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

APPEAL FROM RICHLAND COUNTY COURT OF COMMON PLEAS
Civil Action 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 which Allstate Fire and Casualty Insurance Company, The Main Street America Group and Old Dominion Insurance Company are the Appellants,

And

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

BRIEF OF APPELLANT ALLSTATE FIRE AND CASUALTY INSURANCE COMPANY

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II. Whether the circuit court erred in finding the immunity granted by the Workers' Compensation Act transforms a fully insured vehicle into an uninsured vehicle.

III. Whether the circuit court erred in failing to effectuate the legislative intent of the Workers' Compensation Act and Uninsured Motorist Statutes.

STATEMENT OF THE CASE

Stephany Connelly ("Connelly") was allegedly injured while riding as a passenger in a vehicle driven by her co-worker, Freya Trezona ("Trezona") on February 24, 2015, in Columbia, South Carolina. Trezona was allegedly negligent in causing the accident. Connelly instituted this declaratory judgment action against Main Street America Group ("Main Street") and Old Dominion Insurance Company ("Old Dominion"), who issued an automobile liability policy covering the vehicle involved in the accident; Allstate Fire and Casualty Insurance Company ("Allstate"), the carrier of an automobile policy issued to Connelly and her husband, James; Trezona, the alleged at-fault driver; and Debbie Cohn, Trezona's mother and co-owner of the Trezona vehicle.

The action seeks a declaration that Main Street/Old Dominion's and Allstate's uninsured motorist coverage applies to the accident. The insurance carriers, Main Street/Old Dominion and Allstate, as well as the Respondents, the Connellys, submitted cross motions for summary judgment. In an Order filed October 2, 2017, the circuit court denied the carriers' motions for summary judgment and granted judgment as a matter of law to the Connellys.

STATEMENT OF FACTS

The following facts have been stipulated by the parties. Connelly was injured in an automobile accident while riding as a passenger in a vehicle operated by Trezona and co-owned by Debbie Cohn and Trezona. Connelly and Trezona were co-employees working within the course and scope of their employment with Apple One Employment Agency at the time of the accident. As a result of Trezona's negligent operation of the vehicle, Connelly incurred damages. At the time of the accident, the vehicle Trezona was driving was insured under a policy of liability insurance issued by Old Dominion to Cohn[1] with liability limits in compliance with S.C. Code Ann. § 38-77-140.

After the accident, Connelly applied for and began receiving benefits under the South Carolina Workers' Compensation Act (the "Act"). Pursuant to S.C. Code Ann. § 42-1-540[2], Connelly is not legally entitled to recover damages from Trezona, because she is Connelly's co-employee[3].

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[1] Trezona is the daughter of Cohn and is an insured under the policy.

[2] S.C. Code Ann. § 42-1-540 states: "The rights and remedies granted by this title to an employee when he and his employer have accepted the provisions of this title, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin as against his employer, at common law or otherwise, on account of such injury, loss of service or death."

[3] South Carolina courts have held that the same immunity from civil suit provided to employers under the Workers' Compensation Act also extends to co-employees. *See, e.g., Posey v. Proper Mold & Engineering, Inc.*, 378 S.C. 210, 661 S.E.2d 395 (Ct. App. 2008); *Nolan v. Daley*, 222 S.C. 407, 73 S.E.2d 449 (1952) (holding a co-employee who negligently injures another employee while in the scope of employment is immune under the Act and cannot be held personally liable).

However, Connelly made a claim against Trezona's automobile liability policy to Main Street/Old Dominion. The policy's bodily injury liability limits of $100,000/$300,000 were in effect at the time of the collision and Trezona meets the definition of an insured under the terms of the policy. Main Street/Old Dominion denied liability for the accident, because Trezona is immune from suit under the South Carolina Workers' Compensation Act[4]. Connelly then sought uninsured motorist ("UM") benefits from the Main Street/Old Dominion policy. Main Street/Old Dominion denied the UM claim on the grounds that the vehicle Trezona was driving was not an uninsured vehicle and workers' compensation is Connelly's exclusive remedy in South Carolina.

Allstate issued an automobile policy to the Connellys with policy limits in the amount of $250,000 each person and $500,000 each accident. The Allstate policy contained an uninsured motorist endorsement with the same coverage limits. Connelly also presented a UM claim to Allstate. Like Main Street/Old Dominion, Allstate also denied the claim on the grounds that the vehicle Trezona was driving was not uninsured at the time of the accident and that Connelly was not entitled to legally recover damages from Trezona because workers' compensation is Connelly's exclusive remedy in South Carolina.

The circuit court held that Trezona's lack of legal liability to Connelly pursuant to the Workers' Compensation Act transforms the Trezona vehicle, which meets the General Assembly's definition of an insured motor vehicle, into an uninsured motor vehicle. The circuit court also held that Connelly can by-pass the statutes requiring

[4] Main Street/Old Dominion did not deny *coverage* for the accident. The liability policy was in effect at the time of the accident. Main Street denied that Trezona had any *liability* to Connelly for the accident.

commencement of a tort action against the at-fault motorist to recover UM benefits and bring a direct action against the UM carriers to obtain UM benefits. Further, the circuit court held that Connelly is entitled to UM benefits under both policies irrespective of the exclusivity provision in the Workers' Compensation Act and the statutes controlling the availability of uninsured motorist coverage.

STANDARD OF REVIEW

The determination of coverage under an insurance policy is an action at law. *Nationwide Mut. Ins. Co. v. Prioleau*, 359 S.C. 238, 241, 597 S.E.2d 165, 167 (Ct. App. 2004); *see also Morehead v. Doe*, 324 S.C. 559, 568, 479 S.E.2d 817, 821 (Ct. App. 1996) (holding an action for breach of an insurance contract is an action at law); *Johnson v. State Farm Mut. Auto. Ins. Co.*, 260 S.C. 24, 193 S.E.2d 806 (1973) (holding the construction of an unambiguous insurance policy is a matter for the trial judge). An appellate court may decide novel questions of law with "no particular deference to the lower court." *Clark v. Cantrell*, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000).

An appellate court reviews the grant of summary judgment under the same standard applied by the circuit court. *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP; *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 217, 578 S.E.2d 329, 334 (2003). A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner. *David*, 367 S.C. at 250, 626 S.E.2d at 5.

ARGUMENT

The exclusive remedy provision of the Workers' Compensation Act does not convert an insured vehicle into an uninsured vehicle under South Carolina's uninsured motorist statutes or Allstate's policy. The statutory requirements for uninsured motorist coverage in South Carolina are found in S.C. Code Ann. § 38-77-10 *et. al.* Section 38-77-150 states:

> 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.

S.C. Code Ann. § 38-77-150(A) (emphasis added).

