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 Court Judge

Case No. 2021-000005
2016-CP-40-5885

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 Appellants,

And

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

REPLY BRIEF OF APPELLANT ALLSTATE FIRE AND CASUALTY INSURANCE COMPANY

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STATEMENT OF ISSUES ON APPEAL

I. THE COURT OF APPEALS ERRED IN HOLDING CONNELLY CAN BRING AN ACTION DIRECTLY AGAINST THE UM CARRIER WHEN SHE IS NOT LEGALLY ENTITLED TO RECOVER DAMAGES AGAINST THE MOTORIST.

II. IN REACHING ITS DECISION, THE COURT OF APPEALS IGNORED THE STATUTORY DEFINITION OF "UNINSURED VEHICLE" MANDATING REVERSAL BY THIS COURT

ARGUMENTS

I. THE COURT OF APPEALS ERRED IN HOLDING CONNELLY CAN BRING AN ACTION DIRECTLY AGAINST THE UM CARRIER WHEN SHE IS NOT LEGALLY ENTITLED TO RECOVER DAMAGES AGAINST THE MOTORIST.

Respondents' entire argument hinges on the Court accepting their characterization of the issue in this case as one of their inability to "personally collect" damages against Trezona. Respondents' arguments, while interesting, are without merit in all respects. This is not a situation in which Connelly is simply unable to collect a judgment against Trezona personally. Rather, Trezona is immune from suit, and Connelly cannot get a judgment against Trezona because there is no judgment against Trezona. Thus, Trezona is not legally liable to Connelly. Simply put, Connelly cannot, under South Carolina law, legally recover damages against Trezona.[1] This Court should reject Respondents' mischaracterization of the issue in this case.[2]

South Carolina Code Annotated Section 38-77-150(A) (2015) clearly states, the insurance company is obligated "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."[3] Subsection B then delineates how uninsured motorist actions should be brought by stating the process of serving the insurance carrier

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[1] In fact, Connelly did not pursue a judgment against Trezona within the statute of limitations, and any insinuation made by the Respondent that the Complaint in this case contained any cause of action or claim for relief against Trezona is disingenuous. The Complaint does not assert a tort action or claim for relief against Trezona to establish negligence, proximate cause and/or damages. The only causes of action are for declaratory judgment and breach of contract, and the only relief sought is against Allstate and Old Dominion. Cohn and Trezona were dismissed because they were not necessary parties to this contract action.

[2] Respondents assert "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." This is a meritless statement. There were no causes of action or claims asserted against Trezona in the complaint to be severed.

[3] Section 38-77-150 does not use the word "collect" – it uses the word "recover."

with "pleadings in the action establishing liability," giving the insurer "the right to appear and defend in the name of the uninsured motorist in any action," as well as defining how long the insurer has to appear in the action. Thus, the statute makes it clear, the insurance company is responsible only for claims the insured is legally entitled to recover from the owner or operator of an uninsured motor vehicle, meaning the legal liability must be determined first and explaining the process for how to establish it.

Respondent argues the joint stipulation in the declaratory judgment action that Trezona's negligence caused the accident and Connelly's resulting injuries and damages satisfies the procedure as set out in South Carolina's UM statutes and establishes Trezona's legal liability.[4] The Respondents then cite portions of different UM and UIM statutes in an effort to convince this Court there is no requirement to bring a tort action against a motorist to establish legal liability for damages. They even go so far as to state any legal defenses available to a UM carrier such as lack of jurisdiction and the expiration of the statute of limitations should have no effect on an insured's ability to seek recover directly against a UM or UIM carrier by way of a declaratory judgment action.

However, as previously argued by both Allstate and Old Dominion, the language of the UM/UIM statutes and the cases interpreting them since their passage, establish a clear requirement

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[4] The stipulation reads, "For purposes of this declaratory judgment only, the parties stipulate that Trezona's negligence caused the accident and Connelly's resulting injuries and damages." This stipulation was limited to use in this declaratory judgment only. It did not absolve the Respondent from her obligation to establish Trezona's legal liability in a separate tort action. Nor can the stipulation be read in such a way to waive Petitioner's argument that Connelly is required to establish that she is legally entitled to recover damages from Trezona in a separate tort action, especially in light of the joint stipulation between the parties 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."

that a tort action must be brought against the motorist and the UM/UIM carrier be given an opportunity to defend in the name of the motorist. *See* § 38-77-150(B) ("The insurer has the right to appear and defend in the name of the uninsured motorist."); *See Williams v. Selective Ins. Co.*, 315 S.C. 532, 446 S.E.2d 402 (1994)(holding any lawsuit filed against the motorist must be brought before the expiration of the statute of limitations to pursue UIM coverage); *Louden v. Moragne*, 327 S.C. 465, 486 S.E.2d 525 (Ct. App. 1997).[5] Accepting Respondent's tortured interpretation of South Carolina's statutory scheme would lead to absurd results.

