THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jocelyn Newman, Circuit Judge

Opinion No. 5755

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

v.

The Main Street America Group, Old Dominion Insurance Company,
and Allstate Fire and Casualty Insurance Company,…….... ….Petitioners.

The Main Street America Group and Old Dominion Insurance Company's
PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATION

The undersigned counsel for the petitioners The Main Street America Group and Old Dominion Insurance Company hereby certifies that he made a petition for rehearing of the appeal on August 27, 2020, which the court of appeals denied on December 3, 2020.

QUESTIONS PRESENTED

I. According to its plain and ordinary meaning, and this Court's precedent, the statutory phrase "legally entitled to recover as damages" conditions payment of the uninsured-motorist-coverage (UM) benefits on the insured's recovery of a judgment against the at-fault driver. The court of appeals found the phrase ambiguous without explication of its meaning, sidestepped mandatory authority, and held that the UM statute did not set such a condition. Did the court of appeals err in so holding?

II. Under the UM statute, an insured vehicle becomes uninsured if its insurer successfully denies coverage. Old Dominion Insurance Company undertook to pay damages for which its insured would become legally responsible. Under the Workers' Compensation Act, however, the insured driver did not, and never could, become liable to pay them. Does denial of a claim, because the insured event did not occur, amount to a denial of coverage that renders an insured vehicle uninsured?

STATEMENT OF THE CASE

Stephany A. and James M. Connelly sued the insurers Allstate Fire and Casualty Insurance Company, Old Dominion Insurance Company and The Main Street America Group[1] for breach of contract and declaratory judgment. (Joint App. to Pet. Cert. 118.) The Connellys' complaint alleged that they were entitled to benefits under the uninsured-motorist provisions (UM) of the policy issued by Allstate, and under Old Dominion's policy issued to the mother of Stephany's co-worker, Freya Trezona, who was also named as a defendant. (J.A. 120–26.)

[1] The Main Street America Group is a holding company that owns Old Dominion. The Main Street America Group did not issue the policy in question.

Trezona and Connelly worked at AppleOne Employment Agency. (J.A. 146.) On February 24, 2015, Trezona caused an accident while she and Connelly traveled together for work in Trezona's car. (Id.) Connelly suffered injuries in the accident because of Trezona's negligence in operating her vehicle. (Id.) At the time, Old Dominion insured the car. (Id.) According to the terms of the policy, Trezona was an insured under its liability portion and Connelly, as Trezona's passenger, was an insured under the UM provision. (J.A. 146–47.)

Following the accident, Connelly made a workers' compensation claim and received benefits. (J.A. 146.) She also made claims for compensation under the liability and UM coverages of Old Dominion's policy. (Id.) Because of the exclusive-remedy provision of the South Carolina Workers' Compensation Act (the Act), Connelly was not legally entitled to recover damages from Trezona. (Id.) Citing Trezona's immunity to a tort action and workers' compensation being Connelly's exclusive remedy, Old Dominion denied the claim under the liability coverage. (Id.) And since Trezona's car was not an uninsured vehicle as defined by the policy, it denied the UM claim as well. (Id.) Connelly also filed a UM claim under her policy with Allstate; it was denied on the same grounds. (J.A. 147.)

In their answer to the complaint, Old Dominion and Main Street asserted that Trezona's immunity from liability in tort precluded Connelly's right to UM benefits under the policy. (J.A. 141.) Having stipulated to the material facts, each party moved for summary judgment. (J.A. 145–97.) At the hearing, the attorneys for the insurers argued that their respective clients were entitled to judgment as a matter of law because, under the Act, the at-fault driver was immune from liability in tort, which liability was a prerequisite for their duty to pay benefits. (J.A. 223, 227–28.) Counsel for the Connellys, on the other hand, argued that the denial of the claim under the liability provisions of the policy made the vehicle uninsured, and that the policy language "legally entitled

to recover" could be read as requiring only the showing of driver's fault, as opposed to demonstrating accrual of a viable cause of action, capable of being reduced to a judgment. (J.A. 238–39.)

The circuit court denied Old Dominion's and Allstate's motions and granted summary judgment for the Connellys. (J.A. 5.) As a threshold matter, it found that Old Dominion did not deny liability but rather denied coverage under the policy, rendering Trezona's car an "uninsured motor vehicle." (J.A. 7.) Then, having found the UM coverage operable, the court held that "[t]o effectuate the intent of the legislature [it] must interpret the critical language 'legally entitled to recover' as simply a requirement to demonstrate fault." (J.A. 18.)

