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-Respondent,

v.

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

Of whom Roger Brock is the Respondent-Appellant.

APPELLANT-RESPONDENT'S FINAL REPLY BRIEF TO RESPONSE BRIEF OF RESPONDENT-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

ARGUMENT

The Act's offset provision 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 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) (emphasis added). Despite this mandate that **any and all coverage** from solvent insurers arising from the same facts, injury, or loss as the claim against the Association must be offset, Brock advances the position that this statute does not permit the Association to offset his liability coverage, UM coverage, PIP coverage, or medical insurance benefits even though they all arise from the same facts, injury, or loss as his claim against the Association. This argument is in direct contradiction of the statute and would result in a windfall to Brock in this case.

I. The Plain Language Of The Act Unambiguously Requires The Association To Set Off *All* Amounts Paid to A Claimant By *Any* Other Solvent Insurer For Injury Arising Out Of The Same Facts, Injury, or Loss.

First, Brock asserts that the offset statute is unclear and ambiguous on its face because "the phrase 'a claim under an insurance policy' is ambiguous and the statutory text does nothing to define the meaning of 'claim' or 'insurance policy.'" Brock's Response Brief at 9. However, there is nothing ambiguous about a phrase so commonly understood as a "a claim under an insurance policy," and no definition is needed for the words "claim" or "insurance policy" to understand the meaning of this phrase. Brock cannot credibly assert that it is

unclear whether the claims he made under the liability, UM, PIP, or medical insurance policies at issue are "claims under an insurance policy."

The South Carolina Supreme Court recently addressed a similar argument that the phrase "other valid and collectible insurance" in an underinsured motorist policy was ambiguous on its face and the policy failed to define the phrase. *Bardsley v. Gov't Employees Ins. Co.*, Op. No. 27295, 2013 WL 4082345 (S.C. Sup. Ct. Aug. 14, 2013). Although *Bardsley* involves a matter of contract interpretation rather than statutory interpretation, the South Carolina Supreme Court's rulings regarding what constitutes ambiguous language are instructive here. In *Bardsley*, the court rejected the argument that the phrase "other valid and collectible insurance" is ambiguous on its face: "There is nothing inherently unclear or confusing about the term 'other valid and collectible insurance.' It plainly means other insurance which is in effect and from which coverage is available." *Bardsley*, at *3. Similarly, here, there is nothing unclear about the plain meaning of "a claim under an insurance policy." It means just what it says.

The *Bardsley* court also rejected the argument that the phrase "other valid and collectible insurance" was ambiguous because it was not defined in the policy:

> It is a well-settled principle of contract interpretation that absent a contractual definition to the contrary, contract language is given its ordinary and plain meaning. . . . If policy language was rendered ambiguous simply because it was not defined, insurance policies would need to contain definitions for every word in order to avoid ambiguity, a requirement which would be absurd. To say that any word that is not defined is ambiguous is to ignore the utility of human language. We use words because they have commonly accepted meanings, and it is only when they are subject to more than one meaning as used in a particular policy that they may become ambiguous.

Bardsley, at *3; *see also Sloan v. Hardee*, 371 S.C. 495, 499, 640 S.E.2d 457, 459 (2007) (When interpreting a statute, "[w]ords must be given their plain and ordinary meaning without

resort to subtle or forced construction to limit or expand the statute's operation.") (*citing Bryant v. City of Charleston*, 295 S.C. 408, 368 S.E.2d 899 (1988); *State v. Blackmon*, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991)). Similarly, here, there is no need to define the phrase "a claim under an insurance policy" or the terms "claim" or "insurance policy" because they are commonly understood words which are given their "ordinary and plain meaning" and need no further definition.[1] If these words were deemed ambiguous simply because they are not defined in the statute, the Legislature would need to define every word in a statute to avoid ambiguity, a requirement the *Bardsley* court aptly described as "absurd."

Most importantly, the *Bardsley* court noted that the alleged ambiguity of a phrase must be explained:

> When a court makes a finding of ambiguity, it must set forth either how a provision is capable of more than one meaning or is obscure in meaning. A simple finding of ambiguity, absent any reasoning, is insufficient. Without more, an appellate court is unable to review the validity of a circuit court's conclusion that a provision is ambiguous.

