STATE OF SOUTH CAROLINA COUNTY OF RICHLAND 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.	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT Civil Action No.: 2016-CP-40-05885 **ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT**

This matter comes before the Court upon Old Dominion Insurance Company and Main Street America Group's motion for summary judgment, filed on March 6, 2017;[1] Allstate Fire and Casualty Insurance Company's Motion for Summary Judgment and Memorandum in Support, filed on March 8, 2017; and Plaintiff's Notice of Motion and Motion for Summary Judgment, filed on March 21, 2017. A hearing was held on these motions at the Richland County Judicial Center on May 17, 2017.

For the reasons set forth below, Plaintiff's motion for summary judgment is GRANTED; and Defendants' motions for summary judgment are DENIED.

STIPULATED FACTS[2]

On February 24, 2015, Stephany Connelly was riding as a passenger in a Jeep Compass vehicle owned and operated by Freya Trezona ("Trezona"). Ms. Connelly was occupying the vehicle with Trezona's permission. The vehicle had uninsured ("UM") liability insurance

[1] These defendants filed no formal motion but only a document entitled "Old Dominion Insurance Company and Main Street America Group's Memorandum in Support of Motion for Summary Judgment," which the Court has accepted as their motion.
[2] The parties filed a written Joint Stipulation of Fact on January 31, 2017.

coverage under a policy issued by The Main Street America Group ("Main Street")/Old Dominion Insurance Company ("Old Dominion"). Ms. Connelly maintained a separate policy of UM coverage with Allstate Fire and Casualty Insurance Company ("Allstate") covering her private vehicle. Trezona negligently caused an automobile collision, resulting in injuries to Ms. Connelly.

At the time of the collision, Ms. Connelly and Trezona were co-employees, both working within the course and scope of their employment with Apple One Employment Agency. Ms. Connelly made a claim for, and received benefits under, the South Carolina Workers' Compensation Act. Ms. Connelly and James Connelly ("the Connellys") then made claims for damages under the Trezona liability policy. Main Street/Old Dominion denied coverage, relying on the Workers' Compensation Act's exclusive remedy provision which provided tort immunity to Trezona. Faced with an absence of liability coverage, the Connellys made claims for UM benefits under both the Main Street/Old Dominion and Allstate policies. Both carriers denied the UM claims.

SCOPE OF REVIEW

A suit for declaratory judgment is neither legal nor equitable per se; the nature of the suit, therefore, is determined by the underlying issue. *Felts v. Richland County*, 303 S.C. 354, 400 S.E.2 781 (1991). The issue here involves the determination of UM coverage. Therefore, the action is at law. *Horry County v. Ins. Reserve Fund*, 344 S.C. 493, 54 S.E.2d 637 (Ct. App. 2001). The parties' Joint Stipulations of Fact leave only a question of law for the trial court. *WDW Props. v. City of Sumter*, 342 S.C. 6, 535 S.E.2d 631 (2000). Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the

moving party is entitled to judgment as a matter of law. *Turner v. Milliman*, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011); *see also* Rule 56(c), SCRCP.

I. The Trezona Vehicle was an Uninsured Vehicle.

UM coverage is mandatory coverage in South Carolina. South Carolina Code §38-77-150(A) provides:

> No automobile insurance policy or contract may be issued or delivered unless it contains a provision by endorsement or otherwise, herein referred to as the uninsured motorist 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*, within limits which may be no less than the requirements of Section 38-77-140. (Emphasis added).

Before UM benefits become available, the at-fault motorist must be operating an uninsured vehicle. Main Street/Old Dominion and Allstate deny that the Trezona Jeep Compass vehicle was an uninsured motor vehicle. The definition of "uninsured motor vehicle" is controlled by statute. South Carolina Code §38-77-30(14) and its relevant subsection (b) provide that an uninsured motor vehicle means a motor vehicle as to which "...there is nominally that insurance, but the insurer writing the same successfully denies coverage thereunder..." Here, Main Street/Old Dominion provided liability coverage on the Trezona vehicle but denied coverage for the Connellys' claims, relying on the exclusivity provision of the Workers' Compensation Act with its grant of immunity to Trezona.

