

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.

**RECORD ON APPEAL**

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**RECORD ON APPEAL  
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STATE OF SOUTH CAROLINA  
COUNTY OF BAMBERG  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2013 CP-05-63

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

The South Carolina Property and Casualty Insurance  
Guaranty Association

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant  
or  
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:** ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: Defendant's Motion to Recosider is DENIED.

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.  
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

| Judgment in Favor of<br>(List name(s) below)                                                              | Judgment Against<br>(List name(s) below) | Judgment Amount To be Enrolled<br>(List amount(s) below) |
|-----------------------------------------------------------------------------------------------------------|------------------------------------------|----------------------------------------------------------|
|                                                                                                           |                                          | \$                                                       |
|                                                                                                           |                                          | \$                                                       |
|                                                                                                           |                                          | \$                                                       |
| If applicable, describe the property, including tax map information and address, referenced in the order. |                                          |                                                          |

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

0136

Judge Code

1/20/15

Date

**For Clerk of Court Office Use Only**

This judgment was entered on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ and a copy mailed first class or placed in the appropriate attorney's box on this 22 day of JAN, 2015 to attorneys of record or to parties (when appearing pro se) as follows:

\_\_\_\_\_  
\_\_\_\_\_  
**ATTORNEY(S) FOR THE PLAINTIFF(S)**

\_\_\_\_\_  
\_\_\_\_\_  
**ATTORNEY(S) FOR THE DEFENDANT(S)**

B. H.  
**CLERK OF COURT**

**Court Reporter:**  
\_\_\_\_\_

**ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.**

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA )  
COUNTY OF BAMBERG )

IN THE COURT OF COMMON PLEAS  
SECOND JUDICIAL CIRCUIT  
CASE NO.: 2013-CP-05-63

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

Plaintiffs,

v.

The South Carolina Property and Casualty  
Insurance Guaranty Association,

Defendant.

ORDER GRANTING  
PLAINTIFFS' MOTION  
FOR SUMMARY JUDGMENT  
AND DENYING DEFENDANT'S  
MOTION FOR SUMMARY  
JUDGMENT

JAMES B. HERS  
CLERK OF COURT  
BAMBERG, SC

2014 SEP 10 PM 12:05

FILED  
BAMBERG COUNTY

A TRUE COPY

Attest.....

CLERK OF COURT  
BAMBERG COUNTY, SC

This matter was before me on Cross-Motions for Summary Judgment filed by both parties. The Plaintiffs were represented by Daniel Luginbill and the Defendant was represented by Howard A. VanDine, III and Tara C. Sullivan.

There is no dispute of material fact, and the issues before the Court are purely matters of law. Accordingly, Summary Judgment is the appropriate mechanism to resolve the dispute. However, the facts of the case must be set forth to accurately apply them to the applicable law in this case. Accordingly, I make the following:

#### FINDINGS OF FACTS

On January 7, 2008, James S. Buchanan was involved in a motor vehicle accident in Bamberg County, South Carolina. A log truck owned by Travis Scott and driven by Eddie Best had a set of tandem tires come off the axle. This set of tires struck the front of Mr. Buchanan's vehicle, breaking the front axle. As a result, Mr. Buchanan's truck crossed the centerline striking another tractor-trailer. The resulting collision caused Mr. Buchanan's truck to catch fire and he was incinerated in the cab of his truck.

Mr. Scott's vehicle was insured for One Million (\$1,000,000) by Aequicap Insurance Co. (Aequicap). Aequicap went into receivership in the state of Florida. The South Carolina Property and Casualty Guaranty Association (The Association) has assumed management of claims made against South Carolina insureds for causes of actions made against the Florida Guaranty Fund.

Pursuant to a settlement of the underlying tort case, (Case Number 2008-CP-05-122), which was designed to frame the outstanding issues between the parties, the damages suffered by the Plaintiff are \$800,000. After giving the Association credit for \$376,622 received by the Plaintiffs pursuant to Florida Workers' Compensation benefits and settlements with certain co-defendants in the underlying case, there remains a "balance" due to Plaintiffs from the full amount of the Judgment of \$423,378, which obviously exceeds the \$300,000 cap of S.C. Code Ann., §38-31-60. The Association claims that the credits should be applied from the cap, which would leave a balance of zero. Plaintiff asserts the credits are applied to the full amount of the judgment, leaving the Association liable for its full statutory limits of \$300,000.

Given the stipulation of facts the parties have entered as part of the wrongful death settlement, there are no issues of material fact in dispute. The only question is one of law for the Court. Both parties have moved for summary judgment, and the court's decision is one of statutory interpretation only.

#### CONCLUSIONS OF LAW

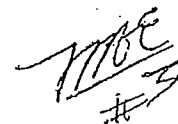
**I. THE PLAIN LANGUAGE OF THE STATUTES MANDATES THAT THE ASSOCIATION HAS AN OBLIGATION TO PAY \$300,000 TO THE PLAINTIFF.**

*PRE*  
*#2*

The South Carolina Property and Casualty Insurance Guaranty Association Act, S.C. Code Ann. §38-31-10, et seq. (the “Act”), is a remedial statute designed to “protect consumers in the event that their insurer becomes insolvent.” *Hudson v. Lancaster Convalescent Center*, 7543 S.E.2d 486, 407 S.C. 112 (2014). “[The Association’s] purpose is to provide some protection to insureds whose insurance companies become insolvent.” *South Carolina Property and Cas. Ins. Guar. Ass’n v. Carolinas Roofing and Sheet Metal Contractors Self-Insurance Fund*, 446 S.E.2<sup>nd</sup> 422, 424, 315 S.C. 555, 557 (1994).

Examining the text of the applicable statutes reveals portions of the statute are most ambiguous. The Association has asserted that *Hudson, supra*, held that the entire chapter is unambiguous. The case held nothing of the sort, and instead discussed only the ability of the Association to sue or be sued. *Hudson* held that those relevant portions of the statute were unambiguous. *Hudson* did look at the definition of “covered claim,” but only in the context of determining whether the Association could be liable in suit for its own actions, specifically penalties and interest for not paying a claim due under a policy of workers’ compensation insurance. The Court held it was liable, declining to limit the Association’s liability to the payment of covered claims only.

S.C. Code Ann. § 38-31-20 defines “covered claim” as “... an unpaid claim ... which arises out of and is within the coverage ... of an insurance policy ... if the insurer is insolvent ... .” The only limitation within the definition is that the claim must be within the coverage limits of the policy written by the defunct insurer. Nothing in the definition of “covered claim” refers to a limit of the Association’s liability to pay on a

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claim. This is logical, as no one making a claim should be allowed to seek an amount greater than what the policy would pay out if it was in full force and effect.<sup>1</sup>

S.C. Code Ann. § 38-31-60 limits the extent of the Association's liability to pay a claim to \$300,000. Section 38-31-60(a)(iv) provides, in pertinent part, "The association ... is obligated to the extent of claims existing before the determination of insolvency ... ." This *obligation* includes only the amount each covered claim is in excess of two hundred fifty dollars and is less than three hundred thousand dollars." (emphasis added). Under the plain language of this section, it is the Association's duty to pay that is limited, not the amount of the covered claim. This is a critical distinction in determining how to apply the set-offs.

