THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
C/A No. 2016-CP-40-05885
Jocelyn Newman, Circuit Judge

Appellate Case No. 2017-002234

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

v.

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

INITIAL BRIEF OF THE APPELLANTS
The Main Street America Group and Old Dominion Insurance Company

---

Thomas F. Dougall
Michal Kalwajtys
1700 Woodcreek Farms Rd.
Elgin, SC 29045
(803) 865-8858
Attorneys for Appellants
The Main Street America Group and
Old Dominion Insurance Company

Alfred Johnston Cox
Janice Holmes
PO Box 7368
Columbia, SC 29202
(803) 779-1833
Attorneys for Appellant
Allstate Fire and Casualty Insurance Company

John D. Kassel
Theile Branham McVey
PO Box 1476
Columbia, SC 29202
(803) 256-4242
Attorneys for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

STATEMENT OF THE ISSUES ON APPEAL

I. Under South Carolina law, an employee, who in fact injured her co-employee while acting in the course and scope of employment, is not the legal cause of the injury. The respondent, Stephany Connelly, suffered an injury—while a passenger in her co-employee's car—due to the co-employee's alleged negligence in operating the vehicle. Connelly applied for, and began receiving, worker's compensation. She also filed a claim with the co-employee's liability insurer and, following denial based on the co-employee's immunity, filed a claim as an "insured" under the "uninsured motorist" (UM) endorsement of the same auto policy. The insurer denied the UM claim because Connelly was not "legally entitled to recover" damages from the driver.

Does the UM statute, which mandates inclusion in the auto policies of a provision "undertaking to pay the insured all sums he is legally entitled to recover as damages from the owner or operator of the uninsured motor vehicle," require, thereby, a mere demonstration of fault, as opposed to legal liability, on the part of the uninsured driver?

II. Freya Trezona, Connelly's co-employee and the alleged at-fault driver, was insured against liability for bodily injury, and the car she drove was an insured vehicle. In response to Connelly's claim for coverage of her injury, the insurer of the vehicle denied liability by asserting Trezona's immunity under the South Carolina Workers' Compensation Act.

Was denial of liability by Old Dominion tantamount to a successful denial of coverage, under § 38-77-30(14)(b), whereby an insured car could become an "uninsured motor vehicle" under the terms of the very same policy?

STATEMENT OF THE CASE

Stephany A. and James M. Connelly sought judicial declaration that they were entitled to payment of damages under the UM provisions of the auto policies issued by the Appellants, The Main Street America Group (Main Street)[1], Old Dominion Insurance Company (Old Dominion), and Allstate Fire and Casualty Insurance Company (Allstate). (Compl. ¶¶ 21–25; R.__.) In their complaint filed on September 30, 2016, the Connellys also claimed breach of contract on the part of the insurers. (Compl. ¶¶ 26–37; R.__.)

On December 10, 2016, Old Dominion and Main Street answered the complaint, asserting that the driver's immunity from liability in tort precluded any right to UM benefits under the policy. (Answer; R.__; AllsAnswer; R.__.)

On January 31, 2017, the parties jointly stipulated to the material facts (JSF; R.__.), and in March 2017, each moved for summary judgment. (JSF; R.__.) The Honorable Jocelyn Newman, Circuit Judge, heard the motions on May 17, 2017. At the hearing, the attorneys for Old Dominion and Allstate argued that their respective clients were entitled to judgment as a matter of law because, under the South Carolina Workers Compensation Act (the Act), the at-fault driver was immune from liability in tort, which liability is a prerequisite for their duty to pay damages. (Tr; R.__.) Counsel for the Connellys, on the other hand, argued that the denial of the claim under the liability provisions of Old Dominion's policy rendered the vehicle "uninsured," and that the policy language "legally entitled to recover" could be read as requiring only the showing of fault on the part of the driver, instead of the showing of ability, under the law, to recover damages from her. (Tr.; R.__.)

---

[1] The Main Street America Group is a holding company that owns Old Dominion. The Main Street America Group did not issue the policy in question.

By the Order dated September 28, 2017, the court denied Old Dominion's and Allstate's motions and granted summary judgment for the Connellys. (Ord.; R.__.) First, the court found that Old Dominion did not deny liability but rather denied coverage under the policy, rendering Trezona's car an "uninsured motor vehicle." (Ord.; R.__.) Then, having found the UM coverage operable, Judge Newman held that "[t]o effectuate the intent of the legislature this Court must interpret the critical language 'legally entitled to recover' as simply a requirement to demonstrate fault." (Ord.; R.__.) Consistent with this holding, the court ordered a trial on the issue of damages. (Ord.; R.__.)

On October 26, 2017, The Main Street America Group and Old Dominion Insurance Company filed their Notice of Appeal of Judge Newman's order.

STATEMENT OF THE FACTS

On February 24, 2015, Stephany Connelly and her co-worker, Treya Trezona travelled by car in the course and scope of their employment with AppleOne Employment Agency. (JSF ¶¶ 8, 9, 11; R.__.) Trezona drove the car, which belonged to her and her mother and was insured by Old Dominion. (JSF ¶¶ 1, 5, 8; R.__.) Due to her alleged negligence in operating the vehicle, Trezona caused an accident that resulted in injuries to her passenger, Connelly. (JSF ¶ 8, 9, 10; R.__.) Trezona was an "insured" under the liability provisions of the Old Dominion policy and Connelly was an "insured" under the UM endorsement. (JSF ¶¶ 7, 17; R.__.)