Main Street and Old Dominion appealed, arguing that a fair reading of "legally entitled to recover," in accordance with the plain and ordinary meaning of its constituent words, did not reveal any ambiguities; that the Supreme Court's opinions had held that a judgment against the uninsured driver is a condition precedent to recovery of UM benefits; and that the denial of a claim based on the insured driver's lack of liability due to immunity was not a denial of coverage that renders an insured vehicle uninsured. (J.A. 264–89.)

The court of appeals decided the case without oral arguments and affirmed the circuit court's order. (J.A. 385.) In doing so, however, it failed to consider the mandatory authority cited by Main Street and Old Dominion and held that "finding legal entitlement to recovery is not a condition precedent to entitlement to UM coverage." (J.A. 378.) The opinion also lacked an analysis uncovering semantic dichotomies of the statutory language; the finding of ambiguity rested merely on lack of definitions and the parties' conflicting interpretations. (J.A. 378–81.) Main Street and Old Dominion petitioned for rehearing of the appeal, pointing out the court of

appeals' misapprehension of the parties' stipulations and oversight of the applicable caselaw. (J.A. 387–98.) The petition was denied. (J.A. 413.)

ARGUMENT

This Court should grant a writ of certiorari to review the decision of the court of appeals because it violates the principles of statutory construction, ignores mandatory caselaw, and conflates and misapplies the concepts of fault, liability, and coverage. Furthermore, it is a case of first impression in regard to the interplay of the UM statute and the Workers' Compensation Act.

I. The court of appeals erred because the phrase "legally entitled to recover" is not ambiguous and had been expounded by this Court as requiring a judgment against the at-fault driver before the insurer's obligation under UM endorsement could be enforced.

Under § 38-77-150(A) of the South Carolina Code, auto insurers, apart from providing collision and liability coverages, must also undertake "to pay the insured all sums he is legally entitled to recover as damages from the owner or operator of the uninsured motor vehicle." S.C. Code Ann. § 38-77-150(A) (2015). Old Dominion has complied with this requirement by adopting the statute's language: its policy provides that Old Dominion "will pay damages which an 'insured' is legally entitled to recover from the owner or operator of the 'uninsured motor vehicle'. . . ." (J.A. 101.)

Under this provision, the insured accrues an enforceable right to UM benefits once she becomes legally entitled to recover damages from the driver who caused her injuries. In other words, the statutory phrase "legally entitled to recover" encapsulates the condition precedent to Old Dominion's contractual obligation.

A. A fair reading of the phrase "legally entitled to recover" reveals no ambiguities that could justify departure from the plain and ordinary meaning of its constituent words.

This Court has held that "the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." *State v. Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010). This seemingly purposive approach is thus anchored in the ordinary meaning of the statutory language: the court must give the words "their plain and ordinary meaning without resort to a subtle or forced construction which limits or expands the statute's operation." *Adkins v. Varn*, 312 S.C. 188, 191, 439 S.E.2d 822, 824 (1993). In the end, the courts "are interpreters not legislators and are bound by the language of [the statutes] as written." *Bentley v. Spartanburg County*, 398 S.C. 418, 426, 730 S.E.2d 296, 301 (2012).

Here, the court of appeals did not adhere to these precepts. Under the guise of following the legislative intent, the court read the words "legally entitled to recover as damages" out of the statute; or conversely, inserted an exception the legislature never conceived. An ascertainment of legislative intent, however, cannot entail rewriting of a statute: "the court has no right to add the words [the legislature] omitted, nor to interpolate them on conceits of symmetry and policy." *Kinard v. Moore*, 220 S.C. 376, 388, 68 S.E.2d 321, 325 (1951). Quite the contrary, the court's task in ascertaining the legislative intent "boils down to finding the meaning of the words used." A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 395 (2012) (quoting R.W.M. Dias, *Jurisprudence*, 219 (4th ed. 1976)). And that meaning is straightforward here: an insured must have a right, under South Carolina law, to a judicial award of compensation from the uninsured driver. The court of appeals' endorsement of the circuit court's view that "legal entitlement to recovery is not a condition precedent to entitlement to UM coverage[,]" (J.A. 378) contradicts the plain and ordinary meaning of those words.