S.C. Code Ann., § 38-31-100(1) gives the Association a setoff against "a covered claim" for the full limits of any other coverage from any other insurer that may apply. If there are no limits, then the "claim must be reduced by the total recovery." Of critical importance to understanding the legislature's intent is the fact that § 38-31-100(1) applies the set-off to the "covered claim," rather than the "Association's obligation."<sup>2</sup>

Applying this framework of statutory language to the facts of this case, there was a claim pending before the insolvency, as the wreck happened prior to the insolvency. Neither party disputes this is a covered claim. The *covered claim* is for \$800,000, per the approved wrongful death settlement. The off-sets of § 38-31-100(1), totaling \$376,622,

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<sup>1</sup> It is important to note that all but one of the cases listed by the Association in Appendix A to its brief are cases involving setoffs applied to the policy limit, rather than the statutory limit, despite how they are framed in the brief of the Association.

<sup>2</sup> In this case, the damages were agreed upon and the set-off limited to the amounts actually received, rather than policy limits, under the agreement of the parties settling the wrongful death claim. This was done with the intent to better frame the issue to be decided in this declaratory judgment action.

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are then applied to the \$800,000 claim, leaving a balance of \$423,378. The Association's *obligation* to pay is then further limited to \$300,000 by action of § 38-31-60.

It is clear that the purpose of this section is to prevent a double-recovery by an insured making a claim against a solvent insurer then making the same claim against the Association. By following the plain logical interpretation of the statutory text, this purpose is met, while also fulfilling the main purpose of the Act by providing coverage.

**II. S.C. CODE ANN. § 38-31-60 IS IDENTICAL IN FUNCTION TO THE TORT CLAIMS ACT, WHICH APPLIES THE SETOFFS TO DAMAGES, NOT THE CAP.**

A cardinal rule of statutory interpretation is to determine the intent of the legislature. *Jones v. State Farm Mut. Auto. Ins. Co.*, 612 S.E.2d 719, 364 S.C. 222, (Ct. App. 2005). Where the language of an act is ambiguous or gives rise to doubt as to legislative intent, a court may search for that intent beyond the borders of the act itself. *Id.* To the extent ambiguity remains, looking to similar statutes within South Carolina's statutory framework helps guide the inquiry.

In construing a statute, the court looks to the language as a whole in light of its manifest purpose. *State v. Dawkins*, 352 S.C. 162, 573 S.E.2d 783 (2002); *Adams v. Texfi Indus.*, 320 S.C. 213, 464 S.E.2d 109 (1995). It is well settled that statutes dealing with the same subject matter are *in pari materia* and must be construed together; where possible, to achieve a harmonious result. *Joiner, ex rel. Rivas v. Rivas*, 536 S.E.2d 372, 342 S.C. 102 (2000). Section 38-31-10, et seq. deals explicitly with the application of limitations on the liability of the state, in this case the non-profit Association created by

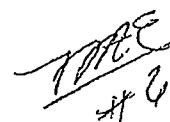
*MAE*  
*TS*

the State of South Carolina, to persons who have been injured. Accordingly, these statutes must be read together to produce a harmonious treatment of the issues.

There are no reported cases interpreting S.C. Code Ann., §38-31-60. However, there are other limits on the liability of state entities in South Carolina's legislative framework. As Defendant has pointed out in argument and in its brief, the Association is not a governmental agency, but rather a separate entity created by statute. This distinction is not important here, as the Court is looking to similar statutes for guidance only.

The South Carolina Tort Claim's Act, S.C. Code Ann., § 15-78-10, et seq., contains various provisions limiting the liability of state entities for claims made against them. Specifically, S.C. Code Ann., § 15-78-120 provides, in pertinent part, "no person shall recover in any action or claim brought hereunder a sum exceeding three hundred thousand dollars because of loss arising from a single occurrence regardless of the number of agencies or political subdivisions involved."

Section 38-31-100(1) has the same purpose as § 15-78-120 in that it prevents a double recovery as discussed above, and protects the State from unlimited exposure. This interpretation gains further support in § 38-31-100(2), which specifically contemplates a claimant being able to recover from more than one Guaranty Association, and that the S.C. Association is entitled to credit for the amount of recovery the claimant receives from such other Association. Again, the purpose of the language is to prevent double recovery, not prevent full recovery, by the claimant. The Association admits this purpose in its brief when it cites to the following language from *Colorado Ins. Guar. Ass'n v. Menor*, 166 P.2<sup>nd</sup> 205, 215 (Colo. App. 2007), "... the fund should be reserved

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to pay insureds of insolvent insurers who have not recovered the same damage from another source." Here, Plaintiff has not recovered the same damages, rather, the Estate is pursuing the damages still unpaid after applying the set-off and the caps.

The issue of how to apply a set-off from a joint tortfeasor in a Tort Claims Act case was specifically decided in *Smalls v South Carolina Dept. of Educ.*, 528 S.E.2<sup>nd</sup> 682, 339 S.C. 208 (Ct. App. 2000). In *Smalls*, the Court held, "[c]ontrary to Department's argument, it is not entitled to a set-off from the amount of the cap because Smalls has not recovered all damages awarded by the jury and application of a set-off in this manner would unfairly deprive a plaintiff of the verdict." *Id.*, at 689, at 222. In *Smalls*, the Plaintiff's settlements with joint tortfeasors were less than the jury's verdict. Therefore, applying the set-off to the verdict, rather than the cap, did not result in a double recovery and thus "we see no equitable reason to apply the credit in the manner urged by the Department." *Id.*

The same manner of applying set-offs also applies to actions against charitable organizations. S.C. Code Ann., § 33-56-180(A) states "[a] person...may recover in an action brought against the charitable organization only the actual damages he sustains in an amount not exceeding the limitations on liability imposed in the South Carolina Torts Claims Act ... ." As *Smalls* sets out the manner in which the cap and set-offs are applied to it for Tort Claims Act cases, it follows that the same rule would apply to charitable immunity cases as well. While not controlling, *Smalls* and its progeny have a logic that the Court finds persuasive and harmonious to the statutes at issue here.

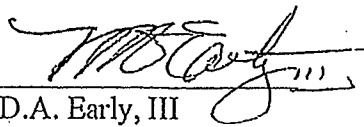
Of note, nothing in Title 38, Chapter 10 clearly sets out that a claimant may only receive \$300,000 in any event. It only limits the Association's payment to a single

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claimant to \$300,000. If the purpose of the Act is to protect South Carolina citizens from insurance companies who become insolvent, then the Act is remedial and should be liberally construed in favor of payment to the claimant in order to best accomplish that goal. Adopting the interpretation suggested by the Association would prevent full compensation, and in this case, any compensation from the Association. It would also work to dissuade claimants from resolving claims against joint tortfeasors who may have little proportional liability, thus increasing the likelihood of protracted litigation and actually increasing the Association's exposure. As such, it is against public policy to adopt such an argument.