Connelly made a workers' compensation claim and received benefits (JSF ¶ 12; R.__.). Thereafter, she made claims for damages under the liability and uninsured motorist coverage of the Old Dominion's policy. (JSF ¶ 14; R.__.) Connelly is not legally entitled to recover damages from Trezona because, under the exclusivity provision of the South Carolina Workers' Compensation Act, Trezona is immune to court action. (JSF ¶ 13; R.__.) Because of Trezona's

immunity Old Dominion denied the claim under the liability part of the policy. (JSF ¶ 14; R.__.) Old Dominion also denied the UM claim because the vehicle operated by Trezona was not an "uninsured vehicle" and workers compensation was her exclusive remedy (JSF ¶ 18; R.__.) Connelly also filed a UM claim under her policy with Allstate. (JSF ¶ 19; R.__.) Allstate denied it on the same grounds as did Old Dominion. (JSF ¶ 19; R.__.)

STANDARD OF REVIEW

This is an appeal of summary judgment in a declaratory judgment action. A suit for judicial declaration of the parties' rights and obligations is neither equitable nor legal—the underlying issues determine its nature. *Felts v. Richland County*, 303 S.C. 354, 400 S.E.2d 781 (1991). Thus, an action involving interpretation of an insurance contract and the statutory framework in which it operates is necessarily an action at law. *Cobb v. Benjamin*, 325 S.C. 573, 482 S.E.2d 589 (Ct. App. 1997).

The grant of summary judgment is reviewed by this Court under the standard that governs the trial court under Rule 56(c), SCRCP. *Englert, Inc. v. Netherlands Ins. Co.*, 315 S.C. 300, 302, 433 S.E.2d 871, 873 (Ct. App. 1993). The trial court should render summary judgment if, upon consideration of the entire record, it determines that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP. When all material facts are stipulated by the parties, only the questions of law remain. *WDW Props. v. City of Sumter,* 342 S.C. 6, 10, 535 S.E.2d 631, 632 (2000). "An appellate court may decide questions of law with no particular deference to the circuit court." *In re Campbell*, 379 S.C. 593, 599, 666 S.E.2d 908, 911 (2008). "The interpretation of a statute is a question of law, which this Court reviews de novo." *S.C. Public Interest Found. v. Courson*, __ S.C. __, 801 S.E.2d 185 (Ct. App. 2017).

ARGUMENT

This case boils down to one simple question: Under applicable law, what are the sums Connelly is entitled to recover as damages from Trezona? As the following argument demonstrates, the answer is zero. Accordingly, the circuit court's order should be reversed and the case dismissed.

I. UNDER THE SOUTH CAROLINA UM STATUTE, DETERMINATION OF LEGAL LIABILITY OF THE AT-FAULT DRIVER IS THE CONDITION PRECEDENT TO AN INSURER'S OBLIGATION TO PAY BENEFITS UNDER THE UM ENDORSEMENT.

South Carolina law requires insurance companies offering automobile insurance in this state to include in their policies a provision "undertaking to pay the insured all sums he is legally entitled to recover as damages from the owner or operator of the uninsured motor vehicle." S.C. Code Ann. § 38-77-150(A) (2015). Consistent with this mandate, Old Dominion issued a policy whose insuring agreement for uninsured motorists coverage tracks the language of the statute: "We will pay damages which an 'insured' is legally entitled to recover from the owner or operator of the 'uninsured motor vehicle' . . . ." (R.__.)

A. The plain and ordinary meaning of the phrase "legally entitled to recover as damages" entails feasibility of a court action against the uninsured motorist.

The language of the statute is a starting point for its interpretation. *Jennings v. Jennings*, 401 S.C. 1, 736 S.E.2d 242, 243 (2012). Unless the language is ambiguous, the common and ordinary meaning of the words used in the statute governs its application. *Id.* at 4, 736 S.E.2d at 243–44. Here, the statutory phrase "legally entitled to recover as damages" is clear and unambiguous. It establishes that a claimant under the UM provision must have a judgment awarding damages, or, at the very least, a demonstrable ability to obtain one in the court of law.

Exposition of the phrase in accordance with the dictionary definitions demonstrates that it cannot impart any other meaning. The adverb "legally" means, according to the Oxford English Dictionary, "In a legal manner; according to law, lawfully." The Oxford English Dictionary (online edition)[2]; Merriam Webster defines "legally" in a similar vein: "in legal manner: in accordance with the law." Merriam-Webster (online edition).[3] Judicial usage of this adverb is consistent with these definitions. *See e.g. Commonwealth v. Groller*, 41 D.&C. 366 (Pa. D. & C. 1941) ("according to the applicable law"); *Whitaker v. Com.*, 367 S.W.2d 831 (Ky. 1963) ("enabled by law"); *Baessler v. Freier*, 258 P.3d 720 (Wyo. 2011) ("conforming to or permitted by law or established rules"). The word "entitled" denotes possession of a right. It means: to be "furnished with proper grounds for seeking or claiming something." Merriam-Webster (online edition).[4] In legal usage, "to recover" is "to secure by legal process." *Garner's Dictionary of Legal Usage* 758 (3rd ed. 2011). And last but not least, "damages" is "money claimed by, or ordered to be paid to, a person as compensation for loss or injury." *Black's Law Dictionary* 471 (10th ed. 2014). That word happens to be defined by the statute as including "both actual and punitive damages," S.C. Code Ann. 38-77-30(4) (2015), thus implying a type of compensation only a jury can award.