Respondent's arguments that insureds are entitled to recover UM coverage by a simple showing of "fault," rather than by establishing legal liability in a tort action against the motorist, are equally unavailing. Despite Respondent's arguments and the Court of Appeals' opinion to the contrary, "fault" does not equal "legal liability."[6]

Both S.C. Code Ann. § 38-77-150 and Allstate's policy limit recovery of UM coverage to situations in which an insured is legally entitled to recover damages *from the owner or operator of an uninsured motor vehicle.* There is no indication of a legislative intent a UM carrier would be

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[5] Respondents directly address whether the necessary procedural requirements were met with regard to § 38-77-150(B) (2015). This statue is clear, an action must be brought which establishes the driver's liability so the "copies of the pleading in the action" can be served on the insurance carrier. However, a declaratory judgment action fails to meet this requirement. "In general, contributory negligence and negligence are questions of fact for the jury and only rarely become questions of law for the court to decide." *Felder v. K-Mart Corp.*, 297 S.C. 446, 448, 377 S.E.2d 332, 333 (1989).

[6] Respondents go to lengths to point out that the Tort Claim Act and the Charitable Immunity Act contain specific provisions that allow third parties in accidents involving employees of governmental and/or charitable entities to pursue claims for UM and UIM limits in excess of the statutory caps. See S.C. Code Ann. § 15-78-120 (2005) and S.C. Code Ann. § 33- 56-180 (2006). Respondents neglect to point out that the Workers Compensation Act contains no provision allowing an employee with a negligence claim against a co-employee to pursue UM or UM claims against the co-employee.

responsible for damages the insured is not legally entitled to recover from an uninsured motorist. Legal liability is not the same as fault – as in this case, a motorist can be "at-fault," but not legally obligated to pay damages because of statutory immunity. Other possible scenarios of fault without legal liability include comparative negligence of the insured more than 50%, lack of jurisdiction and expiration of the statute of limitations. If Respondents' position is accepted, insureds will be permitted to recover UM coverage despite a lack of legal liability on the part of the motorist. The legislature specifically chose to limit recovery for uninsured motorist coverage under § 38-77-150 to scenarios where the motorist was found legally liable. Any other interpretation of the statute would change the meaning of the statute to something the legislature did not intend.

Further, South Carolina courts have consistently held entitlement to UM coverage hinges on establishing the legal liability of the uninsured motorist. Interpreting prior versions of the UM statute containing the same mandate that copies of the pleadings in the action establishing liability must be served on the insurance carrier, this Court has recognized the right to recover UM coverage depends on strict compliance with the statute. *Criterion Ins. Co. v. Hoffmann*, 258 S.C. 282, 291-92, 188 S.E.2d 459, 463 (1972). The Court recognized the "right to sue and collect from one's own liability insurance carrier in case of a loss caused by a hit-and-run driver or other driver of an uninsured automobile is a creature of the legislature. Except for the statute, and endorsements required, no right exists to recover from one's own insurance carrier." *Criterion Ins. Co. v. Hoffmann*, 258 S.C. at 290, 188 S.E.2d at 462. There, because the insured did not provide a copy of the complaint with the summons provided to the insurance company as evidence of "copies of the pleadings," the insured did not comply with the necessary uninsured motorist statutes. The court found the statute, "included a requirement that a complaint be filed when an uninsured motorist action is commenced and that a copy of the complaint be served upon the insurance

