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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jocelyn Newman, Circuit

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Appellate Case No. 2021-00005

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Stephany A. Connelly and James M. Connelly..... Plaintiffs

v.

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

Of which Allstate Fire and Casualty Insurance Company, The Main
Street America Group and Old Dominion Insurance Company are the ..... Petitioners

And

Stephany A. Connelly and James M. Connelly are the ..... Respondents

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# BRIEF OF RESPONDENTS

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## QUESTIONS PRESENTED

Rule 242(i), SCACR, states: "If the petition [for a writ of certiorari] is granted, the Clerk shall notify each party or his attorney, specifying the question or questions to be considered, and the parties shall prepare briefs addressing the question(s)." In this matter, the Clerk's Order of September 21, 2021 states: "[T]he petitions for writs of certiorari are granted as to Petitioners' Questions I and II." The Order is unclear as to the precise questions to be considered by the Court because the two petitions phrased the questions differently.

Specifically, Petitioner Allstate Fire and Casualty Company ("Allstate") requested the Court's discretionary review of the following three questions:

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?

(Allstate's Pet. for a Writ of Cert., p. 2).

On the other hand, Petitioners Main Street America Group and Old Dominion Insurance Company (collectively, "Old Dominion") asked for the Court's review of only two questions:

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?

(Old Dominion's Pet. for a Writ of Cert., p. 1).

In this brief, Respondents address the questions as stated by Allstate's Questions I and II for several reasons. First, the September 21, 2021 Order states the Court granted certiorari as to Questions I and II, which suggests it was not granting discretionary review of every question submitted; since Allstate's petition was the only one that listed more than two questions, it appears the Court was referring to the questions listed in Allstate's petition. Similarly, it would have been unnecessary for the Court to specify the numbered questions to be addressed if it were granting Old Dominion's petition inasmuch as it only listed two questions. Additionally, although somewhat argumentative, Allstate's petition presented more succinct questions, the responses to which will dictate the outcome of this matter, whereas Old Dominion's petition incorporates unnecessary arguments and details into the questions presented. *See* Rule 242(d)(2), SCACR (a petition for a writ of certiorari shall contain questions presented for review "without unnecessary detail"). Respondents disagree with the characterizations in Old Dominion's questions and believe Allstate's questions better describe the questions for the Court to consider. Finally, the answers to Allstate's Questions I and II will also resolve the actual questions contained within and the legal issues raised by the "Questions Presented" of Old Dominion's petition.

As an additional matter, Respondents note that the questions as to which the Court granted certiorari do not specifically raise the procedural issues argued by Petitioners in the Court of Appeals – that is, whether the present action is sufficient to establish the adverse motorist's liability or whether that requires a separate action. (*See, e.g.*, J.A. 404-05). Accordingly, Respondents do not believe that issue is before the Court at this stage. However, without waiving their position, and out of an abundance of caution, Respondents address that procedural topic under argument heading 3 (*infra*, p. 17).

## STATEMENT OF THE CASE

This action arises out of a motor vehicle accident that occurred on February 24, 2015. (J.A. 122; 146). Debbie Cohn ("Cohn") and Freya Trezona ("Trezona") owned and Trezona operated the vehicle that caused the accident. (J.A. 121; 146). Respondent Stephany Connelly ("Stephany") was a permissive passenger in that vehicle and sustained bodily injuries in the accident. (J.A. 146, ¶¶ 8-10). Trezona was the at-fault motorist; her negligence caused the accident and Stephany's injuries. (J.A. 146, ¶ 10). Stephany's husband, Respondent James Connelly, alleges he sustained a loss of consortium as a result of Stephany's injuries in the accident. (J.A. 122).

Trezona and Stephany were fellow employees of an employment agency and were within the course and scope of their employment at the time of the accident. (J.A. 146, ¶ 11).

The vehicle operated by Trezona was insured by Old Dominion. Old Dominion's policy provided bodily injury liability ("BI") coverage with limits of $100,000 per person and uninsured motorist ("UM") coverage with limits of $100,000 per person. (J.A. 145, ¶¶ 1-2). Under its BI coverage, Old Dominion agreed to pay damages for bodily injury for which Trezona "becomes legally responsible because of an auto accident." (J.A. 81). Old Dominion agreed to pay its UM coverage for damages that an occupant of a covered vehicle (such as Stephany) "is legally entitled to recover from the owner or operator" of a vehicle to which a liability insurance policy does not "appl[y] at the time of the accident" or for which the liability insurance company "successfully denies coverage." (J.A. 101).

At the time of the accident, Respondents were insured by Allstate under a policy that included UM coverage with limits of $250,000 per person. (J.A. 145, ¶ 4). In its policy, Allstate agreed to pay UM coverage for damages an insured "is legally entitled to recover from the owner or operator" of a vehicle for which the liability insurer "successfully denies coverage." (J.A. 45).

Respondents made a claim against Old Dominion for BI coverage due to Trezona's fault in causing the accident and, alternatively, against both Old Dominion and Allstate for UM coverage. Old Dominion and Allstate refused to tender any coverages.