Accordingly, the phrase "legally entitled to recover as damages" denotes a situation where the insured has a case she can win. Put another way, for a right to compensation under the UM endorsement to arise, she must have a right, under the law, to seek a judicial award of compensation from the uninsured driver. Fair reading of this passage, in accordance with the ordinary meaning of each word, compels this conclusion.

---

[2] http://www.oed.com/view/Entry/107015?redirectedFrom=legally#eid (last visited Jan. 17, 2018).
[3] https://www.merriam-webster.com/dictionary/legally (last visited Jan. 17, 2018).
[4] https://www.merriam-webster.com/dictionary/entitled (last visited Jan. 17, 2018).

B. The statutory context reinforces the sense of "legally entitled to recover as damages" conveyed by the plain and ordinary meaning of its constituent words.

The text of the statute must be read as a whole and construed so that "no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous. *16 Jade Street, LLC v. R. Design Const. Co., LLC*, 398 S.C. 338, 343, 728 S.E.2d 448, 450 (2012). Furthermore, the statutory provisions should be interpreted in a way that renders them compatible, not contradictory. *See Davis v. Sch. Dist. of Greenville County*, 374 S.C. 39, 45, 647 S.E.2d 219, 222 (2007).

Here, the whole text of Article 3—"Mandate to Write and Insurance Coverage," S.C. Code Ann. § 38-77-112 (2015), *et seq.*—bolsters the reading of the phrase "legally entitled to recover" as setting forth a prerequisite of a feasible court action. Consider the language of § 38-77-150(B), which appears immediately below the phrase at issue: "No action may be brought under the uninsured motorist provision unless copies of the pleadings in the *action establishing liability* are served in a manner provided by law upon the insurer . . . ." S.C. Code Ann. § 38-77-150(B) (2015) (emphasis added). Consider also § 38-77-190(2015). This section provides that "an insurer paying a claim under the uninsured motorist provision . . . is subrogated to the rights of the insured to whom the claim was paid against any and every person causing the injury." S.C. Code § 38-77-190 (2015). In light of this provision, to hold that an insured does not have to have a claim capable of being reduced to judgment in the court of law is to render the insurer's subrogation right illusory, and the section itself superfluous.

Thus, it stands to reason that "legally entitled to recover" presupposes feasibility of a lawsuit, and, unsurprisingly, that is how the South Carolina Supreme Court has understood the phrase.

C. Under the South Carolina Supreme Court's jurisprudence, to recover under the UM endorsement an insured must first have a case in tort against the uninsured motorist.

In its opinion in *Laird v. Nationwide Ins. Co.*, 243 S.C. 388, 134 S.E.2d 206 (1964), which involved an issue of coverage of punitive damages under the policies written in accordance with the Uninsured Motorist Act of 1959[5], the Supreme Court held that the "[r]ecovery under the uninsured endorsement is *subject to the condition* that the insured *establish legal liability* on the part of the uninsured motorist." *Id.* at 394, 134 S.E.2d at 209 (emphasis added). The court indicated that the liability is to be established in an action *ex delicto*. *Id.* Only "[a]fter a judgment is entered against the uninsured motorist, a direct action *ex contractu* can be brought to recover from the insurance company on its endorsement . . . ." *Id.* In *Vernon v. Harleysville Mutual Casualty Company*, 244 S.C. 152, 135 S.E.2d 841 (1964), the Supreme Court reiterated this point stating that the uninsured motorist endorsement "guarantees payment, within specified limits, of *a judgment recovered* against uninsured motorist *on his tort liability*." *Id.* at 158, 135 S.E.2d at 844 (emphasis added) (prior to seeking payment under UM endorsement, the plaintiff brought an action and obtained judgment whereby the negligence of the uninsured motorist, its causal link with the injury sustained, as well the amount of damages, were determined.) *See also Lawson v. Porter*, 256 S.C. 65, 180 S.E.2d 643 (1971); *H.C. Park v. Safeco Ins. Co. of America*, 251 S.C. 410, 413, 251 S.E.2d 709, 710 (1968) ("[N]o right to recover can accrue to the plaintiff against [the] insurance company until and unless [the tortfeasor] becomes liable to pay."); *Ferguson v. State Farm Mut. Auto. Ins. Co.*, 261 S.C. 96,

[5] Uninsured Motorist Act of 1959 contains the same critical phrase as the current iteration of the law. The act provided that no policy should be issued "unless it contain[ed] an endorsement or provisions undertaking to pay the insured all sums which he shall be *legally entitled to recover as damages* from the owner or operator of an uninsured vehicle." S.C. Code Ann. § 46-750.13 (1962) (emphasis added).

