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SC Court of Appeals

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.

REPLY BRIEF OF APPELLANT ALLSTATE FIRE AND CASUALTY INSURANCE COMPANY

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STATEMENT OF THE ISSUES ON APPEAL

I. Whether 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.

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.

In reply to the Brief of Respondents Stephany A. Connelly and James M. Connelly (the "Connellys") and in further support of the Brief of Appellant Allstate Fire and Casualty Insurance Company ("Allstate"), Allstate offers the following arguments, incorporating by reference the background facts stated in its prior Brief.

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.

The trial court erred in finding the phrase "legally entitled to recover" found in S.C. Code Ann. § 38-77-150 is ambiguous. It is unambiguous when read in the context of the entire statute. As recognized by the South Carolina Supreme Court, "[t]he right to sue and collect from one's own liability insurance carrier in case of a loss caused by a … driver of an uninsured automobile is a creature of the legislature." *Criterion Ins. Co. v. Hoffmann*, 258 S.C. 282, 292, 188 S.E.2d 459, 463 (1972). Accordingly, "[t]he statute creating the right has set forth the procedure for enforcing the right." *Id.* One needs look no further than the clear language of the statute to determine entitlement to UM coverage.

Subsection (A) of § 38-77-150 mandates that automobile insurance policies must contain uninsured motorist ("UM") provisions "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." Subsection (B) then sets forth a prerequisite for actions under UM provisions: copies of the pleadings in the action establishing liability must be served on the insurer. Thus, legal entitlement to recovery means the claimant (in this case, the Connellys) must commence an "action establishing liability" against the uninsured motorist and serve the UM carrier with copies of the pleadings.

Interpreting prior versions of the UM statute containing the same mandate that copies of the pleadings in the action establishing liability must be served on the insurance carrier, the *Criterion* Court recognized the right to recover UM coverage depends on strict compliance with the statute:

> The terms of the statute and the policy which we have quoted are clear and not ambiguous. This being true, there is no room for construction and we are required to apply the statute according to its literal meaning. Most courts take a liberal view when dealing with the question of coverage; however, the procedural obligations that the insured must discharge in order to recover, since they are prescribed by statute, are viewed by the courts as mandatory, and strict compliance with them is a prerequisite to recover.

Criterion, 258 S.C. at 291-92, 188 S.E.2d at 463. In this case, strict compliance with § 38-77-150 requires the Connellys to bring an action against Trezona to establish her legal liability to the Connellys. However, due to Trezona's immunity under the Workers' Compensation Act, the Connellys cannot establish her legal liability. (R.p.147 ¶13.) Therefore, the Connellys have failed to comply with the requirements of § 38-77-150 and are not entitled to UM coverage.

The circuit court erred in ignoring the plain and unambiguous terms of § 38-77-150(A) & (B) and looking to other jurisdictions for an interpretation of "legally entitled to recover" when South Carolina courts have consistently held entitlement to UM coverage hinges on establishing the liability of the uninsured motorist. *See Vernon v. Harleysville Mut. Cas. Co.*, 244 S.C. 152, 159, 135 S.E.2d 841, 844 (1964) ("[R]ecovery under the uninsured endorsement is subject to the condition that the insured establish legal liability on the part of the uninsured motorist."); *Laird v. Nationwide Ins. Co.*, 243 S.C. 388, 394, 134 S.E.2d 206, 209 (1964) (holding an UM action is *ex delicto* and requires the insured establish the legal liability of the uninsured motorist before "a direct

action *ex contractu* can be brought to recover from the insurance company endorsement"); *Ferguson v. State Farm Mut. Auto. Ins. Co.*, 261 S.C. 96, 102, 198 S.E.2d 522, 525 (1973) (holding an "insurer's liability under the uninsured motorist endorsement … arises after the liability of the uninsured motorist has been established").

The circuit court further erred in holding the "legally entitled to recover" language of § 38-77-150 simply requires a finding of fault against the uninsured motorist because a finding of fault does not equate to establishing legal liability. Trezona is at fault because her negligence was the cause in fact of the accident and Connelly's resulting injuries and damages. (R.p.147 ¶10[1].) However, Trezona is not legally liable for the accident and Connelly's injuries and damages because she is Connelly's co-employee and is immune from suit. *See Machin v. Carus Corp.*, 419 S.C. 527, 540, 799 S.E.2d 468, 475 (2017) (holding that for policy reasons the employer may not be the legal cause of the plaintiff's injuries). As recognized by the South Carolina Supreme Court in *Machin*, "legal cause is a policy decision made by the legislature or the courts to deny liability for otherwise actionable conduct." *Id.* at 542, 799 S.E.2d at 476.