Allstate's policy is consistent with § 38-77-150. It states:

> **Insuring Agreements**
>
> If a premium is shown on the Policy Declarations for Uninsured Motorists Insurance, **we** will pay those damages that an insured person is legally entitled to recover from the owner or operator of an uninsured auto because of:
>
> 1. **bodily injury** sustained by an insured person; and
> 2. **property damage**.

(R.p.47.) Under section 38-77-150 and Allstate's policy, a person seeking UM coverage must be legally entitled to recover damages from the owner or operator of an uninsured motor vehicle. Neither condition precedent to coverage is met in this case.

Connelly has stipulated that Trezona's vehicle maintained the limits required by §38-77-140 and that she is not legally entitled to recover damages from Trezona. (R.p.147 ¶13.) Therefore, Connelly is not entitled to recover UM benefits under Allstate's policy. Simply put, Connelly's pursuit of UM benefits fails because both prerequisites

found in § 38-77-150 are absent - Trezona was not operating an uninsured motor vehicle as defined by South Carolina law and she is not legally entitled to recover damages from Trezona.

The circuit court erroneously based its decision to grant Connelly's motion for summary judgment on decisions from a small minority of states which hold under their statutory schemes that "legally entitled to recover" is ambiguous and only requires a finding of fault to trigger coverage. The circuit court also erred in holding that Connelly can bring a direct action against Allstate to obtain UM benefits and is not required to commence an action against Trezona, the at-fault driver. In so holding, the circuit court both failed to recognize the legislative intent and public policy behind the Workers' Compensation Act and UM statutes and to apply the plain and unambiguous provisions of South Carolina's UM statutes and Allstate's policy.

I. The circuit court erred in finding legal entitlement to recovery is not a condition precedent to the recovery of uninsured motorist coverage under South Carolina's statutory scheme.

In South Carolina, UM coverage is triggered upon the insured's legal entitlement to recover damages from the owner or operator of an uninsured motor vehicle. In other words, a condition precedent to the recovery of UM coverage is establishing the legal liability of the at-fault motorist.

In order to obtain UM coverage, S.C. Code Ann. § 38-77-150 requires filing suit against the at-fault party and serving the UM carrier with a copy of the complaint:

> (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.

Based upon § 38-77-150, the South Carolina Supreme Court has found that "recovery under the uninsured endorsement is subject to the condition that the insured establish legal liability on the part of the uninsured motorist." *Vernon v. Harleysville Mut. Cas. Co.*, 244 S.C. 152, 135 S.E.2d 841 (1964); *see also Cormier v. Nat'l Farmers Union Prop. & Cas. Co.*, 445 N.W.2d 644, 647 (N.D. 1989) ("[T]he clear meaning of the language, 'legally entitled to recover,' imports a condition precedent to the uninsured motorist insurer's obligation that the insured have a legally enforceable right to recover damages from the owner or operator of the uninsured motor vehicle.").

As explained further by the South Carolina Supreme Court,

> Recovery under the uninsured endorsement is subject to the condition that the insured establish legal liability on the part of the uninsured motorist. Such an action is one *ex delicto* and the only issues to be determined therein are the liability and the amount of damage. After a judgment is entered against the uninsured motorist, a direct action *ex contractu* can be brought to recover from the insurance company endorsement, and policy defenses may be properly raised by the insurance company.

Laird v. Nationwide Ins. Co., 243 S.C. 388, 394, 134 S.E.2d 206, 209 (1964); *see also, Lawson v. Porter*, 256 S.C. 65, 68, 180 S.E.2d 643, 644 (1971); *Criterion Ins. Co. v. Hoffmann*, 258 S.C. 282, 294, 188 S.E.2d 459, 464 (1972). Furthermore, the tort action against the uninsured motorist must be commenced against the uninsured motorist within the applicable three year statute of limitations or any claim to uninsured motorist benefits is forfeited. *See Williams v. Selective Ins. Co.*, 315 S.C. 532, 446 S.E.2d 402 (1994); *Louden v. Moragne*, 327 S.C. 465, 486 S.E.2d 525 (Ct. App. 1997).

As explained even further by the *Criterion* Court,

> The right to sue and collect from one's own liability insurance carrier in case of a loss caused by a hit-and-run driver or other driver of an uninsured automobile is a creature of the legislature. Except for the

> statute, and endorsements required, no right exists to recover from one's own insurance carrier. One must look to the terms of the uninsured motorist statute and policy endorsements and comply therewith to get the benefit of law.
>
> Both our statute and the policy endorsements here involved require the service of a complaint.... It is the province of the lawmakers to create a right of action, to provide for process and to declare the procedure for collecting from one's own insurance carrier. They did just that.

Criterion, 258 S.C. at 290, 188 S.E.2d at 462. When the legislature enacted § 38-77-150, it established the mechanism whereby actions may be brought under the UM provisions. *See also* S.C. Code Ann. §§ 38-77-170 and 180 (establishing procedures for actions against unknown "John Doe" drivers). These statutes evince a legislative intent that in order to recover UM coverage, an injured individual must be able to maintain an action against the at-fault uninsured motorist and that a legal right to recovery must exist. The effect of the circuit court order, on the other hand, is that an injured individual can bring an action against the UM carrier directly when no such action could be brought against the uninsured motorist. Surely such an absurd result was not intended by the legislature.

The circuit court's holding plaintiffs are not required to first secure a judgment against the uninsured driver undermines the legislative intent and directly contradicts not only the plain and unambiguous terms and procedures set forth in § 38-77-150, but also Supreme Court precedent in *Laird, Lawson* and *Criterion* acknowledging the legislature's authority to establish the procedure for collecting UM coverage. Further, the Supreme Court recognized the right to recover from one's own insurance carrier is entirely dependent on the statute and policy endorsements. *Criterion*, 258 S.C. at 290, 188 S.E.2d at 462 ("One must look to the terms of the uninsured motorist statute and policy endorsements and comply therewith to get the benefit of law."); *see also Ex parte*

Carlton, 867 So. 2d 332, 337 (Ala. 2003) ("[W]hether an insured is 'legally entitled to recover' depends entirely on the merits of the insured's claim against a tortfeasor under the laws of the state."); *Erie Ins. Exch. v. Conley*, 29 A.3d 389, 392 (Pa. Super. Ct. 2011) ("Pursuant to the clear and unambiguous language of the policy, we conclude that, in order for Appellant to be eligible to receive UM or UIM coverage under the policy, the law must entitle him to recover damages for bodily injuries from the owner or operator of an uninsured or underinsured motor vehicle, *i.e.*, from his employer."); *Peterson v. State Farm Bureau Ins. Co.*, 927 P.2d 192, 195 (Utah Ct. App. 1996) ("Thus, for an insured to satisfy the 'legally entitled to recover' criterion, Utah law requires a viable claim that is able to be reduced to judgment in a court of law.").