To disregard that meaning, the court of appeals found the statutory and policy language ambiguous. It did so without engaging in an analysis of how "legally entitled to recover" could have alternative meanings. Mere assertion of ambiguity, however, does not make it so: "when a court makes a finding of ambiguity, it must set forth either how a provision is capable of more than one meaning or is obscure in meaning. A simple finding of ambiguity, absent any reasoning, is insufficient." *Bardsley v. Gov't Emps. Ins. Co.*, 405 S.C. 68, 75, 747 S.E.2d 436, 440 (2013)

Granted, the circuit court offered a reasoning, which the court of appeals adopted: the phrase was ambiguous because the parties disagreed as to its meaning and "the language [wa]s not defined in either the statute or the insurance policies." (J.A. 378.) But this reasoning is unsound. Note that Connelly had no trouble comprehending the meaning conveyed by the phrase. She stipulated that she "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." (J.A. 146.) In fact, her counsel acknowledged at the summary-judgment hearing that "Ms. Connelly can't recover from Ms. Trezona because that's the law." (J.A. 254.)

The lack-of-definition rationale offered by the court has no merit either. As this Court explained in *Bardsley*, "[i]f policy language was rendered ambiguous simply because it was not defined, insurance policies would need to contain definitions for every word . . . . To say that any word that is not defined is ambiguous is to ignore the utility of human language." 405 S.C. at 76, 747 S.E.2d at 440. The *Bardsley* court further observed that "we use words because they have commonly accepted meanings, and it is only when they are subject to more than one meaning as used in a particular policy that they may become ambiguous." *Id.*

Here, the court of appeals failed to examine the semantic content of the phrase and uncover any legitimate bifurcation of its meaning. It did not explain how "legally" did not necessarily mean

"according to law" or "under the law," how "entitled" could mean something other than possession of a right recognized by South Carolina law, or how "to recover" did not mean to secure by a process the law provides. For this reason, the finding of ambiguity was baseless and the purposive construction of the phrase unwarranted.

When the statute's language is unambiguous, as it "conveys a clear and definite meaning, then the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *State v. Gaines*, 380 S.C. 23, 33, 667 S.E.2d 728, 733 (2008). The court of appeals' decision violated this principle.

B. According to several opinions of this Court, the UM statute establishes a condition precedent—in a form of a judgment against the at-fault driver—to the insurer's performance of its policy obligation.

The court of appeals implicitly held that under § 38-77-150(A) of the South Carolina Code a legal right to recovery of a tort judgment is not a condition precedent to the insurer's policy obligations. (J.A. 378.) This holding, however, conflicts with multiple decisions of this Court. Though it cited this Court's opinion in *Ferguson v. State Farm Mut. Auto. Ins. Co.*, 261 S.C. 96, 198 S.E.2d 522 (1973)—which holds that the insurer's obligation to its insured under the UM policy becomes enforceable only after the liability of the uninsured driver is established, *id.* at 102, 198 S.E.2d at 525—the court of appeals concluded that procurement of a judgment against the at-fault driver is not required by the statute. (J.A. 381.) Alas, the court reached this conclusion without taking stock of the caselaw that squarely addresses the issue.

In *Laird v. Nationwide Ins. Co.*, this Court held that "[r]ecovery under the uninsured endorsement *is subject to the condition* that the insured establish legal liability on the part of the uninsured motorist." 243 S.C. 388, 394, 134 S.E.2d 206, 209 (1964) (emphasis added). The insured must do so in a tort action. *Id*. According to the Court, only "[*a*]*fter a judgment is entered* against

the uninsured motorist, a direct action *ex contractu* can be brought to recover from the insurance company on its endorsement . . . ." *Id.* (emphasis added).

An opinion in *Vernon v. Harleysville Mut. Cas. Co.* further explained that the UM provision "guarantees payment, within specified limits, of *a judgment recovered* against an uninsured motorist on his tort liability." 244 S.C. 152, 158, 135 S.E.2d 841, 844 (1964) (emphasis added).

