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

Appellate Case No. 2021-000005

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.

PETITIONERS
The Main Street America Group and Old Dominion Insurance Company's
REPLY
TO RESPONDENTS' RETURN
TO PETITIONS FOR A WRIT OF CERTIORARI

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INTRODUCTION

In their return to petitions, the Connellys argue against the grant of a writ of certiorari because the court of appeals' decision "does not break new ground" and "is in accord with prior Supreme Court precedent . . . ." (Return p. 3.) Note, however, that the Connellys' position on the novelty of legal questions involved contradicts their argument to the court of appeals, seeking this Court's review of the case pursuant to Rule 204(b) of the South Carolina Appellate Court Rules. As for the Connellys' latter ground to oppose certiorari, the petitioners Main Street America Group and Old Dominion Insurance Company (collectively, Old Dominion) have already demonstrated how the court of appeals' decision conflicts with this Court's precedent and will refrain from doing it here. Old Dominion will show, however, that the caselaw the Connellys cited—which the court of appeals' decision is purportedly in harmony with—is inapposite.

DISCUSSION

Unlike the court of appeals, which implicitly held that "'legally entitled to recover' required only 'demonstrating fault and resulting damage' (J.A 381), the Connellys argue that "'legally entitled to recover" is synonymous with 'establishing liability[]'." (Return p. 5.) Indeed, they are correct, but not for the reasons cited in their return.

As this Court has repeatedly stated, "recovery under the uninsured endorsement is subject 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) (emphasis added). The "legal liability" is not a label for just fault-plus-cause-in-fact. It is not a collective term for some of the elements of a cause of action; it is the end result of plaintiff's proof of all the elements of her claim, in derogation of any valid defenses. Thus, a liability to pay damages cannot arise without a judgment concluding an action in tort. *See id.* The judgment requirement under the UM statute is evident in its plain language.

Consider the phrasing of the UM-coverage mandate in its entirety: "No automobile insurance policy . . . may be issued . . . unless a provision . . . undertaking to *pay all sums* which [the insured] is legally entitled to recover *as damages*." S.C. Code Ann. § 38-77-150(A) (2015) (emphasis added). Hence, the sums an insurer is obligated to pay under the policy can only be measured by the sums awarded as damages, and there is no award without a judgment rendered against the uninsured driver.

According to Black's Law Dictionary, "damages" is "money claimed by, or ordered to be paid to, a person as compensation for loss or injury . . . ." *Black's Law Dictionary* 471 (10th ed. 2014). The statute defines the term as "both actual and punitive damages[,]" S.C. Code Ann. § 38-77-30(4) (2015), thus necessarily implying a type of compensation only a court can award at the conclusion of a tort case. It follows, then, that until a judgment is rendered against the at-fault driver, the extent of the insurer's policy obligation vis-à-vis its insured, if any, is not fixed, and an action

against the insurer lacks justiciability. Furthermore, the statute's express inclusion of punitive damages belies the argument that declaratory-judgment action could be an appropriate procedural vehicle for establishing driver's liability. This is because punitive damages are not declared—as if they were a matter of plaintiff's preexisting rights—but are adjudged, mainly to punish and deter the tortfeasor. *See O'Neil v. Smith*, 388 S.C. 246, __, 695 S.E.2d 531, 534 (2010).

* * *

It ought to be uncontroversial that defenses asserted by a defendant can affect the plaintiff's capacity to establish liability, and in case of an immunity prevent it altogether. When there is immunity there cannot be liability— these concepts are jural opposites and cannot operate simultaneously. *See* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale Law Journal 16, 30, 44–58 (1913). Put differently, a liability is a legal vulnerability to an injured person's power to seek judicial remedy; that liability cannot arise, however, when a statute such as the Workers Compensation Act explicitly disempowers the potential plaintiff. *See id.*; *Machin v. Carus Corp.*, 419 S.C. 527, 534, 799 S.E.2d 468, 471–72 (2017) .

