THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Case No. 2011-CP-10-8496

South Carolina Property and Casualty Insurance Guaranty Association,

Appellant-Respondent,

-v-

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

Defendants,

Of Whom Roger Brock is

Respondent-Appellant.

INITIAL RESPONSE BRIEF OF RESPONDENT-APPELLANT

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STATEMENT OF ISSUES ON APPEAL

Whether the Circuit Court correctly granted partial summary judgment to Respondent-Appellant Roger Brock ("Brock") and ruled that Appellant-Respondent South Carolina Property and Casualty Insurance Guaranty Association (the "Association") is not entitled to offset $22,500.00 for liability coverage and $40,590.45 for medical insurance benefits Respondent-Appellant Roger Brock ("Brock") received when: (1) the applicable offset statute, S.C. Code Ann. § 38-31-100, does not explicitly designate that such coverage is available for offset by the Association; (2) the offset of such coverage conflicts with the purpose of the Association; and (3) such coverages constitute a collateral source of insurance coverage.

STATEMENT OF THE CASE

The Association filed a declaratory judgment action on November 15, 2011. See Complaint for Declaratory Judgment. The essence of this declaratory judgment action is that the Association contends it is entitled to offset all of the amounts received by Brock from solvent insurers in the amount of $93,090.45 pursuant to S.C. Code Ann. § 38-31-100. Brock received these amounts as a result of injuries he sustained in a vehicle collision.[1] Following the exchange of written discovery, Brock and the Association filed cross motions for summary judgment, both conceding that this matter involves statutory construction and contains no genuine issues of material fact. See (Plaintiff's Motion for Summary Judgment, filed May 10, 2012; Defendant's Motion for Summary Judgment, filed Aug. 20, 2012). Counsel for both parties likewise concurred that no genuine issues of material fact existed on the date of the summary judgment hearing. See (Motion for Summary Judgment Transcript, p. 2, lns. 1-21). After hearing oral arguments and receiving multiple memorandums of law, Circuit Court Judge R. Markley Dennis, Jr. ruled that both parties' motions for summary judgment were granted in part and denied in

[1] The underlying facts giving rise to this matter are outlined in the Statement of Facts herein.

part. See (Order, filed Jan. 26, 2012). More specifically, Judge Dennis found that the Association may not offset the $22,500.00 for liability coverage and the $40,590.45 for medical insurance benefits Brock received. Id. at 8. However, Judge Dennis found that the Association was entitled to offset the $5,000.00 for personal injury protection ("PIP") coverage and the $25,000.00 for uninsured motorist ("UM") coverage Brock received. Id. Accordingly, the Association was ordered to pay Brock the remaining amount of $63,090.45. Id. The Association submitted its notice of appeal of the Order on February 20, 2013. (Notice of Appeal, filed Feb. 22, 2012). Brock thereafter submitted his notice of cross-appeal on February 26, 2013. (Notice of Cross-Appeal, filed Feb. 28, 2012). The issue of whether S.C. Code Ann. § 38-31-100 applies to allow the Association to offset payments from other solvent insurers is a matter of first impression under South Carolina law.

STATEMENT OF FACTS

Roger Brock is a citizen and resident of the State of Arkansas. (Amended Complaint, ¶ 1, Case No. 2:10-cv-02926-RMG (D.S.C. filed Dec. 8, 2010) (attached to Brock's Memorandum in Support of Summary Judgment and referenced herein as "Exhibit A")). On October 2, 2009, while visiting Walterboro, South Carolina, Brock was involved in a serious motor vehicle accident with a logging truck driven by Ryan Stephens. (Exhibit A, ¶¶ 2-24). Brian Mason, Brock's friend who was driving the car in which Brock was riding, was killed in the collision. (Complaint, ¶¶ 1-27, Case No. 2:10-cv-1086-PMD (D.S.C. filed Jun. 23, 2010) (attached to Brock's Memorandum in Support of Summary Judgment and referenced herein 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, ¶¶ 7-24, Case No. 2:10-cv-02814-RMG (D.S.C. filed Nov. 1, 2010) (attached to Brock's Memorandum in Support of Summary Judgment