102, 198 S.E.2d 522, 525 (1973) ("[T]he insurer's liability under the uninsured motorist endorsement is contractual in nature and arises after the liability of the uninsured motorist has been established.")

Here, Connelly cannot establish legal liability of the allegedly uninsured driver. Under South Carolina law, a mere demonstration of fault entitles one to nothing. To show that she is legally entitled to recover damages, Connelly must have a case against Trezona—she must demonstrate presence of each and every element of the cause of action for negligence. However, in the words of her counsel, "Ms. Connelly can't recover from Ms. Trozona [sic] because that's the law." (Tr. 37; JSF ¶ 13 R.__.) Since Connelly has no case *ex delicto* against Trezona, she cannot have an *ex contractu* case against Old Dominion.

D. Operation of the South Carolina Workers' Compensation Act's exclusivity provision deprives Connelly of a tort cause of action against Trezona, precluding recovery under the UM endorsement.

Apart from her injury, the existence of the duty of care on the part of Trezona, and the negligent breach of that duty, Connelly must be able to prove causation, which comprises cause-in-fact and the legal cause. *See* Michael G. Sullivan, *Elements of Civil Causes of Action* 172 (2000); F. Patrick Hubbard and Robert L. Felix, *The South Carolina Law of Torts* 152–74 (4th ed. 2011). The South Carolina Workers Compensation Act, however, makes that impossible.

Under the Act, all rights and remedies granted thereby "*exclude all other rights and remedies* of such employee . . . as against his employer, at common law or otherwise, on account of such injury, loss of service or death." S.C. Code Ann. § 42-1-540 (2015) (emphasis added). This exclusion extends to co-employees. *Strickland v. Galloway*, 348 S.C. 644, 647, 560 S.E.2d 448, 449 (Ct. App. 2002). According to the South Carolina Supreme Court in *Machin v. Carus*

Corp., __S.C.__, 799 S.E.2d 468 (2017), operation of this provision removes an essential element of the negligence cause of action: the co-employee "cannot be found to be the proximate, or legal cause of the plaintiff's injuries because [she] is immune from tort liability . . . ." *Id.* at __, 799 S.E.2d at 476. For this reason, Trezona's alleged negligence in operation of the vehicle is not the proximate cause of Connelly's injuries and, therefore, Connelly's recovery in tort is precluded as a matter of law.

South Carolina appellate courts have not considered the effect of the at-fault driver's immunity under the Act on an insurer's liability under the UM endorsement; however, many courts of other jurisdiction have opined on that issue, expounding statutory and policy language similar or identical to that before this Court. Take for instance a 2016 opinion of the Court of Appeals in Austin, Texas, in *Soledad v. Tex. Farm Bureau Mut. Ins. Co.*, 505 S.W.3d 600 (Tex. Ct. App. 2016).

In *Soledad*, the court considered implication of the "legally entitled to recover" language in light of the Texas Worker's Compensation Act's exclusivity provision. The court held—without engaging in detailed explication of the phrase—that the plaintiff, who suffered injuries caused by her co-employee's negligent driving in the course and scope of their employment, was "not 'legally entitled to recover' damages from the owner or operator of the vehicle that caused her injuries, and . . . therefore . . . failed to satisfy her policy's unambiguous requirements to obtain UM/UIM benefits." *Id.* at 606. The Texas court remarked, citing 23[6] court opinions from

---

[6] *Valentine v. Safeco Lloyds Ins. Co.*, 928 S.W.2d 639 (Tex. App.–Houston [1st Dist.]); *Ex parte Carlton*, 867 So. 2d 332, 338 (Ala. 2003); *Continental Divide Ins. Co. v. Dickinson*, 179 P.3d 202 (Colo. Ct. App. 2007); *Allstate Ins. Co. v. Boynton*, 486 So.2d 552 (Fla. 1986); *Williams v. Thomas*, 370 S.E.2d 773 (Ga. 1988); *State Farm Mut. Auto. Ins. Co. v. Royston*, 817 P.2d 118, 119 (Haw. 1991); *Atlantic Mut. Ins. Co. v. Payton*, 682 N.E.2d 1144 (Ill. 1997); *Otterberg v. Farm Bureau Mut. Ins. Co.*, 696 N.W.2d 24 (Iowa 2005); *State Farm Mut. Auto. Ins. Co. v. Slusher*, 325 S.W.3d 318 (Ky. 2010); *Hebert v. Clarendon Am. Ins. Co.*, 984 So.2d 952 (La.

across the nation, that "the majority of courts in other jurisdictions have also held that an employee who receives workers' compensation benefits is not 'legally entitled to recover' from her employer or co-employee and is therefore not entitled to UM/UIM benefits." *Id.* at 603–04. Among those cited, a case from South Carolina's neighboring state is noteworthy.