The Connellys propose that we completely scramble these concepts and categories as to equate liability with fault, and thus allow "legally entitled to recover" to mean what it does not say. (*See* Return p. 5.) They cite legislative intent purportedly discernable from the language of the related §§ 38-77-160, -170, and -180, whose

phrases such as "damages are sustained," "vehicle which causes bodily injury or property" or "caused the injury or damages" are to indicate that in the legislature's view fault and liability were one and the same. But no matter how expansively and liberally construed, that language is hardly in any tension with the plain and ordinary meaning of "legally entitled to recover."

Merely sustaining damage or suffering an injury does not automatically entitle anyone to anything. A damages claim has to be cognizable under the law that obtains in a jurisdiction, which law includes the common law in conjunction with the statutes that operate to its exclusion. The Connellys' claim against Trezona is not such a claim because the Act's exclusive-remedy provision removed its indispensable element—the proximate cause. *See Machin*, 419 S.C. at 543, 799 S.E.2d 468, 476 (2017).

* * *

According to the Connellys, the caselaw discussing the underinsured-motorist coverage (UIM) under § 38-77-160, being *in pari materia* with § 38-77-150, bolsters their argument that the term liability, appearing in both statutes, denotes just fault and its causal link with insured driver's injury. But a closer reading of the cited cases reveals that the opposite is true.

The Connellys seem to argue, citing *Ackerman v. Travelers Indem. Co.*, 318 S.C. 137, 456 S.E. 2d 408 (Ct. App. 1995), that an underinsured driver, who is a promisee of a covenant-not-to-execute, enjoys a status equivalent to that of an uninsured driver protected by an immunity. And since a covenantor can seek payment

of benefits from his or her UIM insurer, so should the Connellys be entitled to claim UM benefits from Old Dominion, despite Trezona's immunity. (*See* Return p. 6.) But unlike an immunity, which prevents liability, the covenant does not operate to deprive plaintiff's capacity to establish the at-fault driver's liability in tort. In fact, its very purpose is to preserve the viability of the cause of action so that liability of the underinsured driver can ultimately be established and, consequently, the insurance benefits under UIM coverage validly claimed.

As the word "execute" in the instrument's name indicates, the covenantor does not forgo obtaining a judgment awarding damages but only a right to seek its satisfaction out of the covenantee's personal assets. And the signing of the covenant does not operate to release the tortfeasor from liability. *Wade v. Berkeley County*, 348 S.C. 224, 228, 559 S.E.2d 586, ___ (2002); *Ackerman*, 318 S.C. at ___, 456 S.E.2d at 413. If it did, and thus prevented a judgment, and yet the insured had a right to claim UIM benefits, then the Connellys' analogy would be valid. Alas, it is not.

The *Ackerman* court held that a covenant-not-to-execute does not preclude recovery of the UIM benefits because it is "not intended as a release or discharge . . . and is executed simply to purchase freedom from the threat of execution from any judgment that may be attained against the [at-fault driver] . . . ." *Id.* The court so held because the Ackermans' right to obtain a judgment was expressly reserved in the covenant's language and, therefore, they were "still entitled to recover damages from the [at-fault driver]." *Id.*

Here, on the other hand, Trezona's immunity disentitles the Connellys to recovery of a damages award, and hence recovery of the UM benefits from Old Dominion is precluded. This is because, unlike the covenant, an immunity to liability has the same effect as a release from liability, and the same implications for the insurer's obligations under its UM coverage. Note here the case of *Adcock v. Allstate Ins. Co.*, in which the Fourth Circuit held that the district court's grant of summary judgment for the UM insurer was proper "because [the insured]'s release of the [at-fault driver] barred him from ever establishing the condition precedent to his recovery of benefits from his own insurance company[.]" 936 F.2d 567 (4th Cir. 1991).

