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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The 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.

BRIEF OF APPELLANT
ALLSTATE FIRE AND CASUALTY INSURANCE COMPANY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

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

STATEMENT OF THE CASE

The Court of Appeals erred in holding Respondents Stephanie A. Connelly and James M. Connelly can receive uninsured motorist benefits even though they cannot (and did not) legally recover damages against an uninsured motorist as required under South Carolina law. The Court's decision also fails to recognize the distinction between an insured and an uninsured motor vehicle as defined by the South Carolina General Assembly.

On February 24, 2015, Stephany Connelly ("Connelly") was allegedly injured while riding as a passenger in a vehicle driven by her co-worker, Freya Trezona ("Trezona") in Columbia, South Carolina. Trezona was allegedly negligent in causing the accident. Connelly recovered damages through a claim with the South Carolina Worker's Compensation Commission. Connelly then instituted this declaratory judgment action against Main Street America Group and Old Dominion Insurance Company ("Old Dominion"), which issued an automobile liability policy covering the vehicle driven by Trezona; Allstate Fire and Casualty Insurance Company ("Allstate"), the carrier of an automobile policy issued to Connelly and her husband, James; Trezona, the alleged at-fault driver; and Debbie Cohn, Trezona's mother and co-owner of the Trezona vehicle. The declaratory judgment complaint did not assert any tort claims against Trezona or Cohn, who were subsequently dismissed by consent of the parties.

The declaratory judgment action seeks a declaration that Old Dominion's and Allstate's uninsured motorist coverage applied to the accident. All parties stipulated to the material facts, moved for summary judgment and contended the question was a matter of law based on statutory and policy interpretation. In an Order filed October 2, 2017, the circuit court denied the carriers' motions for summary judgment and granted judgment as a matter of law to the Connellys. Allstate and Old Dominion filed notices of appeal on October 23, 2017, and October 26, 2017,

respectively. The Court of Appeals issued its Opinion affirming the circuit court on August 12, 2020. Allstate and Old Dominion timely filed Petitions for Rehearing, which were denied by Order of December 3, 2020. This Court granted Allstate's and Old Dominion's Petitions for Writ of Certiorari on September 21, 2021.

STANDARD OF REVIEW

The determination of coverage under an insurance policy is an action at law. Nationwide Mut. Ins. Co. v. Prioleau, 359 S.C. 238, 241, 597 S.E.2d 165, 167 (Ct. App. 2004); see also Morehead v. Doe, 324 S.C. 559, 568, 479 S.E.2d 817, 821 (Ct. App. 1996) (holding an action for breach of an insurance contract is an action at law); Johnson v. State Farm Mut. Auto. Ins. Co., 260 S.C. 24, 193 S.E.2d 806 (1973) (holding the construction of an unambiguous insurance policy is a matter for the trial judge). An appellate court may decide novel questions of law with "no particular deference to the lower court." Clark v. Cantrell, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000).

An appellate court reviews the grant of summary judgment under the same standard applied by the circuit court. David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP; Russell v. Wachovia Bank, N.A., 353 S.C. 208, 217, 578 S.E.2d 329, 334 (2003). A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner. David, 367 S.C. at 250, 626 S.E.2d at 5.

FACTS

The following facts have been stipulated by the parties. Connelly was injured in an automobile accident while riding as a passenger in a vehicle operated by Trezona and co-owned by Cohn and Trezona. Connelly and Trezona were co-employees working within the course and scope of their employment with Apple One Employment Agency at the time of the accident. As a result of Trezona's negligent operation of the vehicle, Connelly incurred damages.[1] At the time of the accident, the vehicle Trezona was driving was insured under a policy of liability insurance issued by Old Dominion to Cohn[2] with liability limits in compliance with S.C. Code Ann. § 38-77-140 (2015). (App. 146)

After the accident, Connelly applied for, and began receiving, benefits under the South Carolina Workers' Compensation Act (the "Act"). Pursuant to S.C. Code Ann. § 42-1-540 (2015)[3], Connelly is not legally entitled to recover damages from Trezona, because she is Connelly's co-employee.[4] The Connellys stipulated "Connelly is not legally entitled to recover

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[1] This stipulation was entered into "For purposes of this declaratory judgment only . . . " (App. 146 ¶ 10).

[2] Trezona is Cohn's daughter and is an insured under the policy.

[3] S.C. Code Ann. § 42-1-540 states: "The 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, his personal representative, parents, dependents or next of kin as against his employer, at common law or otherwise, on account of such injury, loss of service or death."