and referenced herein as "Exhibit C")). Although not fatal, the injuries Brock sustained were both permanent and severe. (Affidavit of Roger Brock, ¶ 1, filed Aug. 20, 2012 (attached to Brock's Memorandum in Support of Summary Judgment and referenced herein as "Exhibit D")). As a result of the violent collision, Brock 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, ¶ 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, ¶ 1). In addition, he will require oral surgery and implants in the future to replace missing teeth. (Exhibit D, ¶ 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, ¶ 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, Sanders 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, ¶¶ 16-18, filed Nov. 15, 2011).

Early on in the federal litigation, the parties obtained reliable information that Aequicap was in serious financial trouble. (Exhibit D, ¶ 3); (Affidavit of Francis X. McCann, ¶¶ 6-9, dated Oct. 17, 2012) (attached to Brock's Memorandum in Support of Summary Judgment and referenced herein 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.

Following mediation and upon further consideration of Aequicap's precarious financial condition, Brock ultimately decided to settle the case for an amount which was far less than what would actually compensate him for his substantial injuries. (Exhibit D, ¶ 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, ¶ 8). As a result of Brock's concessions, a settlement was ultimately reached on January 21, 2011. (Exhibit D, ¶ 3). In exchange for a release of all claims against the defendants, Brock agreed to accept the sum of $185,000.00, even though his actual injuries greatly exceeded that amount. (Exhibit D, ¶ 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 to Brock's Memorandum in Support of Summary Judgment and referenced herein 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, ¶¶ 16-18, 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. 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"). Pursuant to the Act, the Association is to pay certain "covered claims," as that term is defined under the Act. See id. Demand was thereby made on the Association for the payment of the full settlement amount of

$185,000.00.

In light of the Aequicap insolvency and the collision in which Brock was 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
d. PIP benefits from Progressive Ins. Co. (resident relative coverage through Brock's parents' carrier)	$5,000.00
TOTAL	$93,090.45

Following Brock's demand, the Association refused to pay Brock the full settlement amount of $185,000.00 and filed a declaratory judgment action, asserting its 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 to date, representing the difference between the settlement amount ($185,000.00) and the claimed offsets ($93,090.45). Id. Brock objected to the reduction and demanded payment of the agreed upon settlement sum. See (Answer of Defendant Roger Brock, filed Dec. 21, 2011) (attached hereto as "Exhibit G"); (Exhibit D)).

STANDARD OF REVIEW

An appellate court reviews the granting of summary judgment under the same standard applied by the trial court pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. Wogan v. Kunze, 379 S.C. 581, 585, 666 S.E.2d 901, 903 (2008). 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. 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). "A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." Colleton County Taxpayers Ass'n v. Sch. Dist. of Colleton County, 371 S.C. 224, 231, 638 S.E.2d 685, 688 (2006).

ARGUMENT

This action involves an issue of statutory interpretation. Questions of statutory interpretation are questions of law. Grier v. AMISUB of S.C., Inc., 397 S.C. 532, 535, 725 S.E.2d 693, 695 (2012) (quoting CFRE, LLC v. Greenville County 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). "[S]tatutes in derogation of the common law are to be strictly construed." Id. at 536, 725 S.E.2d at 696 (citing Epstein v. Coastal Timber Co., 393 S.C. 276, 285, 711 S.E.2d 912, 917 (2011)). "Under this rule, a statute restricting the common law will 'not be extended beyond the clear intent of the legislature.'" Id. (quoting Crosby v. Glasscock Trucking Co., 340 S.C. 626, 628, 532 S.E.2d 856, 857 (2000)).

