

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jocelyn Newman, Circuit Court Judge

RECEIVED

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Case No. 2016-CP-40-5885

SC Court of Appeals

Court of Appeals Case No.: 2017-002234

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

APPELLANT ALLSTATE FIRE AND CASUALTY INSURANCE COMPANY'S
PETITION FOR REHEARING

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Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Appellant Allstate Fire and Casualty Insurance Company (“Allstate”) hereby petitions for the Court for rehearing. The opinion of the Court (Opinion No. 5755) was filed August 12, 2020. The opinion affirms the grant of summary judgment in favor of the respondents, finding that they are entitled to recover uninsured motorist benefits when involved in accident caused by an individual who is immune from suit. Allstate respectfully asserts that the issues set forth below warrant reconsideration by this Court.¹

I. INTRODUCTION

The Court’s decision, in an unprecedented manner, affirms the grant of summary judgment in favor of the respondents, allowing them to pursue uninsured motorist benefits with respect to claims against a motorist against whom they could never legally recover damages. The decision fundamentally transforms the process for presenting uninsured motorist claims while depriving insurers of their affirmative defenses. Furthermore, the Court misconstrued the facts in the record and failed to recognize the distinction between an insured and an uninsured motor vehicle as defined by the South Carolina General Assembly.

Rehearing is warranted on multiple grounds. As detailed below, the Court’s opinion misapprehends facts, law, and arguments critical to its determination. Allstate therefore respectfully requests that the Court grant its petition for rehearing.

II. STANDARD OF REVIEW

¹ In addition to the arguments and facts contained herein, Allstate incorporates the arguments and facts contained in its Final Brief and the arguments made by Main Street/Old Dominion.

The purpose of a petition for rehearing “is to aid the court in deciding correctly a case heard by it.” Arnold v. Carolina Power & Light Co., 168 S.C. 163, 172, 167 S.E. 234, 238 (1933). Where, as here, the existing record does not support the decision, a petition for rehearing is appropriate. See, e.g., Ashley II of Charleston, LLC v. PCS Nitrogen, Inc., 409 S.C. 487, 492 n.4, 763 S.E.2d 19, 21 n.4 (2014) (“If, based on the current record, we have misapprehended the scope of PCS’s indemnification claim against Ross, we invite a rehearing petition. . . .”); Arnold, 168 S.C. at 172, 167 S.E. at 238 (court is “bound by the transcript of record as to the facts of the cause.”). See Kennedy v. S.C. Ret. Sys., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) (“In order to prevail on a petition for rehearing, appellants must demonstrate the Court overlooked or misapprehended their argument.”); Rule 221(a), SCACR (petition shall state the points “supposed to have been overlooked or misapprehended”). These standards are met here.

III. ARGUMENT

A. The Court’s Opinion Circumvents the Statutory Requirement that an Injured Individual Establish Legal Liability By Allowing the Individual To Bring an Action Against the UM Carrier Directly When No Such Action Could Be Brought Against the Uninsured Motorist.

First, the Court’s opinion allows individuals to recover uninsured motorist benefits directly from an insurer without establishing the legal liability of the uninsured motorist – a process which has heretofore never been recognized by this State. By not requiring the respondents to file suit against the uninsured motorist, the Court’s analysis essentially nullifies the uninsured motorist insurer’s ability to defend the uninsured driver and assert any defenses available to the uninsured motorist.

As an initial matter, the Court’s opinion misapprehends the statutory requirement that the respondents must file and serve a tort lawsuit against Trezona, and serve the

insurers with a copy of the same. While this Court and the trial court found that the language of section 38-77-150(B) does not address any requirement of filing suit against the at-fault driver, such assertion is against the plain language of the statute. Section 38-77-150(B) specifically provides:

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 . . .

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

The phrase “pleadings in the action establishing liability” implies that some action must be filed against the uninsured motorist to establish the uninsured motorist was, in fact, liable. A declaratory judgment action directly against the insurers, where the question before the Court is whether a claim is covered by the terms and conditions of a policy, fails to meet this requirement. South Carolina’s statutory scheme 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 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). Such is not true if a declaratory judgment action filed directly against the insurer satisfies the statutory requirement.²

² This Court’s decision would arguably allow an injured party to bring a declaratory judgment action directly against a UM insurer after the statute of limitations has expired as to the at-fault driver. The same rationale applies; although the at-fault driver was negligent and caused the damages, the at-fault driver is no longer legally obligated to pay damages to an injured party because the statute of limitations has expired and is essentially immune from liability.

