

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Jocelyn Newman, Circuit Judge

Appellate Case No. 2021-000005

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

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

REPLY BRIEF OF THE PETITIONERS
The Main Street America Group and Old Dominion Insurance Company

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INTRODUCTION

In their Brief, Respondents attempt to entice this Court to make the same error the Court of Appeals made, namely, to misinterpret South Carolina’s uninsured motorist (UM) statute’s critical phrase: “legally entitled to recover as damages.” S.C. Code Ann. § 38-77-150(A) (2015).

In so doing, Respondents try to beguile this Court to join a small minority of jurisdictions that likewise make the error the Court of Appeals made here: finding that this phrase should be construed only to mean that “an insured is entitled to uninsured motorist coverage *merely by establishing fault on the part of the tortfeasor* and the amount of the insured’s damages.” (J.A. 381) (emphasis added). This interpretation, however, would be contrary to our state’s established rules of statutory construction and its precedential opinions.

According to South Carolina jurisprudence, an uninsured-motorist (UM) policy guarantees payment of a judgment recovered against an at-fault driver and, therefore, the insured cannot enforce such payment until the driver becomes liable to pay the judgment. *See Vernon v. Harleysville*, 244 S.C. 152, 158, 135 S.E.2d 841, 844 (1964); *Park v. Safeco*, 251 S.C. 410, 162 S.E.2d 709 (1968). Under plain language of its UM policy, which incorporates the statutory articulation of the insurer’s duty, Old Dominion is obligated to pay Stephany Connelly (“Connelly”) compensation in the amount that is commensurate with the sums she is “legally entitled to recover as damages” from Freya Trezona.¹ Because Connelly cannot recover an award

¹ S.C. Code Ann. § 38-77-150(A) provides that auto insurers must include in their policies “a provision by endorsement or otherwise, herein referred to as the uninsured motorist provision, 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[.]” (emphasis added).

Old Dominion’s policy expresses this obligation as follows: “we will pay damages which an ‘insured’ is legally entitled to recover from the owner or operator of the ‘uninsured motor vehicle’ . . .” (J.A. 101)

of damages from Trezona due to the exclusive-remedy provision of the South Carolina Workers' Compensation Act (the "Act"),² she has no enforceable right to UM benefits under Old Dominion's policy.

This Court should reverse the decision of the Court of Appeals because it unjustifiably deviated from the plain and ordinary meaning of the UM statute and disregarded the effect of the Act's exclusive-remedy provision on Connelly's capacity to recover a judgment establishing Trezona's legal liability.

The petitioners Main Street America Group and Old Dominion Insurance Company (collectively, "Old Dominion") submit this reply brief to address the respondents Stephany and James Connelly's ("Respondents") arguments³ and further elucidate the issues before this Court.

ARGUMENT

I. Only Trezona's "legal liability" can trigger Old Dominion's duty to pay Connelly the benefits under the UM coverage.

Respondents argue that the legally-entitled-to-recover language of S.C. Code Ann. § 38-77-150(A) and the phrase "establishing liability" found in the adjacent S.C. Code Ann. §§ 38-77-150(B) and 38-77-160 are equivalent. (*See* Respondents' Brief pp. 7 and 10.) Respondents are

² S.C. Code Ann. § 42-1-540 (1985) provides that:

[t]he 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 . . . as against his employer, at common law or otherwise, on account of such injury, loss of service or death.

³ Because it would require a verbatim restatement of the argument made in its opening Brief, Old Dominion refrains from replying to section II of Respondents' Brief regarding Old Dominion's denial of Connelly's UM claim based on Trezona's lack of tort liability.

correct in deeming them equivalent. The conclusions they draw from that equivalence, however, are wrong.

A. An at-fault driver’s legal liability cannot arise when a statute, such as the South Carolina Workers’ Compensation Act, confers upon her an immunity to tort claims.

Respondents propose that we equate “liability” with “fault” and thus allow “legally entitled to recover” to mean what it does not say. In support of their argument, they cite S.C. Code Ann. § 38-77-200, which references the only precondition for claiming UM benefits: “the *establishment of legal liability* of the uninsured driver” *See also Laird v. Nationwide Ins. Co.*, 243 S.C. 388, 394, 134 S.E.2d 206, 209 (1964); (Respondents’ Brief p. 7.) But in concluding that the phrase “establishment of legal liability” entails mere demonstration of fault and damages, Respondents discount the importance of the adjective “legal” in that phrase.

