

**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable R. Markley Dennis, Jr.

Case No. 2011-CP-10-8496

South Carolina Property and Casualty Insurance Guaranty Association,

Appellant-Respondent,

-v-

Roger Brock, Ryan Stevens, Malachi Sanders and Health Advantage/BCBS of Arkansas,

Defendants,

Of Whom Roger Brock is

Respondent-Appellant.

REPLY BRIEF OF RESPONDENT-APPELLANT

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APPELLANT ROGER BROCK

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ARGUMENT

I. THE ASSOCIATION FAILS TO RECOGNIZE THE AMBIGUITY OF S.C. CODE ANN. § 38-31-100.

In its Response Brief, the Association argues that the language of S.C. Code Ann. § 38-31-100 is clear and unambiguous on its face and as a result the Association is entitled to offset the amount it owes claimants such as Brock by the limits of and/or the recovery made under coverage from other solvent insurers as a matter of course. See Response Brief of Appellant-Respondent, pp. 3 - 6. The Association fails to address the ambiguity of S.C. Code Ann. § 38-31-100 as raised by Brock and ignores the fact that the phrase “a claim under an insurance policy” is ambiguous and the statutory text does nothing to define the meaning of “claim” or “insurance policy.” Instead, the Association summarily concludes that a “‘claim under an insurance policy’ is such a commonly understood phrase that it creates no ambiguity and needs no further definition.” Response Brief of Appellant-Respondent, p. 5. Brock respectfully submits that the Association’s conclusion is incorrect.

The phrase “a claim under an insurance policy” as contained in S.C. Code Ann. § 38-31-100 is undefined. The South Carolina Property and Casualty Insurance Guaranty Association Act codified at S.C. Code Ann. § 38-31-10 *et seq.* (the “Act”) contains numerous other definitions and descriptive language but fails to define this phrase. As a result, the Act does not identify which forms of insurance coverage classes are available for offset by the Association. The Act’s lack of definition of this critically important phrase produces statutory ambiguity in how S.C. Code Ann. § 38-31-100 should properly be applied. Despite the presence of this ambiguity, the Association seeks the very broadest interpretation of S.C. Code Ann. § 38-31-100 possible that would allow the Association to offset any form of insurance coverage received by claimants such as Brock. As has been set forth by Brock in this appeal, no statutory language or

South Carolina precedent provides for such an interpretation. In fact, numerous other courts across the country faced with this same issue have recognized the ambiguity in their respective statutes, thereby prompting the legislature to clarify the types of insurance coverages subject to offset.¹

Furthermore, the words of S.C. Code Ann. § 38-31-100 must be construed in context and in light of the intended purpose of the statute in a manner which harmonizes with its subject matter and accords with its general purpose. See Cabiness v. Town of James Island, 393 S.C. 176, 192, 712 S.E.2d 416, 425 (2011). Section 38-31-100 simply cannot be interpreted to allow the Association to offset UM coverage and PIP benefits from the total amount of Brock's settlement in a manner which achieves harmony with the Act or accords with its general purpose. The Association is an unincorporated non-profit legal entity created pursuant to the Act. See S.C. Code Ann. § 38-31-10 *et seq.* "The Guaranty Association's function is to provide protection for insureds in the event their insurance carriers become insolvent." S.C. Prop. & Cas. Ins. Guar. Ass'n v. Carolinas Roofing & Sheet Metal Contractor's Self-Insurers Fund, 303 S.C. 368, 369, 401 S.E.2d 144, 145 (1991). Importantly, the Association "is considered the insurer to the extent of its obligation on the covered claims and, to this extent, has all rights, duties, and *obligations* of the insolvent insurer as if the insurer had not become insolvent." S.C. Code Ann. § 38-31-60(b)

¹ See, e.g., Cal. Ins. Code § 1063.2(c)(1) (statute amended in 1991 to include particular language about offset classes available to guaranty association); Haw. Rev. Stat. § 431:16-112 (statute amended in 2012 to include particular language about offset classes available to guaranty association); Kan. Stat. Ann. § 40-2910(a) (statute amended in 2005 to include particular language about offset classes available); Ky. Rev. Stat. Ann. § 304.36-120(a) (statute amended in 1998 to specifically identify forms of coverage available for offset); LSA-R.S. § 22:2062 (statute amended in 2010 to specifically include that medical coverage is subject to offset); Mo. Ann. Stat. § 375.778(1) (statute amended in 2004 to include particular language about offset classes available to guaranty association); N.C. Gen. Stat. § 58-48-55(a) (statute amended in 2003 to include particular language about offset classes available to guaranty association); N.H. Rev. Stat. Ann. § 404-H:12(1) (statute specifically identifies UM benefits as subject to offset by guaranty association); N.J. Stat. Ann. § 17:30A-12(b) (statute amended in 2004 to include particular language about offset classes available to guaranty association); N.M. Stat. Ann. § 59A-43-11(A) (statute specifically identifies UM benefits as subject to offset by guaranty association); 40 Pa. Stat. Ann. § 991.1817(a) (statute amended in 1994 to include particular language about offset classes available to guaranty association); Tex. Ins. Code Ann. art. § 462.251(a)(1) (statute amended in 2005 to include particular language specifying offset classes available to guaranty association).