In this case, there is no dispute Connelly is not legally entitled to recover from Trezona. Connelly has admitted that she is not legally entitled to recover damages from Trezona. (R.p.147 ¶13)("Connelly is not legally entitled to recover damages from Trezona, because Trezona is immune from suit as a co-employee under the exclusivity provision of the Act."). "When counsel enter into an agreed stipulation of fact as a basis for decision by the court, both sides will be bound by such agreed stipulation, and the court will not go beyond such stipulation to determine the facts upon which the case is to be decided." *Belue v. Fetner*, 251 S.C. 600, 606, 164 S.E.2d 753, 755 (1968); *Kirkland v. Allcraft Steel Co.*, 329 S.C. 389, 392, 496 S.E.2d 624, 626 (1998) ("Stipulations, of course, are binding upon those who make them.").

As prescribed by the exclusivity provision of the Workers' Compensation Act, Trezona is not subject to legal liability. Connelly is not legally entitled to recover damages from Trezona and does not have a viable claim that is capable of being reduced

to judgment in a court of law. Consequently, Connelly cannot meet the first condition precedent to the recovery of UM benefits under the policy and her claim for UM coverage must fail.

Based on the statutory framework for entitlement to UM coverage, suit must be first brought against the uninsured driver and legal liability established. The legislature allows the UM carrier to defend the uninsured driver and assert any defenses available to the uninsured motorist. *See* § 38-77-150(B) ("The insurer has the right to appear and defend in the name of the uninsured motorist.") If the uninsured motorist has a liability, service or statute of limitations defense, then the insurer is entitled to raise it in defense of the action. *See Williams,* 315 S.C. 532, 446 S.E.2d 402; *Louden,* 327 S.C. 465, 486 S.E.2d 525. Such defenses do not render the vehicle being driven at the time of the accident an uninsured vehicle.

Just as a UM carrier can raise a statute of limitations defense available to an uninsured motorist, so too can a UM carrier raise a liability defense provided by the Workers' Compensation Act. As explained by the Kansas District Court (where unlike in South Carolina direct actions against UM carriers are permitted by Kansas UM statutes):

> The insured must be able to establish fault on the part of the uninsured motorist which gives rise to the damages and to prove the extent of those damages. This would mean that in a direct action against the insurer the insured has the burden of proving that the other motorist was uninsured, and the amount of this liability. In resisting the claim the insurer would have available to it, in addition to policy defenses compatible with the statute, the substantive defenses that would have been available to the uninsured motorist such as contributory negligence, etc.
>
> If the insurance company can assert any defense that would have been available to the uninsured motorist (in the case at bar the exclusive remedy of the workers' compensation scheme), then an injured person cannot recover from the insurance company when it could not recover against the tortfeasor. The reasonable inference to be drawn from these cases is that

> the exclusive remedy of the workers' compensation scheme does not transform an otherwise "insured" motorist into an "uninsured" motorist and that the insurance company may raise the exclusive remedy bar as a defense to the payment of uninsured motorist benefits.

Chance v. Farm Bureau Mut. Ins. Co., 756 F. Supp. 1440, 1443 (D. Kan. 1991) (citing *Winner v. Ratzlaff*, 505 P.2d 606, 607 (Kan. 1973)); *see also Hebert v. Clarendon Am. Ins. Co.*, 984 So. 2d 952, 955 (La. Ct. App. 2008) (citing *Carlisle v. State*, 400 So. 2d 284, 285 (La. Ct. App. 1981)) ("[T]he plaintiff had no cause of action against the UM carriers because '[u]insured motorist coverage is contingent upon there being liability by an uninsured or underinsured motorist,' and because the plaintiff had no cause of action against the fellow employee due to the statutory immunity provided by La.R.S. 23:1032, he had no cause of action against the UM carriers."); *Hopkins v. Auto-Owners Ins. Co.*, 200 N.W.2d 784, 786 (Mich. Ct. App. 1972) ("Because of the exclusiveness of the workmen's compensation coverage, plaintiff never had a remedy against the tortfeasor. He was never entitled to damages from the negligent motorist."). Allstate has the same workers' compensation immunity defense as the at-fault motorist, Trezona. In turn, Connelly cannot recover from Allstate, because she cannot recover from Trezona.

A finding that Connelly is not entitled to UM benefits arising from her accident with Trezona is wholly consistent with South Carolina's UM statutes and our Supreme Court's historical interpretation of those statutes. It is also consistent with the vast majority of jurisdictions that have applied their UM statutes to similarly made arguments. For instance, in *State Farm Mutual Automobile Insurance Co. v. Slusher*, 325 S.W.3d 318 (Ky. 2010), the Kentucky Supreme Court addressed a factually similar situation involving the right of an employee to recover under his personal UM or UIM policy for injuries sustained in a work-related motor vehicle accident caused by the negligence of a

co-employee. The employee in *Slusher* was injured during the course and scope of his employment when his co-employee's truck rolled into the building in which the decedent was working. The employee's estate received workers' compensation benefits from the employer's carrier and was unable to assert a wrongful death claim against the co-employee due to the exclusive remedy provision of the Workers' Compensation Act[5]. When the employee's estate sought payment under his personal UM and UIM policies, the carrier denied on the grounds the policy limited UM and UIM liability to damages the estate was legally entitled to collect from the owner or operator of an uninsured or underinsured vehicle. Like S.C. Code Ann. § 38-77-150(A), Kentucky's statutory law eliminated the estate's legal entitlement to collect any damages from the employer or a co-worker in excess of the workers' compensation benefits paid.

Citing the exclusivity statute, the *Slusher* court found that except for the workers' compensation benefits that had already been awarded, the employee's estate is not "legally entitled to collect" any further amounts from either the employer or the co-employee. Consequently, the estate could not collect under its UM or UIM coverage because the contractual language of the policy afforded payment of those benefits only

[5] KRS 342.690(1) states: "If an employer secures payment of compensation as required by this chapter, the liability of such employer under this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death .... The exemption from liability given an employer by this section shall also extend to such employer's carrier and to all employees, officers or directors of such employer or carrier." *See also Travelers Indem. Co. v. Reker*, 100 S.W.3d 756, 760 (Ky. 2003) (holding the effect of this statute is to "shield a covered employer and its insurer from any other liability to a covered employee for damages arising out of a work-related injury.").

for "bodily injury an insured is legally entitled to collect from the driver of an uninsured motor vehicle."