[4] South Carolina courts have held that the same immunity from civil suit provided to employers under the Workers' Compensation Act also extends to co-employees. See, e.g., Posey v. Proper Mold & Engineering, Inc., 378 S.C. 210, 661 S.E.2d 395 (Ct. App. 2008); Nolan v. Daley, 222 S.C. 407, 73 S.E.2d 449 (1952) (holding a co-employee who negligently injures another

damages from Trezona, because Trezona is immune from suit as a co-employee under the exclusivity provision of the Act." (App. 146, ¶ 13).

Despite Trezona's immunity from suit, Connelly made a claim to Old Dominion against Trezona's automobile liability policy. The policy's bodily injury liability limits of $100,000/$300,000 were in effect at the time of the collision and Trezona meets the definition of an insured under the terms of the policy. However, Old Dominion denied liability for the accident, because Trezona is immune from suit under the South Carolina Workers' Compensation Act.[5] Connelly then sought uninsured motorist ("UM") benefits from the Old Dominion policy. Old Dominion denied the UM claim on the grounds the vehicle Trezona was driving was not an uninsured vehicle and workers' compensation is Connelly's exclusive remedy under South Carolina law. (App. 146)

Connelly also presented a UM claim to Allstate. At the time of the accident, Allstate issued an automobile policy to the Connellys with policy limits in the amount of $250,000 each person and $500,000 each accident. The Allstate policy contained an uninsured motorist endorsement with the same coverage limits. Allstate denied the UM claim from Connelly on the grounds the vehicle Trezona was driving was not uninsured at the time of the accident and Connelly is not entitled to legally recover damages from Trezona because workers' compensation is Connelly's exclusive remedy in South Carolina. (App. 146)

Connelly never served Trezona with a summons and complaint alleging a tort claim

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employee while in the scope of employment is immune under the Act and cannot be held personally liable).

[5] Main Street/Old Dominion did not deny *coverage* for the accident. The liability policy was in effect at the time of the accident. Old Dominion denied that Trezona had any *liability* to Connelly for the accident.

against her to establish Trezona was legally obliged to pay damages to Connelly. Rather, Connelly filed this declaratory judgment action directly against Old Dominion and Allstate. The circuit court held Trezona's lack of legal liability to Connelly pursuant to the Workers' Compensation Act transforms the Trezona vehicle from one meeting the definition of an insured motor vehicle, as defined by the General Assembly, into an uninsured motor vehicle. The circuit court also held Connelly can by-pass the statutes requiring commencement of a tort action against the at-fault motorist to recover UM benefits and bring a direct action against the UM carriers to obtain UM benefits. Further, the circuit court held that Connelly is entitled to UM benefits under both policies irrespective of the exclusivity provision in the Workers' Compensation Act and the statutes controlling the availability of uninsured motorist coverage.

The Court of Appeals affirmed the circuit court, allowing individuals to recover uninsured motorist benefits directly from an insurer without first establishing the legal liability of the motorist. By not requiring Respondents to file suit against the motorist, the Court's opinion essentially transforms an insured vehicle into an uninsured vehicle and nullifies the insurer's statutorily prescribed ability to defend the driver and assert any defenses available to the motorist.

In addition, the Court of Appeals' decision defies several cardinal rules of statutory and insurance policy interpretation. It also makes an unprecedented leap in torturing statutory language to create a result not supported by the insurance policy language or the statutory or case law. The Court's opinion ignores the statutory requirements of S.C. Code Ann. § 38-77-150 (2015) and creates a new procedure through which claimants can pursue uninsured motorist claims. According to the Court of Appeals, if the defendant driver has liability insurance but the claimant cannot legally recover against the defendant for any number of reasons, then the

claimant by-pass the statutorily required procedure for recovering UM coverage by making a UM claim directly against the insurer. This is not a result intended by the legislature in codifying S.C. Code Ann. § 38-77-150.

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.

The Court of Appeals' opinion allows individuals to recover uninsured motorist benefits directly from an insurer without establishing the legal liability of the motorist – a process which has heretofore never been recognized by this State. By not requiring Respondents to file suit against the motorist, the Court's analysis essentially nullifies the insurer's ability to defend the motorist and assert any defenses available.

The Court of Appeals misconstrues the statutory requirement that the Respondents must file and serve a tort lawsuit against Trezona and serve the insurers with a copy. While the Court of Appeals found the language of section 38-77-150(B) does not address any requirement of filing suit against the at-fault driver, such assertion is against the plain language of the statute. Section 38- 77-150(B) specifically provides,

> No action may be brought under the uninsured motorist provision unless copies of the pleadings in the action establishing liability are served in the manner provided by law upon the insurer . . .