Establishment of the uninsured driver’s liability is not an outcome of a mere fact-finding inquiry. It is an outcome of application of law. Indeed, the General Assembly, in mandating auto liability coverage, characterized the insurable loss as one occasioned by “the liability *imposed by law*.” *See* S.C. Code Ann. § 38-77-140 (2015) (emphasis added). Thus, contrary to Respondents’ view, “legal liability” is not a mere label for “fault and damages.” It is the end result of plaintiff’s proof of all the elements of a claim that is cognizable under South Carolina law—the law that includes not only the common law of torts but also the General Assembly’s statutory limitation on “legal liability,” such as immunity under the Act’s exclusive-remedy provision, S.C. Code Ann. § 42-1-540.

In *Machin v. Carus*, this Court pondered the effect of the Act’s exclusive-remedy provision on the tort of negligence, with a particular focus on one of its elements—the legal cause. Quoting its sister court in Tennessee, the Court emphasized the distinction between cause-in-fact and legal cause and its implications for establishing a tortfeasor’s liability:

Although both . . . are elements of negligence that the plaintiff must prove, they are very different concepts. Cause-in-fact refers to the cause-and-effect relationship between the defendant's tortious conduct and the plaintiff's injury or loss. Thus, cause-in-fact deals with the 'but for' consequences of an act. The defendant's conduct is a cause of the event if the event would not have occurred but for that conduct. In contrast, proximate cause, or *legal cause*, concerns a determination of whether legal liability should be imposed where cause-in-fact has been established. Proximate or *legal cause* is a policy decision made by the legislature or the courts to deny liability for otherwise actionable conduct based on considerations of logic, common sense, policy, and precedent.

Id. at 541–42, 799 S.E.2d at 475–76 (emphasis added) (quoting *Snyder v. LTG Lufttechnische GmbH*, 955 S.W.2d 252, 256 n.6 (Tenn. 1997)).

By enacting the Act's exclusive-remedy provision, our General Assembly made the policy decision to *not* impose "legal liability" onto an injured person's employer or co-employee even where factual "fault" exists. *See e.g., Strickland v. Galloway*, 348 S.C. 644, 646–47, 560 S.E.2d 448 (Ct. App. 2002); *Wise v. Richard Wise d/b/a Wise Serv.*, 394 S.C. 591, 716 S.E.2d 117 (Ct. App. 2011); *Machin*, 419 S.C. at 543, 799 S.E.2d at 476. Thus, if the term "legal liability" is to retain any meaning, mere proof of Trezona's failure to exercise due care, and its causal link to Connelly's injuries, cannot suffice. By virtue of her immunity under the Act, Trezona's negligence was not the legal cause of Connelly's injuries. Consequently, though Trezona's fault can be established, her legal liability cannot.

B. Connelly cannot establish Trezona's "legal liability" because she cannot, as a matter of law, obtain a judgment against her.

An insured cannot enforce his or her rights under the UM coverage before recovering of a tort judgment against the uninsured driver. Indeed, the judgment requirement is evident in the entitled-to-recover language of the UM statute.

In *Laird v. Nationwide Ins. Co.*, this Court—having addressed the statute's language—stated the following with remarkable clarity:

Recovery under the uninsured endorsement is subject to the condition that the insured establish legal liability on the part of the uninsured motorist. Such an action is one *ex delicto* and the only issues to be determined therein are the liability and the amount of damage. *After judgment is entered against the uninsured motorist*, a direct action *ex contractu* can be brought to recover from the insurance company on its endorsement.

Laird, 243 S.C. at 394, 134 S.E.2d at 209 (citations omitted) (emphasis added); *see also Vernon*, 244 S.C. at 158, 135 S.E.2d at 844 (“[UM] endorsement ‘guarantees payment, within specified limits, of a *judgment recovered against uninsured motorist on his tort liability*’.”) (emphasis added); *Lawson v. Porter*, 256 S.C. 65, 68–69, 180 S.E.2d 643, 644 (1971) (“*in the event the plaintiff obtains a judgment against the defendant and an action ex contractu is brought by him against [the insurer], under the uninsured motorist provision of his policy, then [the insurer] may plead any policy defenses.*”) (emphasis added).

Thus, since Connelly has never had an *ex delicto* case against Trezona, let alone recovered a judgment, she cannot now have an *ex contractu* case against Old Dominion.

Respondents unconvincingly attempt to distinguish *Laird*, *Lawson* and *Vernon* because they “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.” (Respondents’ Brief p. 11.) According to Respondents, “[s]ubsequent references to a ‘judgment’ in those cases . . . did not distinguish between monetary judgments and declaratory judgments (as in the present action).” (Id.) That is not so. The judgments the Court referred to in those cases concluded tort actions and awarded damages.