Bardsley, at *3. Here, the circuit court made no explanation of how the phrase "a claim under an insurance policy" or the offset provision in general was capable of more than one meaning or was obscure in meaning. Brock also fails to attempt to explain how this provision is ambiguous in any way—he merely states that it is. However, a simple allegation or finding of ambiguity is insufficient. *Id.* The Association submits that there can be no explanation of how the offset statute is capable of more than one meaning or obscure in meaning in any way

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[1] Although "claim" and "insurance policy" are not defined, "insurance" is defined as "a contract where one undertakes to indemnify another or pay a specified amount upon determinable contingencies," and "policy" is defined as "a contract of insurance." S.C. Code Ann. §§ 38-1-20(25), (45). Claim is not specifically defined but is used repeatedly in the definitions of other words, further evidencing that it is so well-understood it needs no further definition beyond its plain and ordinary meaning. See, e.g. S.C. Code Ann. §§ 38-1-20(3), (32) and §§ 38-31-20(6), (8).

because the plain language of the offset provision clearly sets forth its one and only meaning—that the Association must offset other insurance coverage arising from the same facts, injury, or loss as the claim against the Association.

II. The South Carolina Legislature Amended South Carolina's Statute To Avoid The Ambiguity In The Model Act Referred To By Brock.

Brock wrongly asserts that South Carolina's offset provision is based on the uniform model act's ambiguously-worded offset provision. Brock's Response Brief p. 10-11. Brock argues that although many states have amended their respective offset statutes which were also based on the model act to clarify which types of offset classes are available to their state's guaranty association, South Carolina has not adopted any statutory amendment to delineate the type of offset classes available to the Association. *Id.* Brock's assertions are factually inaccurate, however.

South Carolina's offset provision was previously based on the uniform model act's ambiguously-worded offset provision to which Brock refers. Specifically, our offset provision previously 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**, is required to exhaust first his right under that policy. Any amount payable on a covered claim under this chapter must be reduced by the amount of any recovery under that insurance policy.

S.C. Code Ann. § 38-31-100(1) (enacted by 1993 S.C. Acts 181 and repealed by 2001 S.C. Acts 82) (emphasis added). The phrase "which is also a covered claim" created much confusion in states across the country that shared this model act language. The confusion resulted because it is unclear whether this phrase modifies "a claim against an insurer under any provision in an insurance policy" or "other than a policy of an insolvent insurer." *See*,

e.g., *Indiana Ins. Guar. Assoc. v. Blickensderfer*, 778 N.E.2d 439, 441-49 (Ind. Ct. App. 2002) (explaining the two possible interpretations).

Courts disagreed about how to interpret the model act language, resulting in inconsistent results across the country. Some courts found that the phrase "which is also a covered claim" modified "a claim against an insurer under any provision in an insurance policy," and determined that a claim under the other insurance also must be a covered claim against the guaranty association for an offset to be allowed under their state's law. This interpretation created a very narrow category of claims which the respective guaranty associations could offset. *See*, *e.g.*, *Blickensderfer*, 778 N.E.2d at 441-49 (finding that "which is also a covered claim" modifies "a claim against an insurer under any provision in an insurance policy" and holding that the Association could not offset other insurance claims unless they were also covered claims). This is the argument Brock advances in this case, even though South Carolina's offset provision no longer contains the arguably restrictive language relied on in *Blickensderfer* and similar cases.[2]

In fact, to avoid this narrow view, many states, including South Carolina, amended their respective offset statutes containing this ambiguous "which is also a covered claim" language. These states eliminated this language and clarified which types of offset classes are available to their state's guaranty association. *See* Table A to Association's Brief and Association's Respondent's Brief (revised statutes in bold). However, Brock mistakenly asserts that South Carolina was not one of them. Brock's Response Brief p. 10-11. To the contrary, the South Carolina Legislature amended the offset provision in 2001 to its current form, eliminating the "which is also a covered claim" language and adding broad language

[2] For example, Brock asserts that his medical insurance benefits cannot be offset because it is not a "covered claim." Brock's Response Brief p. 16-19.

providing the Association must offset **any** and **all** coverage that arises from the same facts, injury, or loss that gave rise to the claim against the Association. 2001 S.C. Acts 82. Moreover, the Legislature added further clarifying language, specifically stating that the claim under another insurance policy may be offset "whether or not it is a policy issued by a member insurer." *Id.*

III. The Legislative Intent Supports the Limited Purpose of the Association and Its Right to Offset Other Coverage Arising From the Same Facts, Injury, or Loss.

Furthermore, Brock's assertion and the circuit court's finding that South Carolina's offset provision "does not delineate which forms of insurance coverage are available for offset by the Association" is inaccurate. Brock's Response Brief p. 10. The offset statute specifically delineates that **any** and **all** coverage arising from the same facts, injury, or loss that gave rise to the claim against the Association must be offset. S.C. Code § 38-31-100(1). The fact that the statute does not go on to list examples of coverage included in any and all other coverage does not somehow indicate that anything less than any and all other coverage must be offset as Brock suggests. To require the Legislature to further explain any and all by including a laundry list of any and all coverages that could possibly exist for every potential claim would be an "absurd" requirement. *Bardsley*, at *3; *see also Sloan*, 371 S.C. at 499, 640 S.E.2d at 459. The plain meaning of the terms "any" and "all" other coverage certainly include the coverage Brock received from the liability, UM, PIP, or medical insurance policies at issue.

