

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2011-CP-10-8496

Appellate Case No. 2013-000402

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 the Respondent-Appellant.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

South Carolina Property and Casualty
Insurance Guaranty Association,

Plaintiff,

v.)

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

Defendants.)

COURT OF COMMON PLEAS

Civil Action No.: 2011-CP-10-8496

ORDER

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JULIE J. ARMSTRONG
CLERK OF COURT
BY

This matter is before the Court pursuant to cross motions for summary judgment filed by Plaintiff South Carolina Property and Casualty Insurance Guaranty Association (the "Association") and Defendant Roger Brock ("Brock"). Both parties' respective motions assert that each is entitled to judgment as a matter of law on the issue of whether the Association, in its capacity as the guaranty association for the relevant insolvent insurer pursuant to S.C. Code Ann. § 38-31-10 *et seq.*, is entitled to offset certain insurance benefits Brock received as a result of an underlying motor vehicle collision.

Upon the Court's consideration of the parties' motions, memoranda, and affidavits, and having heard oral arguments on October 24, 2012, I hereby grant in part and deny in part the parties' motions for summary judgment. This order rules upon each and all of the issues and grounds raised by both parties in their motions. More specifically, I hereby order that the Association may not offset any liability coverage and medical insurance benefits Brock received as a result of his claim. I further order that the Association is entitled, however, to offset

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personal injury protection and uninsured motorist insurance benefits that Brock received. Thus, the Association is ordered to pay Brock the amount of \$63,090.45.

FACTUAL BACKGROUND

Roger Brock is a citizen and resident of the State of Arkansas. On October 2, 2009, while visiting Walterboro, South Carolina, he was involved in a serious motor vehicle accident with a logging truck driven by Ryan Stephens. Brian Mason, Brock's friend who was driving the car in which Brock was riding, was killed in the collision. Angela Hess, who was also a passenger in the vehicle with Brock and Brian Mason, was likewise seriously injured as a result of the collision. Although not fatal, the injuries Brock sustained were both permanent and severe.

To seek redress for his injuries, Brock filed suit in the United States District Court for the District of South Carolina, Charleston Division, against Ryan Stephens and Malachi Sanders (the owner of the logging truck), among others, claiming entitlement to a recovery for severe injuries, lost wages, lost earning capacity, and past and future medical expenses. At the time of the collision, Ryan Stephens was insured through a policy issued by Aequicap Insurance Company ("Aequicap"), a Florida domiciled insurer that insured individuals and entities in the State of South Carolina.

Early on in the litigation, the parties obtained reliable information that Aequicap was in serious financial trouble. Therefore, all three cases arising out of the same collision were jointly mediated on January 5, 2011, just months after having been filed. The mediation was unsuccessful. However, following mediation and upon further consideration of Aequicap's precarious financial condition, Brock ultimately conceded to settle the case for a discounted amount. In exchange for a release of all claims against the Defendants, Brock agreed to accept

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the sum of \$185,000.00. The settlement agreement was filed with, and approved by, the District Court and became binding on the parties.

Less than a month after the settlement was reached, and prior to payment of the settlement amount, Aequicap was declared insolvent by the State of Florida. Because Aequicap, as the insolvent insurer, was a company admitted and licensed by the South Carolina Department of Insurance, and because the insured alleged to have caused Brock's injuries was a resident of South Carolina at the time Brock was injured, the claim was referred to the South Carolina Property and Casualty Guaranty Association. Therefore, demand was made on the Association for the payment of the full settlement amount of \$185,000.00.

The Association is an unincorporated non-profit legal entity created pursuant to the South Carolina Property and Casualty Insurance Guaranty Association Act, codified at S.C. Code Ann. § 38-31-10 *et seq.* (the "Act"). Pursuant to the Act, the Association is to pay certain "covered claims," as the term is defined under the Act. As a condition precedent to recovery from the Association, a claimant is required to first exhaust all available coverage from solvent insurers. See S.C. Code Ann. § 38-31-100 (West 2011). To the extent recovery is made, the Association is allowed an offset against its statutory obligation according to the Act. See id.

In light of the Aequicap insolvency and the collision in which Brock was severely injured, Brock received the following amounts from other solvent insurers:

- | | |
|---|-------------|
| a. Liability Coverage from Nationwide Ins. Co.
(insurer for Mason vehicle in which Brock was riding) | \$22,500.00 |
| b. Medical Insurance from Health Advantage/BCBS of Arkansas
(Brock's private pay medical insurance carrier) | \$40,590.45 |
| c. Uninsured Motorist Coverage from Progressive Ins. Co.
(resident relative coverage through Brock's parents' carrier) | \$25,000.00 |

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d. Personal Injury Protection from Progressive Ins. Co.
(resident relative coverage through Brock's parents' carrier) \$5,000.00

TOTAL \$93,090.45

The Association asserts entitlement to an offset for all payments from solvent insurers pursuant to S.C. Code Ann. § 38-31-100. As such, the Association has only paid Brock \$91,909.55, representing the difference between the settlement amount and the claimed offsets. Brock objects to the reduction and seeks payment of the claimed offsets in the amount of \$93,090.45. The \$91,909.55 Brock was paid by the Association and the Association's claimed offset of \$93,090.45 total Brock's \$185,000.00 settlement amount with Aequicap.

LEGAL STANDARD

Summary judgment is appropriate if, upon viewing the evidence and inferences to be drawn from it in a light most favorable to the non-moving party, there is no genuine issue of material fact and the moving party is clearly entitled to judgment as a matter of law. S.C. R. Civ. P. 56(c); Standard Fire Ins. Co. v. Marine Contracting & Towing Co., 301 S.C. 418, 392 S.E.2d 460 (1990); Davis v. Piedmont Eng'rs Architects & Planners, 284 S.C. 20, 324 S.E.2d 325 (Ct. App. 1984). "The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). "A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." Colleton Cnty. Taxpayers Ass'n v. Sch. Dist. of Colleton Cnty., 371 S.C. 224, 231, 638 S.E.2d 685, 688 (2006).

This action involves an issue of statutory interpretation. Questions of statutory interpretation are questions of law. Grier v. AMISUB of South Carolina, Inc., 397 S.C. 532, 535, 725 S.E.2d 693, 695 (2012) (quoting CFRE, LLC v. Greenville Cnty. Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011)). "It is well established that '[t]he cardinal rule of statutory

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construction is to ascertain and effectuate the intent of the legislature.” Id. (quoting Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). ““What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature.”” Id. (quoting Hodges, 341 S.C. at 85; 533 S.E.2d at 581). Courts must “follow the plain and unambiguous language in a statute.” Id. The words of the statute “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.’” Cabiness v. Town of James Island, 393 S.C. 176, 192, 712 S.E.2d 416, 425 (2011) (quoting Eagle Container Co. v. County of Newberry, 379 S.C. 564, 570, 666 S.E.2d 892, 896 (2008)). However, when “applying the words literally leads to a result so patently absurd that the General Assembly could not have intended it,” courts then “look beyond the statute’s plain language.” Grier, at 536, 725 S.E.2d at 695 (citing Cabiness, 393 S.C. at 192, 712 S.E.2d at 425).

When provisions of a statute conflict, the court has a “duty to attempt to harmonize the [] two ostensibly at-odd provisions.” Grazia v. S.C. State Plastering, LLC, 390 S.C. 562, 571, 703, S.E.2d 197, 201 (2010); see also Hinton v. S.C. Dep’t of Probation, Parole and Pardon Servs., 357 S.C. 327, 592 S.E.2d 335 (Ct. App. 2004) (the court should seek a construction that gives effect to every word of a statute rather than adopting an interpretation that renders a portion meaningless). Thus, “a specific statutory provision prevails over a more general one.” Wooten ex re. Wooten v. S.C. Dept. of Transp., 333 S.C. 464, 468, 511 S.E.2d 355, 357 (1999).

I. The Association and Brock Are Both Entitled to Summary Judgment in Part.

There is no genuine issue of material fact in this declaratory judgment action. During oral arguments, counsel for both parties conceded that no genuine issues of material fact exist and the Court finds that summary judgment is appropriate in this action. The Court shall

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determine this declaratory action of statutory interpretation as a matter of law. See Grier, 397 S.C. at 535, 725 S.E.2d at 695.

The purpose of the South Carolina Property and Casualty Insurance Guaranty Association "is to provide protection for insureds in the event their insurance carriers become insolvent." South Carolina 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); see also South Carolina Prop. & Cas. Ins. Guar. Ass'n v. Carolinas Roofing & Sheet Metal Contractor's Self-Insurers Fund, 315 SC 555, 446 S.E.2d 422 (1994). Similarly, under S.C. Code Ann. § 38-29-30, the purpose of the South Carolina Life and Accident and Health Insurance Guaranty Association Act, the Association's sister organization, is:

to maintain public confidence in the promises of insurers by providing a mechanism for protecting . . . insureds . . . of life insurance policies, accident and health insurance policies . . . against failure in the performance of contractual obligations due to the impairment of the insurer issuing these policies or contracts.

Id. In order to provide this protection, "an association of insurers is created to enable the guaranty of payment of benefits." S.C. Code Ann. § 38-29-30(1).

Under S.C. Code Ann. § 38-31-20(8) (West 2011), "covered claim" under this chapter is defined as "an unpaid claim . . . which arises out of and is within the coverage and is subject to the applicable limits of an insurance policy to which this chapter applies." According to § 38-31-30(1), "[t]his chapter applies to all kinds of direct insurance but does not apply to . . . life, annuity, health, or accident insurance." S.C. Code Ann. § 38-31-30(1) (West 2011).

The offset or exhaustion provision of the Act provides in pertinent part:

A person, having a claim under an insurance policy, whether or not it is a policy issued by a member insurer, and the claim under such other policy arises from the same facts, injury, or loss that gave rise to the covered claim against the association, is required to first exhaust all coverage and limits provided by any

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such policy. Any amount payable on a covered claim under this chapter must be reduced by the full limits of such other coverage as set forth on the declarations page and the association shall receive a full credit for such limits, or, where there are no applicable limits, the claim must be reduced by the total recovery. Notwithstanding the foregoing, no person may be required to exhaust all coverage and limits under the policy of an insolvent insurer.

S.C. Code Ann. § 38-31-100(1) (West 2011). Pursuant to this provision, even if “the policy is direct insurance, the Act applies only to a ‘covered claim.’” S.C. Prop. & Cas. Ins. Guar. Ass’n v. Carolinas Roofing & Sheet Metal Contractors Self-Ins. Fund, 315 S.C. 555, 557, 446 S.E.2d 422, 424 (1994).

The issue of whether the exhaustion statute applies to allow the Association to offset payments from other solvent insurers appears to be a matter of first impression under South Carolina law under the circumstances presented by this action.

a. The Association May Not Offset \$22,500.00 for Liability Coverage Received by Brock.

The language of S.C. Code Ann. § 38-31-100(1) does not unambiguously allow the Association to offset liability coverage received by Brock from Nationwide Insurance Company, the insurer of the vehicle involved in the collision, when construed in context of the intended purpose of the statute and in a manner which harmonizes with its subject matter and general purpose. Rather, such an interpretation would directly defeat the stated purpose of the Association and be inconsistent with how many other courts have interpreted similar offset statutes under like guaranty association statutes.

As a preliminary matter, 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. Upon detailed review, many other states have statutes that were amended by each state’s respective legislature in order to specifically provide whether

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their state guaranty association is entitled to offset particular forms of independent insurance coverage.¹ Further review reveals that prior to such amendments, many of the cited statutes contained a more ambiguously worded offset provision similar to South Carolina's version contained in S.C. Code Ann. § 38-31-100.²

In fact, when interpreting their own state offset statutes, several other courts have held an offset of any benefits rendered by solvent insurers for the same injury that results in a recovery less than the full amount to which the insured is entitled unfairly penalizes the injured party. See, e.g., Gibson v. Ala. Ins. Guar. Ass'n, 601 So. 2d 416, 416–19 (Ala. 1992); Harris v. Lee, 387 So. 2d 1145, 1146 (La. 1980); R & R Indus. Park, LLC v. Utah Prop. & Cas. Ins. Guar. Ass'n, 199 P.3d 917, 925–27 (Utah 2008); Int'l Collection & Serv. v. Vt. Prop. & Cas. Ins. Guar. Ass'n, 150 Vt. 630, 633, 555 A.2d 978, 980 (Vt. 1988).

For example, the Supreme Court of Vermont held that a plaintiff claimant, who suffered fire loss for which it obtained partial recovery from its own insurer, was entitled to recover unpaid losses from the guaranty association after a third party's insurer became insolvent. Int'l

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); La. Rev. Stat. Ann. § 22:2062A (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 P.A. Cons. Stat. Ann. § 991.1817(a) (statute amended in 1994 to include particular language about offset classes available to guaranty association); R.I. Gen. Laws Ann. § 27-34-12(a)(1)-(5) (statute amended in 2010 to include particular language specifying offset classes available to guaranty association); Tex. Ins. Code Ann. § 462.251(a)(1) (statute amended in 2005 to include particular language specifying offset classes available to guaranty association).

² See id. Prior to such statutory amendments many other states had ambiguously worded versions of the model act concerning a guaranty association's ability to offset other insurance benefits received by a claimant. "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 (2002)

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Collection & Serv., 150 Vt. at 633, 555 A.2d at 978, 980. The Vermont statute at issue included the exhaustion and non-duplication of recovery provisions of the Vermont Property and Casualty Insurance Guaranty Association Act, which states:

Any person having a claim against an insurer under any provision in an insurance policy other than policy of an insolvent insurer which is also a covered claim, shall be required to exhaust first his or her right under such policy. Any amount payable on a covered claim under this subchapter shall be reduced by the amount of any recovery under such insurance policy.

8 V.S.A. § 3619(a) (West 2011).

The Int'l Collection & Serv. court found the statute to be ambiguous, and thus examined the intent of the Vermont Legislature. See Int'l Collection & Serv., 150 Vt. at 633, 555 A.2d at 980. According to the stated objectives of the act, the court found that the intent of the legislature was “to eliminate any loss caused by the insolvency of the insurer.” Id. That, in conjunction with the language of § 3619(a), lead “to the conclusion that the act is not to be construed so as to place the claimant in any different position than it would have been had the insolvency not occurred.” Id. Relying on an Arizona case “construing an almost identical clause,” the court agreed that “the words ‘shall be reduced’ require an offset recovered against the total ‘amount payable’ to the claimant as damages.” Id. at 634, 555 A.2d at 980. The amount the plaintiff recovered from the third party and its own insurance “fell short of the stipulated loss” because, “[b]ut for the insolvency, [the plaintiff] could have recovered this amount in the action against the [insolvent third party’s] insureds.” Id. The court held that “the plaintiff is entitled to recovery from the guaranty fund for its unpaid loss” because this result “achieved the intent of the section to prevent a duplication of recoveries, and comports with the act’s purpose to leave a claimant in the same position as if there had been no insolvency.” Id. at 633–34, 555 A.2d at 980.

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More recently, the Supreme Court of Utah held that the Utah Property and Casualty Insurance Guaranty Association ("UPCIGA") was not permitted to offset its obligation to cover claims by the amounts plaintiffs received from third party insurers when plaintiffs did not recover the total amount to which they were entitled. R & R Indus. Park, LLC v. Utah Prop. & Cas. Ins. Guar. Ass'n, 199 P.3d 917, 925 (Utah 2008). The offset provision at issue states:

- (1)(a) Any person who has a claim against an insurer, whether or not the insurer is a member insurer, under any provision in an insurance policy, other than a policy of an insolvent insurer that is also a covered claim, is required to first exhaust that person's right under that person's policy.
- (b) Any amount payable on a covered claim under this part under an insurance policy is reduced by the amount of any recovery under the insurance policy described in Subsection (1)(a).

Utah Code § 31A-28-213 (West 2008).

The R & R Indus. Park, LLC court found the provision to be ambiguous and rejected the interpretation that the guaranty association was permitted to subtract from its obligation "any amount the claimant has recovered from *any* other insurance policy." R & R Ins. Park, LLC, 199 P.3d at 925 (emphasis in original). Rather, the court saw this interpretation "counterintuitive and, in fact, [to] undermine [] the purpose of the statute, which is to protect the insured from the risks of insolvency of insurance carriers." Id. To allow the offset of any recovery would "eliminate much, if not all, of the obligation of the UPCIGA and deprive insureds of coverage they secured from their insolvent carriers." Id. In effect, it would also penalize claimants for having purchased multiple coverage for large losses. Id. Relying on and agreeing with decisions from courts in Connecticut, California, Nevada, the District of Columbia, and New Mexico, the Supreme Court of Utah held that "the offset provision of the Guaranty Act applies to prevent double recovery of amounts above an insured's total loss. UPCIGA may not deduct or offset any recovery from a third party insurer from its obligation before the insured has been fully paid for

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its loss.” Id. at 926–27 (citing Conn. Ins. Guar. Ass’n v. Union Carbide Corp., 271 Conn. 371, 388, 585 A.2d 1216, 1224–25 (1991) (holding that the “evident purpose of providing . . . for a reduction of a covered claim ‘by the amount of any recovery’ from other available insurance was to prevent a person from twice receiving benefits for the same loss or otherwise obtaining a windfall, not to reduce the amount of a claim for a loss that remains partially unsatisfied”); Zhou v. Jennifer Mall Rest. Inc., 699 A.2d 348, 352 (D.C. 1997) (stating that the non-duplication of recovery principle of guaranty associations prevents “a situation in which an insured collects the amount of the total loss from one insurance company and then gets an additional sum from [the guaranty association]”) (alteration in original); Aztec Wall Serv. Co. v. Prop. & Cas. Ins., Guar. Ass’n of N.M., 115 N.M. 475, 480, 853 P.2d 726, 731 (1993) (“To require an offset, as the Association urges, of the amount recovered from the primary insurance carrier against the Association’s liability would be absurd because it was that recovery which triggered the application of the [plaintiff’s] excess insurance policy in the first place.”); CD Inv. Co. v. Cal. Ins. Guar. Ass’n, 84 Cal. App. 4th 1410, 1427, 101 Cal. Rpt. 2d 806, 816 (2000) (stating that “the purpose of the [insurance guaranty] act is to place the insured in a position to recover the same amount available under the insured’s policy, as if the insurer had not become insolvent”) (quoting Cimini v. Nev. Ins. Guar. Ass’n, 112 Nev. 442, 445, 915 P.2d 279, 282 (1996) (alteration in original)). Thus, because the plaintiff in R & R Ins. Park, LLC had not yet recovered the full amount, the offset provision of the statute did not apply because the statute’s purpose was to prevent duplicative recoveries, not to reduce the amount of the full recovery. Id. at 927.

Turning to the facts of the within action, Brock was to receive \$185,000.00 from the now insolvent Aequicap under the pertinent settlement agreement. The Association has already paid

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\$91,909.55. The remaining \$93,090.45 that the Association claims should be offset would not result in a prohibited duplicative recovery, as Brock has not yet received the entire \$185,000.00 to which he is entitled under the settlement agreement. Accordingly, construed in context of the intended purpose of the statute and in a manner which harmonizes with the subject matter and general purpose of the Act, the Association may not offset the liability insurance benefits received by Brock and Brock is entitled to judgment on this ground.

b. The Association May Not Offset \$40,590.45 for Medical Insurance Benefits received by Brock.

In addition to the foregoing reasoning, the medical benefits Brock received may not be used to offset the Association's liability because such benefits are subject to the collateral source rule and to do so would lead to a patently absurd result by penalizing those individuals with private pay medical insurance benefits.³ Furthermore, numerous courts in other states have held that a guaranty association is not entitled to offset private pay medical insurance benefits under similar state offset statutes because the receipt of such benefits by an insured does not constitute a double recovery.

For example, in Harris v. Lee, 387 So. 2d 1145, 1146 (La. 1980), the Supreme Court of Louisiana held that the Louisiana Guaranty Association was not permitted to reduce its obligation by the amount of the medical payments the plaintiff received under his group health policy for injuries sustained in an automobile accident. The offset provision of the Louisiana Insurance Guaranty Association Law at that time stated that "[a]ny amount payable on a covered claim under this [p]art shall be reduced by the amount of any recovery under such insurance

³ As a preliminary point of clarification, Blue Cross/Blue Shield of South Carolina has no pending claim for subrogation or reimbursement for the medical insurance benefits received by Brock.

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policy.” Id. (citing LSA-R.S. § 22:1386(1)).⁴ The provision, however, was limited by LSA-R.S. § 22:1377, which read:

This Part shall apply to all kinds of direct insurance, except life, health and accident, title, disability, mortgage guaranty, and ocean marine insurance.

Id. Thus, because “[h]ealth and accident insurance is specifically excluded from the Louisiana Insurance Guaranty Association Law and the non-duplication of recovery provision does not apply to payments by health and accident insurers,” there is no duplication of recovery. Harris v. Lee, 387 So. 2d at 1146; see also Alabama Ins. Guar. Ass’n v. Stephenson, 514 So.2d 1000, 1002 (Ala. 1987) (holding that Blue Cross health insurance was “a kind of direct insurance excepted” by Alabama’s non-duplication provision); Ind. Ins. Guar. Ass’n v. Davis, 768 N.E.2d 902, 908-09 (Ind. Ct. App. 2002) (holding that “the claimant’s recovery from Blue Cross-Blue Shield was not a ‘covered claim’ because the [guaranty association act] does not apply to health insurance” and as such, the guaranty association was not permitted to reduce their obligation by these amounts).

Courts have also made a distinction when a statute excludes health insurance but not accident insurance. In Ind. Ins. Guar. Ass’n v. Blickensderfer, 778 N.E.2d 439, 444 (Ind. Ct. App. 2002), the Court of Appeals of Indiana stated that the “plain language of [the guaranty association act] makes it clear that the chapter does not apply to health insurance and, as a result, a ‘covered claim’ could not stem from health insurance benefits.” Id.

Other states adopting the model act without such limitations reach this same conclusion. See Brennan v. Kansas Ins. Guar. Ass’n, 293 Kan. 446, 456, 264 P.3d 102, 111 (Kan. 2011) (“Most jurisdictions addressing whether their own guaranty fund may offset medical insurance

⁴ La. Rev. Stat. Ann. § 22:206A was formerly cited as LSA-R.S. 22:1386. As noted herein, this provision was later amended in 2010 to specifically provide that medical coverage is subject to offset. No such guiding language is contained in S.C. Code Ann. § 38-31-100(1).

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benefits under an identical or substantially similar statute to the pre-amended version of K.S.A. 40-2910 have found no entitlement to offset medical insurance benefits.”); see also Pritchett v. Clifton, 738 F.2d 319, 320-21 (8th Cir. 1984) (guaranty association was not entitled to offset amount injured party recovered under her medical insurance policy). As such, “covered claims” under the statute could not stem from health insurance benefits.

To interpret the statute to allow offsets for medical insurance would violate the language of the statute and would be unsuccessful in giving effect to the expressed intent of the legislature. See Grier v. AMISUB of South Carolina, Inc., 397 S.C. 532, 536, 725 S.E.2d 695 (2012); see also Stephens, 514 So.2d at 1002 (excluding health insurance received by claimant from offset provision was consonant with the purposes of both the guaranty association act and the non-duplication provision, to prevent duplicative recovery); Indiana Ins. Guar. Ass'n v. Blickensderfer, 778 N.E.2d 439, 443 (Ind. Ct. App. 2002) (finding that surely the legislature “did not intend that the statute would require a claimant to exhaust a claimant’s rights under any conceivable insurance policy for any conceivable claim that may be pending, even if such a claim or such a policy had nothing to do with the claim against the insolvent insurer” because such a result would be “absurd”).

Furthermore, “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

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proceeds, it would have done so.” Id. Moreover, 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. In the Court’s view, the collateral source rule likewise applies to the offset provision under the Act. Brock’s receipt of medical 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.

In addition, to permit offsets for these recoveries would also essentially penalize Brock for having medical benefits and other forms of private insurance coverage. See R & R Ins. Park, LLC, 199 P.3d at 925 (stating that to allow the guaranty association an offset of any recovery would in effect penalize claimants for having purchased multiple coverage for large losses); CD Inv. Co., 84 Cal. App. 4th at 1428, 101 Cal. Rpt.2d at 816 (refusing to permit the guaranty association to reduce its obligation by other amounts paid to claimant by solvent insurers because the insured would be put in a worse position for having bought two policies). By allowing the Association to offset Brock’s medical insurance benefits, Brock is effectively penalized for having purchased and utilizing the benefit of his private pay insurance. In no other context would a tortfeasor be permitted an offset for payments made by a medical insurance carrier. Such a result obviously defeats the stated purpose of the Association because, instead of protecting Brock, the Association unjustly charges him for having separate coverage. This result cannot be the intent of the legislature. Accordingly, the Association may not offset the \$40,590.45 in medical benefits received by Brock and judgment on this ground is granted in favor of Brock.

Rmpt/15

c. The Association is Entitled to Offset \$25,000.00 for Uninsured Coverage Received by Brock.

As a resident relative living with his parents at the time of the subject wreck, Brock received uninsured motorist coverage in the amount of \$25,000.00 through a policy his parents held with Progressive Insurance Company. The Association is entitled to an offset for this recovery. Brock reached a settlement with Stevens, the insured under Aequicap's policy, and now asserts a claim against the Association based on this settlement. Because Brock's claim is also within the coverage of the uninsured policy, a policy issued by a solvent insurer, Brock must first exhaust the solvent insurer's coverage. See S.C. Code Ann. §§ 38-31-100(1), 38-31-100(5). Brock obtained a recovery under this uninsured motorist policy solely by virtue of Aequicap's insolvency, which rendered Ryan Stephens, the at-fault driver, an uninsured motorist. Otherwise, Brock would not have received any recovery under that policy. Brock's claim against the Association must, therefore, be reduced by the amount Brock received from the solvent insurer's uninsured coverage.

Although neither party has cited any South Carolina cases regarding the Association's entitlement to an offset for a claimant's uninsured coverage, case law from other states regarding a guaranty association's right to offset uninsured motorist coverage is instructive. For example, in Stecher v. Iowa Ins. Guar. Ass'n, 465 N.W.2d 887 (Iowa 1991), the court affirmed a declaratory judgment in favor of the Iowa Guaranty Association on its claim for an offset of uninsured motorist coverage. The Supreme Court of Iowa noted "[o]ur interpretation of section 515B.9(1) comports with decisions in the majority of states which have interpreted similar statutes to hold that accident victims must exhaust their uninsured motorist coverages before filing a claim with the state's insurance guaranty association." Id. at 889; see also Northland Ins. Co. v. Virginia Prop. & Cas. Ins. Guar. Ass'n, 240 Va. 115, 392 S.E.2d 682 (Va. 1990) (finding

RMP/16

that the Virginia Guaranty Association was not liable to the claimants after the offset of their uninsured coverage recovery); Hetzel v. Clarkin, 244 Kan. 698, 772 P.2d 800 (Kan. 1989) (holding that the Kansas Guaranty Association is entitled to a credit for claimant's recovery under his own uninsured coverage).

Consistent with the foregoing, the Association is entitled to offset its liability to Brock by the uninsured coverage in the amount of \$25,000.00 and judgment is granted in favor of the Association on this ground.

d. The Association is Entitled to Offset \$5,000.00 for Personal Injury Protection Coverage Received by Brock.

Brock also received personal injury protection ("PIP") benefits in the amount of \$5,000.00 from the same policy in which he received the uninsured coverage. The Association is entitled to an offset for this recovery too. Brock reached a settlement with Stevens, the insured under Aequicap's policy, and now asserts a claim against the Association based on this settlement. Because Brock's claim is also within the coverage of the policy issued by a solvent insurer, Brock must first exhaust the solvent insurer's coverage. See S.C. Code Ann. §§ 38-31-100(1), 38-31-100(5). Brock's claim against the Association must, therefore, be reduced by the amount Brock received for PIP benefits.

Once again, although neither party has cited any South Carolina cases regarding the Association's entitlement to an offset for a claimant's receipt of PIP benefits, case law from other states regarding a Guaranty Association's right to offset PIP benefits is instructive. In McMichael v. Robertson, 77 Md. App. 208, 549 A.2d 1157 (Md. Ct. Spec. App. 1988), the court found that the recovery received by the claimants from their own personal injury protection coverage offset the Maryland Guaranty Corporation's liability for a judgment against an insolvent liability insurer. Id. at 215, 549 A.2d at 1160-61. Consistent with this

RmdTT/17

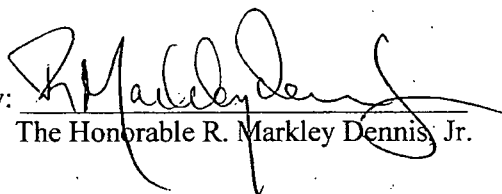
general holding, the Association is entitled to offset the PIP benefits Brock received and judgment is granted in favor of the Association on this ground.

CONCLUSION

For the reasons set forth above, both parties' motions for summary judgment are granted in part and denied in part. The Association may not offset the \$22,500.00 for liability coverage and the \$40,590.45 for medical insurance benefits Brock received. The Association is, however, entitled to offset the \$5,000.00 for personal injury protection coverage and the \$25,000.00 for uninsured motorist coverage Brock received. Thus, the Association is hereby ordered to pay Brock the remaining amount of \$63,090.45.

AND IT IS SO ORDERED.

By:


The Honorable R. Markley Dennis, Jr.

Charleston, South Carolina

January 14, 2013

Rmpt/18

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	
South Carolina Property and Casualty Insurance Guaranty Association,	)	Civil Action No.
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
Roger Brock, Ryan Stevens, Malachi Sanders and Health Advantage/BCBS of Arkansas,	)	
	)	
Defendants.	)	

**COMPLAINT FOR
DECLARATORY JUDGMENT**

FILED
2011 NOV 15 AM 10:05
JULIE L. ARMSTRONG
CLERK OF COURT

The Plaintiff South Carolina Property and Casualty Insurance Guaranty Association ("Plaintiff" or "Association"), complaining of the Defendants herein, allege as follows:

THE PARTIES, JURISDICTION, AND VENUE

1. The Association is an unincorporated legal entity created by the South Carolina legislature pursuant to the South Carolina Property and Casualty Insurance Guaranty Association Act, S.C. Code § 38-31-10 et seq. (the "Act").
2. Defendant Roger Brock ("Brock") is a resident and citizen of the State of Arkansas.
3. Defendant Ryan Stevens is a resident and citizen of the State of South Carolina.
4. Defendant Malachi Sanders is a resident and citizen of the State of South Carolina.
5. Defendant Health Advantage/BCBS of Arkansas ("BCBS") is a corporation organized and existing under the laws of the State of Arkansas.
6. This Court has jurisdiction pursuant to S.C. Code Ann. § 15-53-30.

7. Venue is proper in Charleston County pursuant to S.C. Code Ann. § 15-7-30.

FACTUAL BACKGROUND

8. On or about October 2, 2009, Brock was involved in a motor vehicle accident in which he sustained certain injuries.

9. Brock initiated a lawsuit in the United District Court for the District of South Carolina, captioned *Roger W. Brock v. Ryan Stephens, et al*, C.A. No. 2:10-cv-02926-RMG.

10. In or around January 2011, the parties reached a settlement of Brock's claims for \$185,000.00.

11. This settlement was approved by the court, and Brock's claim was dismissed.

12. Brock has received \$22,500.00 in liability coverage from a Nationwide Insurance Company policy issued to Brian Mason.

13. Brock has received \$25,000.00 for uninsured coverage from Progressive Insurance Company.

14. Brock has received \$5,000.00 for personal injury protection from Progressive Insurance Company.

15. Brock has received \$40,590.45 from BCBS in medical insurance benefits arising out of the accident on October 2, 2009.

16. Prior to payment of the settlement amount, Aequicap Insurance Company ("Aequicap"), the insurer for Malachi Sanders, among others, was declared insolvent by the courts of Florida and became an "insolvent insurer," as that term is defined in the Act.

17. Ryan Stevens was the driver of a vehicle insured under the Aequicap policy, and involved in the automobile accident at issue.

18. As a result of Aequicap's insolvency, Brock's claims against Sanders and Stephens became a "covered claim" under the Act.

19. Brock has filed a claim with the Association and demanded payment of the \$185,000.00 settlement amount.

20. The Association admits certain amounts are due and owing to Brock, and has offered to make payment of those amounts, which Brock has refused.

21. In extending the offer to pay the amount the Association acknowledges as due and owing, the Association denies it is obligated to provide the coverage and payment to the extent demanded by Brock.

22. The Association's duties, liabilities and obligations are controlled by the terms and conditions set forth in the Act, and its obligations and responsibilities are not the same as the insolvent insurer.

23. Pursuant to S.C. Code § 38-31-100, the Act requires that all coverage provided by any other insurance policy first must be exhausted before payment may be obtained from the Association. The Association's obligation, if any, is reduced by the full policy limits available under such other insurance policy.

24. Pursuant to the express terms of the Act, the Association is entitled to an offset of the amounts received by Brock for liability coverage, uninsured coverage, personal injury protection, and private pay medical insurance benefits as more fully explained below.

FOR A FIRST CAUSE OF ACTION
(Declaratory Judgment)

25. Plaintiff reasserts and incorporates the allegations of Paragraphs 1 through 24 of this Complaint as fully as if repeated verbatim.

26. The Association requests, and interests of the parties to this action require, a judicial determination, in accordance with the Act, as to whether the association is obliged to pay Brock the settlement amount of \$185,000.00 in light of the liability coverage he received in the amount of \$22,500.00; the uninsured coverage he received in the amount of \$25,000.00; the personal injury protection he received in the amount of \$5,000.00; and the private pay medical insurance benefits he received in the amount of \$40,590.45.

27. There is an actual controversy between the Association and Defendants as to the Association's statutory obligations, and a declaratory judgment is necessary for the purpose of settling and affording relief from uncertainty with respect to the rights, status, and future legal responsibilities between the Association and the Defendants.

28. S.C. Code § 38-31-100(1) provides:

A person, having a claim under an insurance policy, whether or not it is a policy issued by a member insurer, and the claim under such other policy arises from the same facts, injury or loss which gave rise to the covered claim against the association, is required to first exhaust all coverage and limits provided by any such policy. Any amount payable on a covered claim under this chapter must be reduced by the full limits of such other coverage as set forth on the declarations page and the association shall receive a full credit for such limits, or, where there are no applicable limits, the claim must be reduced by the total recovery.

29. S.C. Code § 38-31-100(1)(a) provides:

A claim under a policy providing liability coverage to a person who may be jointly and severally liable with or a joint tortfeasor with the person covered under the policy of the insolvent insurer that gives rise to the covered claim must be considered to be a claim arising from the same facts, injury, or loss that gave rise to the covered claim against the association. Any amount payable on a covered claim under this chapter must be reduced by the full and combined policy limits of all joint tortfeasors.

30. S.C. Code § 38-31-100(5) provides:

A person who has liquidated by settlement or judgment a claim against an insured under a policy issued by an insolvent insurer, and the claim is a covered

claim and is also a claim within the coverage of any policy issued by a solvent insurer, must be required first to exhaust all coverage and limits provided under the policy issued by the solvent insurer before execution, levy, or any other proceedings are begun to enforce any judgment obtained against or the settlement with the insured of the insolvent insurer. Any amount payable on a covered claim under this chapter, whether through settlement, judgment, or otherwise, must be reduced by the full limits of such other coverage as set forth on the declarations page of the policy issued by the insolvent insurer.

31. Brock's claims against Nationwide for liability coverage, Progressive for uninsured coverage and personal injury protection, and BCBS for medical insurance benefits arise from the same facts, injury or loss which gave rise to his claim against the Association, namely the motor vehicle accident occurring on or about October 2, 2009.

32. As such, Brock is required to exhaust the coverage provided by Nationwide, Progressive, and BCBS before recovering from the Association, and the Association is therefore entitled to an offset of the full limits available under these policies.

33. BCBS may claim an interest in this litigation in that they have asserted a subrogation lien against Brock's recovery of insurance benefits in connection with the accident on October 2, 2009.

34. Pursuant to the express terms of the Act, any subrogation rights of BCBS are subject to, and subordinate to, the Association's right of offset.

35. S.C. Code § 38-31-100(4) provides:

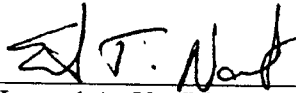
No claim held by an insurer . . . based on . . . rights of subrogation . . . may be recovered from a claimant or asserted in any legal action against a person insured under a policy issued by an insolvent insurer or the association except to the extent the amount of the claim exceeds the obligation of the association under this chapter.

36. As such, any subrogation claim by BCBS does not defeat the Association's entitlement to an offset of the insurance benefits received by Brock from BCBS.

WHEREFORE, having fully complained of the Defendants, Plaintiff prays for a declaration that Plaintiff's liability to Brock in connection with his settlement for \$185,000.00 is offset by the limits of coverage provided by Nationwide's liability coverage, Progressive's uninsured coverage, Progressive's personal injury protection, and the total recovery from BCBS's health insurance benefits; for a declaration of the rights of the parties; and for such other and further relief as the Court may deem just and proper.

NELSON MULLINS RILEY & SCARBOROUGH, L.L.P.

By:



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Attorneys for Plaintiff South Carolina Property and Casualty
Insurance Guaranty Association

Columbia, South Carolina

November 15, 2011

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

South Carolina Property and Casualty
Insurance Guaranty Association,

Plaintiff,

v.

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

Defendants.

COURT OF COMMON PLEAS

Civil Action No.: 2011-CP-10-8496

**ANSWER OF DEFENDANT
ROGER BROCK**

FILED
2011 DEC 21 PM 2:38
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Defendant Roger Brock, as and for his Answer, hereby states and alleges as follows:

FOR A FIRST DEFENSE

1. All allegations of the Complaint are denied unless specifically admitted, modified, or explained herein.
2. On information and belief, Defendant Brock admits the allegations in Paragraph 1 of the Complaint.
3. Defendant Brock admits the allegations in Paragraph 2 of the Complaint.
4. On information and belief, Defendant Brock admits the allegations in Paragraphs 3 and 4 of the Complaint.
5. Defendant Brock is without sufficient information to admit or deny the allegations in Paragraph 5 of the Complaint.
6. Paragraphs 6 and 7 of the Complaint call for legal conclusions to which no responses are required.

7. Defendant Brock admits the allegations in Paragraphs 8, 9, and 10 of the Complaint.

8. Answering Paragraph 11 of the Complaint, Defendant Brock admits that his claim in the federal court action was dismissed following the settlement of the case, but denies that his settlement was approved by the federal court in any hearing or otherwise.

9. Defendant Brock admits the allegations in Paragraphs 12, 13, 14, and 15 of the Complaint.

10. Answering Paragraph 16 of the Complaint, Defendant Brock admits that AequiCap Insurance Company, the insurer for Defendant Malachi Sanders among others, was declared insolvent by the courts of Florida prior to the payment of the settlement amount. The remaining allegations in Paragraph 16 of the Complaint call for a legal conclusion to which no response is required.

11. On information and belief, Defendant Brock admits the allegations in Paragraph 17 of the Complaint.

12. Paragraph 18 of the Complaint calls for a legal conclusion to which no response is required.

13. Defendant Brock admits the allegations in Paragraph 19 of the Complaint.

14. Defendant Brock admits the allegations in Paragraph 20 of the Complaint, but would clarify and allege that the amounts admitted and offered by the Plaintiff are substantially less than what is due and owing to Defendant. Defendant Brock would further admit that he has received payment from Plaintiff for the uncontested amount of his claim totaling \$91,909.55.

15. Defendant Brock denies the allegations in Paragraph 21 of the Complaint.

16. Paragraphs 22, 23, and 24 of the Complaint call for legal conclusions to which no responses are required. To the extent those paragraphs raise allegations of fact, the same are denied.

17. Answering Paragraph 25 of the Complaint, Defendant Brock repeats and realleges the allegations set forth herein above.

18. Defendant Brock denies the allegations in Paragraphs 26 and 27 of the Complaint and alleges that the Plaintiff is fully liable to this Defendant in the amount of \$185,000 and is not entitled to a set off for the receipt of insurance benefits by the Defendant from other sources.

19. Paragraphs 28, 29, and 30 of the Complaint contain passages from various statutory sections to which no response is required. Defendant Brock further craves reference to the language contained in those statutes.

20. Defendant Brock denies the allegations in Paragraph 31 of the Complaint except to the extent that the claims made by Defendant to Nationwide, Progressive, BCBS and the Association were all a result of the collision that occurred on October 2, 2009, in which Defendant sustained serious injuries and substantial losses.

21. Paragraph 32 of the Complaint calls for a legal conclusion to which no response is required. To the extent that this paragraph raises an allegation of fact, the same is denied.

22. Defendant Brock is without sufficient information to admit or deny the allegations in Paragraph 33 of the Complaint, but does admit that BCBS has asserted a subrogation lien against Defendant's recovery of benefits in connection with the accident that occurred on October 2, 2009.

23. Paragraph 34 of the Complaint calls for a legal conclusion to which no response is required.

24. Paragraph 35 of the Complaint contains a passage from a statutory section to which no response is required. Defendant Brock further craves reference to the language contained in that statute.

25. Paragraph 36 of the Complaint calls for a legal conclusion to which no response is required. To the extent that this paragraph raises an allegation of fact, the same is denied.

26. Defendant Brock denies the factual statements set forth in the Wherefore clause of the Complaint.

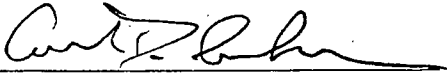
FOR A SECOND DEFENSE
(Improper Venue)

27. The venue chosen by Plaintiff is improper. The Complaint should be dismissed and/or venue should be changed to Colleton County pursuant to S.C. R. Civ. Pro. 12(b)(3), 82(b), and S.C. Code Ann. §§ 15-7-30 and 15-7-100 (Supp. 2010) given that two of the named defendants are, upon information and belief, residents of Colleton County and a substantial part of the alleged act or omission giving rise to Defendant Brock's claim also occurred in Colleton County.

WHEREFORE, Defendant Roger Brock prays that the Complaint against him be dismissed, that he be awarded judgment against the Plaintiff in the amount of \$185,000 minus the amount already tendered by Plaintiff totaling \$91,909.55, that he be awarded prejudgment interest, and for such other and further relief as determined by the Court.

Defendant Brock hereby objects to Plaintiff's motion and/or request pursuant to S.C. R. Civ. Pro. 53(b) for a general Order of Reference to the Master in Equity for Charleston County as set forth in the Summons.

ROSEN, ROSEN & HAGOOD, LLC

By: 

Andrew D. Gowdown
Lorene Stuhr Dukes
134 Meeting Street, Suite 200
P.O. Box 893
Charleston, SC 29402
(843) 577-6726

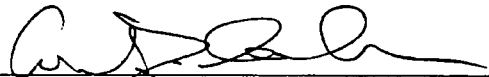
ATTORNEYS FOR DEFENDANT
ROGER BROCK

Charleston, South Carolina
December 21, 2011

CERTIFICATE OF SERVICE

I certify that on December 21, 2011, I caused
to be: ☒ mailed
☐ hand delivered
☐ faxed
☐ e-mailed

a true copy of the foregoing pleading(s) to
each counsel of record.


Attorney for Defendant Brock

FILED
2011 DEC 21 PM 2:38
JULIE J. ARMSTRONG
CLERK OF COURT

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	
South Carolina Property &	)	
Casualty Insurance Guaranty,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 11-CP-10-8496
	)	
Roger Brock, Ryan Stevens and	)	
Malachi Sanders,	)	
	)	
Defendant.	)	

TRANSCRIPT OF HEARING

The within Hearing was held in the above-captioned action on October 24, 2012, before The Honorable R. Markley Dennis, Jr. in Courtroom 3E of the Charleston County Courthouse, 100 Broad Street, Charleston, South Carolina; attended by Counsel, as follows:

APPEARANCES:

Erik Norton, Esq.
Appearing for South Carolina Property & Casualty

Tara Sullivan, Esq.

Andrew Gowdown, Esq.
Tim Waller, Esq.
Appearing for Defendant Roger Brock

DEBORAH GARRISON
Circuit Court Reporter - 9th Judicial Circuit
Post Office Box 901
Johns Island, South Carolina 29457
dGarrison@sccourts.org

1 THE COURT: The next one is Motions
2 in South Carolina Property & Casualty versus
3 Brock. I see the attorneys in that. You may
4 come forward. Cross Motions for summary
5 judgment. So everybody agrees that it is a
6 matter of law? Does the plaintiff agree that
7 it is a matter of law?

8 MR. GOWDOWN: Yes, Your Honor.

9 THE COURT: So whatever my ruling is,
10 that will become -- it won't be appealed as to
11 issue of fact?

12 MR. GOWDOWN: No, Your Honor.

13 MR. NORTON: That's right.

14 THE COURT: All right. The reason
15 that I ask you is because I had those same
16 representations by attorneys in Beaufort in '97
17 and, lo and behold, when I had signed my Order I
18 got a Motion that said 'no, there's a genuine
19 issue of material fact.' They reversed it. I
20 said, 'okay, I will ask it specifically next
21 time.'

22 MR. GOWDOWN: (Tenders).

23 THE COURT: Thank you. If you would,
24 before we get started, identify yourselves and
25 the party that you represent.

1 ERIC NORTON: Eric Norton for the
2 South Carolina Property & Casualty Insurance
3 Association.

4 TARA SULLIVAN: Tara Sullivan.

5 THE COURT: Okay.

6 MR. GOWDOWN: Andrew Gowdown, Your
7 Honor, for Defendant Roger Brock.

8 TIM WALLER: Tim Waller for Defendant
9 Roger Brock.

10 THE COURT: Thank you, Gentlemen.

11 ERIK NORTON: Your Honor, may I
12 approach?

13 THE COURT: Sure.

14 ERIK NORTON: We did file a brief
15 and reply, (tendering).

16 THE COURT: Thank you. All briefs
17 are incorporated fully for purposes of review.
18 Each of you may rely on your respective
19 submissions in that regard.

20 Since we have cross Motions, I will let
21 the plaintiff go first.

22 MR. NORTON: Thank you, Your Honor,
23 may it please the Court.

24 THE COURT: Yes, sir.

25 MR. NORTON: We are here on cross

1 Motions for summary judgment on the issue of
2 statute interpretation, which the parties do
3 agree is an issue of law. Unless somebody comes
4 up with something really novel within the next
5 thirty minutes, there is no issue of genuine
6 fact before the court.

7 THE COURT: Okay.

8 MR. NORTON: The question before the
9 Court is the interpretation of the South
10 Carolina Property & Casualty Guaranty
11 Association Act.

12 What has happened here is that it is
13 undisputed that Mr. Gowdown's client, Mr. Brock,
14 suffered some serious injuries as the result of
15 an automobile accident with a logging truck.
16 He reached a settlement with the logging truck's
17 driver, with EquiCap Insurance, in the amount of
18 \$185,000. EquiCap subsequently became
19 insolvent. Mr. Brock filed a claim with the
20 association.

21 So we don't -- and, Your Honor, we
22 filed, both parties file extensive memos. If
23 I am repeating stuff that I don't need to,
24 please move me along. I want to make sure that
25 we are clear about everything.