For the reasons set forth above, Plaintiff's Motion for Summary Judgment is GRANTED. Defendant's Motion for Summary Judgment is DENIED. The Association shall pay \$300,000 within thirty (30) days of service of this Order.

AND IT SO ORDERED

By:   
D.A. Early, III  
Presiding Judge  
2<sup>nd</sup> Judicial Circuit

Bamberg, SC

  
August 1, 2014

STATE OF SOUTH CAROLINA )

COUNTY OF BAMBERG )

**CERTIFICATE OF MAILING**

I, Bari J. Crider, secretary to Daniel W. Luginbill, counsel for plaintiff in the case of Janette Buchanan and Shana Smallwood, et al. v. The South Carolina Property and Casualty Insurance Guaranty Association, Case #13-CP-05-63, do hereby certify that I have served the foregoing Order Granting Plaintiffs' Motion for Summary Judgment and Denying Defendant's Motion for Summary Judgment, by mailing a copy U. S. mail, first class delivery, postage prepaid to the attorney(s) or person(s) at the address(es) indicated as follows:

Tara Sullivan, Esquire  
Howard VanDine, III, Esquire  
Nelson, Mullins, Riley & Scarborough, LLP  
PO Box 11070  
Columbia, S. C. 29211

Sept. 11, 2014

Bamberg, SC

By: Bari J. Crider

Bari J. Crider, Secretary to  
Daniel W. Luginbill, Counsel for Plaintiff  
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P. O. Box 1150  
Bamberg, SC 29003  
(803) 245-7799

STATE OF SOUTH CAROLINA

COUNTY OF BAMBERG

Janette Buchanan and Shana Smallwood, et al.

Plaintiff(s)

vs.

The South Carolina Property & Casualty Insurance  
Guaranty Association,

Defendant(s)

(Please Print)

Submitted By: Daniel W. Luginbill

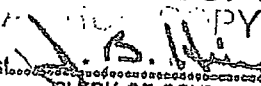
Address: PO Box 1150, Bamberg, SC 29003

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2013-CP - 05- 63

A TRUE COPY

Attest:   
CLERK OF COURT

BAMBERG COUNTY, SC

SC Bar #: 68525

Telephone #: (803) 245-7400

Fax #: (803) 245-0037

Other:

E-mail: dan@wlklawfirm.com

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

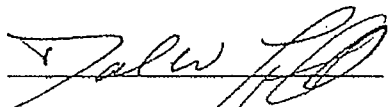
DOCKETING INFORMATION (Check all that apply)

\*If Action is Judgment/Settlement do not complete

- ☐ JURY TRIAL demanded in complaint. ☒ NON-JURY TRIAL demanded in complaint.  
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.  
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.  
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- |                                                                                                                                                                                                                                                                                                                                            |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
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| <input type="checkbox"/> <b>Inmate Petitions</b><br><input type="checkbox"/> PCR (500)<br><input type="checkbox"/> Mandamus (520)<br><input type="checkbox"/> Habeas Corpus (530)<br><input type="checkbox"/> Other (599)                                                                                                                  | <input type="checkbox"/> <b>Judgments/Settlements</b><br><input type="checkbox"/> Death Settlement (700)<br><input type="checkbox"/> Foreign Judgment (710)<br><input type="checkbox"/> Magistrate's Judgment (720)<br><input type="checkbox"/> Minor Settlement (730)<br><input type="checkbox"/> Transcript Judgment (740)<br><input type="checkbox"/> Lis Pendens (750)<br><input type="checkbox"/> Transfer of Structured Settlement Payment Rights Application (760)<br><input type="checkbox"/> Other (799) | <input type="checkbox"/> <b>Administrative Law/Relief</b><br><input type="checkbox"/> Reinstate Driver's License (800)<br><input type="checkbox"/> Judicial Review (810)<br><input type="checkbox"/> Relief (820)<br><input type="checkbox"/> Permanent Injunction (830)<br><input type="checkbox"/> Forfeiture-Petition (840)<br><input type="checkbox"/> Forfeiture-Consent Order (850)<br><input type="checkbox"/> Other (899)                                          | <input type="checkbox"/> <b>Appeals</b><br><input type="checkbox"/> Arbitration (900)<br><input type="checkbox"/> Magistrate-Civil (910)<br><input type="checkbox"/> Magistrate-Criminal (920)<br><input type="checkbox"/> Municipal (930)<br><input type="checkbox"/> Probate Court (940)<br><input type="checkbox"/> SCDOT (950)<br><input type="checkbox"/> Worker's Comp (960)<br><input type="checkbox"/> Zoning Board (970)<br><input type="checkbox"/> Administrative Law Judge (980)<br><input type="checkbox"/> Public Service Commission (990)<br><input type="checkbox"/> Employment Security Comm (991)<br><input type="checkbox"/> Other (999) |
| <input type="checkbox"/> <b>Special/Complex /Other</b><br><input type="checkbox"/> Environmental (600)<br><input type="checkbox"/> Automobile Arb. (610)<br><input type="checkbox"/> Medical (620)<br><input type="checkbox"/> Other (699)                                                                                                 | <input type="checkbox"/> <b>Pharmaceuticals (630)</b><br><input type="checkbox"/> Unfair Trade Practices (640)<br><input type="checkbox"/> Out-of State Depositions (650)<br><input type="checkbox"/> Motion to Quash Subpoena in an Out-of-County Action (660)<br><input type="checkbox"/> Sexual Predator (510)                                                                                                                                                                                                 |                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |

Submitting Party Signature: 

Date: April 11, 2013

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

**FOR MANDATED ADR COUNTIES ONLY**  
Allendale, Anderson, Beaufort, Colleton, Florence, Greenville,  
Hampton, Horry, Jasper, Lexington, Pickens (Family Court Only), and Richland

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

**You are required to take the following action(s):**

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210<sup>th</sup> day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
  - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
  - b. Requests for temporary relief;
  - c. Appeals
  - d. Post Conviction relief matters;
  - e. Contempt of Court proceedings;
  - f. Forfeiture proceedings brought by governmental entities;
  - g. Mortgage foreclosures; and
  - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

**Please Note:**     **You must comply with the Supreme Court Rules regarding ADR.**  
                          **Failure to do so may affect your case or may result in sanctions.**

|                                   |   |                                  |
|-----------------------------------|---|----------------------------------|
| STATE OF SOUTH CAROLINA           | ) | IN THE COURT OF COMMON PLEAS     |
|                                   | ) |                                  |
| COUNTY OF BAMBERG                 | ) | CASE NUMBER: 13-CP-05- <u>63</u> |
|                                   | ) |                                  |
| Janette Buchanan and Shana        | ) |                                  |
| Smallwood, individually, and      | ) |                                  |
| as Co-Personal Representatives of | ) |                                  |
| the Estate of James S. Buchanan,  | ) |                                  |
|                                   | ) |                                  |
| Plaintiff,                        | ) |                                  |
| vs.                               | ) | <b>COMPLAINT</b>                 |
|                                   | ) | (Declaratory Judgment Action)    |
|                                   | ) | (Non-Jury)                       |
|                                   | ) |                                  |
| The South Carolina Property and   | ) |                                  |
| Casualty Insurance Guaranty       | ) |                                  |
| Association,                      | ) |                                  |
|                                   | ) |                                  |
| Defendant.                        | ) |                                  |
|                                   | ) |                                  |

Plaintiffs would respectfully allege and show unto the Court:

1. Plaintiffs are the duly appointed Personal Representatives of the Estate of James S. Buchanan, filed of record in Bamberg County, South Carolina.

