THE STATE OF SOUTH CAROLINA
In the Court of Appeals
Appellate Case No. 2017-002234

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Case No. 2016-CP-40-5885
Jocelyn Newman, Circuit Court Judge

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

And

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

FINAL BRIEF OF RESPONDENTS
Stephany A. And James M. Connelly

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STATEMENT OF THE ISSUES ON APPEAL

I. Whether S.C. Code Ann. 38-77-150's "legally entitled to recover" language is ambiguous given conflicting interpretations by various courts nationally.

II. Whether interpreting S.C. Code Ann. 38-77-150's "legally entitled to recover" language to mean simply finding fault effectuates the South Carolina Legislature's intent to protect motorists from injury and death caused by at fault uninsured motorists.

III. Whether the Trezona vehicle was an uninsured vehicle pursuant to S.C. Code Ann. 38-77-30 (14) given the denial of coverage by Appellants.

IV. Whether procuring uninsured motorist benefits can co-exist with the exclusivity provision of the South Carolina Workers' Compensation Act.

STATEMENT OF THE CASE

Stephany Connelly was injured in a motor vehicle wreck while riding as a passenger in a vehicle being operated by her co-worker Freya Trezona on February 24, 2015. Trezona negligently caused the wreck. Connelly brought a personal injury claim against Trezona. Her husband, James Connelly brought a similar claim against Trezona for loss of consortium. Main Street America Group/Old Dominion Insurance Company denied all claims for liability coverage and uninsured motorist coverage. Allstate Fire and Casualty Insurance Company denied all claims for uninsured motorist coverage.

On September 30, 2016 the Connellys brought a declaratory judgment against both carriers seeking a declaration that the Connellys were entitled to uninsured motorist coverage. All parties filed motions for summary judgment. In an order filed October 2, 2017, the circuit court granted the Connellys motion for summary judgment and denied both carriers' motion for summary judgment. This appeal followed. The Connellys filed a motion pursuant to Rule 204(b) of the South Carolina Appellate Court Rules seeking an Order certifying the case for review by the Supreme Court. The motion was denied February 7, 2018.

STATEMENT OF FACTS

The parties engaged in a written joint stipulation as to the operative facts of this case. (R. pp.142-147). On February 24, 2015 Stephany Connelly was riding as a passenger in a Jeep Compass vehicle owned and operated by Freya Trezona. Ms. Connelly was occupying the vehicle with permission of Ms. Trezona. The vehicle had liability and uninsured motorist coverage issued under a policy by Main Street America Group and Old Dominion Insurance Company ("Main Street/Old Dominion"). In an effort to protect themselves the Connellys paid for and maintained a separate policy of uninsured motorist coverage with Allstate Fire and Casualty Insurance Company ("Allstate") covering their private vehicle. Ms. Trezona negligently caused a motor vehicle wreck resulting in injuries to Ms. Connelly.

At the time of the wreck, Ms. Connelly and Ms. 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. Stephany Connelly then made a claim for damages under the Trezona liability policy. James Connelly made a claim as well for loss of consortium. 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 liability coverage the Connellys made claims for uninsured motorist ("UM") benefits under both the Main Street/Old Dominion and Allstate policies. Both carriers denied the UM claims stating the Trezona vehicle was not an uninsured vehicle and the Workers' Compensation Act provided the exclusive remedy for the Connellys.

The circuit court found the Trezona vehicle to be uninsured given the carriers' denial of coverage under S.C. Code Ann. South Carolina Code §38-77-30(14)(b) and *Unisun Ins. Co. v.*

Schmidt, 339 S.C. 362, 529 S.E.2d 280 (2000). Further, the circuit court held that the *legally entitled to receive* language of S.C. Code Ann. 38-77-150 to be ambiguous and interpreted the statute to simply require a finding of fault by the uninsured driver. Such an interpretation would effectuate the legislative intent to provide recovery to those injured by uninsured motorists. Finally, the circuit court distinguished between claims against an employer/co-employee and claims against an uninsured motorist carrier. While the S.C. Workers' Compensation Act would block the former, its exclusivity provision would not block the latter.

STANDARD 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.2d 781 (1991). The issue here involves the determination of UM coverage. Therefore, the action is one at law. *Horry County v. Ins. Reserve Fund*, 344 S.C. 493, 54 S.E.2d 637 (Ct. App. 2001). An appellate court may decide questions of law with no particular deference to the circuit court. *In re Campbell*, 379 S.C. 593, 666 S.E.2d 908 (2008). The interpretation of a statute is a question of law which an appellate court reviews *de novo*. *S.C. Public Interest Foundation v. Courson*, 801 S.E.2d 185, (Ct. App. 2017).

