STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Jocelyn Newman, Circuit Court Judge

Appellate 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 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.

RETURN TO PETITIONS FOR REHEARING

The Court of Appeals correctly addressed, apprehended, and decided the issues presented by this appeal. The Petitions for Rehearing[1] do nothing more than reassert Appellants' previous arguments, which this Court rejected. The Court should therefore deny the Petitions for Rehearing.

There are two legal questions presented by Respondents' uninsured motorist ("UM") claims under the insurance policies issued by Appellants: (1) Does an injured party have the

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[1] Because the arguments in the two petitions largely overlap, Respondents have filed this single response to both.

substantive right to pursue UM coverage when the tortfeasor is personally immune from liability under the South Carolina Workers' Compensation Act ("SCWCA"); and (2) If so, what is the proper *procedural mechanism* to enforce that right?

Appellants' approach of addressing the enforcement procedure as a threshold issue distracts from the true holding of this Court on the substantive question of legislative intent. In addition, if accepted, Appellants' flawed position on that topic would have the effect of undermining claimants' legal rights to UM coverage based on a procedural predicament – truly, "form over substance" – that the Court did not need to address in the present action in any event. Therefore, Respondents address these legal issues in the order outlined above (*i.e.*, substance before procedure) rather than in the order argued by Appellants in their petitions.

STANDARDS FOR PETITIONS FOR REHEARING

Petitions for Rehearing are authorized by Rule 221(a), SCACR, to address "points supposed to have been overlooked or misapprehended by the court." They are not an opportunity for a disappointed litigant to have a "second bite at the apple" by arguing his case to the Court of Appeals for a second time. *Checker Yellow Cab Co. v. Checker Cab & Parcel Service,* 287 S.C. 608, 612, 340 S.E.2d 549, 552 (Ct. App. 1986), *citing Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 167 S.E. 234 (1933).

ARGUMENT

1. The Court correctly concluded Respondents have the right to pursue UM claims.

   a. Respondents are "legally entitled to recover" from Trezona.

Simply put, the primary issue in this case is whether the Legislature's use of the phrase "legally entitled to recover" from an uninsured motorist in S.C. CODE ANN. § 38-77-150(A) (1976, as amended) means an insured's ability to prove an uninsured motorist was at fault for a collision

and caused the insured's damages or also includes consideration of the at-fault motorist's immunity under the SCWCA. The Court properly understood this question (Slip Op. at 35), acknowledged that the statute does not define the phrase (*id.* at 36), and considered both sides' arguments as to whether the Circuit Court had properly construed the Legislature's intent. (*Id.* at 38-40).[2] Based upon the Court's proper interpretation of the phrase, it held that Respondents have the right to pursue their UM claims.

The Legislature addressed UM coverage and claims, as well as underinsured ("UIM") coverage and claims, in several sections of the Automobile Insurance chapter of the State Insurance Code, Chapter 77 of Title 38. Aside from the distinct applications of UM and UIM coverages and the mandatory nature of minimum limits UM coverage, the two coverages are generally treated the same in the code. As such, in divining legislative intent, it is appropriate for the Court to review these related provisions and to harmonize them. *Stewart v. Charleston County Sch. Dist.*, 386 S.C. 373, 379, 688 S.E.2d 579, 582 (Ct. App. 2009) ("Statutes dealing with the same subject matter are to be construed together, if possible, to produce a harmonious result."), *citing Joiner ex rel. Rivas v. Rivas*, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000).

A review of these code sections demonstrates the Legislature employed several terms when describing the liability of a motorist necessary to support a claim for UM or UIM coverage:

- Section 38-77-150(A): Describes UM coverage as a policy 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."
- Section 38-77-150(B): Characterizes an action against an uninsured motorist as an "action establishing liability."

[2] Because the phrase is undefined and susceptible to more than one meaning, the Court correctly affirmed the trial court's finding that it is ambiguous and therefore subject to rules of statutory construction to determine the Legislature's intent. *Hopper v. Terry Hunt Constr.*, 373 S.C. 475, 482, 646 S.E.2d 162, 166 (Ct. App. 2007) *aff'd* 383 S.C. 310, 680 S.E.2d 1 (2009).

- Section 38-77-160: Characterizes an action against an underinsured motorist as an "action establishing liability."

- Section 38-77-160: Also describes UIM coverage as "coverage in the event that *damages are sustained* in excess of the liability limits carried by an at-fault insured or underinsured motorist"; subsequently refers to the adverse driver as the "putative *at-fault* insured" (emphasis added).