In reaching this conclusion, the *Slusher* court sided with a majority of other jurisdictions. *Slusher*, 325 S.W.3d at 324 n. 12 (citing *Carlton*, 867 So.2d 332 (employee injured as a passenger in a vehicle driven by a co-employee was, under Workers' Compensation Act, not legally entitled to recover from owner or operator of uninsured vehicle, for purposes of uninsured motorist statute, and, therefore not entitled to UM benefits under his insurance policy); *Wachtler v. State Farm Mut. Auto. Ins. Co.*, 835 So.2d 23 (Miss. 2003) (insured was not "legally entitled to recover" from co-employee driving truck that struck insured and, therefore, was not entitled to UM benefits under personal automobile policies; the exclusive remedy provision of the Workers' Compensation Act barred recovery from co-employee); *Williams v. Thomas*, 370 S.E.2d 773 (Ga. App. 1987) (an employee who suffered an on-the-job injury when struck by a motor vehicle owned by his employer and operated by his co-employee while in the scope of employment, and for which the employee was awarded workers' compensation benefits, held not entitled to recover uninsured motorist benefits under his own automobile insurance policy); *Williams v. Country Mut. Ins. Co.*, 328 N.E.2d 117 (Ill. App. 1975) (collision between two employees' automobiles on their employer's premises in the course of employment, was within the purview of the state workers' compensation law; the injured employee's sole recourse was under the workers' compensation statute, and there was no coverage under the injured employee's UM coverage, even though the co-employee was uninsured); *Lee v. Allstate Ins. Co.*, 467 So.2d 44 (La. App. 1985) (employee injured in an automobile accident caused by co-employee held not entitled to

recover from his co-employee's insurer or from his own UM carrier as both insurers were entitled to avail themselves of the exclusive remedy provision of the state workers' compensation statute.)).

In determining the worker's estate was not legally entitled to recover UM and/or UIM benefits due to the exclusivity provision in the Workers' Compensation Act, the *Slusher* court distinguished cases applying the same analysis as the circuit court when it held the UM statute requires only a finding of fault to trigger coverage. Under this "essential facts" approach, the circuit court and a small minority of jurisdictions addressing this issue interpret the phrase "legally entitled to recover," or its equivalent, to allow an insured to collect UM coverage merely by establishing fault on the part of the tortfeasor and the amount of the insured's damages. *Id.* at 322. Under the "essential facts" approach, the tortfeasor's immunity does not preclude UM coverage[6].

Noting the shortcomings of the essential facts analysis, the *Slusher* court found that the abridgment of the essential facts approach "fails to properly consider an individualized analysis of a particular policy's language and its interplay with statutory public policy exemptions to tort liability, such as the exclusive remedy provisions of the Workers' Compensation Act." *Slusher*, 325 S.W.3d at 324 n. 11; *see also Williams v. State Farm Mut. Auto. Ins. Co.*, 641 A.2d 783, 787 (Conn. 1994) ("In order to recover uninsured motorist benefits, the plaintiff must prove, pursuant to the applicable statutes

[6] Representative of the essential facts approach is *Borjas v. State Farm Mutual Automobile Insurance Co.*, 33 P.3d 1265 (Colo. Ct. App. 2001), which held "legally entitled to recover" means the insured need only establish fault of the motorist giving rise to damages and the extent of those damages. However, *Borjas* is easily distinguished from this case because it involved governmental immunity and not workers' compensation immunity. Importantly, the plaintiff in *Borjas* had no source of recovery due to the at-fault motorist's negligence. In contrast, Connelly has already recovered workers' compensation benefits.

and regulations, as well as the contract, that he is 'legally entitled to collect' damages from the uninsured motorist...'Legally entitled to collect damages from the owner or driver of an uninsured motor vehicle,' means that in order to recover under the policy, the plaintiff must prove: (1) that the other motorist was uninsured; (2) that the other motorist was legally liable under the prevailing law; and (3) the amount of liability.").

UM coverage in South Carolina is not triggered simply by a finding of negligence and to hold otherwise, as the circuit court did in this case, is to contravene both the UM statute and the terms of the policy. In *Criterion*, the South Carolina Supreme Court held the right to recover UM coverage from one's own insurance carrier was created by the legislature and is based entirely on compliance with the UM statute and applicable policy provisions. *Criterion*, 258 S.C. at 290 ("One must look to the terms of the uninsured motorist statute and policy endorsements and comply therewith to get the benefit of law."). Holding that only a finding of fault triggers UM coverage circumvents the unambiguous language of § 38-77-150 establishing as a condition precedent to the recovery of UM benefits the existence of a claim capable of being reduced to judgment in a court of law. The circuit court's error in its analysis of the "legally entitled to recover" language found in both the UM statute and the policy requires reversal of the order granting summary judgment to the Connellys and entry of an order granting summary judgment to Allstate.

II. The circuit court erred in finding the immunity granted by the Workers' Compensation Act transforms a fully insured vehicle into an uninsured vehicle.

Connelly's UM claim must fail because she does not meet the first requirement of § 38-77-150 – that she be "legally entitled to recover" in a claim against Trezona.

However, her UM claim must also fail because Trezona was not the operator or owner of an uninsured motor vehicle – the second condition precedent to the recovery of UM. The General Assembly has specifically defined the term "uninsured motor vehicle." S.C. Code Ann. § 38-77-30 provides the following definition:

> (14) "Uninsured motor vehicle" means a motor vehicle as to which:
>
> (a) there is not bodily injury liability insurance and property damage liability insurance both at least in the amounts specified in Section 38-77-140; or
> (b) there is nominally that insurance, but the insurer writing the same successfully denies coverage thereunder; or
> (c) there was that insurance, but the insurer who wrote the same is declared insolvent, or is in delinquency proceedings, suspension, or receivership, or is proven unable fully to respond to a judgment; and
> (d) there is no bond or deposit of cash or securities in lieu of the bodily injury and property damage liability insurance;
> (e) the owner of the motor vehicle has not qualified as a self-insurer in accordance with the applicable provisions of law.
>
> A motor vehicle is considered uninsured if the owner or operator is unknown. However, recovery under the uninsured motorist provision is subject to the conditions set forth in this chapter.
>
> Any motor vehicle owned by the State or any of its political subdivisions is considered an uninsured motor vehicle when the vehicle is operated by a person without proper authorization.

In addition, S.C. Code Ann. § 56-9-20 of the South Carolina Financial Responsibility Act contains the following definition:

> (1) "Insured motor vehicle": A motor vehicle as to which there is bodily injury liability insurance and property damage liability insurance, meeting all of the requirements of item (7) of this section, or as to which a bond has been given or cash or securities delivered in lieu of such insurance or as to which the owner has qualified as a self-insurer in accordance with the provisions of § 56-9-60;

S.C. Code Ann. § 56-9-20.