Specifically in *Laird*, the plaintiff sued an uninsured at-fault driver and won a judgment awarding both compensatory and punitive damages. *Laird*, 243 S.C. at 390–92, 134 S.E.2d at 207–08. Having thus established the driver’s liability in tort, the plaintiff could rightfully demand that her UM insurer pay the sums that equaled the damages award. *Id.*

In *Vernon*, the plaintiff first recovered a monetary judgment against the uninsured motorist and only then sought payment of benefits under the UM and collision coverages from two different insurers. 244 S.C. at 153, 135 S.E.2d 842. In finding one carrier liable under its UM policy, the Court noted that the plaintiff “brought an action and obtained a judgment against the uninsured motorist . . . [thus] the amount he was ‘legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle’ was determined.” *Id.* at 158, 135 S.E.2d 844.

In *Lawson*, a UM insurer tried to assert its policy defenses in its insured’s tort action against the uninsured driver. *Lawson*, 256 S.C. at 67–68, 180 S.E.2d at 643–44. Having distinguished between the action establishing tort liability of an at-fault driver and a contract action establishing an insurer’s liability under the UM endorsement, this Court held that the policy defenses are available only in the latter, which the insured cannot bring until a judgment concluding the former is entered. *Id.*

Respondents’ criticism that *Laird*, *Vernon*, *Lawson* are inapposite—because they did not discuss the effect of a tortfeasor’s immunity on the UM insurer’s coverage (Respondents’ Brief at 11)—is a red herring. These cases clearly lay out the prerequisite for the insurers’ obligation to pay UM benefits, that is, the necessity of obtaining a judgment against the uninsured motorist in tort before proceeding against the insurer in contract. Here, because of Trezona’s immunity under the Act, the prerequisite judgment is lacking.

Respondents also question the relevance of *Park v. Safeco*, 251 S.C. 410, 162 S.E.2d 709 (1968), because it was “an appeal in a declaratory judgment action filed by an injured party against an alleged tortfeasor’s liability insurer . . . before establishing the alleged tortfeasor’s liability and resulting damages.” (Respondents Brief p. 11.) In their summary of the case, however, Respondents inexplicably omitted that the plaintiff also sued his UM insurer. Indeed, the *Park*

decision is highly relevant because of the Court’s succinct statement of the condition precedent to the recovery of UM benefits: “*no right to recover can accrue to plaintiff against either insurance company until and unless the [at-fault] driver becomes liable to pay.*” *Id.* at 413, 162 S.E.2d at 710 (emphasis added). And so it is here: Respondents have not accrued a right to recover UM benefits from Old Dominion because Trezona has not (and because of her immunity can never) become liable to pay damages.⁴

C. Old Dominion’s stipulation that Trezona’s negligence caused the accident resulting in Connelly’s injuries does not establish Trezona’s “legal liability.”

Because Respondents understood that they could not sue Trezona in tort, and thus could not obtain a judgment awarding damages from her, they sued her under the guise of a “Declaratory Judgment–Breach of Contract” action. Additionally, they sued the petitioners as well as Trezona’s mother, Debbie Cohn, who was the named insured on Old Dominion’s policy. (J.A. 120–126). Old Dominion had a duty to defend Trezona and Cohn, and in performance of that duty secured their dismissal from this case.

Respondents argue that by doing so, “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.” (Respondents Brief at 19.) In the last sentence of the quoted passage, Respondents refer to the

⁴ Necessity of a judgment for establishing legal liability of the at-fault driver, which in turn creates a justiciable controversy between the victim of an accident and an insurer, was most recently noted, though in a slightly different context, by the then Chief Judge Few in *Otterbacher v. Snyder*, Op. No. 2015-UP-332 (S.C. Ct. App. filed July 1, 2015): “We find the circuit court should not have reached the merits of this [declaratory judgment] lawsuit because there is no justiciable controversy. . . . Otterbacher has not obtained a judgment against the Snyders and thus never established their liability.” *Id.* at 2.

Joint Stipulation of Fact, wherein the parties stipulated that “Trezona’s negligence caused the accident and Connelly’s resulting injuries and damages.” (J.A. 146.) According to Respondents, this action “*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.” (Respondents’ Brief p. 19) (emphasis in the original.)