(emphasis added). Accordingly, once an insurer is declared insolvent, a guaranty association steps into the shoes of the insolvent insurance company with all of the rights, duties and obligations of the insolvent insurer to the extent those obligations are defined by statute. See Swift v. Richardson Sports Ltd. Partners, 188 N.C. App. 82, 90, 658 S.E.2d 674, 679 (N.C. Ct. App. 2008) (applying Tennessee law). Because the intended purpose of the Act is to provide protection for insureds in the event their insurance carriers become insolvent, the Association's attempt to offset UM coverage and PIP benefits from the total amount of Brock's settlement, without a specific right as defined by statute, does not harmonize or accord with the subject matter and general purpose of the Act or the Association.

II. THE ASSOCIATION WRONGLY ATTEMPTS TO CONFINE THIS COURT'S REVIEW TO A HANDFUL OF CASES INTERPRETING STATUTES WITH CERTAIN STATUTORY LANGUAGE.

The Association takes issue with the consideration of case law from other jurisdictions reviewing statutes with similar, but not identical, statutory language as South Carolina's offset statute. Specifically, the Association criticizes any consideration of guaranty association offset statutes in other states that do not contain the "same facts, injury, or loss" language and cases interpreting such statutes. See Response Brief of Appellant-Respondent, pp. 6, 18. As the Association correctly acknowledges, only a handful of reported decisions in other jurisdictions have addressed offset statutes containing the "same facts, injury, or loss" language. See id., p. 6; Table B.

The Association's argument focusing on the "same facts, injury, or loss" language glosses over the ambiguity of S.C. Code Ann. § 38-31-100 and the basis of the Circuit Court's ruling. The Circuit Court aptly recognized that "the South Carolina offset statute, unlike versions of the offset statute in numerous other states, does not delineate which forms of insurance

coverage are available for offset by the Association.” See (R. p. 7). The “same facts, injury, or loss” language is of limited significance where “a claim under an insurance policy” is ambiguous and the statutory text fails to define the meaning of “claim” or “insurance policy” under South Carolina’s offset statute. With no guiding South Carolina law on the subject, the relevant analysis with respect to law in other jurisdictions involves how other jurisdictions interpreted or amended their own respective offset statutes in the absence of statutory language defining which forms of insurance coverage are available for offset by a guaranty association. Accordingly, it is entirely appropriate for this Court to consider offset statutes in other jurisdictions without the “same facts, injury, or loss” language where such language is not germane to the ambiguity of S.C. Code Ann. § 38-31-100. Likewise, the Association’s attempt to restrict this Court’s interpretation of S.C. Code Ann. § 38-31-100 to a handful of cases in other states that have interpreted offset statutes containing this particular phrase is misguided.

As previously raised by Brock and recognized by the Association, many other states have amended their own respective offset statutes since original adoption, often specifically because of the inherent ambiguity contained in the statutory language of the model act. “Significantly, particularly as applied in the areas of exhaustion and non-duplication of recovery, the model law frequently has been described as being plagued by multiple ambiguities and apparent inconsistencies.” Bell v. Slezak, 571 Pa. 333, 342, 812 A.2d 566, 571 (Pa. 2002). The purpose of these statutory amendments is to identify which particular types of offset classes are available to each respective state’s guaranty association, thereby avoiding the ambiguity present in this case. No statutory amendment has been passed by our state legislature to clarify which classes of coverage may be available for offset by the Association under S.C. Code Ann. § 38-31-100. The Association argues that the “same facts, injury, or loss” language contained in S.C. Code

Ann. § 38-31-100 provides clarification, but such language fails to provide any specificity on the types of offset classes that may be available to the Association where clear and unambiguous identification and authority is needed. In its Response Brief, the Association goes so far as to claim that the reason other states have amended their own respective offset statutes is to “bring the wording more in line with the Legislative intent and the requirements asserted under South Carolina’s broader provision.” See Response Brief of Appellant-Respondent, p. 8. The Association does not and cannot provide any legal authority or legislative intent for such a sweeping statement. In contrast, other state legislatures have amended their respective offset statutes in order to identify which particular types of offset classes are available to each respective state’s guaranty association.²

Under the Association’s erroneous position, this Court is restricted to consider the few legal opinions in other jurisdictions interpreting offset statutes containing the “same facts, injury, or loss” language, regardless of whether the remaining language of each jurisdiction’s offset statute, guaranty association act, and other relative statutes conforms to South Carolina law. Furthermore, the cases cited by the Association offer limited support for its argument to offset UM coverage and PIP benefits Brock received under South Carolina law. See Response Brief of Appellant-Respondent, Tables D, E. Many of the cases and offset statutes cited by the Association contain specific language allowing a guaranty association to offset UM coverage or PIP benefits – precisely the statutory authority missing from S.C. Code Ann. § 38-31-100 and the Act. The fact that offset statutes in many other jurisdictions specifically include language that allows a guaranty association to offset UM coverage or PIP benefits only serves to support Brock’s position – had the legislature intended to allow the Association to offset UM coverage or

² See infra note 1.