- Section 38-77-170: Refers to an unknown motorist against whom an insured may pursue a UM claim as "the owner or operator of any motor *vehicle which causes bodily injury or property damage* to the insured" (emphasis added).

- Section 38-77-180: Refers to an unknown motorist against whom an insured may pursue a UM claim as "the owner or operator of any vehicle *causing injury or damages*" via physical contact and to the same motorist, once identified, as "the owner or operator who *caused the injury or damages*" (emphasis added).

- Section 38-77-190: In authorizing subrogation of a UM insurer, permits such a claim against a "person *causing the injury, death, or damage*" (emphasis added).

When considered together, these statutes inform the Court as to the Legislature's intent. Specifically, they show that its use of the phrase "legally entitled to recover" is synonymous with "establishing liability." Moreover, all subsequent reference to recovery against an uninsured or underinsured motorist employ concepts of fault, causation, and damages without any mention of an affirmative defense based on immunity (except for setting the amount at which UIM coverage is triggered when damages are capped by statute, an issue not relevant here). Thus, it is equally clear that when the Legislature used the phrases "legally entitled to recover" and "establishing liability" it meant actions where an insured can prove the adverse motorist was at fault and caused the insured's damages.

This conclusion is consistent with the manner in which this Court has interpreted UIM coverage. Specifically, in *Ackerman v. Travelers Indem. Co.*, 318 S.C. 137, 456 S.E.2d 408 (Ct. App. 1995), the Court held that the plaintiffs were entitled to pursue a tort action against an at-fault motorist for the purpose of recovering UIM benefits (*i.e.*, an "action establishing liability" under Section 38-77-160) even though the at-fault motorist was not "'legally obligated to pay'

damages" because of a covenant not to execute. *Id.* at 146, 456 S.E.2d at 412-13. In doing so, the Court differentiated between whether the plaintiffs were "entitled to recover damages" from the at-fault driver – the same language as in Section 38-77-150(A) – and whether they were entitled "to legally enforce the judgment" against him, *id.* at 147, 456 S.E.2d at 413, and concluded the plaintiffs were still "entitled to recover" even though the named defendant was, in effect, personally immune from any judgment.

There is no reason to believe the Legislature intended a different result for UM and UIM coverages. The statutes governing the two are *in pari materia* – that is, they deal with the same subject. *Howell v. U.S. Fid. & Guar. Ins. Co.,* 370 S.C. 505, 509, 636 S.E.2d 626, 628 (2006). Additionally, they employ the identical "action establishing liability" language, *compare* S.C. CODE ANN. § 38-77-150(A) & -160 (1976, as amended), which is the equivalent of "legally entitled to recover."

The Court's decision in this case is not only validated by the legislative intent discussed above, it is further supported by the South Carolina case law cited by the Court differentiating between the need to establish the adverse motorist's liability in tort and the contractual claim for UM coverage. (Slip Op. at 38-39). Appellants – insurers who are contractually required to afford UM coverage consistent with the above-referenced statutory scheme – should not be able to avoid their obligations when, at the same time, they conceded the adverse motorist was negligent and caused damages. (R. p. 143, ¶ 10).

Further, the Court's conclusion on this issue is not only consistent with the Oklahoma and West Virginia cases it cited (Slip Op. at 36-38) but also with cases from a number of other jurisdictions that have held an insured is entitled to recover UM coverage despite an at-fault motorist's statutory immunity. *See, e.g., Watkins v. United States,* 462 F. Supp 980 (S.D. Ga.

1977), *aff'd* 586 F.2d 279 (5th Cir. 1979); *State Farm Mut. Auto. Ins. Co. v. Baldwin,* 470 So.2d 1230 (Ala. 1985); *Borjas v. State Farm Auto. Ins. Co.,* 33 P.3d 1265 (Colo. App. 2001); *Mich. Millers Mut. Ins. Co. v. Bourke,* 607 So.2d 418 (Fla. 1992); *Wilkinson v. Vigilant Ins. Co.,* 236 Ga. 456, 224 S.E.2d 167 (1976); *Hoglund v. State Farm Mut. Auto. Ins. Co.,* 592 N.E.2d 1031 (Ill. 1992); *General Acc. Fire & Life Assur. Corp. v. Klatt,* 121 Ill. App. 3d 862, 460 N.E.2d 339 (1984); *Guillot v. Travelers Indem. Co.,* 338 So.2d 334 (La. App. 1976); *West Am. Ins. Co. v. Popa,* 108 Md. App. 73, 670 A.2d 1021 (1996); *Oates v. Safeco Ins. Co. of Am.,* 583 S.W.2d 713 (Mo. 1979); *Williams v. Holsclaw,* 128 N.C. App. 205, 495 S.E.2d 166 (1998); *Marusa v. Erie Ins. Co.,* 136 Ohio St. 3d 118, 991 N.E.2d 232 (2013); *Kmonk-Sullivan v. State Farm Mut. Auto. Ins. Co.,* 746 A.2d 1118 (Pa. Super. 1999); *Gardner v. Erie Ins. Co.,* 722 A.2d 1041 (Pa. 1998).