Respondents then filed this action naming Cohn, Trezona, Old Dominion, and Allstate as defendants. (J.A. 120). They alleged in their Complaint that Trezona was negligent and caused their injuries and damages. (J.A. 122). Petitioners initially denied most of the Complaint's allegations (J.A. 128, 138-39) but later admitted them via a stipulation filed on January 31, 2017. (J.A. 145). Among other things, all parties specifically stipulated: "Trezona's negligence caused the accident and Connelly's resulting injuries and damages." (J.A. 146, ¶ 10). After they filed the stipulation, the parties agreed to dismiss Cohn and Trezona. (J.A. 4; 221).

Old Dominion denied Respondents' claim for BI coverage because, as Stephany's co-employee, Trezona could not be personally responsible to pay damages due to exclusive remedy principles of the South Carolina Workers' Compensation Act ("SCWCA"), Respondents were not legally entitled to recover damages from Trezona, and the Old Dominion policy only indemnifies an insured who is "legally responsible" for damages resulting from an accident. (J.A. 139, ¶21; 141, ¶36; 146-47, ¶¶ 13-15). In its Answer, Old Dominion asserted: "The terms, conditions, exclusions, endorsements, and limitations contained in the [Old Dominion] policy preclude plaintiffs' claims for coverage…." (J.A. 141, ¶39). Old Dominion and Allstate denied Respondents' UM claims on the grounds that Trezona was immune from liability given workers' compensation exclusivity and that Trezona was not an uninsured motorist. (J.A. 147, ¶¶ 18-19).

Petitioners and Respondents filed cross-motions for summary judgment. (J.A. 151; 164; 181). Circuit Judge Jocelyn Newman heard these motions on May 17, 2017. (J.A. 218). By Order dated September 28, 2017 (J.A. 5), Judge Newman granted Respondents' Motion for Summary

Judgment and denied Petitioners' Motions for Summary Judgment. Specifically, she found that, because of workers' compensation exclusivity, Old Dominion's BI coverage did not apply to Respondents' claims against Trezona, thereby making her an uninsured motorist. (J.A. 7-8). Judge Newman also found that, for purposes of UM coverage, Respondents were "legally entitled to recover" from Trezona by establishing her fault that caused Respondents' damages (facts that were stipulated) despite Respondents' inability to collect from Trezona personally due to workers' compensation exclusivity. (J.A. 9-18).

Petitioners appealed the Circuit Court's Order. The Court of Appeals affirmed. (J.A. 375). Petitioners sought a rehearing (J.A. 386; 402), which the Court of Appeals denied. (J.A. 413). By Order of September 21, 2021, this Court granted a Writ of Certiorari as to two questions.

## SUMMARY OF ARGUMENT

For an injured party to exercise her substantive right to pursue UM coverage, the UM statute's phrase "legally entitled to recover" requires her to prove an adverse motorist was at fault for an accident that caused her damages. The fact the injured party cannot personally collect from the tortfeasor does not give an insurer the basis to deny a claim for UM coverage. Here, the parties agree Trezona negligently caused the accident and Stephany's resulting injuries and damages. Therefore, Respondents are "legally entitled to recover" from Trezona and may pursue their claims for UM coverage against Petitioners.

However, because Respondents cannot collect damages from Trezona personally, Trezona cannot "become legally responsible" to pay Respondents' damages as a result of the accident and Old Dominion cannot be required to indemnify Trezona under the terms of its BI coverage. As a result, Old Dominion's denial of Respondents' claim is a denial of BI coverage. Because of this liability coverage denial, Trezona became an uninsured motorist with respect to the accident.

## ARGUMENT

1. The Court of Appeals' holding was consistent with this State's UM/UIM statutes and case law that define the phrase "legally entitled to recover" and correctly applied the UM statute.

The Circuit Court and the Court of Appeals concluded Respondents are legally entitled to recover damages from Trezona as a result of the subject accident and, as such, can recover UM benefits from Petitioners. The primary issue presented by Petitioners' appeal is whether the Legislature's use of the phrase "legally entitled to recover" from an uninsured motorist in S.C. CODE ANN. § 38-77-150(A) (2015) – the same wording used in each UM policy at issue here – simply means an insured's ability to prove an uninsured motorist was at fault for an accident and caused the insured's damages or whether it also requires consideration of the at-fault motorist's immunity under the SCWCA.

The trial court found that the phrase was ambiguous and therefore undertook to construe it "consistent with the intent of the legislature." (J.A. 10). While the Court of Appeals acknowledged the trial court's rationale (J.A. 380-81), it did not hold that the statute was ambiguous when it affirmed the trial court's conclusion on how to define the phrase.[1] Rather, the Court of Appeals reviewed decisions from both South Carolina and other jurisdictions and found "the phrase 'legally entitled to recover' should be 'construed to mean that an insured is entitled to uninsured coverage merely by establishing fault on the part of the tortfeasor and the amount of the insured's damages.'" (J.A. 381) (citation omitted). Whether the Court of Appeals based its decision on any perceived ambiguity is academic in any event because its construction of the term is consistent with the statutory scheme, harmonious with existing South Carolina precedent, and correct.