As set forth in Section I above, the language of the statute is unambiguous and it is therefore unnecessary to evaluate the legislative intent. Nevertheless, to the extent resort to

legislative intent is needed, it supports the limited purpose of the Association and its right to offset the coverages at issue here.

Brock asserts that there is no legislative history evidencing any intent from the South Carolina Legislature in its adoption of the offset provision. Brock's Response Brief p. 12. He further asserts that although the Association argues the intent of the offset statute is to limit the Association's obligation, there is no support for such a theory. *Id.* Again, Brock's assertions are factually inaccurate.

IV. Case Law From Other Jurisdictions Supports The Broad Right Of The Association To Offset Amounts Paid To A Claimant As A Result Of Other Coverage Arising From The Same Facts, Injury, or Loss.

As noted above, the South Carolina Legislature amended the offset provision in 2001 to its current form, eliminating the "which is also a covered claim" language and clarifying that **any** and **all** coverage that arises from the same facts, injury, or loss that gave rise to the claim against the Association must be offset. 2001 S.C. Acts 82. In the "preamble" to this Act, the Legislature describes it as an Act "to amend Section 38-31-100, as amended, relating to procedures for asserting claims and to **limitations** on claims, so as to require exhausting **all** coverage and claims and providing credit to the Guaranty Association under certain conditions." *Id.* (emphasis added). Therefore, the Legislature expressly intended that the offset provision would limit the claims asserted against the Association by requiring exhaustion of all coverage and providing a credit to the Association for the same under certain conditions—namely, where the other coverage arises from the same facts, injury, or loss as the claim against the Association. As evidenced by the plain meaning of the offset statute as well as the legislative intent regarding its amendment to its current form, the Association's obligation to claimants like Brock is limited by the requirement that Brock exhaust all other

coverage arising from the same facts, injury, or loss as his claim against the Association and the provision of a credit or reduction of the Association's liability to Brock for this other coverage.

Brock also wrongly contends that the circuit court properly addressed case law from other jurisdictions to determine the meaning of South Carolina's offset statute. Brock's Response Brief p. 9-10. As noted in Section I above, resort to case law from other jurisdictions is not necessary because our offset provision is unambiguous on its face. Even if case law from other jurisdictions is utilized to help interpret South Carolina's statute, however, the statutes analyzed in cases from other jurisdictions must be identical or at least substantially similar to South Carolina's statute to be instructive as to South Carolina's statute. As set forth below, the cases relied on by Brock all refer to statutes that are entirely different from South Carolina's. The cases that do analyze statutory language like South Carolina's all support the Association's position.

Every case relied on by Brock and the circuit court analyzes an offset statute that contains the "which is a covered claim" language. *See generally* Association's Brief and Association's Respondent's Brief. As explained above, this language is ambiguous and the South Carolina Legislature repealed it. Nine other states have offset statutes containing language like South Carolina's provision requiring the offset of all other coverage arising from the same facts, injury, or loss as the claim against their respective guaranty associations. *See* Table A to Association's Brief and Association's Respondent's Brief (nine states in bold). Courts in three of these states have analyzed these similar offset statutes and have allowed offset of all other insurance coverage available as a result of the same facts, injury, or loss giving rise to the claim against the Association. *See* Table B to Association's Brief and

Association's Respondent's Brief. Therefore, to the extent case law is considered to determine the effect of South Carolina's offset statute, these three cases allowing offset are the only ones that provide any meaningful guidance.

V. The Act Does Not Require The Association To Make Brock Whole, And Brock Has Received The Full Amount For Which He Voluntarily Settled His Claim In Any Event.

Brock wrongly asserts that the Association should not be allowed any offsets where a claimant has not been made whole. Brock's Response Brief p. 12. However, this is directly contradictory to the plain meaning of the offset statute. On its face, the offset statute allows the Association to reduce its liability to a claimant by the amount of any and all other coverage the claimant has received **whenever** that other coverage arises from the same facts, injury, or loss as the claim against the Association **without** any qualification that the claimant be made whole before such offsets are allowed. S.C. Code Ann. § 38-31-100(1). This express limitation on the Association's liability to a claimant inherently allows offsets even if a claimant may not necessarily be made whole. This is consistent with the purpose of the Association, which is not designed to fully compensate claimants but provide a limited measure of protection to insureds of insolvent insurers. *See* 2001 S.C. Acts 82; *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). Finally, the cases on which Brock relies to support his assertion that offsets should not be allowed where a claimant has not been made whole all rely on statutes with the arguably ambiguous "which is also a covered claim"

language discussed above, and therefore, are not instructive on the meaning of South Carolina's offset provision which was amended to remove such language.[3]