Consistent with the statutory definition of "uninsured motor vehicle," the Allstate policy issued to the Connellys states:

> **An Uninsured Auto Is:**
> 1. a **motor vehicle** which has
>   a. no bodily injury liability bond or insurance in effect; and
>   b. no cash or securities deposited with the State Treasurer;
>
>   at the time of the accident.
> 2. a **motor vehicle** covered by insurance which doesn't provide at least the minimum limits specified by the South Carolina Financial Responsibility Act and for which there is no cash deposit or bond in lieu of such minimum insurance limits.
> 3. a **motor vehicle** for which the bonding or insuring company:
>   a. successfully denies coverage;
>   b. is or becomes insolvent;
>   c. is in delinquency proceedings, suspension or receivership; or
>   d. is proven unable to respond to a judgment.
> 4. a hit-and-run **motor vehicle** ...
> 5. a phantom **motor vehicle** ....

(R.p.48.)

The position advanced by the Connellys and adopted by the circuit court is that the vehicle driven by Trezona was uninsured because liability coverage was denied based on the exclusivity of the Workers' Compensation Act. At the same time, the Connellys maintain the exclusivity provision of the Act does not apply because, according to their argument, the Act is not Connelly's exclusive remedy. The Connellys cannot have application and non-application of the Act at the same time. *See, e.g., Atl. Mut. Ins. Co. v. Payton*, 682 N.E.2d 1144, 1148 (1997) ("A reason that the driver is deemed uninsured is because the Workers' Compensation Act grants immunity from any liability towards a co-employee. Now Payton is trying to argue that the exclusive remedy and immunity protection provided by the Act do not apply. He cannot have application and non-application of the provisions of the Act at the same time.").

The circuit court held in error that Main Street/Old Dominion's refusal to offer its liability limits based upon Trezona's lack of legal liability rendered UM coverage operable pursuant to § 38-77-30(14) (providing a vehicle is uninsured when "there is nominally that insurance, but the insurer writing the same successfully denies coverage thereunder"). This conclusion glosses over the fact that Main Street/Old Dominion did not and has not ever denied liability coverage for Trezona's accident. *North River Ins. Co. v. Gibson*, 244 S.C. 393, 396, 137 S.E.2d 264, 265 (1964) ("The real question is whether [the carrier] has effectively denied coverage, within the meaning of the statute."). There is no evidence in the record that Main Street/Old Dominion denied liability coverage. Connelly meets the definition of an insured, the policy was in effect and the policy contained more than the mandatory minimum limits of liability coverage. If Connelly were to file suit against Trezona, Main Street/Old Dominion would retain counsel to defend her and file a motion to dismiss based upon the exclusivity provision of the Workers' Compensation Act[7].

The circuit court's decision should be reversed because the court failed to acknowledge the difference between denying *liability* for an accident and denying *coverage*. "[T]he Workers' Compensation Act does not just provide the employer with a defense of exclusivity but takes away from the employee the right to recover damages from his employer and co-employee." *Payton*, 682 N.E.2d at 1146; *Cook v. Mack's Transfer & Storage*, 291 S.C. 84, 88, 352 S.E.2d 296, 299 (Ct. App. 1986) ("Since a remedy exists under the statute, the injured worker has no right to bring a common law action in the courts."). Trezona, through her liability carrier, has availed herself of this

[7] A motion Connelly concedes should be granted, which is why no suit against Trezona has been filed.

defense to liability - and pursuant to South Carolina law, that same defense would be available to Allstate in defense of any uninsured motorist claim filed by Connelly.

The Trezona vehicle does not meet the definition of an uninsured vehicle under § 38-77-30 or Allstate's policy. It is undisputed that the vehicle was covered by a policy of insurance with liability limits in compliance with §38-77-140 at the time of the accident. Connelly's inability to recover liability coverage for the accident is not because the vehicle was uninsured, but because Trezona has no legal liability under South Carolina law. The trial court's ruling undermines South Carolina's entire statutory scheme. Pursuant to South Carolina statutes UM coverage must be based upon the legal liability of an uninsured motorist. UM carriers can raise all legal defenses available to an uninsured driver in defense of that driver.

Under Connelly's theory, a denial to offer liability coverage of a negligent driver based upon a statute of limitations defense would also render a vehicle uninsured. The premise is the same – the driver is negligent and liability coverage is unavailable because the driver is no longer legally liable for the accident. Therefore the vehicle is "uninsured" allowing her to collect UM coverage directly from the UM carrier only upon a showing that the driver was negligent. Of course, to reach this result, one would have to overlook the fact, as the trial court did in this case, that the vehicle was fully insured at the time of the accident and liability coverage was never denied. Such a result was not contemplated by the legislature in passing statutes that clearly predicate the recovery of UM coverage upon a determination of legal liability of a motorist that is actually operating an uninsured vehicle.

Connelly's argument that workers' compensation exclusivity renders an otherwise insured vehicle uninsured has been rejected by the vast majority of jurisdictions that have considered it in light of their own statutory UM schemes. *See, e.g., Chance*, 756 F. Supp. at 1446 ("Nor does the exclusive remedy of the workers' compensation scheme convert Stover's automobile into an 'uninsured motor vehicle.' Stover's policy included liability insurance and therefore he was not 'uninsured' at the time of the accident."); *Kough v. New Jersey Auto. Full Ins. Underwriting Ass'n*, 568 A.2d 127, 134 (N.J. Ct. App. 1990) ("[Arguing a] fully insured [vehicle] might be deemed an uninsured motor vehicle because the liability insurance as not applicable to plaintiff at the time of the accident, or because the liability insurer denied coverage ... would be a strained interpretation since it would deem [the] vehicle uninsured even if she had in effect a liability policy of $500,000. Moreover, such a broad interpretation of the phrase 'uninsured vehicle' would still require a tortured definition of the phrase 'legally entitled to recover.'").

For example, the Alabama Supreme Court held the exclusivity provision of the applicable workers' compensation scheme precluded an individual from recovering UM benefits because the individual was not legally entitled to recover damages from the owner or operator of an uninsured vehicle. *Carlton*, 867 So. 2d at 332. In doing so, the court explicitly overruled prior decisions which "carved out judicial exceptions to the legislative determination that an insured could recover uninsured-motorist benefits only when the insured was legally entitled to recover from the uninsured motorist." *Id.* at 336. According to the court, "[t]hese were exceptions the Legislature could have provided for but did not see fit to do so." *Id.* (highlighting the "folly of judicially expanding the meaning of the unambiguous" UM statute and the "nonsensical result of the case"). The

court noted, "The mere fact that a vehicle insured for bodily injury liability is operated by someone who is immune from liability while operating that vehicle cannot make the vehicle an 'uninsured motor vehicle.'" *Id.* According to the court, "Expanded coverage is appropriate when the policyholder and the insurer contract for it or when the legislature requires it. But, such coverage should not be imposed by a court through an expansive interpretation of clear statutory language." *Id.* at 337.

