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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BAMBERG COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2013-CP-05-63

Appellate Case No. 2015-000246

Janette Buchanan and Shana Smallwood, Individually and as Co-Personal Representatives of the Estate of James S. Buchanan, ... Respondents,

v.

The South Carolina Property and Casualty Insurance Guaranty Association, ... Appellant.

INITIAL REPLY BRIEF OF APPELLANT

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I. The Association's obligation is limited to $300,000, and any amounts available from other insurance must be deducted from that amount.

A. The trial court misapplied the Guaranty Act.

The issue before this Court is the meaning of the highlighted phrase in the Association's offset provision:

> 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 limited 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 § 38-31-100(1) (emphasis added). Respondents accuse the Association of removing the "covered claim" language from this highlighted phrase. This is not true. It is Respondents who want to ignore the preceding language "any amount payable" on that covered claim. This language was included by the Legislature in this offset provision and cannot be ignored. It is necessary to describe the amount to be paid by the Association under any factual scenario. Namely, the amount payable would be the lesser of: (1) the insolvent insurer's policy limits; (2) a claimant's damages; or (3) the Association's statutory maximum of $300,000. *See* S.C. Code § 38-31-20(8) (claim is subject to limits of insolvent insurer's policy limits); S.C. Code § 38-31-60(a)(iv) (Association is not obligated on any claim beyond $300,000); *S.C. Prop. and Cas. Ins. Guar. Ass'n v. Brock*, 410 S.C. 361, 764 S.E.2d 920 (2014) (Association's obligation was at most claimant's $185,000 damages amount because it was less than insolvent insurer's policy limits and Association's $300,000 statutory cap). Here, because both the insolvent insurer's policy

limits and the claimant's damages exceed $300,000, the amount payable by the Association is its statutory cap of $300,000.

The plain meaning of this statutory section is that "[a]ny amount payable on a covered claim under this chapter"—and, accordingly, the number that "must be reduced" by the other coverage received by Respondents—is the Association's obligation, which is statutorily defined to include only those covered claims in excess of $250 and less than $300,000. S.C. Code § 38-31-60(a)(iv). Section 38-31-60(d) confirms that the "amount payable" is equal to the Association's obligation: "The association . . . shall . . . pay covered claims to the extent of the association's obligation." S.C. Code § 38-31-60(d). Thus, as to the Association, the amount payable on the covered claim can never be more than the Association's statutory obligation of $300,000. Therefore, the offset for a claimant's recovery from other insurance must be offset against the Association's maximum obligation of $300,000, not the claimant's total damages as the Association can never be obligated on an amount above $300,000.

The South Carolina Supreme Court has already found Section 38-31-100(1) unambiguous and held it is the Association's obligation which is reduced by this offset provision. *Brock*, 410 S.C. 361, 764 S.E.2d 920 (2014). In *Brock*, the court noted that the parties disagreed on the types of insurance coverage the Association could "offset against its obligation to pay" the claimant pursuant to S.C. Code § 38-31-100(1). *Id.* at 366, 764 S.E.2d at 922. The *Brock* court expressly held that S.C. Code § 38-31-100(1) entitles the Association to offset "its ***obligations*** under the Act." *Id.* (emphasis added). This Court should follow the unanimous holding in *Brock* and find that the Association's obligation to a claimant, which can never be more than $300,000, is reduced by the other

coverage that claimant has received. This is the only consistent interpretation and application of the offset provision.

Moreover, the statutory offset provision is expressly described as reducing the Association's obligation. A subsection of S.C. Code § 38-31-100(1) provides as follows:

> To the extent that ***the association's obligation is reduced by the application of this section***, the liability of the person insured by the insolvent insurer's policy for the claim must be reduced in the same amount.

S.C. Code § 38-31-100(1)(b) (emphasis added). Like the South Carolina Supreme Court found in *Brock*, the South Carolina Legislature expressly described the offset provision as a reduction of the Association's obligation.

This reading of the plain language is further supported by other language in S.C. Code § 38-31-60(a)(iv), which states the Association has no obligation if a claimant has other primary coverage in excess of $300,000:

> The association has no obligation to pay a claimant's covered claim . . . if:
>
> (1) the insured had primary coverage at the time of the loss with a solvent insurer equal to or in excess of three hundred thousand dollars and applicable to the claimant's loss . . .

