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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Jocelyn Newman, Circuit Court Judge

Appellate Case No. 2021-000005

Stephany A. Connelly and James M. Connelly……. Petitioners.

v.

The Main Street America Group, Old Dominion Insurance Company,
and Allstate Fire and Casualty Insurance Company…….……Respondents.

PETITION FOR REHEARING

INTRODUCTION

Pursuant to Rules 221(a) and 240, SCACR, Stephany A. Connelly and James M. Connelly ("Petitioners") petition for a rehearing of the Court's decision in *Connelly v. The Main Street America Group*, Op. No. 28130 (S.C. Sup. Ct. filed January 11, 2023) (Howard Adv. Sh. No. 2 at 177). The Court overlooked or misapprehended several of Petitioners' arguments and also overlooked potential unintended effects that could result from the wording of its Opinion.

ARGUMENT

In their brief, Petitioners discussed the entire statutory scheme for uninsured motorist ("UM") and underinsured motorist ("UIM") coverages – of which the phrase "legally entitled to recover" is but one of several terms the legislature used in describing when an insured has a right to receive the first-party insurance benefits for which he has contracted. (Respondent's Brief, pp.

7-9). Petitioners noted the Court is required to apply statutory language in a way that achieves a harmonious result rather than creating an internal conflict in the statutory scheme. (*Id*. at 7).[1]

The Court acknowledged the propriety of considering the statutory scheme as a whole and not just the language at issue when it relied upon S.C. CODE ANN. § 38-77-150(B) to interpret S.C. CODE ANN. § 38-77-150(A) in section III.C. of its Opinion. (Howard Adv. Sh. No. 2 at 188). However, it failed to harmonize its holding with respect to other portions of the UM and UIM statutes. As a result, the Court's Opinion did not address Petitioners' arguments based on S.C. CODE ANN. § 38-77-150 to -200 (2015). (Respondent's Brief, pp. 7-9). If it had, it would have reached a different interpretation of the phrase "legally entitled to recover" – one that is consistent with other language used throughout UM and UIM statutes and which only requires an insured to prove fault and causally related damages.

Moreover, the Court failed to address Petitioners' arguments based on precedent construing "legally entitled to recover" as applied to the UIM portions of the same statutory scheme. (Respondent's Brief, pp. 9-10). Again, if it had addressed these arguments, the Court should have found that a UM insured is entitled to recover even under circumstances where the at-fault motorist is personally immune from a judgment.

Instead, the Court effectively equated Section 38-77-150(A)'s phrase "all sums which [an insured] is legally entitled to recover" to "all sums which an insured *in fact recovers*." Specifically, it concluded that, for an insured who has purchased UM coverage to avail himself of that coverage, he must (1) have a "viable claim" (Howard Adv. Sh. No. 2 at 188), (2) file suit against the at-fault

[1] While the Court applied this approach in section III.C. of its Opinion in relying upon S.C. CODE ANN. § 38-77-150(B) to interpret S.C. CODE ANN. § 38-77-150(A) (Howard Adv. Sh. No. 2 at 188), it failed to harmonize its holding with respect to other portions of the UM and UIM statutes.

motorist (*id*.), (3) serve the UM carrier with the pleadings, including the defensive pleadings (*id*.),[2] (4) allow a factfinder to "consider the presence and viability of any defenses to liability" (*id*. at 190), (5) overcome all such defenses presented (*id*. at 185), and then (6) secure a judgment against the at-fault motorist. (*Id*. at 185, 188).

This conclusion is at odds with the legislative scheme by imposing the condition of a judgment – a term the legislature *did not use* in S.C. CODE ANN. § 38-77-150 to -200 (2015) – rather than simply the terminology dictated by the statutory scheme: *fault and damages*. (*See* Respondent's Brief, pp. 8-9). If the Court were to apply the statutory language rather than imposing the requirement of a judgment, it is clear Petitioners are entitled to recover UM coverage here because they did file suit against Trezona (the present action) and, in this action, established Trezona's fault that caused Petitioners' damages (via stipulation).

Alternatively, but equally importantly, even if the Court is unwilling to change its holding, it should grant rehearing and alter its Opinion because the current Opinion's language creates three potential outcomes that the Court could not have intended.