b. Trezona was an uninsured motorist.

Because Respondents are legally entitled to recover against Trezona for purposes of UM coverage, the remaining issue before the Court was whether Trezona was an uninsured motorist. If the liability insurance applicable to Trezona's car was willing to provide coverage for amounts Respondents are legally entitled to recover from her, then she would not be uninsured; however, Appellant Old Dominion denied the claim for liability insurance because its policy only indemnifies the insured if she is "legally responsible" for damages resulting from a collision. (R. p. 143, ¶ 14; p. 144, ¶ 15). Simply put, because the denial was based on the language of the insuring agreement of Appellant Old Dominion's policy, it was a denial of liability insurance coverage, which the Court correctly held made Trezona an uninsured motorist under S.C. CODE ANN. § 38-77-30(14) (1976, as amended).

The result is the same as in *Unisun Ins. Co. v. Schmidt,* 339 S.C. 362, 529 S.E.2d 280 (2000), upon which the Court relied in affirming the Circuit Court. In that case, as Appellant

Allstate concedes "[t]he liability policy simply did not apply to the accident because it was not an insured event." (Allstate's Pet. for Rehearing, p. 7). Appellant Old Dominion also denied liability coverage because the insured event necessary to trigger that coverage would be Trezona's legal responsibility for Respondents' damages from the collision, which is different from the question of whether Respondents are legally entitled to recover from Trezona. *See Ackerman,* 318 S.C. at 146-47, 456 S.E.2d at 412-13 ("legally obligated to pay damages" and ability "to legally enforce the judgment" – each of which may be equated with "legal responsibility" – were different from "entitled to recover").

Under S.C. CODE ANN. § 38-77-160 (1976, as amended), a motorist is considered underinsured if a claimant's damages exceed "any damages cap or limitation imposed by statute." This not only expresses a legislative intent for UIM coverage – which is part of the same statutory scheme as UM coverage – to apply when recovery is statutorily limited, it also supports the conclusion that the Legislature intended for UM coverage to apply despite statutory limitations like SCWCA immunity. Otherwise, the effect of the legislation would be to allow a claim for an injured party where there is a limited statutory recovery, regardless of how small, but to deny the same claim if there is no statutory recovery; this would be directly contrary to the legislative purpose of UM coverage that provides a liberally construed remedy in favor of injured persons. *See, e.g., Gunnels v. American Liberty Ins. Co.,* 251 S.C. 242, 247, 161 S.E.2d 822, 824 (1968). Moreover, a contrary interpretation of the Legislature's intent in using this statutory language would result in Respondents' ability to collect *UIM* coverage for Trezona's negligence (*i.e.,* all their damages would be in excess of a statutory limitation) but not UM coverage. This latter construction would make less sense than the former, further demonstrating that the legislative intent was to allow UM claims under the present circumstances.

2. Given the procedural posture of this case, the Court properly held that Respondents' UM claims are not barred by the lack of a separate tort action against Trezona.

In this action, Respondents alleged in their Complaint that Trezona was negligent and caused their injuries and damages. (R. p. 119, ¶¶ 12-16). They also named Trezona as a Defendant in the action. (R. p. 117). Appellants initially denied most of these allegations (R. p. 125, ¶ 9; p. 135, ¶ 16 to p. 136, ¶ 19) but later admitted them via stipulation filed on January 31, 2017. (R. p. 143, ¶ 10). The parties agreed to dismiss Trezona at the hearing on May 17, 2017, well after they filed this stipulation. (R. p. 218, lines 4-12).