1 There is really no question about that.
2 What the question is that Mr. Brock received, in
3 the Association's view, the benefit of that
4 \$585,000 through payments from the Association
5 in the amount of approximately \$91,000, and
6 other sources of solvent insurers. We believe
7 that to allow Mr. Brock to recover anything
8 further than that would amount essentially to a
9 double recovery; in violation of the Act, which
10 has an exhaustion provision.

11 I think, without belaboring the point,
12 there is a fairly substantial disagreement
13 between the parties about the purpose of the
14 Act. I think that it goes right to the heart of
15 the issue.

16 Your Honor may be aware that every
17 state has a Guaranty Association and each such
18 Association is created as a matter of statute.
19 South Carolina's association has been around
20 since the '60s.

21 I think that it speaks something to
22 this argument that it has never been raised
23 before. It is a novel issue. That there isn't
24 a South Carolina case on point. We think
25 that's because it is fairly clear -- well,

1 obviously we wouldn't be here arguing if it was
2 that clear. But we thought that it was until a
3 little while ago.

4 The statutes from each state are based
5 on a model Act. The model Act has been
6 changed. It's been changed -- it's been around
7 a long time but it's been changed, by most
8 states, to some degree. Some vary a little
9 bit, some a lot -- as in the case of the state
10 of South Carolina.

11 What our Supreme Court has said in the
12 few cases that construe the Act is that the Act
13 -- the Act provides some measure of protection
14 to an insurer or claimant in the event that an
15 insurer become insolvent.

16 THE COURT: Um-humm.

17 MR. NORTON: What is important about
18 that is that though case law is very clear that
19 the Association doesn't step in the shoes of
20 the insured, they step in to the extent
21 required by the Act. I think that's a very key
22 point that is set forth in three different
23 cases, all essentially saying the same thing.
24 All of these cases are cited in our brief. We
25 can stop and talk about them if necessary, but

1 I think most of us recognize this. One of the
2 very specific ways, and one of the issues here
3 today, it -- one of the very specific ways that
4 the South Carolina statute varies from other
5 statutes, and one of the ways which the South
6 Carolina Guaranty Association varies from the
7 insolvent insurer is the right to exhaustion or
8 to set off on behalf of the Association. This
9 is set forth in Section 38-31-100(10, which is
10 cited in our brief and we have it all sort o
11 laid out -- this is -- it starts on page five,
12 Your Honor, which is the actual text of the
13 statute.

14 THE COURT: Yes.

15 MR. NORTON: I do actually have an
16 extra copy of the statute.

17 THE COURT: I have it right here on
18 my computer. Thank you.

19 MR. NORTON: So we have the text
20 here. What this section essentially does is
21 that it says that you have to look, that a
22 claimant has to look at other solvent insurers
23 first. That the Association is the payment
24 authority of last resort for claims related to
25 an insolvent insurer.

1 So what we want to do is, I want to
2 kinda walk through with you just a little bit
3 how the statute sort of reads. We've got a
4 couple of logs here and I just want to, if I
5 can, talk to you about the way that the -- to
6 sort of move through the statute to get to
7 exhaustion. Help you to get an idea of what a
8 covered claim is.

9 This is 38-31-20. You may have it
10 there in front of you.

11 THE COURT: I have it in front of me
12 and it's easier to see.

13 MR. NORTON: Okay. Good. What a
14 covered claim is, is that it's any unpaid claim
15 within the coverage of an insurance policy to
16 which the chapter applies.

17 THE COURT: Do me a favor.

18 MR. NORTON: Yes, sir.

19 THE COURT: Don't read it to me. I
20 can read the statute and I can reread it. Just
21 -- I really don't need you to go through that.
22 I am going to obviously read it, unless I just
23 feel compelled to rule.

24 MR. NORTON: Well, let me tell you
25 this, Your Honor. And I apologize for moving

1 slow through there.

2 THE COURT: No.

3 MR. NORTON: I just wasn't sure how
4 familiar you were with -- but I've got you.

5 THE COURT: Let me just assure you
6 of something. I don't know that I've ever read
7 the statute but I assure you that, if in
8 listening to your arguments I feel that I've
9 got to sit down and study and learn this
10 statute -- I don't profess that I'd gain as
11 much knowledge as y'all have, but I think that
12 I can read it and understand it. So let's go
13 ahead and go through -- just tell me
14 specifically why in this particular case --
15 tell me what it is that you think that the
16 statute -- why you think that the statute says
17 that you should prevail?

18 MR. NORTON: Okay. In order to be a
19 cover claim, it has to be a claim against an
20 insolvent insurer.

21 THE COURT: Correct.

22 MR. NORTON: Okay. Under the offset
23 provision, under the exhaustion provision,
24 there is statutory requirement that the
25 claimant exhausts coverage of all insurance

1 policies.

2 Here's the issue. The question is
3 whether he has to exhaust coverage of all
4 insurance policies that arise under the same
5 facts, loss or injury that relate to the claim
6 against the guaranty association.

7 What Mr. Brock says is that he only
8 has to offset amounts received from insurance
9 policies that are covered claims.

10 What we say is that that is not what
11 the statute says. What the statute says is
12 that -- and I will point you to this. The
13 critical language in the statute is that the
14 sole insurance policy must provide coverage for
15 claims arising from the same facts, injury or
16 loss that gave rise to the covered claim.

17 What is important here is, Your Honor,
18 that there are only eight other states in the
19 United States that use that same language that
20 I just quoted to you; that is in our statute,
21 that's in subsection one here. All of the
22 other statutes (sic) use this covered claim
23 language that is in the model Act. Under those
24 cases -- Your Honor, just to be here, the cases
25 all across this country under that model Act

1 are kinda all over the place. It's been well
2 acknowledged that that model Act was not a
3 model of the draftsmanship's craft. It's not
4 clear at all. It results in a few outlying
5 cases that come up with some odd results. But
6 the vast majority, the vast weight of the cases
7 find that the associations across the country
8 are entitled to offset for payments made by
9 solvent insurers as credits against what it is
10 owed to the claimant.

11 In South Carolina case, it recognized
12 the problem with the statute and it fixed it by
13 using this same facts, injury or loss language.
14 So have several other states. This all started
15 happening, really, since the late '90s, that
16 this has happened. As you know, in the annals
17 of legislative change, that's fast.

18 So this differentiates South Carolina
19 statute from all of these other cases from
20 across the country. So in terms of application
21 to this case, this is on page seven of our memo
22 if it is easier for you to see.

23 THE COURT: Okay.

24 MR. NORTON: We've got a chart that
25 kinda lays it out. In the first column it says

1 -- it outlines what Mr. Brock seeks to receive.

2 THE COURT: Okay.

3 MR. NORTON: \$278,000 at this point.

4 What he is looking for is, he's looking to keep
5 the \$20,000 in uninsured motorist coverage that
6 he's been keep; keep the \$45,500 -- or get the
7 benefit of the \$45,598.45 of health insurance
8 payments that have already been made on his
9 benefit; keep the \$5,000 PIP coverage; keep the
10 \$22,500 in liability insurance that he settled
11 with the driver of the car's insurance; and he
12 wants the Guaranty Association, on top of that,
13 to pay him \$185,000 -- for a total payment of
14 \$278,998.45.

15 This is \$60,000 more than he would
16 have gotten if EquiCap had never become
17 insolvent, which is obviously an undeserved
18 result.

19 Here, if EquiCap had never become
20 insolvent, he never would have gotten the
21 uninsured motorist coverage because he would
22 have had -- he would have been insured.

23 He would also have been required to
24 subrogate, to pay back, the \$45,598.45 he
25 received for health insurance claims.

1 THE COURT: I don't know that I
2 agree with you on that. Go on.

3 MR. NORTON: Certainly they have a
4 right to.

5 THE COURT: They may not. I don't
6 know, but -- but clearly I -- I understand what
7 your argument is.

8 MR. NORTON: And clearly, I think,
9 it's undisputed that up until this Blue Cross/
10 Blue Shield was asserting that right. Whether
11 or not they would have won or not -- okay. But
12 certainly it is something that could be thought
13 about that's there.

14 He would have gotten the personal
15 injury protection coverage. He would have
16 gotten that anyway.

17 The \$22,500 that he got paid from
18 Nationwide. He gets paid that.

19 Then he gets \$185,000 from EquiCap.

20 So he gets \$212,500.

21 The bottomline is that he should have
22 certainly gotten more than he would have gotten
23 had EquiCap not gotten insolvent, under their
24 theory.

25 THE COURT: Okay.

1 MR. NORTON: And what we think --
2 this is the third column. This is how we
3 interpret the Act and how the Act has been
4 construed and been alive for -- for years.
5 He believe that he's received the \$25,000.
6 He believe that he's received the benefit of
7 the \$45,000. And it's of note, Your Honor,
8 that the statute has a specific provision to
9 protect the insureds of insolvent insurers,
10 that Blue Cross - Blue Shield cannot subrogate
11 in this circumstance.

12 THE COURT: Okay.

13 MR. NORTON: So there is at least a
14 question there. Then you've got the PIP
15 coverage, which is the \$5,000.

16 The \$22,500 in Nationwide liability,
17 we believe that should offset against the
18 \$185,000 and that the Association should pay
19 Mr. Brock \$91,909.55; which it has already
20 done, and that's undisputed.

21 THE COURT: Okay.

22 MR. NORTON: What we believe is that
23 what Mr. Brock received is a benefit of the
24 Act, \$93,998.45 because without the Association
25 all he really gets if the \$25,000. In fact, he

1 gets zero out of EquiCap. That's the purpose
2 of the statute -- the purpose of the Guaranty
3 Act.

4 So, Your Honor, we can -- I want to
5 publish just a couple of provisions that Mr.
6 Gowdown raised in his brief and ---

7 THE COURT: No, you can reply to his
8 argument.

9 MR. NORTON: I'll be glad to. Thank
10 you, Your Honor.

11 THE COURT: Mr. Gowdown?

12 MR. GOWDOWN: Thank you, Your
13 Honor. I want to be very clear about what it
14 is that Mr. Brock' is seeking.

15 What he is not seeking is \$278,000.

16 He is not seeking the \$185,000 in
17 addition to the others.

18 What he is seeking is \$93,000.

19 It started with a settlement of
20 \$185,000. \$91,000 has been paid.

21 Mr. Brock has been paid some other
22 coverage from some other carriers, which he is
23 required to do, and that totals \$93,000.

24 That is what we are claiming in this
25 case.

1 I want to focus on the statute, Your
2 Honor. We have never raised the issue that the
3 exhaustion statute has anything to do with
4 covered claims. What we are focusing on is in
5 that section 100, the provision that says
6 "having a claim under an insurance policy."

7 What we are arguing about is the
8 medical benefits, the uninsured coverage and
9 the PIP coverage that Mr. Brock got as a result
10 of this case.

11 In our view, that section having "a
12 claim under an insurance policy" is ambiguous.
13 The term is not defined, "insurance policy" is
14 not defined, ---

15 THE COURT: Let me just ask you just
16 a commonsense thing -- to me it's common sense,
17 maybe it is not so -- maybe it's not very good.
18 Let's just take the first one. How can you
19 even use -- are you claiming that you are
20 entitled to retain the uninsured motorist money
21 without complying?

22 MR. GOWDOWN: I'm sorry, Your
23 Honor. I am not ---

24 THE COURT: The money that you
25 recovered from the uninsured carrier, do you

1 think that you're entitled to that without
2 applying it to your settlement?

3 MR. GOWDOWN: We think that it's
4 a collateral source, Your Honor.

5 THE COURT: How could it be
6 collateral? Because you'd never get there if
7 you didn't have no -- noncoverage. I mean, it
8 wouldn't be available to you.

9 MR. GOWDOWN: Well, ---

10 THE COURT: Underinsured, maybe.
11 Not uninsured.

12 MR. GOWDOWN: Well, I can't
13 imagine a situation ---

14 THE COURT: I can. You wouldn't
15 have had a claim if the company had been
16 viable.

17 MR. GOWDOWN: What I am saying is
18 that I can't think of a situation where in this
19 guaranty setting that I would ever have an
20 underinsured claim.

21 THE COURT: No, no. I am saying an
22 uninsured -- you would never have had an
23 uninsured claim.

24 MR. GOWDOWN: Right. I would
25 have had an underinsured claim.

1 THE COURT: No, you wouldn't unless
2 you had -- well, do you have underinsurance?

3 MR. GOWDOWN: Yes, I do, Your
4 Honor.

5 THE COURT: Okay.

6 MR. GOWDOWN: I originally stated
7 to make that claim with the insurance company
8 ---

9 THE COURT: But you didn't collect
10 it under the underinsurance. You collected it
11 under uninsured?

12 MR. GOWDOWN: That's correct.

13 THE COURT: All right. That's the
14 problem. If you collected it under the under
15 insurance, I may tend to agree with you.

16 MR. GOWDOWN: The ---

17 THE COURT: But uninsured and under
18 insurance are two different animals.

19 MR. GOWDOWN: I agree, Your
20 Honor. But under Section 38-77-160, which I am
21 sure you are very familiar with, the uninsured
22 and underinsured motorist provisions, the Court
23 has already rule that underinsured benefits are
24 subject to the collateral source rule. It
25 stands to reason that uninsured ---

1 THE COURT: I don't -- no, it
2 doesn't stand to reason. I'm sorry. You
3 and I -- you can appeal that and we'll have
4 it cleared. I think that they are totally
5 different. I mean, just completely different.
6 You don't have -- just so that we are clear,
7 there is no under insurance payment in this
8 scenario.

9 MR. GOWDOWN: There is not.

10 THE COURT: Okay.

11 MR. GOWDOWN: There is not.

12 THE COURT: Okay.

13 MR. GOWDOWN: With respect to the
14 medical insurance benefits, Your Honor, Mr.
15 Brock had Blue Cross - Blue Shield.

16 THE COURT: I may be inclined to
17 agree with you on that but ---

18 MR. GOWDOWN: His medical
19 expenses were in excess of \$71,000 and that is
20 what Blue Cross - Blue Shield paid on his
21 behalf.

22 THE COURT: Okay.

23 MR. GOWDOWN: The Association
24 requiring deduction for that. That clearly is
25 a collateral source.

1 THE COURT: Okay.

2 MR. GOWDOWN: He paid for those
3 benefits himself.

4 THE COURT: Maybe. Maybe not.

5 MR. GOWDOWN: He shouldn't be
6 penalized because he has private pay insurance,
7 be required to pay something that somebody who
8 doesn't have insurance isn't required to pay.

9 THE COURT: I understand that, Mr.
10 Gowdown. The problem -- and this is what I've
11 got to decide, obviously. The problem -- and
12 you all say that it is not an issue of fact, so
13 that's fine. I am glad to know that.

14 But clearly -- let's just say that the
15 claim is settled and paid. Unless you have
16 something that I haven't seen, and I am sure
17 that it is there, otherwise you wouldn't be
18 arguing it. If your payment is made by the
19 insurance company, Blue Cross - Blue Shield is
20 going to be looking for some money. At least
21 they were the last -- about the ten years of my
22 practice, ten or fifteen. Before that it was
23 purely collateral source, nobody ever touched
24 it. But policies started changing and things
25 started changing and you're telling me that

1 your policy with this man prohibited them from
2 coming in against that?

3 MR. GOWDOWN: No, Your Honor.
4 What happened is that they did pursue that in
5 this DJ action. Then eventually they waived it
6 and stepped out. So there is no subrogation
7 that Blue Cross is seeking against my client,
8 currently.

9 THE COURT: Well, if they -- again I
10 -- I'll have to consider that to be -- that's a
11 benefit to whom? Is it a benefit to you or is
12 it a benefit to the person that is paying it?
13 That's the problem. Because if -- the reason
14 that they may have waived it is 'we are not
15 going to proceed against this particular
16 situation because of the statute -- entities
17 coming in because the company went bankrupt.
18 I don't know what motivated them to do that.
19 But clearly initially they had a right to seek
20 -- what part, I don't know. Because it -- I
21 don't automatically just assume a hundred
22 percent, because -- because there are all sorts
23 of figures that I see every day, and that I
24 know that I experienced in my own practice,
25 insofar as reduced amounts. Usually it started

1 with a third, but -- (pause). I wonder where
2 they got that from.

3 But, anyway, let's go on to the next
4 one.

5 MR. GOWDOWN: They have waived
6 it, Your Honor.

7 THE COURT: Okay.

8 MR. GOWDOWN: I still think that
9 it is a collateral source because no tort
10 feator in any personal injury case would ever
11 be entitled to benefit of the medical benefits.

12 THE COURT: No. They are
13 indirectly. I agree with you that they are not
14 entitled to them in the action itself, but they
15 are indirectly. That happens every day.

16 MR. GOWDOWN: Well, I realize
17 that. But the tort feator doesn't get the
18 benefits ---

19 THE COURT: I understand that but
20 you -- the tort feator gets the benefit in the
21 sense that you're going to pay, out of the
22 money that he or she pays, you are going to pay
23 the company back. That is not what happened in
24 that.

25 MR. GOWDOWN: Well, if there is

1 the right of subrogation.

2 THE COURT: That's right.

3 MR. GOWDOWN: Then, finally, Your
4 Honor, the PIP coverage of \$5,000. Again,
5 there is a specific statute on this 38-77-140
6 that says that PIP benefits are not subject to
7 settlement.

8 THE COURT: Right. I would treat
9 the PIP benefit the same as the underinsurance.
10 I think that's a contractual issue that you are
11 entitled to. Purely a collateral source.

12 MR. GOWDOWN: So under the
13 circumstances, Your Honor, we think that the
14 statute is ambiguous, that it is not clear on
15 what types of coverage are included and what
16 are not.

17 THE COURT: Okay.

18 MR. GOWDOWN: Other states have
19 agreed with us on this issue, and we've cited
20 those cases in our brief.

21 THE COURT: Sure.

22 MR. GOWDOWN: Many other states
23 have gone, because they recognize the ambiguity
24 following negotiation and have specifically
25 included in their statute underinsurance,

1 uninsured, liability, all the way through.

2 THE COURT: Yeah.

3 MR. GOWDOWN: So they recognize
4 the deficiency in the statute and have gone
5 back and cleaned it up. Unfortunately South
6 Carolina has not done that.

7 THE COURT: Imagine that.

8 MR. GOWDOWN: So we are seeking
9 the full amount of \$93,000, Your Honor. It is
10 not the \$185,000.

11 THE COURT: But we don't need lawyer
12 legislators?

13 MR. GOWDOWN: I'm sorry.

14 THE COURT: We don't need lawyer
15 legislators. I understand what you're saying.
16 Obviously I've got to read your briefs and get
17 a -- but I think I understand what the issues
18 are. I really do, I think. You can reply if
19 you wish.

20 MR. NORTON: May I?

21 THE COURT: Sure.

22 MR. NORTON: Two points, and they go
23 right to the heart of the issue. I hope that
24 they will help guide you in looking at this.

25 I understand, I think, a little better

1 what his argument is. First of all, I'll say
2 that, you know, Your Honor, if he recovers
3 \$93,000 plus the \$91,000 that he has already
4 been paid, that's \$185,000. Plus he is keeping
5 what he's got and that is how we got to the
6 \$278,000. So I am not sure, entirely, -- but,
7 anyway, here's the key. When he talks about
8 which insurance policies apply, I encourage
9 Your Honor to read the statutes together with
10 the language of the "insurance policy" -- or
11 the next word, "whether or not a member
12 insured."

13 THE COURT: I understand that. You
14 know what? I appreciate your position but
15 obviously it isn't as clear as you want to make
16 it. If it was, you wouldn't be here in the
17 first place.

18 MR. NORTON: No, I agree, Your Honor.

19 THE COURT: So I think -- I think
20 that it could be made clear, as other states
21 have done. The legislature needs to do that.
22 I don't know why it hasn't done that. Be that
23 as it may, maybe because nobody has tried to do
24 that. I doubt that. I think that there are
25 very few original thoughts today. So ---

1 MR. NORTON: Your Honor, I appreciate
2 your view on it. I think it applies to all
3 insurance policies. I also think that it is
4 worth noting that -- if you look in our brief,
5 the brief that we did on the collateral source
6 rule, we don't think that it applies in this
7 case. The reason that we don't believe that it
8 applies is because it directed towards the
9 wrongdoer and the Association is not a
10 wrongdoer in this case ---

11 THE COURT: I understand that you're
12 not a wrongdoer but -- you can't say that you
13 step in the shoes -- you can't say, 'I
14 shouldn't have that happen to me.' Sorry,
15 that's what you are there for. So, thank you.

16 MR. NORTON: I will just say this
17 last thing, throw it out for you to think
18 about. Because the collateral source rule is a
19 common rule, it is abrogated by the statute.

20 THE COURT: I appreciate that.
21 Baloney. Thank you. I don't rely -- the
22 Supreme Court may say you are absolutely right,
23 but I don't believe that.

24 MR. NORTON: Okay, Your Honor.

25 THE COURT: Now when they say that

1 it is, I will say 'you were right, I should
2 have listened.' Thank you. Obviously we will
3 be reading this and I'll let you know. Thank
4 you.

5 (HEARING CONCLUDED)

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CERTIFICATE OF REPORTER

I, the undersigned, Deborah Garrison,
official court reporter for the 9th Judicial
Circuit of the State of South Carolina, do
hereby certify that the foregoing is a true,
accurate and complete transcript of the hearing
held before The Honorable R. Markley Dennis,
Jr., on October 24, 2012;

I further certify that I am neither kin
nor counsel to any of the parties and have no
interest in the outcome of this action.

Deborah Garrison

Deborah Garrison

Circuit Court Reporter

9th Judicial Circuit

Charleston, South Carolina

April 2, 2013

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

South Carolina Property and Casualty)
Insurance Guaranty Association,)

Plaintiffs,)

vs.)

Roger Brock, Ryan Stevens, and)
Malachi Sanders,)

Defendants.)

COURT OF COMMON PLEAS

C/A NO. 2011-CP-10-8496

PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

FILED
2012 MAY 10 PM 1:01
JULIE J. ARMSTRONG
CLERK OF COURT

**TO: ANDREW D. GOWDOWN, ESQUIRE, ATTORNEY FOR DEFENDANT
ROGER BROCK:**

YOU WILL PLEASE TAKE NOTICE that Plaintiff South Carolina Property and Casualty Insurance Guaranty Association (hereinafter "Plaintiff") will move before the Court of Common Pleas for Charleston County for an Order granting summary judgment in its favor as to its claims against Defendants and dismissing all defenses asserted against it.

The grounds for this Motion are that no genuine issue of material fact exists as to any of these claims or defenses, all of which involve statutory construction. Under the prevailing statutes, the Plaintiff is entitled to a set-off and deduction from Defendant Brock's settlement for recoveries made by the Defendant Brock, including liability coverage, uninsured motorist coverage, personal injury protection, and as a result of the payment of medical benefits. This Motion is further based on the fact that no subrogation claim or other right to recover against the Defendant Brock's settlement may be, or has been, asserted. As such, the Plaintiff is entitled to an order allowing each of these applicable set-offs and limiting Brock's coverage from the Association's limited resources.

Plaintiff's Motion will be further based on pleadings filed with the Court, relevant affidavits, other documents as permitted by the Rules, and the Memorandum of Law, which will be filed and served under separate cover.

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Attorneys for Plaintiff South Carolina Property and Casualty
Insurance Guaranty Association

Columbia, South Carolina

May 9, 2012.

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

South Carolina Property and Casualty
Insurance Guaranty Association,

Plaintiff,

v.

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

Defendants.

COURT OF COMMON PLEAS

Civil Action No.: 2011-CP-10-8496

**MOTION FOR SUMMARY JUDGMENT
OF DEFENDANT ROGER BROCK**

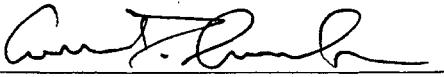
FILED
AUG 20 PM 3:13
JULIE J. ARMSTRONG
CLERK OF COURT

**TO: HOWARD A. VANDINE, III, ERIK T. NORTON, AND TARA C. SULLIVAN,
ATTORNEYS FOR PLAINTIFF**

The Defendant Roger Brock moves, pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, for an order granting him summary judgment as to all claims asserted against him by Plaintiff.

The resolution of this case is dependent on the interpretation of statutory law and, therefore, there is no genuine issue of material fact. Under a correct reading of the applicable statutes, the Plaintiff is not entitled to any set-off or deduction from Defendant Brock's settlement with the insolvent insured, for which the Plaintiff is now responsible, including liability coverage, uninsured motorist coverage, personal injury protection, or medical benefits. Accordingly, Defendant Brock is entitled to judgment as a matter of law. This motion is supported by the Affidavit of Roger Brock, a Memorandum of Law to be filed with this Court with accompanying exhibits, and arguments of counsel.

ROSEN, ROSEN & HAGOOD, LLC

By: 

Andrew D. Gowdown

Lorene Stuhr Dukes

151 Meeting Street, Suite 400

P.O. Box 893

Charleston, SC 29402

(843) 577-6726

ATTORNEYS FOR DEFENDANT
ROGER BROCK

Charleston, South Carolina
August 17, 2012

CERTIFICATE OF SERVICE

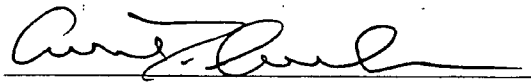
I certify that on August 17, 2012, I caused
to be: ~~✗~~ mailed

☐ hand delivered

☐ faxed

☐ e-mailed

a true copy of the foregoing pleading(s) to
each counsel of record.



Attorney for Defendant Brock

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

South Carolina Property and Casualty
Insurance Guaranty Association,

Plaintiff,

v.)

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

Defendants.)

COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
Civil Action No.: 2011-CP-10-8496

AFFIDAVIT OF ROGER BROCK

2012 AUG 20 PM 3:13
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

PERSONALLY APPEARED before me, Roger Brock, who, first being duly sworn, does state as follows:

1. I am a Defendant in this Declaratory Judgment action which seeks to reduce the amount of compensation I will receive for the severe and permanent injuries I sustained in a collision with a tractor trailer on October 2, 2009. As a result of the violent collision, in which my friend was killed, I suffered nerve damage to my hand and arm; my nose was nearly severed from my face; my left pinky finger was broken; and I had to have four teeth extracted. To this day, I continue to experience pain and numbness in my leg, hip, neck, back, chest, arm, and shoulder as well as pain and cramping in my hand and wrist. I will also require oral surgery and implants to replace my missing teeth.

2. In order to receive reparation for my significant damages, I filed an action in the United States District Court against the driver and owners of the tractor trailer, captioned *Brock v. Stephens, et al.*, Case No. 2:10-cv-2926-RMG. My actual medical and dental expenses approached \$80,000.00, and the plastic surgery I require will be substantial. I was only 39 years

old at the time of my injuries, and I will continue to suffer from pain, scarring, and loss of enjoyment of life for my remaining years.

3. At the commencement of the litigation, I learned that the Defendants in the underlying action were insured through Aequicap Insurance Company. However, during the course of the case, I learned that this insurance company was financially unstable and may be bankrupt before the case could get to trial. This knowledge was a critical factor in my decision to accept \$185,000.00 to settle my claim, even though my injuries, I believe, far exceeded that amount. I entered the settlement agreement fully expecting that this would be the amount the responsible parties would pay and I would receive. As I understand it, the settlement agreement was approved by the Court, and my claims were dismissed.

4. Now, the South Carolina Property and Casualty Insurance Guaranty Association ("Association") is claiming that I should receive even less than the significantly compromised amount which I had agreed to accept. Had I insisted on an amount that would have been fairer to me, I would have collected a much greater sum than what the Association seeks to pay. In the nearly three years since the collision, I have received only \$91,909.55 from the responsible parties, through the Association.

FURTHER DEPONENT SAYETH NOT.

Roger Brock

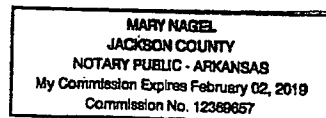
Roger Brock

SWORN to before me this

16 day of August, 2012

Mary Nagel (SEAL)
NOTARY PUBLIC FOR ARKANSAS

MY commission expires: 02-02-19



STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

South Carolina Property and Casualty
Insurance Guaranty Association,

Plaintiff,

v.

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

Defendants.

COURT OF COMMON PLEAS

Civil Action No.: 2011-CP-10-8496

**DEFENDANT ROGER BROCK'S
MEMORANDUM OF LAW IN
SUPPORT OF HIS MOTION FOR
SUMMARY JUDGMENT**

2012 OCT 22 AM 10:30
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

Defendant Roger Brock ("Brock") submits this memorandum of law in support of his motion for summary judgment as to all claims alleged in the Complaint for Declaratory Judgment of Plaintiff South Carolina Property and Casualty Guaranty Association ("Association"). Because the Association is not entitled to the offsets it seeks, and because Brock's recovery would essentially be cut in half, Brock's motion for summary judgment must be granted.

FACTUAL BACKGROUND

Roger Brock is a citizen and resident of the State of Arkansas. Amended Complaint, Case No. 2:10-cv-02926-RMG (D.S.C. filed Dec. 8, 2010) (attached hereto as "Exhibit A"). On October 2, 2009, while visiting Walterboro, South Carolina, he was involved in a serious motor vehicle accident with a logging truck driven by Ryan Stephens. Exhibit A. Brian Mason, Brock's friend who was driving the car in which Brock was riding, was killed in the collision. Complaint, Case No. 2:10-cv-1086-PMD (D.S.C. filed Jun. 23, 2010) (attached hereto as

"Exhibit B"). Angela Hess, who was also a passenger in the vehicle with Brock and Brian Mason, was likewise seriously injured as a result of the collision. Complaint, Case No. 2:10-cv-02814-RMG (D.S.C. filed Nov. 1, 2010) (attached hereto as "Exhibit C"). Although not fatal, the injuries Brock sustained were both permanent and severe. Affidavit of Roger Brock, at ¶ 1 (filed Aug. 20, 2012) (attached hereto as "Exhibit D"). As a result of the violent collision, he suffered nerve damage to his hand and arm, his nose was nearly severed from his face, his left pinky finger was broken, and he had to have four teeth extracted. Exhibit D, at ¶ 1. He continues to experience pain and numbness in his leg, hip, neck, back, chest, arm, and shoulder as well as pain and cramping in his hand and wrist. Exhibit D, at ¶ 1. In addition, he will require oral surgery and implants in the future to replace missing teeth. Exhibit D, at ¶ 1. Brock was only 39 years old at the time, and he will continue to suffer from pain, scarring, and loss of enjoyment of life for his remaining years. Exhibit D, at ¶ 2.

To seek redress for his injuries, Brock filed suit in the United States District Court for the District of South Carolina, Charleston Division, against Ryan Stephens and Malachi Sanders (the owner of the logging truck), among others, claiming entitlement to a recovery for severe injuries, lost wages, lost earning capacity, and past and future medical expenses. See Exhibit A. At the time of the collision, Stephens was insured through a policy issued by Aequicap Insurance Company ("Aequicap"), a Florida domiciled insurer that insured individuals and entities in the State of South Carolina. See Complaint for Declaratory Judgment (filed Nov. 15, 2011).

Early on in the federal litigation, the parties obtained reliable information that Aequicap was in serious financial trouble. Exhibit D, at ¶ 3; Affidavit of Francis X. McCann, at ¶ 6-9 (Oct. 17, 2012) (attached hereto as "Exhibit E"). Therefore, all three cases were jointly mediated on January 5, 2011, just months after having been filed. The mediation, however, was

unsuccessful. Nevertheless, following mediation and upon further consideration of Aequicap's precarious financial condition, Brock ultimately conceded to settle the case for an amount which was far less than what would actually compensate him for his substantial injuries. Exhibit D, at ¶ 3. Aequicap's financial problems and potential insolvency were likewise major considerations in Hess' decision to accept Aequicap's offer to settle her claims. Exhibit E, at ¶ 8. As a result of Brock's concessions, a settlement was ultimately reached on January 21, 2011. Exhibit D, at ¶ 3. In exchange for a release of all claims against the Defendants, Brock agreed to accept the sum of \$185,000, even though his actual injuries greatly exceeded that amount. Exhibit D, at ¶ 3. The settlement agreement was filed with, and approved by, the District Court and became binding on the parties. Consent Amended Order of Dismissal, Case No. 2:10-cv-02926-RMG (filed Feb. 23, 2011) (attached hereto as "Exhibit F").

Less than a month after the settlement was reached, and prior to payment of the settlement amount, Aequicap was declared insolvent by the State of Florida. See Complaint for Declaratory Judgment (filed Nov. 15, 2011). Because Aequicap, as the insolvent insurer, was a company admitted and licensed by the South Carolina Department of Insurance, and because the insured alleged to have caused Brock's injuries was a resident of South Carolina at the time Brock was injured, the claim was referred to the South Carolina Property and Casualty Guaranty Association. See id. Therefore, demand was made on the Association for the payment of the full settlement amount of \$185,000. See id.

The Association is an unincorporated non-profit legal entity created pursuant to the South Carolina Property and Casualty Insurance Guaranty Association Act codified at S.C. Code Ann. § 38-31-10, *et seq.* ("Act"). "The Guaranty Association's function is to provide protection for insureds in the event their insurance carriers become insolvent." South Carolina 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). Pursuant to the Act, the Association is to pay certain "covered claims," as the term is defined under the Act. As a condition precedent to recovery from the Association, a claimant is purportedly required to first exhaust all available coverage from solvent insurers. See S.C. Code Ann. § 38-31-100 (West 2011). To the extent recovery is made, the Association is arguably allowed an offset against its statutory obligation according to the Act. Id.

In light of the Aequicap insolvency and the collision in which Brock was severely injured, Brock received, or was afforded the benefit of, the following amounts from other solvent insurers:

a. Liability Coverage from Nationwide Ins. Co. (insurer for Mason vehicle in which Brock was riding)	\$22,500.00
b. Medical Insurance from Health Advantage/BCBS of Arkansas (Brock's private pay medical insurance carrier)	\$40,590.45
c. Uninsured Motorist Coverage from Progressive Ins. Co. (resident relative coverage through Brock's parents' carrier)	\$25,000.00
d. Personal Injury Protection from Progressive Ins. Co. (resident relative coverage through Brock's parents' carrier)	\$5,000.00
TOTAL	\$93,090.45

In this case, the Association asserts entitlement to an offset for all payments from solvent insurers pursuant to S.C. Code Ann. § 38-31-100. See Complaint for Declaratory Judgment (filed Nov. 15, 2011). As such, the Association has only paid Brock \$91,909.55, representing the difference between the settlement amount (\$185,000) and the claimed offsets (\$93,090.45). Id. Brock objects to the reduction and demands full payment of the agreed upon settlement sum.

See Answer of Defendant Roger Brock (filed Dec. 21, 2011) (attached hereto as "Exhibit G"); see also Exhibit D.

The Association also reached separate settlement agreements with Angela Hess and the Estate of Brian Mason. See Plaintiff's Answers and Objections to Defendant Roger Brock's First Set of Interrogatories, ¶¶ 13-14 (August 1, 2012) (attached hereto as "Exhibit H"). In its discovery responses to this declaratory judgment action, the Association asserts that it does not deviate from the provisions of S.C. Code Ann. § 38-31-100 and claims entitlement to offset for any recovery on any policy as a matter of course. Exhibit H, at ¶ 12. The Association further alleges that it does not claim offsets to Medicare or Medicaid benefits claimants receive. Exhibit H, at ¶¶ 8-9. Nevertheless, the Association in fact negotiated the offset amounts with Angela Hess in her similarly situated action. Exhibit E, at ¶¶ 10-13. The Association had initially sought to reduce the claim of Angela Hess in the amount of \$225,000 by \$22,500, which was the amount of liability coverage received from Nationwide Insurance Company, the carrier for the Estate of Brian Mason. Exhibit E, at ¶ 11. However, the Association ultimately negotiated the offset amount sought as a result of the liability coverage and agreed to split the difference, thereby reducing the claim by only \$11,250 rather than \$22,500. Exhibit E, at ¶ 12.

For the reasons that follow, the Association is not entitled to the offsets it seeks and Brock's motion for summary judgment must be granted.

LEGAL STANDARD

Summary judgment is appropriate if, upon viewing the evidence and inferences to be drawn from it in a light most favorable to the non-moving party, there is no genuine issue of material fact and the moving party is clearly entitled to judgment as a matter of law. S.C. R. Civ. P. 56(c); Standard Fire Ins. Co. v. Marine Contracting & Towing Co., 301 S.C. 418, 392 S.E.2d

460 (1990); Davis v. Piedmont Eng'rs Architects & Planners, 284 S.C. 20, 324 S.E.2d 325 (Ct. App. 1984). "The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). "A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." Colleton Cnty. Taxpayers Ass'n v. Sch. Dist. of Colleton Cnty., 371 S.C. 224, 231, 638 S.E.2d 685, 688 (2006).

LEGAL ANALYSIS

A. Standard for Statutory Interpretation

This action involves an issue of statutory interpretation. Questions of statutory interpretation are questions of law. Grier v. AMISUB of South Carolina, Inc., 397 S.C. 532, 535, 725 S.E.2d 693, 695 (2012) (quoting CFRE, LLC v. Greenville Cnty. Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011)). "It is well established that '[t]he cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.'" Id. (quoting Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature.'" Id. (quoting Hodges, 341 S.C. at 85, 533 S.E.2d at 581). Courts must "follow the plain and unambiguous language in a statute." Id. The words of the statute "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.'" Cabiness v. Town of James Island, 393 S.C. 176, 192, 712 S.E.2d 416, 425 (2011) (quoting Eagle Container Co. v. County of Newberry, 379 S.C. 564, 570, 666 S.E.2d 892, 896 (2008)). However, when "applying the words literally leads to a result so patently absurd that the

General Assembly could not have intended it,” courts then “look beyond the statute’s plain language.” Grier, at 536, 725 S.E.2d at 695 (citing Cabiness, 393 S.C. at 192, 712 S.E.2d at 425).

When provisions of a statute conflict, the court has a “duty to attempt to harmonize the [] two ostensibly at-odd provisions.” Grazia v. S.C. State Plastering, LLC, 390 S.C. 562, 571, 703, S.E.2d 197, 201 (2010); see also Hinton v. S.C. Dep’t of Probation, Parole and Pardon Servs., 357 S.C. 327, 592 S.E.2d 335 (Ct. App. 2004) (the court should seek a construction that gives effect to every word of a statute rather than adopting an interpretation that renders a portion meaningless). Thus, “a specific statutory provision prevails over a more general one.” Wooten ex re. Wooten v. S.C. Dept. of Transp., 333 S.C. 464, 468, 511 S.E.2d 355, 357 (1999).

B. Purpose of the Association and the Act

The purpose of the South Carolina Property and Casualty Insurance Guaranty Association “is to provide protection for insureds in the event their insurance carriers become insolvent.” South Carolina 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). Moreover, under S.C. Code Ann. § 38-29-30, the purpose of the South Carolina Life and Accident Health Insurance Guaranty Association, the Association’s sister organization, is:

to maintain public confidence in the promises of insurers by providing a mechanism for protecting . . . insureds . . . of life insurance policies, accident and health insurance policies . . . against failure in the performance of contractual obligations due to the impairment of the insurer issuing these policies or contracts.

Id. In order to provide this protection, “an association of insurers is created to enable the guaranty of payment of benefits.” S.C. Code Ann. § 38-29-30(1). Thus, because the purpose of the Association is also to provide protection for insureds, that includes the purpose to provide and maintain public confidence in the promises of insurers.

I. Brock Is Entitled to Summary Judgment As a Matter of Law

There is no genuine issue of material fact in this declaratory judgment action. Brock is entitled to summary judgment as a matter of law because the offsets the Association is attempting to deduct from Brock's settlement amount are invalid and unjust. The offset or exhaustion provision of the Act provides in pertinent part:

A person, having a claim under an insurance policy, whether or not it is a policy issued by a member insurer, and the claim under such other policy arises from the same facts, injury, or loss that gave rise to the covered claim against the association, is required to first exhaust all coverage and limits provided by any such policy. Any amount payable on a covered claim under this chapter must be reduced by the full limits of such other coverage as set forth on the declarations page and the association shall receive a full credit for such limits, or, where there are no applicable limits, the claim must be reduced by the total recovery.

S.C. Code Ann. § 38-31-100(1) (West 2011). Thus, even if "the policy is direct insurance, the Act applies only to a 'covered claim.'" S.C. Prop. & Cas. Ins. Guar. Ass'n v. Carolinas Roofing & Sheet Metal Contractors Self-Ins. Fund, 315 S.C. 555, 557, 446 S.E.2d 422, 424 (1994).

Under S.C. Code Ann. § 38-31-20(8) (West 2011), "covered claim" means "an unpaid claim . . . which arises out of and is within the coverage and is subject to the applicable limits of an insurance policy to which this chapter applies." "This chapter applies to all kinds of direct insurance but does not apply to . . . life, annuity, health, or accident insurance." S.C. Code Ann. § 38-31-30(1) (West 2011). However, this statute applies to amounts "under any governmental insurance or guaranty program" and thus amounts received on a covered claim under this statute "must be reduced by the full amount of any recovery under the governmental insurance or guaranty program." Id.; § 38-31-100(3). The issue of whether the exhaustion statute applies to allow the Association to offset payments from other solvent insurers is a matter of first impression under South Carolina law.

The Association takes the position that the phrase “a claim under an insurance policy” is clear and unambiguous and that the plain meaning of the statute allows it to deduct “[a]ny amount payable on a covered claim” that Brock has recovered from any other insurance policy. As such, the Association argues it is permitted to deduct recoveries Brock received from liability coverage, private pay medical benefits, uninsured motorist coverage, and personal injury protection from the total amount of Brock’s settlement. However, such an interpretation would be inconsistent with both the purpose of the Association and with how courts throughout the United States have interpreted similar statutes. Furthermore, even if the phrase “a claim under an insurance policy” is deemed unambiguous, the payments Brock received are not subject to the offset provision under the statutory definitions governing the Association.

a. The Association Must Not Be Permitted to Offset Any Benefits Received Because Brock Has Not Yet Recovered the Entire Amount of His Settlement.

S.C. Code Ann. § 38-31-100(1) must not be interpreted to allow the Association to offset payments from other solvent insurers where the injured party has not been made whole. Such an interpretation would directly defeat the stated purpose of the Association and be inconsistent with how other courts have interpreted similar statutes. Many courts in other states that have statutes with almost identical language to that of South Carolina’s statute have held that an offset of any benefits rendered by solvent insurers for the same injury that results in a recovery less than the full amount to which the insured is entitled unfairly penalizes the injured party. See, e.g., Gibson v. Ala. Ins. Guar. Ass’n, 601 So. 2d 416, 416–19 (Ala. 1992); Harris v. Lee, 387 So. 2d 1145, 1146 (La. 1980); R & R Indus. Park, LLC v. Utah Prop. & Cas. Ins. Guar. Ass’n, 199 P.3d 917, 925–27 (Utah 2008); Int’l Collection & Serv. v. Vt. Prop. & Cas. Ins. Guar. Ass’n, 150 Vt. 630, 633, 555 A.2d 978, 980 (1988).

For example, the Supreme Court of Vermont held that a plaintiff claimant, who suffered fire loss for which it obtained partial recovery from its own insurer, was entitled to recover unpaid losses from the guaranty association after a third party's insurer became insolvent. Int'l Collection & Serv., 150 Vt. at 633, 555 A.2d at 978, 980. The Vermont statute at issue included the exhaustion and non-duplication of recovery provisions of the Vermont Property and Casualty Insurance Guaranty Association Act, which states:

Any person having a claim against an insurer under any provision in an insurance policy other than policy of an insolvent insurer which is also a covered claim, shall be required to exhaust first his or her right under such policy. Any amount payable on a covered claim under this subchapter shall be reduced by the amount of any recovery under such insurance policy.

8 V.S.A. § 3619(a) (West 2011).

The Int'l Collection & Serv. court found the statute to be ambiguous, and thus examined the intent of the Vermont Legislature. See Int'l Collection & Serv., 150 Vt. at 633, 555 A.2d at 980. According to the stated objectives of the act, the court found that the intent of the legislature was "to eliminate any loss caused by the insolvency of the insurer." Id. That, in conjunction with the language of § 3619(a), lead "to the conclusion that the act is not to be construed so as to place the claimant in any different position than it would have been had the insolvency not occurred." Id. Relying on an Arizona case "construing an almost identical clause," the court agreed that "the words 'shall be reduced' require an offset recovered against the total 'amount payable' to the claimant as damages." Id. at 634, 555 A.2d at 980. The amount the plaintiff recovered from the third party and its own insurance "fell short of the stipulated loss" because, "[b]ut for the insolvency, [the plaintiff] could have recovered this amount in the action against the [insolvent third party's] insureds." Id. The court held that "the plaintiff is entitled to recovery from the guaranty fund for its unpaid loss" because this result "achieved the

intent of the section to prevent a duplication of recoveries, and comports with the act's purpose to leave a claimant in the same position as if there had been no insolvency." Id. at 633–34, 555 A.2d at 980.

More recently, the Supreme Court of Utah held that the Utah Property and Casualty Insurance Guaranty Association (UPCIGA) was not permitted to offset its obligation to cover claims by the amounts plaintiffs received from third party insurers when plaintiffs did not recover the total amount to which they were entitled. R & R Indus. Park, LLC v. Utah Prop. & Cas. Ins. Guar. Ass'n, 199 P.3d 917, 925 (Utah 2008). The offset provision at issue states:

- (1)(a) Any person who has a claim against an insurer, whether or not the insurer is a member insurer, under any provision in an insurance policy, other than a policy of an insolvent insurer that is also a covered claim, is required to first exhaust that person's right under that person's policy.
- (b) Any amount payable on a covered claim under this part under an insurance policy is reduced by the amount of any recovery under the insurance policy described in Subsection (1)(a).

Utah Code § 31A–28–213 (Supp.2008).

The R & R Indus. Park, LLC court found the provision to be ambiguous and rejected to interpret it to mean that UPCIGA was permitted to subtract from its obligation “any amount the claimant has recovered from any other insurance policy.” R & R Indus. Park, LLC, 199 P.3d at 925. Rather, the court saw this interpretation “counterintuitive and, in fact, [to] undermine [] the purpose of the statute, which is to protect the insured from the risks of insolvency of insurance carriers.” Id. To allow the offset of any recovery would “eliminate much, if not all, of the obligation of the UPCIGA and deprive insureds of coverage they secured from their insolvent carriers.” Id. In effect, it would also “penalize [claimants] for having purchased multiple coverage for large losses.” Id. Relying on and agreeing with decisions from courts in Connecticut, California, Nevada, the District of Columbia, and New Mexico, the Supreme Court

of Utah held that “the offset provision of the Guaranty Act applies to prevent double recovery of amounts above an insured’s total loss. UPCIGA may not deduct or offset any recovery from a third party insurer from its obligation before the insured has been fully paid for its loss.” *Id.* at 926–27 (citing Conn. Ins. Guar. Ass’n v. Union Carbide Corp., 271 Conn. 371, 388, 585 A.2d 1216, 1224–25 (1991) (holding that the “evident purpose of providing . . . for a reduction of a covered claim ‘by the amount of any recovery’ from other available insurance was to prevent a person from twice receiving benefits from the same loss or otherwise obtaining a windfall, not to reduce the amount of a claim for a loss that remains partially unsatisfied”); Zhou v. Jennifer Mall Rest. Inc., 699 A.2d 348, 352 (D.C. 1997) (stating that the non-duplication of recovery principle of guaranty associations prevents “a situation in which an insured collects the amount of the total loss from one insurance company and then gets an additional sum from [the guaranty association]”) (alteration in original); Aztec Wall Serv. Co. v. Prop. & Cas. Ins., Guar. Ass’n of N.M., 115 N.M. 475, 480, 853 P.2d 726, 731 (1993) (“To require an offset, as the Association urges, of the amount recovered from the primary insurance carrier against the Association’s liability would be absurd because it was that recovery which triggered the application of the [the plaintiff’s] excess insurance policy in the first place.”); CD Inv. Co. v. Cal. Ins. Guar. Ass’n, 84 Cal. App. 4th 1410, 1427, 101 Cal. Rpt. 2d 806, 816 (2000) (stating that “the purpose of the [insurance guaranty] act is to place the insured in a position to recover the same amount available under the insured’s policy, as if the insurer had not become insolvent”) (quoting Cimini v. Nev. Ins. Guar. Ass’n, 112 Nev. 442, 445, 915 P.2d 279, 282 (1996)) (alteration in original)). Thus, because the plaintiff in R & R Ins. Park, LLC had not yet recovered the full amount, the offset provision of the statute did not apply because the statute’s purpose was to prevent duplicative recoveries, not to reduce the amount of the full recovery. *Id.* at 927.