S.C. Code § 38-31-60(a)(iv). So, for example, if a claimant has damages of $10,000,000 but has other primary coverage in any amount in excess of $300,000 but less than $10,000,000, the Association has no obligation to pay anything at all despite the wide difference between the damages amount and the other primary coverage. While the Association has not asserted in this case that Respondents have more than $300,000 in other primary coverage, this statutory section illustrates that any offset is to be applied against the statutory cap rather than the damages amount. The General Assembly set $300,000 as the obligation amount in at least two separate statutory provisions.

Respondents assert that the statutory offset provision instead reduces their total damages amount of $800,000 instead of the statutory cap of $300,000. This is incorrect for two reasons.

First, Respondents ignore that the phrase "covered claim" is qualified by "any amount payable" in Section 38-31-100(1). It is not the covered claim that must be reduced—it is "any amount payable" on that covered claim. Any amount payable can only mean at the most $300,000 as shown by S.C. Code §§ 38-31-100 and 38-31-60. Because the Legislature included the qualifying phrase "any amount payable" when referring to the "covered claim" in S.C. Code § 38-31-100(1) and repeated it in the Guaranty Act's other statutory offsets in S.C. Code §§ 38-31-100(1)(a), (2), (3), and (5), it must have some meaning and must be given effect. *Anderson v. South Carolina Election Comm'n*, 397 S.C. 551, 556, 725 S.E.2d 704, 707 (2012) (*citing Beaufort Cnty. v. S.C. State Election Comm'n*, 395 S.C. 366, 718 S.E.2d 432 (2011)) (noting that different parts of a statute must each be given effect); *see also Williams v. Government Employees Ins. Co.*, 409 S.C. 586, 604, 762 S.E.2d 705, 715 (2014) ("[T]he General Assembly is presumed not to perform useless acts."); *Denene, Inc. v. City of Charleston*, 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2002) ("The Court must presume the legislature did not intend a futile act, but rather intended its statutes to accomplish something."). As set forth above, the plain meaning of "any amount payable on a covered claim" is the same as the Association's "obligation," which is defined to include only covered claims of more than $250 and less than $300,000.

Second, Respondents incorrectly assert that "any amount payable" on their covered claim means the $800,000 payable by Aequicap (the insolvent insurer) on its

$1,000,000 policy, rather than the amount payable by the Association. Respondents' Brief at pp. 18-19. However, the statutory offset provision itself plainly reduces the amount payable ***by the Association***, not the liability of the insolvent insurer. The express language of S.C. Code § 38-31-100(1) shows that it reduces the amount paid by the Association, not the insolvent insurer: "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*** . . . " S.C. Code § 38-31-100(1) (emphasis added). It is clear from this highlighted language that this statutory offset is providing credit to the Association, whose maximum obligation is $300,000.

Moreover, the statute further qualifies "any amount payable on a covered claim" by stating that the amount must be payable "under this chapter." *See* S.C. Code § 38-31-10 *et seq.* This further demonstrates that the offset is applicable to the Association's obligation, not the insolvent insurer's.

Therefore, the plain language of the statute requires that statutory offsets should be applied against the Association's statutory cap of $300,000, not the damages amount. Accordingly, the Order must be reversed.

B. The Order's internal inconsistency regarding ambiguity of the Guaranty Act cannot be ignored.

Respondents argue that the Order's internal inconsistency regarding whether the Guaranty Act is ambiguous is irrelevant. Respondents' Brief at pp. 11-13. However, the internal inconsistencies are both undeniable and resulted in prejudice to the Association.

The Order finds that the statutes at issue are "most ambiguous," but then finds that their "plain language" requires the statutory offset to be deducted from a claimant's

total damages amount rather than the Association's obligation on that claim. Both cannot be true. If the statutes are ambiguous as the trial court held, the trial court was required to articulate that ambiguity, which it failed to do. *See Bardsley v. Gov't Employees Ins. Co.*, 405 S.C. 68, 75, 747 S.E.2d 436, 440 (2013). Alternatively, if the statutes are not ambiguous as the trial court also held, the trial court misapplied their plain language as set forth above. The incongruent reasoning of the trial court resulted in a misapplication of the statue. Accordingly, the Order must be reversed.