carrier." *Criterion Ins. Co.*, 258 S.C. at 294, 188 S.E.2d at 464. Here, no uninsured motorist action was commenced against the motorist. The Court in *Ferguson v. State Farm Mut. Auto. Ins. Co.*, 261 S.C. 96, 198 S.E.2d 522 (1973) even left open the possibility for an insured to recover additional benefits under uninsured motorist benefits above the limits provided in the South Carolina Workmen's Compensation Act. However, as a condition precedent, the insurer's liability "arises after the liability of the uninsured motorist has been *established*." *Ferguson*, 261 S.C. at 102-03, 198 S.E.2d at 525 (emphasis added). The use of the term "established" is also helpful in understanding liability such that establishing liability, or proving liability, is more than a simple finding of fault. The court could have said, the insurers liability arises after fault is determined; however, it did not, because here, the statute requires an establishment of legal liability. S*ee also*, *Vernon v. Harleysville Mut. Cas. Co.*, 244 S.C. 152, 159, 135 S.E.2d 841, 844 (1964) ("[R]ecovery under the uninsured endorsement is subject to the condition that the insured establish legal liability on the part of the uninsured motorist.").

Respondents argue that the terms "legally entitled to recover" and "fault" mean the same thing because sections 38-77-150 and 38-77-160 use both words. However, the legislature made a clear distinction between UM coverage and UIM coverages, which are, in fact, different coverages. Section 38-77-150 states that all automobile policies must contain an "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 . . ." S.C. Code Ann. § 38-77-150. Section 38-77-160 states,

> Automobile insurance carriers shall offer, at the option of the insured, uninsured motorist coverage up to the limits of the insured's liability coverage in addition to the mandatory coverage prescribed by Section 38-77-150. *Such carriers shall also offer, at the option of the insured, underinsured motorist coverage up to the limits of the insured liability coverage to provide coverage in the event that damages are*

> *sustained in excess of the liability limits carried by an at-fault insured or underinsured motorist* or in excess of any damages cap or limitation imposed by statute.

S.C. Code Ann. § 38-77-160 (2015).

Like the term "uninsured motor vehicle," "Underinsured motor vehicle" is also a defined term within South Carolina's statutory scheme, which should not be ignored. It means "a motor vehicle as defined in item (9) as to which there is bodily injury liability insurance or a bond applicable at the time of the accident in an amount of at least that specified in Section 38-77-140 and the amount of the insurance or bond is less than the amount of the insureds' damages." As such, UIM coverage applies only where a vehicle is insured in compliance with section 38-77-140, but the liability limits are insufficient to cover damages sustained by an insured. S.C. Code Ann. § 38-77-140 (2015). It is presupposed an insured would be legally entitled to recover damages against an underinsured motorist – otherwise there can be no claim for UIM coverage. By its very nature, the insured must have a legally valid claim in excess of the "at-fault" motorist's liability coverage to even pursue a claim to recover UIM coverage. There is no need to reiterate this fact in section 38-77-160. Respondents' reading of these two sections is non-sensical.

Respondents also incorrectly rely on *Ackerman v. Travelers Indem Co.*, 318 S.C. 137, 456 S.E.2d 408 (Ct. App. 1995); *Wade v. Berkeley County*, 348 S.C. 224, 559 S.E.2d 586 (2002); and *O'Neill v. Smith*, 388 S.C. 246, 695 S.E.2d 531 (2010) in support of their proposition that the phrase "legally entitled to recover" has the same meaning as "fault." However, each of these cases can be easily distinguished from the facts of the current case and do not support the conclusion Respondents assert they do.

First, Respondents' did not inform the Court that "The Ackermans sued Scott in tort for damages relating to Mr. Ackerman's bodily injury and Mrs. Ackerman's loss of consortium. The

Ackermans accepted the tender of liability limits from Scott, executed and delivered the Covenant Not To Execute and obtained a stay of their tort action against Scott pending resolution of this case." *Ackerman v. Travelers Indem. Co.*, 318 S.C. at 139, 456 S.E.2d at 409 n. 1.

Respondents also neglected to point out the plaintiff in *Ackerman* satisfied the procedural process for pursuing a UIM claim, while the Respondent here has not. The Complaint in this case contains no cause of action or claim for tort relief against Trezona, and for Respondent to assert otherwise is disingenuous at best. The Complaint contains no cause of action or claim for relief against Trezona, because no such tort claim ever existed against Trezona as a matter of law.