The language of South Carolina's statute is substantially similar to the statutes cited in the preceding cases. See S.C. Code Ann. § 38-31-100(1). As such, the Association, like the guaranty associations in Int'l Collection & Serv. and R & R Ins. Park, LLC, should not be permitted to offset the amounts Brock has received from other solvent insurers because he has not yet received the entire amount of his settlement. Under the settlement agreement, Brock was to receive \$185,000 from the now insolvent Aequicap. The Association has already paid \$91,909.55. The remaining \$93,090.45 that the Association claims should be offset would not result in a prohibited duplicative recovery, as Brock has not yet received the entire \$185,000 to which he is entitled. Thus, because Brock has not been fully paid for his loss, the Association should not be permitted to offset any recovery amount Brock has received from a third-party solvent insurer. Permitting such an offset would unjustly leave Brock with only about half of the settlement amount to which he is entitled, and must not be allowed. Moreover, allowing an offset for the coverages received by Brock expands the rights of the Association and permits deductions not otherwise afforded to the tortfeasor.

b. Medical Benefits Received Cannot Be Used to Offset the Association's Liability

The medical benefits Brock received cannot be used to offset the Association's liability because such benefits are uncovered claims, they are subject to the collateral source rule, and to do so would lead to a patently absurd result by penalizing individuals having private pay medical benefits and other forms of private insurance coverage. In addition, it is clear that courts that have interpreted these non-duplication principles for guaranty associations find that they do not apply to amounts received from medical benefits or other sources. When a claimant receives an amount from private pay medical benefits, it does not constitute a double recovery and, thus, should not be used to reduce the amount the guaranty association is obligated to pay. For

example, in Harris v. Lee, 387 So. 2d 1145, 1146 (La. 1980), the Supreme Court of Louisiana held that the Louisiana Guaranty Association was not permitted to reduce its obligation by the amount of the medical payments the plaintiff received under his group health policy for injuries sustained in an automobile accident. The offset provision of the Louisiana Insurance Guaranty Association Law, states that “[a]ny amount payable on a covered claim under this [p]art shall be reduced by the amount of any recovery under such insurance policy.” LSA-R.S. 22:1386(1). The provision, however, is limited by LSA-R.S. 22:1377, which reads:

This Part shall apply to all kinds of direct insurance, except life, health and accident, title, disability, mortgage guaranty, and ocean marine insurance.

Id. Thus, because “[h]ealth and accident insurance is specifically excluded from the Louisiana Insurance Guaranty Association Law and the non-duplication of recovery provision does not apply to payments by health and accident insurers,” there is no duplication of recovery. Id.; see also Alabama Ins. Guar. Ass’n v. Stephenson, 514 So.2d 1000, 1002 (Ala. 1987) (holding that the Blue Cross health insurance was “a kind of direct insurance excepted” by Alabama’s non-duplication provision); Ind. Ins. Guar. Ass’n v. Davis, 768 N.E.2d 902, 908-09 (Ind. Ct. App. 2002) (holding that “the claimant’s recovery from Blue Cross-Blue Shield was not a ‘covered claim’ because the [guaranty association act] does not apply to health insurance” and as such, the guaranty association was not permitted to reduce their obligation by these amounts).

Courts have also made a distinction when a statute excludes health insurance but not accident insurance. In Ind. Ins. Guar. Ass’n v. Blickensderfer, 778 N.E.2d 439, 444 (Ind. Ct. App. 2002), the Court of Appeals of Indiana stated that the “plain language of [the guaranty association act] makes it clear that the chapter does not apply to health insurance and, as a result, a ‘covered claim’ could not stem from health insurance benefits.” Id.

The South Carolina Act has language that is almost identical to the Louisiana statute discussed in Harris. Section 38-31-30(1) states “[t]his chapter applies to all kinds of direct insurance but does not apply to . . . life, annuity, health, or accident insurance.” As in Harris, the recoveries Brock received from uninsured motorist coverage, personal injury protection, and medical insurance, are not coverages subject to offset under the statute and thus the non-duplication provision does not apply to them. Thus, to the extent the court finds the phrase “a claim under an insurance policy” to be ambiguous, it is modified by the phrase “covered claims,” which is clearly defined. See S.C. Code Ann. §§ 38-31-20(8), -30(1). Other states adopting a model act without such limitations reach this same conclusion. See Brennan v. Kansas Ins. Guar. Ass’n 293 Kan., 446, 456, 264 P.3d 102, 111 (Kan. 2011) (“Most jurisdictions addressing whether their own guaranty fund may offset medical insurance benefits under an identical or substantially similar statute to the pre-amended version of K.S.A. 40-2910 have found no entitlement to offset medical insurance benefits.”); see also Pritchett v. Clifton, 738 F.2d 319, 320-21 (8th Cir. 1984) (guaranty association was not entitled to offset amount injured party recovered under her medical insurance policy). As such, “covered claims” under the statute could not stem from either health insurance benefits or accident insurance benefits.

To interpret the statute to allow offsets for both medical and accident insurance would expressly violate the explicit language of the statute and would be unsuccessful in giving effect to the expressed intent of the legislature. See Grier v. AMISUB of South Carolina, Inc., 397 S.C. 532, 536, 725 S.E.2d 695 (2012); see also Stephens, 514 So.2d at 1002 (excluding health insurance received by claimant from offset provision was consonant with the purposes of both the guaranty association act and the non-duplication provision, to prevent duplicative recovery); Indiana Ins. Guar. Ass’n v. Blickensderfer, 778 N.E.2d 439, 443 (Ind. Ct. App. 2002) (finding

that surely the legislature “did not intend that the statute would require a claimant to exhaust a claimant’s rights under any conceivable insurance policy for any conceivable claim that may be pending, even if such a claim or such a policy had nothing to do with the claim against the insolvent insurer” because such a result would be “absurd”).

Furthermore, medical insurance benefits received are subject to 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.” Estate of Ratteni v. Grainger, 298 S.C. 276, 277, 379 S.E.2d 890, 890 (1989). Insurance proceeds are subject to the collateral source rule. Id. The reasoning of the collateral source rule directly applies to the offset provision under the law governing the Association. Brock’s receipt of medical benefits from a source wholly independent of the wrongdoer does not allow the Association to deduct such damages barred by the collateral source rule.

In addition, to permit offsets for these recoveries would also essentially penalize Brock for having medical benefits and other forms of private insurance coverage. See R & R Ins. Park, LLC, 199 P.3d at 925 (stating that to allow the guaranty association an offset of any recovery would in effect “penalize [claimants] for having purchased multiple coverage for large losses”); CD Inv. Co., 84 Cal. App. 4th at 1428, 101 Cal. Rpt.2d at 816 (refusing to permit the guaranty association to reduce its obligation by other amounts paid to claimant by solvent insurers because the insured would be put in a worse position for having bought two policies). Brock is effectively penalized twice for having private pay insurance. In no other context would a tortfeasor be permitted an offset for payments made by a medical insurance carrier. This situation is no different. Such a result obviously defeats the stated purpose of the Association

because instead of protecting Brock, the claimant, the Association unjustly charges him for having separate coverage. Moreover, these charges are clearly arbitrary as the Association, in its sole discretion, negotiates offset amounts on certain forms of coverage while failing to offset others, such as Medicare and Medicaid. Exhibit G, at ¶ 8-9, 12. This patently absurd result could not possibly have been the intent of the legislature.

c. Uninsured Motorist Benefits Received Are not Subject to Offset

The uninsured motorist benefits Brock received must not be used to reduce the Association's obligation because such benefits are not subject to offset under South Carolina law and are likewise subject to the collateral source rule. First, such benefits are not covered under § 38-31-30 since uninsured motorist benefits are accident insurance. (This chapter applies to all kinds of direct insurance *but does not apply to . . . life, annuity, health, or accident insurance.*" S.C. Code Ann. § 38-31-30(1) (West 2011)) (emphasis added). Under the statutory definition, the Association is not permitted to offset Brock's uninsured motorist coverage from a solvent insured. See Rhode Island Insurers' Insolvency Fund v. Benoit, 723 A.2d 303 (R.I. 1999) (Claim for uninsured motorist benefits from solvent insurer was not a "covered claim," and, thus, Insurers' Insolvency Fund could not offset UM benefits to reduce its liability on a covered claim against an insolvent automobile liability insurer).

The "purpose of the uninsured motorist statute is to provide benefits and protection against the peril of injury or death by an uninsured motorist to an insured motorist and his family." Nationwide Mut. Ins. Co. v. Smith, 376 S.C. 60, 69, 654 S.E.2d 837, 841 (Ct. App. 2007) (quoting Ferguson v. State Farm Mut. Auto. Ins. Co., 261 S.C. 96, 100, 198 S.E.2d 522, 524 (1973)). The amount Brock received as uninsured motorist coverage is not subject to subrogation under § 38-77-160 (West 2011), which explicitly states "[b]enefits paid pursuant to

this section are not subject to subrogation or assignment.” As such, the \$25,000 Brock received as uninsured motorist coverage is not subject to be offset by the Association to reduce its total liability.

Moreover, “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. Accordingly, the Association may not offset Brock’s uninsured motorist benefits pursuant the collateral source rule in addition to § 38-31-30(1) and § 38-77-160.

d. Personal Injury Protection Benefits are Not Subject to an Offset

The benefits Brock received from his personal injury protection (“PIP”) coverage must not be offset because allowing the Association to do so would not only defeat the intent of the legislature, it would further 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). This provision is in conflict with the provision that allows the Association to offset its obligation. Under South Carolina’s guiding rules of statutory construction, the provision that prohibits the offset of PIP benefits is more specific than the general provision regarding the Association’s right to offset.

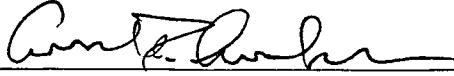
The Act only lists “any benefits” and therefore is broader and more general in nature than the PIP provision. Thus, the PIP provision controls over the Association’s provision and the Association must not be permitted to offset the PIP benefits Brock received as a result. Wooten ex re. Wooten v. S.C. 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.”).

Moreover, prohibiting the offset of the PIP benefits is in accordance with the legislative intent of both the PIP statute and the Act governing the Association. Other courts have held that a guaranty association is not permitted to offset PIP benefits against its obligation. See, e.g., Gimmestad v. Gimmestad, 451 N.W.2d 662, 665 (Minn. Ct. App. 2002) (holding that, because the recovery of the PIP benefits by the injured party would not result in a duplicative recovery, the guaranty association was not permitted to offset them); Stone v. Kentucky Ins. Guar. Ass’n, 858 S.W.2d 726, 728 (Ky. Ct. App. 1993) (holding that guaranty association was not permitted to offset basic reparation benefits, which included PIP payments). Finally, allowing the Association to offset the PIP benefits Brock has received is likewise impermissible under the collateral source rule for the same reasons set forth herein. Accordingly, PIP benefits Brock received may not be offset by the Association.

CONCLUSION

For all the above reasoning and law, Defendant Brock respectfully requests that its Motion for Summary Judgment be granted and that the Plaintiff be ordered to pay the remaining amount of Brock’s claim, totaling \$93,090.45.

ROSEN, ROSEN & HAGOOD, LLC

By: 

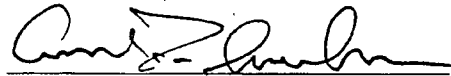
Andrew D. Gowdown
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P.O. Box 893
Charleston, SC 29402
(843) 577-6726

ATTORNEYS FOR DEFENDANT
ROGER BROCK

Charleston, South Carolina
October 19, 2012

CERTIFICATE OF SERVICE

I certify that on October 19, 2012, I caused
to be: ☐ mailed
☐ hand delivered
☐ faxed
☒ e-mailed
a true copy of the foregoing pleading(s) to
each counsel of record.



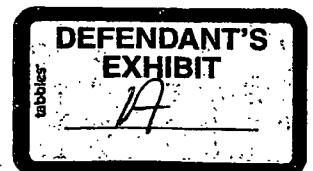
Attorney for Defendant Brock

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Roger W. Brock,	)	Case Number : 2:10-cv-2926-RMG
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
Ryan Stephens individually;	)	AMENDED COMPLAINT
Malachi Sanders, Jr., individually;	)	(Jury Trial Demanded)
Malachi Sanders, III, individually;	)	
Malachi Sanders; Malachi Sanders	)	
Junior; Malachi Sanders Logging;	)	
Sanders Malachi Logging; M & J	)	
Logging; and Sanders Log,	)	
	)	
Defendants.	)	

The Plaintiff, Roger Brock, complaining of the Defendants herein, both jointly and severally, alleges and states as follows:

1. The Plaintiff, Roger Brock, is a resident and citizen of Jackson County, Arkansas.
2. Upon information and belief, Defendant Ryan R. Stephens (hereinafter "Defendant Stephens") is a citizen and resident of Colleton County, South Carolina.
3. Upon information and belief, Defendant Stephens was, at all times relevant to this action, a motor carrier driver pursuant to 49 C.F.R. Part 392.3 and 49 C.F.R. Part 395.1 – 395.8.
4. Upon information and belief, Defendant Malachi Sanders, Jr., is a citizen and resident of Colleton County, South Carolina.
5. Upon information and belief, Defendant Malachi Sanders, III, is a citizen and resident of Colleton County, South Carolina.
6. Upon information and belief, Defendant Malachi Sanders is a trucking company with its principal place of business in Colleton County, South Carolina.



7. Upon information and belief, Defendant Malachi Sanders Junior is a trucking company with its principal place of business in Colleton County, South Carolina.

8. Upon information and belief, Defendant Malachi Sanders Logging is a trucking company with its principal place of business in Colleton County, South Carolina.

9. Upon information and belief, Defendant Sanders Malachi Logging is a trucking company with its principal place of business in Colleton County, South Carolina.

10. Upon information and belief, Defendant M&J Logging is a trucking company with its principal place of business in Colleton County, South Carolina.

11. Upon information and belief, Defendant Sanders Log is a trucking company with its principal place of business in Colleton County, South Carolina.

12. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332 because complete diversity exists and the amount in controversy exceeds \$75,000 exclusive of interest and costs.

13. Because the alleged events and/or omissions giving rise to this claim occurred in Colleton County, South Carolina, venue is proper in this Court pursuant to 28 U.S.C. § 1391(a) and Local Civil Rule 3.01(A)(1).

14. At the time of the acts alleged herein, Defendant Stephens was the agent, servant, and/or employee of Malachi Sanders, Jr.; Malachi Sanders, III; Malachi Sanders; Malachi Sanders Junior; Malachi Sanders Logging; Sanders Malachi Logging; M & J Logging; and/or Sanders Log.

15. At the time of the acts alleged herein, Defendant Stephens was the driver and /or operator of a commercial tractor trailer for Malachi Sanders, Jr.; Malachi Sanders, III; Malachi Sanders; Malachi Sanders Junior; Malachi Sanders Logging; Sanders Malachi Logging; M & J

Logging; and/or Sanders Log as their agent, servant and/or employee and with their express knowledge and permission. At all times pertinent hereto, Defendant Stephens was acting within the scope of his employment.

16. Under the principles of *respondeat superior*, the law of agency, and/or the laws of the State of South Carolina, Defendants Malachi Sanders, Jr.; Malachi Sanders, III; Malachi Sanders; Malachi Sanders Junior; Malachi Sanders Logging; Sanders Malachi Logging; M & J Logging; and/or Sanders Log are vicariously and directly liable for the actions and/or conduct of Defendant Stephens as described herein.

17. This case involves a motor vehicle wreck that occurred on October 2, 2009, in Colleton County, South Carolina.

18. At all times pertinent herein, Plaintiff was the passenger in a 1994 Chevrolet truck owned and driven by Brian Mason bearing Arkansas license plate number 696MSW.

19. At all times pertinent herein, Defendant Stephens was the operator of a 1989 Peterbilt tractor and Pitts logging trailer bearing South Carolina license plate PS92794 and owned by M & J Logging, Defendant Stephens' employer.

20. On or about October 2, 2009, at approximately 12:15 a.m., Brian Mason was operating the above-referenced truck in a prudent and careful manner and traveling north on Highway 61 in Colleton County, South Carolina. Plaintiff was seated in the back seat of the extended cab.

21. At the same time, Defendant Stephens was illegally backing his commercial vehicle into a private driveway blocking all lanes of travel on Highway 61. At the time, it was dark, there were no lights on the roadway, there was inadequate reflective tape on the tractor trailer, and the tractor's headlights were pointed south into the southbound lane of travel.

22. Brian Mason, the operator of the Chevrolet truck in which Plaintiff was a passenger, could not see Defendant Stephens' tractor trailer because its dark color was indistinguishable from the nighttime darkness, and there were no other observable indications or warnings that Defendant Stephens was blocking the entire roadway with his commercial vehicle. As a result, Brian Mason continued to travel north on Highway 61 and collided with the logging trailer, which was situated diagonally across the lane in which Brian Mason and Plaintiff were travelling.

23. As a result of the violent collision with Defendant Stephens' commercial vehicle, the Plaintiff has suffered substantial and permanent injuries. His nose was nearly severed from his face; he suffered nerve damage to his hand and arm; his left pinky finger was broken; and he was required to have four teeth extracted. He continues to experience pain and numbness in his leg, hip, neck, back, chest, arm, and shoulder as well as pain and cramping in his hand and wrist. In addition, Plaintiff will require surgery to correct his deviated septum as well as oral surgery and implants to replace his missing teeth.

24. The collision, injuries, and damages described herein were the actual, direct, proximate, and foreseeable result of the negligence, gross negligence, negligence per se, carelessness, recklessness, willfulness, wantonness, and heedlessness of the Defendants.

AS AND FOR A FIRST CAUSE OF ACTION
(Negligence)

25. Plaintiff repeats, realleges, and incorporates each and every allegation contained in the foregoing paragraphs as if repeated verbatim.

26. The Defendants owed a duty to Plaintiff to operate the tractor trailer at issue in obedience with all state and federal laws and in such a manner so as not to negligently, grossly

negligently, recklessly, willfully, or wantonly cause injury or damage to others lawfully using the highways, including Plaintiff.

27. The Defendants breached the duties owed to Plaintiff and were negligent, careless, grossly negligent, reckless, willful, and/or wanton at the time and place above-mentioned in one or more of the following particulars:

- a. Driving a motor vehicle in such a manner as to indicate a willful, wanton, reckless, negligent, and grossly negligent disregard for the rights and safety of others, including Plaintiff, in violation of S.C. Code Ann. § 56-5-2920;
- b. Illegally backing the commercial vehicle across lanes of traffic in violation of S.C. Code Ann. § 56-5-3810;
- c. Failing to operate the commercial vehicle in the manner required by the Federal Motor Carrier Safety Regulations;
- d. Failing to maintain proper control of the commercial vehicle;
- e. Improper and illegal lane change;
- f. Failing to recognize or respect other vehicles having the right of way;
- g. Failing to maintain a proper lookout;
- h. Failing to warn others lawfully using the highway, including Plaintiff, that the Defendants' commercial vehicle was blocking all lanes of travel;
- i. Failing to prevent or avoid the collision described herein;
- j. Failing to take any measures to minimize the risk that such a collision would occur;
- k. Failing to exercise the degree of care and caution which a reasonably prudent person would have exercised under the same or similar circumstances; and
- l. In such other particulars as the evidence may show.

28. As a direct and proximate cause of the negligence per se, negligence, gross negligence, carelessness, recklessness, willfulness, wantonness, and heedlessness of Defendants, their agents, servants, and employees, Plaintiff was severely injured. The injuries and damages

suffered by Plaintiff include, but are not limited to: trauma to his body; a severe facial laceration; a broken finger; significant damage to his mouth necessitating the extraction of four teeth; pain and numbness in his leg, hip, neck, back, chest, arm, and shoulder; debilitating pain and suffering; soreness; discomfort; tenderness; permanent disfigurement; anxiety; expenses for past and future medical treatment; multiple surgeries including surgery to correct his deviated septum as well as oral surgery and implants to replace his missing teeth; loss of enjoyment of life; lost wages; lost earning capacity; and other tangible and intangible damages.

29. In doing the acts alleged above, Defendant Stephens was grossly negligent, careless, reckless, willful, wanton and heedless. As a result, Plaintiff is entitled to recover punitive and/or exemplary damages in an amount to be determined by the trier of fact.

AS AND FOR A SECOND CAUSE OF ACTION
(Negligent Entrustment)

30. Plaintiff repeats, realleges, and incorporates each and every allegation contained in the foregoing paragraphs as if repeated verbatim.

31. At the time of the collision, Defendants Malachi Sanders, Jr.; Malachi Sanders, III; Malachi Sanders; Malachi Sanders Junior; Malachi Sanders Logging; Sanders Malachi Logging; M & J Logging; and/or Sanders Log were the owners and/or persons and businesses in control of the tractor trailer driven by Defendant Stephens, and each maintained responsibility for its use.

32. As owners and/or persons or businesses in control of the commercial vehicle driven by Defendant Stephens, Defendants Malachi Sanders, Jr.; Malachi Sanders, III; Malachi Sanders; Malachi Sanders Junior; Malachi Sanders Logging; Sanders Malachi Logging; M & J Logging; and/or Sanders Log owed the public, including Plaintiff, a duty of care when entrusting

the commercial vehicle to Defendant Stephens, knowing that the vehicle would be operated by Defendant Stephens on the public roadways in this state.

33. Defendant Stephens was inexperienced, untrained, and incapable of operating his commercial vehicle in the manner required by the Federal Motor Carriers Safety Regulations and state law.

34. Defendants Malachi Sanders, Jr.; Malachi Sanders, III; Malachi Sanders; Malachi Sanders Junior; Malachi Sanders Logging; Sanders Malachi Logging; M & J Logging; and/or Sanders Log knew or should have known that Defendant Stephens was not competent to operate the commercial vehicle in the manner required by the Federal Motor Carrier Safety Regulations and state law because of his inexperience and lack of training, and that this incompetence would cause Defendant Stephens to operate the commercial vehicle in such a manner as to create an unreasonable and appreciable risk of harm to others, including Plaintiff.

35. Despite knowing that Defendant Stephens was not competent to operate the commercial vehicle, Defendants Malachi Sanders, Jr.; Malachi Sanders, III; Malachi Sanders; Malachi Sanders Junior; Malachi Sanders Logging; Sanders Malachi Logging; M & J Logging; and/or Sanders Log nonetheless entrusted the commercial vehicle to Defendant Stephens for his sole use and for the purpose of furthering the business interests of said Defendants.

36. At the time of the collision, Defendant Stephens did in fact operate the commercial vehicle entrusted to him by Defendants Malachi Sanders, Jr.; Malachi Sanders, III; Malachi Sanders; Malachi Sanders Junior; Malachi Sanders Logging; Sanders Malachi Logging; M & J Logging; and/or Sanders Log in a careless and reckless manner.

37. As a direct and proximate cause of the negligence per se, negligence, gross negligence, carelessness, recklessness, willfulness, wantonness, and heedlessness of Defendants,

their agents, servants, and employees, Plaintiff was severely injured. The injuries and damages suffered by Plaintiff include, but are not limited to: trauma to his body; a severe facial laceration; a broken finger; significant damage to his mouth necessitating the extraction of four teeth; pain and numbness in his leg, hip, neck, back, chest, arm, and shoulder; pain and cramping in his hand and wrist; debilitating pain and suffering; soreness; discomfort; tenderness; permanent disfigurement; anxiety; expenses for past and future medical treatment; multiple surgeries including surgery to correct his deviated septum as well as oral surgery and implants to replace his missing teeth; loss of enjoyment of life; lost wages; lost earning capacity; and other tangible and intangible damages.

38. In doing the acts alleged above, Defendants were grossly negligent, careless, reckless, willful, wanton and heedless. As a result, Plaintiff is entitled to recover punitive and/or exemplary damages in an amount to be determined by the trier of fact.

AS AND FOR A THIRD CAUSE OF ACTION
(Negligent Hiring, Training, Supervision, and Retention)

39. Plaintiff repeats, realleges, and incorporates each and every allegation contained in the foregoing paragraphs as if repeated verbatim.

40. At the time of the collision, Defendant Stephens was an employee of Defendants Malachi Sanders, Jr.; Malachi Sanders, III; Malachi Sanders; Malachi Sanders Junior; Malachi Sanders Logging; Sanders Malachi Logging; M & J Logging; and/or Sanders Log., and was acting within the scope of his employment.

41. Defendants Malachi Sanders, Jr.; Malachi Sanders, III; Malachi Sanders; Malachi Sanders Junior; Malachi Sanders Logging; Sanders Malachi Logging; M & J Logging; and/or Sanders Log owed statutory and common law duties to the public, including Plaintiff, to use due

care in the hiring, training, supervision, and retention of its employees, including Defendant Stephens.

42. Defendants Malachi Sanders, Jr.; Malachi Sanders, III; Malachi Sanders; Malachi Sanders Junior; Malachi Sanders Logging; Sanders Malachi Logging; M & J Logging; and/or Sanders Log failed to properly hire, train, supervise, and/or retain Defendant Stephens and allowed him to operate the commercial vehicle without adequate experience and skill in violation of state and federal laws.

43. Defendants Malachi Sanders, Jr.; Malachi Sanders, III; Malachi Sanders; Malachi Sanders Junior; Malachi Sanders Logging; Sanders Malachi Logging; M & J Logging; and/or Sanders Log knew or should have known that Defendant Stephens was not competent to operate the commercial vehicle in the manner required by the Federal Motor Carriers Safety Regulations and state law because of his inexperience and lack of training, and that this incompetence would cause Defendant Stephens to operate the commercial vehicle in such a manner as to create an unreasonable and appreciable risk of harm to others, including Plaintiff.

44. As a direct and proximate cause of the negligence per se, negligence, gross negligence, carelessness, recklessness, willfulness, wantonness, and heedlessness of Defendants, their agents, servants, and employees, Plaintiff was severely injured. The injuries and damages suffered by Plaintiff include, but are not limited to: trauma to his body; a severe facial laceration; a broken finger; significant damage to his mouth necessitating the extraction of four teeth; pain and numbness in his leg, hip, neck, back, chest, arm, and shoulder; pain and cramping in his hand and wrist; debilitating pain and suffering; soreness; discomfort; tenderness; permanent disfigurement; anxiety; expenses for past and future medical treatment; multiple surgeries including surgery to correct his deviated septum as well as oral surgery and implants to

replace his missing teeth; loss of enjoyment of life; lost wages; lost earning capacity; and other tangible and intangible damages.

45. In doing the acts alleged above, Defendants were grossly negligent, careless, reckless, willful, wanton and heedless. As a result, Plaintiff is entitled to recover punitive and/or exemplary damages in an amount to be determined by the trier of fact.

46. Plaintiff demands a jury trial pursuant to Rule 38 of the Federal Rules of Civil Procedure.

WHEREFORE, Plaintiff prays for the following relief:

- i. Judgment against Defendants for actual and punitive damages in an amount to be determined by the trier of fact;
- ii. For the costs and disbursements of this action;
- iii. For interest as provided by law; and
- iv. For such other relief as this Court may deem just and proper.

ROSEN, ROSEN & HAGOOD, LLC

By: /s/ Andrew D. Gowdown
Andrew D. Gowdown, Federal ID #7577
Lorene Stuhr Dukes, Federal ID #10627
P.O. Box 893
Charleston, SC 29402
(843) 577-6726

ATTORNEYS FOR PLAINTIFF

Charleston, South Carolina
December 8, 2010.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Brian Mason, deceased, by and
through his Personal Representative,
Sheila Mason,

Plaintiff,

v.

Ryan Stephens, individually;
Malachi Sanders, Jr., individually;
Malachi Sanders, III, individually;
Malachi Sanders; Malachi Sanders
Junior; Malachi Sanders Logging;
Sanders Malachi Logging; M & J
Logging; Sanders Log;

Defendants.

Case Number: 2:10-cv-1086-PMD

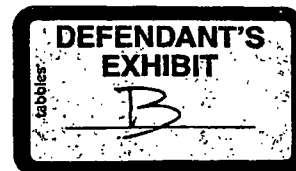
COMPLAINT
(Jury Trial Demanded)

**(Negligence, Negligent Entrustment,
Negligent Hiring, Retention, and
Supervision)**

The Plaintiff Brian Mason, deceased, by and through his Personal Representative, Sheila Mason, and the undersigned attorneys, complaining of the Defendants, jointly and severally, would allege and show unto the Court the following:

JURISDICTION AND VENUE

1. The Decedent was a citizen and resident of Cross County, State of Arkansas. The Plaintiff, Sheila Mason, is the duly appointed Administrator of Plaintiff's Estate, is a resident of Cross County, State of Arkansas and has authority to bring this wrongful death action on behalf of Plaintiff's beneficiaries under the South Carolina Wrongful Death Act, S.C. Code § 15-51-10 et seq. and to bring this survival action on behalf of Plaintiff's Estate under S.C. Code § 15-5-90. The Order Appointing Sheila Mason as Personal Representative Administrator of the Decedent's Estate was entered



in Cross County, Arkansas Probate Division and has been filed with the Colleton County Probate Court and is attached hereto as Exhibit No. 1.

2. Defendant Ryan R. Stephens (hereinafter "Defendant Stephens"), upon information and belief, is a citizen and resident of Colleton County, South Carolina.

3. Upon information and belief, Defendant Stephens was, at all times relevant to this action, a motor carrier driver pursuant to 49 C.F.R. Part 392.3 and 49 C.F.R. Part 395.1 to 395.8.

4. Upon information and belief Malachi Sanders, Jr., individually, upon information and belief is a citizen and resident of Colleton County, South Carolina.

5. Upon information and belief, Malachi Sanders, III, individually, upon information and belief is a citizen and resident of Colleton County, South Carolina.

6. Defendant Malachi Sanders is a trucking company with its principle place of business in Colleton County, South Carolina.

7. Defendant Malachi Sanders Junior is a trucking company with its principle place of business in Colleton County, South Carolina.

8. Defendant Malachi Sanders Logging is a trucking company with its principle place of business in Colleton County, South Carolina.

9. Defendant Sanders Malachi Logging is a trucking company with its principle place of business in Colleton County, South Carolina.

10. Defendant M & J Logging is a trucking company with its principle place of business in Colleton County, South Carolina.

11. Defendant Sanders Log is a trucking company with its principle place of business in Colleton County, South Carolina.

12. This suit arises out of an automobile accident that occurred in Colleton County, South Carolina on October 2, 2009.

13. Pursuant to 28 U.S.C. § 1332, this Court has jurisdiction based on complete diversity of citizenship of the parties and because the amount in controversy exceeds \$75,000.00 exclusive of interest and costs.

14. In accordance with 28 U.S.C. § 1391 and Local Civil Rule 3.01(A)(1), venue is proper in the Charleston Division of the District of South Carolina as the alleged acts and/or omissions occurred in the Charleston Division of South Carolina.

FOR A FIRST CAUSE OF ACTION
(Negligence)

15. Plaintiff realleges and reincorporates the previous paragraphs above as if fully set forth herein verbatim.

16. At all times relevant hereto, Defendant Stephens was an employee, agent and legal representative of Malachi Sanders, Jr., individually; Malachi Sanders, III, individually; Malachi Sanders; Malachi Sanders Junior; Malachi Sanders Logging; Sanders Malachi Logging; M & J Logging; and/or Sanders Log.

17. At all times relevant hereto, Defendant Stephens was an employee and/or permissive user operating a large commercial truck on behalf of Malachi Sanders, Jr., individually; Malachi Sanders, III, individually; Malachi Sanders; Malachi Sanders Junior; Malachi Sanders Logging; Sanders Malachi Logging; M & J Logging; and/or Sanders Log.

18. Malachi Sanders, Jr., individually; Malachi Sanders, III, individually; Malachi Sanders; Malachi Sanders Junior; Malachi Sanders Logging; Sanders Malachi Logging; M & J Logging; and/or Sanders Log are responsible for Defendant Stephens's actions and the consequences of his actions on October 2, 2009.

19. On or about October 2, 2009 at approximately 12:15 a.m., the Plaintiff was traveling north on Highway 61, located in Colleton County, South Carolina.

20. The Plaintiff was acting in a reasonably prudent and careful manner at all times pertinent hereto.

21. At the same time Defendant Stephens was illegally backing his commercial vehicle at night across all lanes of travel on Highway 61 into a private driveway, with the tractor's headlights pointed south in the southbound lane of travel.

22. That the Plaintiff was unable to see and appreciate the Defendant's actions, due to the dark color of the trailer placed diagonal across the roadway at night, and as a result continued to travel in a northbound direction towards the commercial vehicle as it was attempting to reverse, across all lanes of travel, into a private driveway and collided with the trailer, attached to the commercial vehicle, as the trailer was located in a diagonal direction across the Plaintiff's lane of travel.

23. The Plaintiff suffered substantial multiple body trauma, blunt force trauma, and chest trauma as a result of the collision and subsequently died.

24. The collision, injuries, and damages described in this Complaint were the direct, foreseeable and proximate result of the negligent and careless, and willful, wanton, reckless, and grossly negligent acts or omissions of Defendant Stephens, who was a permissive user of the commercial vehicle and was acting in the course and scope of his employment, agency, and representation of Malachi Sanders, Jr., individually; Malachi Sanders, III, individually; Malachi Sanders; Malachi Sanders Junior; Malachi Sanders Logging; Sanders Malachi Logging; M & J Logging; and/or Sanders Log in the following particulars:

- a. Driving a motor vehicle in such a manner as to indicate a willful, wanton, reckless, grossly negligent, and negligent disregard for the safety of others, in violation of S.C. Code Ann. § 56-5-2920;
- b. Illegal backing across lanes, in violation of S.C. Code Ann. § 56-5-3810;
- c. Failing to maintain a proper lookout;
- d. Failing to maintain proper control of his motor vehicle;
- e. Improper and illegal lane change;
- f. Failing to use the degree of care and caution that a reasonable person would have used under the circumstances then and there prevailing;
- g. Failing to yield the right-of-way;
- h. In failing to observe the Plaintiff's vehicle, and to avoid the collision described herein, when it was at all times in plain and unobstructed sight;
- i. Failing to keep the motor vehicle he was operating under control;
- j. Failing to operate commercial vehicle in the manner required by the FMCSR; and
- k. In such other and further particulars as the evidence at trial may show.

All of which acts and omissions, or both, were the actual, direct and proximate cause of the damages and injuries claimed herein.

25. As a direct and proximate result of Defendant Stephens' willful, wanton, reckless, grossly negligent, and negligent acts as set out above, the Plaintiff's beneficiaries, as represented by Sheila Mason, Plaintiff's Estate Administrator, have suffered injuries, which have caused, and in the future will cause, his beneficiaries to suffer one or more of the following elements of damage as to the wrongful death claim:

- a. pecuniary loss;

- b. mental shock and suffering;
- c. wounded feelings;
- d. grief and sorrow;
- e. loss of companionship; and
- f. deprivation of use and comfort of Plaintiff's society, including loss of his experience, knowledge, and judgment in managing the affairs of himself and his beneficiaries;

26. In addition, as a direct and proximate result of Defendant Stephens' willful, wanton, reckless, grossly negligent, and negligent acts as set out above, the Plaintiff suffered injuries, which caused him to suffer one or more of the following elements of damage as to his survival action claim:

- a. physical pain;
- b. disfigurement;
- c. suffering;
- d. mental anguish;
- e. emotional distress; and
- f. shock and injury to Plaintiff's nerves and nervous system.

27. Due to the willful, wanton, reckless, grossly negligent, and negligent acts of Defendant Stephens as set out above, as well as his violation of state law, Plaintiff is entitled to recover actual and punitive damages, jointly and severally, as determined by a jury.

FOR A SECOND CAUSE OF ACTION

(Negligent Entrustment)

28. Plaintiff realleges and reincorporates the paragraphs above as if fully set forth herein verbatim.

29. Malachi Sanders, Jr., individually; Malachi Sanders, III, individually; Malachi Sanders; Malachi Sanders Junior; Malachi Sanders Logging; Sanders Malachi Logging; M & J Logging; and/or Sanders Log knew or should have known that Defendant Stephens was untrained and incapable of operating his vehicle in the manner required by the Federal Motor Carriers Safety Regulations (the "FMCSR") and state law.

30. Malachi Sanders, Jr., individually; Malachi Sanders, III, individually; Malachi Sanders; Malachi Sanders Junior; Malachi Sanders Logging; Sanders Malachi Logging; M & J Logging; and/or Sanders Log knew or should have known that Defendant Stephens' inexperience and lack of training was evidence that he was incapable of complying with the FMCSR and state law and was therefore a reckless driver.

31. Malachi Sanders, Jr., individually; Malachi Sanders, III, individually; Malachi Sanders; Malachi Sanders Junior; Malachi Sanders Logging; Sanders Malachi Logging; M & J Logging; and/or Sanders Log entrusted a commercial vehicle to Defendant Stephens despite knowing that he lacked proper training and experience.

32. As a direct, foreseeable, and proximate result of the negligent, grossly negligent, reckless, willful, and wanton acts and omissions of Malachi Sanders, Jr., individually; Malachi Sanders, III, individually; Malachi Sanders; Malachi Sanders Junior; Malachi Sanders Logging; Sanders Malachi Logging; M & J Logging; and/or Sanders Log, Plaintiff suffered conscious pain and suffering, physical harm and injury, and endured pain and suffering, including mental distress, emotional anguish and death.

33. Plaintiff is entitled to judgment against Malachi Sanders, Jr., individually; Malachi Sanders, III, individually; Malachi Sanders; Malachi Sanders Junior; Malachi

Sanders Logging; Sanders Malachi Logging; M & J Logging; and/or Sanders Log for his above-described injuries and for actual and punitive damages in an amount to be determined by the jury.

FOR A THIRD CAUSE OF ACTION
(Negligent Hiring, Supervision and Retention)

34. Plaintiff realleges and reincorporates the paragraphs above as if fully set forth herein verbatim.

35. Malachi Sanders, Jr., individually; Malachi Sanders, III, individually; Malachi Sanders; Malachi Sanders Junior; Malachi Sanders Logging; Sanders Malachi Logging; M & J Logging; and/or Sanders Log owed statutory and common law duties to the Plaintiff not to negligently hire, supervise and retain employees.

36. Malachi Sanders, Jr., individually; Malachi Sanders, III, individually; Malachi Sanders; Malachi Sanders Junior; Malachi Sanders Logging; Sanders Malachi Logging; M & J Logging; and/or Sanders Log knew or should have known that Defendant Stephens was untrained and incapable of complying with the FMCSR and state laws.

37. Malachi Sanders, Jr., individually; Malachi Sanders, III, individually; Malachi Sanders; Malachi Sanders Junior; Malachi Sanders Logging; Sanders Malachi Logging; M & J Logging; and/or Sanders Log knew or should have known that Defendant Stephens' inexperience and lack of training was evidence that he was unable to comply with the FMCSR and state laws and was therefore a reckless driver.

38. Malachi Sanders, Jr., individually; Malachi Sanders, III, individually; Malachi Sanders; Malachi Sanders Junior; Malachi Sanders Logging; Sanders Malachi Logging; M & J Logging; and/or Sanders Log failed to properly supervise and train

Defendant Stephens and allowed him to operate his vehicle without the most basic training in violation of the FMCSR and state law.

39. As a direct, foreseeable, and proximate result of the negligent, grossly negligent, reckless, willful, and wanton acts and omissions of Malachi Sanders, Jr., individually; Malachi Sanders, III, individually; Malachi Sanders; Malachi Sanders Junior; Malachi Sanders Logging; Sanders Malachi Logging; M & J Logging; and/or Sanders Log, Plaintiff suffered conscious pain and suffering, physical harm and injury, and endured pain and suffering, including mental distress, emotional anguish and death.

40. Plaintiff is entitled to judgment against Malachi Sanders, Jr., individually; Malachi Sanders, III, individually; Malachi Sanders; Malachi Sanders Junior; Malachi Sanders Logging; Sanders Malachi Logging; M & J Logging; and/or Sanders Log for his above-described injuries and for actual and punitive damages in an amount to be determined by the jury.

41. Plaintiff is entitled to judgment against the Defendants, jointly and severally, for his above-described injuries and for actual and punitive damages in an amount to be determined by the jury.

42. Plaintiff demands a jury trial.

WHEREFORE, Plaintiff prays for the following:

- i. Judgment against Defendants for actual and punitive damages in an amount to be determined by the jury;
- ii. For the costs of this action; and
- iii. For such other and further relief as this court deems just and proper.

PIERCE, HERNS, SLOAN & McLEOD, LLC
321 East Bay Street
Post Office Box 22437
Charleston, SC 29401
(843) 722-7733

s/ Allan P. Sloan, III
Allan P. Sloan, III
Fed ID #: 6268

Wilson W. Greene
FED ID #: 10211

Attorneys for the Plaintiff

June 23, 2010
Charleston, South Carolina

IN THE CIRCUIT COURT OF CROSS COUNTY, ARKANSAS
PROBATE DIVISION
FILED

IN THE MATTER OF
THE ESTATE OF
BRIAN DALE MASON, DECEASED

JUN 14 2010

PR-2010-37-3

Debbie J. Jones
COUNTY & PROBATE CLERK
CROSS COUNTY, AR

SHEILA MASON

BY *Fabrice A. Hesse* D.C.

PETITIONER

AMENDED ORDER APPOINTING ADMINISTRATOR

Now on this 14th day of June, 2010, this matter comes on to be heard on the Petition of Sheila Mason for Appointment of Administrator of the Estate of Brian Dale Mason, Deceased, and upon consideration of such Petition, testimony of Sheila Mason, and other matters and things before the Court, and the Court being well and sufficiently advised finds:

1. That Brian Dale Mason is deceased and died intestate.
2. That this Court has Jurisdiction and venue properly lays in this County.
3. That Sheila Mason is proper person and fully qualified by law to serve as

Administratrix of said Estate.

4. That Sheila Mason shall not sell, give, encumber or otherwise dispose of personal property of the deceased or any assets of the Estate of Brian Dale Mason, without prior written Court approval.

5. That due to the stipulations as set forth in Paragraph number four (4), bond is hereby waived.

It is therefore considered ordered, adjudged and decreed that the Estate be and hereby is opened and that Sheila Mason is hereby named Administratrix of the Estate of the Decedent, that Letters of Administration shall be issued to said person.

FILED FOR RECORD
June 14, 2010 at *10:25 AM*
Recorded in book *WW* Page *236*

Benny E. Story
BEN STORY
CIRCUIT JUDGE

Debbie J. Jones
COUNTY & PROBATE CLERK
CROSS COUNTY, AR
BY *Fabrice A. Hesse* D.C.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

ANGELA HESS,
Plaintiff

v.

Ryan Stephens, individually;
Malachi Sanders, Jr., individually;
Malachi Sanders, III, individually;
Malachi Sanders; Malachi
Sanders, Junior; Malachi Sanders
Logging;
Sanders Malachi Logging; M & J
Logging; Sanders Log.

Defendants.

2:10-cv-02814-RMG

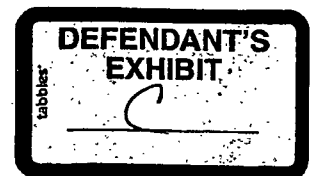
COMPLAINT

(Jury Trial Demanded)

(Negligence; Negligent Entrustment;
and
Negligent Hiring, Retention and
Supervision)

The Plaintiff, Angela Hess, complaining of the Defendants herein,
both jointly and severally, alleges and states as follows:

1. The Plaintiff, Angela Hess, is a resident and citizen of the State of Arkansas.
2. Upon information and belief, Defendant Ryan R. Stephens (hereinafter "Defendant Stephens") is a citizen and resident of Colleton County, South Carolina.
3. Upon information and belief, Defendant Stephens was, at all times relevant to this action, a motor carrier driver pursuant to 49 C.F.R. Part 392.3 and 49 C.F.R. Part 395.1 - 395.8.



(2)

4. Upon information and belief, Defendant Malachi Sanders, Jr., is a citizen and resident of Colleton County, South Carolina.

5. Upon information and belief, Defendant Malachi Sanders, III, is a citizen and resident of Colleton County, South Carolina.

6. Upon information and belief, Defendant Malachi Sanders is a trucking company with its principal place of business in Colleton County, South Carolina.

7. Defendant Malachi Sanders Junior is a trucking company with its principal place of business in Colleton County, South Carolina.

8. Upon information and belief, Defendant Malachi Sanders Logging is a trucking company with its principal place of business in Colleton County, South Carolina.

9. Upon information and belief, Defendant Sanders Malachi Logging is a trucking company with its principal place of business in Colleton County, South Carolina.

10. Upon information and belief, Defendant M&J Logging is a trucking company with its principal place of business in Colleton County, South Carolina.

11. Upon information and belief, Defendant Sanders Log is a trucking company with its principal place of business in Colleton County, South Carolina.

(3)

12. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332 because complete diversity exists and the amount in controversy exceeds \$75,000 exclusive of interest and costs.

13. Because the alleged events and/or omissions giving rise to this claim occurred in Colleton County, South Carolina, venue is proper in this Court pursuant to 28 U.S.C. § 1391(a) and Local Civil Rule 3.01 (A)(1).

14. At the time of the acts alleged herein, Defendant Stephens was the agent, servant, and/or employee of Malachi Sanders, Jr.; Malachi Sanders, HI; Malachi Sanders; Malachi Sanders Junior; Malachi Sanders Logging; Sanders Malachi Logging; M & J Logging; and/or Sanders Log.

15. At the time of the acts alleged herein, Defendant Stephens was the driver and/or operator of a commercial tractor trailer for Malachi Sanders, Jr.; Malachi Sanders, III; Malachi Sanders; Malachi Sanders Junior; Malachi Sanders Logging; Sanders Malachi Logging; M & J Logging; and/or Sanders Log as their agent, servant and/or employee and with their express knowledge and permission. At all times pertinent hereto, Defendant Stephens was acting within the scope of his employment.