As recognized by the *Carlton* court, the circuit court erred in transforming a fully insured vehicle into an "uninsured vehicle". In doing so, the circuit court imposed coverage through "an expansive interpretation of clear statutory language." *Id.* Such expanded coverage should be a mechanism of either the legislature or the policy contract, but not of judicial pronouncement. The circuit court's error requires reversal of the order and the entry of an order holding the Trezona vehicle was not "uninsured".

III. The circuit court erred in failing to effectuate the legislative intent of the Workers' Compensation Act and the Uninsured Motorist Statutes.

In holding UM coverage co-exists with the exclusivity provision of the Workers' Compensation Act, the circuit erred in failing to recognize that Workers' Compensation is a "creature of statute" that fully replaces Connelly's common law rights. *See Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 441, 581 S.E.2d 836, 838-39 (2003) ("[W]orkers' compensation is a creature of statute. As such, we are bound to strictly construe the terms of the statute and to rely on the General Assembly to amend the statute where necessary."). The South Carolina Supreme Court recently recognized that the exclusivity provision of the Workers' Compensation Act extinguishes the legal liability of the employer and replaces "the common law idea of tort liability":

> "The Workers' Compensation Act was designed to supplant tort law by providing a no-fault system focusing on quick recovery, relatively ascertainable awards, and limited litigation." ... The concept of workers' compensation is "founded upon recognition of the advisability, from the standpoint of society as well as of employer and employee, of discarding the common law idea of tort liability in the employer-employee relationship and of substituting therefor the principle of liability on the part of the employer, regardless of fault, to compensate the employee, in predetermined amounts based upon his wages, for loss of earnings resulting from accidental injury arising out of and in the course of employment ... The employee receives the right to swift and sure compensation; the employer receives immunity from tort actions by the employee ... This quid pro quo approach to [workers'] compensation has worked to the advantage of society as well as the employee and the employer."

Machin v. Carus Corp., 419 S.C. 527, 534, 799 S.E.2d 468, 471 (2017) (citing *Nicholson v. S.C. Dep't of Soc. Servs.*, 411 S.C. 381, 389, 769 S.E.2d 1, 5 (2015); *Parker v. Williams and Madjanik, Inc.*, 275 S.C. 65, 69-70, 267 S.E.2d 524, 526 (1980)).

Similarly, the Court of Appeals held:

> The Workers' Compensation Act was founded upon a recognition that it is desirable to discard the common law doctrines of tort liability in the employer-employee relationship and substitute a duty of the employer, regardless of fault, to compensate the employee, in predetermined amounts based upon his wages, for loss of earnings resulting from accidental injury arising out of and in the course of his employment.
>
> In effect, the Workers' Compensation Act shifts from the employee to the employer the risk of work related injuries incident to modern industrial activity. In return, it requires the worker, as a condition for receiving the benefits of the Act, to surrender his right to sue at common law. This balancing of advantages is embodied in the exclusive rights and remedies provision of the Act....
>
> [The exclusivity] provision bars all actions against an employer where a personal injury to an employee comes within the Act. It makes the Act the exclusive means of settling all such claims. In some cases, the amount of compensation available under the Act may be substantially less than could be recovered in a successful common law action; but in other cases the employee will receive benefits he would not otherwise have enjoyed because of his inability to establish the employer's common law liability.

> This is a balance struck by the Legislature in order to afford the widest practical coverage for work related injuries.
>
> **The Workers' Compensation Act provides an exclusive system of compensation in derogation of common law rights and is not cumulative or supplemental thereto, but wholly substitutional.** The compensation afforded by the Act is statutory in character, and the right of any claimant thereto is dependent upon the terms and conditions of the statute. These include the procedures for adjudicating a compensation claim as well as the terms and conditions of substantive entitlement.

Cook, 291 S.C. at 86-87, 352 S.E.2d at 298 (internal citations omitted) (emphasis added). The exclusivity provision of the Act limits the injured employee's rights and remedies to those provided by the Act. *Machin*, 419 S.C. at 534, 799 S.E.2d at 471. Also, by enacting the Act's exclusivity provision, the legislature has pre-determined "that for policy reasons the employer may not be the legal cause of the plaintiff's injuries." *Id.* at 540, 799 S.E.2d at 475 (citing *Snyder v. LTG Lufttechnische GmbH*, 955 S.W.2d 252, 256 (Tenn. 1997)). Because the Workers' Compensation Act is a creature of statute, courts are constrained to strictly construe the Act and leave it to the General Assembly to amend and define any ambiguities. *See Wigfall v. Tideland Utilities, Inc.*, 354 S.C. 100, 110, 580 S.E.2d 100, 105 (2003) ("We are further bound by precedent to strictly construe statutes in derogation of the common law. Workers' compensation statutes provide an exclusive compensatory system in derogation of common law rights. As such, when reading a workers' compensation statute we strictly construe its terms, leaving it to the Legislature to amend and define its ambiguities."). Applying this logic to the instant case, Trezona may not be the legal cause of Connelly's injuries. In turn, Connelly is not legally entitled to recover from Trezona.

In failing to give effect to the exclusivity provision of the Act, the circuit court also failed to acknowledge the distinction between cause in fact and legal cause. *See*

R.p.5 ("[The argument] that Main Street/Old Dominion did not deny coverage but denied liability ... 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.")[8]. In *Machin*, the Supreme Court held that distinguishing between cause in fact and legal or proximate cause "is not merely an exercise in semantics":

> The terms are not interchangeable. Although both cause in fact and proximate, or legal, cause are elements of negligence that the plaintiff must prove, they are very different concepts. Cause in fact refers to the cause and effect relationship between the defendant's tortious conduct and the plaintiff's injury or loss. Thus, cause in fact deals with the "but for" consequences of an act. The defendant's conduct is a cause of the event if the event would not have occurred but for that conduct. In contrast, proximate cause, or legal cause, concerns a determination of whether legal liability should be imposed where cause in fact has been established. Proximate or legal cause is a policy decision made by the legislature or the courts to deny liability for otherwise actionable conduct based on considerations of logic, common sense, policy, [and] precedent.

Machin, 419 S.C. at 541-42, 799 S.E.2d at 475-76 (citing *Snyder*, 955 S.W.2d at 256 n. 6 (holding refusal to allow a jury to find an employer to be a proximate cause of a plaintiff's injuries is a rule "uniquely applicable to the allocation of fault to an employer when the employer's liability is governed by the Workers[']] Compensation Law")). Thus, while Trezona's negligence was the cause in fact of Connelly's injuries, it was not the legal or proximate cause of the injuries because the legislature "has already determined that for policy reasons the employer may not be the legal cause of the plaintiff's injuries." *Id.* at 540, 799 S.E.2d at 475 (citing *Snyder*, 955 S.W.2d at 256).

[8] Again, this argument can be made where a negligent driver is not legally liable because the statute of limitations has expired.