S.C. Code Ann. § 38-77-150(B) (emphasis added).

The phrase "pleadings in the action establishing liability" means some action must be filed against the uninsured motorist to establish the uninsured motorist is, in fact, legally liable. A declaratory judgment action directly against the insurers, where the question before the Court is whether a claim is covered by the terms and conditions of a policy, fails to meet this requirement. South Carolina's statutory scheme allows the UM carrier to defend the uninsured driver and assert any defenses available to the uninsured motorist. See § 38-77-150(B) ("The insurer has the right to appear and defend in the name of the uninsured motorist.") If the

uninsured motorist has a liability, service, or statute of limitations defense, then the insurer is entitled to raise it in defense of the action. See Williams v. Selective Ins. Co., 315 S.C. 532, 446 S.E.2d 402 (1994); Louden v. Moragne, 327 S.C. 465, 486 S.E.2d 525 (Ct. App. 1997). Such is not true if a declaratory judgment action filed directly against the insurer satisfies the statutory requirement.[6]

The Court's misapplication of the statutory requirement that pleadings must be filed establishing liability of the uninsured motorist is further exemplified with its misapprehension of the phrase "legally entitled to recover." The statutory requirements for uninsured motorist coverage in South Carolina are found in S.C. Code Ann. § 38-77-10 (2015) *et. al*. Section 38-77-150(A) states:

> No automobile insurance policy or contract may be issued or delivered unless it contains 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*, within limits which may be no less than the requirements of Section 38-77-140.

S.C. Code Ann. § 38-77-150(A) (emphasis added). Allstate's policy is consistent with section 38-77-150. It states:

> **Insuring Agreements**
>
> If a premium is shown on the Policy Declarations for Uninsured Motorists Insurance, **we** will pay those damages that an insured person is legally entitled to recover from the owner or operator of an uninsured auto because of:

[6] The Court of Appeals' decision would allow an injured party to bring a declaratory judgment action to recover damages directly against a UM insurer after the statute of limitations has expired as to the at-fault driver. The same rationale applies; although the at-fault driver was negligent and caused the damages, the at-fault driver is no longer legally obligated to pay damages to an injured party because the statute of limitations has expired and is essentially immune from liability.

1. **bodily injury** sustained by an insured person; and
2. **property damage**.

(App. 48). Under section 38-77-150 and Allstate's policy, a person seeking UM coverage must be legally entitled to recover damages from the owner or operator of an uninsured motor vehicle.

In its opinion, the Court of Appeals determined the statutory phrase "legally entitled to recover" is ambiguous and the phrase requires only "demonstrating fault and resulting damages." However, the words of a statute "must be given their plain and ordinary meaning without resort[ing] to subtle or forced construction to limit or expand [the statute's] operation." Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992). While the statute may not contain any language specifically addressing the situation of a motorist being immune to suit, silence is not tantamount to ambiguity. The statute plainly states the claimant must be "legally entitled to recover" from the uninsured motorist. The Court of Appeals' interpretation of the statute as only requiring a demonstration of "fault" completely ignores the plain meaning of the phrase. A finding of fault does not equate to a finding of legal liability. This approach ignores the distinction between cause in fact and legal cause and essentially renders section 38-77-150 meaningless.[7]

Under section 38-77-150, entitlement to UM coverage requires establishing the legal liability of the uninsured motorist and not simply finding fault. There are a number of reasons why a party may be at fault for causing an accident but not legally liable to the plaintiff (i.e. statute of limitations, exclusivity provisions of the Act, comparative negligence, etc.). For those reasons, the statute permits insurers to defend in the name of the uninsured motorists and raise

[7] Further, Respondents' stipulation that they are "not legally entitled to recover damages from Trezona" is binding upon the Respondents regardless of the interpretation given to the phrase.

any affirmative defenses the uninsured motorist may have. See Williams, 315 S.C. 532, 446 S.E.2d 402; Louden, 327 S.C. 465, 486 S.E.2d 525. If the General Assembly intended to allow claimants to recover simply with a showing of fault, it would have clearly stated that in the statute. It did not. Rather, the General Assembly chose to require the claimant to establish the "liability" – not the fault – of the uninsured motorist.