That a judgment in a tort action is a condition precedent to the insurer's duty to pay benefits under both UM and UIM coverages is actually illustrated by another covenant-not-to-execute case cited in the Connellys' return: *O'Neil v. Smith*, 388 S.C. 246, __, 695 S.E.2d 531 (2010).

In *O'Neill*, this Court answered a certified question whether plaintiffs' pursuit of punitive damages, following their signing of a covenant-not-to-execute, violated public policy. *Id*. The plaintiffs' UIM insurer, State Farm, which assumed the defense of the at-fault driver in the underlying action once the liability insurer paid the policy limits, moved for summary judgment on the plaintiffs' punitive-damages claims. *Id.* at __, 695 S.E.2d at 532. State Farm did so on the grounds that allowing the plaintiffs to seek punitive damages when "the covenant effectively relieved Defendants from personal liability . . . would . . . thwart[] public policy and would perpetuate [sic] a

fraud upon the court and the jury because it would be based upon the fiction that Defendants could be punished by an award of punitive damages." *Id.* This Court disagreed because, apart from punishment, punitive damages serve two other public-policy goals, namely deterrence and compensation for the invasion of plaintiff's private rights. *Id.* at __, 695 S.E.2d at 534. According to the court, these goals can be achieved even though defendant's personal assets are being protected from execution and the UIM insurance company, and not the at-fault driver, will bear the brunt of the punitive-damages award. *Id*.

In arriving at that answer, the *O'Neil* court noted that "damages" is a defined term in the South Carolina Code and—as used throughout Chapter 77: Automobile Insurance—it denotes both actual and punitive damages. *Id.* at __, 695 S.E.2d at 533. Accordingly, the law mandates coverage of punitive damages both in cases of the insured's liability and the insured's legal entitlement to recovery from the un- or underinsured drivers. *Id.* at __, 695 S.E.2d at 533–34.

In summarizing *O'Neill*'s holding, the Connellys observe that "the question of whether a plaintiff is 'legally entitled to recover' from an at-fault motorist is not answered by whether the plaintiff can collect from the motorist personally but, rather by whether the plaintiff can establish the at-fault motorist's liability for damages." (Return p. 7.) Agreed. The nature of the assets that can serve as the source for collection on a judgment is indeed irrelevant. What is relevant to recovery of UIM benefits, however, is recovery of a judgment awarding those damages. Without a

judgment, the extent of UIM insurer's obligation cannot be determined. Note here Justice Kittredge's *O'Neill* opinion, in which he dissented on justiciability grounds from the majority's ruling. Justice Kittredge observed, quoting plaintiffs' brief, that "until there is a jury verdict that returns punitive damages, and the aggregate of punitive damages and actual damages exceeds $100,000, State Farm's exposure in this case is unsettled and premature." *Id.* at __, 695 S.E.2d at 536 (Kittredge J., dissenting) (quoting plaintiffs' brief; internal quotation marks omitted). In other words, the issue was not ripe for adjudication because the plaintiffs had not satisfied the condition precedent for claiming UIM benefits—they had not yet obtained a judgment against the at-fault driver.

Because under no circumstance a covenant-not-to-execute can be considered an equivalent of an immunity to liability, the caselaw on the covenant's immateriality to the insured's right to UIM benefits is inapplicable here.

CONCLUSION

the Connellys' return fails to rebut the petitioners' arguments for a writ of certiorari. This case indeed presents a novel question of law because South Carolina courts have not hitherto considered the significance of the at-fault driver's immunity for an insured's rights under a UM policy—a policy that provides for compensation commensurate with the sums the insured is legally entitled to recover as damages from the at-fault driver. Moreover, in deciding the case, the court of appeals applied foreign

caselaw while disregarding multiple opinions of this Court that hold that an insured's right to UM benefits is conditioned on recovery of a judgment against the uninsured driver.

For these reasons, The Main Street America Group and Old Dominion Insurance Company ask this Court to grant their petition and issue a writ of certiorari to the court of appeals.

Respectfully submitted,

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