C. The trial court ignored the *Brock* decision and misconstrued the *Hudson* decision.

Respondents argue that the Association "overreads" the holdings in *Brock* and *Hudson*. *Brock*, 410 S.C. 361, 764 S.E.2d 920; *Hudson v. Lancaster Convalescent Center*, 407 S.C. 112, 754 S.E.2d 486 (2014). Respondents' Brief at p. 13. Both *Brock* and *Hudson*, however, support the Association's position that the statutory offset reduces the Association's $300,000 obligation to Respondents. As set forth above, the *Brock* court interpreted S.C. Code §§ 38-31-60 and 38-31-100(a), the same provisions at issue here, and unanimously found the statutory offset reduces the Association's obligation. 410 S.C. 361, 764 S.E.2d 920. While Respondents are correct that the Association's obligation was less than the statutory cap in the *Brock* matter, the *Brock* holding nevertheless supports the application of the statutory offset to the Association's obligation. In *Brock*, the Association was obligated to pay Mr. Brock $185,000 as it was the lesser of his insolvent insurer's policy limits, his damages, or the Association's statutory maximum of $300,000. 410 S.C. at 364, 764 S.E.2d at 921; s*ee also* S.C. Code §§ 38-31-20(8) and 38-31-60(a)(iv). The statutory offset was applied to reduce the Association's $185,000 statutory obligation to Mr. Brock. 410 S.C. at 365-67, 764

S.E.2d at 922-23. Because Mr. Brock had received $93,090.45 in other insurance coverage, the Association's obligation was reduced to $91,909.55. *Id.* Here, the same mechanism should apply. The Association's obligation cannot be more than $300,000 pursuant to the express language of S.C. Code § 38-31-60(a)(iv). As in *Brock*, the statutory offset should be applied to reduce the Association's $300,000 statutory obligation to Respondents in this matter.

Similarly, the *Hudson* court construed various provisions of the Guaranty Act, some of which are at issue in this matter, and found those provisions and the Guaranty Act to work in harmony. 407 S.C. 112, 754 S.E.2d 486. Likewise, S.C. Code § 38-31-60(a)(iv) and S.C. Code § 38-31-100(1) must be read together as a whole, giving each one effect, to find that the amount payable by the Association is $300,000, which must be reduced by the other coverage Respondents received. The Association asks the Court to give effect to each of these statutory provisions to find that the Association has no liability to Respondents as a result.

II. The Trial Court Ignored the Association's Purpose and the Public Policy Underlying the Guaranty Act.

The trial court erred by ruling that the Guaranty Act is "identical in function" to the Tort Claims Act, and erroneously reasoned by analogy that the only purpose of the Guaranty Act's offset provisions is to prevent double recovery. (Order pp. 5-8, R. ___). However, the Tort Claims Act contains no statutory offset or exhaustion provision, and the Guaranty Act's offset provisions do more than just limit double recovery. These errors and others by the trial court caused it to misinterpret the Guaranty Act by crediting offsets against the total damages amount rather than crediting the offsets against the Association's statutory cap of $300,000. The trial court therefore must be reversed.

A. The Legislature intended the Guaranty Act to maximize the offsets to the Association for the benefit of South Carolina insureds.

The Association pays claims by assessing members, costs which are required to be passed on to South Carolina insureds. S.C. Code § 38-31-60(c) (Association must assess member insurers amounts necessary to pay for the Association's obligation); S.C. Code § 38-31-140 (member insurers must charge their policyholders for these costs). The Legislature has recognized the financial repercussions on South Carolina insureds when claims are made against the Association and taken steps to limit their impact. The Guaranty Act was amended in 2001 to expand limitations on claims by requiring exhaustion of all other available coverages prior to submitting a claim to the Association and providing an offset to the Association for these other coverages. *See* Appellant's Brief at pp. 15-16. The 2001 amendments expanded and clarified the offsets available to the Association, reflecting the Legislature's intent to maximize the offsets available and limit the Association's responsibilities, thereby protecting South Carolina insureds (*i.e.*, policyholders of the Association's member insurers) from increasing premiums resulting from insolvent insurers while offering some limited protection to insureds of insolvent insurance companies. *Brock*, 410 S.C. at 367-68, 764 S.E.2d at 923 (holding the Association is "a statutory entity that exists to provide ***some*** protection for the insureds of insolvent insurance companies") (emphasis added); *Hudson,* 407 S.C. at 124, 754 S.E.2d at 492 (finding that the Association is a "last resort").