The approach adopted by the circuit court ignores the distinction between cause in fact and legal cause and essentially holds § 38-77-150 meaningless. Entitlement to UM coverage requires establishing the legal liability of the uninsured motorist and not simply finding fault. As described by the *Criterion* Court, the precedent the Connellys "would have this Court establish is inconsistent with the statute and the endorsements and would

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[1] This stipulation was made "[f]or purposes of the declaratory judgment action only." The carriers have not admitted Trezona's negligence for the purpose of a tort action. The limited nature of this stipulation is reflected in the subsequent stipulation that Connelly is not legally entitled to recover damages from Trezona because Trezona is immune from suit pursuant to the Workers' Compensation Act. (R.p.147 ¶13.)

invite litigants to neglect the procedures obviously intended by the legislature and clearly declared in the statute." *Criterion*, 258 S.C. at 295-96, 188 S.E.2d at 465. Because the circuit court erred in holding "legally entitled to recover" is ambiguous and ignoring § 38-77-150's mandate that legal liability must established, the Order Granting Plaintiffs' Motion for Summary Judgment and Denying Defendants' Motion for Summary Judgment should be reversed.

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

The circuit court's holding that the vehicle driven by Trezona is uninsured because Trezona is immune from suit changes the landscape of uninsured motorist coverage in South Carolina. In an area of insurance law where "[t]he General Assembly has unequivocally spoken on the prerequisites to bringing an action against an uninsured motorist carrier," the circuit court has erroneously interpreted statutory language and judicially expanded coverage. *See Collins v. Doe*, 352 S.C. 462, 466, 574 S.E.2d 739, 741 (2002) ("The legislature unambiguously required that a plaintiff seeking to recover against her uninsured motorist coverage for the negligence of an unknown John Doe driver strictly comply with the plain language of the statute."); *Ex parte Carlton,* 867 So. 2d 332, 337 (Ala. 2003) ("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.").

In the instant case, the at-fault driver was negligent but not legally liable for the accident. Per the circuit court's ruling, this makes the vehicle uninsured. Under the same

reasoning, a liability carrier's refusal to pay liability coverage based upon a statute of limitations defense would also render the vehicle uninsured. The situations are the same: the driver is negligent and the driver has liability insurance but the carrier refuses to pay based upon a legal/procedural defense. Does an effective statute of limitations defense transform a fully insured vehicle into an uninsured vehicle[2]? Surely this is not the result intended by the legislature.

Further, the Connellys mischaracterize Allstate's policy. To be clear, the instant action is one for a declaratory judgment. The exclusions referenced by the Connellys are found in the liability section of Allstate's policy. The Connellys are not seeking coverage under Allstate's liability coverage. Further, if a co-employee could assert a claim against the Connellys, Allstate's policy states that such a claim, if viable, would be covered[3].

Similarly, the Connellys' reliance on *Unisun Insurance Co. v. Schmidt*, 339 S.C. 362, 529 S.E.2d 280 (2000), is misplaced. That case involved the denial of liability coverage based upon lack of permissive use, not a denial of liability. There was no liability coverage in *Unisun* because the person driving the vehicle did not meet the policy's definition of an insured person. The liability policy simply did not apply to the accident because it was not an insured event. Here, Old Dominion did not deny coverage – Trezona is an insured person and was driving the vehicle with permission. Coverage exists and applies to the accident. The accident is an insured event. However, Trezona has no legal liability – she is not legally responsible to the Connellys for their injuries.

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[2] Under the Connellys' theory, assertion of any legal defense to liability would render the vehicle uninsured.

[3] The exclusion referenced in the Connellys' Brief is contained in "Part 1 Automobile Liability Insurance" and states: "This coverage does not apply for: ... anyone other than **you**, for claims made by a co-worker injured in the course of employment." (R.p.43.)