2. Defendant is an unincorporated, non-profit entity, formed pursuant to S.C. Code Ann, §38-31-10, et seq., to manage claims made against private insurance companies that have become insolvent who have South Carolina residents as insureds.

3. On January 7, 2008, James S. Buchanan, was involved in a motor vehicle accident in Bamberg, South Carolina (hereinafter referred to as the "accident").

4. As a result of the accident, James S. Buchanan died at the scene and his Personal Representative filed a lawsuit against several entities, including the driver and the owner of the vehicle which precipitated the wreck that claim Mr. Buchanan's life, both of whom are South Carolina residents Eddie R. Best and

Travis Scott, in the case of Janette Buchanan, et al. v. Eddie R. Best, et al., Case No.: 08-CP-05-122, in Bamberg County, South Carolina.

5. The vehicle driven by Mr. Best and owned by Mr. Scott was insured for \$1 Million by Aequicap Insurance Company (Aequicap). Aequicap declared insolvency in the state of Florida after suit was filed against its insureds.

6. Aequicap was a Florida Corporation at the time of its insolvency. The Defendant assumed management of claims made against South Carolina insureds for causes of actions made against them from the Florida Guaranty Fund.

7. The parties have stipulated, for purposes of this action, that the damages sustained by the Personal Representatives are \$800,000.00, as set forth in that certain Stipulations and Settlement Agreement (Settlement Agreement) entered into by the parties in the matter of Janette Buchanan, et al. v. Eddie R. Best, et al., ending Case No.: 08-CP-05-122.

8. The Defendant is only liable for claims up to \$300,000 pursuant to S.C. Code Ann., §38-31-60.

9. Pursuant to S.C. Code Ann. §38-31-100(1), "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."

10. Plaintiffs have recovered a total of \$376,622, in settlement proceeds from alleged joint-tortfeasors and from Workman's Compensation benefits.

11. Plaintiff's assert they have a covered claim in the amount of \$800,000 which is correctly reduced by \$376,622 pursuant to S.C. Code Ann., §38-31-100(1) and the terms of the Settlement Agreement, leaving a balance on the claim of \$423,378.

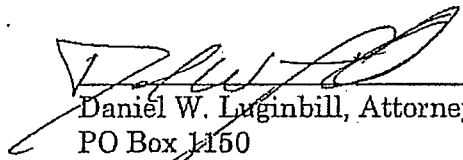
12. The Defendant's obligation to pay the claim is limited to \$300,000 pursuant to S.C. Code Ann. §38-31-60.

13. A dispute exists between the parties as to the interpretation of the provisions of S.C. Code Ann., §38-31-10, et seq., primarily as to whether the credit the Defendant receives is against the full value of the claim made against the policy of the insolvent insurer, or whether that credit is to be reduced from to the \$300,000 maximum claim amount.

WHEREFORE, Plaintiff prays this Court inquire into these matters and issue its Judgment directing the Defendant to pay \$300,000 in satisfaction of Plaintiff's covered claim.

April 11, 2013

Bamberg, S. C.

  
Daniel W. Luginbill, Attorney for Plaintiff  
PO Box 1150  
Bamberg, S. C. 29003  
Telephone: (803)245-7799  
Fax: (803)245-0037

STATE OF SOUTH CAROLINA )

COUNTY OF BAMBERG )

IN THE COURT OF COMMON PLEAS  
SECOND JUDICIAL CIRCUIT

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

Plaintiffs,

vs.

The South Carolina Property and  
Casualty Insurance Guaranty  
Association,

Defendant.

Civil Action No. 2013-CP-05-63

**DEFENDANT'S ANSWER TO  
PLAINTIFFS' COMPLAINT**

JAMES B. HIERS  
CLERK OF COURT  
BAMBERG, SC

2013 NOV -8 AM 10:22

FILED  
BAMBERG COUNTY

Defendant The South Carolina Property and Casualty Insurance Guaranty Association  
(the "Association") answers the Plaintiffs' Complaint as follows:

1. Each and every allegation of the Complaint not specifically admitted herein is expressly denied.

**FOR A FIRST DEFENSE AND BY WAY OF ANSWER**

2. The Association admits the allegations of Paragraph 1 on information and belief.

3. The Association admits the allegations of Paragraph 2 to the extent they allege that the Association is an unincorporated, non-profit entity formed pursuant to S.C. Code Ann. § 38-31-10, *et seq.*, and further admits that the Association's obligations as to claims are as set forth therein. The Association denies any remaining allegations inconsistent therewith.

4. The Association admits the allegations of Paragraphs 3 through 4.

5. The Association admits the allegations of Paragraph 5 to the extent they allege that the Aequicap Insurance Company insured one of the vehicles in the accident and that

Aequicap was declared insolvent in the State of Florida by the Florida Department of Insurance after suit was filed against its insureds. The Association denies any remaining allegations. The Association asserts that there is a pending declaratory judgment action currently on appeal to determine the limits of the Aequicap policy, and it reserves all rights to amend its position should the Court rule that the policy limits are less than the \$300,000.00 maximum claim amount as set forth in S.C. Code Ann. § 38-31-10, *et seq.*

6. The Association admits the allegations of Paragraph 6 to the extent they allege that Aequicap was a Florida entity at the time of its insolvency and that the Association assumed handling of the claim pursuant to and as set forth in S.C. Code Ann. § 38-31-10, *et seq.* The remaining allegations are denied.

7. The Association admits the allegations of Paragraph 7. However, the Association asserts that this Stipulations and Settlement Agreement has not yet been approved by the Court, and therefore, it reserves all rights to amend its position should the Court refuse to approve the Agreement for whatever reason.

8. In response to Paragraph 8, the Association admits it is liable for the subject claim as set forth in S.C. Code Ann. § 38-31-10, *et seq.* and that its liability is capped at up to \$300,000.00, subject to offsets allowed pursuant to S.C. Code Ann. § 38-31-10, *et seq.*

9. The Association admits the allegations of Paragraph 9 through 10.

10. The Association admits that Paragraph 11 sets forth Plaintiffs' position in this matter but denies the accuracy of Plaintiffs' position and the relief sought therein.

11. In response to Paragraph 12, the Association admits it is liable for the subject claim as set forth in S.C. Code Ann. § 38-31-10, *et seq.* and that its liability is capped at up to \$300,000.00, subject to offsets allowed pursuant to S.C. Code Ann. § 38-31-10, *et seq.* The

Association denies any remaining allegations inconsistent therewith.