In addition, the issue in *Ackerman* involved a "covenant not to execute" and whether the covenant precluded recovery of underinsured motorist benefits. *Ackerman,* 318 S.C. at 146, 456 S.E.2d at 413. After the injured party recovered the motorist's liability policy limits in exchange for a covenant not to execute, the injured party sought underinsured motorist benefits from his own insurance carrier. The Court of Appeals found the plaintiff was entitled to pursue underinsured motorist coverage under the terms of the covenant not to execute, reasoning,

> A Covenant Not To Execute is a promise not to enforce a right of action or execute a judgment *when one had such right at the time of entering into the agreement*.
>
> ***
>
> Because the language of the covenant in this case clearly contemplates that the Ackermans may recover any underinsured coverage available, but will not go against the personal assets of Scott, the trial court concluded that recovery of underinsured coverage is not precluded by the Covenant Not to Execute. We agree.
>
> The Ackermans are still entitled to recover damages from Scott; they merely agreed not to legally enforce the judgment.

Ackerman v. Travelers Indem. Co., 318 S.C. at 147, 456 S.E.2d at 413 (emphasis added).

The reasoning applied in *Ackerman, O'Neill* and *Wade* does not apply here. In those cases, the plaintiffs were entitled to recover damages from the motorist. The Connellys never had a right of action or ability to obtain a judgment against Trezona. They are not legally entitled to recover damages from Trezona and have no ability to obtain a legally enforceable judgment against her due to the immunity afforded under the South Carolina Worker's Compensation Act. (J.A. p. 146). The parties even stipulated, "Connelly is not legally entitled to recover damages from Trezona."[7] (J.A. p. 146).

The Respondents imply the effect of statutory immunity is akin to a plaintiff voluntarily agreeing not to pursue a motorist's personal assets in order to collect liability insurance proceeds. Such an implication is false. The policy in favor of allowing an insured to pursue UIM coverage after agreeing not to enforce a later judgment against a motorist assets has nothing to do with the effect of legal immunity from liability. *Ackerman*, *O'Neill* and *Wade* all involved situations where tort suits were served on the "at-fault" motorist to "establish liability." The UM or UIM insurers in those cases retained the ability to defend the tort suit in the name of the motorist and to assert any defenses available to him – an ability the Court of Appeals has deprived Allstate of with its opinion. Further, none of these cases stands for the proposition that proving that one is "legally entitled to recover" is the same as proving "fault."

[7] The Respondent's argument that the parties' stipulation that Trezona was negligent and caused Connelly's damages waived the requirement that Respondents bring an action to establish Trezona's legal liability is disingenuous. The Respondents specifically pled in their complaint they are prohibited from suing Trezona in tort by the SCWCA, an allegation that was admitted by the Petitioners. (J.A. 123 and 128). Respondents did not sue Trezona in tort in this action (having recognized that they are prohibited from doing so), the only causes of action being alleged against the Petitioners.

To quote the Respondent's brief, "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." *O'Neill*, at 255, n. 3, 695 S.E.2d at 535 n.3. This is exactly the point the Petitioners are making. The plaintiff *must* establish the motorist's *liability*, not fault, for damages before becoming legally entitled to recover. Here, the parties stipulated Trezona's negligence caused the accident; however, there has been no legal determination of legal liability. Trezona is not legally liable to the Connellys – she immune from suit under the South Carolina Workers Compensation Act. Thus, the Respondents have not proven they are "legally entitled to recover."

Respondents also cite *Jenkins v. City of Elkins*, 738 S.E.2d 1 (W. Va. 2012), which was also cited by the Court of Appeals, as well as number of cases from other states, to suggest this Court should follow their interpretation of the phrase, "legally entitled to recover." However, in the same breath, the Respondents also discourage this Court from looking to other states for guidance. As we have addressed, the cases Respondents cite do not answer the questions provided and were decided under different statutory schemes. Thus, it can be instructive to review, nationally, how other states are interpreting similar language.[8]

The effect of Respondents' arguments and the Court of Appeals' opinion is to allow claimants to circumvent the statutory requirements requiring a party establish the legal liability of

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[8] "Our research indicates that the majority of courts in other jurisdictions have also held that an employee who receives workers' compensation benefits is not 'legally entitled to recover' from her employer or co-employee and is therefore not entitled to UM/UIM benefits." *Soledad v. Texas Farm Bureau Mut. Ins. Co.*, 506 S.W.3d 600, 603–04, n. 1 (Tex. App. 2016) (collecting cases in support and citing *Jenkins v. City of Elkins*, 230 W.Va. 335, 738 S.E.2d 1, as in the minority).