[1] Petitioners erroneously assert the Court of Appeals held that the statutory language is ambiguous. (Allstate's Br., p. 11; Old Dominion's Br., p. 9).

The Legislature addressed UM coverage and claims, as well as underinsured ("UIM") coverage and claims, in several sections of the Automobile Insurance chapter of the State Insurance Code, Chapter 77 of Title 38. Aside from the distinct applications of UM and UIM coverages and the mandatory nature of minimum limits UM coverage, the two coverages are generally treated the same in the Code. For example, the Legislature used the same phrase to describe an action for mandatory minimum limits UM coverage, an action for optional additional UM coverage, and an action for optional UIM coverage: each is an "action establishing liability" of an adverse motorist. S.C. CODE ANN. §§ 38-77-150(B) & -160 (2015).

Because related UM and UIM statutes are *in pari materia*, it is appropriate for the Court to review and to harmonize their provisions to divine legislative intent. *Stewart v. Charleston County Sch. Dist.*, 386 S.C. 373, 379, 688 S.E.2d 579, 582 (Ct. App. 2009) ("Statutes dealing with the same subject matter are to be construed together, if possible, to produce a harmonious result."), *citing Joiner ex rel. Rivas v. Rivas*, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000).

When considered together, these statutes clearly demonstrate the Legislature's intent when describing the liability of a motorist necessary to support a claim for UM or UIM coverage. Specifically, subsections A and B of Section 38-77-150 use the terminology "legally entitled to recover" and "action establishing liability" to refer to when an insurer is responsible to pay UM benefits. S.C. CODE ANN. § 38-77-150(A) & (B) (2015). Because the Legislature used the phrases to describe the same thing, those phrases define each other; therefore, it follows that an insured is legally entitled to recover UM coverage if she can establish an at-fault uninsured motorist's liability. *Accord* S.C. CODE ANN. § 38-77-200 (2015) (nothing may be required of an insured to recover UM coverage "except the establishment of legal liability of the uninsured motorist").

The UM and UIM statutes also provide insight on the Legislature's use of the phrase "establishing liability." Not only does Section 38-77-160 employ the term "action establishing liability," it also describes UIM coverage as "coverage in the event that *damages are sustained* in excess of the liability limits carried by an *at-fault* insured or underinsured motorist" and refers to the adverse driver as the "putative *at-fault* insured." S.C. CODE ANN. § 38-77-160 (2015) (emphasis added). In other words, this demonstrates the Legislature intended "establishing liability" to mean proof of fault and causally related damages.

Other UM statutes also incorporate fault, causation, and damages when describing the prerequisites to establishing liability of an uninsured motorist. Section 38-77-170 characterizes an unknown motorist against whom an insured may pursue a UM claim as "the owner or operator of any motor *vehicle which causes bodily injury or property damage* to the insured." S.C. CODE ANN. § 38-77-170 (2015) (emphasis added). Similarly, Section 38-77-180 refers to an unknown motorist against whom an insured may pursue a UM claim as "the owner or operator of any vehicle *causing injury or damages*" via physical contact and to the same motorist, once identified, as "the owner or operator who *caused the injury or damages*." S.C. CODE ANN. § 38-77-180 (2015) (emphasis added). In discussing subrogation by a UM insurer, Section 38-77-190 authorizes such a claim against a "person *causing the injury, death, or damage*." S.C. CODE ANN. § 38-77-190 (2015) (emphasis added).

These statutes consistently employ concepts of fault, causation, and damages without any mention of a requirement of responsibility for payment, condition of collectability, or consideration of affirmative defenses based on immunity (except for setting the amount at which UIM coverage is triggered when damages are capped by statute). Thus, it is evident that when the Legislature used the phrase "legally entitled to recover" it meant where an insured can prove the

adverse motorist was at fault and caused the insured's damages. Here, Respondents have done so.[2]

This conclusion is consistent with the manner in which South Carolina appellate courts have interpreted UIM coverage since 1995. In *Ackerman v. Travelers Indem. Co.*, 318 S.C. 137, 456 S.E.2d 408 (Ct. App. 1995), the Court of Appeals held the plaintiffs were entitled to pursue a tort action against an at-fault motorist for the purpose of recovering UIM benefits (*i.e.,* an "action establishing liability" under Section 38-77-160) even though the at-fault motorist was not "'legally obligated to pay' damages" because of a covenant not to execute. *Id.* at 146, 456 S.E.2d at 412-13. In doing so, it differentiated between whether the plaintiffs were "entitled to recover damages" from the at-fault driver – the same language as in Section 38-77-150(A) – and whether they were entitled "to legally enforce the judgment" against him, *id.* at 147, 456 S.E.2d at 413, and concluded the plaintiffs were still "entitled to recover" even though the named defendant was personally immune from and not personally responsible to pay any judgment.