Appellants rely upon S.C. CODE ANN. § 38-77-150(B) (1976, as amended) in support of their argument that Respondents had to file a separate tort action against Trezona in order to perfect their right to recover UM coverages. Specifically, that statute states: "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." Although a separate tort action is admittedly the typical route to satisfy this requirement, the statute does not require a separate tort action as suggested by Appellants. Rather, it only requires an action that establishes the adverse driver's liability. Indeed, Appellants essentially concede this point in their Petitions for Rehearing. (*See* Allstate's Pet. for Rehearing, p. 4 (Section 38-77-150(B) "implies that some action be filed against the uninsured motorist to establish the uninsured motorist was, in fact, liable."; "some action" could be something other than a separate tort action); The Main Street America Group's and Old Dominion Ins. Co.'s Pet. for Rehearing, p. 5 (case law "all but outright states that a tort action resulting in a judgment against the at-fault motorist is a condition precedent to recovery from the UM insurer."; in other words case law does not state a separate tort action is required)).

In this case, the parties' stipulation established Trezona's liability for the subject collision and Respondents' resulting damages. Having agreed to that – and thereafter requesting and obtaining Respondents' consent to dismiss Trezona from this action – Appellants should not be heard to complain that they were not afforded the procedural protection of the UM statute.[3] In short, this *is* the action that established Trezona's liability and, as such, this action satisfied any procedural obligation on Respondents to exercise their right to pursue UM coverage.

The Court's ruling did not "create a scenario that is contrary to South Carolina law" by allowing Respondents to proceed with a hearing on remand without Trezona as a party. (Allstate's Pet. for Rehearing, p. 9). Trezona would still be a party if Appellants had not sought – and obtained – her dismissal. Appellants created the scenario about which they now complain. In any event, to the extent Appellants dispute the nature or extent of Respondents' damages, they can still do so on remand, in the fashion contemplated by the Circuit Court. (R. p. 16). In that proceeding, the trial court can take measures to avoid prejudice from having insurance companies rather than a tortfeasor defending the damages hearing, as is often done in tort actions given the collateral source rule. *See* Rule 16(b), SCRCP; *see also* S.C. Code Ann. § 38-77-150(B) (1976, as amended) (a UM insurer "has the right to appear and defend in the name of the uninsured motorist in any action which may affect its liability"). The result will be a declaratory judgment stating the amount to which Respondents are entitled to recover from Appellants pursuant to the subject insurance policies.

Moreover, if a separate action had been filed, nothing more would have been achieved. The same reasons that motivated Appellants to stipulate to Trezona's negligence and causation

[3] The statute also requires that the UM carrier be served. There is no dispute that Appellants were served in the present action.

would likely have prevailed in a separate action. Appellants would no doubt have raised immunity under the SCWCA as a defense to that action but that would have simply returned the Court to the initial issue of Respondents' substantive right to pursue their UM claims – an issue resolved by this action.

In the end, Appellant Allstate's contention that "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" (Allstate's Pet. for Rehearing, p. 3) falls flat. This action has provided Appellants with the ability to defend the claims against Trezona.

As a result, the Court should not be distracted by Appellants' arguments that Respondents failed to perfect their UM claims. Under the facts of this case, Respondents did all that was necessary to satisfy the statute and Appellants agreed with that procedure via their stipulation and dismissal of Trezona.

Alternatively, even if the Court were to agree that Respondents still need to pursue a separate tort action against Trezona, the fact that Trezona enjoys immunity from personal liability under the SCWCA does not require a finding that such a tort action cannot proceed for the purpose of establishing Respondents' right to collect UM coverage. There are several contexts in which practices employed in this State allow plaintiffs to pursue actions against defendants against whom no personal recovery can be had – for example:

- An action against an underinsured motorist protected by a covenant not to execute but who remains a defendant so that the plaintiff can pursue UIM coverage.
- An action against a governmental entity subject to the Tort Claims Act (or, possibly, its negligent employee) for the purpose of pursuing UIM coverage above the cap set forth in S.C. CODE ANN. § 15-78-120 (1976, as amended).
- An action against an uninsured charitable organization and/or its uninsured reckless employee for the purpose of pursuing UM coverage above the cap set forth in S.C. CODE ANN. § 33-56-180 (1976, as amended).

- An action against a charitable organization and/or its reckless employee for the purpose of pursuing UIM coverage above the cap set forth in S.C. CODE ANN. § 33-56-180 (1976, as amended).

- An action against a defendant whose debts have been discharged in bankruptcy when recovery is limited to applicable liability insurance coverage. *See, e.g., Matter of Edgeworth,* 993 F.2d 51, 53-54 (5th Cir. 1993).