But again, Respondents’ argument is fatally flawed—it conflates “liability” with “fault” and mischaracterizes the holdings of this Court’s opinions set forth above. Indeed, “fault” and “liability” are not interchangeable terms as they denote very distinct concepts. *See generally* F. Patrick Hubbard and Robert L. Felix, *The South Carolina Law of Torts* 235–42, 301–03 (4th ed. 2011) Incidentally, Respondents acknowledge as much by referring to “fault, causation, and damages” as “*prerequisites* to establishing liability.” (Respondent’s Brief p. 8) (emphasis added). And as discussed above, the prerequisite of causation comprises not only cause-in-fact but also legal cause, without which legal liability cannot be established.

Here, the law of South Carolina does not impose legal liability on Trezona, even though she was the cause-in-fact of Connelly’s injuries, which Old Dominion admitted in the stipulation. And it is the establishment of *legal liability* and not the establishment of the cause-and-effect relationship that is the *sine qua non* of an insured’s rights to UM benefits. *See* S.C. Code Ann. § 38-77-200 (2015).

II. The South Carolina opinions cited by Respondents and the Court of Appeals offer no support for Respondent’s case against Old Dominion.

A. *Antley v. Nobel, Wright v. Smallwood, and Sanders v. Doe*, are inapplicable because, unlike this case, they involved at-fault drivers who were not protected by an immunity under the Act.

In its opinion, the Court of Appeals cited *Antley v. Nobel Insurance Co.*, 350 S.C. 621, 567 S.E.2d 872 (Ct. App. 2002) and *Sanders v. Doe*, 831 F.Supp. 886 (S.D. Ga. 1993) to support its

ruling that Connelly was not precluded from recovery of UM benefits even though she had received workers' compensation benefits. (J.A. 381–82.) But unlike Connelly, the *Antley* and *Sanders* plaintiffs were not victims of their co-employees' negligence.

Antley was a professional truck driver who had suffered injuries in an accident caused by an unidentified driver in Savannah, Georgia. *Antley*, 350 S.C. at 624, 567 S.E.2d at 873–74. Because the accident occurred in the course and scope of his employment, he was entitled to the benefits under the Act. *Id.* His receiving workers' compensation, however, could not have barred recovery of the UM benefits because tort liability of the unidentified driver could be established in an action filed pursuant to the *John Doe*–provision of Georgia's UM statute. *See id.* For this reason, the insurer could be liable to Antley in contract.

But here, that is not the case. Old Dominion cannot be liable to Connelly in contract because Trezona cannot be liable to Connelly in tort. And it is Trezona's liability in tort that is critical to Connelly's substantive contractual rights vis-à-vis Old Dominion. This is because, “[r]ecovery under the uninsured endorsement *is subject to the condition* that the insured *establish legal liability* on the part of the uninsured driver.” *Laird*, 243 S.C. at 394, 134 S.E.2d at 209 (emphasis added).

In deciding *Antley*, the Court of Appeals invoked this Court's decision in *Wright v. Smallwood*, 308 S.C. 471, 419 S.E.2d 219 (1992), which Respondents also cite here. (Respondents' Brief p. 16). But again, in *Wright*, the driver responsible for the plaintiff's on-the-job injury was not a co-employee, and therefore not immune under the Act. In fact, before instituting a declaratory judgment action against his self-insured employer, the City of Columbia, and his own insurer, State Farm, Wright had recovered a \$3,500 default judgment against the at-fault driver. *Id.* at 472, 419 S.E.2d at 220. Having first found that the City was bound by the UM

statute and had to provide UM coverage, this Court held that because “UM coverage does not sound in tort, but in contract . . . [t]he exclusivity provision of the Workers’ Compensation law does not operate to bar Wright’s contractual claim for UM benefits.” *Id.*

The *Wright* holding is hardly surprising considering that the City was not being sued to establish its tort liability for Wright’s injuries. Moreover, and unlike here, the judgment against the party that actually caused Wright’s injuries had been recovered, and thus the condition precedent to the City’s UM obligations satisfied.

Just as *Antley* and *Wright*, the opinion of the United States District Court for the Southern District of Georgia in *Sanders v. Doe*, 831 F.Supp. 886 (S.D. Ga. 1993), bears no significance to the issues at hand. *Sanders* involved almost identical facts as *Antley*. The insurer, Aetna Casualty and Surety Company, tried to cloak itself in the protected status of the plaintiff’s employer, claiming to be its alter ego. *Id.* at 890. Because Aetna’s obligations to Sanders were contractual in nature, Aetna could not have been protected by the Act’s exclusive remedy provision that immunized only employers and co-employees to an action in tort. *Id.* at 890–91. But again, the John Doe driver in *Sanders* was not immune by virtue of the exclusive-remedy provision of the Act and his liability, unlike Trezona’s, could be established.