While this Court did not review *Ackerman*, it apparently regards the Court of Appeals' decision as a correct construction of the law. In *Wade v. Berkeley County*, 348 S.C. 224, 228, 559 S.E.2d 586, 587 (2002), this Court cited *Ackerman* favorably regarding the effects of a covenant

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[2] Petitioners rely on Respondents' stipulation (J.A. 146, ¶ 13) 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." (Allstate's Brief, p. 11, n.7; Old Dominion's Brief, p. 9). Their reliance is misplaced.

First, the stipulation must be read in context: It was part of the parties' agreement that Respondents did not need to pursue this action further against Trezona to establish her negligence, proximate cause, and damages. Second, Respondents clearly did not intend to dismiss the present action and to bar their claims for UM coverage by entering into the stipulation. Finally, because the statement is expressly couched in terms of the SCWCA's exclusivity provision, it is a statement regarding the subject matter jurisdiction of the Workers' Compensation Commission; however, because parties cannot confer subject matter jurisdiction by consent or agreement, *see, e.g., Chabek v. Nationwide Mut. Fire Ins. Co.*, 303 S.C. 26, 29, 397 S.E.2d 786, 788 (Ct. App. 1990), the Court is not bound to follow the stipulation.

not to execute. For more than 25 years, this Court has never suggested *Ackerman* is bad law or should be overruled.

More significantly, in *O'Neill v. Smith*, 388 S.C. 246, 695 S.E.2d 531 (2010), this Court applied the same rationale as *Ackerman* to conclude that plaintiffs could pursue a UIM claim to recover punitive damages although they could not collect from the at-fault motorist personally due to a covenant not to execute. While discussing cases from other jurisdictions that had addressed whether a plaintiff was "legally entitled to recover" damages under UM or UIM coverages, the Court noted that the existence of a covenant not to execute in that case made "no practical difference" and did not affect its holding that the plaintiff was entitled to be compensated by his UIM insurer. *Id.* at 255 n.3, 695 S.E.2d at 535 n.3. In other words, this Court held in *O'Neill* that the question of whether a plaintiff is "legally entitled to recover" from an underinsured motorist is not answered by whether the adverse motorist is personally responsible for paying the plaintiff but, rather, by whether the plaintiff can establish that motorist's liability for damages.

While these cases were decided in the UIM context, there is no reason to believe the Legislature intended a different result for UM and UIM coverages. As noted above, the statutes governing the two coverages are *in pari materia*. *Howell v. U.S. Fid. & Guar. Ins. Co.*, 370 S.C. 505, 509, 636 S.E.2d 626, 628 (2006). Additionally, they employ the identical "action establishing liability" language, *compare* S.C. CODE ANN. § 38-77-150(A) & -160 (2015), which is the equivalent of "legally entitled to recover."

Old Dominion relies upon a trio of older South Carolina cases – *Laird v. Nationwide Ins. Co.*, 243 S.C. 388, 134 S.E.2d 206 (1964); *Vernon v. Harleysville Mut. Cas. Co.*, 244 S.C. 152, 135 S.E.2d 841 (1964); and *Lawson v. Porter*, 256 S.C. 65, 180 S.E.2d 643 (1971) – to argue that this Court has previously construed "action establishing liability" to mean entry of a judgment

against an uninsured motorist. (Old Dominion's Br., p. 11). However, none of those cases involved the question of whether an uninsured motorist's personal immunity affected a UM insurer's coverage or the precise question of statutory construction presented by the instant appeal. Each of those cases, in almost identical language, simply noted that the UM statute requires an insured to establish an uninsured motorist's liability in an action wherein the only issues to be determined are liability (with no further explication of that term) and damages. *Laird*, 243 S.C. at 394, 134 S.E.2d at 209; *Vernon*, 244 S.C. at 159, 135 S.E.2d at 844; *Lawson*, 256 S.C. at 68, 180 S.E.2d at 644. Subsequent references to a "judgment" in those cases were without consideration of immunity issues and did not distinguish between monetary judgments and declaratory judgments (as in the present action). Therefore, these cases are not dispositive of the question before this Court.

Indeed, if the Court were to choose to disregard context in reviewing these cases, it could find that they actually support the Court of Appeals' decision here. For example, in *Laird*, the Court noted:

> *Two requirements* must be met before a person can claim under or receive the benefits of uninsured motorist coverage. *Such person must qualify as an 'insured' under the endorsement of the policy upon which claim is being made and must be involved in an accident with the owner or operator of an uninsured motor vehicle.* The intent of the General Assembly, in enacting the Uninsured Motorist Act, was to provide benefits and protection against the peril of injury by an uninsured motorist to an insured motorist, his family, and the permissive users of his vehicle.

