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S.C. SUPREME COURT

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

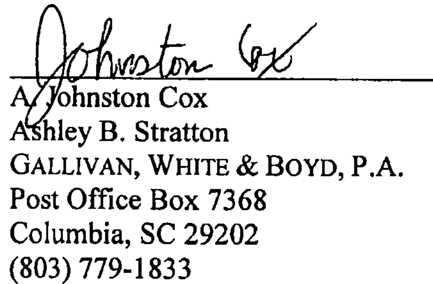
APPEAL FROM RICHLAND COUNTY
Civil Action No. 2016-CP-40-5885
Jocelyn Newman, Circuit Court Judge

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

PETITION FOR A WRIT OF CERTIORARI OF ALLSTATE FIRE AND CASUALTY INSURANCE COMPANY



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Pursuant to Rule 242 of the South Carolina Appellate Court Rules, Petitioner Allstate Fire and Casualty Insurance Company hereby petitions this Court for a writ of certiorari to review Opinion No. 5755 of the Court of Appeals. 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. Petitioner now seeks a writ of certiorari so that this Court may review the Court of Appeals' Opinion, which if it stands, creates contradictory insurance law and ignores and otherwise tortures plain and unambiguous policy language.

CERTIFICATION OF COUNSEL

The undersigned hereby certifies that a petition for rehearing was made and ruled upon by the Court of Appeals on December 3, 2020.

QUESTIONS PRESENTED FOR REVIEW:

I. Did the Court of Appeals err 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. Did the Court of Appeals err in finding the immunity granted by the Workers' Compensation Act transforms a fully insured vehicle into an uninsured vehicle?

III. Did the Court of Appeals err in failing to effectuate the legislative intent of the Workers' Compensation Act and Uninsured Motorist Statutes?

STATEMENT OF THE CASE

The Court of Appeals erred in holding that Respondents Stephanie A. Connelly and James M. Connelly can pursue uninsured motorist benefits with respect to claims against a motorist against whom they could never legally recover damages. Furthermore, the Court's

decision fails to recognize the distinction between an insured and an uninsured motor vehicle as defined by the South Carolina General Assembly.

On February 24, 2015, Stephany Connelly ("Connelly") was allegedly injured while riding as a passenger in a vehicle driven by her co-worker, Freya Trezona ("Trezona") in Columbia, South Carolina. Trezona was allegedly negligent in causing the accident. Connelly recovered damages through a claim with the South Carolina Worker's Compensation Commission. Connelly then instituted this declaratory judgment action against Main Street America Group ("Main Street") and Old Dominion Insurance Company ("Old Dominion"), who issued an automobile liability policy covering the vehicle involved in the accident and being driven by her co-worker, Trezona; Allstate Fire and Casualty Insurance Company ("Allstate"), the carrier of an automobile policy issued to Connelly and her husband, James; Trezona, the alleged at-fault driver; and Debbie Cohn, Trezona's mother and co-owner of the Trezona vehicle. The complaint did not assert any tort claims against Trezona or Cohn. Both Trezona and Cohn were subsequently dismissed by consent.

This action sought a declaration that Main Street/Old Dominion's and Allstate's uninsured motorist coverage applied to the accident. All parties moved for summary judgment, stipulating to the material facts and contending the question was a matter of law based on statutory and policy interpretation. In an Order filed October 2, 2017, the circuit court denied the carriers' motions for summary judgment and granted judgment as a matter of law to the Connellys. Allstate and Main Street/Old Dominion filed notices of appeal on October 23, 2017 and October 26, 2017, respectively. The Court of Appeals issued its Opinion affirming the circuit court on August 12, 2020. Allstate and Main Street/Old Dominion timely filed Petitions for Rehearing, which were denied by Order of December 3, 2020.