To justify the departure from the clear mandate of the legislature when it enacted the exclusivity provision of the Act, the circuit court reasoned that UM coverage sounds in contract and, according to the court, the exclusivity provision only bars tort actions[9]. In doing so, the circuit court incorrectly relied on *Barfield v. Barfield*, 742 P.2d 1107 (Okla. Sup. Ct. 1987). *See Wachtler*, 835 So. 2d at 27 ("The holding of the Oklahoma Supreme Court [in *Barfield*] is contrary to a majority of the jurisdictions in this country

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[9] Several jurisdictions have analyzed similar facts and held that the contract-tort distinction is immaterial in this context. *See Cont'l Nat'l Indem. Co. v. Fields*, 926 So. 2d 1033, 1037-38 (Ala. 2005) ("We agree that Tamms's contractual cause of action survives her death; the fact that her cause of action survives does not, however, answer the ultimate question of whether her estate is legally entitled to recover under the uninsured-motorist statute. To satisfy this condition precedent to recovery, Fields, as Tamms's personal representative, must establish that the uninsured motorist, Coultas, is legally liable to the estate for damages."); *Peterson v. Kludt*, 317 N.W.2d 43, 49 (Minn. 1982) ("[The statute] allow[s] an injured party to proceed against both the employer's workers' compensation insurer and third parties if the underlying obligation sounds in contract (as here) as opposed to tort... because Peterson elected workers' compensation coverage and thus can no longer proceed personally against Western National and General Casualty, there is no contractual obligation between Peterson and State Farm for which State Farm is liable.... Here there was no lack of insurance, but rather the insurance was inapplicable because Peterson elected to make his recovery, as he was required to do, under the Workers' Compensation Act. As a result, Peterson is barred from recovering against his own insurance company, State Farm, on uninsured motorist insurance."); *Kough*, 568 A.2d at 132 ("The reasoning in our case law seems to reject a contractual analysis for UM coverage such as emphasized by the majority of the Oklahoma Supreme Court in *Barfield*. Our Supreme Court has characterized uninsured motorist insurance as a 'contractual substitute for a tort action against an uninsured motorist.' Simply stated, 'an uninsured motorist claim is a statutory cause of action which has many characteristics of a tort action.' UM coverage has been described as 'compensation for the uninsured driver's common law liability.' 'The insured's legal entitlement to damages for the uninsured driver's negligence imports into the UM policy all of the normal rules governing tort liability and damages.'") (internal citations omitted); *Romanick v. Aetna Cas. & Sur. Co.*, 795 P.2d 728, 730 (Wash. Ct. App. 1990) ("Romanick is correct in that he has a contractual relationship with Aetna; however, Aetna's duties under that contract are defined in terms of what Romanick is legally entitled to recover from Shaffer. In other words, Aetna's liability is gauged by that of Shaffer. Therefore, the relationship between Romanick and Shaffer is relevant in determining Aetna's obligation.").

and to this Court's holding and interpretation of 'legally entitled to recover.'"); *State Farm Mut. Auto. Ins. Co. v. Royston*, 817 P.2d 118 (Haw. 1991) (identifying *Barfield* as "a sharply divided five to four decision" and siding with an "overwhelming majority" as well as the dissent in *Barfield* by holding the unambiguous UM statute and legislative history confirm that "tort liability of the uninsured owner or operator is a prerequisite for recovery."). In finding an insured was not "legally entitled to recover" damages from his co-employee within the meaning of his UM policy because the exclusivity provision of the workers' compensation statute provided a substantive bar to any legal claim against his co-employee for his injuries, the Iowa Supreme Court distinguished *Barfield* and held:

> In this case, our legislature has adopted the workers' compensation system. This system supplants the common law, and we no longer recognize a cause of action for negligence by an employee against the employer or co-employee. Thus, Otterberg never had any legal right to recover against the driver of the ambulance.... **The phrase "legally entitled to recover" cannot be stretched so far as to cover situations when an insured could have never recovered from the uninsured motorist because the law did not provide for any recovery**.... Although we liberally interpret the phrase "legally entitled to recover," we will not interpret it so liberally as to contravene our fundamental principles of recovery.... [W]e find no intent expressed by our legislature that the benefits of UM coverage are broad enough to supplement compensation under our workers' compensation system. Thus, we will not interfere with the clear statement by our legislature that UM coverage exists only when the insured is "legally entitled to recover" from the tortfeasor.

*Otterberg v. Farm Bureau Mut. Ins. Co.*696 N.W.2d 24, 30-31 (Iowa 2005) (internal citations omitted) (emphasis added).

The South Carolina legislature chose to supplant the common law rights of an injured employee with the workers' compensation scheme. The long-established policy of the Act to provide compensation to injured employees regardless of fault substitutes

and supplants Connelly's common law right of recovery against Trezona and overshadows the policy of the uninsured motorist statute. In fact, Connelly need not draw on the policy of the UM statute to afford her coverage when she is already protected and guaranteed coverage by the Workers' Compensation Act. *See, e.g., Royston*, 817 P.2d at 122 (holding legislative intent of UM statute was to provide for instances where persons suffered injuries for which no compensation or recourse would be available due to the financial irresponsibility of the guilty motorist and finding no need to "torture the meaning" of the UM statute to provide a remedy when one has already been provided by the workers' compensation act).

The South Carolina legislature has guaranteed Connelly recovery – even in situations where the adverse driver is not at fault - by passing the Workers' Compensation Act. The Act ensures that an employee riding in a vehicle with a co-employee is *never* in an uninsured situation because it ensures that an employee always has a remedy, regardless of lack of fault of the co-employee. *See, e.g., Cormier*, 445 N.W.2d at 648 ("The clearly expressed purpose of the uninsured motorist statute is to protect insureds from uninsured motor vehicles.... The Cormiers' argument does not advance the legislative intent to compensate persons injured by uninsured vehicles (and thus effectively without recourse) where there is available recovery under workers compensation.") (internal citations omitted). The Worker's Compensation Act also limits her remedies – the co-employee is immune from personal liability. That is the trade-off to South Carolina's public policy that all injured employees receive workers compensation benefits, even when the employee herself may be at fault. As recognized by the Florida Supreme Court, expanding UM coverage to cover the situation presented

in this case would "roil the waters in an area where the legislature has attempted to calm the seas":

> In Florida a source of indemnification for a worker injured by a co-worker driving an uninsured vehicle is already available, *i.e.* the benefits of the Workers' Compensation Law. Society's goal of protecting the worker under this circumstance has been achieved. We do 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.
>
> In addition, the immunity offered through workers' compensation 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 a work-related injury to the remedy offered. Expanding UM coverage to cover the circumstance before us here would ... create a large class of uninsured vehicles. The ensuing litigation would roil the waters in an area where the legislature has attempted to calm the seas. Absent a clear statement of intent from the legislature that it considers the benefits of broader UM coverage to outweigh the detriment, we will not disturb its clear and unambiguous statement that coverage exists only when the insured is legally entitled to recover from the tortfeasor.