Therefore, Old Dominion refused to pay any of its liability limits to the Connellys. The holding in *Unisun* has absolutely no bearing on the issue presented in this case. Based upon established South Carolina law and the terms of the UM provision of Allstate's policy, Trezona's vehicle does not meet the definition of an uninsured vehicle.

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

The Connellys' failure to meet the requirements imposed by the UM statutes is fatal to their claim. South Carolina courts have consistently required strict compliance with UM statutes despite the fact that such statutes are remedial in nature and should be liberally construed. *See, e.g., Shealy v. Doe*, 370 S.C. 194, 634 S.E.2d 45 (Ct. App. 2006) (rejecting interpretation of UM statute that would "totally eviscerate" its efficacy because even though "the result is lamentable to the injured party," it is "mandated by the statute"). For instance, in *Enos v. Doe*, 380 S.C. 295, 669 S.E.2d 619 (Ct. App. 2008), the Court of Appeals affirmed a directed verdict for an insurance carrier because the plaintiff seeking UM coverage failed to comply with the statutory mandate requiring a sworn affidavit for John Doe claims. Faced with the same policy arguments as the Connellys assert in this case, the Court strictly enforced the statute, reasoning that the "legislature has clearly dictated that recovery from an uninsured motorist carrier is only allowed when certain conditions are met." *Enos*, 380 S.C. at 312, 669 S.E.2d at 627. According to the Court, "[t]he General Assembly has unequivocally spoken on the prerequisites to bringing an action against an uninsured motorist carrier, and [plaintiff] has failed to meet the *sine qua non* prescribed by the legislature." *Id.*

Similarly, the Connellys have failed to meet the statutory mandates imposed by the legislature because they are not "legally entitled to recover" from Trezona and

because Trezona was not operating an uninsured vehicle. While the denial of UM coverage may be a "lamentable" result, it is up to the legislature to change the result:

> It is perhaps unnecessary to say that courts have no legislative powers, and in the interpretation and construction of statutes their sole function is to determine, and within the constitutional limits of the legislative power to give effect to, the intention of the Legislature. They cannot read into a statute something that is not within the manifest intention of the Legislature as gathered from the statute itself. To depart from the meaning expressed by the words is to alter the statute, to legislate and not to interpret. The responsibility for the justice or wisdom of legislation rests with the Legislature, and it is the province of the courts to construe, not to make, the laws. There is a marked distinction between liberal construction of statutes, by which courts, from the language used, the subject-matter, and the purposes of those framing them, find out their true meaning, and the act of a court in ingrafting upon a law something that has been omitted, which the court believes ought to have been embraced. The former is a legitimate and recognized rule of construction, while the latter is judicial legislation, forbidden by the constitutional provisions distributing the powers of government among three departments, the legislative, the executive, and the judicial.

Laird, 243 S.C. at 395, 134 S.E.2d at 209 (1964) (citing *Creech v. S.C. Pub. Serv. Auth.*, 200 S.C. 127, 20 S.E.2d 645 (1942), *overruled on other grounds by Williams v. Town of Hilton Head Island*, 311 S.C. 417, 429 S.E.2d 802 (1993)). Further recognizing the legislature alone holds the power to change statutes, the *Criterion* Court held:

> If it is advisable that the statute be changed, it is within the province of the legislature to do so. For the courts "to set about to relieve against the consequences of the insured's neglect under the facts and circumstances of this case would inevitably lead to the establishment of a mischievous precedent, and to great uncertainty and confusion in the determination of future cases of a similar nature. It is needless to describe the effects of such a condition of things in order to appreciate the necessity of avoiding it."

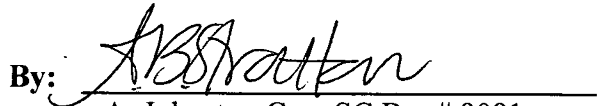
Criterion, 258 S.C. at 294, 188 S.E.2d at 464 (internal citations omitted). In this case, the circuit court departed from the plain language of the UM statute and judicially expanded

UM coverage. The court's erroneous assumption of legislative powers requires reversal of its Order.

CONCLUSION

For the reasons stated herein and in the Brief of Appellant, Allstate respectfully requests reversal of the circuit court's Order Granting Plaintiffs' Motion for Summary Judgment and Denying Defendants' Motion for Summary Judgment.

GALLIVAN, WHITE & BOYD, P.A.

By: 

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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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