Several years after *Laird* and *Vernon*, this Court decided *Lawson v. Porter*, a case that involved assertion of subrogation rights and policy defenses by a UM insurer appearing in a tort action against the uninsured driver. 256 S.C. 65, 67–68, 180 S.E.2d 643–44 (1971). The *Lawson* court explained that the insurer's standing in an action establishing tort liability of the driver differs from that in a contract action in which its own liability under a UM endorsement is to be determined; this difference bears on the type of defenses an insurer can assert. *Id.* at 68, 180 S.E.2d at 644. The court noted, citing *Laird*, that successful conclusion of a tort action against the uninsured driver is necessary for the viability of a contract action against the insurer. *Id.* And it further held that "in the event the plaintiff obtains a judgment against the defendant and an action *ex contractu* is brought by [the plaintiff] against [the insurer], under the uninsured motorist provision of his policy, then [the insurer] may plead any policy defenses . . . ." *Id.* at 68–69, 180 S.E.2d at 644.

In *Park v. Safeco Ins. Co. of America*, this Court held that an insured has no standing to sue the insurer until and unless he establishes the driver's liability in tort, thus expressing the condition precedent set by the UM statute: the insured "has no right to call upon his own insurance carrier under the uninsured motorist endorsement of his own policy until such liability is fixed. Stated another way, no right to recover can accrue to plaintiff against [his] insurance company

until and unless [the uninsured driver] becomes liable to pay." 251 S.C. 410, 413, 162 S.E.2d 709, 710 (1968).

The court of appeals failed to consider the above caselaw and held that the UM statute did not condition recovery of UM benefits on prior judgment against the at-fault driver. Because it was contrary to binding precedent, that holding was error.

C. The provisions that surround § 38-77-150 further support this Court's interpretation that two separate actions, with different timelines, are required for the insured's recovery of UM benefits.

The context in which the phrase "legally entitled to recover" appears in the statute further informs its meaning. Indeed, this Court's distinction between a successful action *ex delicto* against the at-fault driver and a subsequent action *ex contractu* against the UM insurer is rooted in the language and structure of Article 3, "Mandate to Write and Insurance Coverage," S.C. Code Ann. § 38-77-112, *et seq.* Under the statute, an insured cannot demand payment of UM benefits and then sue the insurer—if the demand is refused—without first filing an action against the uninsured driver; an action in which the insurer cannot be named as a defendant.

Section 38-77-150(B) provides that "[n]o action may be brought under the uninsured motorist provision unless copies of the pleadings in the action establishing liability are served in a manner provided by law upon the insurer . . . ." S.C. Code Ann. § 38-77-150(B) (2015). The plain language of this provision indicates different timelines for the tort action—in which a UM insurer may appear to assume the defense of the uninsured driver—and a contract action whereby the insured may seek to establish the insurer's liability under the policy. Thus, the tort action must precede the contract action. Likewise, § 38-77-160, which prescribes an offer of underinsured-motorist coverage (UIM), contains the same language sequencing the actions. S.C. Code Ann. § 38-77-160 (2015).

Moreover, § 38-77-170 explicitly sets forth the conditions for recovery of UM benefits when the at-fault driver is unknown, and § 38-77-180 establishes the terms on which an action against an unknown driver can be filed—"an action may be instituted against the unknown defendant as 'John Doe' and service of process may be made by delivery of a copy of the summons and complaint to the clerk of the court in which the action is brought." S.C. Code Ann. § 38-77-180 (2015). The inclusion of the *John Doe*-action provision implies that under no circumstance can an insurer be sued before or along with the uninsured driver.

Despite this broader statutory context, the court of appeals found that § 38-77-150(B) "does not address any requirement of filing suit against the at-fault driver." (J.A. 383.) Such reading of that section, however, renders the *John Doe*-action provision superfluous: why bother with a pro forma lawsuit against a fictional person and not sue the insurer at once? The legislature's failure to provide for a direct action against the insurer when the at-fault driver is unknown, while it created more cumbersome procedure, shows that a tort action is indispensable for recovery of UM benefits.

Seen in this light, the Connellys' lawsuit—naming the insurers and the at-fault driver as codefendants under the heading "declaratory judgment–breach of contract"—appears to have been a clever maneuver meant to bypass the requirement of filing a viable tort action against Trezona before proceeding against Old Dominion and Allstate in contract.

D. Connelly is not legally entitled to recover damages from Trezona because operation of the Workers' Compensation Act deprived Connelly of all legal remedies she could otherwise pursue against Trezona.