Allstate Ins. Co. v. Boynton, 486 So. 2d 552, 559 (Fla. 1986); *overruled in part by statute as recognized in State Farm Mut. Auto. Ins. Co. v. Hassen*, 650 So. 2d 128, 137 (Fla. Dist. Ct. App. 1995) (finding amendment of UM statute changes *Boynton* rationale only in "situation[s] involving retention of subrogation rights.").

Proof of the legislative intent that the Workers' Compensation Act is an employee's exclusive remedy against a co-employee is further evidenced by the fact the General Assembly did not include a provision in the Workers' Compensation Act entitling workers injured by co-employees to seek additional recovery from uninsured and/or underinsured motorist carriers. The General Assembly certainly could have included such a provision with the Act, just as it chose to do in the South Carolina Tort

Claims Act, the exclusive remedy against governmental employees and entities[10]. S.C. Code Ann. § 15-78-190, entitled "Compensation of plaintiff pursuant to underinsured or uninsured defendant provisions of plaintiff's insurance policy," provides:

> If the amount of the verdict or judgment is not satisfied by reason of the monetary limitations of this chapter upon recovery from the State or political subdivision thereof, the plaintiff's insurance company, subject to the underinsured and uninsured defendant provisions of the plaintiff's insurance policy, if any, shall compensate the plaintiff for the difference between the amount of the verdict or judgment and the payment by the political subdivision. If a cause of action is barred under § 15-78-60 of the 1976 Code, the plaintiff's insurance company must compensate him for his losses subject to the aforementioned provisions of his insurance policy.

The South Carolina Supreme Court construed this statute in *Cain v. Nationwide Property & Casualty Insurance Co.*, and held that "by enacting section 15-78-190, the Legislature assured that an insurance company could not cite the 'exclusive civil remedy portion' of section 15-78-20 to deny payment from the plaintiff's uninsured or underinsured motorist coverage where recovery pursuant to the Tort Claims Act was insufficient." 378 S.C. 25, 31, 661 S.E.2d 349, 352 (2008)[11].

If the General Assembly had intended that co-employees could circumvent the exclusivity provision of the Workers Compensation Act and recover uninsured or

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[10] Section 15-78-20(b) states: "The remedy provided by this chapter is the exclusive civil remedy available for any tort committed by a governmental entity, its employees, or its agents except as provided in § 15-78-70(b)."

[11] The *Cain* opinion is instructive in that it also analyzed the statutory definitions of uninsured and underinsured vehicles. The Court recognized that "the sole purpose of these kinds of insurance is to provide compensation where the at-fault motorist either is not insured or does not have enough insurance." *Id.* Relying on the definitions of uninsured and underinsured vehicles in the plaintiff's policy and corresponding statutory definitions, the *Cain* Court held plaintiff was not entitled to recover under the UM section of his policy because the tortfeasor's vehicle had insurance protection greater than the minimum limits but less than plaintiff's damages and was, therefore, "underinsured". *Id.* at 32, 661 S.E.2d at 353.

underinsured motorist benefits, it would have placed a similar provision within the Workers' Compensation Act[12]. The fact that the General Assembly chose not to insert a similar provision into the Workers' Compensation Act evinces the legislature's intent in limiting an injured employee's remedies to the Act. S*ee State v. Thomas*, 372 S.C. 466, 469, 642 S.E.2d 724, 725 (2007) (holding that the inclusion of specific provisions to prohibit suspension of sentences in other statutes and omission of any such provision in the proximity statute, indicates the legislature did not intend to limit the general authority to suspend sentences); *Branch v. City of Myrtle Beach ex rel. Attorney Gen. of S.C.*, 340 S.C. 405, 410, 532 S.E.2d 289, 292 (2000) (holding that by including definition of public employee in other sections but not in right-to-work statute, legislature did not intend to cover public employees); *see also Williams*, 370 S.E.2d at 774 ("Although it could have done so, the General Assembly has made no exception to the unambiguous rights and remedies provisions of this statute of exclusivity, so as to enable an injured employee to obtain a judgment against a co-employee in order to meet any **statutory or contractual conditions** necessary to the ultimate recovery of insurance benefits from his own insurer.") (emphasis added).

The circuit erred in failing to effectuate the legislative intent in both the Workers' Compensation Act and the UM statutes. Both workers' compensation and uninsured motorist coverage are creatures of statute, enacted by the legislature in derogation of the

[12] The circuit court reasoned that the Act's provision allowing claims against "third parties" implicitly allows claims against a UM carrier. However, a co-employee is not a third party under the Act and the Act only allows such actions where the at-fault party is someone other than an employer or co-employee. A UM carrier is not an at-fault party in an accident case. The Act does not permit a third party action under the facts of this case, and as previously discussed, the availability of UM coverage turns on the legal liability of the uninsured motorist.

common law. In holding "legally entitled to recover" is ambiguous and allowing the recovery of UM coverage upon only a showing a fault, the circuit court circumvented South Carolina statutes establishing basis and the procedure for the maintenance of a UM action.

The implications of the circuit court's order are far-reaching in that it permits claimants to bring direct actions against UM carriers in cases where the at-fault driver has no legal liability. There is no provision in South Carolina's UM statutes allowing a direct action against a UM carrier without first commencing and action and obtaining a judgment against the at-fault driver. Because the circuit court's order stands in direct contravention of the legislative intent in enacting both the Workers' Compensation Act and the UM statutes, the order should be reversed and summary judgment entered for Allstate.

CONCLUSION

For the reasons stated above, Allstate respectfully requests the reversal of the circuit court's order and the institution of an order granting judgment as a matter of law in favor of Allstate on the grounds that Connelly is not "legally entitled to recover" from Trezona and consequently, cannot maintain a direct action against Allstate for UM coverage in contravention of the clearly stated intention of the legislature in both the Workers' Compensation Act and the UM statute.

[Signature Page to Follow]

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April 12, 2018

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

APPEAL FROM RICHLAND COUNTY COURT OF COMMON PLEAS
Civil Action 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 are ..... Appellants

and

Of whom, Stephany A. Connelly and James M. Connelly are ..... Respondents

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APPELLANT ALLSTATE FIRE AND CASUALTY INSURANCE COMPANY'S CERTIFICATION AS TO BRIEF AND REPLY BRIEF

Counsel for Appellant, Allstate Fire and Casualty Insurance Company, hereby certifies that the Brief and Reply Brief of Appellant Allstate complies with Rule 211(b).

[Signature Page to Follow]

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April 12, 2018