the Act. 876 So. 2d at 441.

Watts commenced an action against Rupe and other defendants, including Sentry Insurance ("Sentry"), which had issued an uninsured-motorist insurance policy to Johnson Controls covering the vehicle Watts was driving. In that action, "Watts alleged that the injuries and damage he suffered were proximately caused by the negligent or wanton conduct of Rupe, an underinsured motorist, and that Sentry had failed to pay Watts benefits under the policy." Id. Sentry filed a motion for a summary judgment, which the trial court granted. Watts appealed to the supreme court. On appeal, the supreme court noted that Sentry had argued that it was not liable to Watts because he was receiving payments on his workers' compensation claim against Johnson Controls. Sentry relied on

the exclusivity provision of the Act, Ala. Code 1975, § 25-5-53, in support of that argument. The supreme court described the issue before it as follows:

> "The issue this case presents is whether an employee who is receiving workers' compensation benefits from his employer for injuries he sustained in a motor-vehicle accident that occurred while the employee was driving a vehicle belonging to the employer can recover underinsured-motorist benefits from the employer's automobile liability insurer (which is not the employer's workers' compensation insurer), if the employee's injuries were proximately caused by the negligence or wantonness of an underinsured driver, who was not a co-employee?
>
> "The answer to that question is yes, subject to the employer's right to reimbursement for the compensation paid on account of the employee's injury to the extent of the employee's recovery of damages against the third-party tortfeasor. Ala. Code 1975, § 32-7-23 and § 25-5-11.
>
> "The Alabama Workers' Compensation Act, Ala. Code 1975, § 25-5-1 et seq., specifically provides that an injured employee who is receiving workers' compensation benefits can file an action against a third party (except for certain third parties not relevant here), whose negligence or wantonness proximately caused the injuries for which the employee is receiving workers' compensation benefits. § 25-5-11. Rupe was a third party against whom Watts could bring an action pursuant to § 25-5-11. Sentry was contractually obligated to pay Watts, its own insured, those damages, if any, over and above the damages Rupe's own liability insurance carrier would pay for Rupe's alleged negligence or wantonness in

> causing Watts's injuries. Until a trier of the facts ascertains Watts's damages, if any, whether Rupe was in fact an underinsured motorist is unknown. That, however, does not entitle Sentry to a summary judgment. The mere fact that the trier of fact may find against a plaintiff on the issues of liability or damages in an action does not entitle the defendant to a summary judgment. Sentry is not being sued because of negligence or wantonness on the part of Watts's employer or any entity protected from such an action by § 25-5-53. Nothing in the Alabama Code or Alabama caselaw shelters Sentry from its liability for underinsured-motorist coverage under the facts of this case."

Watts, 876 So. 2d at 442.

It is clear from the foregoing that the issue in Watts was not whether Watts's employer or its workers' compensation insurance carrier might be entitled to subrogation against or reimbursement from any recovery by Watts from Sentry. The issue was simply whether Sentry could preclude Watts's recovery based on § 25-5-53. Thus, the statement by the supreme court in Watts that Watts's recovery was "subject to the employer's right to reimbursement for the compensation paid on account of the employee's injury to the extent of the employee's recovery of damages against the third-party tortfeasor," 876 So. 2d at 442, clearly was dicta. In light of the fact that, in Watts, the supreme court did not

mention Cahoon or any of the pertinent post-Cahoon precedents, including Bunkley, Sutton, or precedents referencing Cahoon favorably in relation to the distinction between tort actions and contract actions, see Preferred Risk Mut. Ins. Co. v. Ryan, 589 So. 2d 165, 167 (Ala. 1991), this court may not depart from the course that has been charted since Cahoon, which clearly addressed the issue of the meaning of the pertinent language used in § 25-5-11(a). See § 12-3-16; Ex parte Williams, 838 So. 2d 1028, 1031 (Ala. 2002) ("Because obiter dictum is, by definition, not essential to the judgment of the court which states the dictum, it is not the law of the case established by that judgment.").

A further discussion of the parties' arguments is unnecessary.[9] In light of Cahoon and this court's precedents relying on Cahoon, the trial

[9]O'Brien argues that the library's alternative res judicata argument was rejected by the trial court and that, even if that had not been the case, there was insufficient evidence to support the conclusion that the trial court in the workers' compensation action had entered a judgment authorizing the library's subrogation claim. The trial court did not consider the merits of the res judicata argument but, rather, concluded that that issue was moot. The library makes no attempt to rely on the doctrine of res judicata in support of the July 2021 judgment. Based on the record before us, we cannot conclude that the doctrine of res judicata is applicable, and, thus, we do not address that issue.

court erred by allowing the library's claim under § 25-5-11(a). That said, we remain concerned about the potential for double recovery by an employee and the various issues that presents, which may be illustrated by considering what might occur if the library and TIC attempt to collect their combined subrogation claims, which exceed $100,000, from Carter, who is liable for $100,000.[10] See Ex parte BE&K Constr. Co., 728 So. 2d 621, 624 (Ala. 1998) (quoting Powell v. Blue Cross & Blue Shield, 581 So. 2d 772, 774 (Ala. 1990), overruled on other grounds by Ex parte State Farm Fire & Cas. Co., 764 So. 2d 543 (Ala. 2000)) (" 'The entire law of subrogation, conventional or legal, is based upon equitable principles. The equitable considerations that are the underpinnings of subrogation are (1) that the insured should not recover twice for a single injury, and (2) that the insurer should be reimbursed for payments it made that, in fairness, should be [made] by the wrongdoer.' "). In light of Cahoon, however, the solution to the double-recovery issue falls to the legislature, unless the supreme court decides to revisit the rationale in that case.

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[10]The Horne court held that "the employer's right of subrogation against the negligent third party is superior to that of the insurer under the uninsured motorist law." 203 Va. at 287, 123 S.E.2d at 405.

Based on the foregoing, the July 2021 judgment is reversed and this case is remanded for proceedings consistent with this opinion.

REVERSED AND REMANDED.

Thompson, P.J., and Hanson and Fridy, JJ., concur.

Moore, J., concurs in the result, with writing.

MOORE, Judge, concurring in the result.

When an employee receives an injury in an automobile accident that is caused by a third-party uninsured motorist and recovers damages from the employer's automobile-insurance carrier, the "injury ... for which compensation is payable ... was caused under circumstances also creating a legal liability for damages on the part of [a] party other than the employer" and, "[t]o the extent of the recovery of damages against the other party, the employer shall be entitled to reimbursement for the amount of compensation theretofore paid on account of injury ...." Ala. Code 1975, § 25-5-11(a). I believe that State Farm Mutual Automobile Insurance Co. v. Cahoon, 287 Ala. 462, 252 So. 2d 619 (1971), erroneously construed the operative language in Ala. Code 1940 (1958 Recomp.), tit. 26, § 312, the predecessor to § 25-5-11, and that the cases following Cahoon erroneously preclude an employer or its workers' compensation carrier from enforcing its statutory credit and reimbursement rights. See 2 Terry A. Moore, Alabama Workers' Compensation § 21:79-21:84 (1st ed. West 1998). Nevertheless, I agree with the main opinion that, unless and

until the supreme court overrules Cahoon and its progeny, those cases govern our decision on this point.