Just like the South Carolina Supreme Court in *Laird*, *Vernon*, and *Lawson*, the Court of Appeals of Georgia interprets the Georgia Uninsured Motorist Act's requirement that the insurers undertake to pay all sums the insured would be legally entitled to recover as damages, as setting forth a condition in the form of a suit that "shall have been brought and recovered against the uninsured motorist." *Williams v. Thomas*, 370 S.E.2d 773, 775 (Ga. Ct. App. 1988) (citing *Hartford Acc., etc., Co. v. Studebaker*, 228 S.E.2d 322 (1976) and nine other Georgia opinions). Absent such action, the insurer is not liable to pay anything to the insured. *Id.* In *Williams*, the Georgia court held that because the exclusive rights and remedies provision of the Georgia Workers' Compensation Act barred the appellant from obtaining a judgment against the co-employee who caused his injury, he could not "satisfy the condition precedent to an action against his insurer for recovery under the uninsured motorist provisions of his policy." *Id.*

Farther west, the Supreme Court of Mississippi ruled likewise. In *Medders v. U.S. Fidelity and Guar. Co.*, 623 So. 2d 979 (Miss. 1993), it affirmed the lower court's decision against an insured seeking UM benefits for the injuries caused by a fellow employee, holding

---

App. 2008); *Hopkins v. Auto–Owners Ins. Co.*, 200 N.W.2d 784 (Mich. 1972); *Medders v. United States Fid. & Guar. Co.*, 623 So.2d 979 (Miss. 1993); *Kesterson v. Wallut*, 157 S.W.3d 675 (Mo. App. 2004); *Okuly v. USF & G Ins. Co.*, 78 P.3d 877 (Mont. 2003); *Matarese v. New Hampshire Mun. Ass'n Prop. Liab. Ins. Trust, Inc.*, 791 A.2d 175 (N.H. 2002); *Kough v. New Jersey Auto. Full Ins. Underwriting Ass'n*, 568 A.2d 127 (N.J. Super. Ct. App. Div. 1990); *Stuhlmiller v. Nodak Mut. Ins. Co.*, 475 N.W.2d 136 (N.D. 1991); *Snyder v. American Family Ins. Co.*, 871 N.E.2d 574, 583 (Ohio 2007); *Cope v. West Am. Ins. Co. of Ohio Cas. Grp.*, 785 P.2d 1050 (Or. 1990); *Erie Ins. Exch. v. Conley*, 29 A.3d 389 (Pa. Super. Ct. 2011); *Lieber v. ITT Hartford Ins. Ctr., Inc.*, 15 P.3d 1030 (Utah 2000); *Welch v. Miller & Long Co. of Md., Inc.*, 521 S.E.2d 767 (Va. 1999); *Romanick v. Aetna Cas. & Sur. Co.*, P.2d 728 (Wash. 1990).

that the statutory phrase "legally entitled to recover . . . limits the scope of the coverage mandated by the statute to those instances in which the insured would be entitled . . . to recover through legal action." *Id.* at 989. It further held that "[t]here is no statutory mandate to provide coverage where the alleged tortfeasor is immune from liability." *Id.* According to the court, "[t]he statutory language . . . is 'simply too unambiguous to admit a judicially created exception . . . .'" *Id.* (quoting the United States Court of Appeals for the Fifth Circuit in *Perkins v. Insurance Co. of North America*, 799 F.2d 955, 962 (5th Cir. 1986)).

E. The trial court's finding of ambiguity has no merit and its decision ignores the plain and ordinary meaning of the statute.

The trial court found ambiguity where there was none. Based on this finding it proceeded to read the critical words in contravention of their ordinary meaning. In the words of Bryan Garner and the late Justice Scalia, the trial court climbed "the ladder of abstraction" to discern suitable legislative purpose and derive from it the text's meaning. *See* A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 18–19 (2012). However, for the South Carolina courts the words of the statutory text in their ordinary meaning ought to be paramount.

In *Bentley v. Spartanburg County*, 398 S.C. 418, 730 S.E.2d 296 (2012), our Supreme Court stressed that the courts are "interpreters not legislators and are bound by the language of the [statute] as written." *Id* at 426, 730 S.E.2d at 301. It is but a truism that "the words in the statute must be given their ordinary meaning." *Anderson v. South Carolina Election Comm'n*, 397 S.C. 551, 556, 725 S.E.2d 704, 707 (2012). Indeed, "where language is unambiguous, the Court's inquiry is over, and the statute must be applied according to its plain meaning." *Jennings*, 401 S.C. at 4, 736 S.E.2d at 244). "The court has no right to add words [the legislature]

omitted, nor to interpolate them on conceits of symmetry and policy." *Consumer Advocate v. South Carolina Dept. of Ins.*, 397 S.C. 599, 602, 725 S.E.2d 708, 710 (Ct. App. 2012). "Where a statute is clear on its face, it is improvident to judicially engraft requirement to legislation just because doing so may further the intent behind the statute." *Grier v. AMISUB of South Carolina, Inc.*, 397 S.C. 532, 540, 725 S.E.2d 692, 698 (2012).

Here, the phrase "legally entitled to recover as damages" is not ambiguous: It does not have alternative meanings. *See* A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 32 (2012). The trial court presumptively held the phrase to be ambiguous: It failed to articulate how this phrase could impart different meanings in different factual contexts. The trial court merely cited lack of statutory or policy definition, and the parties' conflicting interpretations, as evidence of ambiguity. (Ord. p. 6.) In doing so, the trial court disregarded precedent, which holds that the phrase at issue establishes existence of a feasible court claim against the at-fault driver as the prerequisite for the insurer's liability under UM endorsement. *See e.g. Laird*, supra.