243 S.C. at 394, 134 S.E.2d at 208-09 (emphasis added).

Old Dominion's reliance on *Park v. Safeco Ins. Co. of Am.*, 251 S.C. 410, 162 S.E.2d 709 (1968) is also misplaced. That case was an appeal in a declaratory judgment action filed by an injured party against an alleged tortfeasor's liability insurer seeking to establish the existence of liability insurance coverage before establishing the alleged tortfeasor's liability and resulting damages. The Court there concluded "the lower court correctly sustained the demurrer because

there is presently between plaintiff and Safeco no justiciable issue ripe for judicial pronouncement, because the possible issues are not sufficiently immediate and real to warrant action by the court." *Id*. at 414, 162 S.E.2d at 711. *Park* is inapposite to the present case.

The legislative intent discussed above validates the Court of Appeals' decision in this case. Additionally, its holding is supported by the South Carolina case law the Court of Appeals cited differentiating between the need to establish the adverse motorist's liability in tort and the contractual claim for UM coverage. (J.A. 381-82). Petitioners – insurers who are contractually required to afford UM coverage consistent with the above-referenced statutory scheme – should not be able to avoid their obligations when, at the same time, they have conceded the adverse motorist was negligent and caused damages. (J.A. 146). *See Wright v. Smallwood*, 308 S.C. 471, 475, 419 S.E.2d 219, 221 (1992) ("UM coverage does not sound in tort, but in contract. Therefore, the exclusivity provision of the Workers' Compensation law does not operate to bar [a] contractual claim for UM benefits.").

One of the cases cited by the Court of Appeals, *Sanders v. Doe*, 831 F. Supp. 886 (S.D. Ga. 1993) (*see* J.A. 382), acknowledged this very point in holding that, under South Carolina law, a plaintiff need only demonstrate he is "legally entitled to recover" against the adverse motorist to require the applicable UM insurer to pay benefits despite an exclusive remedy defense under the SCWCA. *Id*. at 892.

As the Court of Appeals recognized, courts construing UM statutes from other jurisdictions have reached this same conclusion. *Jenkins v. City of Elkins*, 738 S.E.2d 1 (W. Va. 2012), interpreted a West Virginia UM statute that employed the identical "legally entitled to recover" language as the South Carolina UM statute. It reviewed decisions from various jurisdictions before holding "the phrase 'legally entitled to recover' contained in the uninsured motorist statute … is

construed to mean that an insured is entitled to uninsured coverage merely by establishing fault on the part of the tortfeasor and the amount of the insured's damages." *Id.* at 14. Our Court of Appeals is not alone; other appellate courts have cited *Jenkins* in support of similar conclusions. *Cross v. State Farm Mut. Auto. Ins. Co.*, 2018 Ark. App. 98, 541 S.W.3d 495, 502 (2018); *Am. Family Mut. Ins. Co. v. Ashour*, 410 P.3d 753, 766 (Colo. App. 2017).

To be sure, there are cases that have held otherwise – and there is no shortage of efforts to characterize one view as the majority rule and the opposing view as the minority rule. *See, e.g., Jenkins*, 738 S.E.2d at 12. Petitioners have likewise urged their opinions of the most popular interpretation of the language at issue. (Old Dominion's Brief, p. 15, n.5; Allstate's Brief, p. 12, n.8).[3] Counting courts from other jurisdictions should not dictate the outcome here, though. *Cf. Owners Ins. Co. v. Salmonsen*, 366 S.C. 336, 339, 622 S.E.2d 525, 526 (2005) ("[W]e decline the district court's invitation to simply choose the majority or minority view and instead focus narrowly on the issue at hand."). Rather, the South Carolina statutes and cases cited above provide ample support for the Court of Appeals' decision without the need to consider whether to jump on one bandwagon or another.[4]

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[3] Old Dominion discounts decisions that address UM coverage for claims against at-fault motorists who enjoy immunity for reasons other than workers' compensation exclusivity. (Old Dominion's Brief, pp. 17-18). It seeks support for this conclusion from the premise that, where workers' compensation fully indemnifies the injured party, she should not have the right to seek a UM claim also. (*Id*., p. 18).

That premise is faulty when applied here because the SCWCA does not provide for the full range of damages afforded by a personal injury action in tort. *Breeden v. TCW, Inc./ Tennessee Express*, 355 S.C. 112, 118, 584 S.E.2d 379, 382 (2003) ("Workers' compensation benefits do not include all the various types of damages that may be recovered in a personal injury suit against a third party tortfeasor."). Moreover, as discussed above, the public policy of this State does not favor granting the benefits of workers' compensation exclusivity to UM insurers.

[4] Should the Court decide to count other jurisdictions that have addressed whether immunity should preclude a claim for UM benefits, it should consider the following cases in which the courts have allowed such a recovery: *Watkins v. United States*, 462 F. Supp 980 (S.D. Ga. 1977), *aff'd*

Similarly, even if the Court were to agree with Petitioners that the Court of Appeals' holding was that the phrase "legally entitled to recover" is ambiguous, the above amply demonstrates that one reasonable interpretation of the statutory language is that which the Court of Appeals applied. Since that interpretation is consistent with the remedial purpose of the UM statute, it is the correct one to apply if an ambiguity exists.