First, by failing to reconcile its holding with cases cited by Petitioners regarding an insured's right to pursue a UM or UIM action despite a covenant not to execute, one could conclude that the Court created a new precedent that implicitly overruled those cases. In other words, the Opinion, as currently written, without addressing cases such as *Ackerman v. Travelers Indem. Co.*, 318 S.C. 137, 456 S.E.2d 408 (Ct. App. 1995) (an insured is "legally entitled to recover

[2] Notably, the Court misapplies a quote from *Criterion Ins. Co. v. Hoffmann*, 258 S.C. 282, 290, 292, 188 S.E.2d 459, 462, 464 (1972), in concluding that S.C. CODE ANN. § 38-77-150(B)'s reference to the "pleadings" an insured must serve on a UM insurer includes defensive pleadings. The quote from *Criterion* was a generic definition of "pleadings" from Black's Law Dictionary that the Court used to distinguish between a summons and a complaint. It was not a basis for the Court to find that Section 38-77-150 requires an insured to serve the insurer with the answer to the complaint. Rather, an answer would be served on the insured by the insurer defending the case.

damages" from an at-fault motorist even if he cannot legally enforce a judgment against him), *Wade v. Berkeley County*, 348 S.C. 224, 559 S.E.2d 586 (2002) (same), and *O'Neill v. Smith*, 388 S.C. 246, 695 S.E.2d 531 (2010) (an insured is legally entitled to recover punitive damages from an at-fault motorist even if he cannot legally enforce a judgment for punitive damages), at least arguably now permits insurers to deny claims for UM and UIM benefits when an insured has given a covenant not to execute to an at-fault motorist because the insured cannot obtain an enforceable judgment (*i.e.*, a judgment on which he can actually recover) against that motorist.

Second, by emphasizing the necessity of a judgment as an absolute condition to a UM or UIM recovery, the Court appears to grant insurers free license to deny such claims with impunity until their insureds have incurred the expense and delay of filing a lawsuit and prosecuting it to judgment.[3] This has the potential for discontinuing the routine settlement of first-party UM and UIM claims without litigation and clogging the court system with actions that should not be necessary, particularly when one considers that insurers have a duty of good faith and fair dealing to settle claims for which their "liability has become reasonably clear." S.C. CODE ANN. § 38-59-20(4) (2015).

Finally, taken literally, the Court's Opinion as written suggests an insured's claim for UM benefits is barred unless he not only serves the UM insurer with a summons and complaint but also serves the insurer with the answer to the complaint. The statute does not require this and the insured cannot accomplish it in any event because an answer is not filed until after the insured has

[3] The language of the Opinion is conflicting. In subsection III.B., the Court stated: "'legally entitled to recover' is wholly unambiguous: it means a plaintiff *has secured a judgment* against an at-fault defendant after overcoming any defenses the defendant may have presented." (Howard Adv. Sh. No. 2 at 185) (emphasis added). However, in subsection III.C., the Court found: "the General Assembly intended the 'legally entitled to recover' language in subsection (A) to mean the injured motorist must prove he has a viable claim *that is able to be reduced to judgment* in a court of law." (*Id*. at 188) (emphasis added).

served the summons and complaint. Additionally, to impose this condition on the insured would achieve an absurd result as the insurer defending the tort action is the one that initially serves the answer on the insured. *See State v. Taylor*, 436 S.C. 28, 34, 870 S.E.2d 168, 171 (2022) ("The Court must reject a statutory interpretation if it leads to an absurd result that could not possibly have been intended by the legislature or that defeats plain legislative intent.").

If the Court is unwilling to change its holding in this case, it should nevertheless issue a revised Opinion that avoids the above outcomes by stating:

(1) For purposes of UM and UIM claims, an insured remains legally entitled to recover damages against an at-fault motorist despite providing a covenant not to execute.

(2) An insured is not required to reduce his claim against an at-fault motorist to judgment to make a valid claim for UM or UIM benefits if there are no legal bars to his filing an action against the at-fault motorist (such as statutory immunity or statute of limitations) and he can prove fault and damages. Insurers remain subject to the duty of good faith and fair dealing with respect to such pre-judgment claims.

(3) The pleading S.C. CODE ANN. § 38-77-150(B) requires an insured to serve on a UM insurer is a complaint.

CONCLUSION

Petitioners therefore request the Court grant their petition for rehearing by either reversing its rulings on the meaning of "legally entitled to recover" and Petitioners' right to recover UM benefits under the unique circumstances of this case.

Alternatively, Petitioners ask the Court to grant their petition for rehearing for the purpose of clarifying its rulings so as to avoid the effect of preventing an injured insured from collecting UM or UIM benefits if he has signed a covenant not to execute and the conclusion that an injured

insured has no right to receive UM or UIM benefits until he has reduced his claim to a judgment against the at-fault motorist.

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