An appellate court reviews the grant of summary judgement under the same standard applied by the circuit court. *David v. McLeod Regional Medical Center*, 367 S.C. 242, 626 S.E.2d 1 (2006). 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, Rule 56(c), SCRCP.

ARGUMENT

I. S.C. Code Ann. 38-77-150's *legally entitled to recover* language is ambiguous given conflicting interpretations by various courts nationally.

The South Carolina UM statute S. C. Code § 38-77-150(A) provides that a UM policy must undertake 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... (Emphasis added.)

The novel question presented by this case is whether an innocently 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. Under the UM statute one must be legally entitled to recover damages from the uninsured motorist before UM benefits are available. Was Ms. Connelly *legally entitled to recover damages* from Ms. Trezona? No, if this language means Ms. Connelly must first receive a judgment following a lawsuit against Ms. Trezona. Under the S.C. Workers' Compensation Act, Ms. Trezona is immune from a tort action by Ms. Connelly. Yes, if this language simply means Ms. Connelly must demonstrate fault against Ms. Trezona in causing the wreck[1]. 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 a policy. Second, various courts have entertained different interpretations. For example, Appellants rely on several cases from distant jurisdictions interpreting the *legally entitled to recover* language as a fatal obstacle to the recovery of UM benefits. See, *Otterberg v. Farm Bureau Mut. Ins. Co.*, 696 N.W.2d 24 (Iowa 2005);

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[1]Ms. Connelly has stipulated she cannot recover damages for her injuries from Ms. Trezona in a tort action. Depending on this Court's interpretation of the UM statute, Ms. Connelly's stipulation may provide no roadblock to UM coverage.

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, *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 provides evidence of the statute's ambiguity. *Jenkins v. City of Elkins*, 230 W.Va. 335, 345, 738 S.E.2d 1, 11 (2012).

II. Interpreting S.C. Code Ann. 38-77-150's *legally entitled to recover* language to mean simply finding fault effectuates the South Carolina Legislature's intent to protect motorists from injury and death caused by at-fault uninsured motorists.

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 statutes are 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 Respondents first secure a judgment against the unresponsive driver undermines the legislative intent. Requiring a finding of fault against the unresponsive driver furthers the legislative intent. "The uninsured motorist statue is remedial in nature, enacted for the benefit of injured persons, and is to be liberally construed so that the purpose intended may be accomplished." *Unisun Insurance v. Schmidt*, 339 S.C. 362, 529 S.E.2d 280 (Sup. Ct. 2000). 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.

Providing UM coverage furthers the legislative intent to allow individuals to protect themselves from unresponsive and uninsured motorists who cause harm. Here, the Connellys

attempted to protect themselves by paying for and procuring UM coverage from Allstate. They paid the premiums for the coverage. Appellants now want to deny them the security they bargained for.

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 in the opinion to suggest procuring a judgment was the only way to establish liability. In *Otterbacher v. Snyder*, Unpublished Opinion, 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 Ms. Trezona was at fault in causing the wreck and injuries to Ms. Connelly.

Appellants suggest the Connellys cannot trigger UM coverage as result of the wreck because they are not legally entitled to recover damages from Ms. Trezona due to workers' compensation immunity. This argument falls away when interpreting the statute to simply mean the Connellys must demonstrate fault and resulting damages. Appellants argue further the Connellys cannot satisfy the UM statute which requires them to file suit against Ms. Trezona. Actually, the language of S.C. Code Ann. § 38-77-150(B) does not address any requirement of filing suit against the at-fault driver. It does lay out a procedure for serving the UM carrier:

> (B) No action may be brought under the uninsured 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 uninsured motorist provision. The insurer has the right to appear and defend in the name of the uninsured motorist in any action which may affect its liability and has thirty days after service of process on it in which to appear. The evidence of service upon the insurer may not be made a part of the record.

In this case, the Connellys served their declaratory judgment action establishing liability upon both carriers in accordance with the statute.

A. 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 *legally entitled to recover* language as simply requiring a showing of fault by the adverse driver. For example, 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 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. *Borjas*, 33 P.3d at 1267. The Court stated:

> 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.
> *Borjas*, 33P.3d at 1268.

Finally the *Borjas* court listed several other justifications for allowing UM coverage despite a claim of immunity[2]. 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

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[2] The *Borjas* court cited numerous cases interpreting similar statutes and finding UM coverage despite an at fault driver cloaked with governmental immunity: *Watkins v. US*, 462 F.Supp. 980 (S.D. Ga. 1977)(under a similar Georgia UM statute although the tortfeasor was immune under a federal statute, UM insurance coverage applied); *State Farm Automobile Insurance Co., v Baldwin*, 470 So.2d 1230 (Ala. 1985)(under a similar Alabama UM statute an insured was legally entitled to recover under a UM policy even though recovery from the tortfeasor was barred by governmental immunity); *Michigan Millers, Mutual Insurance Co., v. Bourke*, 607 So.2d 418 (Fla. 1992); *West American Insurance Co. v. Popa*, 108 Md. App. 73, 670 A.2d 1021 (1996), aff'd. 352 Md. 455, 723 A.2d 1 (1998); *Williams v. Holsclaw*, 128 N.C. App. 205, 495 S.E.2d 166 (1998); *Kmok-Sullivan v. State Farm Mutual Automobile Insurance Co.*, 746 A.2d 1118 (Pa. Super.Ct. 1999)(petition for appeal granted Jan 3, 2001).