Section § 42-1-540 of the South Carolina Code disallows tort suits against employers, and by extension co-employees, and limits the injured employee's rights or remedies to those provided by the Workers' Compensation Act. S.C. Code Ann. § 42-1-540 (1985); *Machin v. Carus Corp.*,

419 S.C. 527, 534, 799 S.E.2d 468, 471 (2017); *Strickland v. Galloway*, 348 S.C. 644, 647, 560 S.E.2d 448, 449 (Ct. App. 2002). All rights and remedies granted by the Act "exclude all other rights and remedies of such employee . . ., at common law or otherwise, on account of such injury . . . ." S.C. Code Ann. § 42-1-540 (1985). The Act operates in derogation of the common law; "it is not amendatory, cumulative or supplemental thereto, nor declaratory thereof but wholly substitutional in character." *Price v. Peachtree Elec. Servs., Inc.*, 396 S.C. 403, 409, 721 S.E.2d 461, 464 (Ct. App. 2012).

The immunity from liability, which the Act confers on the employers and co-employees, reflects "the broader *quid pro quo* arrangement imposed upon the employer and employee by the Act. The employee receives the right to 'swift and sure compensation' in exchange for giving up the right to sue in tort." *Wise v. Richard Wise d/b/a Wise Serv.*, 394 S.C. 591, 598, 716 S.E.2d 117, 121 (Ct. App. 2011). Compensation under the Act can be both swift and sure because the Act "requires the employer to secure the payment of compensation." *Id.*

Here, Connelly received benefits under the Act. By exercising her right to swift and sure compensation, she gave up her right to sue Trezona in tort. In other words, her legal entitlement to recovery of damages from Trezona was extinguished by operation of the Act. Conversely, the Act conferred an immunity on Trezona, which rendered her actions or omissions incapable of constituting a proximate, or legal, cause of Connelly's injuries. *See Machin v. Carus Corp.*, 419 S.C. 527, 543, 799 S.E.2d 468, 476 (2017). Because Connelly has never accrued a right of action against Trezona, her abstract rights under Old Dominion's policy could not have concretized as to actuate its contractual duty. In short, she has not satisfied the condition precedent to the recovery of UM benefits.

The court of appeals found a workaround, however. According to the court, Trezona's immunity under the Act's exclusive-remedy provision would be inconsequential if the phrase "legally entitled to recover" was construed to convey a requirement of merely demonstrating fault as opposed to establishing liability. (*See* J.A. 378–79.) To support this proposition, the court invoked an opinion of the Supreme Court of Appeals of West Virginia in *Jenkins v. City of Elkins*, 738 S.E.2d 1 (W.Va. 2012). (J.A. 379–81.) But unlike here, *Jenkins* involved an immunity of a political subdivision.

The court of appeals quoted a part of *Jenkins* opinion that in turn quotes a passage from a treatise on uninsured- and underinsured-motorist insurance. (J.A. 380.) In the quoted section, the authors, Alan I. Widiss and Jeffrey Thomas, attempt to dissuade courts from treating the phrase "legally entitled to recover" in terms of its actual meaning and advocate for an interpretation driven by balancing of the public-policy interests—in their view the issue of immunity ought to yield to indemnification of the injured person. *Jenkins*, 738 S.E.2d at 13 (quoting Alan I. Widiss & Jeffrey E. Thomas, *Uninsured and Underinsured Motorist Insurance* § 7.14, at 532 (2005)). The court of appeals failed to appreciate, however, that the passage it quoted pertained to the common-law tort immunities—such as governmental, charitable, or spousal—that leave an injured person "completely without a source of indemnification." *Id*.

In the chapter on underinsured-motorist coverage, however, Professors Widiss and Thomas address the immunity granted by workers' compensation laws. They note that "[u]nless a claimant would be entitled to indemnification from a tortfeasor, individuals who are covered by workers' compensation will not be able to recover from an insurer providing underinsured motorist insurance." 3 A. Widiss & J. Thomas, *Uninsured and Underinsured Motorist Insurance* § 34.2 (2020). The authors actually concede that their policy arguments lose their persuasive power in

regard to the immunity granted by workers' compensation statutes, which provide for at least partial indemnification of the injured persons. *Id*. In fact, they are adamant that in cases where the "insureds have been fully indemnified . . . by workers' compensation . . . there should be no right to also receive the uninsured motorist insurance." 1 A. Widiss & J. Thomas, *Uninsured and Underinsured Motorist Insurance* § 7.14 (2020).