16. Under the principles of *respondeat superior*, the law of agency, and/or the laws of the State of South Carolina, Defendants Malachi Sanders, Jr.; Malachi Sanders, III; Malachi Sanders; Malachi Sanders Junior; Malachi Sanders Logging; Sanders Malachi Logging; M & J

(4)

Logging; and/or Sanders Log are vicariously and directly liable for the actions and/or conduct of Defendant Stephens as described herein.

17. This case involves a motor vehicle wreck that occurred on October 2, 2009, in Colleton County, South Carolina.

18. At all times pertinent herein, Plaintiff was the passenger in a 1994 Chevrolet truck owned and driven by Brian Mason bearing Arkansas license plate number 696MSW.

19. At all times pertinent herein, Defendant Stephens was the operator of a 1989 Peterbilt tractor and Pitts logging trailer bearing South Carolina license plate PS92794 and owned by M & J Logging, Defendant Stephens' employer.

20. On or about October 2, 2009, at approximately 12:15 a.m., Brian Mason was operating the above-referenced truck in a prudent and careful manner and traveling north on Highway 61 in Colleton County, South Carolina. Plaintiff was a passenger in this truck and was seated on the front seat.

21. At the same time, Defendant Stephens was illegally backing his commercial vehicle into a private driveway blocking all lanes of travel on Highway 61. At the time, it was dark, there were no lights on the roadway, there was inadequate reflective tape on the tractor trailer, and the tractor's headlights were pointed south into the southbound lane of travel.

(5)

22. Brian Mason, the operator of the Chevrolet truck in which Plaintiff was a passenger, could not see Defendant Stephens' tractor trailer because its dark color was indistinguishable from the nighttime darkness, and there were no other observable indications or warnings that Defendant Stephens was blocking the entire roadway with his commercial vehicle. As a result, Brian Mason continued to travel north on Highway 61 and collided with the logging trailer, which was situated diagonally across the lane in which Brian Mason and Plaintiff were traveling.

23. As a result of the violent collision with Defendant Stephens' commercial vehicle, the Plaintiff has suffered substantial and permanent injuries including, but not limited to: multiple facial lacerations with impregnated glass which required a plastic surgeon for surgical repair; massive facial scarring; permanent neurologic sensory defect; facial contusion with fracture of the front teeth which required oral surgery for extraction of multiple teeth; concussion with intermittent vertigo; right shoulder strain/sprain; right pectoralis major muscle pain; sprain of the right trapezius muscle; chest contusion; fracture of the left hand; chronic residual pain; and loss of enjoyment of life. Plaintiff will require surgery to correct her buckled deviated septum, intralesional cortical steroids as a result of thick hypertrophic scarring; surgery to remove fragments of glass along with surgical scar reconstruction (Z or W plasty); surgical reconstruction as a result of a wide area of tissue loss of the right nasal

(6)

ala, with possible rotation flap or a full thickness graft; as well as oral surgery, implants to replace her missing teeth, and dentures.

24. The collision, injuries, and damages described herein were the actual, direct, proximate, and foreseeable result of the negligence, gross negligence, negligence per se, carelessness, recklessness, willfulness, wantonness and heedlessness of the Defendants.

AS A FIRST CAUSE OF ACTION
(Negligence)

25. Plaintiff repeats, realleges, and incorporates each and every allegation contained in the foregoing paragraphs as if repeated verbatim.

26. The Defendants owed a duty to Plaintiff to operate the tractor trailer at issue in obedience with all state and federal laws and in such a manner so as not to negligently, grossly negligently, recklessly, willfully, or wantonly cause injury or damage to others lawfully using the highways, including Plaintiff.

27. The Defendants breached the duties owed to Plaintiff and were negligent, careless, grossly negligent, reckless, willful, and/or wanton at the time and place above-mentioned in one or more of the following particulars:

- a. Driving a motor vehicle in such a manner as to indicate a willful, wanton, reckless, negligent, and grossly negligent disregard for the rights and safety of others, including Plaintiff, in violation of S.C. Code Ann. § 56-5-2920;

(7)

- b. Illegally backing the commercial vehicle across lanes of traffic in violation of S.C. Code Ann. § 56-5-3810;
- c. Failing to operate the commercial vehicle in the manner required by the Federal Motor Carrier Safety Regulations;
- d. Failing to maintain proper control of the commercial vehicle;
- e. Improper and illegal lane change;
- f. Failing to recognize or respect other vehicles having the right of way;
- g. Failing to maintain a proper lookout;
- h. Failing to warn others lawfully using the highway, including Plaintiff, that the Defendants' commercial vehicle was blocking all lanes of travel;
- i. Failing to prevent or avoid the collision described herein;
- j. Failing to take any measures to minimize the risk that such a collision would occur;
- k. Failing to exercise the degree of care and caution which a reasonably prudent person would have exercised under the same or similar circumstances; and
- l. In such other particulars as the evidence may show.

28. As a direct and proximate cause of the negligence per se, negligence, gross negligence, carelessness, recklessness, willfulness, wantonness, and heedlessness of Defendants, their agents, servants, and employees, Plaintiff was severely injured as set forth above. The injuries and damages suffered by Plaintiff include, but are not limited to: multiple facial lacerations with impregnated glass which required a plastic surgeon for surgical repair; massive facial scarring; permanent neurologic sensory

(8)

defect; facial contusion with fracture of the front teeth which required oral surgery for extraction of multiple teeth; concussion with intermittent vertigo; right shoulder strain/sprain; right pectoralis major muscle pain; sprain got the right trapezius muscle; chest contusion; fracture of the left hand; chronic residual pain; and loss of enjoyment of life. Plaintiff will require surgery to correct her buckled deviated septum, intralesional cortical steroids as a result of thick hypertrophic scarring; surgery to removed fragments of glass along with surgical scar reconstruction (z or w plasty); surgical reconstruction as a result of a wide area of tissue loss of the right nasal ala, with possible rotation flap or a full thickness graft; as well as oral surgery, implants to replace her missing teeth, and dentures.

29. In doing the acts alleged above, Defendant Stephens was grossly negligent, careless, reckless, willful, wanton and heedless. As a result, Plaintiff is entitled to recover punitive and/or exemplary damages in an amount to be determined by the trier of fact.

FOR A SECOND CAUSE OF ACTION
(Negligent Entrustment)

30. Plaintiff repeats, realleges, and incorporates each and every allegation contained in the foregoing paragraphs as if repeated verbatim.

31. At the time of the collision, Defendants Malachi Sanders, Jr.; Malachi Sanders, III; Malachi Sanders; Malachi Sanders Junior; Malachi Sanders Logging; Sanders Malachi Logging; M & J Logging; and/or Sanders

(9)

Log were the owners and/or persons and businesses in control of the tractor trailer driven by Defendant Stephens, and each maintained responsibility for its use.

32. As owners and/or persons or businesses in control of the commercial vehicle driven by Defendant Stephens, Defendants Malachi Sanders, Jr.; Malachi Sanders, III; Malachi Sanders; Malachi Sanders Junior; Malachi Sanders Logging; Sanders Malachi Logging; M & J Logging; and/or Sanders Log owed the public, including Plaintiff, a duty of care when entrusting the commercial vehicle to Defendant Stephens, knowing that the vehicle would be operated by Defendant Stephens on the public roadways in this state.

33. Defendant Stephens was inexperienced, untrained and incapable of operating his commercial vehicle in the manner required by the Federal Motor Carriers Safety Regulations and state law.

34. Defendants Malachi Sanders, Jr.; Malachi Sanders, III; Malachi Sanders; Malachi Sanders Junior; Malachi Sanders Logging; Sanders Malachi Logging; M & J Logging; and/or Sanders Log knew or should have known that Defendant Stephens was not competent to operate the commercial vehicle in the manner required by the Federal Motor Carriers Safety Regulations and state law because of his inexperience and lack of training, and that this incompetence would cause Defendant Stephens to

(10)

operate the commercial vehicle in such a manner as to create an unreasonable and appreciable risk of harm to others, including Plaintiff.

35. Despite knowing that Defendant Stephens was not competent to operate the commercial vehicle, Defendants Malachi Sanders, Jr.; Malachi Sanders, III; Malachi Sanders; Malachi Sanders Junior; Malachi Sanders Logging; Sanders Malachi Logging; M & J Logging; and/or Sanders Log nonetheless entrusted the commercial vehicle to Defendant Stephens for his sole use and for the purpose of furthering the business interests of said Defendants.

36. At the time of the collision, Defendant Stephens did in fact operate the commercial vehicle entrusted to him by Defendants Malachi Sanders, Jr.; Malachi Sanders, III; Malachi Sanders; Malachi Sanders Junior; Malachi Sanders Logging; Sanders Malachi Logging; M & J Logging; and/or Sanders Log in a careless and reckless manner.

37. As a direct and proximate cause of the negligence per se, negligence, gross negligence, carelessness, recklessness, willfulness, wantonness, and heedlessness of Defendants, their agents, servants, and employees, Plaintiff was severely injured. The injuries and damages suffered by the Plaintiff include, but are not limited to: multiple facial lacerations with impregnated glass which required a plastic surgeon for surgical repair; massive facial scarring; permanent neurologic sensory defect; facial contusion with fracture of the front teeth which required oral

(11)

surgery for extraction of multiple teeth; concussion with intermittent vertigo; right shoulder strain/sprain; right pectoralis major muscle pain; sprain got the right trapezius muscle; chest contusion; fracture of the left hand; chronic residual pain; and loss of enjoyment of life. Plaintiff will require surgery to correct her buckled deviated septum, intralesional cortical steroids as a result of thick hypertrophic scarring; surgery to removed fragments of glass along with surgical scar reconstruction (z or w plasty); surgical reconstruction as a result of a wide area of tissue loss of the right nasal ala, with possible rotation flap or a full thickness graft; as well as oral surgery, implants to replace her missing teeth, and dentures.

38. In doing the acts alleged above, Defendants were grossly negligent, careless, reckless, willful, wanton and heedless. As a result, Plaintiff is entitled to recover punitive and/or exemplary damages in an amount to be determined by the trier of fact.

FOR A THIRD CAUSE OF ACTION
(Negligent Hiring, Training, Supervision, and Retention)

39. Plaintiff repeats, realleges, and incorporates each and every allegation contained in the foregoing paragraphs as if repeated verbatim.

40. At the time of the collision, Defendant Stephens was an employee of Defendants Malachi Sanders, Jr.; Malachi Sanders, III; Malachi Sanders; Malachi Sanders Junior; Malachi Sanders Logging; Sanders Malachi Logging; M & J Logging; and/or Sanders Log., and was acting within the scope of his employment.

(12)

41. Defendants Malachi Sanders, Jr.; Malachi Sanders, III; Malachi Sanders; Malachi Sanders Junior; Malachi Sanders Logging; Sanders Malachi Logging; M & J Logging; and/or Sanders Log owed statutory and common law duties to the public, including Plaintiff, to use due care in the hiring, training, supervision, and retention of its employees, including Defendant Stephens.

42. Defendants Malachi Sanders, Jr.; Malachi Sanders, III; Malachi Sanders; Malachi Sanders Junior; Malachi Sanders Logging; Sanders Malachi Logging; M & J Logging; and/or Sanders Log failed to properly hire, train, supervise, and/or retain Defendant Stephens and allowed him to operate the commercial vehicle without adequate experience and skill in violation of state and federal laws.

43. Defendants Malachi Sanders, Jr.; Malachi Sanders, III; Malachi Sanders; Malachi Sanders Junior; Malachi Sanders Logging; Sanders Malachi Logging; M & J Logging; and/or Sanders Log knew or should have known that Defendant Stephens was not competent to operate the commercial vehicle in the manner required by the Federal Motor Carriers Safety Regulations and state law because of his inexperience and lack of training, and that this incompetence would cause Defendant Stephens to operate the commercial vehicle in such a manner as to create an unreasonable and appreciable risk of harm to others, including Plaintiff.

(13)

44. As a direct and proximate cause of the negligence per Se, negligence, gross negligence, carelessness, recklessness, willfulness, wantonness, and heedlessness of Defendants, their agents, servants, and employees, Plaintiff was severely injured. The injuries and damages suffered by Plaintiff include, but are not limited to: multiple facial lacerations with impregnated glass which required a plastic surgeon for surgical repair; massive facial scarring; permanent neurologic sensory defect; facial contusion with fracture of the front teeth which required oral surgery for extraction of multiple teeth; concussion with intermittent vertigo; right shoulder strain/sprain; right pectoralis major muscle pain; sprain got the right trapezius muscle; chest contusion; fracture of the left hand; chronic residual pain; and loss of enjoyment of life. Plaintiff will require surgery to correct her buckled deviated septum, intralesional cortical steroids as a result of thick hypertrophic scarring; surgery to removed fragments of glass along with surgical scar reconstruction (z or w plasty); surgical reconstruction as a result of a wide area of tissue loss of the right nasal ala, with possible rotation flap or a full thickness graft; as well as oral surgery, implants to replace her missing teeth, and dentures.

45. In doing the acts alleged above, Defendants were grossly negligent, careless, reckless, willful, wanton and heedless. As a result, Plaintiff is entitled to recover punitive and/or exemplary damages in an amount to be determined by the trier of fact.

(14)

46. Plaintiff is entitled to judgment against the Defendants, jointly and severally, for the above-described injuries and for actual and punitive damages in an amount to be determined by the jury.

47. Plaintiff demands a jury trial pursuant to Rule 38 of the Federal Rules of Civil Procedure.

WHEREFORE, Plaintiff prays for the following relief:

1. Judgment against Defendants, jointly and severally, for actual and punitive damages in an amount to be determined by the trier of fact;
2. For the costs and disbursements of this action;
3. For interest as provided by law; and
4. For such other relief as this Court may deem just and proper.

S/Francis X. McCann
FRANCIS X. McCANN
Fed. Ct. ID #2910
66 Hasell Street
Charleston, SC 29401
843-577-4242
fxmccann@mccannlaw.net

Charleston, South Carolina

1st day of November, 2010

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
Civil Action No. 2011-CP-10-8496

South Carolina Property and Casualty
Insurance Guaranty Association,

Plaintiff,

v.

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

Defendants.

AFFIDAVIT OF ROGER BROCK

By

JULIE J. ARMSTRONG
CLERK OF COURT

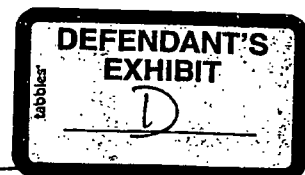
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FILED

PERSONALLY APPEARED before me, Roger Brock, who, first being duly sworn, does
state as follows:

1. I am a Defendant in this Declaratory Judgment action which seeks to reduce the
amount of compensation I will receive for the severe and permanent injuries I sustained in a
collision with a tractor trailer on October 2, 2009. As a result of the violent collision, in which
my friend was killed, I suffered nerve damage to my hand and arm, my nose was nearly severed
from my face, my left pinky finger was broken, and I had to have four teeth extracted. To this
day, I continue to experience pain and numbness in my leg, hip, neck, back, chest, arm, and
shoulder as well as pain and cramping in my hand and wrist. I will also require oral surgery and
implants to replace my missing teeth.

2. In order to receive reparation for my significant damages, I filed an action in the
United States District Court against the driver and owners of the tractor trailer, captioned *Brock
v. Stephens, et al.*, Case No. 2:10-cv-2926-RMG. My actual medical and dental expenses
approached \$80,000.00, and the plastic surgery I require will be substantial. I was only 39 years



old at the time of my injuries, and I will continue to suffer from pain, scarring, and loss of enjoyment of life for my remaining years.

3. At the commencement of the litigation, I learned that the Defendants in the underlying action were insured through Aequicap Insurance Company. However, during the course of the case, I learned that this insurance company was financially unstable and may be bankrupt before the case could get to trial. This knowledge was a critical factor in my decision to accept \$185,000.00 to settle my claim, even though my injuries, I believe, far exceeded that amount. I entered the settlement agreement fully expecting that this would be the amount the responsible parties would pay and I would receive. As I understand it, the settlement agreement was approved by the Court, and my claims were dismissed.

4. Now, the South Carolina Property and Casualty Insurance Guaranty Association ("Association") is claiming that I should receive even less than the significantly compromised amount which I had agreed to accept. Had I insisted on an amount that would have been fairer to me, I would have collected a much greater sum than what the Association seeks to pay. In the nearly three years since the collision, I have received only \$91,909.55 from the responsible parties, through the Association.

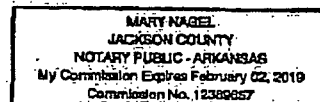
FURTHER DEPONENT SAYETH NOT.

Roger Brock
Roger Brock

SWORN to before me this

16 day of August, 2012
Mary Nagel (SEAL)
NOTARY PUBLIC FOR ARKANSAS

MY commission expires: 02-02-19



STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

South Carolina Property and Casualty
Insurance Guaranty Association,

Plaintiff,

v.

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

Defendants.

COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
Civil Action No.: 2011-CP-10-8496

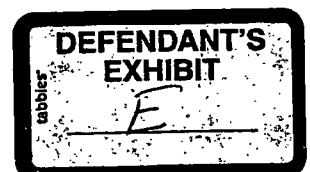
AFFIDAVIT OF FRANCIS X. MCCANN

PERSONALLY APPEARED before me, Francis X. McCann, who, first being duly
sworn, does state as follows:

1. I am an attorney admitted to practice before the South Carolina bar and have over
thirty years experience practicing law in South Carolina.

2. I represented Angela Hess ("Hess"), a plaintiff, in Civil Action Number: 2:10-
CV-02814-RMG, filed in the United States District Court, District of South Carolina, which
arose out of injuries Hess sustained while riding as a passenger in a vehicle that was involved in
a collision on October 2, 2009, in Colleton County, South Carolina.

3. Civil Action Number 2:10-CV-02814-RMG arose out of the same facts as the
similarly situated case brought by Roger Brock for injuries he sustained while riding as a
passenger in the same vehicle and as a result of the same vehicle collision, captioned as Civil
Case Number 2:10-CV-02926-RMG and filed in the United States District Court, District of
South Carolina, by Andrew D. Gowdown and Lorene S. Dukes from the law firm of Rosen,
Rosen & Hagood, LLC (collectively "Federal Civil Actions").



STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

South Carolina Property and Casualty
Insurance Guaranty Association,

Plaintiff,

v.

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

Defendants.

COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
Civil Action No.: 2011-CP-10-8496

AFFIDAVIT OF FRANCIS X. MCCANN

PERSONALLY APPEARED before me, Francis X. McCann, who, first being duly
sworn, does state as follows:

1. I am an attorney admitted to practice before the South Carolina bar and have over thirty years experience practicing law in South Carolina.
2. I represented Angela Hess ("Hess"), a plaintiff, in Civil Action Number: 2:10-CV-02814-RMG, filed in the United States District Court, District of South Carolina, which arose out of injuries Hess sustained while riding as a passenger in a vehicle that was involved in a collision on October 2, 2009, in Colleton County, South Carolina.
3. Civil Action Number 2:10-CV-02814-RMG arose out of the same facts as the similarly situated case brought by Roger Brock for injuries he sustained while riding as a passenger in the same vehicle and as a result of the same vehicle collision, captioned as Civil Case Number 2:10-CV-02926-RMG and filed in the United States District Court, District of South Carolina, by Andrew D. Gowdown and Lorene S. Dukes from the law firm of Rosen, Rosen & Hagood, LLC (collectively "Federal Civil Actions").

4. In both Federal Civil Actions, the plaintiffs brought causes of actions against Defendants Ryan Stephens, individually, Malachi Sanders, Jr., individually, Malachi Sanders, III, individually, Malachi Sanders, Malachi Sanders, Jr., Malachi Sanders Logging, Sanders Malachi Logging, M & J Logging, and Sanders Log (collectively "Federal Defendants").

5. Aequicap Insurance Company ("Aequicap"), a Florida corporation, insured several of the Federal Defendants at the relevant time of the vehicle collision. All of the Federal Defendants in both Federal Civil Actions were represented by Rob Moseley, Esquire.

6. At or shortly after the filing of my client's case, the Federal Defendant's attorney, Mr. Moseley, indicated that Aequicap was in serious financial trouble.

7. Hess agreed to settle her claims for the sum of \$225,000. The total available coverage was \$1,000,000.

8. Aequicap's financial problems and potential insolvency were major considerations in my recommendation to my client to accept Aequicap's offer to settle her claims for \$225,000.

9. Shortly thereafter, I was informed that Aequicap was in receivership in the State of Florida.

10. On or about May 17, 2011, Hess submitted a proof of claim against Aequicap with the South Carolina Property and Casualty Insurance Guaranty Association ("SCIGA") for the amount of \$225,000 after being notified her claims needed to be brought in the State of South Carolina and not the State of Florida. A copy of the Proof of Claim form and supporting documentation is attached hereto as Exhibit A.

11. As part of the Proof of Claim, Hess was required to submit a supporting affidavit listing any and all other insurance coverage that may have been available as compensation for

her injuries. In her affidavit, Hess disclosed that she had received only liability coverage in the amount of \$22,500 from Nationwide Insurance Company, the carrier for Brian Mason, who was the driver of the vehicle in which Hess and Brock were riding as passengers. Hess did not have any health insurance coverage.

12. Following submission of Hess' Proof of Claim, SCIGA, through its Claims Supervisor, Bill Britt, sought to reduce the claim of \$225,000 by \$22,500, which was the amount of liability coverage received from Nationwide. After further discussion, Mr. Britt and I decided to split the difference at \$11,250. Accordingly, SCIGA agreed to pay my client \$213,500 (\$225,000 minus \$11,250 minus a \$250 deductible collected by SCIGA) in exchange for a release of all claims from Hess. A copy of my e-mail to the Federal Defendant's attorney, Mr. Moseley, confirming this settlement arrangement with SCIGA is attached hereto as Exhibit B.

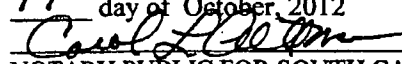
13. Hess agreed to the amount offered by SCIGA in the amount of \$213,500 and signed a release. The Release of All Claims form is attached hereto as Exhibit C.

FURTHER DEPONENT SAYETH NOT.



Francis X. McCann

SWORN to before me this

17th day of October, 2012
 (SEAL)
NOTARY PUBLIC FOR SOUTH CAROLINA

MY commission expires: 8/8/22

PROOF OF CLAIM
against
AequiCap Insurance Company

That AequiCap Insurance Company, after deducting all offsets and counterclaims is indebted to him as follows:

SOCIAL SECURITY # 432-53-9271 DOB 4/7/1966

POLICYHOLDER: Malachi Sanders
& M&J Logging

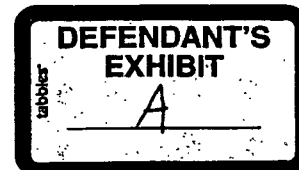
NATURE OF CLAIM (BRIEF EXPLANATION OF FACTS): Please See Attached

That the above account is TRUE and CORRECT and no part of the amount claimed due has been paid.

Angela M. Hess
CLAIMANT

SUBSCRIBED AND SWORN TO BEFORE ME, this the 17th day of May, 2011.

NOTARY PUBLIC Caryl Patton
My Commission Expires: 8/30/12



ANGELA HESS v. AEQUICAP INS. CO.
Claim #0699

EXPLANATION OF FACTS:

Late at night on October 2, 2009 a logging truck insured by Aequicap was stopped perpendicular across a rural highway blocking both lanes of traffic. The truck failed to have safety or warning lights and had an insufficient amount of reflective tape on its side. Ms. Hess was a passenger in a vehicle that struck the logging truck. The driver of the vehicle was killed, and Ms. Hess was seriously injured.

Ms. Hess suffered several injuries which included, but are not limited to severe facial lacerations, the loss of all of her teeth, and a fracture to the C5 vertebra. Her medical bills totaled \$96,870.77.

As a result of her serious injuries, Ms. Hess has permanent massive facial scarring and a permanent impairment for neurologic sensory defect. She is unable to work and requires extensive dental work (\$64,848.00 estimate) and plastic surgery (\$60,000.00 estimate).

As outlined in the Consent Amended Order of Dismissal (a copy of which is attached), Ms. Hess settled her claim for \$225,000.00.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

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USDC, CLERK, CHARLESTON, SC

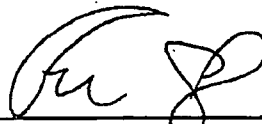
2011 FEB 23 P 3:37

Angela Hess,) Civil Action No.: 2:10-cv-02814-RMG
Plaintiff)
)
v.) **CONSENT AMENDED**
) **ORDER OF DISMISSAL**
Ryan Stephens, et al.)
Defendant(s))
_____)

The court having been advised by counsel for the parties that the above action has been settled,

IT IS ORDERED that this action is hereby dismissed without costs and without prejudice. If settlement is not consummated by the payment of Two Hundred Twenty-five Thousand Dollars (\$225,000.00) to the Plaintiff by the Defendants within sixty (60) days of the date of the signed Mediation Settlement [by March 26, 2011], either party may petition the Court to reopen this action and restore it to the calendar. Rule 60(b)(6), F.R.Civ.P. In the alternative, to the extent permitted by law, either party may within sixty (60) days [March 26, 2011] petition the Court to enforce the settlement. Fairfax Countywide Citizens v. Fairfax County, 571 F.2d 1299 (4th Cir. 1978).

AND IT IS SO ORDERED.



RICHARD M. GERGEL
United States District Court

February 23, 2011
Charleston, South Carolina

I CONSENT:

/s/Francis X. McCann
FRANCIS X. McCANN
Francis X. McCann, P.A.
Attorney for Plaintiff

I CONSENT:

/s/Robert D. Moseley, Jr.
ROBERT D. MOSELEY, Jr.
Smith Moore Leatherwood, LLP
Attorney for Defendants

AFFIDAVIT

STATE OF South Carolina

COUNTY OF Charleston

_____ PERSONALLY
APPEARED BEFORE ME the undersigned, Angela Hess, residing at

3302 Linder Lane
Mt. Pleasant, SC 29466

of lawful age, who first being duly sworn, deposes, says and answers the following:

1. My Social Security Number is # 432-53-9271.

AUTOMOBILE ACCIDENT: YES (xx) NO () If no, please go to Question #12.

2. I was involved in an automobile accident which occurred on 10/2/09,
in which I sustained bodily injuries.

3. Did you own an automobile on the above-referenced date of accident?
Yes xx No _____

4. If yes, the name of the insurance carrier and policy number on the vehicle are:

Insurance Carrier: Alfa Vision, Inc.

Policy Number: 11-03-001816192

5. Do you live in the same household with any person who owned a vehicle on the above-referenced date of accident? Yes xx No _____

6. What is your relationship to that person?

Relationship: fiance

7. The name of that person's insurance carrier and policy number on the owned vehicle are:

Insurance Carrier: Nationwide Assurance

Policy Number: Claim #6303D070525

8. At the time of the accident, were you operating a vehicle with insurance coverage?

Yes _____ No xx

9. If yes, the name of the insurance carrier and policy number are:

Insurance Carrier: _____

Policy Number: _____

10. At the time of the accident, were you a passenger in a vehicle with insurance coverage?

Yes xx No _____

11. If yes, the name of the insurance carrier and policy number are:

Insurance Carrier: Nationwide Assurance

Policy Number: Claim #6303D070525

WORKERS COMPENSATION

12. Were you in the course of employment at the time of this accident? Yes _____ No xx

If yes, name of employer _____

13. Were you covered by Workers' Compensation or any similar law for this accident?

Yes _____ No xx

If yes, name, address and phone # of company, policy / claim number, claim

representative _____

OTHER INSURANCE

14. Are you entitled to any governmental benefit (i.e., Social Security, Medicare, etc.)?

Yes _____ No xx If yes, describe:

15. Were you entitled to any type of state benefits? Yes _____ No xx

If yes, describe:

16. Were other persons or entities responsible for your injuries? YES xx NO _____

If yes, list names, addresses, phone numbers:

please see attached

17. Do you have health insurance coverage available to pay for the treatment of your injuries? YES _____ NO xx

If yes, name, address, phone number of company; claim number:

18. Have you received health insurance benefits or coverage for the injuries?

YES _____ NO xx

If yes, describe:

I HEREBY DECLARE THAT THE ABOVE-STATED FACTS ARE TRUE AND CORRECT
TO THE BEST OF MY KNOWLEDGE.

Angela M. Hiss
Affiant

SWORN to and subscribed before me

this 17th day of May, 2011

Carol L. Altman

Notary Public for South Carolina

My Commission Expires: 8/30/12

ANGELA HESS v. AEQUICAP INS. CO.
Claim #0699

16. A list of names, address and phone numbers of persons and/or entities responsible for Ms. Hess's injuries:

Ryan Stephens
215 Grayson St.
Walterboro, SC 29488
843-549-1950

Steve Sanders
Malachi Sanders, Jr.
Malachi Sanders, III
Malachi Sanders
Malachi Sanders Logging
Sanders Malachi Logging
Sanders Log
M & J Sanders Logging
82 Renee Court
Walterboro, SC 29488
843-549-1646

Carol Altman

Subject: FW: Hess email

From: Frank McCann [mailto:fxmccann@mccannlaw.net]
Sent: Thursday, July 21, 2011 1:01 PM
To: 'Rob Moseley'
Cc: 'Carol Altman'
Subject: Hess

Rob

I just settled my claim with Bill Britt for a reduced amount.....split the difference.....\$213,500.

He said he would get you the check today as I said part of the agreement would be that I get the funds asap since my client is penniless he said he would pass that message on to you.

Rob.....as a favor, can you please forward the check and releases overnight to me right away to my street address 66 Hasell Street, Charleston, 29401 (843-577-4242)?

Do you think you can get it here by Monday?

Thank you.....

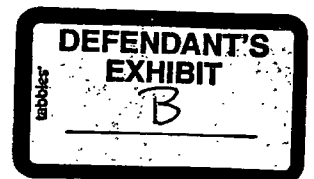
Enjoyed working with you

FX

Sincerely,

Francis X. McCann

Francis X. McCann, P.A.
843-577-4242 telephone
843-723-3554 facsimile



STATE OF SOUTH CAROLINA) RELEASE OF ALL CLAIMS
COUNTY OF CHARLESTON)

FOR AND IN CONSIDERATION of the total sum of **TWO HUNDRED THIRTEEN THOUSAND, FIVE HUNDRED and 00/100 (\$213,500.00)**, and for other good and valuable consideration, I, Angela Hess, a single individual and being of lawful age, have released and discharged, and by these presents do for myself, my heirs, executors, administrators and assigns, release, acquit and forever discharge Ryan Stephens, individually; Malachi Sanders, Jr., individually; Malachi Sanders, III, individually; Malachi Sanders; Malachi Sanders Junior; Malachi Sanders Logging; Sanders Malachi Logging; M & J Logging; Sanders Log; Aequicap Insurance Company, in liquidation; and South Carolina Property and Casualty Insurance Guaranty Association, its agents, assigns, subsidiaries, affiliates, and attorneys and any and all other persons, firms and corporations liable or who might be claimed to be liable either now and/or in the future, none of whom admit any liability but all expressly deny any liability of and from any and all actions, causes of action, claims, demands, damages, costs, loss of services, expenses, compensation, and all consequential damage on account of, or in any way growing out of, any and all known and unknown injuries to Angela Hess, which resulted from an automobile accident that occurred in Walterboro, Colleton County, South Carolina on or about October 2, 2009, and more particularly described in a Complaint filed in the United States District Court for the District of South Carolina Charleston Division, Civil Action No. 2:10-cv-2814-RMG.

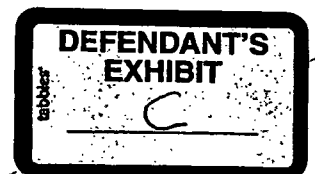
The undersigned agrees as a further consideration and inducement for this compromise settlement that it shall apply to all known and unanticipated injuries and damages resulting from said incident, as well as to those now disclosed, and the undersigned agree to be responsible for satisfying all medical liens, etc., including Medicare or Medicaid, workers' compensation liens, and will protect, indemnify and hold harmless all defendants and/or their insurers from claims in connection with the injuries and damages resulting from said accident.

The undersigned further understands that the action previously instituted will be dismissed, with prejudice, and hereby authorize my attorney to do everything necessary in order to terminate said lawsuit now and for all times.

The undersigned hereby declares and represents that in making this release and agreement, it is understood and agreed that I rely wholly upon my own judgment, and upon the advice of my counsel, and that I have not been influenced to any extent whatever by any representations or statements made by the persons being released or by anyone representing them or their employment.

I understand that this settlement is the compromise of a doubtful and disputed claim, and that the payment is not to be construed as an admission of liability on the part of the persons, firms and corporations hereby released, by whom liability is expressly denied.

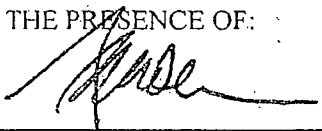
This Release contains the ENTIRE AGREEMENT between the parties hereto, and the terms of this release are contractual and not a mere recital.



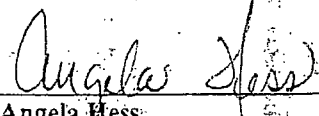
I further state that I have carefully read the foregoing release and know the contents thereof, and sign the same as my own free act.

WITNESS my hand and seal this 9th day of August, 2011.

IN THE PRESENCE OF:


Carol H. Peterson

CAUTION! READ BEFORE SIGNING


Angela Hess

1260342.3

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

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USDC, CLERK, CHARLESTON, SC

2011 FEB 23 P 3:37

Roger Brock

Plaintiff

v.

Ryan Stephens, et al.

Defendant(s)

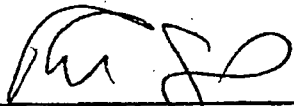
Civil Action No.: 2:10-cv-02926-RMG

CONSENT AMENDED
ORDER OF DISMISSAL

The court having been advised by counsel for the parties that the above action has been settled,

IT IS ORDERED that this action is hereby dismissed without costs and without prejudice. If settlement is not consummated by the payment of One Hundred Eighty-five Thousand Dollars (\$185,000.00) to the Plaintiff by the Defendants within sixty (60) days of the date of the signed Mediation Settlement [by March 26, 2011], either party may petition the Court to reopen this action and restore it to the calendar. Rule 60(b)(6), F.R.Civ.P. In the alternative, to the extent permitted by law, either party may within sixty (60) days [March 26, 2011] petition the Court to enforce the settlement. Fairfax Countywide Citizens v. Fairfax County, 571 F.2d 1299 (4th Cir. 1978).

AND IT IS SO ORDERED.


RICHARD M. GERGEL
United States District Court

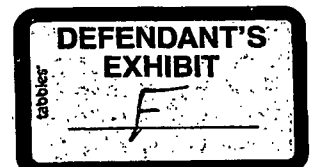
February 23, 2011
Charleston, South Carolina

I CONSENT:

/s/Andrew D. Gowdown
ANDREW D. GOWDOWN
Rosen Rosen & Hagood, LLC
Attorney for Plaintiff

I CONSENT:

/s/Robert D. Moseley, Jr.
ROBERT D. MOSELEY, Jr.
Smith Moore Leatherwood, LLP
Attorney for Defendants



STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

South Carolina Property and Casualty
Insurance Guaranty Association

Plaintiff,

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

Defendants.

COURT OF COMMON PLEAS

Civil Action No. 2011-CP-10-8496

ANSWER OF DEFENDANT
ROGER BROCK

2011 DEC 21 PM 2:38
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

Defendant Roger Brock, as and for his Answer, hereby states and alleges as follows:

FOR A FIRST DEFENSE

1. All allegations of the Complaint are denied unless specifically admitted, modified, or explained herein.
2. On information and belief, Defendant Brock admits the allegations in Paragraph 1 of the Complaint.
3. Defendant Brock admits the allegations in Paragraph 2 of the Complaint.
4. On information and belief, Defendant Brock admits the allegations in Paragraphs 3 and 4 of the Complaint.
5. Defendant Brock is without sufficient information to admit or deny the allegations in Paragraph 5 of the Complaint.
6. Paragraphs 6 and 7 of the Complaint call for legal conclusions to which no responses are required.

DEFENDANT'S
EXHIBIT

7. Defendant Brock admits the allegations in Paragraphs 8, 9, and 10 of the Complaint.

8. Answering Paragraph 11 of the Complaint, Defendant Brock admits that his claim in the federal court action was dismissed following the settlement of the case, but denies that his settlement was approved by the federal court in any hearing or otherwise.

9. Defendant Brock admits the allegations in Paragraphs 12, 13, 14, and 15 of the Complaint.

10. Answering Paragraph 16 of the Complaint, Defendant Brock admits that AequiCap Insurance Company, the insurer for Defendant Malachi Sanders among others, was declared insolvent by the courts of Florida prior to the payment of the settlement amount. The remaining allegations in Paragraph 16 of the Complaint call for a legal conclusion to which no response is required.

11. On information and belief, Defendant Brock admits the allegations in Paragraph 17 of the Complaint.

12. Paragraph 18 of the Complaint calls for a legal conclusion to which no response is required.

13. Defendant Brock admits the allegations in Paragraph 19 of the Complaint.

14. Defendant Brock admits the allegations in Paragraph 20 of the Complaint, but would clarify and allege that the amounts admitted and offered by the Plaintiff are substantially less than what is due and owing to Defendant. Defendant Brock would further admit that he has received payment from Plaintiff for the uncontested amount of his claim totaling \$91,909.55.

15. Defendant Brock denies the allegations in Paragraph 21 of the Complaint.

16. Paragraphs 22, 23, and 24 of the Complaint call for legal conclusions to which no responses are required. To the extent those paragraphs raise allegations of fact, the same are denied.

17. Answering Paragraph 25 of the Complaint, Defendant Brock repeats and realleges the allegations set forth herein above.

18. Defendant Brock denies the allegations in Paragraphs 26 and 27 of the Complaint and alleges that the Plaintiff is fully liable to this Defendant in the amount of \$185,000 and is not entitled to a set off for the receipt of insurance benefits by the Defendant from other sources.

19. Paragraphs 28, 29, and 30 of the Complaint contain passages from various statutory sections to which no response is required. Defendant Brock further craves reference to the language contained in those statutes.

20. Defendant Brock denies the allegations in Paragraph 31 of the Complaint except to the extent that the claims made by Defendant to Nationwide, Progressive, BCBS and the Association were all a result of the collision that occurred on October 2, 2009, in which Defendant sustained serious injuries and substantial losses.

21. Paragraph 32 of the Complaint calls for a legal conclusion to which no response is required. To the extent that this paragraph raises an allegation of fact, the same is denied.

22. Defendant Brock is without sufficient information to admit or deny the allegations in Paragraph 33 of the Complaint, but does admit that BCBS has asserted a subrogation lien against Defendant's recovery of benefits in connection with the accident that occurred on October 2, 2009.

23. Paragraph 34 of the Complaint calls for a legal conclusion to which no response is required.

24. Paragraph 35 of the Complaint contains a passage from a statutory section to which no response is required. Defendant Brock further craves reference to the language contained in that statute.

25. Paragraph 36 of the Complaint calls for a legal conclusion to which no response is required. To the extent that this paragraph raises an allegation of fact, the same is denied.

26. Defendant Brock denies the factual statements set forth in the Wherefore clause of the Complaint.

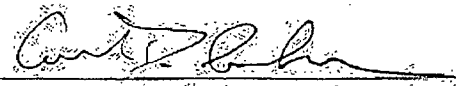
FOR A SECOND DEFENSE
(Improper Venue)

27. The venue chosen by Plaintiff is improper. The Complaint should be dismissed and/or venue should be changed to Colleton County pursuant to S.C. R. Civ. Pro. 12(b)(3), 82(b), and S.C. Code Ann. §§ 15-7-30 and 15-7-100 (Supp. 2010) given that two of the named defendants are, upon information and belief, residents of Colleton County and a substantial part of the alleged act or omission giving rise to Defendant Brock's claim also occurred in Colleton County.

WHEREFORE, Defendant Roger Brock prays that the Complaint against him be dismissed; that he be awarded judgment against the Plaintiff in the amount of \$185,000 minus the amount already tendered by Plaintiff totaling \$94,909.55; that he be awarded prejudgment interest; and for such other and further relief as determined by the Court.

Defendant Brock hereby objects to Plaintiff's motion and/or request pursuant to S.C. R. Civ. Pro. 53(b) for a general Order of Reference to the Master in Equity for Charleston County as set forth in the Summons.

ROSEN, ROSEN & HAGOOD, LLC

By: 

Andrew D. Gowdown
Lorene Stuhr Dukes
134 Meeting Street, Suite 200
P.O. Box 893
Charleston, SC 29402
(843) 577-6726

ATTORNEYS FOR DEFENDANT
ROGER BROCK

Charleston, South Carolina
December 21, 2011

FILED
2011 DEC 21 PM 2:38
JULIE J. PAMSTRONG
CLERK OF COURT

CERTIFICATE OF SERVICE

I certify that on December 21, 2011 I caused
to be e-mailed:

- ☐ hand delivered
- ☐ faxed
- ☐ e-mailed

a true copy of the foregoing pleading(s) to
each counsel of record.


Attorney for Defendant Brock

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

South Carolina Property and Casualty
Insurance Guaranty Association,

Plaintiff,

vs.

Roger Brock, Ryan Stevens, and
Malachi Sanders,

Defendants.

Civil Action No. 2011-CP-10-8496

**PLAINTIFF'S ANSWERS AND
OBJECTIONS TO DEFENDANT
ROGER BROCK'S FIRST SET OF
INTERROGATORIES**

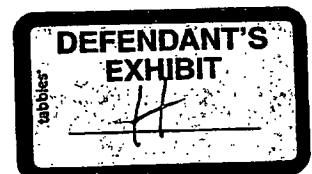
TO: ANDREW D. GOWDOWN, ESQUIRE, ATTORNEY FOR DEFENDANT
ROGER BROCK;

COMES NOW South Carolina Property and Casualty Insurance Guaranty Association ("Plaintiff"), Plaintiff in the above-captioned matter, and in the time required by law, serves its Answers and Objections to the First Set of Interrogatories of Defendant Roger Brock ("Defendant") as follows:

GENERAL OBJECTIONS

1. Plaintiff first objects to each Interrogatory to the extent it seeks information that constitutes, evidences, or reflects confidential communications between Plaintiff and counsel on the grounds that such communications are privileged and are not subject to discovery.

2. Plaintiff objects to each Interrogatory to the extent it seeks information that constitutes, evidences, or reflects trial preparation materials or work product of Plaintiff or its representatives, agents, or attorneys on the grounds that such materials are immune from discovery.



3. Plaintiff objects to each Interrogatory to the extent it exceeds the scope of Rules 26 and 33 of the South Carolina Rules of Civil Procedure.

4. Plaintiff objects to each Interrogatory to the extent it seeks information already available to or as equally available to Defendant.

5. Plaintiff objects to each Interrogatory to the extent it is not limited to a specific time, and construes each Interrogatory's time period to end at the time the Complaint was filed unless the Interrogatory specifically requests information after this time, to which Plaintiff may object.

6. Plaintiff expressly states that the answers set forth are premised upon information presently known. Further discovery and case investigation in this matter may yield further information affecting these responses. Plaintiff will supplement responses only as required by South Carolina Rule of Civil Procedure 26(e).

7. Plaintiff objects to and does not admit any information provided herein is relevant, admissible or otherwise appropriate for use in this matter and does not waive but reserves the right to seek to exclude any such material from the trial.

INTERROGATORIES

1. Give the names, addresses, and telephone numbers of all persons known to the Plaintiff or Plaintiff's counsel to be witnesses concerning Defendant Brock's claim with the Association.

ANSWER: Plaintiff is not aware of any witnesses other than the parties to this matter. Bill Britt is handling the claim for the Association and may testify regarding the facts and circumstances surrounding the subject claim. Plaintiff incorporates herein those individuals identified in Defendant's Answers to Plaintiff's

Interrogatories and reserves the right to identify others to the extent discovered hereinafter or it is determined individuals may have relevant information.

2. Set forth a list of photographs, plats, sketches or other prepared documents that relate to the claims or defenses in this case.

ANSWER: Subject to the foregoing general objections, see Responses and Objections to Defendant's Requests for Production.

3. List all photographs, statements, sketches, records, tangible items or other prepared documents of which Plaintiff is aware that are in any way related to or connected to any of the facts or issues in this case and in Plaintiff's possession or that of Plaintiff's counsel or any agents, identifying with present addresses the person or other agents having possession of the same.

ANSWER: Subject to the foregoing general objections, see Responses and Objections to Defendant's Requests for Production.

4. List all photographs, statements, sketches, records, tangible items or other prepared documents of which Plaintiff is aware that are in any way related to or connected to any of the facts or issues in this case that are in the possession of any person other than the Plaintiff or Plaintiff's counsel or agent, identifying with present addresses the person or other agents having possession of the same.

ANSWER: Plaintiff is not aware of any such documents other than those documents that may be in the possession of Defendant. As to the South Carolina Code or other regulations, Defendant is in as good a position to obtain and/or identify these documents.

5. In the past ten (10) years, has Plaintiff ever claimed and received a set-off or deduction pursuant to S.C. Code Ann. § 38-31-100 for benefits received by a claimant from a self-insured retention fund? If so, please provide the following information: the name of the claimant, the name of the insured, the name of the insolvent company, the date of loss, the Association's file number, and the amount of the set-off or deduction received by the Associate against the total value of the claim.

ANSWER: Plaintiff objects to this Interrogatory because it seeks information that is not relevant, not limited in scope, ill-defined, overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Moreover, Plaintiff is unsure what is meant by a "self-insured retention fund" and is not familiar with such an item. As such, Plaintiff is unable to provide a proper response until the term is better defined. To the extent a "self-insured retention fund" exists, which is unknown to Plaintiff, Plaintiff objects to this Interrogatory to the extent it seeks information regarding a set-off or deduction in connection with benefits received from a self-insured retention fund as Plaintiff has not claimed a set-off or deduction based on Defendant's receipt of any benefits from a self-insured retention or any self-insured fund in connection with this matter. Without waiving the objection, Plaintiff's files are neither organized as, nor identified by, the type of set-off taken and any effort to uncover this information would require the expenditure of numerous man hours to review the numerous claim files handled over the years which contain confidential material and information relating to non-parties. Based on this, the Plaintiff objects to identifying any claim, individual or other matter in that it is an invasion of privacy.

6. In the past ten (10) years, has Plaintiff ever claimed and received a set-off or deduction pursuant to S.C. Code Ann. § 38-31-100 for funds drawn from a claimant's personal savings or checking account in which the funds were utilized to pay for the claimant's prescription expenses or medical expenses? If so, please provide the following information: the name of the claimant, the name of the insured, the name of the insolvent company, the date of loss, the Association's file number, and the amount of the set-off or deduction received by the Association against the total value of the claim.

ANSWER: Plaintiff objects to this Interrogatory because it seeks information that is not relevant, not limited in scope, ill-defined, overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Specifically, Plaintiff objects to this Interrogatory to the extent it seeks information regarding a set-off or deduction in connection with funds drawn from a claimant's personal savings or checking account as Plaintiff has not claimed a set-off or deduction based on funds drawn from Defendant's personal savings or checking account in connection with this matter. Without waiving the objection, S.C. Code Ann. § 38-31-100 does not apply to amount paid by claimants, except to the extent covered by insurance. As such, Plaintiff has not, to its knowledge, sought to obtain a set-off pursuant to S.C. Code Ann. § 38-31-100 relating to personal funds unless reimbursed by or otherwise relating to insurance payments and benefits. Finally, without waiving the objection, Plaintiff's files are neither organized as, nor identified by, the type of set-off taken and any effort to uncover this information would require the expenditure of numerous man hours to review the numerous claim files handled over the years which

contain confidential material and information relating to non-parties. Based on this, the Plaintiff objects to identifying any claim, individual or other matter in that it is an invasion of privacy.