I. BASED ON THE PURPOSE OF THE ASSOCIATION AND THE AMBIGUITY OF THE ACT, IT IS UNCLEAR WHETHER THE MEANING OF S.C. CODE ANN. § 38-31-100 ALLOWS THE ASSOCIATION TO DEDUCT THE LIABILITY COVERAGE AND MEDICAL INSURANCE BENEFITS BROCK RECEIVED.

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 Guaranty Association's function is to provide protection for insureds in the event their insurance carriers become insolvent." S.C. Prop. & Cas. Ins. Guar. Ass'n v. Carolinas Roofing & Sheet Metal Contractor's Self-Insurers Fund, 303 S.C. 368, 369, 401 S.E.2d 144, 145 (1991). Importantly, the Association "is considered the insurer to the extent of its obligation on the covered claims and, to this extent, has all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent." S.C. Code Ann. § 38-31-60(b). Thus, because the purpose of the Association is to provide protection for insureds, that includes the purpose to provide and maintain public confidence in the promises of insurers.

Pursuant to the Act, the Association is to pay certain "covered claims," as that term is defined under the Act. See S.C. Code Ann. § 38-31-10 *et seq.* 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. To the extent recovery is made, the Association is arguably allowed an offset against its statutory obligation according to

the Act. See id.

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). Under § 38-31-20(8), "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." S.C. Code Ann. § 38-31-20(8) (West 2012). Therefore, 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). "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 2012). Although not yet addressed under South Carolina law, other states have found that the purpose of "the offset provision of the Guaranty Act applies to prevent double recovery of amounts above an insured's total loss." R & R Indus. Park, LLC v. Utah Prop. & Cas. Ins. Guar. Ass'n, 199 P.3d 917, 925 (Utah 2008) (citing Conn. Ins. Guar. Ass'n v. Union Carbide Corp., 217 Conn. 371, 388, 585 A.2d 1216, 1224–25 (Conn. 1991).

A. S.C. Code Ann. § 38-31-100 is unclear and ambiguous.

In its Brief, the Association preliminarily argues that the language of S.C. Code Ann. § 38-31-100 is clear and unambiguous on its face and as a result the Association is entitled to offset the amount it owes claimants such as Brock by the limits of and/or the recovery made under coverage from other solvent insurers as a matter of course. See Initial Brief of Appellant-

Respondent, pp. 6 - 8. The Association contends it should be allowed to deduct recoveries Brock received through liability coverage and medical insurance benefits from the total amount of Brock's settlement. However, such an interpretation would be inconsistent with the purpose of the Association and the general purpose of the Act. The words of S.C. Code Ann. § 38-31-100 must be construed in context and in light of the intended purpose of the statute in a manner which harmonizes with its subject matter and accords with its general purpose. See Cabiness, 393 S.C. 176, 192, 712 S.E.2d 416, 425 (2011). Section 38-31-100 simply cannot be interpreted to allow the Association to offset liability coverage and medical insurance benefits from the total amount of Brock's settlement in a manner which achieves that harmony as 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."

The Association concludes that, because the language of S.C. Code Ann. § 38-31-100 is clear and unambiguous, under its interpretation, the Circuit Court wrongfully addressed case law from other jurisdictions. See Initial Brief of Appellant-Respondent, pp. 8 - 10. However, the Association fails to acknowledge that the Circuit Court implicitly deemed S.C. Code Ann. § 38-31-100 unclear and ambiguous with respect to which forms of coverage are available for offset by the Association in light of the purpose of the Association and the Act. See Order, at pp. 5-15, filed Jan. 26, 2012.

This matter involves a novel issue of first impression under South Carolina law, which the Association admits in its Brief. The Circuit Court, therefore, necessarily assessed case law and offset statutes in other jurisdictions. See Initial Brief of Appellant-Respondent, p. 9. The Association takes issue with the Circuit Court's consideration of case law from other jurisdictions reviewing statutes with similar, but not identical, statutory language as South

Carolina's offset statute. Specifically, the Association criticizes the Circuit's Court review of offset statutes in other states that do not contain the "same facts, injury, or loss" language. See Initial Brief of Appellant-Respondent, p. 9. As the Association correctly recognizes, only a handful of reported decisions have addressed offset statutes containing similar language. See id; Table B.

