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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jocelyn Newman, Circuit Judge

Appellate Case No. 2021-000005

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

v.

The Main Street America Group, Old Dominion Insurance Company, Allstate Fire and Casualty Insurance Company, Debbie Cohn, and Freya Trezona,

Of which Allstate Fire and Casualty Insurance Company, The Main Street America Group and Old Dominion Insurance Company are the..... Respondents

RETURN TO PETITION FOR REHEARING
The Main Street America Group and Old Dominion Insurance Company

INTRODUCTION

In this matter, this Court applied standard rules of statutory construction to interpret the phrase “legally entitled to recover” in S.C. Code Ann. § 38-77-150, which states that insurance policies must contain an uninsured motorist (UM) provision “undertaking to pay the insured all sums which he is *legally entitled to recover* as damages from the owner or operator of an uninsured motor vehicle...” *Connelly v. Main St. Am. Grp.*, 2023 WL 152540, at *1 (S.C. Jan. 11, 2023) (emphasis in original). The Court found that the phrase was unambiguous, and also found as follows:

We conclude the amount a plaintiff is “legally entitled to recover” under a UM provision of an insurance policy is the amount for which the plaintiff has secured a judgment against the at-fault defendant. Because the [Workers’ Compensation] Act prevents Connelly from ever becoming “legally entitled to recover” from Trezona under these facts, we reverse.

Id., at *1.

Petitioners have filed a Petition for Rehearing, and to prevail, a petitioner must demonstrate that the Court “overlooked” or “misapprehended” his or her earlier arguments. Rule 221(a), SCACR; *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001). “The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time.” *Id.*

The arguments set forth in the Petition for Rehearing have not been “misapprehended” or “overlooked.” Rather, they are either new to the case, or were already presented to the Court and rejected.

For this reason, the Petition for Rehearing should be denied.

ARGUMENT

Petitioners’ first cognizable argument is that the Court allegedly “failed to harmonize its holding with respect to other portions of the UM and UIM statutes” when interpreting the phrase “legally entitled to recover.” (Petition for Rehearing, p. 2). Specifically, Petitioners argue that the Court failed to “address Petitioners’ arguments based on S.C. Code Ann. § 38-77-150 to -200. (Respondent’s Brief, pp. 7-9).” Essentially, Petitioners argued that the Court ignored the following argument:

The UM and UIM statutes also provide insight on the Legislature’s use of the phrase “establishing liability.” Not only does Section 38-77-160 employ the term “action establishing liability,” it also describes UIM coverage as “coverage in the event that *damages are sustained* in excess of the liability limits carried by an *at-*

fault insured or underinsured motorist” and refers to the adverse driver as the “putative *at-fault* insured.” S.C. CODE ANN. § 38-77-160 (2015) (emphasis added). In other words, this demonstrates the Legislature intended “establishing liability” to mean proof of fault and causally related damages.

Other UM statutes also incorporate fault, causation, and damages when describing the prerequisites to establishing liability of an uninsured motorist. Section 38-77-170 characterizes an unknown motorist against whom an insured may pursue a UM claim as “the owner or operator of any motor *vehicle which causes bodily injury or property damage* to the insured.” S.C. CODE ANN. § 38-77-170 (2015) (emphasis added). Similarly, Section 38-77-180 refers to an unknown motorist against whom an insured may pursue a UM claim as “the owner or operator of any vehicle *causing injury or damages*” via physical contact and to the same motorist, once identified, as “the owner or operator who *caused the injury or damages.*” S.C. CODE ANN. § 38-77-180 (2015) (emphasis added). In discussing subrogation by a UM insurer, Section 38-77-190 authorizes such a claim against a “person *causing the injury, death, or damage.*” S.C. CODE ANN. § 38-77-190 (2015) (emphasis added).

(Respondents’ Brief, p. 8). There is absolutely nothing inconsistent about the language used in these statutes and the Court’s interpretation of S.C. Code Ann. § 38-77-150. For instance, the relevant provision of S.C. Code Ann. § 38-77-160 states as follows:

No action may be brought under the underinsured motorist provision unless copies of the pleadings in the *action establishing liability* are served in the manner provided by law upon the insurer writing the underinsured motorist provision. The insurer has the right to appear and defend in the name of the underinsured motorist in any action which may affect its liability and has thirty days after service of process on it in which to appear.

S.C. Code Ann. § 38-77-160 (emphasis added). There is no basis for the argument that the statutory language of S.C. Code Ann. § 38-77-160 (or any of the other statutes referenced by Petitioners) should compel the Court to reconsider its ruling. In fact, the Court is left to guess how the language cited by Petitioners should sway the Court to alter its interpretation of the interaction between S.C. Code Ann. § 38-77-150 and the statutory immunity provided by the Workers’ Compensation Act. In fact, S.C. Code Ann. § 38-77-150(B) is practically identical to the section of S.C. Code Ann. § 38-77-160. Indeed, as set forth in greater detail below, the Court also already

addressed this specific matter directly, including the meaning of the language of S.C. Code Ann. § 38-77-150(B). *Connelly v. Main St. Am. Grp.*, 2023 WL 152540, at *6.