In support of its decision to equate "legally entitled to recover" with "fault," the Court of Appeals relied on the decisions in Antley v. Nobel Insurance Co., 350 S.C. 621, 567 S.E.2d 872 (Ct. App. 2002), *overruled in part on other grounds by* Sweetser v. S.C. Dep't of Ins. Reserve Fund, 390 S.C. 632, 703 S.E.2d 509 (2010), and Sanders v. Doe, 831 F.Supp. 886 (S.D. Ga. 1993). However, neither of these cases is even remotely analogous to the facts at hand. Both Antley and Sanders are John Doe UM claims against their own insurance policies because the accident involved unknown drivers – not insured drivers who were immune from suit. While the insurers in those cases raised the exclusivity remedy as a defense to the UM claims due to the plaintiffs' recovery of workers compensation benefits, they did not do so as a legal defense of the uninsured motorist. The John Does in those cases – as non-co-employee third-parties – would not enjoy the protection, or immunity, afforded by the Act as Trezona does here. Thus, the plaintiffs in Antley and Sanders were "legally entitled to recover" from John Doe, and therefore under the uninsured motorist coverage of their personal insurance policies. In contrast, the Respondents here are not legally entitled to recover from Trezona, as Respondents have stipulated, and therefore Respondents cannot recover UM benefits.[8]

[8] This conclusion is also in line with "the majority of courts in other jurisdictions [which] 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."

The effect of the Court of Appeals' opinion is to circumvent the statutory requirement that claimants bring suit against and establish the legal liability of the uninsured motorist to recover UM benefits in situations where they are not legally entitled to recover damages from an at-fault driver. In effect, in any situation where the claimant could not legally recover against an insured motorist, claimants can now file a suit directly against, and recover damages directly from, the purported UM insurer, thus depriving the UM insurer of the ability to raise any legal defenses it could have raised on behalf of the 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 Ins. Co. v. Hoffmann, 258 S.C. 282, 295-96, 188 S.E.2d 459, 465 (1972). The Court of Appeals' perfunctory conclusion stating otherwise is wholly unsupported in the law and mandates reversal by this Court.

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

In deciding the Trezona vehicle is transformed into an "uninsured" vehicle due to the exclusivity provision of the Workers Compensation Act, the Court of Appeals misapprehends the distinction between denying liability for an accident and denying liability coverage for an accident. There is nothing in the record to suggest Old Dominion's policy was not in full force and effect or the claims would not trigger coverage under the terms and conditions of its policy. However, the Court of Appeals incorrectly found Old Dominion denied coverage, because in its view, based on the stipulation that Trezona was negligent, liability could not be denied. As

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Soledad v. Texas Farm Bureau Mut. Ins. Co., 506 S.W.3d 600, 603–04 (Tex. App. 2016). See also, Soledad, 506 S.W.3d at 604 n.1 (collecting cases).

discussed above, negligence does not equate to legal liability and, thus, Old Dominion could, in fact, deny legal liability despite the stipulation. Simply put, Old Dominion had liability coverage, which it did not deny, for Trezona and, thus, Respondents do not have a claim for uninsured motorist coverage.

Respondents cannot recover uninsured motorist coverage from Old Dominion and Allstate for the simple reason that Trezona was not operating an uninsured motor vehicle at the time of the accident. Whether a vehicle is insured or uninsured is not determined by who is riding as a passenger in the vehicle. If a third person who was not a co-employee of Trezona was riding in the car at the same time as Connelly, Trezona could be legally obligated to pay damages to that third person. Certainly, Old Dominion's liability policy provides coverage to defend and indemnify Trezona against any claims brought by the third person. There is no legal basis upon which to argue the Trezona vehicle is uninsured for injuries incurred by one passenger but insured for injuries to another. This is simply not an issue of non-coverage – it is an issue of the absence of legal liability.

Based upon established South Carolina law and the terms of the UM provision of Allstate's policy, Trezona's vehicle does not meet the definition of an uninsured motor vehicle provided by the General Assembly. S.C. Code Ann. § 38-77-30(14) (2015) specifically 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."[9] Respondents stipulate the Old

[9] On this issue, Respondents have cited cases from other states whose statutes do not provide a definition of an uninsured motor vehicle. Our General Assembly has provided a definition of an uninsured motor vehicle that our courts our bound to follow.