The Association's argument focusing on the "same facts, injury, or loss" language misidentifies the ambiguity of S.C. Code Ann. § 38-31-100 and the basis of the Circuit Court's ruling. The Circuit Court aptly recognized that "the South Carolina offset statue, unlike versions of the offset statute in numerous other states, does not delineate which forms of insurance coverage are available for offset by the Association." See Order, p. 7, filed Jan. 26, 2012. The "same facts, injury, or loss" language is of limited significance where "a claim under an insurance policy" is ambiguous and the statutory text fails to define the meaning of "claim" or "insurance policy" under South Carolina's offset statute. Accordingly, the Circuit Court did not err in analyzing other state offset statutes without the "same facts, injury, or loss" language. Likewise, the Association's attempt to confine this Court's interpretation of S.C. Code Ann. § 38-31-100 to a handful of legal opinions in other states that have interpreted offset statutes containing this particular phrase is misguided.

B. S.C. Code Ann. § 38-31-100 is based on a uniform model act that is ambiguous as it pertains to offset classes available to guaranty associations.

South Carolina's offset statute is based on language from a uniform model act. A dozen states throughout the United States have amended their own respective exhaustion statute, often specifically because of the inherent ambiguity contained in the statutory language of the model act.[2] Prior to such statutory amendments, many states had ambiguously-worded versions of the

[2] See, e.g., Cal. Ins. Code § 1063.2(c)(1) (statute amended in 1991 to include particular language about offset classes

model act statute similar to S.C. Code Ann. § 38-31-100 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). As a result, many of the states with exhaustion statutes based on the model act have provided clarification by passing statutory amendments. The purpose of these statutory amendments is to identify which particular types of offset classes are available to each respective state's guaranty association, if any, thereby avoiding the statutory ambiguity present in this case. No statutory amendment has been adopted to S.C. Code Ann. § 38-31-100 to delineate the type of offset classes that are available to the Association. As evidenced by the numerous statutory amendments in other states clarifying their own respective state exhaustion statutes, it is neither clear nor unambiguous that the plain meaning of S.C. Code Ann. § 38-31-100 allows the Association to deduct "the full limits of such other coverage" that Brock has recovered from any other insurance policy. Accordingly, the Circuit Court properly considered case law from other jurisdictions with similar offset statutes in finding the Association is not entitled to offset $22,500.00 for liability coverage and $40,590.45 for medical insurance benefits Respondent-Appellant Roger Brock ("Brock") received.

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

II. THE CIRCUIT COURT DID NOT MISCONSTRUE THE LEGISLATURE'S INTENT.

There is no legislative history evidencing any intent from the South Carolina legislature in its adoption of S.C. Code Ann. § 38-31-100. As noted, S.C. Code Ann. § 38-31-100 is based on a model act and is not the original creation of the South Carolina legislature. Without guidance from South Carolina's legislature on the intent of S.C. Code Ann. § 38-31-100, the Circuit Court correctly considered case law in other jurisdictions when making its ruling. In its Brief, the Association argues that the intent of § 38-31-100 is merely to limit the obligations of the Association but offers no support for such a theory and repetitively cites the case of South Carolina Property and Casualty Insurance Guaranty Association v. Carolinas Roofing and Sheet Metal Contrators Self-Insurance Fund, 315 S.C. 555, 446, S.E.2d 422 (1994). The Association fails to recognize the equally relevant case of South Carolina Property and Casualty Insurance Guaranty Association v. Carolinas Roofing & Sheet Metal Contractor's Self-Insurers Fund, 303 S.C. 368, 369, 401 S.E.2d 144, 145 (1991), which provides that "[t]he Guaranty Association's function is to provide protection for insureds in the event their insurance carriers become insolvent." Because there is no history of legislative intent concerning S.C. Code Ann. § 38-31-100 and the purpose of the Association is to *provide protection for insureds*, the Circuit Court correctly held that the Association may not offset certain coverage Brock received.