12. The Association admits the allegations of Paragraph 13 and asserts that the credit the Association receives for the coverage arising from the same facts, injury, or loss as the claim against the Association reduces its \$300,000.00 maximum claim amount as set forth in S.C. Code Ann. § 38-31-10, *et seq.*

**FOR A SECOND DEFENSE**

13. The Association asserts that the credit the Association receives for the coverage arising from the same facts, injury, or loss as the claim against the Association reduces its \$300,000.00 maximum claim amount as set forth in S.C. Code Ann. § 38-31-10, *et seq.*

**FOR A THIRD DEFENSE**

14. The Association asserts any and all provisions of S.C. Code Ann. § 38-31-10, *et seq.* as a defense to this action.

**FOR A FOURTH DEFENSE**

15. The Association asserts that no Summons was issued by Plaintiffs, and therefore, Plaintiffs have not appropriately served the Association with this action.

**FOR A FIFTH DEFENSE**

16. The Association asserts this action is premature as there is a pending declaratory judgment action currently on appeal to determine the limits of the Aequicap policy, and it reserves all rights to amend its position should the Court rule that the policy limits are less than the \$300,000.00 maximum claim amount as set forth in S.C. Code Ann. § 38-31-10, *et seq.*

**FOR A SIXTH DEFENSE**

17. The Association asserts that this action is premature as the Court has not yet ruled on the Stipulations and Settlement Agreement or approved its terms, and it reserves all

rights to amend its position should the Court refuse to approve the Agreement for whatever reason.

WHEREFORE, having fully answered the Complaint of the Plaintiffs, the Association prays that the Court issue its judgment directing that the Association's \$300,000.00 maximum claim amount is reduced by the other coverage arising from the same facts, injury, or loss as the claim against the Association in the amount of \$376,622.00, resulting in no liability to Plaintiffs, and for such other and further relief as this Honorable Court may deem just and proper.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: Tara C. Sullivan

Howard A. VanDine, III, SC Bar No. 009818

E-Mail: howard.vandine@nelsonmullins.com

Erik T. Norton, SC Bar No. 73860

E-Mail: erik.norton@nelsonmullins.com

Tara C. Sullivan, SC Bar No. 79806

E-Mail: tara.sullivan@nelsonmullins.com

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070).

Columbia, SC 29201

(803) 799-2000

Attorneys for Defendant The South Carolina Property and  
Casualty Insurance Guaranty Association

Columbia, South Carolina

November 7, 2013.

# CERTIFICATE OF SERVICE

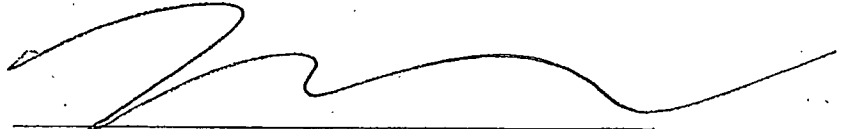
I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Defendants, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail,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

Pleadings:

Defendant's Answer to Plaintiffs' Complaint

Counsel Served:

Daniel W. Luginbill, Esq.  
PO Box 1150  
Bamberg, SC 29003



Maria Weiland  
Administrative Assistant

November 7, 2013

FILED  
BAMBERG COUNTY  
2013 NOV -8 AM 10:22  
JAMES B. HERS  
CLERK OF COURT  
BAMBERG, SC

STATE OF SOUTH CAROLINA )

COUNTY OF BAMBERG )

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

Plaintiff, )

vs. )

The South Carolina Property and Casualty  
Insurance Guaranty Association,

Defendant. )

IN THE COURT OF COMMON PLEAS

SECOND JUDICIAL CIRCUIT

CASE NO. 2013-CP-05-63

MOTION AND ORDER INFORMATION

FORM AND COVERSHEET

Plaintiff's Attorney:

Daniel W. Luginbill, Esq., Bar No. \_\_\_\_\_

Address:

PO Box 1150, Bamberg, SC 29003

Phone: 803-245-7799 Fax: \_\_\_\_\_

E-mail: \_\_\_\_\_ Other: \_\_\_\_\_

Defendant's Attorney:

Tara C. Sullivan, Esq., Bar No. 79806

Address:

1320 Main Street, Columbia, SC 29201

Phone: 803-255-9591 Fax: \_\_\_\_\_

E-mail: tara.sullivan@nelsonmullins.com Other: \_\_\_\_\_

☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)

☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)

☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Defendant's Motion for Summary Judgment

Estimated Time Needed: 30 min

Court Reporter Needed: ☒ YES/ ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Tara C. Sullivan  
Signature of Attorney for ☐ Plaintiff / ☒ Defendant

4/21/14

Date submitted

SECTION III: Motion Fee

☒ PAID - AMOUNT: \$ 25.00

☐ EXEMPT:

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)

☐ Proposed order submitted at request of the court; or,  
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: \_\_\_\_\_

☐ Other: \_\_\_\_\_

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other: \_\_\_\_\_

JUDGE CODE \_\_\_\_\_

Date: \_\_\_\_\_

CLERK'S VERIFICATION

Collected by: \_\_\_\_\_ Date Filed: \_\_\_\_\_

☐ MOTION FEE COLLECTED: \$ \_\_\_\_\_

☐ CONTESTED - AMOUNT DUE: \$ \_\_\_\_\_

STATE OF SOUTH CAROLINA )

COUNTY OF BAMBERG )

IN THE COURT OF COMMON PLEAS  
SECOND JUDICIAL CIRCUIT

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

Plaintiffs,

vs.

The South Carolina Property and  
Casualty Insurance Guaranty  
Association,

Defendant.

Civil Action No. 2013-CP-05-63

**DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT**

JAMES E. REES  
CLERK OF COURT  
BAMBERG, SC

FILED  
BAMBERG COUNTY  
2014 APR 22 PM 2:06

**TO: DANIEL W. LUGINBILL, ESQUIRE, ATTORNEY FOR PLAINTIFFS:**

YOU WILL PLEASE TAKE NOTICE that Defendant The South Carolina Property and Casualty Insurance Guaranty Association (hereinafter "Association") will move before the Court of Common Pleas for Bamberg County for an Order granting summary judgment in its favor as to the claim asserted against it in this matter.

The grounds for this Motion are that the relevant facts are not in dispute and the only issue before the Court in this declaratory judgment action is the application of S.C. Code Ann. § 38-31-10 *et seq.*

Under the prevailing statutes, the credit the Association receives for the coverage arising from the same facts, injury, or loss as the claim against the Association reduces its \$300,000.00 maximum claim amount as set forth in S.C. Code Ann. § 38-31-10, *et seq.* As such, the Association is entitled to an order directing that the Association's \$300,000.00 maximum claim amount is reduced by the other coverage Plaintiffs received arising from the

same facts, injury, or loss as the claim against the Association in the amount of \$376,622.00, resulting in no liability to Plaintiffs.

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

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: Tara C. Sullivan  
Howard A. VanDine, III, SC Bar No. 00918  
E-Mail: howard.vandine@nelsonmullins.com  
Erik T. Norton, SC Bar No. 73860  
E-Mail: erik.norton@nelsonmullins.com  
Tara C. Sullivan, SC Bar No. 79806  
E-Mail: tara.sullivan@nelsonmullins.com  
1320 Main Street / 17th Floor  
Post Office Box 11070 (29211-1070)  
Columbia, SC 29201  
(803) 799-2000

Attorneys for Defendant The South Carolina Property and  
Casualty Insurance Guaranty Association

Columbia, South Carolina

April 21, 2014.