Likely for this reason—and because, unlike in the workers' compensation context, the plaintiffs suing governmental entities have not given up their rights to sue in exchange for the prospect of swift and sure compensation—the West Virginia supreme court's invocation of Widiss and Thomas's policy arguments against governmental immunity could still be consistent with its own caselaw addressing workers'-compensation immunity in light of a UM statute. Note that at the outset of its analysis of "legally entitled to recover," the *Jenkins* court distinguished its earlier decision in *Wisman v. William J. Rhodes and Shamblin Stone, Inc.*, 447 S.E.2d 5 (W.Va. 1994), because it involved an immunity granted by the Workers' Compensation Act: "An employee who receives workers' compensation benefits for injuries that result from a motor vehicle collision with a co-employee which occurs within the course and scope of employment is not entitled to assert a claim for uninsured or underinsured motorist benefits." *Jenkins*, 738 S.E.2d at 11–12. The *Wisman* opinion further held that "[b]ecause of the provisions for employer and co-employee immunity contained in W. Va. Code §§ 23-2-6 and 6a (1994), workers' compensation is the exclusive remedy available to an injured employee, and an uninsured or underinsured motorist carrier has no liability." *Id*.

As in *Jenkins*, West Virginia's highest court supported its *Wisman* holding with a quote from a highly respected treatise—Larson's Workmen's Compensation Law: "for the uninsured motorist clause to operate in the first place, the uninsured third person must be legally subject to

liability. Thus, if the third person is specifically made immune to tort suit by the compensation act's exclusive remedy clause, the uninsured motorist provision does not come into play." *Wisman*, 447 S.E.2d at 8 (citations and quotations marks omitted).

Apart from *Jenkins*, which is distinguishable on the grounds articulated above, the court of appeals cited only one case in which the at-fault driver's immunity under a workers' compensation statute was actually at play—*Torres v. Kansas City Fire & Marine Ins. Co*., 849 P.2d 407 (Okla. 1993). (J.A. 379.) In *Torres*, the Supreme Court of Oklahoma reiterated its prior holding that the phrase "legally entitled to recover" did not require "an insured to establish all the elements of a viable claim in tort . . . " 849 P.2d at 410.

Note, however, that *Torres*'s persuasive value is questionable at best. This is because unlike §§ 38-77-150(B), 160, and 180 of the South Carolina Code, Oklahoma's uninsured-motorist statute does not mandate prior tort action against the uninsured driver: an insured "may file an action directly against his insurance company without joining the uninsured motorist as a party defendant and litigate all of the issues of liability and damages in that one action." *Daigle v. Hamilton*, 782 P.2d 1379, 1381 (Okla. 1989). But as this Court held in *Laird*, *Vernon*, *Lawson*, and *Park*, among others, this is not the case under South Carolina law.

II. Trezona's car did not become "uninsured" because in denying Connelly's claim Old Dominion did not deny that Trezona's risk of incurring liability to pay damages was within the policy's coverage.

Insurance policies provide for two types of indemnification: against loss caused to the insured by a particular occurrence; and against the insured's liability for payment of an award of damages to a third party. *See Piper v. Am. Fid. & Cas. Co*., 157 S.C. 106, 112, 154 S.E. 106, 108 (1930). In the latter type, the insurer's obligation to pay damages does not arise until the liability for its payment attaches to the insured. *Pharr v. Canal Ins. Co.*, 233 S.C. 266, 274, 104 S.E.2d

394, 398 (1958) (quoting *Bailey v. United States Fid. & Guar. Co*, 185 S.C. 169, 175, 193 S.E. 638, 641 (1937)). Put another way, the insured—and by extension any third-party beneficiary of the insurance contract—has no recourse against the insurer until the insured's "liability has become fixed or established . . . on the recovery of a judgment against him . . . ." *Black's Law Dictionary* 886 (10th ed. 2014) (indemnity-against-liability definition, quoting 42 C.J.S. *Indemnity* § 22 (1991)).

