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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Court of Appeals
Appellate Case No. 2021-000005

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

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ALLSTATE FIRE AND CASUALTY INSURANCE COMPANY'S REPLY T O RESPONDENTS' RETURN TO PETITION FOR A WRIT OF CERTIORARI

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Pursuant to Rule 242 of the South Carolina Appellate Court Rules, Petitioner Allstate Fire and Casualty Insurance Company hereby submits this reply to the Return to Petition for a Writ of Certiorari of Respondents Stephany A. Connelly and James M. Connelly.

ARGUMENT

I. THE COURT OF APPEALS' HOLDING THAT RESPONDENTS ARE "LEGALLY ENTITLED TO RECOVER" DAMAGES FROM THE AT-FAULT MOTORIST IS NOT CONSISTENT WITH ESTABLISHED PRECEDENT OR THE STIPULATIONS ENTERED INTO BY THE PARTIES.

Respondents contend that the Court of Appeals' holding that they are "legally entitled to recover" damages from the at-fault motorist is consistent with established precedent and legislative intent. However, allowing individuals to recover uninsured motorist benefits directly from an insurer without establishing the legal liability of the uninsured motorist is a process which has heretofore never been recognized by this State.

The plain language of the applicable statute, § 38-77-150, makes it clear that in order for an injured party to recover uninsured motorist benefits, he or she must file suit against the at-fault motorist and establish that the at-fault motorist was indeed at-fault. Subsection (A) of § 38-77-150 mandates that automobile insurance policies must contain uninsured motorist ("UM") provisions "undertaking to pay the insured all sums which he is legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle." Subsection (B) then sets forth a prerequisite for actions under UM provisions: copies of the pleadings in the action establishing liability must be served on the insurer. Thus, legal entitlement to recovery means the claimant (in this case, the Respondent) must commence an "action establishing liability" against the uninsured motorist and serve the UM carrier with copies of the pleadings.

Despite the plain language, Respondents cite to other statutes regarding uninsured and motorist coverage and argue that the legislature's intent was for the phrase "legally entitled to recover" to be synonymous with "establishing liability." According to Respondents, the only issues relevant to the entitlement to uninsured or underinsured motorist coverage are fault, causation, and damages and there is no place for affirmative defenses. This argument is patently false. South Carolina's statutory scheme specifically 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).

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. Respondents' argument that the statute only requires 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. 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," Respondents rely on the decisions in Ackerman v. Travelers Indem Co., 318 S.C. 137, 456 S.E.2d 408 (Ct. App. 1995); Wade v. Berkeley County, 348 S.C. 224, 559 S.E.2d 586 (2002); and O'Neill v. Smith, 388 S.C. 246, 695 S.E.2d 531 (2010). These cases, however, are not analogous to the facts at hand. Each of those cases involves situations where the at-fault motorist's liability insurer had tendered its liability policy limits in consideration for a covenant not to execute against the insured. While those cases answer certain questions as to what damages an injured party may recover when the at-fault motorist is personally protected from having to pay a judgment by a covenant not to execute, none of them even remotely suggest that an injured party merely need establish the "fault" of the at-fault motorist. Rather, unlike the situation here, each of those cases involved a lawsuit served on the allegedly at-fault motorist to "establish liability." The UM or UIM insurers in those situations retained the ability to defend the suit in the name of the at-fault motorist and to assert any defenses available to him – an ability the Court of Appeals has deprived Allstate with its opinion.

Further, the Court of Appeals ignores the fact that under whatever definition the Court of Appeals adopts for the phrase "legally entitled to recover," the Respondents stipulated that they are, in fact, not legally entitled to recover damages from Trezona. The Respondents alleged in their declaratory judgment complaint Connelly "is legally entitled to recover damages from Freya Trozona. However, under South Carolina Ann. §42-5-10 (1985) Ms. Trozona is immune from suit for a tort action." (J.A. 123). Despite this allegation, Respondents voluntarily and

specifically stipulated in this action that "Connelly 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. p. 146). This stipulation is dispositive of the issue regardless of the definition assigned. Respondents have stipulated that they are not legally entitled to recover damages from Trezona - an essential requirement of one's ability to recover UM coverage.[1]

This Court's established precedent is to give effect to the statutory scheme for uninsured and/or underinsured motorist benefits and to require pleadings be served to establish liability. Interpreting prior versions of the UM statute containing the same mandate that copies of the pleadings in the action establishing liability must be served on the insurance carrier, this Court has recognized the right to recover UM coverage depends on strict compliance with the statute:

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

Criterion Ins. Co. v. Hoffmann, 258 S.C. 282, 291-92, 188 S.E.2d 459, 463 (1972). South Carolina courts have consistently held entitlement to UM coverage hinges on establishing the legal liability of the uninsured motorist. See Vernon v. Harleysville Mut. Cas. Co., 244 S.C. 152, 159, 135 S.E.2d 841, 844 (1964) ("[R]ecovery under the uninsured endorsement is subject

[1] The Respondent's argument that the parties' stipulation that Trezona was negligent and caused Connelly's damages waived the requirement that Respondents bring an action to establish Trezona's legal liability is disingenuous. The Respondents specifically pled in their complaint they are prohibited from suing Trezona in tort by the SCWCA, an allegation that was admitted by the Petitioners. (J.A. 123 and 128). Respondents did not sue Trezona in tort in this action (having recognized that they are prohibited from doing so), the only causes of action being alleged against the Petitioners. Further, the parties' stipulation states, "For purposes of this declaratory action only, the parties stipulate that Trezona's negligence caused the accident and Connelly's resulting injuries and damages." (J.A. 146) The parties fully recognize that the stipulation only applies to the declaratory judgment action alleged against the Petitioners and not to any tort action establishing legal liability against Trezona (which was never commenced).