With denial of the claims, the Trezona vehicle's UM coverage became operable. The Trezona vehicle falls within the plain language of the statute because Main Street/Old Dominion successfully denied any liability coverage. A similar result was reached in *Unisun Ins. Co. v. Schmidt*, 339 S.C. 362, 529 S.E.2d 280 (2000), where the Supreme Court found that the denial of liability coverage, due to vehicle being driven by a non-permissive driver, triggered the vehicle's

UM coverage. See also *Allstate Ins. Co. V. Wilson*, 259 S.C. 586, 593, 193 S.E.2d 527, 531 (1972) (appellant's uninsured motorist coverage became operative when respondent Allstate successfully denied liability for the other vehicle on ground that it was being driven without the consent of the insured).

The Defendants herein argue that Main Street/Old Dominion did not deny coverage but denied liability; thus the Trezona vehicle is an insured vehicle. This argument is foreclosed given both carriers' stipulation that Trezona was negligent and that her negligence was the cause of Ms. Connelly's injuries. Therefore, liability could not be denied only coverage. Moreover, both carriers cite to language in their respective policies defining an insured vehicle. According to Defendants the Trezona vehicle failed to meet the policy language definition of an uninsured vehicle. The Defendants made a coverage denial.

II. Ms. Connelly was "an Insured" Under Both Policies.

UM eligibility requires that Ms. Connelly be an insured under either policy. Ms. Connelly was occupying the Trezona vehicle as a passenger with permission of its owner. As such, she must be deemed an insured. An insured is defined by S.C. Code Ann. §38-77-30(7).

> "Insured" means the named insured and, while resident of the same household, the spouse of any named insured and relatives of either, while in a motor vehicle or otherwise, and any person who uses with the consent, expressed or implied, of the named insured the motor vehicle to which the policy applies and a guest in the motor vehicle to which the policy applies or the personal representative of any of the above.

Main Street/Old Dominion stipulated that Ms. Connelly was an insured under their policy. Ms. Connelly was a named insured under the Allstate policy.

III. The South Carolina UM Statute Requires Only a Finding of Fault to Trigger Coverage.

A. The *Legally Entitled to Recover* Language of South Carolina Code § 38-77-150(A) is Ambiguous

The South Carolina UM statute provides that a UM policy must 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. S.C. CODE ANN. § 38-77-150(A).

The novel question presented by this case is whether an innocent, injured motor vehicle passenger is entitled to UM coverage where the at-fault driver is immune from suit pursuant to the South Carolina Workers' Compensation Act. In other words, in the context of the UM statute, the Court must determine whether Ms. Connelly legally entitled to recover damages. Clearly Main Street/Old Dominion and Allstate answer the question in the negative. Defendants argue that if Trezona is immune from suit then Ms. Connelly cannot be legally entitled to recover damages from her. Indeed, Ms. Connelly has stipulated that she cannot recover damages for her injuries from Ms. Trezona. However, if the meaning of the statute is ambiguous and simply means the insured must demonstrate fault on the part of the uninsured driver then the discussion is far from over. Review of decisions from other jurisdictions addressing similar language and coming to different interpretations suggest ambiguity of this statutory language.

First, the statutory language is not defined in the statute or in either insurance policy. Second, various courts have entertained different interpretations. For example, Defendants rely on several cases from distant jurisdictions interpreting the "legally entitled to recover language" as a fatal obstacle in a plaintiff's ability to collect UM benefits. See *Otterberg v. Farm Bureau Mut. Ins. Co.*, 696 N.W. 24 (Iowa 2005); *Wachtler v. State Farm Mut. Auto. Ins. Co.*, 835 So. 2d 23 (Miss. 2003); and *State Farm Mutual Auto. Ins. Co. v. Slusher*, 325 S.W.3d (Ky. 2010). By

contrast, other courts have interpreted the same or similar language in a broader vein. See, e.g., *Torres v. Kansas City Fire and Marine*, 1993 OK 32, 849 P.2d 407 (Sup Ct. 1993) (finding the "legally entitled to recover" language to mean the insured must simply establish fault on the part of the uninsured motorist). The lack of a statutory or policy definition for the phrase "legally entitled to recover" and the parties' conflicting interpretations provide evidence of the statute's ambiguity. *Jenkins v. City of Elkins*, 230 W.Va. 335, 345, 738 S.E.2d 1, 11 (2012).