For these reasons, the Court of Appeals correctly held that the *sine qua non* for a UM claimant to prove he is "legally entitled to recover" is his ability to prove fault and causally related damages, neither of which is disputed here. The fact an at-fault motorist may be insulated from any responsibility to pay damages personally is irrelevant in this context. Petitioners accepted premiums and agreed to provide UM coverage for accidents like the subject collision.

The Court should not allow Petitioners to avoid their contractual obligations based on the serendipity of Stephany's and Trezona's employment relationship with a third party, just as it held the UIM insurer to its agreement in *O'Neill v. Smith*, despite the contractual relationship between the plaintiff and the at-fault motorist. The Court's holding there (modified for differences between UM and UIM coverages) is also persuasive here:

> The central purpose of [UM] coverage is to protect the injured party, and vindication of the injured party's private rights is an integral part of that purpose, above and beyond the punishment of a specific individual.

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586 F.2d 279 (5th Cir. 1979); *Marusa v. Erie Ins. Co.*, 136 Ohio St. 3d 118, 991 N.E.2d 232 (2013); *Borjas v. State Farm Auto. Ins. Co.*, 33 P.3d 1265 (Colo. App. 2001); *Kmonk-Sullivan v. State Farm Mut. Auto. Ins. Co.*, 746 A.2d 1118 (Pa. Super. 1999); *Williams v. Holsclaw*, 128 N.C. App. 205, 495 S.E.2d 166 (1998); *Gardner v. Erie Ins. Co.*, 722 A.2d 1041 (Pa. 1998); *West Am. Ins. Co. v. Popa*, 108 Md. App. 73, 670 A.2d 1021 (1996); *Mich. Millers Mut. Ins. Co. v. Bourke*, 607 So.2d 418 (Fla. 1992); *Hoglund v. State Farm Mut. Auto. Ins. Co.*, 592 N.E.2d 1031 (Ill. 1992); *General Acc. Fire & Life Assur. Corp. v. Klatt*, 121 Ill. App. 3d 862, 460 N.E.2d 339 (1984); *Oates v. Safeco Ins. Co. of Am.*, 583 S.W.2d 713 (Mo. 1979); *Wilkinson v. Vigilant Ins. Co.*, 236 Ga. 456, 224 S.E.2d 167 (1976); *Guillot v. Travelers Indem. Co.*, 338 So.2d 334 (La. App. 1976), *impliedly overruled on other grounds Breaux v. Government Emps. Ins. Co.*, 369 So.2d 1335 (La. 1979).

> Under South Carolina law, carriers must [provide minimum limits UM and] offer [UM] coverage up to the limits of the insured's liability coverage. Plaintiffs accepted this offer and paid the corresponding premiums for coverage and are entitled to this contractual benefit. [The UM insurer] set its premiums with the knowledge that they are liable for compensatory and punitive damages under the insurance contract, and it cannot now be heard to complain that the delivery of benefits under the contract would thwart public policy.

*O'Neill v. Smith*, 388 S.C. at 255, 695 S.E.2d at 535-36 (citation omitted).

2. <u>There was nominally liability insurance on Trezona's vehicle but Old Dominion successfully denied that coverage; therefore, the Court of Appeals correctly held that Trezona's vehicle was an uninsured motor vehicle.</u>

Because Respondents are legally entitled to recover against Trezona, the remaining issue before the Court of Appeals was whether Trezona was an uninsured motorist.

Nominally, Old Dominion insured Trezona's vehicle. If Old Dominion were willing to provide BI coverage for amounts Respondents are legally entitled to recover from Trezona, then she would not be uninsured; however, Old Dominion denied the claim for BI coverage because its policy only indemnifies an insured if she "becomes legally responsible" for damages resulting from a collision. (J.A. 146, ¶ 14; 147, ¶ 15).[5] Simply put, because Old Dominion's denial was based on the language of its policy's insuring agreement, it was a denial of liability insurance

[5] Notably, whether Trezona "becomes legally responsible" is different from the question of whether Respondents are "legally entitled to recover" from Trezona.

In *Ackerman v. Travelers*, the Court of Appeals equated a defendant being "legally obligated to pay damages" and a plaintiff's ability "to legally enforce the judgment," each of which means the defendant would be responsible for payment to the plaintiff; however, it distinguished those concepts from a plaintiff being "legally entitled to recover," which means the plaintiff can establish the defendant's fault and resulting damages for purposes of UIM coverage, even though the defendant has no obligation to pay. 318 S.C. at 146-47, 456 S.E.2d at 412-13.

Because a defendant in the "legally entitled to recover" scenario is not responsible for payment, the Court should equate the former two circumstances ("legally obligated to pay damages" and a plaintiff's ability "to legally enforce the judgment") with "becom[ing] legally responsible" because the defendant remains personally answerable for the payment of damages in each of them. As such, "legally entitled to recover" is different than "becomes legally responsible."

coverage. The Court of Appeals therefore correctly held that denial made Trezona an uninsured motorist under S.C. CODE ANN. § 38-77-30(14) (2015).[6]

The result is the same as in *Unisun Ins. Co. v. Schmidt*, 339 S.C. 362, 529 S.E.2d 280 (2000), upon which the Court of Appeals relied in affirming the Circuit Court. There, the insurer denied liability coverage because the driver of the insured vehicle lacked the owner's permission to operate it; as a result, the vehicle became an uninsured motor vehicle under Section 38-77-30(14) with respect to its passenger.

