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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 Court Judge

Appellate Case No. 2021-000005

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

v.

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

Of Which Allstate Fire and Casualty Insurance Company, The Main Street America Group and Old Dominion Insurance Company are the Appellants,

And

Stephany A. Connelly and James M. Connelly are the Respondents.

RETURN TO PETITION FOR REHEARING

A. Johnston Cox, SC Bar # 9081
Kendall Crawford, SC Bar # 104110
PO Box 7368
Columbia, SC 29202
jcox@gwblawfirm.com
kcrawford@gwblawfirm.com
(803) 779-1833 Office
(803) 779-1767 Fax

Attorneys for Appellant Allstate Fire
and Casualty Insurance Company

INTRODUCTION

Connelly's Petition for Rehearing first asserts that this Court's unanimous decision is made in error. In the alternative, Connelly requests that the court revise portions of its Opinion to correct certain portions Connelly asserts are misleading or will cause confusion among the Plaintiff bar. None of Connelly's assertions have merit.

Connelly asserts the Court "did not address [her] arguments based on S.C. Code Ann. §§ 38-77-150 – 200 (2015) and the Court disregarded South Carolina precedent while "equat[ing] . . . 'all sums which an insured is legally entitled to recover' to 'all sums which an insured in fact recovers.'" (Petition for Rehearing, 1-3). On the contrary, Connelly is simply presenting a repackaged version of her original Brief. These are the same arguments which have been considered and ruled on by this Court in its correctly decided Opinion. *Connelly v. The Main Street America Group*, Op. No. 21830 (S.C. Sup. Ct. filed January 11, 2023).

With regard to Connelly's proposed revisions to the Opinion, Connelly asserts the Court "failed to reconcile its holding with cases cited by [Connelly] regarding an insured's right to pursue a UM or UIM action despite a covenant not to execute; the Court "grant[s] insurers free license to deny [UM and UIM] claims with impunity; and suggests issues with the Court's statements relating to whether "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." (Petition for Rehearing, 3-5). However, despite Connelly's "concerns", none of the issues she raises actually present any potential for confusion. Nothing in the Court's opinion changes or modifies existing South Carolina law. Rather, the Court's opinion re-affirms long-standing precedent regarding South Carolina's uninsured and underinsured motorist statutory law challenged by Connelly. Because Connelly does not present any legitimate issue

that has been overlooked or misapprehended by the Court, the Petition for Rehearing must be denied.

STANDARD OF REVIEW

The purpose of a petition for rehearing "is to aid the court in deciding correctly a case heard by it." *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 172, 167 S.E. 234, 238 (1933). Where, as here, the existing record supports the decision, a petition for rehearing is inappropriate. A petition for rehearing must explain arguments the party believes were overlooked in the original opinion. *See Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) ("In order to prevail on a petition for rehearing, appellants must demonstrate the Court overlooked or misapprehended their argument."); Rule 221(a), SCACR (petition shall state the points "supposed to have been overlooked or misapprehended").

ARGUMENTS

A. THE SOUTH CAROLINA SUPREME COURT DECISION WAS DECIDED CORRECTLY

a. The Court properly construed "legally entitled to recover" within the statutory scheme.

Throughout this case, Connelly has consistently argued that the terms "legally entitled to recover" and "fault" mean the same thing. She makes the same argument again throughout the Petition for Rehearing. However, aware of the standard for Petitions for Rehearing, Connelly is attempting to repackage the same arguments made previously. This time, Connelly claims the Supreme Court "failed to harmonize the holding with respect to other portions of the UM and UIM statutes." (Petition for Rehearing, 2).

However, the Court extensively reviewed Section 38-77-150(A) with Section 38-77-150(B) to ensure the two sections are consistent with one another. Further, the Court harmonized

its conclusion that the phrase "legally entitled to recover" is unambiguous by analyzing not only the UM and UIM statutes, but also both the South Carolina Workers Compensation Act and the South Carolina Tort Claims Act. After careful analysis, the Court determined that the phrase, "legally entitled to recover" is unambiguous, and the legislative intent underlying Section 3-77-150 "dovetails with the near-unanimous national approach to the factual scenario." (Howard Adv. Sh. No. 2. at 185-186).

Contrary to Connelly's assertion that the Court did not address her arguments contained in page 7-9 of her brief, the Court did consider those arguments and rightly rejected them as misconstruing Sections 38-77-150 and 160. The portion of 38-77-160 to which Connelly refers merely states that UIM coverage is excess coverage over any applicable liability coverage. There is no way Section 38-77-160 can be read to abrogate the statutory requirement that a suit must be filed against an alleged uninsured or underinsured motorist and that a plaintiff must be legally entitled to recover damages from that defendant. The Court's ruling is in no way inconsistent with Sections 38-77-150 and 38-77-160.