The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature. *Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E. 2d 457, 459 (2007). If the statute is ambiguous then courts must construe the terms of the statute. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011). When interpreting the language of the UM statute the court must settle on a meaning that is consistent with the intent of the legislature. The UM statute is remedial in nature, enacted for the benefit of the injured persons, and is to be liberally construed so that the purpose intended may be accomplished. *Gunnels v. American Liberty Ins. Co.*, 251 S.C. 242, 247, 161 S.E.2d 822, 824 (1968).

Given the ambiguity of the statute, this Court must construe the language in a way that is consistent with the intent of the legislature. The purpose of the South Carolina Uninsured Motorist statute is to provide benefits to protect against the peril of injury or death by an uninsured motorist to an insured motorist, his family and the permissive users of his vehicle. *Ferguson v. State Farm Mut. Auto. Ins. Co.*, 261 S.C. 96, 100, 198 S.E.2d 522, 524 (1973). An uninsured motorist is a "financially unresponsive motorist." *O'Neill v. Smith*, 388 S.C. 246, 254, 695 S.E.2 531, 535 (2010). To an injured motorist, it makes no difference whether unresponsiveness is due to workers' compensation immunity or lack of insurance. In either instance, the availability of UM benefits furthers the protective goal of the legislature.

Interpreting the statute to require that plaintiffs first secure a judgment against the unresponsive driver undermines the legislative intent. Requiring simply a finding of fault against the unresponsive driver furthers the legislative intent. This Court is mindful of the lofty position our legislature has endowed UM coverage in our state. It is mandatory coverage. Attempts to restrict UM benefits are either void or themselves limited. See *Ferguson v. State Farm Mut. Auto. Ins. Co.*, 261 S.C. 96, 100, 198 S.E.2d 522, 524 (1973) (finding any limiting language in an insurance contract which had the effect of providing less protection than made obligatory by the statues is contrary to public policy and is of no force and effect); *Wright v. Smallwood*, 308 S.C. 471, 419 S.E.2d 219 (1992) (efforts to deny UM benefits given the exclusivity provision of the S.C. Workers' Compensation Act were rebuffed).

In order to effectuate the legislative intent of protecting motorists from unresponsive drivers this Court is bound to interpret the "legally entitled to recover" language as requiring simply a showing of fault by the unresponsive driver and the amount of resulting damages. As will be seen, cases from other jurisdictions endorse this view.

A formal judgment against an unresponsive motorist is not the only way to demonstrate fault and trigger UM coverage. In *Ferguson v. State Farm*, 261 S.C. 96, 198 S.E. 2d 522 (1973) a judgment was rendered against the uninsured driver. However, the court concluded liability under the UM coverage arose after the liability of the uninsured motorist *had been established.* (Emphasis added. 261 S.C. at 102, 198 S.E.2 at 525). There was no language to suggest procuring a judgment was the only way to establish liability. In *Otterbacher v. Snyder*, 2015 WL 4068204 (Ct. App.), the court concluded that until Otterbacher obtained a judgment or *otherwise establishes liability* against the person who collided with him in a motor vehicle wreck, Otterbacher could not pursue the other driver's liability coverage. See *Park v. Safeco Ins. Co. Of*

Am., 251 S.C. 410, 413, 162 S.E. 2d 709, 710 (1968) (no right to recover can accrue to plaintiff against the insurance company until and unless the insured driver becomes liable to pay). In this case, the fault requirement is satisfied as the parties stipulated that Trezona was at fault in causing the wreck and injuries to Ms. Connelly.