Old Dominion denied BI coverage because Trezona, the driver of the insured vehicle, could not become legally responsible for Respondents' damages and, like the insurer in *Schmidt*, Old Dominion could not be required to indemnify Trezona under its BI coverage. Because there was nominally insurance on Trezona's vehicle but Old Dominion afforded no BI coverage under the facts of this case, Old Dominion's denial was a denial of coverage regardless of how it now chooses to parse the applicable statutory language. (*See* Old Dominion's Brief, p. 24).[7]

On this topic also, UIM statutes provide guidance as to legislative intent. Under S.C. CODE ANN. § 38-77-160 (2015), a motorist is considered underinsured if a claimant's damages exceed "any damages cap or limitation imposed by statute." This not only demonstrates that UIM coverage – which is part of the same statutory scheme as UM coverage – applies when a plaintiff is legally entitled to recover but her recovery is statutorily limited, it also supports the conclusion

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[6] Section 38-77-30(14)(b) defines an "uninsured motor vehicle" as including a vehicle which nominally has liability insurance coverage as required by S.C. CODE ANN. § 38-77-140 (2015) "but the insurer writing the same successfully denies coverage thereunder." As noted above, both Petitioners' policies contain similar language. Allstate's reliance on the Financial Responsibility Act, specifically S.C. CODE ANN. § 56-9-20 (2018) (*see* Allstate's Brief, p. 15), is thus unavailing.

[7] Additionally, despite Old Dominion's suggestion (*see* Old Dominion's Brief, p. 24), a declaratory judgment or other judicial intervention is unnecessary for an insurer to deny coverage. It is common knowledge that insurers often deny coverage for claims without court action.

that the Legislature intended for UM coverage to apply despite statutory limitations like SCWCA immunity. Otherwise, the effect of the legislation would be to allow a claim for an injured party where there is a limited statutory recovery, regardless of how small, but to deny the same claim if there is no statutory recovery. Such a result would be directly contrary to the legislative purpose of having UM coverage provide a liberally construed remedy in favor of injured persons. *See, e.g., Gunnels v. American Liberty Ins. Co.*, 251 S.C. 242, 247, 161 S.E.2d 822, 824 (1968).

Paradoxically, a contrary interpretation of the Legislature's intent in using this statutory language would result in Petitioners' obligation to pay and Respondents' ability to collect *UIM* coverage as a result of Trezona's negligence (*i.e.,* all of Respondents' damages would be in excess of a statutory limitation) but not UM coverage. This latter construction would make less sense than the former, further demonstrating that the legislative intent is to allow UM claims under the present circumstances. However, if the Court were to disagree with this conclusion, it should nevertheless hold that Petitioners' UIM coverages (J.A. 30, 70) apply to Respondents' claims.

3. Respondents satisfied any procedural requirements to perfect their UM claims because the present action established Trezona's liability for the accident.

As noted above, Respondents do not regard this procedural topic as within the scope of the Court's Order granting certiorari. However, because Petitioners have argued the issue (*see* Old Dominion's Brief, pp. 10-13; Allstate's Brief, pp. 9-10, 13), Respondents address it here out of an abundance of caution.

Respondents alleged in their Complaint that Trezona was negligent and caused their injuries and damages. (J.A. 122, ¶¶ 12-16). They named Trezona as a defendant. (J.A. 120). Although they initially denied Trezona's fault, Petitioners later admitted these allegations via stipulation. (J.A. 146, ¶ 10). The parties agreed to dismiss Trezona after they filed the stipulation. (J.A. 221).

In summary, Respondents filed this action against Trezona. This action proved "Trezona's negligence caused the accident and Connelly's resulting injuries and damages." (J.A. 146, ¶ 10). This action therefore established Trezona's liability.

Petitioners rely upon S.C. CODE ANN. § 38-77-150(B) (2015) in support of their argument that Respondents had to file a separate tort action against Trezona in order to perfect their right to recover UM coverages. Specifically, that statute only requires a claimant to serve the UM insurer with "copies of the pleadings in the action establishing liability." Beyond the quoted language, the statute does not specify the type of action to be filed.

Although a tort action is the typical route to satisfy this requirement, the statute does not require a separate tort action as suggested by Petitioners. Rather, it only requires an action that establishes the adverse driver's liability. In fact, Allstate does not even attempt to argue the statutory language is broader, noting only that Section 38-77-150(B) "means some action must be filed against the uninsured motorist to establish the uninsured motorist is, in fact, legally liable." (Allstate's Brief, p. 9). Certainly, "some action" includes an action other than a separate tort action.

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. They did not.