Because it is the at-fault driver’s status as immune from liability in tort that matters here, the *Antley*, *Wright*, and *Sanders* opinions are of no moment.

B. The caselaw on the immateriality of the covenant-not-to-execute to the insured’s rights under UIM coverage is inapplicable because the covenant preserves the capacity to recover a judgment against the at-fault driver.

According to Respondents, the caselaw discussing the underinsured-motorist coverage (UIM) under S.C. Code Ann. § 38-77-160, being *in pari materia* with S.C. Code Ann. § 38-77-

150, bolsters their argument that the term liability, appearing in both statutes, denotes just fault and its causal link with the insured driver's injury. Yet, the opposite is true.

Respondents seem to argue 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. (See Respondent's Brief p. 9, citing *Ackerman v. Travelers Indem. Co.*, 318 S.C. 137, 456 S.E. 2d 408 (Ct. App. 1995).) And since a covenantor can seek payment of benefits from his or her UIM insurer, so should Respondents be entitled to claim UM benefits from Old Dominion, despite Trezona's immunity. (See Respondents' Brief p. 9.) But unlike an immunity, which prevents liability, the covenant does not operate to deprive a plaintiff's capacity to establish the at-fault driver's liability in tort. In fact, the covenant's very purpose is to preserve the viability of the cause of action so the liability of the underinsured driver can ultimately be established and, consequently, the insurance benefits under UIM coverage validly claimed.

This is because, the covenantor does not forgo his ability to obtain a monetary judgment. Rather, he only forgoes the right to seek satisfaction of the judgment out of the underinsured driver's personal assets. Furthermore, 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, 587 (2002); *Ackerman*, 318 S.C. at 146, 456 S.E.2d at 413. If it did so operate, and yet the insured had a right to claim UIM benefits, then Respondents' analogy would be valid. Alas, it is not.

In their further pursuit of this flawed analogy, Respondents cite the opinion in *O'Neil v. Smith*, 388 S.C. 246, 695 S.E.2d 531 (2010), in which this Court determined that plaintiffs can seek punitive-damages award against underinsured driver, even though they signed a covenant-not-to-execute. *Id.* As with *Ackerman*, the *O'Neil* opinion had absolutely nothing to do with the effect of an immunity under the Act on a plaintiff's right to recover UM or UIM benefits.

Because a covenant-not-to-execute cannot be considered an equivalent of an immunity from liability, the caselaw discussed is inapplicable here.

III. According to the West Virginia Supreme Court, on whose caselaw the Court of Appeals and Respondents rely, a person injured by his or her co-employee cannot claim benefits under a UM policy.

The overwhelming majority of jurisdictions across the nation hold that an insured, who suffered injuries in a road accident in the course and scope of employment, cannot recover UM benefits if the at-fault driver is protected by an immunity under a workers' compensation statute. Though Respondents urge this Court "not to jump on the bandwagon" and follow other state courts, they nonetheless propose this Court follow out-of-state opinions, chief among them⁵ the Supreme Court of West Virginia's decision in *Jenkins v. City of Elkins*, 738 S.E.2d 1 (W. Va. 2012) (Respondents' Brief p. 12.) Note, however, that unlike here, the tortfeasor in *Jenkins* was not a co-employee of the plaintiff. Furthermore, Respondents' reliance on *Jenkins* misrepresents West Virginia law.

In fact, in West Virginia, persons injured in the course of their employment by their co-employees' negligent driving have no right to UM benefits. In *Wisman v. Rhodes and Shamblin Stone, Inc.*, 447 S.E.2d 5 (W.Va. 1994), West Virginia's highest court held that an employee who

⁵ In footnote 4 on pages 13 and 14 of their Brief, Respondents cite eleven opinions from nine state courts and one federal court in which the effect of immunities on the recovery of UM benefits was considered. None of them, however, considered an immunity under the exclusive-remedy provision of a workers' compensation statute: the Missouri case did not discuss any immunities; the Georgia case involved a bankruptcy discharge; Louisiana and two cases from Illinois discussed spousal immunities; and the remaining opinions from the Southern District of Georgia (applying Georgia law), Ohio, Colorado, North Carolina, Maryland, and Florida, concerned sovereign immunity. Furthermore, with the exception of North Carolina and Maryland, appellate courts in all aforementioned states have held that an insured injured by a driver protected by the exclusive-remedy provision of a workers' compensation statute has no right to claim UM benefits. *See the table in section IV below.*