Connelly's continued assertion that the meaning given by the Court to the phrase "legally entitled to recover" is inconsistent with other language used throughout UM and UIM statutes is without merit and has been rejected by the Court. In fact, the Court harmonizes the definition of "legally entitled to recover" in section 38-77-150 with a broader array of statutes than Connelly considers. Therefore, rehearing on this issue should be denied.

b. The Court considered previous South Carolina case law in determining how to construe "legally entitled to recover" and did not equate 'all sums which an insured is legally entitled to recover' to 'all sums which an insured in fact recovers.'

As an initial matter, South Carolina courts have consistently held entitlement to UM coverage hinges on one ability to establish the legal liability of the uninsured motorist. Interpreting prior versions of the UM statute containing the same mandate that pleadings in the action establishing liability must be served on the insurance carrier, this Court has long recognized the right to recover UM coverage depends on strict compliance with the statute. *Criterion Ins. Co. v. Hoffmann*, 258 S.C. 282, 291-92, 188 S.E.2d 459, 463 (1972).

The Court cites *Criterion* throughout the Opinion to lend support for its holding. In *Criterion*, the Court recognized the "right to sue and collect from one's own liability insurance carrier in case of a loss caused by a hit-and-run driver or other driver of an uninsured automobile is a creature of the legislature. Except for the statute, and endorsements required, no right exists to recover from one's own insurance carrier." *Criterion Ins. Co. v. Hoffmann*, 258 S.C. at 290, 188 S.E.2d at 462. There, because the insured did not provide a copy of the complaint with the summons provided to the insurance company as evidence of "copies of the pleadings," the insured did not comply with the necessary uninsured motorist statutes. The court found the statute, "included a requirement that a complaint be filed when an uninsured motorist action is commenced and that a copy of the complaint be served upon the insurance carrier." *Criterion Ins. Co.*, 258 S.C. at 294, 188 S.E.2d at 464. S*ee also*, *Vernon v. Harleysville Mut. Cas. Co.*, 244 S.C. 152, 159, 135 S.E.2d 841, 844 (1964) ("[R]ecovery under the uninsured endorsement is subject to the condition that the insured establish legal liability on the part of the uninsured motorist."). Here, no tort action was commenced against Trezona because she cannot be legally liable to Connelly for damages arising out of the accident. The Court followed South Carolina precedent is defining the phrase "legally entitled to recover."

Further, the Court obviously rejected Connelly's attempts to twist the holding in *Ackerman v. Travelers Indem. Co.*, 318 S.C. 137, 456 S.E.2d 408 (Ct. App. 1995) - that a covenant not to execute in favor of an underinsured motorist does not prevent one from pursuing underinsured motorist coverage - to support her arguments. (Respondent's Brief, pp. 9-10). The *Ackerman* holding has nothing to do with the issues presented in this case – the driver in *Ackerman* was not immune from suit. The Plaintiff in that case could legally recover damages against the underinsured motorist. As stipulated by Connelly, she cannot legally recover damages against Trezona, because Trezona is immune from suit.

Connelly's reading of the Court's opinion as "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'" is absurd. (Petition for Rehearing, 2). The Court never used the phrase "all sums which an insured in fact recovers" in its Opinion, nor does the Court state that the insured must actually recover or even be able to recover any sum from the actual driver. Rather, the Court only adheres to long-standing legal precedent that one must obtain a *judgment* against an at-fault driver before bringing a breach of contract action directly against the UM carrier to collect the judgment. *See, Lawson v. Porter*, 256 S.C. 65, 68, 180 S.E.2d 643, 644 (1971). (Howard Adv. Sh. No. 2. at 185). Securing a judgment against the at-fault motorist is not the same as actually recovering or being able to enforce a judgment against an uninsured motorist.

By way of example, it is impossible to collect or enforce a judgment against a John Doe defendant. John Doe does not exist. Yet, S.C. Code Ann. § 38-77-170 specifically permits an insured to pursue an action against John Doe in an effort to collect UM benefits. In exchange for this legislatively created relief, our statutes make it clear that an insured is required to bring a tort

action against John Doe, serve a copy of the pleadings against John Doe on the UM carrier so the carrier has a chance to defend its interests and obtain a judgment against John Doe before she can sue her UM carrier to collect UM benefits. The Court's holding in this case in no way alters, amends or confuses this long-standing precedent.

The Court expressly and correctly rejected Connelly's arguments that proof of fault and damages are the only requirements of our statutory scheme – they were certainly not overlooked. This is evidenced by the Court's statement that to do otherwise "automatically negates any defenses the at-fault driver could present, such as the statute of limitations, comparative negligence, or statutory immunity. We see nothing in the language of the UM statute to suggest the legislature intended that result."