the uninsured motorist in order to recover on claims on which they are legally not entitled. In effect, in any situation where the claimant could not legally recover against the uninsured motorist, claimants can now file a suit directly against the purported UM insurer and deprive the UM insurer of the ability to raise any defenses it could have raised on behalf of the uninsured motorist. This precedent "is inconsistent with the statute and the endorsements and would invite litigants to neglect the procedures obviously intended by the legislature and clearly declared in the statute." *Criterion*, 258 S.C. at 295-96, 188 S.E.2d at 465. The Court of Appeals' conclusion stating otherwise is wholly unsupported in the law and mandates reversal by this Court.

II. IN REACHING ITS DECISION, THE COURT OF APPEALS IGNORED THE STATUTORY DEFINITION OF "UNINSURED VEHICLE," MANDATING REVERSAL BY THIS COURT.

To be clear, no party and no vehicle was uninsured at the time of the accident. "Under the proper structure for analyzing any insurance policy, the analysis begins with the insuring language." *Reeves v. S.C. Mun. Ins. & Risk Fin. Fund*, 434 S.C. 18, 862 S.E.2d 248, 254 (2021). "Courts must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary[,] and popular meaning." *Sloan Constr. Co. v. Cent. Nat'l Ins. Co. of Omaha*, 269 S.C. 183, 185, 236 S.E.2d 818, 819 (1977) (citation omitted). Whether a vehicle is insured is a matter of reviewing the insurance policy and statutory definitions. The Court of Appeals here, however, substituted its own definitions to transform Trezona's insured vehicle into an uninsured one.

S.C. Code Ann. Section 38-77-30 defines an "uninsured motor vehicle," in part, as a motor vehicle as to which (a) there is not liability insurance at least in the amounts specified in § 38-77-140 or (b) there is liability insurance, but the insurer successfully denies coverage. There is no evidence in the record Old Dominion's policy was not in full force and effect at the time of the accident, Old Dominion denied coverage or the claims would not trigger coverage under the terms

and conditions of its policy. There is no evidence in the record Old Dominion would not have provided a defense to its insured under the terms and conditions of the policy had Respondents filed a lawsuit against her. Simply put, Old Dominion's liability policy was in force and applied to the accident.

Old Dominion has never denied coverage under the policy. Rather, Old Dominion denied that its insured driver was legally liable to the Connellys under well-established South Carolina law. The Trezona vehicle meets the statutory definition of an insured vehicle, because Old Dominion never denied coverage for the accident. There is no basis upon which to assert a UM claim against Allstate's policy, because the Trezona vehicle was insured.

As previously argued in Allstate's brief, *Unisun Insurance Co. v. Schmidt*, 339 S.C. 362, 529 S.E.2d 280 (2000), provides no support for Respondents' argument. In that case, the driver did not have permission to drive the car. The policy provided liability coverage only for drivers who had permission to drive the car. The carrier denied liability coverage for the damages caused by the non-permissive driver of the vehicle. The carrier denied coverage for the driver's actions, where as here, Old Dominion denied Trezona's liability for her actions.

Respondents would have this Court find any time a liability carrier successfully denies legal liability in situations where the motorist is "at-fault," the insured vehicle is magically transformed into an uninsured vehicle. There is no support for this position under South Carolina's UM statutes, South Carolina courts' previous interpretation of the UM statutes or Allstate's policy. This Court's acceptance of the Respondents' and the Court of Appeals' position would turn decades of UM law on its ear.

Because the Old Dominion policy was in full force and effect at the time of the accident and it never denied coverage, the vehicle at issue cannot be considered an uninsured vehicle at the

time of the accident. Further, the denial of liability on behalf of the driver does not amount to a denial of coverage under the policy.

CONCLUSION

As outlined above and in previous briefings, the Court should reverse the decision of the Court of Appeals and find because Respondents are not legally entitled to recover damages against Trezona, they are not entitled to recover uninsured motorist coverage from Allstate. Further, the Court should find the Trezona vehicle was not an uninsured motor vehicle as defined by S.C. Code Ann. § 38-77-30.[9]

Respectfully submitted,

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[9] Allstate incorporates by reference herein any and all arguments made in its initial brief and briefs submitted by Old Dominion.