Nowhere does the Guaranty Act suggest that the only purpose of the Guaranty Act's offset provisions is to avoid double recovery, as Respondents repeatedly suggest. Respondents' Brief at pp. 31-34. The Guaranty Act includes limitations on liability well beyond just avoiding double recovery. For example, the Guaranty Act permits the

Association to offset the full limits of an insurance policy covering the injury at issue, regardless of whether that policy actually pays the claimant the full limits. *See* S.C. Code § 38-31-100(1) ("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 of such other coverage . . . "). The Guaranty Act also limits the aggregate amount of a claimant's recovery from the Association to ten million dollars, regardless of the amount of their damages, and precludes some individuals from ever making a claim against the Association based solely on their net worth. *See* S.C. Code §§ 38-31-100(6) and (7).

Further, as noted above, the Legislature also prohibits any person who has more than $300,000 in primary coverage applicable to the loss from making any claim against the Association, regardless of the amount of their loss. *See* S.C. Code § 38-31-60(a)(iv)(1). Based on this Section, if Respondents had $300,000 in primary coverage other than through Aequicap, the Association would owe them nothing no matter their damages. This shows the Legislature intended that the Association should receive the full benefit of all other insurance coverage, and further shows that the Legislature intended that the offset of that other coverage should be set off against the $300,000 statutory cap, not the total amount of damages.

Therefore, the 2001 amendments and the language of the Guaranty Act itself demonstrate that the Legislature intended to maximize the Association's offsets based on other available coverages as well as limit claims against the Association in other ways, not just to prevent double recovery. Reading the Guaranty Act to apply offsets against the $300,000 statutory cap effectuates this purpose.

On the other hand, the trial court's construction of the Guaranty Act does not effectuate the Legislature's purpose of limiting claims. Instead, it encourages claimants to assert damages in excess of $300,000, in hopes of recovering both $300,000 from the Association and additional insurance coverage, which could not be offset if Respondents' position is upheld. Therefore, interpreting the Guaranty Act as the trial court did in its Order would result in more litigation, reduce chances for pre-trial settlement, and ultimately increase costs to South Carolina insureds through members of the Association being responsible for more risk. Such a result cannot stand, and the Order should be reversed.

B. The Tort Claims Act serves an entirely different function and is not instructive in this case.

The Tort Claims Act is of no use in the interpretation of the Guaranty Act. The Tort Claims Act does not contain a statutory exhaustion and offset provision like the Guaranty Act. Any offset against the Tort Claims Act's statutory cap is based on equity, common law prohibitions against double recovery and other legal principles existing outside of the Tort Claims Act. It is not instructive in the least as to how the Guaranty Act should be applied.

For example, in *Smalls* and *Truesdale*, cited by Respondents, the issue was how to credit settlements with a joint tortfeasor against statutory caps for state entities under the Tort Claims Act. *Smalls v. South Carolina Dep't of Educ.*, 339 S.C. 208, 528 S.E.2d 682 (Ct. App. 2000); *Truesdale v. South Carolina Highway Dep't*, 264 S.C. 221, 213 S.E.2d 740 (1975). The respective courts decided the issue based on common law principles against double recovery in the context of apportioning fault between joint tortfeasors. *Id.* *Smalls* and *Truesdale* are totally inapposite to the issues before the Court in this case.

Here, the only issue before the Court is whether the Guaranty Act requires recovery from other coverages to be offset against the $300,000 cap or against the total amount of the Respondents' damages. As set forth above, both the plain language of the statute and the Legislature's intent mandate that this Court credit the recovery under other insurance coverages against the statutory cap rather than the damages amount. The trial court therefore must be reversed.

III. The majority of other jurisdictions apply the offset from the Association's statutory obligation and support reversal of the trial court's Order.