The Court's finding that a plaintiff must "secure a judgment against an at-fault motorist," and it is "only then that the plaintiff becomes legally entitled to recover against that defendant" (Howard Adv. Sh. No. 2. at 185) is an absolutely correct statement of South Carolina law and is consistent with every other jurisdiction in the country that has examined the issue. Therefore, this issue should also be denied rehearing.

B. THERE ARE NO "POTENTIAL OUTCOMES THAT THE COURT COULD NOT HAVE INTENDED" WHICH MAY ARISE FROM THE OPINION

a. The Court did not create confusion by "implicitly overruling" South Carolina precedent relating to covenants not to execute.

In the Petition for Rehearing, Respondent claims the Court has implicitly 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'Neill v. Smith*, 388 S.C. 246, 695 S.E.2d 531 (2010) because now insurers can 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 against that motorist." (Petition for Rehearing, 3-4). Again, this reading of the Court's opinion is baseless.

The Court never proclaims that an insured must personally *recover* money from an at-fault driver to obtain UIM coverage, only that an insured must obtain a judgment against an at-fault driver before suing the UIM carrier for breaching the contract to pay UIM benefits. The Court also never proclaims that an insured must be able to *enforce* a judgment against the driver, nor is there any language in the opinion that could be construed in that manner. The Court's opinion is consistent with the holding in *Ackerman* that "the Ackermans are still *entitled to recover* damages from Scott; they merely *agreed not to legally enforce* the judgment." *Ackerman* at 147, 456 S.E.2d at 413 (emphasis added). Here, Connelly is not entitled to recover damages from Trezona. Trezona is not legally liable to Connelly. Connelly cannot *obtain* a judgment against Trezona. She is immune from suit. Connelly stipulated she "is not legally entitled to recover damages from Trezona." (J.A. p. 146).

b. The Court did not grant insurers the ability to deny UM and UIM claims with impunity.

Connelly asserts that the Court's decision, "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 and the opinion "has the potential for discontinuing the routine settlement of first-party UM and UIM claims without limitation and clogging the court system." (Petition for Rehearing, 4). This claim is absurd.

Insureds have been required to obtain a judgment against an at-fault driver before commencing a legal action against a UM or UIM carrier to enforce the judgment since the General Assembly created uninsured motorist coverage. *See, Lawson v. Porter*, 256 S.C. 65, 68,

180 S.E.2d 643, 644 (1971). This is not a new requirement. It is Connelly who is attempting to subvert and change the law by filing a direct action against Allstate without complying with clear statutory requirements for obtaining UM coverage. UM and UIM claims are settled every day in this State without the necessity of filing a legal action, just as third a party claims are settled every day without the commencement of a legal action. The Court's opinion cannot legitimately be interpreted in a way that changes the current state of the law in South Carolina or in a way that discourages UM carriers from resolving legitimate claims in which an insured may actually be legally entitled to damages from an uninsured motorist (unlike here). There is no reason to revise the Court's opinion to address this non-issue.

c. S.C. Code Ann. § 38-77-150(B) requires copies of the *pleadings* to be served upon the insurer writing the uninsured motorist provision.

South Carolina Code Annotated Section 38-77-150(B) (2015) clearly delineates how uninsured motorist actions should be brought by stating the process of serving the insurance carrier with "copies of the pleadings in the action establishing liability," giving the insurer "the right to appear and defend in the name of the uninsured motorist in any action . . ." In the Petition for Rehearing, Connelly claims the Court is proposing a change to the statutory procedure by requiring a plaintiff to serve the UM carrier with both a complaint and an answer to the complaint. (Petition, p. 4). Again, this "interpretation" suggested by Connelly is absurd.

The Court quotes *Criterion* in this context merely for the proposition that "pleadings" include both complaints and answers. The UM carrier, who is granted the right by the General Assembly to appear in an action against an uninsured driver to protect its interests, must be allowed to do just that – file an answer to raise legal defenses to liability and damages. Accepting Connelly's arguments that our statutory scheme allows insureds to sue UM carriers

directly, denying them the right specifically granted by the General Assembly to raise legal defenses to an uninsured motorist's liability, would require the Court to ignore the unambiguous statutory language. Again, no clarification of the Court's opinion is necessary.

CONCLUSION

As outlined above, Connelly's Petition for Rehearing should be denied. Respondent fails to present an argument that has not been considered and rejected previously by the Court. Connelly's Petition for Rehearing should be denied.

Respectfully submitted,

GALLIVAN, WHITE & BOYD, P.A.

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By: s/A. Johnston Cox

A. Johnston Cox, SC Bar # 9081
Kendall Crawford, SC Bar # 104110
PO Box 7368
Columbia, SC 29202
jcox@gwblawfirm.com
kcrawford@gwblawfirm.com
(803) 779-1833 Office
(803) 779-1767 Fax

Attorneys for Appellant Allstate Fire and Casualty Insurance Company