receives workers' compensation on account of an injury caused by a fellow employee cannot claim UM/UIM benefits: "Because of the provisions for employer and co-employee immunity contained in [the West Virginia's workers' compensation statute] workers' compensation is the exclusive remedy available to an injured employee, and an uninsured or underinsured motorist carrier has no liability." *Id.* at 9. Interestingly, the *Wisman* court appended a footnote to this holding in which it cited the Ohio case of *State Farm v. Webb*, 562 N.E.2d 132 (Ohio 1990). In so doing, West Virginia Supreme Court implicitly endorsed the Ohio Supreme Court's construction of the phrase "legally entitled to recover": the Ohio court concluded that an insurer is not liable under UM coverage when an accident was caused by a driver who "has liability insurance but is immune pursuant to the statutory fellow-employee doctrine, because the insured is not legally entitled to a recovery from the tortfeasor." *Wisman*, 447 S.E.2d at 9 n.3 (quoting *Webb*, 562 N.E.2d at 135.)

Moreover, in concluding that an insured cannot recover UM benefits if the injury was caused by an immune co-employee, the *Wisman* court followed the reasoning of the Supreme Court of Virginia in *Aetna v. Dodson*, 367 S.E.2d 505 (Va. 1988). The *Aetna* court held that Virginia's UM statute's legally-entitled-to-recover language "interposes, as a condition precedent to the UM insurer's obligation, the requirement that the insured have a legally enforceable right to recover damages from an owner or operator of an uninsured motor vehicle." *Id.* at 508. Hence, "because workers' compensation afforded the exclusive remedy against the decedent's employer and fellow employees for his accidental death, his statutory beneficiaries are not 'legally entitled to recover' damages against them." *Id.* Incidentally and notably, the South Carolina UM statute was modeled on Virginia law. *Laird*, 243 S.C. at 392, 134 S.E.2d at 208.

IV. Adopting the Court of Appeals’ and Respondents’ arguments would place South Carolina among a minority of only two states.

As shown in the table below, the overwhelming majority of South Carolina’s sister states—29 in total—have found that a plaintiff may not recover UM benefits where the tortfeasor was a co-worker protected by the immunity provided by a workers’ compensation statute, with the states of Oklahoma, *see e.g., Torres v. Kansas City Fire & Marine Ins. Co.*, 849 P.2d 841 (Okla. 1993) and Arkansas, *see e.g., Cross v. State Farm Mut. Auto. Ins. Co.*, 541 S.W.3d 495 (Ark. 2018), being the outliers. Seen in this context, Respondents’ assertion that “there is no shortage of efforts to characterize one view as the majority rule and the opposing view to be the minority rule” rings particularly hollow. (Respondents’ Brief p. 13).

1.	Alabama	<i>Ex parte Carlton</i> , 867 So.2d 332 (Ala. 2003).	“The [WCA] [is the] only remedy against his employer. Therefore, Carlton is not ‘legally entitled to recover damages from the owner or operator of an uninsured vehicle’ as the plain language of . . . his mother’s . . . policy require[s].”
2.	Colorado	<i>Ryser v. Shelter</i> , 486 P.3d 344 (Colo. App. 2019), <i>aff’d by Ryser v. Shelter</i> , 480 P.3d 1286 (Colo. 2021).	“[R]esolving this contention begins with determining the meaning of ‘legally entitled to recover’ After doing this, we conclude that Ryser is not entitled to UM/UIM benefits under [co-employee’s] insurance policy.”
3.	Florida	<i>Allstate v. Boynton</i> , 486 So.2d 552 (Fla. 1986).	“[T]he policy endorsement [requires] the policyholder to be ‘legally entitled to recover’ from the owner or operator of the uninsured vehicle. . . . [T]he insured must have a claim against the tortfeasor which could be reduced to judgment”
4.	Georgia	<i>Williams v. Thomas</i> , 370 S.E.2d 773 (Ga. Ct. App. 1988).	“Appellant is barred by the exclusive [remedy] provision . . . from obtaining judgment . . . against his co-employee [therefore] cannot satisfy the condition precedent to an action against his insurer.”
5.	Hawaii	<i>State Farm v. Royston</i> , 817 P.2d 118 (Haw. 1991).	“As a condition precedent to recovery of uninsured motorist benefits . . . a person must show that he or she is ‘legally entitled to recover damages’ from the uninsured