The Court's misapplication of the statutory requirement that pleadings must be filed establishing liability of the uninsured motorist is further exemplified with its misapprehension of the phrase "legally entitled to recover." In its opinion, the Court determined that the statutory phrase "legally entitled to recover" is ambiguous and that the phrase requires only "demonstrating fault and resulting damages." However, the words of a statute "must be given their plain and ordinary meaning without resort[ing] to subtle or forced construction to limit or expand [the statute's] operation." Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992). While the statute may not contain any language specifically addressing the situation of an uninsured motorist being immune to suit, silence is not tantamount to ambiguity. The statute does plainly state, however, that the claimant must be "legally entitled to recover" from the uninsured motorist. The Court's interpretation of the statute as only requiring a demonstration of "fault" completely ignores the plain meaning of the phrase. A finding of fault does not equate to a finding of legal liability. This approach ignores the distinction between cause in fact and legal cause and essentially holds § 38-77-150 meaningless.

Under § 38-77-150, entitlement to UM coverage requires establishing the legal liability of the uninsured motorist and not simply finding fault. There a number of reasons why a party may be at fault for causing an accident but not legally liable to the plaintiff (i.e. statute of limitations, exclusivity provisions of the Act, comparative negligence, etc.). For those reasons, the statute permits insurers to defend in the name of the uninsured motorists and raise any affirmative defenses the uninsured motorist may have. See Williams, 315 S.C. 532, 446 S.E.2d 402; Louden, 327 S.C. 465, 486 S.E.2d 525. If the legislature intended to allow claimants to recover simply with a showing of

fault, it could have done that. It did not. Rather, the legislature chose to require the claimant to establish the “liability” – not the fault – of the uninsured motorist.

In support of its decision to equate “legally entitled to recover” with “fault,” the Court relied on the decisions in Antley v. Nobel Insurance Co., 350 S.C. 621, 567 S.E.2d 872 (Ct. App. 2002), *overruled in part on other grounds by Sweetser v. S.C. Dep't of Ins. Reserve Fund*, 390 S.C. 632, 703 S.E.2d 509 (2010) and Sanders v. Doe, 831 F.Supp. 886 (S.D. Ga. 1993). Neither of these cases, however, is even remotely analogous to the facts at hand. Both Antley and Sanders are John Doe UM claims against unknown drivers – not uninsured drivers that were immune from suit. While the insurers in those cases did in fact raise the exclusivity remedy as a defense to the UM claims due to the plaintiffs’ recovery of workers compensation benefits, they did not do so as a defense of the uninsured motorist. The John Does in those cases – as non-co-employee third-parties – would not enjoy the protection afforded by the Act as Trezona does here and, thus, the plaintiffs in Antley and Sanders were, in fact, “legally entitled to recover” from John Doe. Here, the respondents are not legally entitled to recover from Trezona as the respondents have admitted. As such, the respondents cannot recover UM benefits.

The effect of the Court’s opinion is to allow claimants to circumvent the statutory requirements that they establish the legal liability of the uninsured motorists in order to recover of claims on which they are legally not entitled. In effect, in any situation where the claimant could not legally recover against the uninsured motorist, claimants can now file a suit directly against the purported UM insurer and deprive the UM insurer of the ability to raise any defenses it could have raised on behalf of the uninsured motorist. This precedent “is inconsistent with the statute and the endorsements and would 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. The Court’s misapprehension and misapplication of the law warrants rehearing on as a matter of law.

B. The Court’s Opinion Misapprehends the Stipulations and the Meaning of “Uninsured Vehicle.”

Second, the Court’s opinion, in determining that the Trezona vehicle was “uninsured,” misapprehends the distinction between denying liability for an accident and denying liability coverage. Like the trial court, the Court found that Old Dominion denied coverage because, based on the stipulation that Trezona was negligent, liability could not be denied. As discussed above, negligence does not equate to legal liability and, thus, Old Dominion could, in fact, deny liability despite the stipulation. There is nothing in the record to suggest that Old Dominion’s policy was not in full force and effect or that the claims would not trigger coverage under the terms and conditions of its policy. Simply put, Old Dominion had liability coverage for Trezona and, thus, the respondents do not have a claim for uninsured motorist coverage.

In support of its finding that the Trezona vehicle was “uninsured,” the Court relied on Unisun Insurance Co. v. Schmidt, 339 S.C. 362, 529 S.E.2d 280 (2000). 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. Liability 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. 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. See S.C. Code 38-77-30 (defining "uninsured motor vehicle," in part, as a motor vehicle as to which (a) there is not liability insurance at least in the amounts specified in § 38-77-140 or (b) there is liability insurance, but the insurer successfully denies coverage).