III. THIS COURT SHOULD AFFIRM THE CIRCUIT COURT IN PART BY FINDING THAT THE LIABILITY COVERAGE BROCK RECEIVED IN THE AMOUNT OF $22,500.00 IS NOT SUBJECT TO OFFSET BY THE ASSOCIATION.

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. As the Circuit Court correctly observed, several other courts when interpreting their own state offset statutes 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 (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 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 (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 coverages 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 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.

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 $185,000.00 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 $185,000.00 to which he is entitled. Thus, because Brock has not been fully compensated 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.

IV. THIS COURT SHOULD AFFIRM THE CIRCUIT COURT IN PART BY FINDING THAT THE MEDICAL INSURANCE BENEFITS BROCK RECEIVED IN THE AMOUNT OF $40,590.45 ARE NOT SUBJECT TO OFFSET BY THE ASSOCIATION.

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 many courts

that have interpreted these non-duplication principles – in favor of 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 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 policy." Id. (citing LSA-R.S. § 22:1386(1)).[3] 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

[3] LSA-R.S. § 22:2062 was formerly cited as LSA-R.S. 22:1386. As noted herein, this provision was later amended in 2010 by the legislature to specifically provide that medical insurance coverage is subject to offset. No such guiding language is contained in S.C. Code Ann. § 38-31-100(1).

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 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.

Similar to the statutes cited above, S.C. Code Ann. § 38-31-30(1) provides "[t]his chapter applies to all kinds of direct insurance but does not apply to the following: (1) life, annuity, health, or accident insurance; . . ." S.C. Code Ann. § 38-31-30(1). To interpret S.C. Code Ann. § 38-31-100 to allow offsets for medical insurance would violate the statutory language 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 Stephenson, 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 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.[4] "[S]tatutes in derogation of the common law are to be strictly construed." Grier, at 536, 725 S.E.2d at 696 (citing Epstein v. Coastal

[4] In its Brief, the Association cites several cases for the proposition that the existence of an exhaustion statute abrogates the collateral source rule. See Initial Brief of Appellant-Respondent, Table D. None of the cited cases involved medical insurance benefits similar to the coverage involved here with the possible exception of Baker v. Myers, 39 Pa. D.&C.4th 303 (Ct. Comm. Pleas 1999). Unlike South Carolina's offset statute, Pennsylvania's offset statute specifically identifies "health insurance" as a class of coverage available for offset by its guaranty association. See id.

Timber Co., 393 S.C. 276, 285, 711 S.E.2d 912, 917 (2011)). "Under this rule, a statute restricting the common law will 'not be extended beyond the clear intent of the legislature.'" Id. (quoting Crosby v. Glasscock Trucking Co., 340 S.C. 626, 628, 532 S.E.2d 856, 857 (2000)). 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 Indus. 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 should be affirmed in favor of Brock.

CONCLUSION

For the reasons set forth above, this Court should affirm the Circuit Court's Order Granting Summary Judgment in favor of the Respondent-Appellant and find that the Association is not entitled to offset $22,500.00 for liability coverage and $40,590.45 for medical insurance benefits Respondent-Appellant Roger Brock received. This Court should further find that the Association is responsible for paying Brock the remaining amount of his claim, totaling $93,090.45.

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Charleston, South Carolina
August 9, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Case No. 2011-CP-10-8496

South Carolina Property and Casualty
Insurance Guaranty Association, ... *Appellant-Respondent*,

vs.

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

Of whom Roger Brock is ..... *Respondent-Appellant*.

PROOF OF SERVICE

The undersigned hereby certifies that on August 9th 2013, a true and correct copy of the Initial Response Brief of Respondent-Appellant was placed in an envelope with first class postage prepaid and affixed thereto and mailed to the following:

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