Here, Old Dominion promised to indemnify Trezona against liability: "We will pay damages for 'bodily injury' or 'property damage' for which any 'insured' becomes legally responsible because of an auto accident." (J.A. 81.) The scope of that indemnification promise constitutes the policy's coverage. According to Black's Law Dictionary, insurance coverage is "an inclusion of a risk under insurance policy[.]" *Black's Law Dictionary* 446 (10th ed. 2014). It is "the amount and extent of the risk [the insurer] contractually assumed, as specified in the insuring clause and exclusions." *In re Joint E. & S. Dist. Asbestos Litig.*, 993 F.2d 313, 314 (2nd Cir. 1993). In other words, coverage is circumscribed by the monetary limits, the status of the driver as an insured under the policy definition, and the exclusionary provisions that describe particular events or circumstances giving rise to driver's liability in which indemnification is not owed. In short, it is "the net total of policy inclusions minus exclusions." *Utica Mut. Ins. Co. v. Munich Reinsurance Am., Inc.*, 381 F. Supp. 3d 185, 210 (N.D.N.Y. 2019) (quotation marks and citation omitted).

Thus, a denial of coverage must stem from an ascertainment that a particular risk lay beyond the scope of the insurer's legally enforceable promise: for example, an accident occurred a day after the policy expired; the driver did not meet the definition of an "insured" because he or she was not a member of the named-insured's household; or the driver, while meeting one of the definitions of an insured, used the vehicle without reasonable belief of being entitled to do so.

A. Denial of a claim because a covered risk has not materialized is not a denial of coverage of that very risk.

The court of appeals concluded that Connelly was entitled to UM benefits because, under one of the statutory definitions, Trezona's car was an uninsured motor vehicle. Indeed, § 38-77-30(14) of the South Carolina Code defines as such "a motor vehicle as to which . . . there is nominally [liability] insurance, but the insurer writing the same successfully denies coverage thereunder." S.C. Code Ann. § 37-77-30(14) (2015). According to the court, Old Dominion's denial of Connelly's claim, made on the grounds that Trezona is not legally responsible for paying damages to Connelly, was a denial of coverage.

But Old Dominion did not deny Connelly's claim because Trezona did not fit the policy definition of an insured, or because the manner or circumstance in which the car was used fell within the scope of exclusionary provisions. The reason for the denial of Connelly's claim was simple: a liability to pay damages did not attach to Trezona.

Denial of liability and denial of coverage are not synonymous and should not be conflated. An opinion of the Appeals Court of Massachusetts in *Noel v. Metropolitan Prop. & Liab. Ins. Co.* illustrates this point. 672 N.E.2d 119 (Mass. Ct. App. 1996). In that case, the Noels were injured in an accident caused by a driver suffering from a sudden onset of brain-tumor-related symptoms. *Id.* at 120. Allstate, the driver's liability insurer, denied the Noels' claim because the driver, due to symptoms, was not legally responsible for the accident. *Id*. The Noels turned to their insurer, Metropolitan Insurance Company, seeking UM benefits. *Id.* They maintained that Allstate's denial of their claim constituted a denial of coverage that converted the car in question into an uninsured motor vehicle. *Id*. Metropolitan denied the UM claim because the Noels were not entitled to recover from the driver. *Id.* The Noels sued and won summary judgment. *Id.* Metropolitan appealed. *Id*.

The appeals court distilled the issue before it to "whether an insurer's denial of a claim on the ground that its insured is not legally responsible constitutes a denial of coverage so as to render its 'insured' uninsured . . . ." *Id*. In its analysis it distinguished the two, noting that denial of coverage "involves a determination as to whether the particular claim asserted is one to which the policy was intended to apply, whereas the [denial of a claim because the insured is not liable] involves a determination as to the viability of the claim itself." *Id*. at 121. The court further observed that "an insurer against whom a claim is made will frequently deny such claim on issues relating to liability even though coverage actually is afforded . . . ." *Id.* (quoting *Page v. Insurance Co. of N. America*, 256 Cal. App. 2d 374, 380, 64 Cal. Rptr. 89 (1967)).

The *Noel* court reversed the summary judgment and granted one for Metropolitan because the driver "had insurance coverage for damages to persons injured by his automobile in an accident for which he was legally responsible." *Id*. The court added that "if [the driver] were found liable, the [Noels] would be able to recover from [the liability insurer]." *Id*. In other words, the claim was denied because the liability, though covered, could not materialize.