While Appellants may claim the statutory scheme for UM coverage does not provide a specific mechanism for recovery where the at-fault motorist is immune under the SCWCA – a claim Respondents dispute, as discussed above – that would not deprive UM claimants like Respondents of their right to recover UM coverage. Where a right is created by statute, courts cannot deny that right without providing due process of law. *Wicker v. S.C. Dept. of Corrections,* 360 S.C. 421, 424, 602 S.E.2d 56, 57 (2004). Thus, where there is no clearly defined remedy for deprivation of a statutory right, courts have the equitable power to fashion a remedy. *Santee Cooper Resort v. S.C. Pub. Serv. Comm.,* 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989); *see also State ex rel. Daniel v. Strong,* 185 S.C. 27, 43, 192 S.E. 671, 678 (1937) ("[E]quity abhors a wrong without a remedy."); *Lane v. New York Life Ins. Co.,* 147 S.C. 333, 369, 145 S.E. 196, 207 (1928) ("Equity will not suffer a wrong without a remedy."). To find otherwise, as noted above, would elevate form over substance by denying a substantive right due to a perceived technical deficiency arising from an unclear procedural path. *See Atkins v. Wilson,* 417 S.C. 3, 18, 788 S.E.2d 228, 235 (Ct. App. 2016) (rejecting a technical/procedural argument that a party had waived its substantive rights because "[t]o hold otherwise would place form over substance when doing so would not further the ends of justice.").

In other words, even if the Court had concluded that Respondents' use of the present action to establish Trezona's liability for the subject collision was inadequate or improper because the procedure for suing an uninsured motorist immune under the SCWCA is not specifically authorized by the UM statute (despite the language of Section 38-77-150(B)), the Court was not

without options. Specifically, it had the equitable power to fashion a remedy (that is, a procedure that does not deny claimants their right to seek UM coverage without due process). Under the facts of this case, however, that undertaking was not necessary because the Court correctly held that Respondents have properly asserted and protected their UM claims.

CONCLUSION

For the foregoing reasons, the Court should deny the Petitions for Rehearing.

Respectfully submitted,

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October 2, 2020
Charleston, South Carolina

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Jocelyn Newman, Circuit Court Judge

Appellate 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 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.

PROOF OF SERVICE BY EMAIL

I certify that I have served the RETURN TO PETITIONS FOR REHEARING on all parties herein by emailing same on October 6, 2020 to counsel of record as follows:

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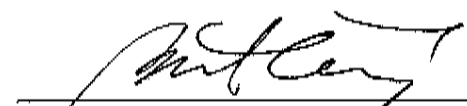
By: 

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October 6, 2020
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Hilda Davis

From: Hilda Davis
Sent: Tuesday, October 6, 2020 9:18 AM
To: Johnston Cox; tdougall@dougallfirm.com; mkalwajtys@dougallfirm.com
Cc: jkassel@kassellaw.com; Bert Utsey
Subject: Connelly v. The Main Street America Group, et al - Appellate Case No. 2017-002234
Attachments: 10.06.2020_LTR_SCCA.pdf; Connelly - Return to Petitions for Rehearing.pdf; Connelly - Proof Svc -Return.pdf

Good morning,

Attached, for service upon you, are Respondents' Return to Petitions for Rehearing, Proof of Service, and copy of our transmittal to the Court of Appeals in the above-referenced matter.

Kind regards,

Hildegard Davis
LEGAL ASSISTANT TO BERT G. UTSEY, III

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October 6, 2020

Via Facsimile Only 803-734-1839

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RE: Stephany A. Connelly and James M. Connelly vs. The Main Street America Group, Old Dominion Insurance Company, Allstate Fire and Casualty Insurance Company, Debbie Cohn and Freya Trezona
Appellate Case No. 2017-002234

Dear Ms. Kitchings:

I am submitting Respondents' Return to Petitions for Rehearing, together with my Proof of Service, for filing with the Court in the above-referenced appeal.

Should you have any concerns regarding this matter, please advise.

Sincerely,

Bert G. Utsey, III

BGU/hd
Enclosures

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Date:	10/06/2020		
Re:	Appellate Case No.: 2017-002234 Stephany A. Connelly and James M. Connelly v. The Main Street America Group, Old Dominion Ins. Co., Allstate Fire and Casualty Ins. Co., et al.		

Message:

Please see attached correspondence and Respondents' Return to Petitions for Rehearing for filing with the Court.

Thank you!

IF YOU DO NOT RECEIVE ALL PAGES OR IF YOU INCUR ANY PROBLEMS WITH THIS TRANSMISSION, PLEASE CALL SENDER AT (843) 818-4399. THANK YOU!