Unlike the trial court's order in the present case, a Kentucky opinion in *State Farm Mut. Auto, Ins. Co. v. Slusher*, 325 S.W.3d 318 (Ky. 2010) demonstrates how an ambiguity may arise. More important, however, it shows when a finding to that effect is without merit.

The facts of *Slusher* are analogous to the facts at bar: an estate of a truck driver, killed due to negligence of his co-worker, received workers' compensation and then sought payment under a UM endorsement. *Id.* at 319–20. The Kentucky Court of Appeals found the phrase "legally entitled to collect" ambiguous and used the "essential facts" approach to resolve that ambiguity. *Id.* at 321. It held that "to recover UM or UIM benefits an insured need only prove:

(1) the fault of the uninsured or underinsured motorist; and (2) the extent of damages caused [thereby]." *Id.* The Supreme Court of Kentucky, however, disagreed and reversed. *Id.* at 325.

Kentucky's highest court acknowledged that the "[c]ontract language, like statutory language may be clear on its face and yet contain a latent ambiguity[,]" *id.* at 322, and agreed with the lower court that the cases it relied on in reaching its decision indeed exposed a latent ambiguity. *Id.* at 323 However, in the case before it, there were no circumstances that would warrant analogous finding. *Id.* The opinions cited by the lower court involved Missouri's sovereign immunity law, which prevented further recovery from the tortfeasor, and Georgia's comparative negligence law, which prevented recovery by the sixty-percent at fault plaintiff from a forty-percent at fault tortfeasor. *Id.* at 323–24. These different legal regimes exposed ambiguity of the word "legally" in the phrase "legally entitled to collect." *Id.* at 324. A court could legitimately ask, "Did "legally" mean under the law of Georgia or the law of Kentucky?" *Id.* Likewise, "Did 'a legal right to recover mean 'legal' under Missouri law or 'legal' under Kentucky law?" *Id.* The *Slusher* court concluded that the case under its review raised no similar questions. *Id.* It held that by operation of the exclusivity provision of the workers' compensation statute, the plaintiff "is not now, nor will ever be, 'legally entitled to collect' any further amounts from the [tortfeasor]." *Id.* at 323. And consequently, because "the contractual language of the . . . policy affords payment of UM . . . benefits only for 'bodily injury an insured is legally entitled to collect from the owner or driver of an uninsured . . . motor vehicle,' under the facts of this case, the [plaintiff] may not collect under its UM . . . coverage." *Id.*

The Supreme Court of Kentucky deemed conclusory the lower court's declaration that the language at issue was ambiguous. *Id.* at 323–24. This is because, the court held, when the interplay between the policy language and the exclusive remedy provisions of the Workers'

Compensation Act is examined, no such ambiguity can be found. *Id.* at 323. The Kentucky court could find "no construction of such language that would support a conclusion that the [plaintiff] was 'legally entitled to collect' any amounts from either the owner of the vehicle . . . or its driver . . . over and above the workers' compensation benefits already awarded under the Act." *Id.*

In Florida, the Supreme Court, considering similar facts, reached the same conclusion. At the outset of its analysis in the case of *Allstate Ins. v. Boynton*, 486 So.2d 552 (Fla. 1986), the court noted that the plain meaning of the requirement expressed by the phrase "legally entitled to recover" is that "the insured must have a claim against the tortfeasor which could be reduced to judgment in the court of law." *Id.* at 555. Having observed the lower court's more limited construction of the phrase, the Supreme Court of Florida proceeded to examine the out-of-state caselaw where "legally entitled to recover" was held to require only showing of fault on the part of the uninsured motorist and the extent of damages caused thereby. *Id.* at 556. The common thread of those cases, however, was that none of them, as opposed to the case at bar, involved operation of the exclusivity provisions of the workers' compensation statutes. *Id.*

The *Boynton* court first noted the availability to the insurer of the tortfeasor's substantive defenses, as well as the importance of the insurer's subrogation rights, and then warned against lumping together different types of immunities into one broad category. *Id.* at 558. According to the court, the immunity under the workers' compensation law calls for special attention because it "exists not only to protect the employer in exchange for his provision of immediate, guaranteed benefits but also to protect society by limiting the impact of work-related injury to the remedy offered." *Id.* at 559. The court indicated that "[e]xpanding UM coverage to cover the circumstances before [it] . . . would create a large class of uninsured vehicles." *Id.*

The Supreme Court of Florida commented that in that state the workers' compensation law provides the source of indemnification for a worker injured by a co-worker driving an uninsured vehicle. *Id.* Therefore, considering that the society's goal of protecting the worker under this circumstance has been achieved, the court did "not need to *torture the meaning of a statute aimed at curing another ill entirely* to provide a remedy where one has already been provided." *Id.* (emphasis added).

Likewise here, this Court should decline Connelly's invitation to disregard the plain and ordinary meaning of the statutory language in order to provide a remedy already accorded under the South Carolina Workers' Compensation Act.