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Defendants, 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:

Defendant's Motion for Summary Judgment

Counsel Served:

Daniel W. Luginbill, Esq.  
PO Box 1150  
Bamberg, SC 29003



Maria Weiland  
Administrative Assistant

April 21, 2014

FILED  
CLERK OF COURT  
BAMBERG, SC  
2014 APR 22 PM 2:07

STATE OF SOUTH CAROLINA

COUNTY OF BAMBERG

Janette Buchanan and Shana Smallwood, et al.

Plaintiff,

vs.

The South Carolina Property & Casualty  
Insurance Guaranty Association,

Defendant.

IN THE COURT OF COMMON PLEAS  
SECOND JUDICIAL CIRCUIT

CASE NO.: 2013-CP-05-63

MOTION AND ORDER INFORMATION  
FORM AND COVERSHEET

Plaintiff's Attorney:

Daniel W. Luginbill, Bar No. 68525

Address:

PO Box 1150, Bamberg, SC 29003

Phone: 803-245-7799 Fax 803-245-0037

E-mail: dan@wlklawfirm.com Other: \_\_\_\_\_

Defendant's Attorney:

Tara Sullivan and Howard VanDine, Bar No.

Tara's 79806, Howard's 009818

Address:

PO Box 11070, Columbia, SC 29211-1070

Phone: 803-799-2000 Fax \_\_\_\_\_

E-mail: tara.sullivan@nelsonmullins.com Other: \_\_\_\_\_

- ☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)  
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)  
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Motion for Summary Judgment

Estimated Time Needed: 30 mins.

Court Reporter Needed: ☒ YES/ ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff/ ☐ Defendant

5-14-14

Date submitted

SECTION III: Motion Fee

☒ PAID - AMOUNT: \$ \_\_\_\_\_

☐ EXEMPT:

(check reason)

- ☐ Rule to Show Cause in Child or Spousal Support  
☐ Domestic Abuse or Abuse and Neglect  
☐ Indigent Status ☐ State Agency v. Indigent Party  
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief  
☐ Motion for Stay in Bankruptcy  
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)  
☐ Proposed order submitted at request of the court; or,  
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: \_\_\_\_\_

☐ Other: \_\_\_\_\_

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other: \_\_\_\_\_

JUDGE CODE \_\_\_\_\_

Date: \_\_\_\_\_

CLERK'S VERIFICATION

Collected by: \_\_\_\_\_ Date Filed: \_\_\_\_\_

☐ MOTION FEE COLLECTED: \$ \_\_\_\_\_

☐ CONTESTED - AMOUNT DUE: \$ \_\_\_\_\_

STATE OF SOUTH CAROLINA )  
COUNTY OF BAMBERG )

IN THE COURT OF COMMON PLEAS  
SECOND JUDICIAL CIRCUIT  
CASE NO.: 2013-CP-05-63

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

Plaintiffs,

v.

The South Carolina Property and Casualty  
Insurance Guaranty Association,

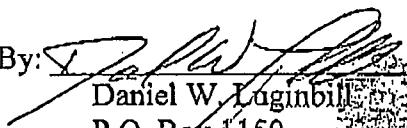
Defendant.

PLAINTIFF'S NOTICE OF  
MOTION AND MOTION  
FOR SUMMARY JUDGMENT

YOU WILL PLEASE TAKE NOTICE, that the undersigned attorney for the Plaintiff will move before the Court within 10 days or as soon as counsel may be heard, for an Order granting Plaintiff Summary Judgment against the Defendant for the relief prayed for in Plaintiff's Complaint.

This motion is based on the statutory and common law of South Carolina, specifically S.C. Code Ann., §38-31-10, et seq. Plaintiff asserts that the Association is entitled to a cap of liability for payment of \$300,000 and that all setoff and credits are applied first to the full value of the claim before the cap on liability is at issue.

WILSON & LUGINBILL, LLC

By: 

Daniel W. Luginbill  
P.O. Box 1150  
Bamberg, SC 29003  
(803) 245-7799  
dan@wklawfirm.com  
Attorney for Plaintiff

Bamberg, SC

May 14, 2014

2014 MAY 15 AM 10:02

FILED  
BAMBERG COUNTY

STATE OF SOUTH CAROLINA )

COUNTY OF BAMBERG )

**CERTIFICATE OF MAILING**

I, Bari J. Crider, secretary to Daniel W. Luginbill, counsel for plaintiff in the case of Janette Buchanan and Shana Smallwood, et al. v. The South Carolina Property and Casualty Insurance Guaranty Association, Case #13-CP-05-63, do hereby certify that I have served the foregoing Plaintiff's Notice of Motion and Motion for Summary Judgment, by mailing a copy U. S. mail, first class delivery, postage prepaid to the attorney(s) or person(s) at the address(es) indicated as follows:

Tara Sullivan, Esquire  
Howard VanDine, III, Esquire  
Nelson, Mullins, Riley & Scarborough, LLP  
PO Box 11070  
Columbia, S. C. 29211

May 14, 2014

Bamberg, SC

By: Bari J. Crider  
Bari J. Crider, Secretary to  
Daniel W. Luginbill, Counsel for Plaintiff  
Wilson & Luginbill, LLC  
P. O. Box 1150  
Bamberg, SC 29003  
(803) 245-7799

FILED  
BAMBERG COUNTY  
2014 MAY 15 AM 10:03  
CLERK OF COURT  
BAMBERG, SC

STATE OF SOUTH CAROLINA )  
COUNTY OF BAMBERG )

IN THE COURT OF COMMON PLEAS  
SECOND JUDICIAL CIRCUIT

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

Plaintiffs,

vs.

The South Carolina Property and  
Casualty Insurance Guaranty  
Association,

Defendant.

Civil Action No. 2013-CP-05-63

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

FILED  
CLERK OF COURT  
2013 MAR 27 AM 9:30

Pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, Defendant The South Carolina Property and Casualty Insurance Guaranty Association ("Association"), by and through its undersigned counsel, hereby submits this Memorandum in Support of its Motion for Summary Judgment as to the declarations sought by Plaintiffs Janette Buchanan and Shana Smallwood, individually, and as Co-Personal Representatives of the Estate of James S. Buchanan ("Plaintiffs") and in Opposition to Plaintiffs' Cross-Motion for Summary Judgment. This Court should grant the Association's Motion, deny Plaintiffs' Cross-Motion, and find that Plaintiffs are not entitled to any payment from the Association based on the plain language contained in S.C. Code Ann. §§ 38-31-60 and 38-31-100(1).

**UNDISPUTED FACTS**

The parties have no dispute as to the facts underlying the allegations in Plaintiffs' declaratory judgment action.