STATEMENT OF THE FACTS

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

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

However, Connelly made a claim against Trezona's automobile liability policy to Main Street/Old Dominion. The policy's bodily injury liability limits of $100,000/$300,000 were in

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

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

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

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

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

The circuit court held that Trezona's lack of legal liability to Connelly pursuant to the Workers' Compensation Act transforms the Trezona vehicle, which meets the General Assembly's definition of an insured motor vehicle, into an uninsured motor vehicle. The circuit court also held that Connelly can by-pass the statutes requiring commencement of a tort action against the at-fault motorist to recover UM benefits and bring a direct action against the UM carriers to obtain UM benefits. Further, the circuit court held that Connelly is entitled to UM

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

benefits under both policies irrespective of the exclusivity provision in the Workers' Compensation Act and the statutes controlling the availability of uninsured motorist coverage.

SUMMARY OF GROUNDS FOR CERTIORARI

Rule 242 of the South Carolina Appellate Court Rules outlines some of the considerations used in deciding whether a writ of certiorari is appropriate. Two of those considerations are present in this action and weigh in favor of this Court issuing a writ of certiorari to review and reverse the Court of Appeals' Opinion. Specifically, the Court of Appeals' Opinion raises a novel question of law on the subject of UM coverage when the vehicle involved in the accident is covered by liability insurance and the injured party is not legally entitled to recover from the tortfeasor. See Rule 242(b)(1) and (3), SCACR.

On Respondents' entitlement to UM coverage, a novel question of law exists with regard to whether an injured party can recover UM benefits when the purported tortfeasor is insured as mandated by the South Carolina Financial responsibility Act, but immune from suit. The Court of Appeals' Opinion allows individuals to recover uninsured motorist benefits directly from an insurer without establishing the legal liability of the uninsured motorist. By not requiring Respondents to file suit against the uninsured motorist, the Court's opinion essentially transforms an insured vehicle into an uninsured vehicle and nullifies the uninsured motorist insurer's statutorily prescribed ability to defend the uninsured driver and assert any defenses available to the uninsured motorist.

Review is also appropriate in this matter because the Court of Appeals' decision defies several cardinal rules of statutory and insurance policy interpretation. It also makes an unprecedented leap in torturing statutory language to create a result not supported by the insurance policy language or the statutory or case law in finding Respondents can recover UM

benefits. 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.

Special and important reasons exist supporting the issuance of a writ of certiorari in this matter, and this Court should grant certiorari and reverse the Court of Appeals, thereby finding Petitioner Allstate was entitled to summary judgment on the issue of Respondents' ability to recover UM benefits under the Allstate policy.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN HOLDING THAT AN INDIVIDUAL CAN BRING AN ACTION AGAINST THE UM CARRIER DIRECTLY WHEN NO SUCH ACTION COULD BE BROUGHT AGAINST THE UNINSURED MOTORIST.

The Court of Appeals' 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 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 the Court of Appeals 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.[5]

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

[5] This Court of Appeals' 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.

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 Respondents have admitted. As such, Respondents cannot recover UM benefits.

The effect of the Court of Appeals' 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 of Appeals' perfunctory conclusion stating otherwise is wholly unsupported in the law and mandates review by this Court.

II. THE COURT OF APPEALS' OPINION REDEFINES THE MEANING OF "UNINSURED VEHICLE."

In determining that the Trezona vehicle was "uninsured," the Court of Appeals misapprehends the distinction between denying liability for an accident and denying liability coverage. Like the trial court, the Court of Appeals 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, 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 Respondents for their injuries despite her negligence – or fault- in causing the accident. Therefore, Old Dominion refused to pay any of its liability limits to Respondents.

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 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 of Appeals' 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 Respondents' 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 Respondents directly against the insurers. However, the insurers are not the correct defendants. The insurers did not cause Respondents' injuries and are not legally responsible to Respondents 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 mandates review by this Court.

CONCLUSION

As outlined above, this Court should issue a writ of certiorari to review and reverse the Court of Appeals' decision, thereby finding Petitioner Allstate was entitled to summary judgment on the issue of Respondents' ability to recover UM benefits under the Allstate policy.