7. In the past ten (10) years, has Plaintiff ever claimed and received a set-off or deduction pursuant to S.C. Code Ann. § 38-31-100 for funds received by a claimant from a noninsurance, third-party payor in which the funds were utilized to pay for the claimant's prescription expenses or medical expenses? If so, please provide the following information: the name of the claimant, the name of the insured, the name of the insolvent company, the date of loss, the Association's file number, and the amount of the set-off or deduction received by the Association against the total value of the claim.

ANSWER: Plaintiff objects to this Interrogatory because it seeks information that is not relevant, not limited in scope, ill-defined, overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Moreover, Plaintiff is unsure what is meant by "noninsurance, third-party payor" and who that may cover. Likewise, Plaintiff objects to this Interrogatory to the extent it seeks information regarding a set-off or deduction in connection with funds received from a noninsurance, third-party payor as Plaintiff has not claimed a set-off or deduction based on Defendant's receipt of any funds from any known "noninsurance, third-party payor" in connection with this matter. Without waiving the objection, S.C. Code Ann. § 38-31-100 relates solely to insurance related entities and guaranty associations or those associations similar in nature, and thus, any such deduction should it occur would not fall under that provision of the S.C. Code. Without waiving the

objection, Plaintiff's files are neither organized as, nor identified by, the type of set-off taken and any effort to uncover this information would require the expenditure of numerous man hours to review the numerous claim files handled over the years which contain confidential material and information relating to non-parties. Based on this, the Plaintiff objects to identifying any claim, individual or other matter in that it is an invasion of privacy.

8. In the past ten (10) years, has Plaintiff ever claimed and received a set-off or deduction pursuant to S.C. Code Ann. § 38-31-100 for benefits received by a claimant from Medicare? If so, please provide the following information: the name of the claimant, the name of the insured, the name of the insolvent company, the date of loss, the Association's file number, and the amount of the set-off or deduction received by the Association against the total value of the claim.

ANSWER: Plaintiff objects to this Interrogatory because it seeks information that is not relevant, not limited in scope, ill-defined, overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Specifically, Plaintiff objects to this Interrogatory to the extent it seeks information regarding a set-off or deduction in connection with benefits received from Medicare as Plaintiff has not claimed a set-off or deduction based on Defendant's receipt of any benefits from Medicare in connection with this matter. Without waiving the objection, on information and belief, the Plaintiff has not, to its knowledge, sought or been given, a set-off for Medicare payments in that the Federal law relating to Medicare reimbursement supersedes any state guaranty statute or requirement relating to this issue.

9. In the past ten (10) years, has Plaintiff ever claimed and received a set-off or deduction pursuant to S.C. Code Ann. § 38-31-100 for benefits received by a claimant from Medicaid? If so, please provide the following information: the name of the claimant, the name of the insured, the name of the insolvent company, the date of loss, the Association's file number, and the amount of the set-off or deduction received by the Association against the total value of the claim.

ANSWER: Plaintiff objects to this Interrogatory because it seeks information that is not relevant, not limited in scope, ill-defined, overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Specifically, Plaintiff objects to this Interrogatory to the extent it seeks information regarding a set-off or deduction in connection with benefits received from Medicaid as Plaintiff has not claimed a set-off or deduction based on Defendant's receipt of any benefits from Medicaid in connection with this matter. Without waiving the objection, on information and belief, the Plaintiff has not sought, or otherwise been granted, a set-off for Medicaid payments in that Federal law relating to Medicaid reimbursement supersedes any state guaranty statute or requirement relating to this issue.

10. List all written, internal policies or procedures of the Association that set forth Plaintiff's procedure for claiming a set-off or deduction against a claim pursuant to S.C. Code Ann. § 38-31-100(1), giving the author's name of such policy or procedure and the date that it became effective.

ANSWER: Plaintiff objects to this Interrogatory because it seeks information that is not relevant, undefined, not limited in scope, and not reasonably calculated to

lead to the discovery of admissible evidence. Without waiving the objection, the Association does not have written policies or procedures as to claiming a set-off but instead relies on the wording of § 38-31-100(1) et. seq. and case law interpreting those provisions. As such, this information is found in the S.C. Code which serves as the written policy of the Association.

11. List all written, internal policies or procedures of the Association that set forth the types of insurance coverage or other benefits received by a claimant which Plaintiff believes it is permitted to claim as a basis for a set-off or deduction pursuant to S.C. Code Ann. § 38-31-100(1), giving the author's name of such policy or procedure and the date that it became effective.

ANSWER: See Response to Interrogatory No. 10.

12. In the past ten (10) years, has Plaintiff ever deviated from the set-off provisions of S.C. Code Ann. § 38-31-100(1)? If so, state with specificity the facts and circumstances surrounding each deviation, including the name of the claimant, the name of the insured, the name of the insolvent company, the date of loss, the Association's file number, and the amount of the set-off or deduction the Association declined to take.

ANSWER: Plaintiff objects to this Interrogatory because it seeks information that is not relevant, not limited in scope, overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Moreover, Plaintiff is unaware of any deviation from the provisions of S.C. Code Ann. § 38-31-100 and claims entitlement to set-off for any such recoveries or policies as a matter of course. Likewise, each claim submitted to the Association has facts and

circumstances which make it unique. Plaintiff's files are neither organized as, nor identified by, the type of set-off taken or the basis for payment, and any effort to uncover this information would require the expenditure of numerous man hours to review the numerous claim files which contain confidential material and information relating to non-parties. Further, claim files related to various insolvencies have been either destroyed or returned to the liquidator and, as such, are unavailable. Based on this, the Plaintiff objects to identifying any claim, individual or other matter in that it is an invasion of privacy, a virtual impossibility to review and identify any such material, and economically unreasonable to require the manpower or cost to perform such a task.

13. Provide an itemization by amount and type of any set-off or deduction taken by the Association from the agreed upon settlement by Aequicap Insurance Company for the claim of the Estate of Brian Mason.

ANSWER: The Association did not take any set-off from the settlement amounts paid to the Estate of Brian Mason in that no other viable coverage was uncovered during the investigation. However, the mandatory \$250 deductible (see § 38-31-60(a)(iv)) was deducted from payments provided to the Estate of Brian Mason.

14. Provide an itemization by amount and type of any set-off or deduction taken by the Association from the agreed upon settlement by Aequicap Insurance Company for the claim of Angela Hess.

ANSWER: Plaintiff objects to this Interrogatory because the amounts and terms of the settlement as it relates to Angela Hess were confidential and not otherwise available for public disclosure. As such, this information may not be disclosed or otherwise presented in the matter. Subject to the above, deductions were

taken from liability insurance paid to Ms. Hess from other policies but no other viable or solvent coverages were found during the investigation.

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Columbia, South Carolina

August 1, 2012

~#4819-6394-8816 v.2 - 00163/01647~

CERTIFICATE OF SERVICE

I, the undersigned administrative assistant of the law offices of Nelson Mullins Riley & Scarborough, L.L.P., attorneys for plaintiffs, S.C. Property and Casualty Insurance Guaranty Association, do hereby certify that I have served a copy of the document(s) hereinbelow specified.

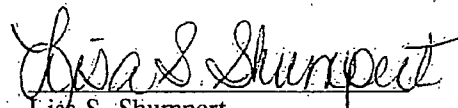
Document(s):

Plaintiff's Answers and Objections to Defendant Roger Brock's First Set of Interrogatories

Plaintiff's Responses and Objections to Defendant Roger Brock's First Set of Request for Production

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Administrative Assistant

August 1, 2012

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

South Carolina Property and Casualty)
Insurance Guaranty Association,)

Plaintiffs,)

vs.)

Roger Brock, Ryan Stevens, and)
Malachi Sanders,)

Defendants.)

COURT OF COMMON PLEAS

C/A NO. 2011-CP-10-8496

MEMORANDUM IN SUPPORT OF
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT AND IN
OPPOSITION TO DEFENDANT'S
CROSS-MOTION FOR SUMMARY
JUDGMENT

FILED
2012 OCT 22 AM 11:39
JULIE J. ARMSTRONG
CLERK OF COURT

Pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, Plaintiff South Carolina Property and Casualty Insurance Guaranty Association ("Association"), by and through its undersigned counsel, hereby submits this Memorandum in Support of its Motion for Summary Judgment as to its claims against Defendants and as to the affirmative defenses asserted by Defendant Roger Brock ("Brock").

UNDISPUTED FACTS

On or about October 2, 2009, Brock sustained injuries as a passenger in a vehicle involved in a motor vehicle accident with a vehicle driven by Defendant Ryan Stevens ("Stevens") and insured by Defendant Malachi Sanders ("Sanders"). Complaint ¶¶ 8, 16-17; Answer ¶¶ 7, 10-11. As a result of his injuries, Brock initiated a lawsuit in the United States District Court for the District of South Carolina against Stevens and Sanders, claiming entitlement to recovery for lost wages, injuries, and medical expenses. Complaint ¶ 9; Answer ¶ 7.

In or around January 2011, Brock and Sanders reached a settlement of Brock's claims for \$185,000.00, and the lawsuit was dismissed. Complaint ¶¶ 10-11; Answer ¶¶ 7-8; Defendant's Responses to Plaintiff's Requests for Admission ¶ 14, attached hereto as **Exhibit 1** and incorporated herein by reference. It is undisputed that Aequicap was responsible for paying the settlement amount. Id. However, prior to the payment of the settlement amount, Aequicap Insurance Company ("Aequicap"), the insurer for Sanders, was declared insolvent by the courts of Florida. Complaint ¶ 16; Answer ¶ 10. As a result of Aequicap's insolvency, Brock filed a claim with the Association, demanding payment of the \$185,000.00 settlement amount. Complaint ¶ 19; Answer ¶ 13.

As a result of the motor vehicle accident on October 2, 2009, and in light of Aequicap's insolvency, Brock has received, or was afforded the benefit of, the following amounts from other solvent insurers:

a.	Progressive Uninsured Motorist Coverage	\$ 25,000.00
b.	BC/BS Medical Bill Payment	\$ 40,590.45
c.	Progressive Personal Injury Protection	\$ 5,000.00
d.	Nationwide Liability Coverage	
	(third party driver's policy)	<u>\$ 22,500.00</u>
	TOTAL	\$ 93,090.45

Complaint ¶¶ 12-15, 31; Answer ¶¶ 9, 20; Ex. 1 ¶¶ 8-11.

Pursuant to its Complaint, the Association asserts entitlement to an offset for all payments from solvent insurers as set forth in S.C. Code Ann. § 38-31-100. Complaint ¶¶ 24-32. As such, the Association has paid Brock \$91,909.55 representing the difference between the settlement amount (\$185,000.00) and the amounts received by or paid on behalf of Brock

(\$93,090.45). Answer ¶ 14; Ex. 1 ¶ 12. Brock has objected to the reduction claiming entitlement to the full settlement amount plus all payments from other solvent insurers. Complaint ¶¶ 24-32; Answer ¶ 18. However, none of the insurance carriers making the above payments have asserted, or continue to assert, any right of subrogation or reimbursement.¹

STANDARD FOR SUMMARY JUDGMENT

Summary judgment must be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See First Federal Savings & Loan Ass'n v. Dangerfield, 307 S.C. 260, 262, 414 S.E.2d 590, 591 (Ct. App. 1992). In this declaratory judgment action, the Parties have filed cross-motions for summary judgment and the relevant facts do not appear to be disputed.

LEGAL ANALYSIS

The Association is a nonprofit unincorporated legal entity created by the South Carolina legislature pursuant to the South Carolina Property and Casualty Insurance Guaranty Association Act, S.C. Code Ann. § 38-31-10 et seq. (the "Act"). See S.C. Prop. and Cas. Ins. Guar. Ass'n v. Carolinas Roofing and Sheet Metal Contractors Self-Insurance Fund, 315 S.C. 555, 557, 446 S.E.2d 422, 424 (1994); Builders Transp. v. S.C. Prop. and Cas. Ins. Guar. Ass'n, 307 S.C. 398, 406, 415 S.E.2d 419, 424 (Ct. App. 1992). All insurers who write any kind of insurance to which the Act applies are members of the Association as a condition of their authority to transact insurance in South Carolina. S.C. Code Ann. § 38-31-40 and § 38-31-20(11). The Association is funded by assessments paid by each member. S.C.

¹ The Association originally named BC/BS of Arkansas as a defendant in this action based on its assertion of a subrogation lien against Brock's recovery of insurance benefits in connection with the motor vehicle accident on October 2, 2009. BC/BS subsequently advised the Association that it was no longer pursuing its subrogation claim, and BC/BS was dismissed from this action. See Ex. 1 ¶¶ 6 and 15. Further, the Act prohibits subrogation by BC/BS in these circumstances. See S.C. Code Ann. § 38-31-100(4).

Code Ann. § 38-31-60(c).

Because the Association was created by statute, its duties, liabilities, and obligations are controlled by the terms and conditions set forth in the Act. S.C. Code Ann. § 38-31-60; see also Builders Transp., 307 S.C. at 406, 415 S.E.2d at 424.² The Association is statutorily charged with providing some measure of protection to claimants of insolvent insurers, but its obligations and responsibilities are not the same as the insolvent insurer itself. S.C. Code Ann. § 38-31-60(b) (The Association is only "considered the insurer to the extent of its obligation on the covered claims.").³ The Association steps in to reduce the inequity that would occur should claimants be left without any potential source of recovery when an insurer becomes insolvent; however, it is not intended as a failsafe to guarantee complete recovery to those unfortunate claimants. See 44 C.J.S. Insurance § 218 ("A claimant, however, will not always be put in the same position [the claimant would have been in had insolvency not occurred], as the association or fund does not completely step into the shoes of the insolvent, and is obligated to pay claims only to the extent provided by statute.")⁴

² See also 44 C.J.S. Insurance § 213 ("The association is a statutory entity that depends on statutory law for its existence and for the definition of its powers, duties, and protections.")

³ See also Carolinas Roofing, 315 at 557, 446 at 424 (noting that the purpose of the Association is "to provide some protection to insureds whose insurance companies become insolvent") (emphasis added); S.C. Prop. and Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc., 304 S.C. 210, 215, 403 S.E.2d 625, 628 (1991) (finding that it is not the intent of the Act to place the Association in the shoes of the insurer because the Association's rights and obligations are limited); 44 C.J.S. Insurance § 213 ("[T]he duties of an Insurance Guarantee Association are not co-extensive with the duties owed by the insolvent insurer under its policy. An Insurance Guarantee Association is a guarantor of last resort. . . . [A]n Insurers Insolvency Fund is not an insurer; rather, it is a statutorily mandated nonprofit association created to provide limited protection to insureds and claimants in the event of insolvency of an insurer. It is not itself an insurer and does not 'stand in the shoes' of the insolvent insurer for all purposes.").

⁴ See also Colorado Ins. Guar. Ass'n v. Menor, 166 P.3d 205, 215 (Colo. App. 2007) ("[T]he Act was intended 'to give a measure of protection to policyholders and claimants who are faced with financial loss because of the insolvency of certain carriers of property and casualty insurance.' It was not designed to pay all claims regardless of whether there are other sources of recovery. The Association is a source of 'last resort.' Member insurers pay assessments to the Association, derived from premiums of policyholders. Although [insureds] correctly point out that a purpose of the fund is to provide a source of recovery of covered claims when an insurer becomes insolvent, the fund should be reserved to pay insureds of insolvent insurers who have not recovered the same damages from another source. The requirement that a previous insurance recovery reduce the amount owed by

Pursuant to the statutory scheme, the Association is to pay certain "covered claims" but only to the extent allowed by the Act. S.C. Code Ann. § 38-31-60(d) (The Association shall "pay covered claims to the extent of the association's obligation and deny all other claims."). There is no dispute that the subject claim is a "covered claim" under the Act. The issue is whether the Act permits the Association to offset Brock's "covered claim" for the other insurance received by or paid on Brock's behalf.

"The primary rule of statutory construction is to ascertain and give effect to the intent of the General Assembly." Anderson v. South Carolina Election Comm'n, 397 S.C. 551, 556, 725 S.E.2d 704, 706-07 (2012) (citing Beaufort Cnty. v. S.C. State Election Comm'n, 395 S.C. 366, 718 S.E.2d 432 (2011)); see also Builders Transp., 307 S.C. at 404, 415 S.E.2d at 423 (looking to intention of South Carolina legislature in adoption of Act to determine meaning of Act's provisions). "Unless there is something in the statute requiring a different interpretation, the words used in a statute must be given their ordinary meaning." Anderson, at 556, 725 S.E.2d at 707 (citing Mid-State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 476 S.E.2d 690 (1996)). "When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." Id. at 556-57, 725 S.E.2d at 707 (citing Mid-State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 476 S.E.2d 690 (1996)).

The Act clearly states that a claimant has a duty, as a condition precedent to recovery from the Association, to exhaust all other coverage from solvent carriers:

A person, having a claim under an insurance policy, whether or not it is a policy issued by a member insurer, and the claim under such other policy arises from the same facts, injury or loss which gave rise to the covered claim against the

the Association serves to protect the limited fund from depletion when the insured has already obtained a recovery for the loss." (quoting Strickler v. DeSai, 813 A.2d 650, 656 (Pa. 2002)).

association, is required to first exhaust all coverage and limits provided by any such policy.

S.C. Code Ann. § 38-31-100(1). To the extent other coverage is available and/or recovery is made, the Association is allowed an offset against its statutory obligation:

Any amount payable on a covered claim under this chapter must be reduced by the full limits of such other coverage as set forth on the declarations page and the association shall receive a full credit for such limits, or, where there are no applicable limits, the claim must be reduced by the total recovery.

Id.⁵

A claimant has this same duty where he has entered into a settlement with an insured under a policy issued by an insolvent insurer:

A person who has liquidated by settlement . . . a claim against an insured under a policy issued by an insolvent insurer, and the claim is a covered claim and is also a claim within the coverage of any policy issued by a solvent insurer, must be required first to exhaust all coverage and limits provided under the policy issued by the solvent insurer before execution, levy, or any other proceedings are begun to enforce . . . the settlement with the insured of the insolvent insurer.

S.C. Code Ann. § 38-31-100(5). Similarly, the Association is allowed an offset against its statutory obligation for such other coverage:

Any amount payable on a covered claim under this chapter . . . through settlement . . . must be reduced by the full limits of such other coverage as set forth on the declarations page of the policy issued by the insolvent insurer.

Id.

Here, Brock has received or was afforded the benefit of \$93,090.45 in uninsured motorist coverage, health insurance benefits, personal injury protection, and liability coverage.

⁵ See also 44 C.J.S. Insurance § 221 ("A person seeking payment from an insurance guaranty association or a fund created by multiple insurance companies generally must first exhaust other insurance available to such person, such as uninsured motorist coverage. It is the philosophy of Insurance Guaranty Fund to have all potential claims against the Fund's assets reduced by a solvent insurer, and not the Fund, whenever possible. The liability of the association or fund is reduced by the amount recovered under such other insurance.")

Ex. 1 ¶¶ 8-11. Brock now wrongly seeks to recover \$185,000.00 in addition to the amount he has already been paid by other solvent insurers. As set forth below, Brock's position would require a reading of the statute leading to the absurd result of Brock receiving \$65,590.45 more than what he would have received if Aequicap had not become insolvent:

	What Brock Seeks to Receive Upon Aequicap's Insolvency	What Brock Would Have Received Had Aequicap Not Become Insolvent	What Brock Should Receive Pursuant to the Act	What Brock Would Receive if Association Did Not Exist
Progressive Uninsured Motorist Coverage	\$ 25,000.00	0 (uninsured coverage would not have been available)	\$ 25,000.00	\$ 25,000.00
BC/BS Medical Benefits	\$ 40,590.45	0 (Brock would have to reimburse BC/BS)	\$ 40,590.45 (Brock does not have to reimburse BC/BS)	\$ 40,590.45
Progressive Personal Injury Protection	\$ 5,000.00	\$ 5,000.00	\$ 5,000.00	\$ 5,000.00
Nationwide Liability Insurance	\$ 22,500.00	\$ 22,500.00	\$ 22,500.00	\$ 22,500.00
Aequicap Liability Insurance	N/A	\$185,000.00	N/A	0
Guaranty Association	\$ 185,000.00	N/A	\$91,909.55	N/A
TOTAL	\$278,090.45	\$212,500.00	\$185,000.00	\$93,090.45

Plainly, the statute should not be construed to allow an insured a windfall on the insolvency of an insurer. To the contrary, the Act specifically states that the Association is not even required to fully compensate the insured of an insolvent insurer. S.C. Code Ann. § 38-31-60(b) (The Association is only "considered the insurer to the extent of its obligation on the covered

claims.").⁶

As explained more fully below, the plain language of the Act allows the Association to offset Brock's \$185,000.00 settlement by the amount of coverage from other solvent carriers for the same facts, injury, or loss. As a result, the Association is entitled to a declaration finding that it is entitled to an offset for each of these other policies pursuant to the terms of the Act.

I. The Association is Entitled to Offset \$25,000 for Uninsured Coverage Received by Brock.

Brock received uninsured motorist coverage in the amount of \$25,000.00 from his own car insurance company in connection with the accident. Ex. 1 ¶ 9. The Association is entitled to an offset of this recovery because Brock's claim for uninsured coverage qualifies as a claim under another insurance policy which arises from the same facts, injury, or loss giving rise to the covered claim pursuant to S.C. Code Ann. § 38-31-100(1). Brock admits his uninsured motorist coverage claim arose from the motor vehicle accident on October 2, 2009, the same loss from which the covered claim against the Association arose. Answer ¶ 20; Ex. 1 ¶¶ 1, 3. Therefore, Brock is required by S.C. Code Ann. § 38-31-100(1) to exhaust the coverage provided by his uninsured policy, and the amount payable by the Association must be reduced by the amount of Brock's recovery under his uninsured coverage.

Furthermore, the Association is also entitled to offset Brock's recovery under his uninsured motorist policy pursuant to S.C. Code Ann. § 38-31-100(5). Brock reached a settlement with Stevens, the insured under Aequicap's policy, and now asserts a claim against

⁶ See also Carolinas Roofing, 315 at 557, 446 at 424 (noting that the purpose of the Association is "to provide some protection to insureds whose insurance companies become insolvent") (emphasis added); Wal-Mart Stores, Inc., 304 S.C. at 215, 403 S.E.2d at 628 (finding that it is not the intent of the Act to place the Association in the shoes of the insurer because the Association's rights and obligations are limited).

the Association based on this settlement. Because Brock's claim is also within the coverage of the uninsured policy--a policy issued by a solvent insurer--Brock must first exhaust the solvent insurer's coverage. Brock's claim against the Association must therefore be reduced by the amount Brock received from the solvent insurer's uninsured coverage.

As a practical matter, Brock obtained recovery under his uninsured motorist coverage solely by virtue of Aequicap's insolvency, which rendered Stevens an uninsured motorist. Otherwise, Brock would not have received any money under his uninsured motorist coverage. Because this recovery would not have been received by Brock but for Aequicap's insolvency, allowing Brock to keep this money without an offset to the Association would create a windfall and a double recovery. Ex. 1 ¶ 7. Therefore, the Association should be allowed to offset the amount Brock received from his uninsured coverage in accordance with the Act and to prevent a double recovery for Brock.

Although there are no South Carolina cases regarding the Association's entitlement to an offset for a claimant's uninsured coverage, all states have guaranty associations created by similar, but not identical, statutes. Therefore, case law from other jurisdictions may be instructive in the absence of South Carolina authority. In the case of uninsured motorist coverage, it is well-established that the Association is entitled to such offset. In fact, C.J.S. uses uninsured motorist coverage as the example for a Guaranty Association's right to offset. See 44 C.J.S. Insurance § 221 ("A person seeking payment from an insurance guaranty association or a fund created by multiple insurance companies generally must first exhaust other insurance available to such person, such as uninsured motorist coverage.").

The case law regarding a Guaranty Association's right to offset uninsured motorist coverage is similarly definitive. For example, in Rinehart v. Hartford Cas. Ins. Co., 371

S.E.2d 788 (N.C. Ct. App. 1988), the court affirmed summary judgment in favor of the North Carolina Guaranty Association on its claim for an offset of uninsured motorist coverage. The court found that the North Carolina Guaranty Association had no liability to a claimant on a liability policy for \$50,000.00 where that claimant had already recovered \$25,000.00 from a different liability insurer and \$25,000.00 from her own uninsured coverage. Id. at 791. Similarly, in Yetzke v. Fausak, 488 N.W.2d 222 (Mich. Ct. App. 1992), the court affirmed summary judgment in favor of the Michigan Guaranty Association, which claimed it was entitled to offset a claimant's uninsured motorist recovery. The claimant was involved in a car accident and sought to recover on the at-fault driver's \$20,000.00 liability policy from the Michigan Guaranty Association after the liability insurer was placed into liquidation. 488 N.W.2d at 223. However, the claimant had received the \$25,000.00 from his own uninsured policy. Id. The court found that the Michigan Guaranty Association was entitled to offset the \$20,000.00 claim by the \$25,000.00 uninsured recovery, and therefore, had no liability to the claimant. Id. at 225-26. Authority from other jurisdictions supporting the Association's right to an offset is too numerous to include here and is included in Section I of **Appendix A**.

As set forth above, the right of the Association to set off uninsured motorist coverage paid to a claimant as a result of an insurer's insolvency is well established through the plain language of the Act and the case law. Therefore, the Association is entitled to offset its liability to Brock by his uninsured coverage of \$25,000.00.

II. The Association is Entitled to Offset \$40,590.45 for Medical Benefits Paid on Behalf of Brock.

Next, Brock was afforded the benefit of \$40,590.45 in medical insurance coverage from Blue Cross/Blue Shield of Arkansas ("BC/BS"), his health insurance provider, in

connection with the accident. Ex. 1 ¶ 11. Because the claims made by Brock under his medical insurance policy arose from the same facts, injury, or loss giving rise to his claim against the Association, the Association is entitled to offset his recovery under this policy pursuant to S.C. Code Ann. § 38-31-100(1). Answer ¶ 20; Ex. 1 ¶¶ 1, 5. The Association is also entitled to offset Brock's recovery under his medical insurance policy pursuant to S.C. Code Ann. § 38-31-100(5). Brock's claim against the Association is clearly within the coverage of his policy with his health insurance provider, a solvent insurer. Under the statutory requirements, the Association is therefore entitled to offset its liability on Aequicap's settlement with Brock by the amount of this coverage.

Moreover, at the time of the settlement, BC/BS had subrogation rights against any funds Brock would receive from Aequicap, and therefore, Brock would have been required to repay the BC/BS lien from the settlement amount he negotiated. However, BC/BS has now indicated it will not seek recovery. See Ex. 1 ¶¶ 6 and 15. Moreover, BC/BS is precluded from pursuing subrogation rights pursuant to the Act. See S.C. Code Ann. § 38-31-100(4).⁷ Therefore, to allow Brock to recover this amount from the Association would amount to a duplication of recovery. Because Brock need not repay the health insurance liens, his use of the funds and his recovery from the Association would cause an inflated recovery beyond the

⁷ BC/BS is statutorily barred from pursuing any subrogation rights against Brock upon Aequicap's insolvency:

No claim held by an insurer, reinsurer, insurance pool, or underwriting association based on an assignment or on rights of subrogation, or otherwise, may be received from a claimant or asserted in any legal action against a person insured under a policy issued by an insolvent insurer or the association except to the extent the amount of the claim exceeds the obligation of the association under this chapter.

S.C. Code Ann. § 38-31-100(4). This statutory prohibition on other insurer's subrogation rights is further evidence that the legislature intended for the primary burden to fall to other insurers rather than the Association. Furthermore, to the extent the Association's liability is reduced, the liability of the insured of the insolvent insurer is reduced as well. S.C. Code Ann. § 38-31-100(1)(b). Again, this is further evidence of the legislature's intent for the burden of the insolvency to fall on the other solvent insurers.

amount he would have ultimately received from the Aequicap settlement and would result in a windfall to Brock. Therefore, the Association should be granted an offset of the benefits paid by BC/BS on Brock's behalf.

Again, there are no South Carolina cases regarding the Association's entitlement to an offset for a claimant's health insurance coverage. However, the clear majority of states addressing this issue have expressed agreement with the Association's contention that it is entitled to offset the health insurance benefits paid on Brock's behalf.⁸ For example, in Roth v. Illinois Ins. Guar. Fund, 852 N.E.2d 289 (Ill. App. Ct. 2006), the Illinois appellate court interpreted its exhaustion statute,⁹ which is similar to South Carolina's, to find that a claimant's health insurance constituted other coverage arising from the same facts, injury, or loss giving rise to the claim against the Illinois Guaranty Fund such that the Guaranty Fund could offset such benefits. After an automobile accident, the claimant settled with the at-fault driver's liability insurer for its policy limits of \$20,000.00, and the liability insurer subsequently became insolvent. 852 N.E.2d at 291. The claimant sought to recover the \$20,000.00 from the Guaranty Fund but the Guaranty Fund sought to offset health insurance benefits in the amount of \$128,067.82 the claimant received in connection with the accident. Id. The court found that the Guaranty Fund could offset its liability to the claimant by this amount, and therefore, its liability to the claimant was extinguished. Id. at 297-302.

⁸ See Section II of Appendix A.

⁹ Illinois's exhaustion statute provides:

"An insured or claimant shall be required first to exhaust all coverage provided by any other insurance policy, regardless of whether or not such other insurance policy was written by a member company, if the claim under such other policy arises from the same facts, injury, or loss that gave rise to the covered claim against the Fund. The Fund's obligation under Section 537.2 shall be reduced by the amount recovered or recoverable, whichever is greater, under such other insurance policy. . . ."

215 Ill Comp. Stat. 5/546(a).

Again, both the plain language of the statute and the clear consensus of case law in other jurisdictions supports the Association's position that medical insurance payments should be offset in these circumstances. Therefore, the Association is entitled to offset the amount paid by BC/BS on Brock's behalf.

III. The Association is Entitled to Offset \$5,000.00 for Personal Injury Protection Coverage Received by Brock.

Brock also received personal injury protection in the amount of \$5,000.00 from his own car insurance company in connection with the accident. Ex. 1 ¶ 10. The Association is entitled to offset this recovery pursuant to S.C. Code Ann. § 38-31-100(1) because Brock's claim for personal injury protection arises from the same facts, injury, or loss giving rise to the covered claim against the Association. Answer ¶ 20; Ex. 1 ¶¶ 1, 4. Furthermore, the Association is entitled to offset Brock's recovery under his personal injury protection policy pursuant to S.C. Code Ann. § 38-31-100(5) because Brock's claim is within the coverage of that policy, which was issued by a solvent insurer.

Although there are no South Carolina cases on this issue, numerous other states agree that the Association is entitled to an offset for personal injury protection coverage.¹⁰ For example, in Shepard v. Washington Ins. Guar. Ass'n, individuals made a claim against the Washington Insurance Guaranty Association after sustaining injuries in an automobile accident caused by a driver whose liability insurer became insolvent. 84 P.3d 940, 941 (Wash. Ct. App. 2004). The Washington Association argued that it was entitled to setoff its liability to the claimants by the \$10,000.00 each claimant had received from her own insurer through personal injury protection coverage. Id. The Washington Court of Appeals interpreted its exhaustion

¹⁰ See Section III of Appendix A.

statute, which is very similar to S.C. Code Ann. § 38-31-100(1):

Any person having a claim against his insurer under any provision in his insurance policy which is also a covered claim shall be required to exhaust first his right under such policy. Any amount payable on a covered claim under this chapter shall be reduced by the amount of such recovery under the claimant's insurance policy.

84 P.3d at 942 (quoting Wash. Rev. Code § 48.32.100(1)). Noting that guaranty associations step into the shoes of the insolvent insurer only to a limited extent, the court agreed that the statute clearly allowed the Washington Association to offset its liability to the claimants by the amounts the claimants received through personal injury protection coverage in addition to offsetting amounts they received through uninsured and medical insurance benefits. *Id.* at 942-43. The Maryland Court of Appeals reached the same result in *McMichael v. Robertson*, 549 A.2d 1157 (Md. Ct. Spec. App. 1988). The court found the recovery received by the claimants from their own personal injury protection coverage offset the Maryland Guaranty Corporation's liability for a judgment against an insolvent liability insurer. 549 A.2d at 1160-61.

Therefore, the plain language of the Act and the vast majority of cases from other jurisdictions support the Association's position that PIP payments should be offset. Consequently, the Association is entitled to offset the PIP payments made in this case.

IV. The Association is Entitled to Offset \$25,000.00 for Liability Coverage Available to Brock.

Brock received liability coverage proceeds in the amount of \$22,500.00 from a \$25,000.00 policy insuring the driver of the vehicle in which Brock was a passenger. Ex. 1 ¶ 8; see also Covenant Not to Execute p. 1, attached hereto as **Exhibit 2** and incorporated herein by reference. The Association is entitled to an offset in the amount of \$25,000.00 for the full

limits of this policy because Brock's claim for liability coverage qualifies as a claim under another insurance policy which arises from the same facts, injury, or loss giving rise to the covered claim pursuant to S.C. Code Ann. § 38-31-100(1). Brock admits his liability insurance claim arose from the motor vehicle accident on October 2, 2009, the same loss from which the covered claim against the Association arose. Answer ¶ 20; Ex. 1 ¶¶ 1-2. Furthermore, the Act provides that a claim under the liability coverage of someone jointly liable with the person insured by the insolvent insurer arises from the same facts, injury, or loss giving rise to the covered claim:

A claim under a policy providing liability coverage to a person who may be jointly and severally liable with or a joint tortfeasor with the person covered under the policy of the insolvent insurer that gives rise to the covered claim must be considered to be a claim arising from the same facts, injury, or loss that gave rise to the covered claim against the association. Any amount payable on a covered claim under this chapter must be reduced by the full and combined policy limits of all joint tortfeasors.

S.C. Code Ann. § 38-31-100(1)(a). Here, the liability insurance covered the driver of the vehicle in which Brock was a passenger. This driver is a joint tortfeasor with Stevens, the insured under Aequicap's policy. Therefore, Brock is required by S.C. Code Ann. § 38-31-100(1) to exhaust the coverage provided by this liability policy, and the amount payable by the Association must be reduced by the full limits available to Brock under this liability coverage.

The Association is also entitled to offset the limits of this liability policy pursuant to S.C. Code Ann. § 38-31-100(5). Brock asserts a claim against the Association based on a settlement reached with Stevens, the insured under Aequicap's policy. Because Brock's claim is also within the coverage of the driver's liability policy--a policy issued by a solvent insurer--Brock must first exhaust the solvent insurer's coverage. Brock's claim against the Association must therefore be reduced by the full limits of the solvent insurer's liability coverage.

There are no South Carolina cases regarding the Association's entitlement to a setoff of liability insurance. However, numerous states support the Association's right to such setoff.¹¹ In Oglesby v. Liberty Mut. Ins. Co., Oglesby brought a negligence action against two companies that manufactured a mobile work rig after an accident on the rig caused her husband's death. 832 P.2d 834, 837 (Okla. 1992). One of the companies' insurers was liquidated, and the Oklahoma Guaranty Association was subsequently added as a defendant in the case. Id. Oglesby asserted that she was not required to pursue her claim against the remaining company's liability insurer before seeking relief from the Oklahoma Guaranty Association. Id. at 842. The court rejected her argument based on the state's exhaustion statute and found that "a claimant must exhaust all other covered claims he/she might have against an insurer; under an insurance policy, before recovering from the Oklahoma Guaranty Association." Id. at 843. The court held that the Oklahoma Guaranty Association was therefore entitled to offset the amount Oglesby had recovered from that insurer. Id.¹²

As demonstrated above, the plain language of the Act and authority from other jurisdictions require liability coverage to be offset against amounts owed by guaranty associations. Similarly, here, the plain language of the Act's exhaustion statute requires Brock's recovery from the Association to be reduced by the full limits of that liability

¹¹ See Section IV of Appendix A.

¹² In Oglesby, there was no discussion of the policy limits of the other liability coverage available to Oglesby and the offset was thus based on the amount Oglesby received. However, the clear language of our statute allows the Association to offset the full limits of the other liability coverage "as set forth on the declarations page" rather than the amount of recovery. Thus, where a claimant settles with another insurer for less than the full policy limits, the Association is nevertheless entitled to an offset of the full policy limits. See Colorado Ins. Guar. Ass'n v. Harris, 827 P.2d 1139 (Colo. 1992) (allowing Colorado Guaranty Association to offset its liability by the \$25,000.00 limits of a claimant's uninsured coverage where the claimant settled with her uninsured carrier for \$22,500.00 because such approach "places on the claimant the burden of maximizing his . . . recovery"); Prutzman v. Armstrong, 579 P.2d 359 (Wash. 1978) (allowing Washington Guaranty Association to offset its liability by a claimant's full \$15,000.00 uninsured coverage limits even though she had settled with her uninsured carrier for only \$12,600.00 and noting that to hold otherwise "would furnish no incentive for [claimants] to seek an adequate settlement from their own insurer because they could always force the WIGA to pay the difference between the settlement and the actual value of their claim").

coverage.

CONCLUSION

The Act's plain language requires Brock to exhaust the coverage provided by his uninsured policy, medical insurance benefits, personal injury protection, and liability insurance, and provides that the Association is entitled to setoff its liability to Brock by the amounts of this other coverage. This is true regardless of whether Brock receives the full benefit of his settlement agreement with Aequicap because the Act does not guarantee the insured of an insolvent insurer complete recovery. As such, the Association's Motion for Summary Judgment should be granted as to each of the claimed offsets.

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APPENDIX A

I. Additional Authority Supporting Association's Right to Offset Uninsured Motorist Coverage

- Alabama Ins. Guar. Ass'n v. Hamm, 601 So. 2d 419 (Ala. 1992) ("To receive the full amount of both liability coverage and UM coverage would be a double recovery, and to the extent of the duplicate recovery, calculated by subtracting the UM recovery from the AIGA coverage, the AIGA's obligation for payment is offset.");
- King v. Jordan, 601 P.2d 273 (Alaska 1979) (holding that Alaska's Guaranty Association was entitled to offset uninsured benefits the claimant received from her own insurer upon the tortfeasor's liability insurer's insolvency);
- Jangula v. Arizona Prop. & Cas. Ins. Guar. Fund, 88 P.3d 182 (Ariz. Ct. App. 2004) (holding that recovery from Guaranty Fund be reduced by the amount claimant recovered from her own uninsured coverage);
- Cal. Ins. Code § 1063.2(c)(1) ("If damages against uninsured motorists are recoverable by the claimant from his or her own insurer, the applicable limits of the uninsured motorist coverage shall be a credit against a covered claim payable under this article.");
- Colorado Ins. Guar. Ass'n v. Menor, 166 P.3d 205, 214 (Colo. Ct. App. 2007) (Guaranty Association was entitled to offset claimant's recovery under uninsured/underinsured coverage and this offset furthered the nonduplication of recovery provision's purpose of "conserving the resources available to CIGA to pay claimants and policyholders");
- Robinson v. Gailno, 880 A.2d 127 (Conn. 2005) (finding that Connecticut's Guaranty Association was entitled to setoff uninsured motorist benefits "to insure that the Fund is a recovery of last resort");
- Marra v. Wilson, CIV. A. 00C-08-019RRC, 2003 WL 367831 (Del. Super. Feb. 20, 2003) (finding that Guaranty Association is entitled to offset any amount received by a claimant from his uninsured coverage);
- Mosley v. Welch, 830 A.2d 1246, 1249 (D.C. 2003) (finding that Guaranty Association is entitled to offset any amount received by a claimant from his uninsured coverage);
- Hasemann v. White, 686 N.E.2d 571 (Ill. 1997) (finding that the Guaranty Association's liability under the Act should be offset by the full limits of a claimant's uninsured coverage);
- Stecher v. Iowa Ins. Guar. Ass'n, 465 N.W.2d 887, 890 (Iowa 1991) (finding that claimants are required to exhaust uninsured coverage before pursuing recovery from the Guaranty Association and that Guaranty Association is entitled to a credit for uninsured coverage recovered by claimants);
- Hetzel v. Clarkin, 772 P.2d 800 (Kan. 1989) (holding that Guaranty Association is entitled to credit for claimant's recovery under his own uninsured coverage);
- Ky. Rev. Stat. Ann. § 304.36-120(a) ("Any person having a claim against an insurer under any provision in an insurance policy other than the policy of an insolvent insurer which is also a covered claim shall be required to exhaust first his right under the policy. Any amount payable on a covered claim under this subtitle shall be reduced by

the amount of recovery under the insurance policy. Any provision in an insurance policy includes, but is not limited to, the following coverages: . . . uninsured motorist . . . ");

- La. Rev. Stat. Ann. § 22:2062A ("(1) Any person having a claim against an insurer shall be required first to exhaust all coverage provided by any other policy, including the right to a defense under the other policy, if the claim under the other policy arises from the same facts, injury or loss that gave rise to the covered claim against the association. . . . (5) For purposes of this Section, a claim under an insurance policy other than a life insurance policy or annuity shall include, but is not limited to: (a) . . . uninsured or underinsured motorist liability coverage . . . ");
- McMichael v. Robertson, 549 A.2d 1157 (Md. Ct. Spec. App. 1988) (finding that the Guaranty Corporation was entitled to a setoff for uninsured benefits received by the claimants);
- Massachusetts Insurers Insolvency Fund v. Premier Ins. Co., 869 N.E.2d 576, 583 (Mass. 2007) ("The purpose of the exhaustion requirement of the first sentence of § 9 is to render the Fund a source of last resort in the event of insolvency. The second sentence of § 9 states a clear legislative policy that any recovery to which a claimant is contractually entitled under his own insurance policy shall be offset to reduce the liability of the Fund. Thus, where UM coverage exists, the burden of paying for losses cannot be shifted to the Fund.");
- Leitch v. Mississippi Ins. Guar. Ass'n, 27 So.3d 396, (Miss. 2010) (Guaranty Association was required to reduce its liability by any amount claimant received from own uninsured coverage); Mo. Ann. Stat. § 375.778 ("Any person having a claim against an insurer, regardless of whether such insurer is a member insurer, under any provision in an insurance policy, other than the policy of the insolvent insurer, which arises out of the same facts, injury, or loss that gave rise to the covered claim against the association and which is also a covered claim shall be required to first exhaust his or her right under such policy or policies of insurance. Such other policies of insurance shall include, but not be limited to, . . . uninsured motorist coverage . . . ");
- N.H. Rev. Stat. Ann. § 404-H:12(1) ("Any person having a claim against an insurer under any provision in an insurance policy other than a policy of an insolvent insurer, including but not limited to the provisions of uninsured motorist coverage of any policy, shall be required to exhaust first his or her right under such policy. Any amount payable on a covered claim under this chapter shall be reduced by the amount of any recovery under such insurance policy.");
- N.M. Stat. Ann. § 59A-43-11(A) ("Any person having a claim against any insurer under any provision in an insurance policy including but not limited to uninsured motorist coverage other than a policy of an insolvent insurer which is also a covered claim, shall be required to exhaust first his rights under the policy. An insured of an insolvent insurer and possessing no other insurance coverage applicable to a specific claim shall be deemed to be 'uninsured' for uninsured motorist coverage purposes. Any amount payable on a covered claim under this article shall be reduced by the amount of any recovery available under such insurance policy.");

- Santarelli v. W. Reserve Transit Auth., 1989 WL 13485 (Ohio Ct. App. 1989) (holding that Guaranty Association was entitled to a setoff against claimant's uninsured motorist recovery);
- Bird v. Norpac Foods, Inc., 934 P.2d 382, 391 (Or. 1997) (finding that Guaranty Association is entitled to a setoff against claimant's uninsured coverage recovery);
- McMahon v. Caravan Refrigerated Cargo, Inc., 594 A.2d 349 (Pa. Super. Ct. 1991) (holding that Guaranty Association properly offset its liability by amount of uninsured benefits received by claimant);
- Hogins v. Ross, 988 S.W.2d 685 (Tenn. Ct. App. 1998) (noting that a claimant was required to exhaust his uninsured motorist coverage before seeking recovery from the Guaranty Association);
- Tex. Ins. Code Ann. § 462.251(a)(1) ("Any person who has a claim under an insurance policy, other than an impaired insurer's policy, and whose claim arises from the same facts, injury, or loss giving rise to a claim against an impaired insurer or the insurer's insured, must first exhaust the person's rights under the insurance policy, including: (1) . . . a claim for indemnity or medical benefits under a . . . uninsured motorist, . . . or other insurance policy . . . ");
- Northland Ins. Co. v. Virginia Prop. & Cas. Ins. Guar. Ass'n, 392 S.E.2d 682 (Va. 1990) (finding that the Guaranty Association was not liable to the claimants after the offset of their uninsured coverage recovery);
- Gallagher v. Sidhu, 109 P.3d 840 (Wash. Ct. App. 2005) (holding that Guaranty Association was entitled to offset its liability to claimants by the amount available to them under their uninsured motorist coverage);
- Matter of Midland Ins. Co., 537 N.W.2d 51 (Wis. Ct. App. 1995) (finding that the Insurance Security Fund was entitled to offset the amount of uninsured coverage available to a claimant).