If the respondents had filed suit against Trezona, as they are statutorily required to do, then there would be no dispute that the Trezona vehicle was insured. Once suit was filed against Trezona, Old Dominion, as the liability insurer, would have retained counsel to defend Trezona. Defense counsel would have moved to dismiss the complaint against Trezona based on the exclusivity provisions of the Act. If the motion was denied, Old Dominion would continue to provide a defense to Trezona and pay for any judgments or settlements up to its liability limits. If the motion was granted, Connelly's claims against Trezona would be dismissed with prejudice, because they are not legally entitled to recover damages against her (just as they would not be legally entitled to recover against her if they failed to sue her within the applicable statute of limitations – which also occurred here). A successful legal defense, whether it is an immunity defense, lack of jurisdiction defense, Rule 12(b)(6) defense, improper service defense or a statute of limitations defense does not transform a vehicle into an "uninsured motor vehicle" just because the at-fault driver was negligent and caused the damages. Finding otherwise

would lead to an absurd result permitting plaintiffs to pursue UM coverage directly against their own insurers any time they are unsuccessful in tort against another motorist.

Moreover, the Court's opinion creates another scenario that is contrary to South Carolina law. In finding for Connelly, the trial court ordered that a hearing be held to determine the Connelly's damages. Upon remand, that process will move forward. The only defendants in the case are the insurers, so either a judge or a jury will be awarding tort damages to the Connellys directly against the insurers. However, the insurers are not the correct defendants. The insurers did not cause the Connelly's injuries and are not legally responsible to the Connelly's for their injuries. Under South Carolina's statutory scheme, a UM carrier does not "stand in the shoes" of an uninsured motorist and cannot be named as a defendant in a tort action to recover UM benefits. See S.C. Code § 38-77-150 ("the insurer has the right to appear and defend in the name of the uninsured motorist in any action which may affect its liability . . . The evidence of service upon the insurer may not be made a part of the record.") (emphasis added). Liability and damages must be established against the at-fault driver before any direct action to recover UM benefits can be brought against an insurer. See Lawson v. Porter, 180 S.E.2d 643, 644 (S.C. 1971) ("Recovery under the uninsured endorsement is subject to the condition that the insured establish the legal liability on the part of the uninsured motorist ... After the judgment is entered against the uninsured motorist, a direct action can be brought *ex contractu* to recover from the insurance company ...") (emphasis added). This Court's decision is contrary to South Carolina statutory law and long standing legal precedent. This decision allows an action directly against an insurer before damages are established and awarded

against an at-fault driver. In fact, it allows a direct action against a UM insurer without any action being brought against and at-fault driver at all.

Finding that a fully insured vehicle becomes “uninsured” simply because the liability insurer successfully asserts a legal defense to liability, even if the at-fault driver was negligent and caused the damages, is a misapprehension of well-established law. The Court’s misapprehension and misapplication of the law warrants rehearing as a matter of law.

IV. CONCLUSION

The Court’s opinion ignores the statutory requirements of S.C. Code § 38-77-150 and creates a new standard for claimants pursuing uninsured motorist claims. Rather than having to file a tort lawsuit against a defendant to establish legal liability and damages, a claimant can file suit directly against his or her UM insurer and deprive the UM insurer of defenses it would be able to make on behalf of the uninsured motorist. Furthermore, if the defendant has liability insurance but the claimant may not be able to legally recover against the defendant, the claimant can remedy the situation through making a UM claim directly against the insurer. This is not a result intended by the legislature.

Allowing the trial court’s grant of summary judgment to stand deprives Allstate of a valid defense it would be entitled to make on behalf of Trezona and permits the respondents to recover for damages to which they admittedly are not legally entitled to recover.³ The respondents should not be permitted to circumvent the statutory process

³ Both § 38-77-150 and Allstate’s policy limit Connelly’s recovery of UM benefits to those an insured is “legally entitled to recover as damages” from the owner or operator of an uninsured motor vehicle. The Connelly’s stipulation that they are not “legally entitled to recover damages” from Trezona defeats their claim regardless of the meaning this

for obtaining UM benefits simply by filing a declaratory judgment action. Even with a judicial declaration that the respondents can obtain UM coverage, they would still need to establish damages – an issue that is not before the Court in a declaratory judgment action and would still need to be litigated in tort. Simply put, the Court’s opinion has misapprehended the facts and the applicable law, turning the process for obtaining UM benefits on its head.

For the foregoing reasons, Allstate submits that this Court misapprehended or overlooked matters of both law and fact that compel a different outcome in this case. Accordingly, rehearing is warranted and the Court should withdraw its current opinion and issue a new opinion reversing the grant of summary judgment in favor of the respondents, as requested by Allstate in its appellate briefing and in this Petition for Rehearing.

Respectfully submitted,

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Court assigns to that phrase. They have stipulated that they are not “legally entitled to recover damages” against Trezona, whatever meaning is given to the phrase.