Instead, Petitioners entered into a stipulation that established Trezona's liability for the subject collision and Respondents' resulting damages. Having agreed to that – and thereafter requesting and obtaining Respondents' consent to dismiss Trezona from this action – Petitioners should not be heard to complain that they did not receive the procedural protection of the UM

statute. In short, this *is* the action that established Trezona's liability and, as such, this action satisfied any procedural obligation on Respondents to exercise their right to pursue UM coverage.

Petitioners cite various cases in which the claimant failed to file *any* action against the uninsured motorist before seeking to recover UM coverage. In those cases, the courts discussed the failure to file a tort action against the adverse motorist. However, they did not address the question of whether the requirements of Section 38-77-150(B) could be satisfied by a declaratory judgment action wherein the UM carriers stipulated to negligence, proximate cause, and damages because that issue was not presented to them. Instead, the present action is entirely consistent with the requirements set forth in the express language of the statute.

Petitioners created the scenario about which they now complain. Trezona would still be a party to this action if they had not sought and obtained her dismissal. Moreover, Respondents have not circumvented the requirement of establishing Trezona's liability; in fact, Respondents did so in this action, with Petitioners' consent.

To the extent Petitioners argue they will not be able to litigate affirmative defenses if this case proceeds, it is noteworthy that they had the right to plead affirmative defenses in this action and in fact raised several affirmative defenses in their Answers. (J.A. 130; 136-37; 141-43). Unless these defenses were resolved by the parties' stipulation or the Courts' ruling on "legally entitled to recover," Petitioners retain the ability to litigate them on remand.

If Petitioners dispute the nature or extent of Respondents' damages, they can still do so on remand, in the fashion contemplated by the Circuit Court. (J.A. 19). In that proceeding, the trial court can take measures to avoid prejudice resulting from insurance companies rather than a tortfeasor defending the damages hearing, as is often done in tort actions given the collateral source rule. *See* Rule 16(b), SCRCP; *see also* S.C. CODE ANN. § 38-77-150(B) (2015) (a UM insurer

"has the right to appear and defend in the name of the uninsured motorist in any action which may affect its liability"). The result will be a declaratory judgment stating the amount to which Respondents are entitled to recover from Petitioners pursuant to the subject insurance policies.

Moreover, if a separate action had been filed, nothing more would have been achieved. The same reasons that motivated Petitioners to stipulate to Trezona's negligence and causation would likely have prevailed in a separate action. Petitioners probably would have raised immunity under the SCWCA as a defense to that action but that would have simply returned the Court to the initial issue of Respondents' substantive right to pursue their UM claims – an issue resolved by this action. Petitioners' remaining affirmative defenses would have been the same.

In the end, this action has provided Petitioners with the ability to defend the claims against Trezona, including presenting the surviving affirmative defenses alleged in their Answers.

As a result, the Court should not be distracted by Petitioners' arguments that Respondents failed to perfect their UM claims. Under the facts of this case, Respondents did all that was necessary to satisfy the statute and Petitioners effectively agreed with that procedure via their stipulation and dismissal of Trezona. The Court of Appeals was correct in affirming the Circuit Court's ruling on this issue.

Alternatively, even if the Court were to agree that Respondents need to pursue a separate tort action against Trezona, the fact that Trezona enjoys immunity from personal liability under the SCWCA does not require a finding that such a tort action cannot proceed for the purpose of establishing Respondents' right to collect UM coverage. There are several contexts in which practices employed in this State allow plaintiffs to pursue actions against defendants who are not personally responsible for damages for the purpose of establishing the plaintiffs' right to recover insurance coverage – for example:

- An action against an underinsured motorist protected by a covenant not to execute but who remains a defendant so that the plaintiff can pursue UIM coverage.

- An action against a governmental entity subject to the Tort Claims Act (or, possibly, its negligent employee) for the purpose of pursuing UIM coverage above the cap set forth in S.C. CODE ANN. § 15-78-120 (2005).

- An action against an uninsured charitable organization and/or its uninsured reckless employee for the purpose of pursuing UM coverage above the cap set forth in S.C. CODE ANN. § 33-56-180 (2006).

- An action against a charitable organization and/or its reckless employee for the purpose of pursuing UIM coverage above the cap set forth in S.C. CODE ANN. § 33-56-180 (2006).

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

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

rights because "[t]o hold otherwise would place form over substance when doing so would not further the ends of justice.").

In other words, even if the Circuit Court or Court of Appeals had concluded that Respondents' use of the present action as a vehicle to establish Trezona's liability for the subject collision was inadequate or improper because the UM statute does not specifically authorize a procedure for suing an uninsured motorist immune under the SCWCA, they were not without options. Specifically, those courts had the equitable power to fashion a remedy – that is, a procedure that does not deny claimants their right to seek UM coverage without due process. Under the facts of this case, however, that undertaking was unnecessary because the courts correctly held Respondents properly asserted and protected their UM claims.

## CONCLUSION

For the reasons set forth above, this Court should affirm the decision of the South Carolina Court of Appeals.

Respectfully submitted,

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