PIP benefits claimants such as Brock received, it would have provided clear and unambiguous statutory language to do so.

III. OFFSETTING UM COVERAGE AND PIP BENEFITS BROCK RECEIVED IS INCONSISTENT WITH THE PURPOSE OF THE ACT, CONFLICTS WITH THE SPECIFIC STATUTE GOVERNING PIP INSURANCE, AND WOULD NOT RESULT IN A WINDFALL FOR BROCK.

A. Offsetting UM Coverage and PIP Benefits Brock Received Is Inconsistent with the Purpose of the Act.

For the same reasons as set forth herein and in Brock's Appellate Briefs, the offset of UM coverage and PIP benefits Brock received is inconsistent with the purpose of the Association and the Act. In its Response Brief, the Association claims that the South Carolina Legislature's desire is "to provide protection to insureds of insolvent carriers while limiting increased rates resulting from increased assessment if the Association's obligations were not so limited." Response Brief of Appellant-Respondent, p. 10. Again, the Association does not and cannot substantiate such a claim. The Association basis its claim on a single citation to the case of South Carolina Property and Casualty Insurance Guaranty Association v. Carolinas Roofing and Sheet Metal Contractors Self-Insurance Fund, 315 S.C. 555, 446, S.E.2d 422 (1994). The Association's cited case completely fails to evidence such legislative intent. See id. Consistent with its previous arguments, the Association fails to recognize the equally relevant case of South Carolina Property and Casualty Insurance Guaranty Association v. Carolinas Roofing & Sheet Metal Contractor's Self-Insurers Fund, 303 S.C. 368, 369, 401 S.E.2d 144, 145 (1991), which provides that "[t]he Guaranty Association's function is to provide protection for insureds in the event their insurance carriers become insolvent." Because there is no history of legislative intent concerning S.C. Code Ann. § 38-31-100, and because the purpose of the Association is to *provide protection for insureds*, offsetting UM coverage and PIP benefits Brock received is

inconsistent with the purpose of the Association and the Act for the reasons set forth herein and in Brock's Appellate Briefs. Furthermore, the Association's arguments concerning legislative intent are unsupported and should, therefore, be disregarded.

B. Offsetting PIP Benefits Brock Received Must Not Be Allowed Under S.C. Code Ann. § 38-77-144.

The benefits Brock received from PIP coverage must not be offset because allowing the Association to do so would violate the specific statute regarding PIP benefits. Under S.C. Code Ann. § 38-77-144, "[i]f an insurer sells no-fault insurance coverage which provides personal injury protection, medical payment coverage, or economic loss coverage, the coverage shall not be assigned or subrogated *and is not subject to a setoff.*" (emphasis added). S.C. Code Ann. § 38-77-144 conflicts with the Circuit Court's interpretation of § 38-31-100, allowing the Association to offset PIP benefits Brock received. Under South Carolina's guiding rules of statutory construction, the PIP statute is more specific than the general provision regarding the Association's right to offset. See Wooten ex rel. Wooten v. S.C. Dept. of Transp., 333 S.C. 464, 468, 511 S.E.2d 355, 357 (1999) ("A specific statutory provision prevails over a more general one."). The Act merely lists "any benefits" and, therefore, is broader and more general in nature, contrary to the position taken by the Association. S.C. Code Ann. § 38-31-100 likewise does not specifically provide that PIP benefits may be offset by the Association. See S.C. Code Ann. § 38-31-100. Accordingly, the offset of PIP benefits Brock received must not be permitted under S.C. Code Ann. § 38-77-144.