Defendants suggest that the Connellys cannot trigger UM coverage as result of the collision because they are not legally entitled to recover damages from Trezona. This argument falls away when interpreting the statute to simply mean demonstrating fault and resulting damages. But Defendants argue further that the Connellys cannot satisfy the UM statute which requires them to file suit against Trezona. However, the language of S.C. CODE ANN. § 38-77-150(B) does not address any requirement of filing suit against the at fault driver.

B. Numerous Jurisdictions Allow UM Coverage Despite an Immune Adverse Driver.

South Carolina courts have not directly addressed the questions whether an at-fault driver causing injury, who is immune from suit, can nonetheless trigger the "legally entitled to recover" language of the UM statue, resulting in UM coverage. However, numerous cases from other jurisdictions have answered this question. To promote the public policy of protecting motorists injured by uninsured drivers, these courts interpret the language as simply requiring a showing of fault by the adverse driver.

In *Borjas v. State Farm Mut. Auto. Ins. Co.*, 33 P.2d 1265 (Colorado Ct. App. 2001), an injured insured was allowed to collect her own UM coverage after being hit by a vehicle driven by a police officer, despite the officer being cloaked with immunity under the Colorado Governmental Immunity Act (CGIA). Colorado's UM statute provided coverage for persons who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease, including death, resulting therefrom. §10-4-

609(1)(a), C.R.S. 2000. State Farm argued that its UM coverage was not available because the injured plaintiff was not legally entitled to recover damages from the at-fault driver who was immune from liability under the CGIA. State Farm cited various cases denying UM coverage because of immunity. In rejecting State Farm's position, the court found such an interpretation was inconsistent with the public policy expressed by the legislature. "If we were to follow that line of cases, members of the public would be deprived of the opportunity to protect themselves from loss under the circumstances presented here, a result not intended by the General Assembly." *Borjas*, 33 P.3d at 1269. The court noted the policy underlying the statute was to compensate innocent drivers for injuries received at the hands of one from whom damages cannot be recovered, stating

> It is entirely consistent with this public policy to construe §10-4-609 to require that UM insurance coverage apply even though the tortfeasor is immune from liability under the CGIA. Negligent drivers and their employers who are immune from liability under the CGIA may not be financially irresponsible in the sense that they lack the ability to pay, but from the perspective of the injured innocent driver, the lack of legal responsibility has the same effect.

Id. at 1268.

Finally the *Borjas* court listed several other court decisions providing support for allowing UM coverage despite a claim of immunity. Giving a further rationale for its opinion, the Court relied on the reasoning expressed in the treatise 1 A. Widiss, *Uninsured and Underinsured Motorist Insurance* §7.14, at 388-90 (2d ed. 2001):

> 1) while tort immunity protects the torfeasor, it should have no effect on an insurance company providing first party UM insurance coverage; 2) it is consistent with the strong public policy of providing insurance coverage to protect drivers when no compensation is available from the negligent tortfeasor; 3) tort immunities are personal to the tortfeasor and therefore cannot be raised by an insurer; and finally, 4) the immune tortfeasor is unaffected by providing UM coverage, while at the same time,

> those disadvantaged by the immunity can protect themselves by purchasing UM insurance.

The court concluded that the phrase "legally entitled to recover damages" as used in the UM statute, simply meant that the insured injured motorist must be able to establish the fault of the uninsured motorist as the cause of her damages.

C. UM Coverage is Available Despite Worker's Compensation Immunity

While *Borjas* addressed the availability of UM coverage in the face of a governmental immunity, there is support for the same result applying where a workers' compensation immunity is in place. In *Barfield v. Barfield*, 742 P.2d 1107 (Oklahoma Sup. Ct. 1987), the widow of a deceased passenger killed by his at-fault co-employee driver was allowed to recover under her husband's UM policy despite receipt of workers' compensation benefits. The court found that tort immunity under the Workers' Compensation Act did not preclude recovery under one's own contract of insurance. Protection under a UM policy is a contractual right resting in the insured and co-existent with the protection under the workers' compensation act. A UM carrier does not stand in the tortfeasor's shoes and thus does not enjoy the benefits of the tortfeasor's immunity. The conditions for recovery under the UM policy can be satisfied even if the insured cannot prove all the elements of the tort against the uninsured driver.