II. Additional Authority Supporting Association's Right to Offset Health Insurance Benefits

- Haw. Rev. Stat. § 431:16-112 ("(a) Any person having a claim against an insurer whether or not the insurer is a member insurer under any provision in an insurance policy other than a policy of an insolvent insurer that is also a covered claim, shall be required to exhaust first the person's rights under the policy. Any amount payable on a covered claim under this part shall be reduced by the amount of any recovery under the insurance policy. . . . (2) A claim under an insurance policy other than a life insurance policy shall include, but is not limited to: (A) A claim against a health maintenance organization, a hospital plan corporation, a professional health service corporation, or disability insurance policy . . . ");
- Kan. Stat. Ann. § 40-2910(a) ("Any person having a claim against an insurer under any provision in an insurance policy other than a policy of an insolvent insurer which is also a covered claim shall be required to exhaust first his right under such policy. A claim under an insurance policy shall include a claim under any kind of insurance, whether such claim is a first party or third party claim, and shall include, without limitation, accident and health insurance, . . . , Blue Cross and Blue Shield and all other coverages except for policies of an insolvent insurer.");
- Ky. Rev. Stat. Ann. § 304.36-120(a) ("Any person having a claim against an insurer under any provision in an insurance policy other than the policy of an insolvent insurer which is also a covered claim shall be required to exhaust first his right under the policy. Any amount payable on a covered claim under this subtitle shall be reduced by the amount of recovery under the insurance policy. Any provision in an insurance policy includes, but is not limited to, the following coverages: . . . health care.");
- La. Rev. Stat. Ann. §22:2062A ("(1) Any person having a claim against an insurer shall be required first to exhaust all coverage provided by any other policy, including the right to a defense under the other policy, if the claim under the other policy arises from the same facts, injury or loss that gave rise to the covered claim against the association. . . . (5) For purposes of this Section, a claim under an insurance policy other than a life insurance policy or annuity shall include, but is not limited to: (a) . . . any and all other medical expense coverage . . . ");
- Mo. Ann. Stat. § 375.778(1) ("Any person having a claim against an insurer, regardless of whether such insurer is a member insurer, under any provision in an insurance policy, other than the policy of the insolvent insurer, which arises out of the same facts, injury, or loss that gave rise to the covered claim against the association and which is also a covered claim shall be required to first exhaust his or her right under such policy or policies of insurance. Such other policies of insurance shall include, but not be limited to, . . . health and accident insurance . . .");
- N.J. Stat. Ann. § 17:30A-12(b) ("Any person having a claim . . . under an insurance policy other than a policy of an insolvent insurer, shall be required to exhaust first his right under that other policy. For purposes of this subsection b., a claim under an insurance policy shall include a claim under any kind of insurance, whether it is a first-party or third-party claim, and shall include without limitation, . . . accident and health insurance, . . . health benefits plan coverage . . .);

- N.C. Gen. Stat. § 58-48-55(a) ("Any person having a right to a defense or a claim against an insurer under any provision in an insurance policy other than a policy of an insolvent insurer which is also a covered claim, shall be required to exhaust first his rights under such policy. Any amount payable on a covered claim under this Article shall be reduced by the amount of any recovery under that insurance policy. For purposes of this section, a claim under an insurance policy shall include a claim under or covered by any kind of insurance, whether it is a first-party or a third-party claim, and whether it is a policy covering the policyholder or another person liable to the claimant, and shall include, without limitation, policies of accident and health insurance, . . . medical expense coverage . . . ");
- Santarelli v. W. Reserve Transit Auth., 1989 WL 13485 (Ohio Ct. App. 1989) (holding that Guaranty Association was entitled to a setoff against claimant's Blue Cross/Blue Shield health insurance benefits);
- 40 P.A. Cons. Stat. Ann. § 991.1817(a) ("Any person having a claim under an insurance policy shall be required to exhaust first his right under such policy. For purposes of this section, a claim under an insurance policy shall include a claim under any kind of insurance, whether it is a first-party or third-party claim, and shall include, without limitation, accident and health insurance, . . . Blue Cross and Blue Shield . . . ");
- Bell v. Slezak, 812 A.2d 566 (Pa. 2002) (finding that the Pennsylvania Guaranty Association's liability to claimants was extinguished after offsetting Blue Cross and Blue Shield payments made on behalf of the claimants in excess of the insolvent insurer's policy limit);
- Strickler v. DeSai, 768 A.2d 862 (Pa. Super. Ct. 2001) (affirming offset for Pennsylvania Guaranty Association based on claimant's receipt of health insurance benefits);
- R.I. Gen. Laws Ann. § 27-34-12(a)(1)-(5) ("Any person having a claim against an insurer, shall be required first to exhaust all coverage provided by any other policy, including the right to a defense under the other policy, if the claim under the other policy arises from the same facts, injury or loss that gave rise to the covered claim against the association. . . . However, no person shall be required to exhaust any right under the policy of an insolvent insurer or any right under a life insurance policy. . . . For purposes of this section, a claim under an insurance policy other than a life insurance policy shall include, but is not limited to: (i) A claim against a health maintenance organization, a hospital plan corporation, a nonprofit hospital, medical or dental service corporation or disability insurance policy . . . ");
- Tex. Ins. Code Ann. § 462.251(a)(1) ("Any person who has a claim under an insurance policy, other than an impaired insurer's policy, and whose claim arises from the same facts, injury, or loss giving rise to a claim against an impaired insurer or the insurer's insured, must first exhaust the person's rights under the insurance policy, including: (1) . . . a claim for indemnity or medical benefits under a health, . . . medical payment . . . or other insurance policy . . . ");
- MacDougall v. Hartford Ins. Group, 2003 WL 1563436 (Va. Cir. Ct. 2003) (holding that Guaranty Association's liability should be reduced by any amounts paid by health insurance coverage on the claimant's behalf);

- Proios v. Bokeir, 863 P.2d 1363 (Wash. Ct. App. 1993) (affirming offset of health insurance benefits by Guaranty Association); and
- Shepard v. Washington Ins. Guar. Ass'n, 84 P.3d 940 (Wash. Ct. App. 2004) (finding the Guaranty Association entitled to an offset for claimant's health insurance payments).

III. Additional Authority Supporting Association's Right to Offset Personal Injury Protection Coverage

- G. & MSS Trucking, Inc. v. Rich, 479 S.E.2d 761 (Ga. Ct. App. 1996) (finding that Insurers Insolvency Pool's liability to a claimant was reduced by that claimant's recovery of medical payment benefits from his insurer);
- Kan. Stat. Ann. § 40-2910(a) ("Any person having a claim against an insurer under any provision in an insurance policy other than a policy of an insolvent insurer which is also a covered claim shall be required to exhaust first his right under such policy. A claim under an insurance policy shall include a claim under any kind of insurance, whether such claim is a first party or third party claim, and shall include, without limitation, accident and health insurance . . . and all other coverages except for policies of an insolvent insurer.");
- La. Rev. Stat. Ann. § 22:2062A ("(1) Any person having a claim against an insurer shall be required first to exhaust all coverage provided by any other policy, including the right to a defense under the other policy, if the claim under the other policy arises from the same facts, injury or loss that gave rise to the covered claim against the association. . . . (5) For purposes of this Section, a claim under an insurance policy other than a life insurance policy or annuity shall include, but is not limited to: (a) . . . liability coverage, . . . and any and all other medical expense coverage . . . ");
- Auto Club Ins. Ass'n v. Meridian Mutl. Ins. Co., 523 N.W.2d 821 (Mich. App. 1994) (finding that the Michigan Guaranty Association had no liability to a claimant that had yet to seek personal injury protection from other insurer);
- Mo. Ann. Stat. § 375.778 ("Any person having a claim against an insurer, regardless of whether such insurer is a member insurer, under any provision in an insurance policy, other than the policy of the insolvent insurer, which arises out of the same facts, injury, or loss that gave rise to the covered claim against the association and which is also a covered claim shall be required to first exhaust his or her right under such policy or policies of insurance. Such other policies of insurance shall include, but not be limited to, liability coverage, health and accident insurance, hospitalization and other medical expense coverage . . . ");
- N.C. Gen. Stat. § 58-48-55(a) ("Any person having a right to a defense or a claim against an insurer under any provision in an insurance policy other than a policy of an insolvent insurer which is also a covered claim, shall be required to exhaust first his rights under such policy. Any amount payable on a covered claim under this Article shall be reduced by the amount of any recovery under that insurance policy. For purposes of this section, a claim under an insurance policy shall include a claim under or covered by any kind of insurance, whether it is a first-party or a third-party claim, and whether it is a policy covering the policyholder or another person liable to the claimant, and shall include, without limitation, policies of accident and health insurance, . . . medical expense coverage, and all other coverage except for policies of an insolvent insurer.");
- Santarelli v. W. Reserve Transit Auth., 1989 WL 13485 (Ohio Ct. App. 1989) (holding that Guaranty Association was entitled to a setoff against claimant's medical pay benefits);

- 40 P.A. Cons. Stat. Ann. § 991.1817(a) ("Any person having a claim under an insurance policy shall be required to exhaust first his right under such policy. For purposes of this section, a claim under an insurance policy shall include a claim under any kind of insurance, whether it is a first-party or third-party claim, and shall include, without limitation, accident and health insurance . . . and all other coverages except for policies of an insolvent insurer.");
- Tex. Ins. Code Ann. § 462.251(a)(1) ("Any person who has a claim under an insurance policy, other than an impaired insurer's policy, and whose claim arises from the same facts, injury, or loss giving rise to a claim against an impaired insurer or the insurer's insured, must first exhaust the person's rights under the insurance policy, including: (1) . . . a claim for indemnity or medical benefits under a . . . personal injury protection . . . or other insurance policy . . . "); and
- MacDougall v. Hartford Ins. Group, 2003 WL 1563436 (Va. Cir. Ct. 2003) (holding that Guaranty Association's liability should be reduced by any amounts the claimants received under the "medpay" provision of their insurance policy).

IV. Additional Authority Supporting Association's Right to Offset Liability Coverage

- Kan. Stat. Ann. § 40-2910(a) ("Any person having a claim against an insurer under any provision in an insurance policy other than a policy of an insolvent insurer which is also a covered claim shall be required to exhaust first his right under such policy. A claim under an insurance policy shall include a claim under any kind of insurance, whether such claim is a first party or third party claim, and shall include, without limitation, accident and health insurance . . . ");
- La. Rev. Stat. Ann. § 22:2062A ("(1) Any person having a claim against an insurer shall be required first to exhaust all coverage provided by any other policy, including the right to a defense under the other policy, if the claim under the other policy arises from the same facts, injury or loss that gave rise to the covered claim against the association. . . . (5) For purposes of this Section, a claim under an insurance policy other than a life insurance policy or annuity shall include, but is not limited to: (a) . . . liability coverage . . . ");
- Lusco v. Vinh, 673 So.2d 1086 (La. Ct. App. 1996) (finding that the Guaranty Association was entitled to offset the amounts received by claimants from a liability insurer);
- Mo. Ann. Stat. § 375.778 ("Any person having a claim against an insurer, regardless of whether such insurer is a member insurer, under any provision in an insurance policy, other than the policy of the insolvent insurer, which arises out of the same facts, injury, or loss that gave rise to the covered claim against the association and which is also a covered claim shall be required to first exhaust his or her right under such policy or policies of insurance. Such other policies of insurance shall include, but not be limited to, liability coverage . . . ");
- N.J. Stat. Ann. § 17:30A-12(b) ("Any person having a claim . . . under an insurance policy other than a policy of an insolvent insurer, shall be required to exhaust first his right under that other policy. For purposes of this subsection b., a claim under an insurance policy shall include a claim under any kind of insurance, whether it is a first-party or third-party claim, and shall include without limitation, general liability, accident and health insurance . . . ");
- Aztec Well Servicing Co., Inc. v. Prop. & Cas. Ins. Guar. Ass'n of State of New Mexico, 853 P.2d 726, 730-31 (N.M. 1993) (finding that New Mexico's version of § 38-31-100(1) applies to "situations in which the insured is entitled to proceeds from two collateral policies insuring against the same risk, one of which becomes unavailable due to insolvency" and holding that "the reasonable interpretation of [the statute] is that it requires an offset of proceeds available to the claimant from another insurance policy that is not insolvent and does not constitute a 'covered claim' under the Act");
- N.C. Gen. Stat. § 58-48-55(a) ("Any person having a right to a defense or a claim against an insurer under any provision in an insurance policy other than a policy of an insolvent insurer which is also a covered claim, shall be required to exhaust first his rights under such policy. . . . For purposes of this section, a claim under an insurance policy shall include a claim under or covered by any kind of insurance, whether it is a first-party or a third-party claim, and whether it is a policy covering the policyholder or

another person liable to the claimant, and shall include, without limitation, policies of accident and health insurance . . . ");

- 40 P.A. Cons. Stat. Ann. § 991.1817(a) ("Any person having a claim under an insurance policy shall be required to exhaust first his right under such policy. For purposes of this section, a claim under an insurance policy shall include a claim under any kind of insurance, whether it is a first-party or third-party claim, and shall include, without limitation, accident and health insurance . . . ");
- Tex. Ins. Code Ann. § 462.251(a)(1) ("Any person who has a claim under an insurance policy, other than an impaired insurer's policy, and whose claim arises from the same facts, injury, or loss giving rise to a claim against an impaired insurer or the insurer's insured, must first exhaust the person's rights under the insurance policy, including: (1) . . . a claim for indemnity or medical benefits under a . . . liability, or other insurance policy . . . ");
- Int'l Collection Serv. v. Vermont Prop. & Cas. Ins. Guar. Ass'n, 555 A.2d 978 (Vt. 1988) (applying a setoff of amounts received by a claimant from a liability insurer to reduce the claimant's settlement paid by the Guaranty Association); and
- Gauze v. Reed, 633 S.E.2d 326 (W. Va. 2006) (finding that a claimant was required to exhaust his coverage with a secondary liability insurer upon the insolvency of the primary liability insurer because "the secondary insurer and not the Guaranty Association should bear the loss.").

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

South Carolina Property and Casualty
Insurance Guaranty Association,

Plaintiff,

v.

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

Defendants.

COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
Civil Action No.: 2011-CP-10-8496

**DEFENDANT ROGER BROCK'S
ANSWERS TO PLAINTIFF'S
REQUESTS FOR ADMISSION**

Defendant Roger Brock, responding to Plaintiff's Requests for Admission, states as follows:

1. Admit that the Defendant's claim against Aequicap Insurance Company arises from the automobile accident on October 2, 2009.

ANSWER: Admitted.

2. Admit that the claim relating to the liability policy issued by Nationwide Insurance Company arises from the automobile accident on October 2, 2009.

ANSWER: Admitted.

3. Admit that the claim relating to the uninsured motorist policy issued by Progressive Insurance Company arises from the automobile accident on October 2, 2009.

ANSWER: Admitted.

4. Admit that the claim relating to the personal injury protection policy issued by Progressive Insurance Company arises from the automobile accident on October 2, 2009.

ANSWER: Admitted.

5. Admit that the claim(s) relating to the health insurance benefits policy issued by Health

ANSWER: Admitted.

6. Admit that Health Advantage/BCBS of Arkansas is no longer asserting a subrogation lien against any amounts paid by Plaintiff to Defendant.

ANSWER: Admitted.

7. Admit that Defendant would not have received uninsured motorist coverage benefits but for the insolvency of Aequicap Insurance Company.

ANSWER: Admitted.

8. Admit that Defendant received \$22,500.00 for liability coverage from Nationwide Insurance Company.

ANSWER: Admitted.

9. Admit that Defendant received \$25,000.00 for uninsured motorist coverage from Progressive Insurance Company.

ANSWER: Admitted.

10. Admit that Defendant received \$5,000.00 for personal injury protection coverage from Progressive Insurance Company.

ANSWER: Admitted.

11. Admit that Defendant had the benefit of \$40,590.45 for health insurance benefits coverage from Health Advantage/BCBS of Arkansas.

ANSWER: Admitted.

12. Admit that Defendant received \$91,909.55 from Plaintiff.

ANSWER: Admitted.

13. Admit that Defendant received or had the benefit of \$185,000.00 in total.

ANSWER: Defendant Brock denies he "received" \$185,000.00 in total. He further objects to the use of "had the benefit of" on the grounds that such terminology is vague and ambiguous in the context of this declaratory judgment action.

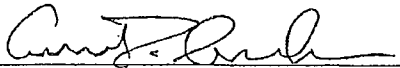
14. Admit that the Consent Amended Order of Dismissal attached as **Exhibit A** is a true and accurate copy of the Consent Amended Order of Dismissal entered in Case No. 2:10- cv- 02926-RMG filed in the United States District Court for the District of South Carolina.

ANSWER: Admitted.

15. Admit that the letter from Ms. Richarda Rich of Gibson & Sharps attached as **Exhibit B** is a true and accurate copy of her letter stating that Health Advantage/BCBS of Arkansas is no longer pursuing its subrogation claim against Defendant.

ANSWER: Admitted.

ROSEN, ROSEN & HAGOOD, LLC

By: 

Andrew D. Gowdown
Lorene Stuhr Dukes
151 Meeting Street, Suite 400
P.O. Box 893
Charleston, SC 29402
(843) 577-6726 (o)
(843) 724-8036 (f)

ATTORNEYS FOR DEFENDANT
ROGER BROCK

Charleston, South Carolina

July 6, 2012

COVENANT NOT TO EXECUTE

WHEREAS, Roger Brock, hereinafter referred to as the undersigned, and Brian Mason , were involved in an automobile accident on or about the 2nd day of October 2009, at or near Hwy 61, Walterboro, South Carolina; and

WHEREAS, the undersigned subsequently claimed bodily injuries and damages as a result of this accident, and

WHEREAS, Nationwide Insurance Companies has issued a policy of automobile liability insurance to Brian Mason, policy number 63 03D 070525 with liability limits of \$25,000/\$50,000 Bodily Injury; and

WHEREAS, the undersigned alleges to have sustained substantial damages arising out of the above accident and the undersigned alleges that these damages will exceed the amount of the liability insurance coverage available to The Estate of Brian Mason; and

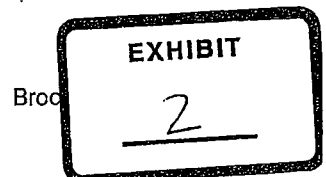
WHEREAS, The Estate of Brian Mason and Nationwide Insurance Companies would wish to limit any liability for damages in excess of the liability coverage available under the above policy number.

NOW THEREFORE, know all men by these presence that I, Roger Brock, a single person, for and in consideration off Twenty-two thousand five hundred and xx/100-----(\$22,500.00) to me in hand paid by The Estate of Brian Mason and Nationwide Insurance Companies, the receipt and sufficiency whereof is hereby acknowledged, by these presence, for myself, my heirs, executors, administrators, successors and assigns, do hereby covenant, promise and agree as follows:

1. That the undersigned does hereby promise and covenant for himself/herself, his/her executors, administrators, successors, and assigns not to execute against The Estate of Brian Mason and/or Nationwide Insurance Companies, their heirs, executors, administrators, legal representatives, successors or assigns, on any judgment that may be obtained by the undersigned on account of any and all claims, demands, damages, costs or expenses, including, but not limited to, any medical or hospital expenses, loss of services, actions and cause of action, arising from any act, omission, or occurrence, resulting or to result from the above referenced automobile accident.

2. That furthermore, the undersigned does further covenant and promise that if he/she should attain a judgment against The Estate of Brian Mason he/she will not execute on any judgment against The Estate of Brian Mason and/or Nationwide Insurance Companies and that, upon a final determination of whether any underinsured motorist benefits and/or excess automobile liability coverage, will be paid, he/she or his or her attorney will cause the judgment to be marked and entered as satisfied.

3. That should the undersigned or his/her attorney refuse to mark and enter any



judgment obtained against The Estate of Brian Mason and/or Nationwide Insurance Companies as satisfied as provided herein above, the undersigned and his/her attorney do hereby authorize the Clerk of Court for the county in which any action is pending, to mark and enter the judgment as satisfied upon receiving a copy of this agreement from counsel for The Estate of Brian Mason and/or Nationwide Insurance Companies.

4. That the undersigned agrees that the payment made by The Estate of Brian Mason and Nationwide Insurance Companies is in compromise of a doubtful and disputed claim and that the payment made is not to be construed as an admission of liability on the part of The Estate of Brian Mason or of any other person hereby benefiting from this Covenant.

5. That the undersigned hereby declares and represents that no promise or inducement or agreement not herein expressed has been made to him/her and that this Covenant contains the entire agreement between the parties hereto, and the terms of this Covenant are contractual and not merely a recital and that The Estate of Brian Mason and Nationwide Insurance Companies have made no representations as to the possibility of recovery of any monies by the undersigned against any underinsured motorist carrier or any excess automobile liability coverage available to claimant.

6. The undersigned further covenants and agrees that this Covenant shall apply to all known, unknown, anticipated, and unanticipated injuries and damages resulting from the above accident.

7. That the undersigned and his/her attorney does further agree that should there be any liens for health care services provided, whether by statute or contract or otherwise, that they will cause the health care provider to be reimbursed from the proceeds of this payment for said liens and that they will indemnify and hold harmless The Estate of Brian Mason and Nationwide Insurance Companies, their heirs, executors, administrators, legal representatives, successors and assigns, from any and all claims, demands, actions or cause of action of whatsoever kind or nature, including the reimbursement of a reasonable attorney's fee in defending such actions brought by any such purported lienholders.

8. That the undersigned hereby acknowledges that he/she relies wholly upon his/her own judgment, belief, and knowledge of the nature, extent of duration of his/her injuries and damages, and the possibility of recovery from said injuries and damages, and that no representations or statements of any kind regarding these injuries and damages or any other matter made by The Estate of Brian Mason or Nationwide Insurance Companies or by their agents or representatives, have been relied on to any extent whatsoever in making this Covenant.

It is mutually understood and agreed that this Covenant is not intended as a release or discharge, nor as an accord and satisfaction with any person whatsoever, but only as a Covenant Not to Execute against The Estate of Brian Mason and Nationwide Insurance Companies, their heirs, executives, administrators, legal representatives, successors and assigns, and is executed simply to purchase freedom from the threat of execution upon any judgment that may be attained against The

Estate of Brian Mason or Nationwide Insurance Companies. The undersigned hereby expressly reserves the rights to prosecute a legal action in court against The Estate of Brian Mason solely for the purpose of establishing a claim for establishing an underinsured claim or any other excess automobile liability coverage available. Nor does this Covenant intend to release any other person, firm, corporation, who is liable or may be liable to the undersigned for any injuries and/or damages that may have been suffered from the above referenced accident.

IN WITNESS WHEREOF, I hereunto set my hand and seal this 4 day of June, 2010.

WITNESSES

Dana Hopkins

[Signature]

Arkansas

STATE OF SOUTH CAROLINA

COUNTY OF Jackson

PLAINTIFF Roger Wayne Brock

SPOUSE

On this 4 day of June 2010, in the year 2010, before me personally came Roger Wayne Brock, to me known to be the person who is described in and who executed the foregoing instrument, and that he/she acknowledged to me that they executed the same and the same is their free act and deed.

Lisa Turner
NOTARY PUBLIC, SOUTH CAROLINA

Arkansas
MY COMMISSION EXPIRES: 1-21-2015

LISA TURNER
NOTARY PUBLIC-STATE OF ARKANSAS
JACKSON COUNTY
MY COMMISSION EXPIRES 1-21-2015

00118101647

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

South Carolina Property and Casualty
Insurance Guaranty Association,

Plaintiff,

v.

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

Defendants.

COURT OF COMMON PLEAS

Civil Action No.: 2011-CP-10-8496

**DEFENDANT ROGER BROCK'S
REPLY TO PLAINTIFF'S
MEMORANDUM IN SUPPORT
OF PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT AND IN
OPPOSITION TO DEFENDANT'S
CROSS-MOTION FOR SUMMARY
JUDGMENT**

FILED
2012 OCT 24 PM 2:17
JULIE J. ARMSTRONG
CLERK OF COURT

Defendant Roger Brock ("Brock") submits this reply to Plaintiff's Memorandum of Law in Support of its Motion for Summary Judgment and in Opposition to Brock's Cross-Motion for Summary Judgment.

FACTUAL BACKGROUND

Roger Brock is a citizen and resident of the State of Arkansas. (Exhibit A to Brock's Memorandum of Law in Support of his Motion for Summary Judgment, hereinafter "Memo. Exhibit A"). On October 2, 2009, while visiting Walterboro, South Carolina, he was involved in a serious motor vehicle accident with a logging truck driven by Ryan Stephens. (Memo. Exhibit A). The injuries Brock sustained were both permanent and severe and Brock was transported by helicopter from the site of the collision to the Medical University of South Carolina for medical treatment. See (Exhibit D to Brock's Memorandum of Law in Support of his Motion for Summary Judgment, hereinafter "Memo. Exhibit D"). As a result of the violent collision, Brock

incurred over \$71,000 in medical bills from numerous different medical providers. See (Roger Brock Summary of Medical Expenses, attached hereto as "Exhibit 1"). He will further require oral surgery and implants in the future to replace missing teeth. See (Memo. Exhibit D, at ¶ 1). Brock continues to experience pain and numbness in his leg, hip, neck, back, chest, arm, and shoulder as well as pain and cramping in his hand and wrist. (Exhibit D, at ¶ 1). In addition, Brock was only 39 years old at the time, and he will continue to suffer from pain, scarring, and loss of enjoyment of life for his remaining years. (Exhibit D, at ¶ 2).

In the underlying case filed against the Defendants responsible for Brock's injuries, a settlement agreement was entered into with Defendants' insurer, Aequicap Insurance Company ("Aequicap"). See (Exhibit F to Brock's Memorandum of Law in Support of his Motion for Summary Judgment, hereinafter "Memo. Exhibit F"). However, as a result of the insolvency of Aequicap prior to its payment of the settlement amount to Brock, demand was properly made on the South Carolina Property and Casualty Insurance Guaranty Association (the "Association") for the payment of the full settlement amount of \$185,000. See Complaint for Declaratory Judgment (filed Nov. 15, 2011). In light of the Aequicap insolvency and the collision in which Brock was severely injured, Brock received, or was afforded the benefit of, the following amounts from other solvent insurers:

- | | |
|---|-------------|
| a. Liability Coverage from Nationwide Ins. Co.
(insurer for Mason vehicle in which Brock was riding) | \$22,500.00 |
| b. Medical Insurance from Health Advantage/BCBS of Arkansas
(Brock's private pay medical insurance carrier) | \$40,590.45 |
| c. Uninsured Motorist Coverage from Progressive Ins. Co.
(resident relative coverage through Brock's parents' carrier) | \$25,000.00 |
| d. Personal Injury Protection from Progressive Ins. Co.
(resident relative coverage through Brock's parents' carrier) | \$5,000.00 |

TOTAL \$93,090.45

The Association asserts entitlement to an offset for all payments from solvent insurers pursuant to S.C. Code Ann. § 38-31-100. See Complaint for Declaratory Judgment (filed Nov. 15, 2011). The Association has paid Brock only \$91,909.55, representing the difference between the settlement amount (\$185,000) and the claimed offsets (\$93,090.45). Id. Brock objects to the reduction and demands full payment of the remaining agreed upon settlement sum from the Association, thereby totaling \$93,090.45. See (Exhibit G to Brock's Memorandum of Law in Support of his Motion for Summary Judgment, hereinafter "Memo. Exhibit G"; see also Memo. Exhibit D).

However, the Association has incorrectly summarized Brock's demand at issue in its Memorandum in Support of Plaintiff's Motion for Summary Judgment and in Opposition to Defendant's Cross-Motion for Summary Judgment (hereinafter the "Association's Memorandum"). In the Association's Memorandum, it claims that Brock is now seeking \$185,000, *in addition to the \$91,909.55 he has already received.* See Association's Memorandum, p. 8 ("Brock now wrongly seeks to recover \$185,000 in addition to the amount he has already been paid by other solvent insurers"). This is simply false. At no time has Brock ever sought more than the agreed upon settlement total of \$185,000 from the Association. Accordingly, the demand sought by Brock and at issue in this matter is \$93,090.45 – the offset amount sought by the Association from Brock's settlement with the tortfeasor's insolvent insurer.

I. The Legal Authority Cited in Plaintiff's Memorandum is Distinguishable from South Carolina Law and Offers Limited Guidance in This Matter.

As set forth above and as a paramount matter in considering the relevant motions, Brock's demand is approximately half of the amount that the Association claims Brock is

demanding. This fact is supported by Brock's communications with the Association and the pleadings filed in this matter. See (Exhibit G to Brock's Memorandum of Law in Support of his Motion for Summary Judgment, hereinafter "Memo. Exhibit G"; see also Memo. Exhibit D). Accordingly, any analysis of an amount sought by Brock above the Association's claimed offset amount of \$93,090.45 in the Association's Memorandum is irrelevant.

In its Memorandum, the Association cites numerous cases and statutes from other states in an attempt to bolster its arguments in support of allowing the Association to offset different forms of insurance coverage under South Carolina law, including an appendix of legal authority for each form of insurance coverage, namely uninsured motorist, health insurance, personal injury protection, and liability coverage. First, and as the Association has admitted in each of its arguments, there are no guiding South Carolina cases addressing the Association's entitlement to the types of offsets it seeks to impose against Brock. (Association's Memorandum, p. 9, 12, 13, 16). The majority of the legal authority cited by the Association is from other states with highly distinguishable guaranty association statutes. The resulting case opinions cited by the Association interpret their own statutory law when determining their state guaranty association's entitlement to offset certain insurance benefits, which language is largely not in accord with the South Carolina offset statute. Therefore, the legal authority cited offers limited support of the Association's position to offset the amounts it seeks in this matter.

For instance, in Appendix A to its Memorandum, the Association cites numerous statutes in other states that permit guaranty associations to offset different forms of insurance coverage received by a claimant. (Association's Memorandum, p. 18-27). While the Association claims that these statutes offer authority supporting Association's right to offset certain forms of independent insurance coverage in South Carolina – just the opposite is true. A thorough review

of the Association's cited statutes reveals that nearly all were amended by each state's respective legislature to specifically include language entitling their guaranty association to offset particular forms of independent insurance coverage.¹ Further review reveals that prior to such amendments, many of the cited statutes in fact contained a more ambiguously worded offset provision similar to South Carolina's version contained in S.C. Code Ann. § 38-31-100.² The inclusion of these specific statutes only serves to substantiate Brock's position in this matter. If the legislature intended to permit the Association to offset such forms of independent insurance coverage, in direct conflict with South Carolina's collateral source rule and separate statutory sections, it would have amended South Carolina's offset provision to specifically entitle the Association to offset such coverage.

Likewise, the majority of the cases cited by the Association in its Memorandum offer limited guidance in this matter. Nearly all the cases cited by the Association interpret guaranty association offset statutes that are differently worded than South Carolina's version. As a result, the holdings in the cited cases are merely a reflection of each state's distinguishable offset

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); 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 coverage available for offset); La. Rev. Stat. Ann. § 22:2062A (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 language about offset classes available to guaranty association); N.C. Gen. Stat. § 58-48-55(a) (statute amended in 2003 to include 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 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 P.A. Cons. Stat. Ann. § 991.1817(a) (statute amended in 1994 to include language about offset classes available to guaranty association); R.I. Gen. Laws Ann. § 27-34-12(a)(1)-(5) (statute amended in 2010 to include language specifying offset classes available to guaranty association); Tex. Ins. Code Ann. § 462.251(a)(1) (statute amended in 2005 to include language specifying offset classes available to guaranty association).

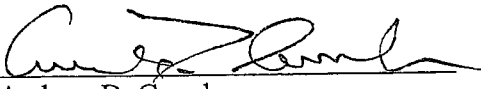
² See *id.* Prior to such statutory amendments most states had ambiguously-worded versions of the model act concerning a guaranty association's ability to offset other insurance benefits received by a claimant. "Significantly, particularly as applied in the areas of exhaustion and non-duplication of 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 (2002)

statute. For example, many of the cases cited have offset statutes that specifically identify the relevant form of insurance coverage sought by the Association and argued in support of offset in its Memorandum. See, e.g., Bell v. Slezak, 812 A.2d 566, 573 (Pa. 2002) (Pennsylvania offset statute specifically identifies accident and health insurance as being available for offset by its guaranty association). Because the South Carolina offset statute does not contain such specific language, the cases cited by the Association offer limited guidance in interpreting South Carolina law as is required in this matter.

CONCLUSION

For all the above reasoning and law, Defendant Brock respectfully requests that his Motion for Summary Judgment be granted and that the Association be ordered to pay the remaining amount of Brock's claim, totaling \$93,090.45.

ROSEN, ROSEN & HAGOOD, LLC

By: 
Andrew D. Gowdown
Lorene Stuhr Dukes
151 Meeting Street, Suite 400
P.O. Box 893
Charleston, SC 29402
(843) 577-6726

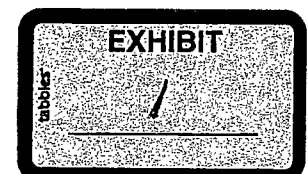
ATTORNEYS FOR DEFENDANT
ROGER BROCK

Charleston, South Carolina
October 24, 2012

ROGER BROCK

SUMMARY OF MEDICAL EXPENSES

PROVIDER	AMOUNT
Colleton County Fire-Rescue	\$1,051.00
Colleton Medical Center	\$15,066.00
Colleton Emergency Group	\$1,617.00
Personal Care Ambulance	\$744.00
University Medical Associates	\$10,544.00
MUSC	\$33,716.42
Family Practice Physician	\$50.00
Dickson Orthopedic	\$532.00
Otolaryngology and Facial Surgery Centre	\$1,547.00
Dr. William Cobb	\$90.00
First Care	\$274.00
St. Bernards	\$1,055.00
Harris Hospital	\$3,225.55
Batesville Neurology	\$1,194.00
Patti Mullins, DDS	\$156.00
TOTAL:	\$71,047.37



00163/01647

FILED
2012 OCT 24 PM 3:27
JULIE J. ADAMS, CLERK OF COURT

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

South Carolina Property and Casualty)
Insurance Guaranty Association,)

Plaintiffs,)

vs.)

Roger Brock, Ryan Stevens, and)
Malachi Sanders,)

Defendants.)

COURT OF COMMON PLEAS

C/A NO. 2011-CP-10-8496

REPLY TO DEFENDANT'S
MEMORANDUM IN SUPPORT OF
HIS MOTION FOR SUMMARY
JUDGMENT

Plaintiff South Carolina Property and Casualty Insurance Guaranty Association ("Association"), by and through its undersigned counsel, hereby submits this Reply to the Memorandum in Support of Defendant Roger Brock's ("Brock") Motion for Summary Judgment.

As an initial matter, it must be noted that the Association's liability to Brock is, at the most, \$185,000.00. His argument that his actual injuries greatly exceeded that amount but he settled for less than his actual loss because of Aequicap's financial problems is irrelevant. Brock chose to settle with Aequicap for \$185,000.00, and his claim against the Association is limited to that amount. The issue is whether the Association is entitled to offset its \$185,000.00 liability by the amount of other coverage Brock is required to exhaust pursuant to the Act.

I. Brock Misunderstands the Purpose of the Act.

Brock misstates the purpose of the Act. As stated in S.C. Prop. and Cas. Ins. Guar. Ass'n v. Carolinas Roofing and Sheet Metal Contractors Self-Insurance Fund, 315 S.C. 555,

557, 446 S.E.2d 422, 424 (1994), the purpose of the Association is "to provide some protection to insureds whose insurance companies become insolvent." 315 S.C. at 557, 446 S.E.2d at 424 (emphasis added). Notably, the purpose of the Association is not to put Brock in the same position as if Aequicap had not gone insolvent as he claims. The Association is not an insurance company and is not designed to make Brock whole. Instead, the Association's purpose is to mitigate the situation Brock would find himself in had Aequicap gone insolvent and the Association was not in existence, leaving him without any potential recovery based on the Aequicap policy. The Association is a source of limited funds designed to provide some relief to all those in this unfortunate situation. Because its funds are limited, it is a necessary evil that everyone will not be compensated to the full extent so that no one claimant would be left without any potential compensation from the Association.

Brock also mistakenly relies on the purpose of the South Carolina Life and Accident Health Insurance Guaranty Association ("SCLAHIGA"). The SCLAHIGA is not a sister organization of the Association as Brock claims, and its purpose--found in an entirely different statutory enactment creating a separate and distinct association handling completely different claims by its own processes--cannot be transposed to serve as the purpose of the Act at issue here. The purpose of the Act has already been determined by this State's Supreme Court--to provide **some** protection to claimants like Brock who cannot recover from an insolvent insurer. See Carolinas Roofing, 315 S.C. at 557, 446 S.E.2d at 424.

Additionally, Brock attempts to equate the Association with the tortfeasor but they are not one and the same. Most importantly, the Association's liability arises from the Act and is accordingly limited by the Act. The tortfeasor's liability is irrelevant to the issue in this matter. In any event, the Act limits the tortfeasor's liability to the extent the Association's

liability is reduced. Furthermore, there really is no tortfeasor here because Brock reached a settlement with Stevens and Sanders so no liability for the underlying automobile accident has been established.

II. Brock Misunderstands the Act's Exhaustion Statute.

The Act's exhaustion statute provides:

A person, having a claim under an insurance policy, whether or not it is a policy issued by a member insurer, and the claim under such other policy arises from the same facts, injury or loss which gave rise to the covered claim against the association, is required to first exhaust all coverage and limits provided by any such policy. Any amount payable on a covered claim under this chapter must be reduced by the full limits of such other coverage as set forth on the declarations page and the association shall receive a full credit for such limits, or, where there are no applicable limits, the claim must be reduced by the total recovery. Notwithstanding the foregoing, no person may be required to exhaust all coverage and limits under the policy of an insolvent insurer.

S.C. Code Ann. § 38-31-100(1). "Covered claim" is defined as:

[A]n unpaid claim, including one of unearned premiums, which arises out of and is within the coverage and is subject to the applicable limits of an insurance policy to which this chapter applies issued by an insurer, **if the insurer is an insolvent insurer** and (a) the claimant or insured is a resident of this State at the time of the insured event, if for entities other than an individual, the residence of a claimant or insured is the state in which its principal place of business is located at the time of the insured event or (b) the claim is for first-party benefits for damage to property permanently located in this State.

S.C. Code Ann. § 38-31-20 (emphasis added). In short, a covered claim refers to claims made against the Association.

Brock mistakenly characterizes the Association's position as being that the phrase "a claim under an insurance policy" is clear and unambiguous and the plain meaning of the statute allows the Association to deduct "any amount payable on a covered claim" that Brock has received from any other insurance policy. This is simply a misreading of the statute and does not accurately reflect the Association's position.

The Association maintains that the entirety of S.C. Code Ann § 38-31-100(1) is clear and unambiguous and should be enforced according to its plain and ordinary language. The statute clearly provides that because Brock has claims under other insurance policies that arise from the same facts, injury or loss which gave rise to Brock's claim against the Association, he must exhaust those other policies. The statute further provides that any amount payable by the Association on Brock's claim against it must be reduced by the full limits of those other policies (or, where there are no applicable limits on those other policies--for example, in a health insurance policy--by the amount of the total recovery).

Brock attempts to add requirements in the exhaustion statute that simply are not there. First, Brock argues that for a claim under another insurance policy to be subject to offset, it must be a covered claim. He argues that because the medical benefits he received are not covered claims, they are not subject to an offset. However, there is no requirement in the statute that the claim under the other insurance has to be a covered claim--or in other words, another claim against the Association--to be offset. The statute clearly explains that for a claim under another insurance policy to be subject to offset, it must arise from the same facts, injury or loss giving rise to the claim against the Association. The statute goes on and specifically prohibits requiring claimants to exhaust any coverage under the policy of an insolvent insurer. Brock's interpretation of the statute would render it completely meaningless. If we were to apply his requirement that the claim under the other insurance must be a covered claim to be offset, the statute would be granting the Association a right to offset only covered claims in one breath but taking away that same right in the next breath.

Next, Brock argues that because the Act does not apply to health or accident insurance,

the medical benefits and uninsured coverage¹ he received cannot be offset. The fact that the Act does not apply to health and accident insurers simply means that such insurers are not members of the Association. The exhaustion statute clearly provides that a policy can be offset "whether or not it is a policy issued by a member insurer." Thus, for another insurance policy to be offset, it does not matter whether the other policy was issued by an insurer who writes property and casualty insurance in South Carolina and would therefore be a member of the Association. Health and accident insurance policies may be offset because it is irrelevant under the statute whether the other policy was issued by a member of the Association.

Brock also encourages expanding the obligations of the Association by imposing a requirement in the statute that offsets may be taken only if a claimant has already been made whole. There is simply no such requirement in the statute, and in fact, the statute mandates that the setoff be taken with no qualification regarding the status of the claimant's recovery. Brock's interpretation simply imposes requirements on the Association that do not exist and, as explained above, misunderstands the limited purpose of the Association.

Finally, the Association's application of the plain language of the statute does not result in a patently absurd result as Brock claims. When applying the exhaustion statute's plain language, Brock is \$91,909.55 better off than he would have been without the Association. The burden of insolvencies is shifted to other solvent insurers so that the Association's limited funds are preserved to assist as many as possible. When applying Brock's interpretation of the exhaustion statute to require no exhaustion, Brock would actually receive \$65,590.45 more

¹ To the extent Brock argues that uninsured benefits are "accident insurance" not subject to the Act, he is mistaken. "Accident and health insurance" is defined in S.C. Code § 38-1-20(1) as "insurance of human beings against death or personal injury by accident, and each insurance of human beings against sickness, ailment, and any type of physical disability resulting from accident or disease, and prepaid dental service, but not including coverages required by the Workers' Compensation Law of this State." In other words, accident insurance and health insurance are one and the same. Insurers providing uninsured coverage are members of the Association, and uninsured coverage is casualty insurance subject to the Act.

than he would have had Aequicap not gone insolvent. The burden of insolvencies is placed squarely on the Association just as if it were an insurer and its limited funds are depleted, increasing the likelihood that other unfortunate individuals with claims against insolvent insurers are left without any source of recovery. Surely, this is a patently absurd result not intended by the legislature when they plainly set forth the Association's right to the offsets at issue.

III. The Collateral Source Rule Does Not Apply as Brock Claims.

Brock argues that the health insurance benefits, uninsured coverage, and personal injury protection coverage he received are not subject to setoff based on the collateral source rule. "The collateral source rule provides that compensation received by an injured party from a source wholly independent of the wrongdoer will not reduce the amount of damages owed by the wrongdoer." In re W.B. Easton Constr. Co., Inc., 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995) (emphasis added). The Association is not a "wrongdoer," and the collateral source rule's bar on reduction of damages owed by a "wrongdoer" simply does not apply to this matter.

Even if the collateral source rule applied to the circumstances at issue, it is a creature of common law, and therefore, was superseded by the codification of the exhaustion statute which mandates that such coverage be offset. See Estate of Rattenni v. Grainger, 298 S.C. 276, 278, 379 S.E.2d 890, 891 (1989) (noting that the General Assembly can abrogate the collateral source rule by statute). By promulgating the Act, the General Assembly abrogated the collateral source rule in this situation.

IV. The Act is More Specific Than UM and PIP Statutes.

Brock argues that the Association is barred from offsetting the uninsured coverage

("UM") and personal injury protection coverage ("PIP") he received based on the UM statute's prohibition of the subrogation of UM coverage and the PIP statute prohibiting subrogation or setoff of PIP coverage, respectively. First, the UM statute prohibiting subrogation of UM coverage is irrelevant because the Association is not seeking to subrogate Brock's UM recovery. In fact, the Act prohibits subrogation as well. S.C. Code Ann. § 38-31-100(4).

Although the UM and PIP statutes generally prohibit subrogation or setoff, they are less specific than the Act's exhaustion statute, which specifically provides that these setoffs are available to determine the Association's liability to claimants of an insolvent insurer. As Brock admits, the more specific statute prevails over the general one. Here, the exhaustion statute's specific allowance of an offset for these coverages supersedes the general prohibition of their subrogation or setoff in the UM and PIP statutes.

V. Offsets in Other Situations Support Association's Entitlement to Offsets.

Brock argues that the Association arbitrarily chooses to apply the offsets granted in the Act's exhaustion statute. In support of this argument, he relies on the fact that the Association negotiated the amount of offset it took from the liability recovery from Angela Hess, another individual involved in the accident with Brock. The fact that the Association negotiated the amount of the offset with Ms. Hess is irrelevant. Further, it is not arbitrary as Brock claims. In fact, it is undisputed that the Association made the same offer to Brock as was made to Ms. Hess--to reduce its liability coverage offset by half--but Brock rejected this offer. In any event, the fact that parties negotiate the offset is evidence that the Association is in fact entitled to such an offset. If the Association had no such right to offset, there would not be anything to negotiate.

Brock also refers to the fact that the Association does not offset benefits received under

Medicare and Medicaid. It must be noted that Brock did not receive any benefits under Medicare or Medicaid, and therefore, these types of offsets are irrelevant in this matter. In any event, federal law prohibits such offset and preempts any offsets permitted by our state in the Act. See, e.g., 42 U.S.C. § 1395(y)(B)(2); 42 CFR § 411.35; 42 CFR § 411.21; Munson v. Sevin, 2005 WL 1123373 (La. Dist. Ct. Jan. 7, 2005) (finding that the Medicare Secondary Payer Act preempts state law such that "there is no valid requirement to exhaust Medicare first and LIGA must be construed as the primary payer and is therefore liable . . . "); U.S. v. Rhode Island Insurers' Insolvency Fund, 80 F.3d 616 (1st Cir. 1996) (finding that the Medicare Secondary Payer Act preempts sections of the Rhode Island Insurers' Insolvency Fund Act making the Fund the primary payer). The observance of federal law with respect to Medicare and Medicaid does not imply that the Association arbitrarily chooses when to offset its liability and surely cannot be held against the Association to deny it other, unrelated offsets granted by state law.

VI. The Association Is Entitled to Offsets Even If Brock Is Not Made Whole.

As explained above, there is no requirement in the Act that Brock be made whole for the Association to be entitled to offsets and making Brock whole is not the purpose of the Act. Brock cites several cases for the proposition that "[m]any courts in other states that have statutes with almost identical language to that of South Carolina's statute have held that an offset of any benefits rendered by solvent insurers for the same injury that results in a recovery less than the full amount to which the insured is entitled unfairly penalizes the injured party." Most importantly, the language of the statutes relied on in these cited cases is not "almost identical" to South Carolina's statute. The significant distinction is that the statutes relied on in the cited cases require the claim under the other insurance to be a covered claim for the

Association to be entitled to an offset whereas South Carolina's statute requires only that the claim under the other insurance arise from the same facts, injury or loss for the Association to be entitled to an offset.

For example, the statute applied in Int'l Collection Serv. v. Vermont Prop. & Cas. Ins. Guar. Ass'n, 555 A.2d 978 (Vt. 1988), provides:

§ 3619. Nonduplication of recovery

(a) Any person having a claim against an insurer under any provision in an insurance policy other than policy of an insolvent insurer **which is also a covered claim**, shall be required to exhaust first his right under such policy. Any amount payable on a covered claim under this subchapter shall be reduced by the amount of any recovery under such insurance policy.

Vt. Stat. Ann. Tit. 8, § 3619 (emphasis added). Similarly, the statute relied on in R&R Indus.

Park, LLC v. Utah Prop. & Cas. Ins. Guar. Ass'n, 199 P.3d 917 (Utah 2008), provides:

(1)(a) Any person who has a claim against an insurer, whether or not the insurer is a member insurer, under any provision in an insurance policy, other than a policy of an insolvent insurer **that is also a covered claim**, is required to first exhaust that person's right under that person's policy.

(b) Any amount payable on a covered claim under this part under an insurance policy is reduced by the amount of any recovery under the insurance policy described in Subsection (1)(a).

Utah Code Ann. § 31A-28-213 (Supp. 2008) (emphasis added). The statute relied on in Gibson v. Alabama Ins. Guar. Ass'n, 601 So.2d 416 (Ala. 1992), similarly provides:

Any person having a claim against an insurer under any provision in an insurance policy other than a policy of an insolvent insurer **which is also a covered claim**, shall be required to exhaust first his rights under such policy. Any amount payable on a covered claim under this chapter shall be reduced by the amount of any recovery under such insurance policy.

Ala. Code § 27-42-12(a) (emphasis added).² Because the statutes applied in the other cases have the "covered claim" standard for an offset rather than the "same facts, injury or loss" standard found in South Carolina's exhaustion statute, these other cases are not instructive on the interpretation of our exhaustion statute. Instead, courts interpreting statutes containing the "same facts, injury or loss" standard found in South Carolina's exhaustion statute have uniformly held that the Association is entitled to offset amounts received from other insurance. See Appendix A.