Further, Brock asserts that he has not been made whole because he has not received the full $185,000.00 for which he settled with Aequicap before its insolvency. Brock's Response Brief p. 16. Again, this is factually inaccurate. To date, Brock has received the amount of $185,000.00: $25,000.00 in UM coverage; $40,590.45 in medical insurance coverage; $5,000.00 in PIP coverage; $22,500.00 in liability coverage; and the remaining $91,909.55 from the Association. *See* Association's Respondent's Brief p. 9. Brock is now seeking to recover more than $185,000.00, and is even seeking amounts above and beyond what he would have received had Aequicap never gone insolvent. *Id.* It is not that Brock is receiving less than he should. To the contrary, he is receiving more than he would have if Aequicap had gone insolvent and there was no Association to provide a limited recovery to ease the burden of the insolvency. *Id.*

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[3] In any event, the cases relied on by Brock for this proposition either support the Association's position or are distinguishable. First, the court in *Int'l Collection Serv. v. Vermont Prop. & Cas. Ins. Guar. Ass'n*, 555 A.2d 978 (Vt. 1988), noted that "the intention of the Legislature is not necessarily to make a claimant whole" and held that its offset statute required that a claim be offset by the amount of other coverage received by a claimant. Next, the policy at issue in *R & R Indus. Park, LLC v. Utah Prop. & Cas. Ins. Guar. Ass'n*, 199 P.3d 917 (Utah 2008), was an excess liability policy, which implicates concerns not at issue here—namely, that it would not be fair to allow the Association to offset its liability for an insolvent excess insurer by the amounts received from a primary insurer because it is the exhaustion of the primary insurance that triggers the excess policy in the first place. In *Gibson v. Alabama Ins. Guar. Ass'n*, 601 So.2d 416 (Ala. 1992), the court noted that Alabama's guaranty association is allowed an offset for the amount of any UM coverage received by a claimant as a result of a liability insurer's insolvency. Finally, after the court decided in *Harris v. Lee*, 387 So.2d 1145 (La. 1980), that because medical insurance policies were not "covered claims" and therefore could not be subject to offset under its offset statute arguably requiring the other insurance to be a "covered claim" in order to be offset, the Louisiana Legislature effectively nullified this decision by revising its statute to remove the "which is also a covered claim" language. La. Rev. Stat. Ann. § 2062 (A).

VI. The Collateral Source Rule Is Not A Bar To The Act's Offset Requirement.

Brock incorrectly argues that the Association may not offset his medical insurance benefits because they are subject to the collateral source rule. Brock's Response Brief p. 16, 19-20. However, the Act's language requiring offset of any and all other coverage directly conflicts with the collateral source rule. The Legislature therefore abrogated the collateral source rule by its enactment of the Act. *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). Otherwise, application of the collateral source rule would render the statute virtually meaningless, a result which courts must avoid. *See CFRE, LLC v. Greenville County Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (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.'") (internal citations omitted).

VII. Allowing Offset Of Brock's Medical Insurance Benefits Would Not Penalize Him For Having Private Insurance Coverage.

Brock also wrongly argues that the Association may not offset his medical insurance benefits because doing so would penalize him for having private insurance coverage. Brock's Response Brief p. 16, 20. To the contrary, the Act actually protects him by specifically prohibiting his medical insurer's subrogation of his medical insurance benefits, which he otherwise would have had to repay out of his recovery. S.C. Code Ann. § 38-31-100(4). Furthermore, not allowing the Association to offset Brock's medical insurance benefits would result in a double recovery for him because he would be allowed to retain the benefits he received from his health insurer, who is not seeking subrogation, and recover the same amount

from the Association again. *See* Association's Respondent's Brief p. 9. Because the law generally disfavors windfalls, and because the Act clearly provides that these benefits may be offset, the Association is entitled to offset Brock's medical insurance benefits. *See, e.g., Park Regency, LLC*, 402 S.C. at 412-13, 741 S.E.2d at 533-34 (modifying a trial court award that would have otherwise resulted in a windfall); *McNair v. Rainsford*, 330 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998) (allowing money to be recovered from innocent third party where third party would have otherwise received a windfall); S.C. Jur. Implied Contracts § 6 ("[J]ustice and equity require the compensation of one who bestowed a benefit on another, because without such recovery the beneficiary would be allowed a windfall . . . ").

CONCLUSION

The Act's plain language requires Brock to exhaust the coverage provided by any and all other insurance arising from the same facts, injury, and loss as his claim against the Association and further provides that the Association is entitled to setoff its liability to Brock by the amounts of these other coverages. For the foregoing reasons, the Association respectfully requests this Court affirm the circuit court's ruling that the Association is entitled to the claimed offsets for Brock's uninsured and personal injury protection coverage.

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief of Appellant-Respondent complies with Rule 211(b), SCACR.

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