to the condition that the insured establish legal liability on the part of the uninsured motorist."); Laird v. Nationwide Ins. Co., 243 S.C. 388, 394, 134 S.E.2d 206, 209 (1964) (holding an UM action is *ex delicto* and requires the insured establish the legal liability of the uninsured motorist before "a direct action *ex contractu* can be brought to recover from the insurance company endorsement"); Ferguson v. State Farm Mut. Auto. Ins. Co., 261 S.C. 96, 102, 198 S.E.2d 522, 525 (1973) (holding an "insurer's liability under the uninsured motorist endorsement ... arises after the liability of the uninsured motorist has been established").[2]

The effect of Respondents' arguments and 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

[2] Respondents claim, "If Petitioners believed that this action was an improper vehicle to establish Trezona's liability for the collision, they could have moved for severance under Rule 21, SCRCP, or separate trials under Rule 42(b), SCRCP." (Respondents' Return to Petitions for a Writ of Certiorari, p. 11). Again, this is argument is disingenuous. There was no independent tort claim alleged against Trezona in the declaratory judgment complaint to be severed, that required a separate trial or to which the Petitioners could raise affirmative defenses. The only relief sought in the complaint is that the Petitioners provide UM coverage to the Respondents. Because Respondents stipulated that Trezona is not legally obligated to pay damages to the Respondents and that she is immune from suit, she is not an interested or necessary party to the declaratory judgment under the South Carolina Declaratory Judgment Act. Trezona is in no way affected by outcome of this litigation and was therefore dismissed as a party.

conclusion stating otherwise is wholly unsupported in the law and mandates review by this Court.

II. THE COURT OF APPEALS' OPINION SUPPLANTS ITS OWN DEFINITION OF "UNINSURED VEHICLE" FOR THE STATUTORY DEFINITION OF "UNINSURED VEHICLE."

In arguing that the at-fault motorist's vehicle was "uninsured," the Court of Appeals substituted their own definition for an uninsured vehicle as opposed to applying the statutory definition found 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). The Court of Appeals found that the vehicle became "uninsured" when Old Dominion denied the Respondents' bodily injury claim because the policy only indemnifies an insured if she is "legally responsible." The Court of Appeals conflates the difference between denying liability and denying coverage.

The parties stipulated that Trezona is an insured under the policy issued by Old Dominion and that Old Dominion does not deny that the vehicle was insured at the time of the accident. (J.A. 147). Old Dominion has never denied coverage under the liability policy. There is no evidence in the record that Old Dominion's policy was not in full force and effect, that Old Dominion denied coverage or that the claims would not trigger coverage under the terms and conditions of its policy. There is no evidence in the record that Old Dominion would not have provided a defense to its insured under the terms and conditions of the policy had Respondents filed a lawsuit against her. Simply put, Old Dominion had liability coverage for the at-fault motorist, that coverage was never denied. Trezona simply is not required to pay damages to Connelly and is immune from suit. Thus, the vehicle Trezona was driving at the time of the

accident does not meet the statutory definition of an uninsured vehicle. Because Old Dominion never denied coverage for the accident, Unisun Insurance Co. v. Schmidt, 339 S.C. 362, 529 S.E.2d 280 (2000) has no bearing on the issues presented in this case.

The assertion of a successful legal defense, whether it be immunity from suit, lack of jurisdiction, failure to state a claim under Rule 12(b)(6), improper service or expiration of the statute of limitations does not transform a vehicle into an "uninsured motor vehicle" on the basis that the driver was "at-fault" and caused the damages. Finding otherwise would lead to an absurd result permitting plaintiffs to pursue UM coverage directly against their own insurers upon the mere showing that the driver was "at-fault," even though they are legally barred from bringing suit against the at-fault driver. And there is absolutely no holding in the Court of Appeals' opinion that would prohibit such an absurd result.

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.

III. RESPONDENTS HAVE NOT FOLLOWED THE STATUTORY SCHEME TO PURSUE UNINSURED OR UNDERINSURED MOTORIST BENEFITS

As discussed above, by not first filing suit against the at-fault motorist and establishing her legal liability, Respondents have completely circumvented the statutory scheme for the pursuit of uninsured or underinsured motorist benefits. 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 an 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. In fact, such a claim directly against the insurer has been expressly held to be premature until such liability of the at-fault driver has been adjudicated. See Laird v. Nationwide Ins. Co., 243 S.C. 388, 394, 134 S.E.2d 206, 209 (1964) (holding an UM action is *ex delicto* and requires the insured establish the legal liability of the uninsured motorist before "a direct action *ex contractu* can be brought to recover from the insurance company endorsement").

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).[3] The Court of Appeals' 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.

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.

[3] Under the Court of Appeal's reasoning, because 39-77-150 does not specifically state that the uninsured motorist must be sued within any statute of limitations, there is no requirement that any suit ever need be brought against either an uninsured or underinsured motorist to establish liability within three years of the accident. The Court of Appeals construction of 38-77-150 would lead to this type of absurd result and a complete dismantling of South Carolina's UM/UIM statutory scheme.