This Court's opinion in *Unisun Ins. Co. v. Schmidt*, on the other hand, shows what a denial of coverage actually is. 339 S.C. 362, 529 S.E.2d 280 (2000). In *Schmidt*, a father let his daughter use a family car. *Id.* at 364, 529 S.E.2d at 281. He instructed her to not let anyone else drive it. *Id*. The daughter, along with her friend Jennifer Hurst, drove the car to a party at Christopher Schmidt's house. *Id*. At some point during the party, Schmidt, without permission, got in the car and drove off with Hurst asleep in the backseat. *Id*. Having lost control, Schmidt drove into a tree, injuring Hurst. *Id.* As a permissive occupant, Hurst claimed to be an insured under the policy that covered the car and sought UM benefits. *Id.*

This Court held that the car became uninsured because the insurer, State Farm Insurance Company, "successfully denied liability coverage." *Id.* at 367, 529 S.E.2d at 282. Indeed, through operation of an exclusionary provision, the scope of State Farm's coverage did not embrace Schmidt's liability—he was not a permissive driver. *Id*. at 365, 529 S.E.2d at 282. Hence, State Farm's denial of a claim under the liability part of its policy was a denial of coverage—a denial that its indemnification promise extended to Schmidt. For this reason, the *Schmidt* court's finding that an otherwise insured car was an uninsured motor vehicle for the purpose of applying UM provision is unremarkable.

Here, however, the circumstances were different. Trezona's liability to pay damages for bodily injury was covered by Old Dominion. But since it has not attached to her due to operation of the Act's exclusive-remedy provision, Old Dominion could deny the claim without having denied coverage of such liability. After all, a liability insurer's duty to adjust and pay a claim is gauged by the underlying liability of its insured, which has not occurred here. Because Old Dominion did not deny coverage, Trezona's car remained an insured vehicle.

B. The insurers' acknowledgement of Trezona's fault in causing the accident is not an admission of liability that justifies a finding of denial of coverage and treatment of the car as uninsured.

The court of appeals invoked the parties' stipulation that Trezona's negligence caused the accident as evidence that liability could not have been denied. (J.A. 383, 146.) In the court's view, "only coverage could be denied, and Insurers made coverage denials." (J.A. 383.) In so holding, however, the court exhibited surprising lack of conceptual discernment.

It is true that in careless lawyerly speech the terms "liability" and "fault," or "negligence," are sometimes used interchangeably. But lapses in proper usage should not lead to misapplication of these very different concepts. Note that Black's Law Dictionary defines liability as "[t]he

quality, state, or condition of being legally obligated or accountable," contrasting it with fault: "a traditional element in determining legal responsibility"—"a breach of duty of care as an element of tort of negligence." *Black's Law Dictionary* 725, 1053, 1196 (10th ed. 2014). And negligence, in its strict sense, is a degree of fault in breaching that duty. *Id.* Hence, we can speak of fault-based or no-fault liability. This Court's decision in *Machin v. Carus*, for example, consisted in differentiation of these concepts: it involved apportionment of fault among tortfeasors whose liability in tort could not be established, and who incurred liability under different legal regime, but without regard to their fault. 419 S.C. 527, 799 S.E.2d 468 (2017). It must follow then that a stipulation as to fault in causing an injury cannot amount to admission of liability in tort. After all, to prove the tort of negligence, establishing fault, though necessary, is by no means sufficient.

Main Street and Old Dominion stipulated that "Trezona's negligence caused the accident and Connelly's resulting injuries and damages." (J.A. 146.) But the parties also stipulated that "Connelly's claim under the liability policy [was denied] because . . . Trezona cannot be legally responsible to Connelly due to her immunity under the Act." (Id.) Because acknowledgment of the insured's fault in causing an injury is not an admission of liability based on that fault, Old Dominion could not have denied coverage of that liability. The court of appeals' contrary finding is wrong as a matter of law.

CONCLUSION

The court of appeals erred on three levels. First, it found ambiguity where there was none and deviated from the plain and ordinary meaning of the UM statute. Second, it did so in conflict with this Court's precedent that had addressed the statute's meaning. Third, it conflated several legal concepts whose proper application was critical to the resolution of this case.

For these reasons, and because this case presents a novel question of law, a writ of certiorari should issue.

Respectfully submitted,

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