The Association contends that the Association must be allowed to offset the PIP benefits Brock received because S.C. Code Ann. § 38-31-100 was adopted later in time than S.C. Code Ann. § 38-77-144. See Response Brief of Appellant-Respondent, p. 12; see also Hair v. State, 305, S.C. 77, 79, 406 S.E.2d 332, 334 (1991) ("[I]f two statutes are in conflict, the latest statute

passed should prevail so as to repeal the earlier statute to the extent of the repugnancy.”). The application of this rule of statutory construction is unnecessary. The Circuit Court’s *interpretation of S.C. Code Ann. § 38-31-100* conflicts with S.C. Code Ann. § 38-77-144. S.C. Code Ann. § 38-31-100 does not identify PIP benefits as a class of coverage available for offset by the Association, the Association simply presumes PIP benefits are within the scope of S.C. Code Ann. § 38-31-100. As a result, to the extent a conflict exists, Brock submits the conflict is the Circuit Court’s interpretation of S.C. Code Ann. § 38-31-100. Thus, this Court should reverse the Circuit Court relative to its ruling that the Association may offset PIP benefits Brock received.

C. Refusing to Allow the Association to Offset the UM Coverage Brock Received does not Result in a Windfall for Brock.

The Association claims that Brock would receive a windfall if the Association is not allowed to offset the UM coverage Brock received. See Response Brief of Appellant-Respondent, pp. 16-17. The Association concludes that, but for Aequicap Insurance Company’s (“Aequicap’s”) insolvency, Brock would not be otherwise entitled to the \$25,000.00 in additional coverage and this amount constitutes a windfall for Brock if not offset by the Association. Absent from the Association’s argument is the fact that had Aequicap remained solvent, Brock would have received underinsurance (“UIM”) coverage instead of UM coverage from the same policy *in addition to the agreed upon settlement sum with Aequicap*. Brock was prevented from receiving the applicable UIM coverage as a result of Aequicap’s insolvency, the insurer in which the Association “has all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent.” S.C. Code Ann. § 38-31-60(b). Accordingly, refusing to allow the Association to offset UM coverage Brock received and reversing the Circuit Court’s Order relative to this issue will not result in a windfall or double recovery for Brock.

IV. S.C. CODE ANN. § 38-31-100 DOES NOT ABROGATE THE COLLATERAL SOURCE RULE.

“South Carolina has long followed the collateral source rule that compensation received by an injured party from a source wholly independent of the wrongdoer should not be deducted from the amount of damages owed by the wrongdoer to the injured party. This rule applies to insurance proceeds.” Estate of Rattenni By & Through Rattenni v. Grainger, 298 S.C. 276, 277-78, 379 S.E.2d 890 (1989) (collateral source rule applied because the benefits received were from the injured party’s own underinsurance policy). “Had the General Assembly intended to abrogate the collateral source rule in regard to this particular class of insurance proceeds, it would have done so.” Id. Therefore, if the legislature intended to permit the Association to offset a particular form of independent insurance coverage, in direct conflict with South Carolina’s collateral source rule and separate statutory sections, it could have amended South Carolina’s offset provision to provide whether the Association is entitled to offset particular forms of coverage as other states have done.

The Association asserts that the existence of S.C. Code Ann. § 38-31-100 serves to abrogate the collateral source rule. “[S]tatutes in derogation of the common law are to be strictly construed.” Grier v. AMISUB of S.C., Inc., 397 S.C. 532, 536, 725 S.E.2d 693, 696 (2012) (citing Epstein v. Coastal Timber Co., 393 S.C. 276, 285, 711 S.E.2d 912, 917 (2011)). “Under this rule, a statute restricting the common law will ‘not be extended beyond the clear intent of the legislature.’” Id. (quoting Crosby v. Glasscock Trucking Co., 340 S.C. 626, 628, 532 S.E.2d 856, 857 (2000)). The language of S.C. Code Ann. § 38-31-100 contains no clear intent by the legislature to derogate from or abrogate the collateral source rule. Thus, Brock’s receipt of UM coverage and PIP benefits from a source wholly independent of the wrongdoer does not allow the Association to deduct such damages barred by the collateral source rule without explicit

guidance to the contrary.

CONCLUSION

For the reasons set forth above and as set forth in Brock's filed Briefs related to this Cross-Appeal, this Court should reverse the Circuit Court's Order Granting Summary Judgment in favor of the Appellant-Respondent and find that the Association is not entitled to offset the \$5,000.00 in personal injury protection benefits and the \$25,000.00 in uninsured motorist coverage that Brock received. This Court should further find that the Association is responsible for paying Brock the remaining amount of his claim, totaling \$93,090.45.

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Of Whom Roger Brock is

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CERTIFICATE OF COUNSEL

The undersigned certifies that Respondent-Appellant's Final Brief, Final Response Brief and Final Reply Brief comply with Rule 211(b), SCACR.

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Of whom Roger Brock is *Respondent-Appellant.*

PROOF OF SERVICE

The undersigned hereby certifies that on **October 10, 2013**, a true and correct copy of the Reply Brief of Respondent-Appellant Roger Brock; Final Response Brief of Respondent-Appellant Roger Brock, and Final Brief of Respondent-Appellant Roger Brock was placed in an envelope with first class postage prepaid and affixed thereto and mailed to the following:

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SC Court of Appeals

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