On January 7, 2008, James S. Buchanan ("Mr. Buchanan") was involved in a motor vehicle accident in Bamberg, South Carolina, with a vehicle driven by Eddie R. Best ("Best") and owned by Travis Scott ("Scott"). (Complaint ¶¶ 3-4). Scott's vehicle was insured for \$1 million by Aequicap Insurance Company ("Aequicap"). (Complaint ¶ 5). Mr. Buchanan died at the scene of the accident. (Complaint ¶ 4).

Janette Buchanan, individually and as Personal Representative of Mr. Buchanan's Estate ("Mrs. Buchanan"), initiated a wrongful death lawsuit in Bamberg County, South Carolina, against Best and Scott. (Complaint ¶ 4). During the pendency of the wrongful death action, Aequicap was declared insolvent by the courts of Florida. (Complaint ¶ 5). As a result of Aequicap's insolvency, Mrs. Buchanan's claim was asserted against the Association as provided by S.C. Code Ann. § 38-31-60. (See also Complaint ¶ 6).

The parties reached a settlement of the Bamberg County lawsuit, which was approved by the South Carolina Court of Common Pleas by Order filed February 24, 2014. (Complaint ¶ 7; see also Order Approving Settlement with attached Stipulations and Settlement Agreement Between Parties, attached hereto as Exhibit A). As part of the parties' settlement agreement, the parties stipulated that the amount of damages sustained by Mrs. Buchanan is \$800,000 and that the Plaintiffs have recovered a total of \$376,622 in settlement proceeds from alleged joint-tortfeasors and Workers' Compensation benefits. (Complaint ¶¶ 7, 10; Ex. A, Settlement Agreement at ¶¶ 1, 5-6).

The Association has not paid any monies in light of the Plaintiffs' other recovery based on the statutory cap and offset provisions of the South Carolina Code. As part of the settlement, the parties agreed that the liability of the Association, if any, would be determined

via this declaratory judgment action based on the parties' stipulations. (Exhibit A, Settlement Agreement at ¶¶ 7, 9).

### ISSUE FOR RESOLUTION

The sole issue presented by this declaratory judgment action is the Association's liability, if any, for Mrs. Buchanan's claim under the statutory regime governing the Association's obligations as codified in S.C. Code Ann. § 38-31-10, *et seq.* (Complaint ¶ 13). It is undisputed that the Association's liability on Mrs. Buchanan's claim is limited to a maximum of \$300,000 pursuant to S.C. Code Ann. § 38-31-60. (Complaint ¶¶ 8, 12). It is also undisputed that the Association is entitled to an offset of \$376,622, the amount of other insurance coverage received by Mrs. Buchanan as a result of the accident pursuant to S.C. Code Ann. § 38-31-100(1). (Complaint ¶¶ 9, 13). However, the parties' positions differ as to how this offset should be applied in light of the Association's \$300,000 statutory limitation of liability for the Association. (Complaint ¶ 13).

Plaintiffs appear to maintain that the offset should be deducted from the total amount of damages of \$800,000, resulting in a remainder of \$423,378 of which the Plaintiffs contend the Association should be liable for its maximum claim limit of \$300,000. (Complaint ¶¶ 11-12). The Association maintains that the offset should be deducted from its maximum claim limit of \$300,000, resulting in no liability from the Association to Plaintiffs based on the plain language of the statutes governing the Association. (See generally Answer).

### STANDARD FOR SUMMARY JUDGMENT

Summary judgment must be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See First Federal Savings & Loan Ass'n v. Dangerfield, 307 S.C. 260, 262, 414 S.E.2d 590, 591 (Ct. App. 1992). As noted

above, the relevant facts are not in dispute and the only issue before the Court in this declaratory judgment action is the application of S.C. Code Ann. §§ 38-31-60 and 100(1).

### LEGAL ANALYSIS

The Association is a nonprofit unincorporated legal entity created by the South Carolina legislature pursuant to the South Carolina Property and Casualty Insurance Guaranty Association Act, S.C. Code Ann. § 38-31-10 et seq. (the “Act”). See S.C. Prop. and Cas. Ins. Guar. Ass’n v. Carolinas Roofing and Sheet Metal Contractors Self-Insurance Fund, 315 S.C. 555, 557, 446 S.E.2d 422, 424 (1994); Builders Transp. v. S.C. Prop. and Cas. Ins. Guar. Ass’n, 307 S.C. 398, 406, 415 S.E.2d 419, 424 (Ct. App. 1992). Because the Association was created by statute, its duties, liabilities, and obligations are controlled by the terms and conditions set forth in the Act. S.C. Code Ann. § 38-31-60; see also Builders Transp., 307 S.C. at 406, 415 S.E.2d at 424.<sup>1</sup>

The South Carolina Supreme Court has recently held that the statutory regime governing the Association is not ambiguous. See Hudson v. Lancaster Convalescent Ctr., 407 S.C. 112, 754 S.E.2d 486 (2014). The Court also reiterated that the Association was created by the General Assembly to afford “some protection” to insureds whose insurance companies become insolvent. Id. at 124, 754 S.E.2d at 492 (citing S.C. Code Ann. § 38-31-60; Carolinas Roofing, 315 S.C. at 557, 446 S.E.2d at 424). The Association is the “last resort” for payment when an insurance company is declared insolvent: Id.

Applying these settled principles and the plain language of the statutory scheme necessitates summary judgment in favor of the Association. The statutory liability limitation

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<sup>1</sup> See also 44 C.J.S. Insurance § 213 (“The association is a statutory entity that depends on statutory law for its existence and for the definition of its powers, duties, and protections.”)

and the offset provisions result in no liability for the Association in this action. Plaintiffs are not entitled to any payment from the Association.

**I. The plain meaning of the Act, when read as a whole, unambiguously requires that the offset be deducted from the Association's \$300,000.00 statutory claim limit rather than a claimant's total amount of damages.**

"The primary rule of statutory construction is to ascertain and give effect to the intent of the General Assembly." Anderson v. South Carolina Election Comm'n, 397 S.C. 551, 556, 725 S.E.2d 704, 706-07 (2012) (citing Beaufort Cnty. V. S.C. State Election Comm'n, 395 S.C. 366, 718 S.E.2d 432 (2011)); see also Builders Transp., 307 S.C. at 404, 415 S.E.2d at 423 (looking to intention of South Carolina legislature in adoption of Act to determine meaning of Act's provisions). "In construing statutory language, the statute must be read as a whole, and sections which are a part of the same general statutory law must be construed together and each one given effect." Anderson, 397 S.C. at 556, 725 S.E.2d at 707 (citing Beaufort Cnty., 395 S.C. 366, 718 S.E.2d 432; Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000)).

"Unless there is something in the statute requiring a different interpretation, the words used in a statute must be given their ordinary meaning." Anderson, 397 S.C. at 556, 725 S.E.2d at 707 (citing Mid-State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 476 S.E.2d 690 (1996)). "When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." Id. at 556-57, 725 S.E.2d at 707 (citing Mid-State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 476 S.E.2d 690 (1996)).