As set forth in the Association's Brief, the majority of other jurisdictions ruling on the issue before this Court agree with the Association's position in this matter. In fact, nine state courts have applied the offset to reduce their respective association's full statutory cap rather than a claimant's higher damages amount. Appellant's Brief at pp. 22-25. Ten other state courts have applied the offset to reduce their respective association's statutory cap based on the insolvent insurer's policy limits (where the limits were less than the association's full statutory cap and, therefore, the policy limits were the statutory limits) rather than a claimant's higher damages amount. (Appendix A, Memorandum in Support of Defendant's Motion for Summary Judgment and in Opposition to Plaintiffs' Cross-Motion for Summary Judgment; R. ____).

Of the nine states expressly applying the offset to their guaranty association's full statutory cap, five of them were based on the ***exact same language*** found in South Carolina's offset provision requiring the reduction of "any amount payable on a covered claim." *Marra v. Wilson*, 2003 WL 367831 (Del. Super. Ct., Feb. 20, 2013); *Leitch v. Mississippi Ins. Guar. Ass'n*, 27 So. 3d 405 (Miss. Ct. App. 2009), *aff'd*, 27 So. 3d 396 (Miss. 2010); *New Hampshire Ins. Guar. Ass'n v. Pitco Frialator, Inc.*, 705 A.2d 1190

(N.H. 1998); *Oglesby v. Liberty Mut. Ins. Co.*, 832 P.2d 834 (Okla. 1992); *Blackwell v. Pennsylvania Ins. Guar. Ass'n*, 567 A.2d 1103 (Pa. Super. Ct. 1989). Of these five cases involving the same statutory language, Respondents concede that the *Marra* and *Blackwell* cases support the Association's position that the statutory offset is applied to reduce the Association's statutory cap without distinction. Respondents' Brief at pp. 39-40 and 48; *see Marra*, 2003 WL 367831; *Blackwell*, 567 A.2d 1103.

Respondents cite to only two cases from other jurisdictions to support their argument that the statutory offset is applied to a claimant's total damages amount rather than the statutory cap. *Arizona Prop. & Cas. Ins. Guar. Fund v. Herder*, 751 P.2d 519, 523-25 (Ariz. 1988); *Thomsen v. Mercer-Charles*, 901 A.2d 303 (N.J. 2006). Neither case supports Respondents' position. After decisions against their guaranty associations in these cases, the legislatures in both Arizona and New Jersey subsequently revised their offset provisions to make it clear that they are meant to operate in the manner argued by the Association here.

First, Respondents cite *Arizona Prop. & Cas. Ins. Guar. Fund v. Herder*, 751 P.2d 519, 523-25 (Ariz. 1988). Respondents' Brief at p. 38. Like South Carolina's offset provision, the statutory offset at issue in *Herder* provided that "[a]ny amount payable on a covered claim shall be reduced" by the other insurance coverage for a claimant. 751 P.2d 519. The *Herder* court found that the amount to be reduced was a claimant's total damages amount rather than the Association's statutory cap. *Id.* After the Arizona Supreme Court reiterated this interpretation in 1997 in *A.H. v. Arizona Prop. & Cas. Ins. Guar. Fund*, 950 P.2d 1147 (1997), Arizona's legislature responded just a few months later in 1998 by overruling the *Herder* and *A.H.* decisions and revising its statutory offset

provision to make it clear that it is the Association's statutory cap which is to be reduced by a claimant's other insurance coverage. *See Jangula v. Ariz. Prop. and Cas. Ins. Guar. Fund*, 88 P.3d 182 (Ariz. Ct. App. 2004). The fact that the Arizona legislature changed its statute after these decisions is evidence that the *Herder* court misread the statute and did not apply the statutory offset in alignment with the legislature's intent. This Court should find that S.C. Code §§ 38-31-60(a)(iv) and 38-31-100(1) unambiguously provide that the Association's statutory cap should be reduced by a claimant's other insurance coverage, obviating the need for an unnecessary revision by the Legislature to clarify what the statutes already provide.