Furthermore, the Int'l Collection court noted that "the intention of the Legislature is not necessarily to make a claimant whole" and actually supports the Guaranty Association's right to a setoff. 555 A.2d at 979. In Int'l Collection, a property owner sustained a loss due to a fire caused by insureds of Ambassador Insurance Company and other third parties totaling \$136,637.74. 555 A.2d at 978-79. The property owner received \$113,600.00 from his own fire insurer. Id. at 978. Ambassador Insurance Company became insolvent, and Vermont's Guaranty Association entered into a settlement agreement with the property owner whereby the Association agreed to pay him the remaining uninsured loss of \$23,037.74. Id. at 979. The property owner subsequently received \$22,826.09 from the liability insurer for the other third parties. Id.

The Int'l Collection court concluded that "the [statute's] words 'shall be reduced' **require** an offset of the amount recovered against the total 'amount payable' to the claimant as

² Similarly, the statute relied on in Harris v. Lee, 387 So.2d 1145 (La. 1980), provides:

Any person having a claim against an insurer under any provision in an insurance policy other than a policy of an insolvent insurer which is also a covered claim, shall be required to exhaust first his right under such policy. Any amount payable on a covered claim under this Part shall be reduced by the amount of any recovery under such insurance policy.

La. Rev. Stat. Ann. 22:1386(1) (emphasis added). The Harris case is discussed in more detail in Section VIII.

damages." Id. at 980 (emphasis added). Accordingly, the court reduced the Guaranty Association's settlement amount of \$23,037.34 by the \$22,826.09 received by the property owner from the other insurer. Id. With this setoff, the Guaranty Association was required to pay only \$211.65, the difference between the settlement amount and the subsequent recovery from the liability insurer. Id. Likewise, the Guaranty Association here should be required to pay only the difference between the settlement amount and the amounts received from the other solvent insurers for the same facts, injury or loss.

Moreover, the R&R decision involved an excess liability policy, which implicates concerns not at issue here. Namely, claimants have argued that it is not fair to allow the Association to offset its liability for an insolvent excess insurer by the amounts they received from their primary insurer because it is the exhaustion of those amounts that trigger the excess insurer's liability in the first place. Here, the Association has not assumed responsibility on an excess policy, making the R&R decision and the cases cited therein dealing with the insolvency of excess insurers inapplicable to the present case.

Finally, the Gibson case directly supports Plaintiff's claim for such offset. Id. In that matter, Gibson was injured by a hit-and-run driver while acting in the scope of his employment. Id. at 417. Accordingly, he sought uninsured coverage under both his own and his employer's uninsured motorist policies. Id. His employer's insurer settled for its policy limits, and he sought additional recovery under his own uninsured policy. Id. His insurer became insolvent, and his claim for additional uninsured recovery was asserted against Alabama's Guaranty Association. Id. The court found that because Gibson's coverage under both uninsured policies was triggered by the hit-and-run accident and not his insured's insolvency, the Guaranty Association was not entitled to a setoff. Id. at 418-19.

However, the Gibson court specifically contrasted Gibson's assertion of coverage under two uninsured policies with the situation where, like Brock here, someone asserts a claim for uninsured coverage based on the insolvency of the tortfeasor's liability coverage. Id. The court held that the Guaranty Association is entitled to a setoff in such a situation:

Specifically, § 27-42-12 provides that if one first exhausts other available insurance coverage, he or she may then proceed against the AIGA as the guaranty fund for an insolvent insurer. However, this Code section (the 'offset statute'), entitled 'Exhaustion of rights; nonduplication of recovery,' also provides that the amounts first recovered offset or reduce the 'covered claim' with the AIGA. . . . For example, we have held that where a claimant recovers uninsured motorist ('UM') coverage because the tort-feasor's liability insurer is insolvent, the claimant cannot also recover from the AIGA on the full amount of the insolvent company's liability coverage. In this instance, one could claim for UM coverage only because, as a result of the insurer's insolvency, there *was no liability coverage*. To receive the full amount of both liability coverage and UM coverage would be a double recovery, and to the extent of the duplicate recovery, calculated by subtracting the UM recovery from the AIGA coverage, the AIGA's obligation for payment is offset.

Id. (quoting Alabama Ins. Guar. Ass'n v. Hamm, 601 So. 2d 419 (Ala. 1992); citing Alabama Ins. Guar. Ass'n v. Magic City Trucking Serv., Inc., 547 So. 2d 849, 852 (Ala. 1989)) (emphasis in original).

In short, the cases on which Brock relies are not instructive because they apply statutes with different language and are otherwise distinguishable. The plain language of South Carolina's exhaustion statute clearly provides that the Association is entitled to offset Brock's other coverage arising from the same facts, injury or loss as the claim against the Association, and there is no requirement that Brock be made whole. Most importantly, Brock's interpretation of the statute would do more than just make him "whole." He is actually seeking to recover \$65,590.45 more than he would have recovered had Aequicap not become insolvent. The statute cannot be re-written to ensure that Brock be made whole and certainly

cannot be manipulated to provide Brock with more than he would have received without the insolvency.

VII. The Association is Entitled to Offset \$25,000 for Uninsured Coverage Received by Brock.

As previously explained, the Association is entitled to offset the uninsured coverage based on the plain language of the statute and the vast majority of authority across the country on this issue. Moreover, to refuse such an offset would result in a windfall to the claimant because such coverage would not be available but for the insolvency.

In addition to the arguments above, Brock relies on Rhode Island Insurers' Insolvency Fund v. Benoit, 723 A.2d 303 (R.I. 1999) to argue that such an offset is not appropriate. Although the Benoit court refused to allow an offset for uninsured coverage benefits received by a claimant, it was interpreting Rhode Island's non-duplication provision, which is very different than South Carolina's exhaustion statute:

Any person having a claim against an insurer under any provision in an insurance policy other than a policy of an insolvent insurer **which is also a covered claim**, shall be required to exhaust first his or her right under that policy. Any amount payable on a covered claim under this chapter shall be reduced by the amount of any recovery under the insurance policy.

723 A.2d at 306-07 (citing R.I. Gen. Laws § 27-34-12(a)) (emphasis added). The language of this statute provides that the Association can only offset claims under other insurance policies which are also covered claims. Id. at 307. Because the uninsured benefits were not covered claims in that they were not claims against an insolvent insurer, the Association could not offset them. Id. The court further relied on the Rhode Island Act's stated purpose to "avoid loss resulting from the insolvency of an insurer." Id. (emphasis added).

However, as discussed above, there is no requirement in South Carolina's exhaustion statute that requires that a claim under other insurance be a covered claim in order for the Association to have a right to offset that other insurance. In fact, claimants are not required to exhaust other covered claims pursuant to the South Carolina statute. Furthermore, although the Act does not state its purpose, the Supreme Court has found that the Association is designed to provide only "some protection" to claimants, not totally avoid their financial loss. Carolinas Roofing, 315 S.C. at 557, 446 S.E.2d at 424. Perhaps most importantly, the uninsured coverage at issue in Benoit did not arise from the fact of the insolvency. Benoit, 732 A.2d at 306. Instead, the vehicle in which the claimant was a passenger also happened to be uninsured. Id. Thus, the claimant did not receive a windfall by the court's refusal to allow the Association to offset this coverage.

Also, it must be noted that Rhode Island subsequently amended the provision at issue in Benoit to more closely align with South Carolina's. The current provision provides in part:

§ 27-34-12. Exhaustion of other coverage.

(a)(1) Any person having a claim against an insurer, shall be required first to exhaust all coverage provided by any other policy, including the right to a defense under the other policy, if the claim under the other policy arises from the same facts, injury or loss that gave rise to the covered claim against the association. The requirement to exhaust shall apply without regard to whether the other insurance policy is a policy written by a member insurer. However, no person shall be required to exhaust any right under the policy of an insolvent insurer or any right under a life insurance policy.

(2) Any amount payable on a covered claim under this chapter shall be reduced by the full applicable limits stated in the other insurance policy, or by the amount of the recovery under the other insurance policy as provided herein.

R.I. Gen. Laws § 27-34-12. This change evidences the Rhode Island legislature's discontent with the Benoit decision and reflects the national trend in allowing offsets for uninsured coverage.

VIII. The Association is Entitled to Offset \$40,590.45 for Medical Benefits Paid on Behalf of Brock.

The plain language of the exhaustion statute permits the Association to offset the medical benefits paid on Brock's behalf, and the clear majority of states addressing this issue support the Association's right to such offset. Moreover, to refuse such an offset would result in a double recovery for Brock because such coverage is no longer subject to subrogation upon Aequicap's insolvency. S.C. Code Ann. § 38-31-100(4).

In addition to the arguments above, Brock relies on a handful of cases to support his claim that South Carolina's exhaustion statute does not allow the Association to offset the medical benefits paid on Brock's behalf. However, these cases do not provide the strong support which he claims. For example, the "non-duplication of recovery" statute at issue in Harris v. Lee, 387 So.2d 1145 (La. 1980), provides:

Any person having a claim against an insurer under any provision in an insurance policy other than a policy of an insolvent insurer **which is also a covered claim**, shall be required to exhaust first his right under such policy. Any amount payable on a covered claim under this Part shall be reduced by the amount of any recovery under such insurance policy.

387 So.2d at 1146 (citing La. Rev. Stat. Ann. 22:1386(1)) (emphasis added). Again, this statute differs from South Carolina's exhaustion statute because it does require that a claim under other insurance be a covered claim for the Association to offset such other insurance. Because health insurance is not covered by the Act, health insurance claims could not be covered claims, and therefore, the Association was not entitled to offset the health insurance

benefits received by the claimant. Id. Because the wording and import of the statute at issue in Harris is not the same as South Carolina's, this decision cannot be relied on to deny the Association its right to offset health insurance benefits. In any event, the Louisiana legislature subsequently amended its statute to more closely align with South Carolina's exhaustion statute, which does not require that a claim under other insurance be a covered claim in order for the Association to offset the other insurance:

§ 2062. Exhaustion of other coverage

A. (1) Any person having a claim against an insurer shall be required first to exhaust all coverage provided by any other policy, including the right to a defense under the other policy, if the claim under the other policy arises from the same facts, injury or loss that gave rise to the covered claim against the association. The requirement to exhaust shall apply without regard to whether or not the other insurance policy is a policy written by a member insurer. However, no person shall be required to exhaust any right under the policy of an insolvent insurer or any right under a life insurance policy or annuity.

(2) Any amount payable on a covered claim under this Part shall be reduced by the full applicable limits stated in the other insurance policy, or by the amount of the recovery under the other insurance policy as provided herein.

La. Rev. Stat. Ann. § 2062 (A). Therefore, the Louisiana legislature effectively nullified the Harris decision by joining the clear majority of states allowing offsets for health insurance coverage.

In fact, every case cited by Brock to refute the Association's right to offset medical benefits applied different statutory language requiring that the claim under other insurance be a covered claim for the Association to offset such other insurance:

- Alabama Ins. Guar. Ass'n, 514 So.2d 1000 (Ala. 1987), which relied on:
 - (a) Any person having a claim against an insurer under any provision in an insurance policy other than a policy of an insolvent insurer **which is also a covered claim**, shall be required to exhaust first his rights under such policy. Any amount payable on a covered claim under this chapter shall be reduced by

the amount of any recovery under such insurance policy.

Ala. Code § 27-42-12 (emphasis added).

- Ind. Ins. Guar. Ass'n v. Davis, 768 N.E.2d 902 (Ind. Ct. App. 2002), and Ind. Ins. Guar. Ass'n v. Blickensderfer, 778 N.E.2d 439, 444 (Ind. Ct. App. 2002), which relied on:

(a) Any person having a claim against an insurer under any provision in an insurance policy other than a policy of an insolvent insurer **which is also a covered claim**, shall be required to exhaust first the person's right under the policy. Any amount payable on a covered claim under this chapter shall be reduced by the amount of recovery under the insurance policy.

Ind. Code § 27-6-8-11 (emphasis added).

- Brennan v. Kansas Ins. Guar. Ass'n, 264 P.3d 102 (Kan. 2011), which relied on a previous version of Kansas's nonduplication provision:³

Any person having a claim against an insurer under any provision in an insurance policy other than a policy of an insolvent insurer **which is also a covered claim** shall be required to exhaust first his right under such policy. Any amount payable on a covered claim under this act shall be reduced by the amount of any recovery under such insurance policy.

Kan. Stat. Ann. § 40-2910(a) (emphasis added).

- Pritchett v. Clifton, 738 F.2d 319 (8th Cir. 1984), which relied on a repealed version of Missouri's nonduplication provision:⁴

³ Kansas amended this version of the statute to read as follows:

"Any person having a claim against an insurer under any provision in an insurance policy other than a policy of an insolvent insurer which is also a covered claim shall be required to exhaust first his right under such policy. A claim under an insurance policy shall include a claim under any kind of insurance, whether such claim is a first party or third party claim, and shall include, without limitation, accident and health insurance, workers' compensation, Blue Cross and Blue Shield and all other coverages except for policies of an insolvent insurer. Any amount payable on a covered claim under this act shall be reduced by the amount of any recovery under such other insurance policy.

Kan. Stat. Ann. § 2010 Supp. 40-2910(a). The Brennan court noted that a setoff of medical benefits is clearly permitted under the plain language of this amended statute. 264 P.3d at 109.

⁴ Missouri amended this statute to read as follows:

Any person having a claim against an insurer, regardless of whether such insurer is a member insurer, under any provision in an insurance policy, other than the policy of the insolvent insurer, which arises out of the same facts, injury, or loss that gave rise to the covered claim against the association and which is also a covered claim shall be required to first exhaust his or

Any person having a claim against his insurer under any provision in his insurance policy **which is also a covered claim** shall be required to exhaust first his right under such policy. Any amount payable on a covered claim under this section shall be reduced by the amount of such recovery under the claimant's insurance policy.

Mo. Rev. Stat. § 375.785(8)(1) (emphasis added).

Again, because the language of the statutes at issue in these cases is not the same as South Carolina's exhaustion statute, these decisions cannot be relied on to deny the Association its right to offset health insurance benefits. Furthermore, some of these decisions have been nullified by the subsequent passage of statutes that clearly provide for the Association's right to offset health insurance benefits.

Finally, Brock argues that he is being penalized for having medical benefits. On the contrary, the Association is not penalizing Brock but helping him. First, Brock is able to recover more than he would have had Aequicap gone insolvent and the Association was not in existence. Second, Brock received the benefit of his health insurance payments--namely, his medical bills have been paid. Because the Act protects him by prohibiting the subrogation rights his health insurer otherwise would have, he is no longer required to make any subrogation payments to his health insurer and retains the benefits of his health insurance payments. S.C. Code Ann. § 38-31-100(4). Therefore, allowing Brock to collect from the

her right under such policy or policies of insurance. Such other policies of insurance shall include, but not be limited to, liability coverage, health and accident insurance, hospitalization and other medical expense coverage, health care coverage by a health maintenance organization or health services corporation, or any amount payable by or on behalf of a self-insured plan, workers' compensation benefits, disability insurance, uninsured motorist coverage, and underinsured motorist coverage. The association's obligation pursuant to subsection 1 of section 375.775 shall be reduced by the amount recovered or recoverable, whichever is greater under any such other insurance policy or policies.

Mo. Rev. Stat. Ann. § 375.778(1). This revised statute is similar to South Carolina's and clearly permits the Association to offset health insurance coverage.

Association without any reduction for the health insurance payments would result in a double recovery. For all of these reasons, the Association should be allowed to offset Brock's medical insurance benefits.

IX. The Association is Entitled to Offset \$5,000.00 for Personal Injury Protection Coverage Available to Brock.

The plain language of the Act and authority from many other states support the Association's right to offset personal injury protection coverage. In addition to the arguments above, Brock cites two cases that refused to allow a guaranty association to offset personal injury protection coverage: Gimmestad v. Gimmestad, 451 N.W.2d 662 (Minn. Ct. App. 1990); Stone v. Kentucky Ins. Guar. Ass'n, 858 S.W.2d 726 (Ky. Ct. App. 1993). Brock is correct that these cases do not enforce the statutory offset against a claimant's personal injury protection benefits. However, the reasons underlying the decisions cited by Brock are not applicable here.

For example, in Gimmestad, the court interpreted a statute with different language than the South Carolina statute:

60C.13 NON-DUPLICATION OF RECOVERY.

Subdivision 1. Any person having a claim against an insurer under any provision in an insurance policy other than a policy of an insurer in liquidation **which is also a covered claim**, is required to exhaust first his right under the other policy. Any amount payable on a covered claim under [this Act] shall be reduced by the amount of any recovery under such insurance policy.

Minn. Stat. § 60C.13 (1982) (emphasis added).

451 N.W.2d at 664. After finding the statute ambiguous, the court looked to the statute's caption "Non-Duplication of Recovery" and the stated purpose of the Act "to avoid financial loss to claimants" to find that the Association was entitled to offset personal injury protection

coverage "only to prevent a claimant from receiving a windfall or double recovery." Id. at 665 (citing Minn. Stat. §§ 60C.13 and 60C.02) (emphasis added). Here, the applicable section is entitled "Exhaustion of other coverage and claims," and there is no reference to non-duplication of recovery in the Act. Although the Act does not state its purpose, the Supreme Court has found that the Association is meant to provide only "some protection" to claimants, not totally avoid their financial loss. Carolinas Roofing, 315 S.C. at 557, 446 S.E.2d at 424. Therefore, the same rationale cannot be applied to the interpretation of South Carolina's exhaustion statute.

Similarly, in Stone, the court interpreted a statute with language that does not match South Carolina's exhaustion statute:

304.36-120. Nonduplication of recovery.—(1) Any person having a claim against his insurer under any provision in his insurance policy **which is also a covered claim** shall be required to exhaust first his right under such policy. Any amount payable on a covered claim under this subtitle shall be reduced by the amount of such recovery under the claimant's insurance policy.

858 S.W.2d at 728 (citing Ky. Rev. Stat. Ann. § 304.36-120(1)) (emphasis added). The court found that Kentucky's statute required the claim under the other insurance to be a covered claim to reduce the Association's liability, and because personal injury protection benefits are not covered claims, the Association was not entitled to offset them. However, as discussed above, there is no requirement in South Carolina's exhaustion statute that requires that the claim under the other insurance be a covered claim in order for the Association to have a right to offset that other insurance. In fact, claimants are not required to exhaust other covered claims pursuant to the South Carolina statute. Therefore, this rationale does not apply to the exhaustion statute at issue here.

Furthermore, Kentucky subsequently amended its statute to specifically include basic

reparation benefits, which includes personal injury protection coverage, as coverage that the Association may offset:

(1) Any person having a claim against an insurer under any provision in an insurance policy other than the policy of an insolvent insurer which is also a covered claim shall be required to exhaust first his right under the policy. Any amount payable on a covered claim under this subtitle shall be reduced by the amount of recovery under the insurance policy. Any provision in an insurance policy includes, but is not limited to, the following coverages: basic reparation benefits under KRS Chapter 304, Subtitle 39; uninsured motorist; underinsured motorist; workers' compensation; and health care.

Ky. Rev. Stat. Ann. § 304.36-120. This revision is evidence that Kentucky's legislature did intend for such coverage to be offset and aligns with the national trend to allow such an offset.

CONCLUSION

The Association's liability to Brock is at most \$185,000.00, the amount of Brock's settlement with Aequicap. The Act's plain language provides that the Association is entitled to offset this liability by the amounts of other coverage provided to Brock by his uninsured policy, medical insurance benefits, personal injury protection, and liability insurance for the same facts, injury or loss. Each of Brock's arguments to the contrary is without merit and contravenes the plain language and purpose of the Act. For the reasons explained herein, the Association's Motion for Summary Judgment should be granted and Brock's Motion for Summary Judgment should be denied.

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Columbia, South Carolina

October 24, 2012.

APPENDIX A

Illinois

215 ILCS 5/546

(a) An insured or claimant shall be required first to exhaust all coverage provided by any other insurance policy, regardless of whether or not such other insurance policy was written by a member company, if the claim under such other policy arises from the **same facts, injury, or loss** that gave rise to the covered claim against the Fund. The Fund's obligation under Section 537.2 shall be reduced by the amount recovered or recoverable, whichever is greater, under such other insurance policy. Where such other insurance policy provides uninsured or underinsured motorist coverage, the amount recoverable shall be deemed to be the full applicable limits of such coverage. To the extent that the Fund's obligation under Section 537.2 is reduced by application of this Section, the liability of the person insured by the insolvent insurer's policy for the claim shall be reduced in the same amount.

Hasemann v. White, 177 Ill. 2d 414, 420, 686 N.E.2d 571, 574 (1997)

Liability of Insurance Guaranty Fund on covered claim following insolvency of automobile liability insurer and claimants' settlement with uninsured motorist (UM) carrier for less than policy limits was offset by full amount of UM policy limits, not amount of settlement. Claimant who settles with his uninsured motorist (UM) carrier for less than policy limit should be assumed to have received policy limit for purposes of assessing liability of Insurance Guaranty Fund; when claimant settles with own carrier for less than policy limits, claimant must bear risk of settling too cheaply.

Norberg v. Centex Homes Corp., 247 Ill. App. 3d 267, 616 N.E.2d 1342 (1993)

Developer was required to exhaust claim against its liability insurer before recovering from Insurance Guaranty Fund pursuant to contribution claim against injured worker's employer whose insurer became insolvent.

Roth v. Illinois Ins. Guar. Fund, 366 Ill. App. 3d 787, 797, 852 N.E.2d 289, 297 (2006)

Health insurance for treating automobile accident victim was "other insurance" within the meaning of statute requiring claimant to exhaust all coverage provided by any other insurance policy, if the claim under the other policy arose from the same facts, injury, or loss that gave rise to the covered claim against the Insurance Guaranty Fund, and, thus, the medical insurance payments entitled Fund to setoff reducing to zero Fund's liability on covered claim against insolvent automobile liability insurer; the claims against medical and automobile liability insurers arose from the same injury.

Iowa

Iowa Code Ann. § 515B.9

1. a. Any person having a claim under an insurance policy, and the claim under such other policy alleges the same damages or arises from the **same facts, injury, or loss** that gives rise to a covered claim against the association, shall be required to first exhaust all coverage

provided by that policy, whether such coverage is on a primary, excess, or pro rata basis and any obligation of the association shall not be considered other insurance.

Stecher v. Iowa Ins. Guar. Ass'n, 465 N.W.2d 887, 890 (Iowa 1991)

Accident victims are required to exhaust uninsured motorist coverages before filing claim with state's Insurance Guaranty Association; on payment of claim, Association is entitled to credit for any uninsured motorist coverage already collected by victim.

Louisiana

La. Rev. Stat. Ann. § 22:2062

A. (1) Any person having a claim against an insurer shall be required first to exhaust all coverage provided by any other policy, including the right to a defense under the other policy, if the claim under the other policy arises from the **same facts, injury or loss** that gave rise to the covered claim against the association. The requirement to exhaust shall apply without regard to whether or not the other insurance policy is a policy written by a member insurer. However, no person shall be required to exhaust any right under the policy of an insolvent insurer or any right under a life insurance policy or annuity.

Mancuso v. Siegel, 94-525 La. App. 5 Cir. 11/29/94, 646 So. 2d 1200, 1203 (La. Ct. App. 1994)

Any person having claim under policy of uninsured (UM) or underinsured motorist (UIM) liability coverage must first exhaust his rights under that policy before looking to Louisiana Insurance Guaranty Association (LIGA) by reason of insolvency of another insurer; in turn, amount payable by such other insurance shall act as credit against damages of claimant and LIGA shall not be liable for that portion.

Minnesota

Minn. Stat. Ann. § 60C.13

Subdivision 1. Other policy coverage. Any person having a claim under another policy whether or not the policy is a policy of a member insurer, which claim arises out of the **same facts** which give rise to the covered claim, shall be first required to exhaust the person's right under the other policy. Any amount payable on a covered claim under this chapter shall be reduced by the amount of any recovery under such insurance policy. For purposes of this subdivision, another insurance policy does not include a workers' compensation policy.

Gimmestad v. Gimmestad, 451 N.W.2d 662, 664-65 (Minn. Ct. App. 1990)

Insurance Guaranty Association, which took the place of insolvent insurer for State and snowplow driver, was not entitled to offset of \$30,000 total personal injury protection benefits received by a passenger, who suffered injuries when vehicle in which she was riding was involved in a snowplow whiteout, from her insurer inasmuch as payment of excess personal injury protection benefits did not produce duplicative recovery. The court interpreted section 60C.13 as only requiring an offset to prevent double recovery. "The [guaranty] will be

entitled to an offset of payments made from another insurance policy only when double recovery would otherwise result."

Missouri

Mo. Ann. Stat. § 375.778

Any person having a claim against an insurer, regardless of whether such insurer is a member insurer, under any provision in an insurance policy, other than the policy of the insolvent insurer, which arises out of the **same facts, injury, or loss** that gave rise to the covered claim against the association and which is also a covered claim shall be required to first exhaust his or her right under such policy or policies of insurance. Such other policies of insurance shall include, but not be limited to, liability coverage, health and accident insurance, hospitalization and other medical expense coverage, health care coverage by a health maintenance organization or health services corporation, or any amount payable by or on behalf of a self-insured plan, workers' compensation benefits, disability insurance, uninsured motorist coverage, and underinsured motorist coverage. The association's obligation pursuant to subsection 1 of section 375.775 shall be reduced by the amount recovered or recoverable, whichever is greater under any such other insurance policy or policies. To the extent the association's obligation pursuant to subsection 1 of section 375.775 is reduced by the application of the section, the liability of the person insured by the insolvent insurer's policy for the claim shall be reduced in the same amount.

Oklahoma

- **Note: new statute in 2010; no current case law**

However, the 2010 amendment to this statute completely rewrote Section 2012, which now only excludes life insurance policy from the exhaustion of remedies requirement. Section 2012 now states:

Any person having a claim against an insurer shall be required to first exhaust all coverage provided by another policy if it arises from the **same facts, injury or loss** that gave rise to the covered claim against the Oklahoma Property and Casualty Insurance Guaranty Association. The requirement to exhaust all coverage shall apply without regard to whether the other insurance policy is a policy written by a member insurer. However, no person shall be required to exhaust any right under the policy of an insolvent insurer or any right under a life insurance policy.

Any amount payable on a covered claim under the Oklahoma Property and Casualty Insurance Guaranty Association Act shall be reduced by the full applicable limits stated in the insurance policy or by the amount of the recovery under the insurance policy as provided herein. The Association shall receive a full credit for the stated limits, unless the claimant demonstrates that the claimant used reasonable efforts to exhaust all coverage and limits applicable

under the other insurance policy. If the claimant demonstrates that the claimant used reasonable efforts to exhaust all coverage and limits applicable under the insurance policy, or if there are no applicable stated limits under the policy, the Association shall receive a full credit for the total recovery.

Okla. Stat. Ann. tit. 36, § 2012(A)(1)-(2).

Rhode Island

- **Note: 2010 Amendment—no case law interpreting**

Rhode Island's statute regarding the Insurance Guaranty Association states:

Any person having a claim against an insurer, shall be required first to exhaust all coverage provided by any other policy, including the right to a defense under the other policy, if the claim under the other policy arises from the **same facts, injury or loss** that gave rise to the covered claim against the association. The requirement to exhaust shall apply without regard to whether the other insurance policy is a policy written by a member insurer. However, no person shall be required to exhaust any right under the policy of an insolvent insurer or any right under a life insurance policy.

Any amount payable on a covered claim under this chapter shall be reduced by the full applicable limits stated in the other insurance policy, or by the amount of the recovery under the other insurance policy as provided herein. The association shall receive a full credit for the stated limits, unless the claimant demonstrates that the claimant used reasonable efforts to exhaust all coverage and limits applicable under the other insurance policy. If the claimant demonstrates that the claimant used reasonable efforts to exhaust all coverage and limits applicable under the other insurance policy, or if there are no applicable stated limits under the policy, the association shall receive a full credit for the total recovery.

For purposes of this section, a claim under an insurance policy other than a life insurance policy shall include, but is not limited to: (i) A claim against a health maintenance organization, a hospital plan corporation, a nonprofit hospital, medical or dental service corporation or disability insurance policy; and (ii) Any amount payable by or on behalf of a self-insurer.

Texas

- no cases

Texas's statute regarding the Insurance Guaranty Association states:

Any person who has a claim under an insurance policy, other than an impaired insurer's policy, and whose claim arises from the **same facts, injury, or loss** giving rise to a claim against an impaired insurer or the insurer's insured, must first exhaust the person's rights under the insurance policy, including:

(1) a claim for benefits under a workers' compensation insurance policy or a claim for indemnity or medical benefits under a health, disability, uninsured motorist, personal injury protection, medical payment, liability, or other insurance policy. . . .

Tex. Ins. Code Ann. § 462.251(a)(1). The statute further states:

Except as provided by Subsection (b), an amount payable as a covered claim under this chapter is reduced by the full applicable limits of another insurance policy described by Section 462.251, and the association shall receive a full credit in the amount of the full applicable limits of the other policy.

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

South Carolina Property and Casualty)
Insurance Guaranty Association,)

Plaintiffs,)

vs.)

Roger Brock, Ryan Stevens, and)
Malachi Sanders,)

Defendants.)

COURT OF COMMON PLEAS

C/A NO. 2011-CP-10-8496

SUPPLEMENTAL MEMORANDUM
IN SUPPORT OF PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND IN OPPOSITION
TO DEFENDANT'S CROSS-
MOTION FOR SUMMARY
JUDGMENT

BY

JULIE J. ARMSTRONG
CLERK OF COURT

2012 NOV -1 PM 1:00

FILED

Pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, Plaintiff South Carolina Property and Casualty Insurance Guaranty Association ("Association"), by and through its undersigned counsel, hereby submits this Supplemental Memorandum in Support of its Motion for Summary Judgment and in Opposition to Defendant Roger Brock's ("Brock") Motion for Summary Judgment.

Although the Association briefly addressed the collateral source issue at page 6 of its Reply to Brock's Memorandum, the Association respectfully submits additional authority in support of its position in light of the discussions at the hearing on the cross-Motions for Summary Judgment in this matter. As stated in the Reply, the collateral source rule was superseded by the codification of S. C. Code Ann. § 38-31-100, the exhaustion statute at issue here, which mandates that claimants must exhaust any claims under other insurance coverage arising from the same facts, injury or loss which gave rise to their claim against the Association and provides that the Association's liability to claimants is reduced by the amount of this other coverage.

Numerous other state courts have found that their respective exhaustion statutes abrogated the common law collateral source rule. See, e.g., King v. Jordan, 601 P.2d 273 (Alaska 1979) ("[T]he 'nonduplication of recovery' provision of AS 21.80.100 embodies a legislative abrogation of the collateral source rule."); Bird v. Norpac Foods, Inc., 934 P.2d 382 (Or. 1997) ("The collateral source rule is a common law creation of this court that the legislature is entitled to alter or abolish, in whole or in part. Here, the legislature's specific and unambiguous direction in ORS 734.640(3), that any recovery under ORS 734.510 *et seq.* from OIGA shall be offset by certain other recoveries overrides whatever impact the collateral source rule otherwise might have in these circumstances."); Ventulett v. Main Ins. Guar. Ass'n, 583 A.2d 1022 (Me. 1990) ("By this offset provision, appearing in a section appropriately entitled 'Nonduplication of recovery,' the legislature has specifically modified the usual collateral source rule so far as MIGA and other available insurance are concerned."); Vokey v. Massachusetts Insurers Insolvency Fund, 409 N.E.2d 783 (Mass. 1980) (agreeing with "[c]ases in other jurisdictions which have interpreted their nonduplication of recovery provisions from the N.A.I.C. Model Act [and] have rejected collateral source arguments and have required offset"); Orren v. Smackover Nursing Home, 876 S.W.2d 600 (Ark. Ct. App. 1994) (holding that the issue of the Guaranty Fund's liability to a claimant is governed by the exhaustion statute, not the common law collateral source rule); Lucas v. Illinois Ins. Guar. Fund, 52 Ill.App.3d 237 (1977) ("The theory advanced by the plaintiffs is that recovery from their own policies is a collateral source recovery providing benefits from a source wholly independent of, and collateral to, the obligor (the Fund), which should not diminish the amount of damages otherwise recoverable from the Fund. . . . Plaintiffs' contentions lack merit."); Baker v. Myers, 39 Pa. D.&C.4th 303 (Ct. Common Pleas 1999) (declining to address the

claimant's collateral source argument because "it has no merit whatsoever, as there is no authority for the proposition that the collateral source rule is applicable to the non-duplication of recovery provision of PPCIGA"). In fact, every case cited by the Association as allowing an offset would be allowing such offset despite the common law collateral source rule.

The exhaustion statute specifically requires that the Association's liability be reduced by amounts from certain collateral sources--namely, those claims under other insurance policies arising from the same facts, injury or loss as the claim against the Association. The collateral source rule prohibits the reduction of liability by amounts received from collateral sources, and therefore, is in direct conflict with the exhaustion statute. If the collateral source rule was applicable to determining the Association's liability to claimants, the Association's liability could never be reduced by any collateral sources and the exhaustion statute would be rendered completely meaningless. This direct conflict between the statute and the common law collateral source rule is evidence that the statute was intended to abrogate the common law rule. Furthermore, courts must read statutes "so 'that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous,' for '[t]he General Assembly obviously intended [the statute] to have some efficacy, or the legislature would not have enacted it into law.'" CFRE, LLC v. Greenville County Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (internal citations omitted). Thus, this Court should not apply the collateral source rule to determine the Association's liability to Brock because it has been abrogated by the exhaustion statute and to do so would render the exhaustion statute completely meaningless in violation of the standards of statutory interpretation.

Therefore, the appropriate standard for determining the reduction of the Association's liability to Brock in this matter is whether his claims under other insurance policies arose from the same facts, injury or loss as his claim against the Association--not whether his recovery under those claims was from collateral sources.

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Columbia, South Carolina

October 30, 2012.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2011-CP-10-8496

RECEIVED

FEB 20 2013

SC Court of Appeals

South Carolina Property and Casualty Insurance
Guaranty Association,..... Appellant,

v.

Roger Brock, Ryan Stevens, and Malachi Sanders, ... Respondents.

NOTICE OF APPEAL

South Carolina Property and Casualty Insurance Guaranty Association ("Association") hereby appeals from the following order and/or judgment of the circuit court in the above matter: the Order denying the Association's Motion for Summary Judgment and granting the Respondent Roger Brock's ("Brock") Motion for Summary Judgment as to the Association's claimed offsets for liability coverage and medical insurance benefits filed January 24, 2013 ("Order") (attached as Exhibit A). The Association received written notice of entry of the Order on January 30, 2013.

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STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

South Carolina Property and Casualty
Insurance Guaranty Association,

Plaintiff,

v.

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

Defendants.

COURT OF COMMON PLEAS

Civil Action No.: 2011-CP-10-8496

ORDER

FILED
2013 JAN 24 AM 10:29
JULIE J. ARMSTRONG
CLERK OF COURT
BY

This matter is before the Court pursuant to cross motions for summary judgment filed by Plaintiff South Carolina Property and Casualty Insurance Guaranty Association (the "Association") and Defendant Roger Brock ("Brock"). Both parties' respective motions assert that each is entitled to judgment as a matter of law on the issue of whether the Association, in its capacity as the guaranty association for the relevant insolvent insurer pursuant to S.C. Code Ann. § 38-31-10 *et seq.*, is entitled to offset certain insurance benefits Brock received as a result of an underlying motor vehicle collision.

Upon the Court's consideration of the parties' motions, memoranda, and affidavits, and having heard oral arguments on October 24, 2012, I hereby grant in part and deny in part the parties' motions for summary judgment. This order rules upon each and all of the issues and grounds raised by both parties in their motions. More specifically, I hereby order that the Association may not offset any liability coverage and medical insurance benefits Brock received as a result of his claim. I further order that the Association is entitled, however, to offset

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personal injury protection and uninsured motorist insurance benefits that Brock received. Thus, the Association is ordered to pay Brock the amount of \$63,090.45.

FACTUAL BACKGROUND

Roger Brock is a citizen and resident of the State of Arkansas. On October 2, 2009, while visiting Walterboro, South Carolina, he was involved in a serious motor vehicle accident with a logging truck driven by Ryan Stephens. Brian Mason, Brock's friend who was driving the car in which Brock was riding, was killed in the collision. Angela Hess, who was also a passenger in the vehicle with Brock and Brian Mason, was likewise seriously injured as a result of the collision. Although not fatal, the injuries Brock sustained were both permanent and severe.

To seek redress for his injuries, Brock filed suit in the United States District Court for the District of South Carolina, Charleston Division, against Ryan Stephens and Malachi Sanders (the owner of the logging truck), among others, claiming entitlement to a recovery for severe injuries, lost wages, lost earning capacity, and past and future medical expenses. At the time of the collision, Ryan Stephens was insured through a policy issued by Aequicap Insurance Company ("Aequicap"), a Florida domiciled insurer that insured individuals and entities in the State of South Carolina.

Early on in the litigation, the parties obtained reliable information that Aequicap was in serious financial trouble. Therefore, all three cases arising out of the same collision were jointly mediated on January 5, 2011, just months after having been filed. The mediation was unsuccessful. However, following mediation and upon further consideration of Aequicap's precarious financial condition, Brock ultimately conceded to settle the case for a discounted amount. In exchange for a release of all claims against the Defendants, Brock agreed to accept

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the sum of \$185,000.00. The settlement agreement was filed with, and approved by, the District Court and became binding on the parties.

Less than a month after the settlement was reached, and prior to payment of the settlement amount, Aequicap was declared insolvent by the State of Florida. Because Aequicap, as the insolvent insurer, was a company admitted and licensed by the South Carolina Department of Insurance, and because the insured alleged to have caused Brock's injuries was a resident of South Carolina at the time Brock was injured, the claim was referred to the South Carolina Property and Casualty Guaranty Association. Therefore, demand was made on the Association for the payment of the full settlement amount of \$185,000.00.

The Association is an unincorporated non-profit legal entity created pursuant to the South Carolina Property and Casualty Insurance Guaranty Association Act, codified at S.C. Code Ann. § 38-31-10 *et seq.* (the "Act"). Pursuant to the Act, the Association is to pay certain "covered claims," as the term is defined under the Act. As a condition precedent to recovery from the Association, a claimant is required to first exhaust all available coverage from solvent insurers. See S.C. Code Ann. § 38-31-100 (West 2011). To the extent recovery is made, the Association is allowed an offset against its statutory obligation according to the Act. See id.

In light of the Aequicap insolvency and the collision in which Brock was severely injured, Brock received the following amounts from other solvent insurers:

- | | |
|---|-------------|
| a. Liability Coverage from Nationwide Ins. Co.
(insurer for Mason vehicle in which Brock was riding) | \$22,500.00 |
| b. Medical Insurance from Health Advantage/BCBS of Arkansas
(Brock's private pay medical insurance carrier) | \$40,590.45 |
| c. Uninsured Motorist Coverage from Progressive Ins. Co.
(resident relative coverage through Brock's parents' carrier) | \$25,000.00 |

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d. Personal Injury Protection from Progressive Ins. Co.
(resident relative coverage through Brock's parents' carrier) \$5,000.00

TOTAL \$93,090.45

The Association asserts entitlement to an offset for all payments from solvent insurers pursuant to S.C. Code Ann. § 38-31-100. As such, the Association has only paid Brock \$91,909.55, representing the difference between the settlement amount and the claimed offsets. Brock objects to the reduction and seeks payment of the claimed offsets in the amount of \$93,090.45. The \$91,909.55 Brock was paid by the Association and the Association's claimed offset of \$93,090.45 total Brock's \$185,000.00 settlement amount with Aequicap.

LEGAL STANDARD

Summary judgment is appropriate if, upon viewing the evidence and inferences to be drawn from it in a light most favorable to the non-moving party, there is no genuine issue of material fact and the moving party is clearly entitled to judgment as a matter of law. S.C. R. Civ. P. 56(c); Standard Fire Ins. Co. v. Marine Contracting & Towing Co., 301 S.C. 418, 392 S.E.2d 460 (1990); Davis v. Piedmont Eng'rs Architects & Planners, 284 S.C. 20, 324 S.E.2d 325 (Ct. App. 1984). "The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). "A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." Colleton Cnty. Taxpayers Ass'n v. Sch. Dist. of Colleton Cnty., 371 S.C. 224, 231, 638 S.E.2d 685, 688 (2006).

This action involves an issue of statutory interpretation. Questions of statutory interpretation are questions of law. Grier v. AMISUB of South Carolina, Inc., 397 S.C. 532, 535, 725 S.E.2d 693, 695 (2012) (quoting CFRE, LLC v. Greenville Cnty. Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011)). "It is well established that '[t]he cardinal rule of statutory

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construction is to ascertain and effectuate the intent of the legislature.” Id. (quoting Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). ““What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature.”” Id. (quoting Hodges, 341 S.C. at 85, 533 S.E.2d at 581). Courts must “follow the plain and unambiguous language in a statute.” Id. The words of the statute “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.’” Cabiness v. Town of James Island, 393 S.C. 176, 192, 712 S.E.2d 416, 425 (2011) (quoting Eagle Container Co. v. County of Newberry, 379 S.C. 564, 570, 666 S.E.2d 892, 896 (2008)). However, when “applying the words literally leads to a result so patently absurd that the General Assembly could not have intended it,” courts then “look beyond the statute’s plain language.” Grier, at 536, 725 S.E.2d at 695 (citing Cabiness, 393 S.C. at 192, 712 S.E.2d at 425).

When provisions of a statute conflict, the court has a “duty to attempt to harmonize the [] two ostensibly at-odd provisions.” Grazia v. S.C. State Plastering, LLC, 390 S.C. 562, 571, 703, S.E.2d 197, 201 (2010); see also Hinton v. S.C. Dep’t of Probation, Parole and Pardon Servs., 357 S.C. 327, 592 S.E.2d 335 (Ct. App. 2004) (the court should seek a construction that gives effect to every word of a statute rather than adopting an interpretation that renders a portion meaningless). Thus, “a specific statutory provision prevails over a more general one.” Wooten ex re. Wooten v. S.C. Dept. of Transp., 333 S.C. 464, 468, 511 S.E.2d 355, 357 (1999).

I. The Association and Brock Are Both Entitled to Summary Judgment in Part.

There is no genuine issue of material fact in this declaratory judgment action. During oral arguments, counsel for both parties conceded that no genuine issues of material fact exist and the Court finds that summary judgment is appropriate in this action. The Court shall

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determine this declaratory action of statutory interpretation as a matter of law. See Grier, 397 S.C. at 535, 725 S.E.2d at 695.

The purpose of the South Carolina Property and Casualty Insurance Guaranty Association "is to provide protection for insureds in the event their insurance carriers become insolvent." South Carolina 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); see also South Carolina Prop. & Cas. Ins. Guar. Ass'n v. Carolinas Roofing & Sheet Metal Contractor's Self-Insurers Fund, 315 SC 555, 446 S.E.2d 422 (1994). Similarly, under S.C. Code Ann. § 38-29-30, the purpose of the South Carolina Life and Accident and Health Insurance Guaranty Association Act, the Association's sister organization, is:

to maintain public confidence in the promises of insurers by providing a mechanism for protecting . . . insureds . . . of life insurance policies, accident and health insurance policies . . . against failure in the performance of contractual obligations due to the impairment of the insurer issuing these policies or contracts.

Id. In order to provide this protection, "an association of insurers is created to enable the guaranty of payment of benefits." S.C. Code Ann. § 38-29-30(1).

Under S.C. Code Ann. § 38-31-20(8) (West 2011), "covered claim" under this chapter is defined as "an unpaid claim . . . which arises out of and is within the coverage and is subject to the applicable limits of an insurance policy to which this chapter applies." According to § 38-31-30(1), "[t]his chapter applies to all kinds of direct insurance but does not apply to . . . life, annuity, health, or accident insurance." S.C. Code Ann. § 38-31-30(1) (West 2011).

The offset or exhaustion provision of the Act provides in pertinent part:

A person, having a claim under an insurance policy, whether or not it is a policy issued by a member insurer, and the claim under such other policy arises from the same facts, injury, or loss that gave rise to the covered claim against the association, is required to first exhaust all coverage and limits provided by any

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such policy. Any amount payable on a covered claim under this chapter must be reduced by the full limits of such other coverage as set forth on the declarations page and the association shall receive a full credit for such limits, or, where there are no applicable limits, the claim must be reduced by the total recovery. Notwithstanding the foregoing, no person may be required to exhaust all coverage and limits under the policy of an insolvent insurer.

S.C. Code Ann. § 38-31-100(1) (West 2011). Pursuant to this provision, even if “the policy is direct insurance, the Act applies only to a ‘covered claim.’” S.C. Prop. & Cas. Ins. Guar. Ass’n v. Carolinas Roofing & Sheet Metal Contractors Self-Ins. Fund, 315 S.C. 555, 557, 446 S.E.2d 422, 424 (1994).

The issue of whether the exhaustion statute applies to allow the Association to offset payments from other solvent insurers appears to be a matter of first impression under South Carolina law under the circumstances presented by this action.

a. The Association May Not Offset \$22,500.00 for Liability Coverage Received by Brock.

The language of S.C. Code Ann. § 38-31-100(1) does not unambiguously allow the Association to offset liability coverage received by Brock from Nationwide Insurance Company, the insurer of the vehicle involved in the collision, when construed in context of the intended purpose of the statute and in a manner which harmonizes with its subject matter and general purpose. Rather, such an interpretation would directly defeat the stated purpose of the Association and be inconsistent with how many other courts have interpreted similar offset statutes under like guaranty association statutes.

As a preliminary matter, 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. Upon detailed review, many other states have statutes that were amended by each state’s respective legislature in order to specifically provide whether

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their state guaranty association is entitled to offset particular forms of independent insurance coverage.¹ Further review reveals that prior to such amendments, many of the cited statutes contained a more ambiguously worded offset provision similar to South Carolina's version contained in S.C. Code Ann. § 38-31-100.²

In fact, when interpreting their own state offset statutes, several other courts have held an offset of any benefits rendered by solvent insurers for the same injury that results in a recovery less than the full amount to which the insured is entitled unfairly penalizes the injured party. See, e.g., Gibson v. Ala. Ins. Guar. Ass'n, 601 So. 2d 416, 416-19 (Ala. 1992); Harris v. Lee, 387 So. 2d 1145, 1146 (La. 1980); R & R Indus. Park, LLC v. Utah Prop. & Cas. Ins. Guar. Ass'n, 199 P.3d 917, 925-27 (Utah 2008); Int'l Collection & Serv. v. Vt. Prop. & Cas. Ins. Guar. Ass'n, 150 Vt. 630, 633, 555 A.2d 978, 980 (Vt. 1988).

For example, the Supreme Court of Vermont held that a plaintiff claimant, who suffered fire loss for which it obtained partial recovery from its own insurer, was entitled to recover unpaid losses from the guaranty association after a third party's insurer became insolvent. Int'l

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); La. Rev. Stat. Ann. § 22:2062A (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 P.A. Cons. Stat. Ann. § 991.1817(a) (statute amended in 1994 to include particular language about offset classes available to guaranty association); R.I. Gen. Laws Ann. § 27-34-12(a)(1)-(5) (statute amended in 2010 to include particular language specifying offset classes available to guaranty association); Tex. Ins. Code Ann. § 462.251(a)(1) (statute amended in 2005 to include particular language specifying offset classes available to guaranty association).