Interpreting the Oklahoma UM statute, the court found the words "legally entitled to recover" simply meant the insured must establish fault on the part of the uninsured motorist which gave rise to damages and prove the extent of those damages. *Id.* at 1112. Recovery was based upon a contractual promise by the insurer to the insured to provide coverage in the event of injury or death resulting by fault of an uninsured motorist. "It would be manifestly unjust to permit the insurer to avoid its contractual duty as well as its statutorily imposed liability under 36

O.S. 1981 §3636, by its assertion of entitlement to third party tort immunity which would deny the insured's widow receipt of that for which the decedent has paid a premium." *Id.* at 1113.

The recovery of UM benefits is not limited to coverage paid for by the insured. UM benefits may also be sought even though the policy was procured and paid for by the employer. The Oklahoma Supreme Court found the estate of a fatally injured worker eligible for employer provided UM coverage even though a co-employee negligently caused the deadly wreck within the course and scope of employment. *Torres v. Kansas City Fire and Marine*, 849 P.2d 407 (Oklahoma Sup Ct. 1993). There, the decedent was a passenger in a company owned vehicle driven by a co-employee. The passenger's estate filed for and received workers' compensation benefits. The estate also brought an action against the carrier for the employer which had a UM endorsement on the vehicle. The UM carrier admitted the wreck was caused by the negligence of the co-employee driver. The carrier admitted the passenger was an insured under the policy by virtue of his occupancy in the vehicle. The trial court ruled as a matter of law recovery was proper under the UM endorsement and the matter of damages was tried to a jury. A jury verdict resulted for estate. The UM carrier appealed, arguing the UM endorsement was inapplicable because the negligent co-employee was immune from liability by virtue of the exclusivity provisions of the workers' compensation laws and thus the insured was not legally entitled to recover damages from the wrongdoer. Under the Oklahoma UM statute, the carrier was obligated only to provide coverage to an insured who is "legally entitled to recover damages" from the owners or operators of uninsured motor vehicles..." The Supreme Court of Oklahoma found the estate was entitled to benefits under the UM policy despite the co-employee negligent driver being immune from suit under the exclusivity provision of the state's workers' compensation act.

Relying on a previous decision, *Uptegraft v. Home Insurance Company*, 622 P.2d 681 (Oklahoma Sup. Ct. 1983), the court stated, "[W]e said the words legally entitled to recover simply mean that the insured must be able to establish fault on the part of the uninsured motorist which gives rise to damages and prove the extent of those damages." *Torres*, 849 P.2d at 410. The Court rejected the view the phrase required an insured to establish all the elements of a viable claim in tort.

The rationale for the court's decision was based upon contract interpretation aimed at effectuating the intention of the parties. The decedent was a passenger in the vehicle and thus an insured under the UM policy. The intention of the passenger, purchaser of the policy, and carrier, was for the insurance carrier to bear the loss for injury to an insured person uncompensated by an uninsured wrongdoer. Interpreting the phrase "legally entitled to recover damages" as simply requiring a showing of fault promotes the parties intention of providing coverage. To require more would result in the insured bearing the loss. Further, the court noted that UM benefits were recoverable despite the fact that the passenger did not pay any premiums for the UM coverage.

IV. UM Coverage Co-Exists with the Worker's Compensation Exclusive Remedy

To the extent that Defendants argue the Connellys' UM claim is precluded by the exclusivity provision of the Workers' Compensation Act, the argument lacks merit. First, the exclusivity provision of the Workers' Compensation Act does not bar UM claims. The exclusivity provision only bars tort actions. A UM claim is a contract action. *Wright v. Smallwood,* 308 S.C. 471, 419 S.E.2d 219 (Sup. Ct. 1992). Second, the Connellys have not sued (in tort or contract) Trezona or their mutual employer, Apple One. Thus, there is no breach of the exclusivity provision.