Respondents next cite *Thomsen v. Mercer-Charles*, 901 A.2d 303 (N.J. 2006), to support their position. Respondents' Brief at pp. 40-41. Again, like South Carolina's offset provision, the statutory offset at issue in *Thomsen* provided that "any amount payable on a covered claim . . . shall be reduced" by other insurance recovery. *Id.* at 308. Despite this language, the *Thomsen* trial court found that their guaranty association could not setoff its statutory cap by a claimant's other insurance recovery where that claimant had not been fully compensated for his damages. *Id.* at 305. Before New Jersey's intermediate appellate court could even rule on the guaranty association's appeal, the New Jersey legislature responded by revising its statutory offset provision to make it clear in future cases that it is the Association's statutory cap which is to be reduced by a claimant's other insurance coverage. *Id.* at n.2 and n.3; *see also Thomsen v. Mercer-Charles*, 872 A.2d 800 (N.J. Sup. Ct. 2005). Again, the fact that the New Jersey legislature changed its statute after the *Thomsen* trial court decision is evidence that the *Thomsen* trial court misread the statute and did not apply the statutory offset in alignment

with the legislature's intent. This Court need not require an unnecessary revision by the Legislature to clarify what the Guaranty Act's offset provision already provides.

Finally, Respondents argue that certain cases cited by the Association from other jurisdictions which supports application of the statutory offset to reduce the statutory cap are distinguishable from this matter. Respondents' Brief at pp. 37-49. However, these cases are not distinguishable as Respondents suggest. Respondents first attempt to distinguish cases cited by the Association from Arizona, Louisiana, Minnesota, and Montana because their statutory offset contains different language than the offset in S.C. Code § 38-31-100(1). Respondents' Brief at pp. 38-39, 41-43, and 45-46; *see also Jangula*, 88 P.3d 182; *Cooper v. Huddy*, 581 So.2d 723 (La. Ct. App. 1991); *Cox v. Minnesota Ins. Guar. Ass'n*, 508 N.W.2d 536 (Min. Ct. App. 1993); *Palmer v. Montana Ins. Guar. Ass'n*, 779 P.2d 61 (Mont. 1989). Specifically, these statutory offsets reference the reduction of "any recovery" under those states' guaranty acts rather than reduction of "any amount payable on a covered claim under this chapter." A.R.S. § 20-673(C)(1997); LSA-R.S. 22:1386(2); Minn. Stat. § 60C.13, subd. 2; § 33-10-115(2), M.C.A. The amount payable by the Association under the Guaranty Act is the same as the amount recovered by the claimant under the Guaranty Act and, therefore, this "distinction" is actually not a distinction at all. Each of these cases applies the statutory offset to the Association's statutory cap.

Respondents also attempt to draw a false distinction based on the type of other coverage which is being used as a setoff. For example, Respondents argue that the *Cooper*, *Cox*, and *Palmer* cases are distinguishable because the amounts being offset were received from other states' guaranty associations. Respondents' Brief at pp. 41-43

and 45-46; *see Cooper*, 581 So.2d 723; *Cox*, 508 N.W.2d 536; *Palmer*, 779 P.2d 61. However, the type of other coverage being setoff makes no difference. Both S.C. Code § 38-31-100(1), providing an offset of other insurance coverage, and S.C. Code § 38-31-100(2), providing an offset of coverage from another guaranty association, use the same statutory offset language: "Any amount payable on a covered claim under this chapter must be reduced . . . " Whatever other coverage is being setoff is being setoff from the Association's obligation, which is capped at $300,000.

Similarly, Respondents attempt to distinguish the *Leitch* and *Hawkins* cases because they involved an offset of uninsured motorist coverage, which came into play as a result of the liability insurer's insolvency. Respondents' Brief at pp. 43-45 and 48; *see Leitch*, 27 So. 3d 405; *Hawkins v. Kentucky Ins. Guar. Ass'n*, 838 S.W.2d 410 (Ky. Ct. App. 1992). Respondents indicate that offsetting uninsured motorist coverage is somehow different than offsetting the other insurance coverage received by Respondents. *Id.* However, the South Carolina Supreme Court has already found that there is no distinction between offsetting uninsured motorist coverage and other types of insurance coverage. *Brock*, 410 S.C. 361, 764 S.E.2d 920.