Petitioners characterize their other arguments as “three potential outcomes that the Court could not have intended.” (Petition for Rehearing, p. 3). These other arguments are nothing more than hypotheticals that (1) the Court has already addressed, or (2) have nothing to do with the statutory construction that the Court has applied to this case.

The first hypothetical is Petitioners’ contention that the Court inadvertently overruled cases involving “covenants not to execute” rather than statutory immunities. Specifically, Petitioners express concern that the Court “fail[ed] 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.” (Petition for Rehearing, pp. 3-4).¹ Petitioners are simply wrong. The Court’s Opinion clearly states that “an employee injured within the course and scope of his employment may, in appropriate circumstances, recover both workers’ compensation benefits and UM benefits, as the exclusivity provision of the [Workers’ Compensation] Act does not automatically bar all contractual claims for UM benefits.” *Connelly v. Main St. Am. Grp.*, 2023 WL 152540, at *4. Indeed, in its own Reply Brief, and in its oral argument, this Respondent distinguished the *Ackerman*, *Wade*, and *O’Neil* cases involving “covenants not to execute” from those cases involving the statutory immunity under the Act. (Reply Brief, pp. 11-12). Clearly, the Opinion

¹ This hypothetical mirrors Petitioners’ assertion that “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).” (Petition for Rehearing, p. 2). This argument relies on the same three cases that Petitioners now claim have been “inadvertently overruled” – *Ackerman v. Travelers Indem. Co.*, 318 S.C. 137, 456 S.E. 2d 408 (Ct. App. 1995), *Wade v. Berkeley County*, 348 S.C. 224, 559 S.E.2d 586 (2002), and *O’Neil v. Smith*, 388 S.C. 246, 695 S.E.2d 531 (2010) – that each involve a “covenant not to execute.” For the same reason stated above, Petitioners are simply wrong. *Connelly v. Main St. Am. Grp.*, 2023 WL 152540, at *4.

does not “fail to reconcile” or “fail to address” Petitioners’ argument. The Opinion addresses – and rejects – this argument.

The second hypothetical involves Petitioners’ fear that this Court has granted “insurers free license to deny such claims with impunity until their insureds have incurred the expense and delay of filing a lawsuit and pursuing it to judgment.” (Petition for Rehearing, p. 4). Petitioners actually undercut their own argument by pointing out that “insurers already have a duty of good faith and fair dealing to settle claims for which their ‘liability has become reasonably clear.’” *Id.* (citing S.C. Code Ann. § 38-59-20(4)). Insurers and insured will continue to have any number of incentives to value and settle claims, including the duty to handle these matters in good faith. Nothing in the Opinion impacts that standard of conduct, and nothing raised in Petitioners’ argument addresses the rectitude of the Court’s construction of S.C. Code Ann. § 38-77-150.

Finally, the third hypothetical is Petitioners’ assertion that the Opinion “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 with the answer to the complaint.” (Petition for Rehearing, pp. 4-5). This argument is unfounded. The statute in question, S.C. Code Ann. § 38-77-150(B), clearly requires service of “copies of the pleadings in the action establishing liability are served in the manner provided by law upon the insurer writing the uninsured motorist provision.” Unsurprisingly, the Court notes in its Opinion that:

From this language, it is manifest the General Assembly has imposed several hurdles as conditions precedent to recovering UM benefits: (1) an injured motorist must file a tort suit against the at-fault driver prior to seeking contractual UM benefits from an insurer, and (2) a copy of the pleadings from that tort suit must be served on the insurer so as to allow it to limit its possible exposure in the event of an adverse judgment.

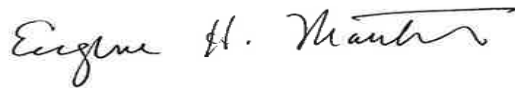
Connelly v. Main St. Am. Grp., 2023 WL 152540, at *6. On this point, the Opinion is quite clear. A copy of the pleadings² from the tort suit – any that have been filed in the case – must be served on the insurer. This language is taken directly from the statute, is unambiguous, and nothing in the Opinion makes that requirement less clear.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Rehearing and grant any other such relief as the Court deems just and proper.

February 2, 2023

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² In that regard, the statute’s requirements are similar to those governing removal of cases from state to federal court, where the party seeking removal must file with the U.S. District Court a copy of “all process, pleadings, and orders served upon such defendant or defendants in such action.” 28 U.S.C. § 1446. This language is unambiguous, and the language in S.C. Code Ann. § 38-77-150(B) is similarly unambiguous.