Third, the carefully balanced interests crafted by the Workers' Compensation Act are preserved despite allowance of UM benefits. Defendants cite *Machin v. Carus Corp*, 419 S.C. 527, 799 S.E.2d 468 (2017), to reiterate the underlying policy considerations of the statute: tort immunity for the employer while instituting a no fault scheme for work place injuries to insure swift and sure but limited compensation. Allowing UM coverage has no impact on the workers' compensation system. Trezona, Apple One and the workers' compensation carrier will be unaffected by the Connelly's receipt of UM benefits.[3]

Fourth, the Workers' Compensation Act anticipates recovery other than workers' compensation for workplace injuries. South Carolina Code §42-1-560 allows an injured plaintiff to seek an action for workplace injury against a third party despite receiving workers' compensation benefits. This is a recognition by the Legislature that workers' compensation benefits are limited in amount. They are designed to replace lost income and pay for medical expenses. Workers' compensation benefits, unlike tort damages, do not include loss of consortium, pain and suffering, emotional distress, loss of enjoyment of life or punitive damages. To suggest, as Defendants do, that workers' compensation will provide the Connellys with a remedy ignores the limited nature of that remedy. An insured is entitled to recover the same amount he would have recovered if the offending motorist had maintained liability insurance. *Ferguson v. State Farm Mut. Auto. Ins. Co.*, 261 S.C. 96, 101, 198 S.E.2d 522, 525 (1973).

Finally, Defendants' reliance on South Carolina Code §15-78-190 is misplaced. The South Carolina Tort Claims Act is the exclusive remedy to address injuries caused by tortious conduct of state actors. Defendants assert that §15-78-190 allows UM and underinsured benefits

[3] In situations where the employer provided the UM coverage, the UM carrier may be entitled to an offset for workers' compensation benefits provided. See *Sweetser v. S.C. Dept of Insurance Reserve Fund*, 390 S.C. 632, 703 S.E.2d 509 (Sup. Ct. 2010) and S.C. CODE ANN. §38-77-220.

if a tort claims remedy is inadequate. If the legislature wanted a similar provision in the Workers' Compensation Act, it could have inserted one. As discussed, the legislature did just that, including §42-1-560 in the Act.

CONCLUSION

The public policy expressed by the legislature in enacting the South Carolina Uninsured Motorist statute, §38-77-150, is to protect motorists harmed by uninsured drivers. Uninsured drivers can include those who are without liability coverage and financially irresponsible, as well as drivers cloaked with immunity from a tort suit. From the perspective of the injured motorist, the outcome from meeting either type of driver on the roadway is the same: no compensation. To effectuate the intent of the legislature this Court must interpret the critical language "legally entitled to recover" as simply a requirement to demonstrate fault. Such an interpretation protects a passenger occupying a vehicle with permission despite her driver being cloaked with workers' compensation immunity from a tort suit. At the same time, recovery of UM benefits does not frustrate the goals of the workers' compensation statutes. Moreover, allowing UM recovery meets the expectation of the parties and certainly allows those who paid for UM insurance premiums the benefit of their bargain.

IT IS THEREFORE ORDERED that Plaintiffs' Motion for Summary Judgment is GRANTED.

IT IS FURTHER ORDERED that Old Dominion Insurance Company and Main Street America Group's motion for summary judgment and Allstate Fire and Casualty Insurance Company's Motion for Summary Judgment are DENIED.

IT IS FURTHER ORDERED that Plaintiffs' cause of action for breach of contract is DISMISSED, as it has not been argued and is, therefore, deemed abandoned.

IT IS FURTHER ORDERED that this matter be scheduled for a trial on the issue of damages.

AND IT IS SO ORDERED.

The Honorable Jocelyn Newman

September 28, 2017
Columbia, South Carolina.