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.

B. 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. An 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[3], the court

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[3] The Oklahoma statute, 36 O.S. 1981, §3636(A) and (B), very similar to the South Carolina UM statute, S.C. Code Annon. §38-77-150, reads as follows:

(A) No policy insuring against loss resulting from liability imposed by law for bodily

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 must prove the extent of those damages. *Barfield*, 742 P.2d 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". *Barfield,* 742 P2d at 1113.

UM benefit recovery 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

> injury or death suffered by any person arising out of the ownership, maintenance or use of a motor vehicle shall be issued, delivered, renewed, or extended in this state with respect to a motor vehicle registered or principally garaged in this state unless the policy includes the coverage described in subsection (B) of this section.
>
> (B) The policy referred to in subsection (A) of this section shall provide coverage therein or supplemental thereto for the protection of persons insured thereunder who are ***legally entitled to recover damages*** from the owners or operators of uninsured motor vehicles and hit-and-run motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom. (Emphasis added).

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 to provide coverage to an insured who is "legally entitled to recover damages from the owners or operators of uninsured motor vehicles..." The court of appeals affirmed. 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.

III. The Trezona vehicle was an uninsured vehicle pursuant to S.C. Code Ann. 38-77-30 (14) given the denial of coverage by Appellants.

Before UM benefits become available, the at-fault motorist must be operating an uninsured vehicle. Main Street/Old Dominion and Allstate deny the Trezona Jeep Compass vehicle was an uninsured motor vehicle. The definition is controlled by statute. South Carolina Code §38-77-30(14) and its relevant subsection (b) provides 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 the Connellys' claims, relying on the exclusivity provision of the Workers' Compensation Act with its grant of immunity to Ms. Trezona. With denial of the claims, the Trezona vehicle's UM coverage became operable. The Trezona vehicle falls within the plain language of the statue 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 denial of liability coverage due to vehicle operation 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).

Appellants herein argue Main Street/Old Dominion did not deny coverage but liability. Thus

the Trezona vehicle was an insured vehicle. This argument is foreclosed given both carriers' stipulation that Ms. Trezona was negligent and the cause of Ms. Connelly's injuries. Liability could not be denied only coverage. Moreover, both carriers cite to language in their respective policies defining an insured vehicle. According to Appellants the Trezona vehicle failed to meet the policy language definition of an uninsured vehicle. Appellants made a coverage denial. Further, the policies by their language exclude coverage for injuries arising out of the course of employment. (R. pp 82, Main Street/Old Dominion policy);(R. pp. 41, 47 Allstate policy).

IV. Procuring uninsured motorist benefits can co-exist with the exclusivity provision of the South Carolina Workers' Compensation Act.

Eligibility of UM benefits is compatible with the exclusivity provision of the Workers' Compensation Act. 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) Ms. 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. *Machin v. Carus Corp*, 419 S.C. 527, 799 S.E.2d 468 (2017) reiterates 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. Ms. Trezona, Apple One and the workers' compensation insurance carrier will not be negatively affected by the Connellys' receipt of UM benefits[4]. Fourth, the Workers' Compensation Act

[4]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. SC*

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. These so called third party actions are 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 and punitive damages. To suggest as Appellants do, that workers' compensation will provide the Connellys with some kind of 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, Appellants reliance on South Carolina Code §15-78-190 of the Tort Claims Act is misplaced. The South Carolina Tort Claims Act is the exclusive remedy to address injuries caused by tortious conduct of state actors. Appellants assert §15-78-190 allows UM and underinsured benefits if a tort claims remedy is inadequate. If the Legislature wanted a similar provision in the Workers' Compensation Act it would have inserted one. As discussed supra, the Legislature did just that and inserted §42-1-560 in the Act.

Department of Insurance Reserve Fund, 390 S.C. 632, 703 S.E.2d 509 (Sup. Ct. 2010) and South Carolina Code §38-77-220.

V. 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 from either. 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.

For these reasons, the Connellys respectfully requests this Court to affirm the ruling of the circuit court granting summary judgment to them for the reasons stated above. Further, this Court may affirm the order of the circuit court based on any ground appearing in the record.

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211 (b), SCARC.

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