Dominion policy was in full force and effect at the time of the accident, the policy complied with section 38-77-140, and Trezona was an insured driver under Old Dominion's liability policy. (App. 145, ¶ 2). The vehicle Trezona was driving at the time of the accident was, at all times, an insured motor vehicle as defined by S.C. Code Ann. § 56-9-20(1) (2018).[10]

If Respondents had filed suit against Trezona, as they were statutorily required to do, then there would be no dispute the Trezona vehicle was insured. Once suit was filed against Trezona, Old Dominion, as the liability insurer, would have retained counsel to defend Trezona. Defense counsel would have moved to dismiss the complaint against her based on the exclusivity provisions of the Act. If the motion was denied, Old Dominion would continue to provide a defense to Trezona and pay for any judgments or settlements up to its liability limits. Alternatively, if the motion was granted, Connelly's claims against Trezona would be dismissed with prejudice, because they are not legally entitled to recover damages against her (just as they would not be legally entitled to recover against her if they failed to sue her within the applicable statute of limitations – which also occurred here). A successful legal defense, whether it is an immunity defense, lack of jurisdiction defense, Rule 12(b)(6) defense, improper service defense or a statute of limitations defense does not transform a vehicle into an "uninsured motor vehicle" just because the at-fault driver was negligent or at-fault and caused the damages. Finding otherwise would lead to an absurd result permitting plaintiffs to pursue UM coverage directly against their own insurers any time they are unsuccessful in tort against another motorist.

In support of its finding the Trezona vehicle was "uninsured," the Court of Appeals relied

[10] "'Insured motor vehicle': A motor vehicle as to which there is bodily injury liability insurance and property damage liability insurance, meeting all of the requirements of item (7) of this section, or as to which a bond has been given or cash or securities delivered in lieu of such insurance or as to which the owner has qualified as a self-insurer in accordance with the provisions of Section 56-9-60." S.C. Code Ann. § 56-9-20 (2016).

on Unisun Insurance Co. v. Schmidt, 339 S.C. 362, 529 S.E.2d 280 (2000). That case involved the denial of liability coverage based upon lack of permissive use – not a denial of liability. Because the driver did not have permission to drive the vehicle, he did not meet the definition of an insured driver, and the vehicle's liability policy did not provide coverage for the accident. There was no liability coverage in Unisun because the person driving the vehicle did not meet the policy's definition of an insured person. Here, Old Dominion did not deny coverage – Trezona is an insured person and was driving the vehicle with permission. Liability coverage exists and applies to the accident. The accident is an insured event. However, Trezona has no legal liability – she is not legally responsible to Respondents for their injuries despite her negligence – or fault – in causing the accident. Therefore, Old Dominion denied liability for the injuries sustained by Connelly. The holding in Unisun has absolutely no bearing on the issue presented in this case. There is no legal support for the Court of Appeals' finding that the vehicle was uninsured at the time of the accident.

The Court of Appeals' opinion creates another scenario that is contrary to South Carolina law. In finding for Connelly, the trial court ordered a hearing be held to determine Respondents' damages. If the Court of Appeals is not reversed, upon remand, that damages hearing will move forward. The only defendants in the case are the insurers, so either a judge or a jury will be awarding tort damages to Respondents directly against the insurers. However, the insurers are not the correct defendants. The insurers did not cause Respondents' injuries and are not legally responsible to Respondents for their injuries. Under South Carolina's statutory scheme, a UM carrier does not "stand in the shoes" of an uninsured motorist and cannot be named as a defendant in a tort action to recover UM benefits. See S.C. Code Ann. § 38-77-150 ("the insurer has the right to appear and defend in the name of the uninsured motorist in any action which may

affect its liability . . . The evidence of service upon the insurer may not be made a part of the record.") (emphasis added). Liability and damages must be established against the at-fault driver before any direct action to recover UM benefits can be brought against an insurer. See Lawson v. Porter, 256 S.C. 65, 68, 180 S.E.2d 643, 644 (1971) ("Recovery under the uninsured endorsement is subject to the condition that the insured establish the legal liability on the part of the uninsured motorist … After the judgment is entered against the uninsured motorist, a direct action can be brought *ex contractu* to recover from the insurance company …") (emphasis added).

The Court of Appeals' decision is contrary to South Carolina statutory law and long-standing legal precedent. This decision allows an action directly against an insurer before damages are established and awarded against an at-fault driver. In fact, it allows a direct action against a UM insurer without any action being brought against an at-fault driver at all. Finding a fully insured vehicle becomes "uninsured" simply because the liability insurer successfully asserts a legal defense to liability, even if the at-fault driver was negligent and caused the damages, is a misapprehension of well-established law. The Court's misapprehension and misapplication of the law mandates reversal by this Court.

CONCLUSION

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

Respectfully submitted,

GALLIVAN, WHITE & BOYD, P.A.

October 21, 2021

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