			tortfeasor. ... When the uninsured tortfeasor is the employer of such person, the requirement of cannot be met[.]”
6.	Illinois	<i>Atlantic v. Payton</i> , 682 N.E.2d 1144 (Ill. 1997).	“The accident took place during the course of employment. Payton has received [WCA] benefits, and therefore he is barred from [suing] for the same injuries against his co-employee ... and the insurer.”
7.	Indiana	<i>O'Dell v. State Farm</i> , 362 N.E.2d 862 (Ind. Ct. App. 1977).	“[T]wo co-employees were involved in [a fatal accident]. ... The claiming dependent secured benefits ... under [WCA] Under these circumstances ... the remedy is exclusive and no common-law action [against the UM insurer] is allowable.”
8.	Iowa	<i>Otterberg v. Farm Bureau</i> , 696 N.W.2d 24 (Iowa 2005).	“We conclude Otterberg is not ‘legally entitled to recover’ damages from ... his co-employee ... within the meaning of his uninsured motorist insurance policy.”
9.	Kansas	<i>Stemple v. Maryland Casualty Co.</i> , 144 P.3d 1273 (Kan. 2006).	“[L]egally entitled to recover’ means that a claimant must prove the insured motorist is legally liable to him or her in spite of all substantive defenses [including immunity under workers’ compensation act].
10.	Kentucky	<i>State Farm v. Slusher</i> , 325 S.W.3d 318 (Ky. 2010).	“State Farm argues that the plain language of the policy, the exclusive remedy provisions of the [WCA], and ... compel the conclusion that it has no liability under ... [UM] provision. We agree.”
11.	Louisiana	<i>Hebert v. Clarendon</i> , 984 So.2d 952 (La. Ct. App. 2008).	“[W]here there is no underlying uninsured [] person from whom the plaintiff is legally entitled to recover, due to the immunity provision of [WCA], the plaintiff’s UM insurer is not legally liable to him.”
12.	Massachusetts	<i>Berger v. H.P. Hood</i> , 624 N.E.2d 947 (Mass. 1993).	“The plaintiff’s UM claim derives from the same incident [] in the course of employment[.] [C]haracterizing the claim as contractual does not alter the [] nature of this common-law claim. [WCA] bars an employee from recovering UM benefits ...”
13.	Michigan	<i>Hopkins v. Auto-Owners</i> , 200 N.W.2d 784 (Mich. 1972).	“Because of the exclusiveness of the workmen’s compensation coverage, plaintiff never had a remedy against the tortfeasor. He was never entitled to damages from the negligent motorist.”

14.	Minnesota	<i>Peterson v. Kludt</i> , 317 N.W.2d 43 (Minn. 1982).	“Peterson [recovered workers’ compensation]. As a result, [he] is barred from recovering against his own insurance company.”
15.	Mississippi	<i>Medders v. U. S. Fid. & Guar. Co.</i> , 623 So.2d 979 (Miss. 1993).	“ <i>legally entitled to recover</i> ... limits the scope of [the mandated coverage] to those instances in which the insured would be entitled to recover through legal action. [No] mandate to provide coverage [when] tortfeasor is immune from liability.”
16.	Missouri	<i>Kesterson v. Wallut</i> , 157 S.W.3d 675 (Mo. Ct. App. 2004).	“Kesterson is barred from suing Wallut due to his immunity under [WCA], which is a substantive limitation on her right to sue him. So ... she was not ‘legally entitled to collect’ from [him] under the State Farm uninsured motorist policies.”
17.	Montana	<i>Okuly v. USF & G Ins. Co.</i> , 78 P.3d 877 (Mont. 2003).	“Okuly is barred from bringing suit and [] recovering from Adams ... , since Adams was Mary Lyn’s co-employee As such, under [WCA] ... Okuly’s exclusive remedy is that which he already received. ... [O]kuly is not ‘legally entitled to recover damages’”
18.	New Jersey	<i>Kough v. New Jersey Auto. Full Ins.</i> , 568 A.2d 127 (N.J. Super. Ct. App. Div. 1990).	“Because Fefferman was a coemployee, plaintiff could not ‘prove a [] liability case against the uninsured,’ a prerequisite for recovery. ... [B]ecause of the [WCA] bar, plaintiff is not ‘legally entitled to recover damages’ from her coemployee.”
19.	New Hampshire	<i>Matarese v. New Hampshire Mun.</i> , 791 A.2d 175 (N.H. 2002).	“The insurance policy and the [UM] statute do not apply where the substantive laws ... such as [WCA] bar, render the tortfeasor immune from liability.”
20.	New York	<i>Hauber-Malota v. Phila. Ins. Cos.</i> , 121 A.D.3d 327 (N.Y. App. Div. 2014).	“[P]ursuant to the plain language of the SUM endorsement, plaintiff is not ‘legally entitled to recover damages’ because of the status of the operator ... as plaintiff’s co-employee”
21.	North Dakota	<i>Stuhlmiller v. Nodak</i> , 475 N.W.2d 136 (N.D. 1991).	“Because Mark is statutorily immune under [WCA], we conclude that Arthur is not ‘legally entitled to recover’ damages from Mark, Mark is not ‘legally liable to pay’ damages, and accordingly Arthur is not entitled to recover under [] policy.”