² See id. Prior to such statutory amendments many other states had ambiguously worded versions of the model act concerning a guaranty association's ability to offset other insurance benefits received by a claimant. "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 (2002)

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Collection & Serv., 150 Vt. at 633, 555 A.2d at 978, 980. The Vermont statute at issue included the exhaustion and non-duplication of recovery provisions of the Vermont Property and Casualty Insurance Guaranty Association Act, which states:

Any person having a claim against an insurer under any provision in an insurance policy other than policy of an insolvent insurer which is also a covered claim, shall be required to exhaust first his or her right under such policy. Any amount payable on a covered claim under this subchapter shall be reduced by the amount of any recovery under such insurance policy.

8 V.S.A. § 3619(a) (West 2011).

The Int'l Collection & Serv. court found the statute to be ambiguous, and thus examined the intent of the Vermont Legislature. See Int'l Collection & Serv., 150 Vt. at 633, 555 A.2d at 980. According to the stated objectives of the act, the court found that the intent of the legislature was "to eliminate any loss caused by the insolvency of the insurer." Id. That, in conjunction with the language of § 3619(a), lead "to the conclusion that the act is not to be construed so as to place the claimant in any different position than it would have been had the insolvency not occurred." Id. Relying on an Arizona case "construing an almost identical clause," the court agreed that "the words 'shall be reduced' require an offset recovered against the total 'amount payable' to the claimant as damages." Id. at 634, 555 A.2d at 980. The amount the plaintiff recovered from the third party and its own insurance "fell short of the stipulated loss" because, "[b]ut for the insolvency, [the plaintiff] could have recovered this amount in the action against the [insolvent third party's] insureds." Id. The court held that "the plaintiff is entitled to recovery from the guaranty fund for its unpaid loss" because this result "achieved the intent of the section to prevent a duplication of recoveries, and comports with the act's purpose to leave a claimant in the same position as if there had been no insolvency." Id. at 633-34, 555 A.2d at 980.

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More recently, the Supreme Court of Utah held that the Utah Property and Casualty Insurance Guaranty Association ("UPCIGA") was not permitted to offset its obligation to cover claims by the amounts plaintiffs received from third party insurers when plaintiffs did not recover the total amount to which they were entitled. R & R Indus. Park, LLC v. Utah Prop. & Cas. Ins. Guar. Ass'n, 199 P.3d 917, 925 (Utah 2008). The offset provision at issue states:

- (1)(a) Any person who has a claim against an insurer, whether or not the insurer is a member insurer, under any provision in an insurance policy, other than a policy of an insolvent insurer that is also a covered claim, is required to first exhaust that person's right under that person's policy.
- (b) Any amount payable on a covered claim under this part under an insurance policy is reduced by the amount of any recovery under the insurance policy described in Subsection (1)(a).

Utah Code § 31A-28-213 (West 2008).

The R & R Indus. Park, LLC court found the provision to be ambiguous and rejected the interpretation that the guaranty association was permitted to subtract from its obligation "any amount the claimant has recovered from *any* other insurance policy." R & R Indus. Park, LLC, 199 P.3d at 925 (emphasis in original). Rather, the court saw this interpretation "counterintuitive and, in fact, [to] undermine [] the purpose of the statute, which is to protect the insured from the risks of insolvency of insurance carriers." Id. To allow the offset of any recovery would "eliminate much, if not all, of the obligation of the UPCIGA and deprive insureds of coverage they secured from their insolvent carriers." Id. In effect, it would also penalize claimants for having purchased multiple coverage for large losses. Id. Relying on and agreeing with decisions from courts in Connecticut, California, Nevada, the District of Columbia, and New Mexico, the Supreme Court of Utah held that "the offset provision of the Guaranty Act applies to prevent double recovery of amounts above an insured's total loss. UPCIGA may not deduct or offset any recovery from a third party insurer from its obligation before the insured has been fully paid for

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its loss.” Id. at 926–27 (citing Conn. Ins. Guar. Ass’n v. Union Carbide Corp., 271 Conn. 371, 388, 585 A.2d 1216, 1224–25 (1991) (holding that the “evident purpose of providing . . . for a reduction of a covered claim ‘by the amount of any recovery’ from other available insurance was to prevent a person from twice receiving benefits for the same loss or otherwise obtaining a windfall, not to reduce the amount of a claim for a loss that remains partially unsatisfied”); Zhou v. Jennifer Mall Rest. Inc., 699 A.2d 348, 352 (D.C. 1997) (stating that the non-duplication of recovery principle of guaranty associations prevents “a situation in which an insured collects the amount of the total loss from one insurance company and then gets an additional sum from [the guaranty association]”) (alteration in original); Aztec Wall Serv. Co. v. Prop. & Cas. Ins., Guar. Ass’n of N.M., 115 N.M. 475, 480, 853 P.2d 726, 731 (1993) (“To require an offset, as the Association urges, of the amount recovered from the primary insurance carrier against the Association’s liability would be absurd because it was that recovery which triggered the application of the [plaintiff’s] excess insurance policy in the first place.”); CD Inv. Co. v. Cal. Ins. Guar. Ass’n, 84 Cal. App. 4th 1410, 1427, 101 Cal. Rpt. 2d 806, 816 (2000) (stating that “the purpose of the [insurance guaranty] act is to place the insured in a position to recover the same amount available under the insured’s policy, as if the insurer had not become insolvent”) (quoting Cimini v. Nev. Ins. Guar. Ass’n, 112 Nev. 442, 445, 915 P.2d 279, 282 (1996) (alteration in original)). Thus, because the plaintiff in R & R Ins. Park, LLC had not yet recovered the full amount, the offset provision of the statute did not apply because the statute’s purpose was to prevent duplicative recoveries, not to reduce the amount of the full recovery. Id. at 927.

Turning to the facts of the within action, Brock was to receive \$185,000.00 from the now insolvent Aequicap under the pertinent settlement agreement. The Association has already paid

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\$91,909.55. The remaining \$93,090.45 that the Association claims should be offset would not result in a prohibited duplicative recovery, as Brock has not yet received the entire \$185,000.00 to which he is entitled under the settlement agreement. Accordingly, construed in context of the intended purpose of the statute and in a manner which harmonizes with the subject matter and general purpose of the Act, the Association may not offset the liability insurance benefits received by Brock and Brock is entitled to judgment on this ground.

b. The Association May Not Offset \$40,590.45 for Medical Insurance Benefits received by Brock.

In addition to the foregoing reasoning, the medical benefits Brock received may not be used to offset the Association's liability because such benefits are subject to the collateral source rule and to do so would lead to a patently absurd result by penalizing those individuals with private pay medical insurance benefits.³ Furthermore, numerous courts in other states have held that a guaranty association is not entitled to offset private pay medical insurance benefits under similar state offset statutes because the receipt of such benefits by an insured does not constitute a double recovery.

For example, in Harris v. Lee, 387 So. 2d 1145, 1146 (La. 1980), the Supreme Court of Louisiana held that the Louisiana Guaranty Association was not permitted to reduce its obligation by the amount of the medical payments the plaintiff received under his group health policy for injuries sustained in an automobile accident. The offset provision of the Louisiana Insurance Guaranty Association Law at that time stated that "[a]ny amount payable on a covered claim under this [p]art shall be reduced by the amount of any recovery under such insurance

³ As a preliminary point of clarification, Blue Cross/Blue Shield of South Carolina has no pending claim for subrogation or reimbursement for the medical insurance benefits received by Brock.

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policy.” Id. (citing LSA-R.S. § 22:1386(1)).⁴ The provision, however, was limited by LSA-R.S. § 22:1377, which read:

This Part shall apply to all kinds of direct insurance, except life, health and accident, title, disability, mortgage guaranty, and ocean marine insurance.

Id. Thus, because “[h]ealth and accident insurance is specifically excluded from the Louisiana Insurance Guaranty Association Law and the non-duplication of recovery provision does not apply to payments by health and accident insurers,” there is no duplication of recovery. Harris v. Lee, 387 So. 2d at 1146; see also Alabama Ins. Guar. Ass’n v. Stephenson, 514 So.2d 1000, 1002 (Ala. 1987) (holding that Blue Cross health insurance was “a kind of direct insurance excepted” by Alabama’s non-duplication provision); Ind. Ins. Guar. Ass’n v. Davis, 768 N.E.2d 902, 908-09 (Ind. Ct. App. 2002) (holding that “the claimant’s recovery from Blue Cross-Blue Shield was not a ‘covered claim’ because the [guaranty association act] does not apply to health insurance” and as such, the guaranty association was not permitted to reduce their obligation by these amounts).

Courts have also made a distinction when a statute excludes health insurance but not accident insurance. In Ind. Ins. Guar. Ass’n v. Blickensderfer, 778 N.E.2d 439, 444 (Ind. Ct. App. 2002), the Court of Appeals of Indiana stated that the “plain language of [the guaranty association act] makes it clear that the chapter does not apply to health insurance and, as a result, a ‘covered claim’ could not stem from health insurance benefits.” Id.

Other states adopting the model act without such limitations reach this same conclusion. See Brennan v. Kansas Ins. Guar. Ass’n, 293 Kan. 446, 456, 264 P.3d 102, 111 (Kan. 2011) (“Most jurisdictions addressing whether their own guaranty fund may offset medical insurance

⁴ La. Rev. Stat. Ann. § 22:206A was formerly cited as LSA-R.S. 22:1386. As noted herein, this provision was later amended in 2010 to specifically provide that medical coverage is subject to offset. No such guiding language is contained in S.C. Code Ann. § 38-31-100(1).

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benefits under an identical or substantially similar statute to the pre-amended version of K.S.A. 40-2910 have found no entitlement to offset medical insurance benefits.”); see also Pritchett v. Clifton, 738 F.2d 319, 320-21 (8th Cir. 1984) (guaranty association was not entitled to offset amount injured party recovered under her medical insurance policy). As such, “covered claims” under the statute could not stem from health insurance benefits.

To interpret the statute to allow offsets for medical insurance would violate the language of the statute and would be unsuccessful in giving effect to the expressed intent of the legislature. See Grier v. AMISUB of South Carolina, Inc., 397 S.C. 532, 536, 725 S.E.2d 695 (2012); see also Stephens, 514 So.2d at 1002 (excluding health insurance received by claimant from offset provision was consonant with the purposes of both the guaranty association act and the non-duplication provision, to prevent duplicative recovery); Indiana Ins. Guar. Ass'n v. Blickensderfer, 778 N.E.2d 439, 443 (Ind. Ct. App. 2002) (finding that surely the legislature “did not intend that the statute would require a claimant to exhaust a claimant’s rights under any conceivable insurance policy for any conceivable claim that may be pending, even if such a claim or such a policy had nothing to do with the claim against the insolvent insurer” because such a result would be “absurd”).

Furthermore, “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

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proceeds, it would have done so.” Id. Moreover, 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. In the Court’s view, the collateral source rule likewise applies to the offset provision under the Act. Brock’s receipt of medical 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.

In addition, to permit offsets for these recoveries would also essentially penalize Brock for having medical benefits and other forms of private insurance coverage. See R & R Ins. Park, LLC, 199 P.3d at 925 (stating that to allow the guaranty association an offset of any recovery would in effect penalize claimants for having purchased multiple coverage for large losses); CD Inv. Co., 84 Cal. App. 4th at 1428, 101 Cal. Rpt.2d at 816 (refusing to permit the guaranty association to reduce its obligation by other amounts paid to claimant by solvent insurers because the insured would be put in a worse position for having bought two policies). By allowing the Association to offset Brock’s medical insurance benefits, Brock is effectively penalized for having purchased and utilizing the benefit of his private pay insurance. In no other context would a tortfeasor be permitted an offset for payments made by a medical insurance carrier. Such a result obviously defeats the stated purpose of the Association because, instead of protecting Brock, the Association unjustly charges him for having separate coverage. This result cannot be the intent of the legislature. Accordingly, the Association may not offset the \$40,590.45 in medical benefits received by Brock and judgment on this ground is granted in favor of Brock.

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c. The Association is Entitled to Offset \$25,000.00 for Uninsured Coverage Received by Brock.

As a resident relative living with his parents at the time of the subject wreck, Brock received uninsured motorist coverage in the amount of \$25,000.00 through a policy his parents held with Progressive Insurance Company. The Association is entitled to an offset for this recovery. Brock reached a settlement with Stevens, the insured under Aequicap's policy, and now asserts a claim against the Association based on this settlement. Because Brock's claim is also within the coverage of the uninsured policy, a policy issued by a solvent insurer, Brock must first exhaust the solvent insurer's coverage. See S.C. Code Ann. §§ 38-31-100(1), 38-31-100(5). Brock obtained a recovery under this uninsured motorist policy solely by virtue of Aequicap's insolvency, which rendered Ryan Stephens, the at-fault driver, an uninsured motorist. Otherwise, Brock would not have received any recovery under that policy. Brock's claim against the Association must, therefore, be reduced by the amount Brock received from the solvent insurer's uninsured coverage.

Although neither party has cited any South Carolina cases regarding the Association's entitlement to an offset for a claimant's uninsured coverage, case law from other states regarding a guaranty association's right to offset uninsured motorist coverage is instructive. For example, in Stecher v. Iowa Ins. Guar. Ass'n, 465 N.W.2d 887 (Iowa 1991), the court affirmed a declaratory judgment in favor of the Iowa Guaranty Association on its claim for an offset of uninsured motorist coverage. The Supreme Court of Iowa noted "[o]ur interpretation of section 515B.9(1) comports with decisions in the majority of states which have interpreted similar statutes to hold that accident victims must exhaust their uninsured motorist coverages before filing a claim with the state's insurance guaranty association." Id. at 889; see also Northland Ins. Co. v. Virginia Prop. & Cas. Ins. Guar. Ass'n, 240 Va. 115, 392 S.E.2d 682 (Va. 1990) (finding

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that the Virginia Guaranty Association was not liable to the claimants after the offset of their uninsured coverage recovery); Hetzel v. Clarkin, 244 Kan. 698, 772 P.2d 800 (Kan. 1989) (holding that the Kansas Guaranty Association is entitled to a credit for claimant's recovery under his own uninsured coverage).

Consistent with the foregoing, the Association is entitled to offset its liability to Brock by the uninsured coverage in the amount of \$25,000.00 and judgment is granted in favor of the Association on this ground.

d. The Association is Entitled to Offset \$5,000.00 for Personal Injury Protection Coverage Received by Brock.

Brock also received personal injury protection ("PIP") benefits in the amount of \$5,000.00 from the same policy in which he received the uninsured coverage. The Association is entitled to an offset for this recovery too. Brock reached a settlement with Stevens, the insured under Aequicap's policy, and now asserts a claim against the Association based on this settlement. Because Brock's claim is also within the coverage of the policy issued by a solvent insurer, Brock must first exhaust the solvent insurer's coverage. See S.C. Code Ann. §§ 38-31-100(1), 38-31-100(5). Brock's claim against the Association must, therefore, be reduced by the amount Brock received for PIP benefits.

Once again, although neither party has cited any South Carolina cases regarding the Association's entitlement to an offset for a claimant's receipt of PIP benefits, case law from other states regarding a Guaranty Association's right to offset PIP benefits is instructive. In McMichael v. Robertson, 77 Md. App. 208, 549 A.2d 1157 (Md. Ct. Spec. App. 1988), the court found that the recovery received by the claimants from their own personal injury protection coverage offset the Maryland Guaranty Corporation's liability for a judgment against an insolvent liability insurer. Id. at 215, 549 A.2d at 1160-61. Consistent with this

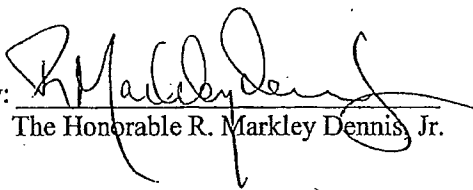
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general holding, the Association is entitled to offset the PIP benefits Brock received and judgment is granted in favor of the Association on this ground.

CONCLUSION

For the reasons set forth above, both parties' motions for summary judgment are granted in part and denied in part. The Association may not offset the \$22,500.00 for liability coverage and the \$40,590.45 for medical insurance benefits Brock received. The Association is, however, entitled to offset the \$5,000.00 for personal injury protection coverage and the \$25,000.00 for uninsured motorist coverage Brock received. Thus, the Association is hereby ordered to pay Brock the remaining amount of \$63,090.45.

AND IT IS SO ORDERED.

By: 

The Honorable R. Markley Dennis, Jr.

Charleston, South Carolina

January 14, 2013

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2011-CP-10-8496

South Carolina Property and Casualty
Insurance Guaranty Association, ...Appellant,

vs.

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

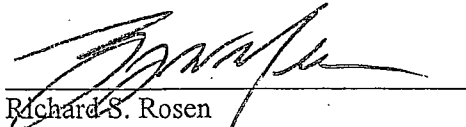
Of whom Roger Brock is Respondent/Cross-Appellant.

NOTICE OF CROSS-APPEAL

Respondent-Cross-Appellant Roger Brock ("Brock") hereby appeals the Order of the Honorable R. Markley Dennis, Jr. in the above matter, attached hereto as Exhibit A. Brock received written notice of entry of this Order on January 30, 2013. Brock received a Notice of Appeal from Appellant South Carolina Property and Casualty Insurance Guaranty Association on February 22, 2013.

[SIGNATURE PAGE FOLLOWS]

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February 25, 2013

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STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

South Carolina Property and Casualty
Insurance Guaranty Association,

Plaintiff,

v.

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

Defendants.

COURT OF COMMON PLEAS

Civil Action No.: 2011-CP-10-8496

ORDER

FILED
2013 JAN 24 AM 10:29
JULIE J. ARMSTRONG
CLERK OF COURT
BY

This matter is before the Court pursuant to cross motions for summary judgment filed by Plaintiff South Carolina Property and Casualty Insurance Guaranty Association (the "Association") and Defendant Roger Brock ("Brock"). Both parties' respective motions assert that each is entitled to judgment as a matter of law on the issue of whether the Association, in its capacity as the guaranty association for the relevant insolvent insurer pursuant to S.C. Code Ann. § 38-31-10 *et seq.*, is entitled to offset certain insurance benefits Brock received as a result of an underlying motor vehicle collision.

Upon the Court's consideration of the parties' motions, memoranda, and affidavits, and having heard oral arguments on October 24, 2012, I hereby grant in part and deny in part the parties' motions for summary judgment. This order rules upon each and all of the issues and grounds raised by both parties in their motions. More specifically, I hereby order that the Association may not offset any liability coverage and medical insurance benefits Brock received as a result of his claim. I further order that the Association is entitled, however, to offset

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personal injury protection and uninsured motorist insurance benefits that Brock received. Thus, the Association is ordered to pay Brock the amount of \$63,090.45.

FACTUAL BACKGROUND

Roger Brock is a citizen and resident of the State of Arkansas. On October 2, 2009, while visiting Walterboro, South Carolina, he was involved in a serious motor vehicle accident with a logging truck driven by Ryan Stephens. Brian Mason, Brock's friend who was driving the car in which Brock was riding, was killed in the collision. Angela Hess, who was also a passenger in the vehicle with Brock and Brian Mason, was likewise seriously injured as a result of the collision. Although not fatal, the injuries Brock sustained were both permanent and severe.

To seek redress for his injuries, Brock filed suit in the United States District Court for the District of South Carolina, Charleston Division, against Ryan Stephens and Malachi Sanders (the owner of the logging truck), among others, claiming entitlement to a recovery for severe injuries, lost wages, lost earning capacity, and past and future medical expenses. At the time of the collision, Ryan Stephens was insured through a policy issued by Aequicap Insurance Company ("Aequicap"), a Florida domiciled insurer that insured individuals and entities in the State of South Carolina.

Early on in the litigation, the parties obtained reliable information that Aequicap was in serious financial trouble. Therefore, all three cases arising out of the same collision were jointly mediated on January 5, 2011, just months after having been filed. The mediation was unsuccessful. However, following mediation and upon further consideration of Aequicap's precarious financial condition, Brock ultimately conceded to settle the case for a discounted amount. In exchange for a release of all claims against the Defendants, Brock agreed to accept

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the sum of \$185,000.00. The settlement agreement was filed with, and approved by, the District Court and became binding on the parties.

Less than a month after the settlement was reached, and prior to payment of the settlement amount, Aequicap was declared insolvent by the State of Florida. Because Aequicap, as the insolvent insurer, was a company admitted and licensed by the South Carolina Department of Insurance, and because the insured alleged to have caused Brock's injuries was a resident of South Carolina at the time Brock was injured, the claim was referred to the South Carolina Property and Casualty Guaranty Association. Therefore, demand was made on the Association for the payment of the full settlement amount of \$185,000.00.

The Association is an unincorporated non-profit legal entity created pursuant to the South Carolina Property and Casualty Insurance Guaranty Association Act, codified at S.C. Code Ann. § 38-31-10 *et seq.* (the "Act"). Pursuant to the Act, the Association is to pay certain "covered claims," as the term is defined under the Act. As a condition precedent to recovery from the Association, a claimant is required to first exhaust all available coverage from solvent insurers. See S.C. Code Ann. § 38-31-100 (West 2011). To the extent recovery is made, the Association is allowed an offset against its statutory obligation according to the Act. See id.

In light of the Aequicap insolvency and the collision in which Brock was severely injured, Brock received the following amounts from other solvent insurers:

- | | |
|---|-------------|
| a. Liability Coverage from Nationwide Ins. Co.
(insurer for Mason vehicle in which Brock was riding) | \$22,500.00 |
| b. Medical Insurance from Health Advantage/BCBS of Arkansas
(Brock's private pay medical insurance carrier) | \$40,590.45 |
| c. Uninsured Motorist Coverage from Progressive Ins. Co.
(resident relative coverage through Brock's parents' carrier) | \$25,000.00 |

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d. Personal Injury Protection from Progressive Ins. Co. (resident relative coverage through Brock's parents' carrier)	\$5,000.00
TOTAL	\$93,090.45

The Association asserts entitlement to an offset for all payments from solvent insurers pursuant to S.C. Code Ann. § 38-31-100. As such, the Association has only paid Brock \$91,909.55, representing the difference between the settlement amount and the claimed offsets. Brock objects to the reduction and seeks payment of the claimed offsets in the amount of \$93,090.45. The \$91,909.55 Brock was paid by the Association and the Association's claimed offset of \$93,090.45 total Brock's \$185,000.00 settlement amount with Aequicap.

LEGAL STANDARD

Summary judgment is appropriate if, upon viewing the evidence and inferences to be drawn from it in a light most favorable to the non-moving party, there is no genuine issue of material fact and the moving party is clearly entitled to judgment as a matter of law. S.C. R. Civ. P. 56(c); Standard Fire Ins. Co. v. Marine Contracting & Towing Co., 301 S.C. 418, 392 S.E.2d 460 (1990); Davis v. Piedmont Eng'rs Architects & Planners, 284 S.C. 20, 324 S.E.2d 325 (Ct. App. 1984). "The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). "A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." Colleton Cnty. Taxpayers Ass'n v. Sch. Dist. of Colleton Cnty., 371 S.C. 224, 231, 638 S.E.2d 685, 688 (2006).

This action involves an issue of statutory interpretation. Questions of statutory interpretation are questions of law. Grier v. AMISUB of South Carolina, Inc., 397 S.C. 532, 535, 725 S.E.2d 693, 695 (2012) (quoting CFRE, LLC v. Greenville Cnty. Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011)). "It is well established that '[t]he cardinal rule of statutory

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construction is to ascertain and effectuate the intent of the legislature.” Id. (quoting Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). “What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature.” Id. (quoting Hodges, 341 S.C. at 85, 533 S.E.2d at 581). Courts must “follow the plain and unambiguous language in a statute.” Id. The words of the statute “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.’” Cabiness v. Town of James Island, 393 S.C. 176, 192, 712 S.E.2d 416, 425 (2011) (quoting Eagle Container Co. v. County of Newberry, 379 S.C. 564, 570, 666 S.E.2d 892, 896 (2008)). However, when “applying the words literally leads to a result so patently absurd that the General Assembly could not have intended it,” courts then “look beyond the statute’s plain language.” Grier, at 536, 725 S.E.2d at 695 (citing Cabiness, 393 S.C. at 192, 712 S.E.2d at 425).

When provisions of a statute conflict, the court has a “duty to attempt to harmonize the [] two ostensibly at-odd provisions.” Grazia v. S.C. State Plastering, LLC, 390 S.C. 562, 571, 703, S.E.2d 197, 201 (2010); see also Hinton v. S.C. Dep’t of Probation, Parole and Pardon Servs., 357 S.C. 327, 592 S.E.2d 335 (Ct. App. 2004) (the court should seek a construction that gives effect to every word of a statute rather than adopting an interpretation that renders a portion meaningless). Thus, “a specific statutory provision prevails over a more general one.” Wooten ex re. Wooten v. S.C. Dept. of Transp., 333 S.C. 464, 468, 511 S.E.2d 355, 357 (1999).

I. The Association and Brock Are Both Entitled to Summary Judgment in Part.

There is no genuine issue of material fact in this declaratory judgment action. During oral arguments, counsel for both parties conceded that no genuine issues of material fact exist and the Court finds that summary judgment is appropriate in this action. The Court shall

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determine this declaratory action of statutory interpretation as a matter of law. See Grier, 397 S.C. at 535, 725 S.E.2d at 695.

The purpose of the South Carolina Property and Casualty Insurance Guaranty Association "is to provide protection for insureds in the event their insurance carriers become insolvent." South Carolina 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); see also South Carolina Prop. & Cas. Ins. Guar. Ass'n v. Carolinas Roofing & Sheet Metal Contractor's Self-Insurers Fund, 315 SC 555, 446 S.E.2d 422 (1994). Similarly, under S.C. Code Ann. § 38-29-30, the purpose of the South Carolina Life and Accident and Health Insurance Guaranty Association Act, the Association's sister organization, is:

to maintain public confidence in the promises of insurers by providing a mechanism for protecting . . . insureds . . . of life insurance policies, accident and health insurance policies . . . against failure in the performance of contractual obligations due to the impairment of the insurer issuing these policies or contracts.

Id. In order to provide this protection, "an association of insurers is created to enable the guaranty of payment of benefits." S.C. Code Ann. § 38-29-30(1).

Under S.C. Code Ann. § 38-31-20(8) (West 2011), "covered claim" under this chapter is defined as "an unpaid claim . . . which arises out of and is within the coverage and is subject to the applicable limits of an insurance policy to which this chapter applies." According to § 38-31-30(1), "[t]his chapter applies to all kinds of direct insurance but does not apply to . . . life, annuity, health, or accident insurance." S.C. Code Ann. § 38-31-30(1) (West 2011).

The offset or exhaustion provision of the Act provides in pertinent part:

A person, having a claim under an insurance policy, whether or not it is a policy issued by a member insurer, and the claim under such other policy arises from the same facts, injury, or loss that gave rise to the covered claim against the association, is required to first exhaust all coverage and limits provided by any

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such policy. Any amount payable on a covered claim under this chapter must be reduced by the full limits of such other coverage as set forth on the declarations page and the association shall receive a full credit for such limits, or, where there are no applicable limits, the claim must be reduced by the total recovery. Notwithstanding the foregoing, no person may be required to exhaust all coverage and limits under the policy of an insolvent insurer.

S.C. Code Ann. § 38-31-100(1) (West 2011). Pursuant to this provision, even if "the policy is direct insurance, the Act applies only to a 'covered claim.'" S.C. Prop. & Cas. Ins. Guar. Ass'n v. Carolinas Roofing & Sheet Metal Contractors Self-Ins. Fund, 315 S.C. 555, 557, 446 S.E.2d 422, 424 (1994).

The issue of whether the exhaustion statute applies to allow the Association to offset payments from other solvent insurers appears to be a matter of first impression under South Carolina law under the circumstances presented by this action.

a. The Association May Not Offset \$22,500.00 for Liability Coverage Received by Brock.

The language of S.C. Code Ann. § 38-31-100(1) does not unambiguously allow the Association to offset liability coverage received by Brock from Nationwide Insurance Company, the insurer of the vehicle involved in the collision, when construed in context of the intended purpose of the statute and in a manner which harmonizes with its subject matter and general purpose. Rather, such an interpretation would directly defeat the stated purpose of the Association and be inconsistent with how many other courts have interpreted similar offset statutes under like guaranty association statutes.

As a preliminary matter, 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. Upon detailed review, many other states have statutes that were amended by each state's respective legislature in order to specifically provide whether

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their state guaranty association is entitled to offset particular forms of independent insurance coverage.¹ Further review reveals that prior to such amendments, many of the cited statutes contained a more ambiguously worded offset provision similar to South Carolina's version contained in S.C. Code Ann. § 38-31-100.²

In fact, when interpreting their own state offset statutes, several other courts have held an offset of any benefits rendered by solvent insurers for the same injury that results in a recovery less than the full amount to which the insured is entitled unfairly penalizes the injured party. See, e.g., Gibson v. Ala. Ins. Guar. Ass'n, 601 So. 2d 416, 416-19 (Ala. 1992); Harris v. Lee, 387 So. 2d 1145, 1146 (La. 1980); R & R Indus. Park, LLC v. Utah Prop. & Cas. Ins. Guar. Ass'n, 199 P.3d 917, 925-27 (Utah 2008); Int'l Collection & Serv. v. Vt. Prop. & Cas. Ins. Guar. Ass'n, 150 Vt. 630, 633, 555 A.2d 978, 980 (Vt. 1988).

For example, the Supreme Court of Vermont held that a plaintiff claimant, who suffered fire loss for which it obtained partial recovery from its own insurer, was entitled to recover unpaid losses from the guaranty association after a third party's insurer became insolvent. Int'l

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); La. Rev. Stat. Ann. § 22:2062A (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 P.A. Cons. Stat. Ann. § 991.1817(a) (statute amended in 1994 to include particular language about offset classes available to guaranty association); R.I. Gen. Laws Ann. § 27-34-12(a)(1)-(5) (statute amended in 2010 to include particular language specifying offset classes available to guaranty association); Tex. Ins. Code Ann. § 462.251(a)(1) (statute amended in 2005 to include particular language specifying offset classes available to guaranty association).

² See id. Prior to such statutory amendments many other states had ambiguously worded versions of the model act concerning a guaranty association's ability to offset other insurance benefits received by a claimant. "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 (2002)

Collection & Serv., 150 Vt. at 633, 555 A.2d at 978, 980. The Vermont statute at issue included the exhaustion and non-duplication of recovery provisions of the Vermont Property and Casualty Insurance Guaranty Association Act, which states:

Any person having a claim against an insurer under any provision in an insurance policy other than policy of an insolvent insurer which is also a covered claim, shall be required to exhaust first his or her right under such policy. Any amount payable on a covered claim under this subchapter shall be reduced by the amount of any recovery under such insurance policy.

8 V.S.A. § 3619(a) (West 2011).

The Int'l Collection & Serv. court found the statute to be ambiguous, and thus examined the intent of the Vermont Legislature. See Int'l Collection & Serv., 150 Vt. at 633, 555 A.2d at 980. According to the stated objectives of the act, the court found that the intent of the legislature was “to eliminate any loss caused by the insolvency of the insurer.” Id. That, in conjunction with the language of § 3619(a), lead “to the conclusion that the act is not to be construed so as to place the claimant in any different position than it would have been had the insolvency not occurred.” Id. Relying on an Arizona case “construing an almost identical clause,” the court agreed that “the words ‘shall be reduced’ require an offset recovered against the total ‘amount payable’ to the claimant as damages.” Id. at 634, 555 A.2d at 980. The amount the plaintiff recovered from the third party and its own insurance “fell short of the stipulated loss” because, “[b]ut for the insolvency, [the plaintiff] could have recovered this amount in the action against the [insolvent third party’s] insureds.” Id. The court held that “the plaintiff is entitled to recovery from the guaranty fund for its unpaid loss” because this result “achieved the intent of the section to prevent a duplication of recoveries, and comports with the act’s purpose to leave a claimant in the same position as if there had been no insolvency.” Id. at 633–34, 555 A.2d at 980.

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More recently, the Supreme Court of Utah held that the Utah Property and Casualty Insurance Guaranty Association ("UPCIGA") was not permitted to offset its obligation to cover claims by the amounts plaintiffs received from third party insurers when plaintiffs did not recover the total amount to which they were entitled. R. & R Indus. Park, LLC v. Utah Prop. & Cas. Ins. Guar. Ass'n, 199 P.3d 917, 925 (Utah 2008). The offset provision at issue states:

- (1)(a) Any person who has a claim against an insurer, whether or not the insurer is a member insurer, under any provision in an insurance policy, other than a policy of an insolvent insurer that is also a covered claim, is required to first exhaust that person's right under that person's policy.
- (b) Any amount payable on a covered claim under this part under an insurance policy is reduced by the amount of any recovery under the insurance policy described in Subsection (1)(a).

Utah Code § 31A-28-213 (West 2008).

The R. & R Indus. Park, LLC court found the provision to be ambiguous and rejected the interpretation that the guaranty association was permitted to subtract from its obligation "any amount the claimant has recovered from any other insurance policy." R. & R Indus. Park, LLC, 199 P.3d at 925 (emphasis in original). Rather, the court saw this interpretation "counterintuitive and, in fact, [to] undermine [] the purpose of the statute, which is to protect the insured from the risks of insolvency of insurance carriers." Id. To allow the offset of any recovery would "eliminate much, if not all, of the obligation of the UPCIGA and deprive insureds of coverage they secured from their insolvent carriers." Id. In effect, it would also penalize claimants for having purchased multiple coverage for large losses. Id. Relying on and agreeing with decisions from courts in Connecticut, California, Nevada, the District of Columbia, and New Mexico, the Supreme Court of Utah held that "the offset provision of the Guaranty Act applies to prevent double recovery of amounts above an insured's total loss. UPCIGA may not deduct or offset any recovery from a third party insurer from its obligation before the insured has been fully paid for

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its loss.” *Id.* at 926–27 (citing Conn. Ins. Guar. Ass’n v. Union Carbide Corp., 271 Conn. 371, 388, 585 A.2d 1216, 1224–25 (1991) (holding that the “evident purpose of providing . . . for a reduction of a covered claim ‘by the amount of any recovery’ from other available insurance was to prevent a person from twice receiving benefits for the same loss or otherwise obtaining a windfall, not to reduce the amount of a claim for a loss that remains partially unsatisfied”); Zhou v. Jennifer Mall Rest. Inc., 699 A.2d 348, 352 (D.C. 1997) (stating that the non-duplication of recovery principle of guaranty associations prevents “a situation in which an insured collects the amount of the total loss from one insurance company and then gets an additional sum from [the guaranty association]”) (alteration in original); Aztec Wall Serv. Co. v. Prop. & Cas. Ins., Guar. Ass’n of N.M., 115 N.M. 475, 480, 853 P.2d 726, 731 (1993) (“To require an offset, as the Association urges, of the amount recovered from the primary insurance carrier against the Association’s liability would be absurd because it was that recovery which triggered the application of the [plaintiff’s] excess insurance policy in the first place.”); CD Inv. Co. v. Cal. Ins. Guar. Ass’n, 84 Cal. App. 4th 1410, 1427, 101 Cal. Rpt. 2d 806, 816 (2000) (stating that “the purpose of the [insurance guaranty] act is to place the insured in a position to recover the same amount available under the insured’s policy, as if the insurer had not become insolvent”) (quoting Cimini v. Nev. Ins. Guar. Ass’n, 112 Nev. 442, 445, 915 P.2d 279, 282 (1996) (alteration in original)). Thus, because the plaintiff in R & R Ins. Park, LLC had not yet recovered the full amount, the offset provision of the statute did not apply because the statute’s purpose was to prevent duplicative recoveries, not to reduce the amount of the full recovery. *Id.* at 927.

Turning to the facts of the within action, Brock was to receive \$185,000.00 from the now insolvent Aequicap under the pertinent settlement agreement. The Association has already paid

\$91,909.55. The remaining \$93,090.45 that the Association claims should be offset would not result in a prohibited duplicative recovery, as Brock has not yet received the entire \$185,000.00 to which he is entitled under the settlement agreement. Accordingly, construed in context of the intended purpose of the statute and in a manner which harmonizes with the subject matter and general purpose of the Act, the Association may not offset the liability insurance benefits received by Brock and Brock is entitled to judgment on this ground.

b. The Association May Not Offset \$40,590.45 for Medical Insurance Benefits received by Brock.

In addition to the foregoing reasoning, the medical benefits Brock received may not be used to offset the Association's liability because such benefits are subject to the collateral source rule and to do so would lead to a patently absurd result by penalizing those individuals with private pay medical insurance benefits.³ Furthermore, numerous courts in other states have held that a guaranty association is not entitled to offset private pay medical insurance benefits under similar state offset statutes because the receipt of such benefits by an insured does not constitute a double recovery.

For example, in Harris v. Lee, 387 So. 2d 1145, 1146 (La. 1980), the Supreme Court of Louisiana held that the Louisiana Guaranty Association was not permitted to reduce its obligation by the amount of the medical payments the plaintiff received under his group health policy for injuries sustained in an automobile accident. The offset provision of the Louisiana Insurance Guaranty Association Law at that time stated that "[a]ny amount payable on a covered claim under this [p]art shall be reduced by the amount of any recovery under such insurance

³ As a preliminary point of clarification, Blue Cross/Blue Shield of South Carolina has no pending claim for subrogation or reimbursement for the medical insurance benefits received by Brock.

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policy.” Id. (citing LSA-R.S. § 22:1386(1)).⁴ The provision, however, was limited by LSA-R.S. § 22:1377, which read:

This Part shall apply to all kinds of direct insurance, except life, health and accident, title, disability, mortgage guaranty, and ocean marine insurance.

Id. Thus, because “[h]ealth and accident insurance is specifically excluded from the Louisiana Insurance Guaranty Association Law and the non-duplication of recovery provision does not apply to payments by health and accident insurers,” there is no duplication of recovery. Harris v. Lee, 387 So. 2d at 1146; see also Alabama Ins. Guar. Ass’n v. Stephenson, 514 So.2d 1000, 1002 (Ala. 1987) (holding that Blue Cross health insurance was “a kind of direct insurance excepted” by Alabama’s non-duplication provision); Ind. Ins. Guar. Ass’n v. Davis, 768 N.E.2d 902, 908-09 (Ind. Ct. App. 2002) (holding that “the claimant’s recovery from Blue Cross-Blue Shield was not a ‘covered claim’ because the [guaranty association act] does not apply to health insurance” and as such, the guaranty association was not permitted to reduce their obligation by these amounts).

Courts have also made a distinction when a statute excludes health insurance but not accident insurance. In Ind. Ins. Guar. Ass’n v. Blickensderfer, 778 N.E.2d 439, 444 (Ind. Ct. App. 2002), the Court of Appeals of Indiana stated that the “plain language of [the guaranty association act] makes it clear that the chapter does not apply to health insurance and, as a result, a ‘covered claim’ could not stem from health insurance benefits.” Id.

Other states adopting the model act without such limitations reach this same conclusion. See Brennan v. Kansas Ins. Guar. Ass’n, 293 Kan. 446, 456, 264 P.3d 102, 111 (Kan. 2011) (“Most jurisdictions addressing whether their own guaranty fund may offset medical insurance

⁴ La. Rev. Stat. Ann. § 22:206A was formerly cited as LSA-R.S. 22:1386. As noted herein, this provision was later amended in 2010 to specifically provide that medical coverage is subject to offset. No such guiding language is contained in S.C. Code Ann. § 38-31-100(1).

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benefits under an identical or substantially similar statute to the pre-amended version of K.S.A. 40-2910 have found no entitlement to offset medical insurance benefits.”); see also Pritchett v. Clifton, 738 F.2d 319, 320-21 (8th Cir. 1984) (guaranty association was not entitled to offset amount injured party recovered under her medical insurance policy). As such, “covered claims” under the statute could not stem from health insurance benefits.

To interpret the statute to allow offsets for medical insurance would violate the language of the statute and would be unsuccessful in giving effect to the expressed intent of the legislature. See Grier v. AMISUB of South Carolina, Inc., 397 S.C. 532, 536, 725 S.E.2d 695 (2012); see also Stephens, 514 So.2d at 1002 (excluding health insurance received by claimant from offset provision was consonant with the purposes of both the guaranty association act and the non-duplication provision, to prevent duplicative recovery); Indiana Ins. Guar. Ass'n v. Blickensderfer, 778 N.E.2d 439, 443 (Ind. Ct. App. 2002) (finding that surely the legislature “did not intend that the statute would require a claimant to exhaust a claimant’s rights under any conceivable insurance policy for any conceivable claim that may be pending, even if such a claim or such a policy had nothing to do with the claim against the insolvent insurer” because such a result would be “absurd”).

Furthermore, “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

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proceeds, it would have done so.” Id. Moreover, 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. In the Court’s view, the collateral source rule likewise applies to the offset provision under the Act. Brock’s receipt of medical 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.

In addition, to permit offsets for these recoveries would also essentially penalize Brock for having medical benefits and other forms of private insurance coverage. See R & R Ins. Park, LLC, 199 P.3d at 925 (stating that to allow the guaranty association an offset of any recovery would in effect penalize claimants for having purchased multiple coverage for large losses); CD Inv. Co., 84 Cal. App. 4th at 1428, 101 Cal. Rpt.2d at 816 (refusing to permit the guaranty association to reduce its obligation by other amounts paid to claimant by solvent insurers because the insured would be put in a worse position for having bought two policies). By allowing the Association to offset Brock’s medical insurance benefits, Brock is effectively penalized for having purchased and utilizing the benefit of his private pay insurance. In no other context would a tortfeasor be permitted an offset for payments made by a medical insurance carrier. Such a result obviously defeats the stated purpose of the Association because, instead of protecting Brock, the Association unjustly charges him for having separate coverage. This result cannot be the intent of the legislature. Accordingly, the Association may not offset the \$40,590.45 in medical benefits received by Brock and judgment on this ground is granted in favor of Brock.

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c. **The Association is Entitled to Offset \$25,000.00 for Uninsured Coverage Received by Brock.**

As a resident relative living with his parents at the time of the subject wreck, Brock received uninsured motorist coverage in the amount of \$25,000.00 through a policy his parents held with Progressive Insurance Company. The Association is entitled to an offset for this recovery. Brock reached a settlement with Stevens, the insured under Aequicap's policy, and now asserts a claim against the Association based on this settlement. Because Brock's claim is also within the coverage of the uninsured policy, a policy issued by a solvent insurer, Brock must first exhaust the solvent insurer's coverage. See S.C. Code Ann. §§ 38-31-100(1), 38-31-100(5). Brock obtained a recovery under this uninsured motorist policy solely by virtue of Aequicap's insolvency, which rendered Ryan Stephens, the at-fault driver, an uninsured motorist. Otherwise, Brock would not have received any recovery under that policy. Brock's claim against the Association must, therefore, be reduced by the amount Brock received from the solvent insurer's uninsured coverage.

Although neither party has cited any South Carolina cases regarding the Association's entitlement to an offset for a claimant's uninsured coverage, case law from other states regarding a guaranty association's right to offset uninsured motorist coverage is instructive. For example, in Stecher v. Iowa Ins. Guar. Ass'n, 465 N.W.2d 887 (Iowa 1991), the court affirmed a declaratory judgment in favor of the Iowa Guaranty Association on its claim for an offset of uninsured motorist coverage. The Supreme Court of Iowa noted "[o]ur interpretation of section 515B.9(1) comports with decisions in the majority of states which have interpreted similar statutes to hold that accident victims must exhaust their uninsured motorist coverages before filing a claim with the state's insurance guaranty association." Id. at 889; see also Northland Ins. Co. v. Virginia Prop. & Cas. Ins. Guar. Ass'n, 240 Va. 115, 392 S.E.2d 682 (Va. 1990) (finding

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that the Virginia Guaranty Association was not liable to the claimants after the offset of their uninsured coverage recovery); Hetzel v. Clarkin, 244 Kan. 698, 772 P.2d 800 (Kan. 1989) (holding that the Kansas Guaranty Association is entitled to a credit for claimant's recovery under his own uninsured coverage).

Consistent with the foregoing, the Association is entitled to offset its liability to Brock by the uninsured coverage in the amount of \$25,000.00 and judgment is granted in favor of the Association on this ground.

d. The Association is Entitled to Offset \$5,000.00 for Personal Injury Protection Coverage Received by Brock.

Brock also received personal injury protection ("PIP") benefits in the amount of \$5,000.00 from the same policy in which he received the uninsured coverage. The Association is entitled to an offset for this recovery too. Brock reached a settlement with Stevens, the insured under Aequicap's policy, and now asserts a claim against the Association based on this settlement. Because Brock's claim is also within the coverage of the policy issued by a solvent insurer, Brock must first exhaust the solvent insurer's coverage. See S.C. Code Ann. §§ 38-31-100(1), 38-31-100(5). Brock's claim against the Association must, therefore, be reduced by the amount Brock received for PIP benefits.

Once again, although neither party has cited any South Carolina cases regarding the Association's entitlement to an offset for a claimant's receipt of PIP benefits, case law from other states regarding a Guaranty Association's right to offset PIP benefits is instructive. In McMichael v. Robertson, 77 Md. App. 208, 549 A.2d 1157 (Md. Ct. Spec. App. 1988), the court found that the recovery received by the claimants from their own personal injury protection coverage offset the Maryland Guaranty Corporation's liability for a judgment against an insolvent liability insurer. Id. at 215, 549 A.2d at 1160-61. Consistent with this

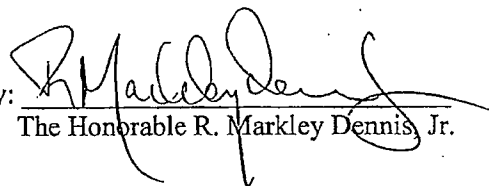
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general holding, the Association is entitled to offset the PIP benefits Brock received and judgment is granted in favor of the Association on this ground.

CONCLUSION

For the reasons set forth above, both parties' motions for summary judgment are granted in part and denied in part. The Association may not offset the \$22,500.00 for liability coverage and the \$40,590.45 for medical insurance benefits Brock received. The Association is, however, entitled to offset the \$5,000.00 for personal injury protection coverage and the \$25,000.00 for uninsured motorist coverage Brock received. Thus, the Association is hereby ordered to pay Brock the remaining amount of \$63,090.45.

AND IT IS SO ORDERED.

By: 
The Honorable R. Markley Dennis, Jr.

Charleston, South Carolina

January 14, 2013

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2011-CP-10-8496
Appellate Case No. 2013-000402

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 the Respondent-Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Record on Appeal contains all material
proposed to be included by any of the parties and not any other material.

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Columbia, South Carolina

September 25, 2013.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2011-CP-10-8496
Appellate Case No. 2013-000402

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SC Court of Appeals

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 the Respondent-Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Record on Appeal contains all material
proposed to be included by any of the parties and not any other material.

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September 25, 2013.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2011-CP-10-8496
Appellate Case No. 2013-000402

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 the Respondent-Appellant.

PROOF OF SERVICE

I, the undersigned Paralegal of the law offices of Nelson Mullins Riley &
Scarborough LLP, attorneys for Appellant-Respondent, do hereby certify that I have served all
counsel in this action with a copy of the document(s) hereinbelow specified by mailing a copy
of the same by United States Mail, postage prepaid, to the following address(es):
Document(s):

Record on Appeal

Counsel Served:

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Meredith S. Keane
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September 25, 2013