II. LACK OF LEGAL LIABILITY ON THE PART OF TREZONA, AND ITS ASSERTION BY OLD DOMINION IN DENYING CONNELLY'S CLAIM, DID NOT CONVERT TREZONA'S CAR INTO AN "UNINSURED MOTOR VEHICLE."

As stipulated by Connelly, Trezona's car was insured. (JSF; R. __.) Old Dominion had been insuring the car under the terms of the auto policy issued to Trezona's mother. (JSF; R.__.) Under the policy, Old Dominion promised to "pay damages for 'bodily injury' or 'property damage' for which any 'insured' becomes legally responsible because of an auto accident." (Policy;R.__.) It also promised to "settle or defend . . . any claim or suit asking for those damages." (Policy;R.__.)

Under § 38-77-30 (14) of the South Carolina Code of Laws, the statutory term "uninsured motor vehicle" is defined to mean, among others, "a motor vehicle as to which: (a) there is not bodily injury liability coverage . . . ; or (b) there is nominally that insurance, but the insurer writing the same successfully denies coverage thereunder; . . . ." S.C. Code Ann. § 38-77-30 (14) (2015). Here, the trial court held, contrary to Connelly's own stipulation, that Old Dominion

denied coverage of Connelly's claim under the policy, whereby Trezona's car became an "uninsured vehicle," triggering operation of the UM endorsement. (JSF;Ord. p._; R.__.)

But note that in rejecting Connelly's claim Old Dominion did not deny coverage under the policy. It simply denied that Trezona was legally responsible to pay Connelly damages for the bodily injury she had suffered. (JSF;R._.) Old Dominion could not have denied coverage because Old Dominion's policy covered Trezona's liability, should one arise; in this case, however, there was simply no liability to be covered.

Connelly might argue that this is an attempt at making a distinction that does not reflect a real difference. That is not so. The trial court implicitly acknowledged the difference but, regrettably, confused "liability" with "negligence," mischaracterizing the parties' stipulation in the process.[7] (Ord. p. 4; R.__.) Again, the trial court failed to interpret and apply the statute in accordance with its plain and ordinary meaning.

A. Old Dominion did not deny coverage, which denial would be necessary to render Trezona's car an "uninsured motor vehicle" under the statute.

The words used in the statute to define an uninsured motor vehicle must be given not only their ordinary meaning but also be construed in context: "their meaning may be ascertained by reference to words associated with them in the statute." *Travelscape, LLC v. South Carolina Dep't. of Revenue*, 391 S.C. 89, 101, 705 S.E.2d 28, 34 (2011). As before, the fair reading of the policy and statutory language provides the answer.

[7] "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." (Ord. p. 4; R.__.)

According to Merriam Webster, the word coverage means "a fact of including or treating," and in reference to insurance, "inclusion within the scope of protective or beneficial plan". *Webster's Third New International Dictionary* 524–25 (1961). In the insurance industry's parlance it is the aggregate of all risks the insurer agrees to take upon itself. *See* 10 Words and Phrases, "Coverage" 297 (2008). Finally, Black's Law Dictionary defines insurance coverage as "inclusion of a risk under insurance policy; the risks within the scope of an insurance policy." *Black's Law Dictionary* 446 (10th ed. 2014). In other words, coverage is the scope of the insurer's legally enforceable promise. This scope is bounded by the monetarily expressed limits, the effective date of the policy, the relevant definitions, such as "insured" or "bodily injury," and the exclusionary provisions. *See* 10 Words and Phrases, "Coverage" 299 (2008) ("'Coverage' is net total of policy inclusions minus exclusions."). The insured's liability in tort, on the other hand, is a circumstance that may or may not fall within that scope. The case at bar perfectly demonstrates the difference, as there was coverage but no liability to be covered.

The statutory definition read as a whole makes it explicit. Consider that the words preceding the word "coverage" are "successfully" and "denied." The adverb "successfully" connotes an effort to achieve a result, and, coupled with "denied," implies a process, such as declaratory judgment action. Declaratory judgment action is a procedural vehicle routinely employed by insurers to obtain judicial approval for their understanding of the extent of their contractual promises. Therefore, a denial of coverage occurs when the insurer concludes, sometimes with judicial help, that it did not agree to undertake a particular risk.

The case of *Allstate v. Wilson*, 259 S.C. 586, 193 S.E.2d 527 (1972), provides an example of a successful denial of coverage with simultaneous acknowledgment of the tortfeasor's liability. In *Wilson* the South Carolina Supreme Court considered an auto policy's definition of

an "insured," whether the at-fault driver was embraced by that definition, and the implications for the victim's UM coverage under her own policy. *Id.* The driver was not a named insured. *Id.* at 590, 193 S.E.2d at 529. To be an "insured," the driver would have had to have driven the car with the permission of the named insured. *Id.* The plaintiff sued both the driver and his father, the named insured on the policy. *Id.* The insurer retained counsel to represent both defendants. *Id.* It did so, however, under reservation of rights because, in his statement to the insurer, the father denied having permitted his son to drive the car. *Id.* at 589, 193 S.E.2d at 529. "At the end of the of the plaintiff's testimony the trial judge granted a nonsuit to the father of the defendant on the ground that [the defendant] was driving the automobile at the time and place in question without permission." *Id.* The jury found the driver liable but the insurer refused to pay the awarded damages. *Id.* According to the Supreme Court, the trial court's grant of nonsuit to the father marked the moment when the insurer "was successful in denying coverage under its liability policy." *Id.* at 593, 193 S.E.2d at 530. Consequently, the "vehicle operated by [the defendant] was an 'uninsured motor vehicle' within the meaning of the [statutory definition]." The court therefore held that "the uninsured motorist endorsement became operative when it was ascertained that the [tortfeasor] was uninsured." *Id.* at 593, 193 S.E.2d at 531.