22.	Ohio	<i>Snyder v. American Family Ins. Co.</i> , 871 N.E.2d 574 (Ohio 2007).	“[UM statute] does not prohibit [UM] policy from limiting [UM] benefits to amounts that the insured is ‘legally entitled to recover’ from the tortfeasor and that such a provision is valid even when it precludes [UM] benefits for injuries caused by tortfeasors immune under [WCA].”
23.	Oregon	<i>Cope v. West Am. Ins. Co.</i> , 785 P.2d 1050 (Or. 1990).	“If plaintiff’s injury arose ... in the course of employment, she would be entitled to [WCA] benefits. Because of the exclusivity of this remedy, she would, therefore, not be ‘legally entitled’ to recover from her co-worker ... [I]f plaintiff’s injury is compensable under the [WCA] provisions, she may not recover against defendants.”
24.	Pennsylvania	<i>Erie Ins. Exch. v. Conley</i> , 29 A.3d 389 (Pa. Super. Ct. 2011).	“[WCA] precludes Appellant from recovering damages from Mr. Olander. Thus, pursuant to the plain language of the policy, [Respondent] is not required to provide to Appellant UM/UIM coverage.”
25.	Texas	<i>Soledad v. Tex. Farm Bureau Mut.</i> , 505 S.W.3d 600 (Tex. App. 2016).	“Soledad may not recover UM benefits after receiving [WCA] benefits. WCA ... bars Soledad from recovering any damages from [co-employees] ... [Because she] is not ‘legally entitled to recover’ damages, ... she failed to satisfy [the] requirements [for] UM benefits.”
26.	Utah	<i>Lieber v. ITT Hartford Ins. Ctr., Inc.</i> , 15 P.3d 1030 (Utah 2000).	“[UM] coverage is not available when the uninsured driver is the employer, or ... an employee of the employer because the WCA precludes viable tort claim outside its parameters.”
27.	Virginia	<i>Welch v. Miller & Long Co. of Md., Inc.</i> , 521 S.E.2d 767 (Va. 1999).	“Because the Act afforded the exclusive remedy against the decedent’s employer or... fellow servant ... the decedent’s statutory beneficiaries ... are not legally entitled to recover damages against them. Thus, a condition precedent to the insurers’ [UM] liability was not met.”
28.	Washington	<i>Romanick v. Aetna Cas. & Sur. Co.</i> , 795 P.2d 728 (Wash. 1990).	“Romanick cannot recover UIM benefits. [He] cannot show that he is legally entitled to recover damages from ... a fellow employee under the [WCA]”

29.	West Virginia	<i>Wisman v. Rhodes and Shamblin Stone, Inc.</i> , 447 S.E.2d 5 (W.Va. 1994).	“Because of the provisions for employer and co-employee immunity contained in [WCA] ... an uninsured or underinsured motorist carrier has no liability.”
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CONCLUSION

It has been an enduring axiom of statutory interpretation that South Carolina courts “cannot read into a statute something that is not within the manifest intention of the legislature as gathered from the statute itself. *To depart from the meaning expressed by the words is to alter the statute, to legislate and not to interpret.*” *Laird*, 243 S.C. at 394, 134 S.E.2d at 209 (citation omitted) (emphasis added). Here, the Court of Appeals did just that.

If its decision were to stand, “legally entitled” would no longer denote what the common and ordinary meaning of these words convey, that is a right under the law, and the “legal liability” would be neither “legal” nor “liability.” And that is not all. By inadvertently creating a right of direct action against the UM insurer before a tort action against an uninsured driver is commenced, the Court of Appeals deleted, as it were, the no-action-may-be-brought proscription from S.C. Code Ann. § 38-77-150(B) and rendered the *John Doe*-action provisions of S.C. Code Ann. §§ 38-77-170 and 38-77-180 superfluous.

Because the Court of Appeals impermissibly rewrote the statute, the petitioners Main Street America Group and Old Dominion Insurance Company ask this Court to reverse its decision affirming the Circuit Court’s summary judgment for Respondents and to remand this case for entry of judgment for these petitioners.

[SIGNATURE PAGE FOLLOWS]

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