Respondents also attempt to distinguish other cases cited by the Association based on purported differences in other statutory provisions which either are not real or are irrelevant. Respondents attempt to distinguish the *Pitco Frialator* case by arguing that "covered claim" is defined differently in New Hampshire's guaranty act. Respondents' Brief at pp. 46-47; *see Pitco Frialator*, 705 A.2d 1190. As an initial matter, the definition of "covered claim" is irrelevant because it is not the covered claim that should be offset—it is "any amount payable" on that covered claim. S.C. Code § 38-31-100(1).

In any event, the purported difference is that New Hampshire's guaranty act defines covered claim to be "not in excess of" the policy limits whereas South Carolina's Guaranty Act defines covered claim to be "subject to" the policy limits. Respondents' Brief at pp. 46-47. There is no distinction. A covered claim cannot be more than the limits of the policy under which the claim arose. In other words, the Association would never provide more recovery for a claimant than that claimant would have received from the insurer had it not gone insolvent. Respondents also assert that the "powers and duties" section of New Hampshire's guaranty act is "significantly" different than South Carolina's. Respondents' Brief at pp. 46-47. However, Respondents do not explain how it is different. Instead, they quote New Hampshire's provision N.H.R.S.A. § 404-B:8,I.(a), which actually aligns with our "powers and duties" section found in S.C. Code § 38-31-60(a). *Id.*

Likewise, Respondents attempt to distinguish the *Oglesby* case by arguing it was based on 36 Okl. St. Ann. § 2007(A)(2) but that South Carolina does not have a similar provision. Respondents' Brief at p. 47; *see Oglesby*, 832 P.2d 834. However, *Oglesby* did not rely at all on subsection (A)(2) of § 2007. 832 P.2d 834. The *Oglesby* court instead relied on § 2007(A)(1) which aligns with S.C. Code § 38-31-60(a) and § 2012(A) which aligns with S.C. Code § 38-31-100(1). *Id.*

In conclusion, the majority of other states ruling on the issue before this Court agree with the Association's position—the statutory offset should be applied to the statutory cap rather than a claimant's total damages amount. Respondents concede some of these cases, attempt to draw false distinctions for others, and fail to recognize that state legislatures overruled the only two decisions they assert support their position by

amending their respective guaranty acts to ensure the Association's statutory cap is reduced by a claimant's other insurance coverage.

CONCLUSION

The statutory offset provision plainly and unambiguously provides that the Association's obligation on Respondents' claim, which cannot be more than $300,000, must be reduced by the other insurance coverage Respondents received. This plain, unambiguous language is also supported by the Legislative intent, public policy, and cases from other jurisdictions. For these reasons, the Association respectfully requests this Court find that the Association is entitled to reduce its $300,000 obligation by the insurance coverage Respondents received in excess of $300,000, with the result that the Association has no obligation to Respondents in this matter.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BAMBERG COUNTY
Court of Common Pleas
Doyet A. Early III, Circuit Court Judge

Case No. 2013-CP-05-00063
Appellate Case No. 2015-000246

Janette Buchanan and Shana Smallwood, individually, and as Co-Personal Representatives of the Estate of James S. Buchanan, ... Respondent,

v.

The South Carolina Property and Casualty Insurance Guaranty Association, ... Appellant.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for The South Carolina Property and Casualty Insurance Guaranty Association, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

Initial Reply Brief of Appellant

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October 15, 2015

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October 15, 2015

The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: Janette Buchanan and Shana Smallwood individually and as Co-Personal Representatives of the Estate of James Buchanan v. The South Carolina Property and Casualty Insurance Guaranty Association
Civil Action No. 2013-CP-05-0063
Appellate Case No. 2015-000246
Our File: 00163/01650

Dear Ms. Kitchings:

Enclosed please find the original and one copy of the Initial Reply Brief of Appellant in regard to the above-referenced matter. We would ask that you file the original and return a clocked-in copy to us via our courier.

By copy of this letter to counsel of record, we are serving them with a copy of this brief.

Very truly yours,

Tara C. Sullivan

Tara C. Sullivan

TCS:lpw
Enclosures
cc: John S. Nichols, Esquire
Daniel W. Luginbill, Esquire