Here, the extent of coverage provided by Old Dominion has never been in dispute: Trezona was an "insured" under the policy and had been covered for payment of "damages for 'bodily injury' for which [she would] become[] legally responsible because of an auto accident." (Policy p. 2; R.__.; JSF) The fact of the matter is, however, that under South Carolina law Trezona would never become responsible to pay damages to Connelly.

B. Denial of a claim because the alleged tortfeasor is not legally responsible to pay damages cannot be considered a "denial of coverage."

Black's Law Dictionary provides an apt definition of liability: "legal responsibility to another or to society, enforceable by civil remedy or criminal punishment." *Black's Law Dictionary* 1053 (10th ed. 2014). Note that it is distinguished from fault, defined as a "breach of duty as an element of the tort of negligence." *Black's Law Dictionary* 725, 1053 (10th ed. 2014). In jurisprudential terms, "liability" is a correlative of "power," and the liability's jural opposite is "immunity." *See* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale Law Journal 16 (1913). The correlative of "immunity," on the other hand, is termed "disability." *Id.* These Hohfeldian jural relations provide a useful framework for analysis here.

Consider that upon a verdict Trezona would have been burdened with liability, as she would become liable to pay the damages awarded by the jury. Conversely, Connelly would have been invested with the power to seek execution. Note, however, that the jural opposite of liability is immunity, which had been conferred on Trezona by the South Carolina Workers' Compensation Act. Thus, by asserting this immunity, Old Dominion denied existence of Trezona's liability.

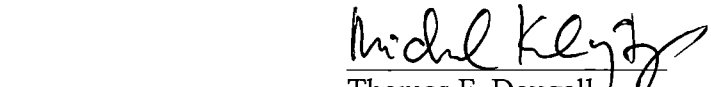
Consequently, Old Dominion's denial of Connelly's claim "because . . . Trezona cannot be legally responsible to Connelly due to her immunity under the Act," (JSF ¶14; R.__), was not a denial of coverage under the policy, and Trezona's car was not, and has never been, an "uninsured motor vehicle."

CONCLUSION

At no point did Trezona's car become an uninsured motor vehicle as defined by the statute. And even if it did, Connelly did not have a right to claim benefits under UM endorsement of Old Dominion's policy. This is because, due to the operation of the South Carolina Workers' Compensation Act's exclusivity provision, she lacked a feasible cause of action against Trezona—she cannot satisfy, as a matter of law, the condition precedent to Old Dominion's obligation under the UM endorsement. In short, she is not legally entitled to recover damages from her.

Because of its failure to interpret and apply the UM statute in accordance with its plain and ordinary meaning, the trial court made a reversible error. For this reason, the Appellants, The Main Street America Group and Old Dominion Insurance Company, respectfully request this Court to reverse the trial court's Order Granting Plaintiffs' Motion for Summary Judgment and Denying Defendants' Motions for Summary Judgment, and dismiss the Connellys' complaint with prejudice.

Respectfully submitted,



Thomas F. Dougall
Michal Kalwajtys
DOUGALL & COLLINS
1700 Woodcreek Farms Rd.
Elgin, SC 29045
(803) 865-8858
Attorneys for Appellants
The Main Street America Group and
Old Dominion Insurance Company

Columbia, South Carolina
January 18, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jocelyn Newman, Circuit Judge

Case No. 2016-CP-40-05885

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

v.

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

PROOF OF SERVICE

The undersigned attorney for the Appellants and The Main Street America Group and Old Dominion Insurance Company hereby certifies that their INITIAL BRIEF OF APPELLANTS and DESIGNATION OF MATTERS TO BE INCLUDED IN THE RECORD ON APPEAL, have been served on all counsel and parties of record, by causing copies of same to be deposited into the United States Mail, addressed as follows:

Alfred Johnston Cox, Esq.
Janice Holmes, Esq.
P.O. Box 7368
Columbia, SC 29202
Attorneys for Appellant
Allstate Fire and Casualty Insurance Company

John D. Kassel, Esq.
Theile Branham McVey, Esq.
PO Box 1476
Columbia, SC 29202

AND

Benjamin Davis McCoy, Esq.
P.O. Box 12009
Columbia, SC 29211
Attorneys for Respondents

This 18th day of January 2018.

DOUGALL & COLLINS

Thomas F. Dougall
Michal Kalwajtys
1700 Woodcreek Farms Rd.
Elgin, SC 29045
(803) 865-8858
Attorneys for Appellants
The Main Street America Group and
Old Dominion Insurance Company