S.C. Code Ann. § 38-31-60(a) provides that the Association is obligated "to the extent of claims existing before the determination of insolvency . . . ." However, its obligations on such claims are limited: "This obligation includes only the amount each covered claim is in

excess of two hundred fifty dollars and is less than three hundred thousand dollars." S.C. Code Ann. § 38-31-60(a)(iv) (emphasis added). Thus, the Association is not obligated on any covered claim, including Plaintiffs', beyond its \$300,000 statutory limit.

The inquiry does not end here, however.

The Act further provides the Association an offset of other insurance received for the same facts, injury or loss which gave rise to the claim against the Association:

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

S.C. Code Ann. § 38-31-100(1) (emphasis added).<sup>2</sup> As Plaintiffs admit, the Association is entitled to offset \$376,622 as this amount represents Plaintiffs' total recovery from other insurance claims arising from the same facts, injury or loss as their claim against the Association.<sup>3</sup>

Similarly, the Act also provides such offset in settlement situations:

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

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<sup>2</sup> See also 44 C.J.S. Insurance § 221 ("A person seeking payment from an insurance guaranty association or a fund created by multiple insurance companies generally must first exhaust other insurance available to such person, such as uninsured motorist coverage. It is the philosophy of Insurance Guaranty Fund to have all potential claims against the Fund's assets reduced by a solvent insurer, and not the Fund, whenever possible. The liability of the association or fund is reduced by the amount recovered under such other insurance.").

<sup>3</sup> Although the offset statute provides that the Association may offset the full policy limits of such other coverage—not simply the recovery achieved under those policies—the parties have agreed to limit the Association's offset to the amounts actually received under those other insurance policies for the purposes of this action and resolution of this issue only. See Ex. A.

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

S.C. Code Ann. § 38-31-100(5).

In applying the language of the above-cited provisions to the facts of this case, the result is that the Association does not have any obligation to Plaintiffs. The offset provisions explicitly state that the amount to be reduced/offset is "[a]ny amount payable on a covered claim under this chapter." S.C. Code Ann. §§ 38-31-100(1), (5). As set forth in S.C. Code Ann. § 38-31-60(a), the "amount payable on a covered claim" cannot exceed \$300,000. Therefore, in situations where a claimant's damages exceed the statutory limit, the offset must be deducted from the Association's statutory claim limit of \$300,000 rather than a claimant's total amount of damages by statute.

The statute does not mention damages. That word is not present in the relevant provisions. Instead, the statute centers on the reduction of covered claims existing before insolvency up to a maximum obligation of \$300,000. When the reduction exceeds the maximum obligation, like here, the claimant cannot recover from the Association.

To read the statute as requiring the offset to be deducted from a claimant's total amount of "damages" would render the offset provisions meaningless in any situation where, like here, a claimant's damages exceed the Association's statutory claim limit and the amount of other related insurance received was less than the difference between the amount of their damages and the claim limit. In such situations, the claimant would automatically receive the claim limit, and the offset provision would essentially be superfluous. Such a construction would

violate the mandate that different provisions of a statute must be construed together and each one given effect. See Anderson, 397 S.C. at 556, 725 S.E.2d at 707. Therefore, construing these statutory provisions together using their plain meaning, the Act clearly and unambiguously provides that the Association is entitled to offset its statutory claim limit of \$300,000 by the \$376,622 that Plaintiffs received in other related coverage.

II. If the Act is found to be ambiguous, this Court may consider the Legislature's intent for the Association to provide a limited recovery to claimants as a last resort.

Because the language of the Act is clear and unambiguous as the Supreme Court found in Hudson, this Court need not look beyond the words of the statute for its meaning. However, in the event this Court finds that the Act is ambiguous, the Court may look beyond the statute to give effect to the legislative intent for the Act. See Anderson, 397 S.C. at 556, 725 S.E.2d at 706-07.

The South Carolina Legislature amended the offset provision in 2001 to its current form to clarify 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). The Legislature expressly intended that the offset provision would limit the claims asserted against the Association and provide a credit to the Association for other coverage arising from the same facts, injury, or loss as the claim against the Association. Here, if the offset was applied to reduce the claimant's total "damages," the claim against the Association isn't limited in any way and the Association isn't given any credit

for the other coverage. Therefore, as evidenced by the plain meaning of the Act as well as the legislative intent regarding the amendment of the offset provision to its current form, the Association's maximum obligation to claimants like Plaintiffs must be limited by the offset, meaning the offset amount must be credited to reduce the Association's liability on its maximum claim amount rather than a claimant's total damages amount.

The South Carolina Supreme Court has previously noted the Act's intent for the Association's liability to be limited as well. As stated in Hudson and Carolinas Roofing, the purpose of the Association is "to provide some protection to insureds whose insurance companies become insolvent." 407 S.C. at 124, 754 S.E.2d at 492; 315 S.C. at 557, 446 S.E.2d at 424 (emphasis added).<sup>4</sup> The Supreme Court's holdings in both cases correctly depicts the Legislature's intent to limit the Association's liabilities as set forth in the Act. The Association steps in to reduce the inequity that would occur should claimants be left without any potential source of recovery when an insurer becomes insolvent; however, it is not intended as a failsafe to guarantee complete recovery to those unfortunate claimants. See 44 C.J.S. Insurance § 218 ("A claimant, however, will not always be put in the same position [the claimant would have been in had insolvency not occurred], as the association or fund does not completely step into the shoes of the insolvent, and is obligated to pay claims only to the extent

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<sup>4</sup> See also S.C. Prop. and Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc., 304 S.C. 210, 215, 403 S.E.2d 625, 628 (1991) (finding that it is not the intent of the Act to place the Association in the shoes of the insurer because the Association's rights and obligations are limited); 44 C.J.S. Insurance § 213 ("[T]he duties of an Insurance Guarantee Association are not co-extensive with the duties owed by the insolvent insurer under its policy. An Insurance Guarantee Association is a guarantor of last resort. . . . [A]n Insurers Insolvency Fund is not an insurer; rather, it is a statutorily mandated nonprofit association created to provide limited protection to insureds and claimants in the event of insolvency of an insurer. It is not itself an insurer and does not 'stand in the shoes' of the insolvent insurer for all purposes.").

provided by statute.”).<sup>5</sup> The Association is a “last resort.” Hudson, 407 S.C. at 124, 754 S.E.2d at 492.

The Act limits the Association’s obligations in a number of ways beyond the maximum obligation and the offset. The Association can assess members for shortfalls in relation to the amount of direct premiums written by member insurers. S.C. Code Ann. § 38-31-60(c). The Association can investigate claims and adjust, compromise, settle, and pay covered claims and deny all other claims. S.C. Code Ann. § 38-31-60(d). The Association can also review settlements, releases, and judgments to determine the extent these may be contested—to prevent collusions. Id.

The limited role of the Association evidences the Legislature’s intent to limit the Association’s liability to claimants consistent with applying the offset to reduce the Association’s liability on its statutory claim limit rather than a claimant’s total damages amount.

**III. If the Act is found to be ambiguous, this Court may consider case law from other jurisdictions finding that the offset should be deducted from the Association’s statutory claim limit rather than a claimant’s total amount of damages.**

Although there are no South Carolina cases directly addressing whether the

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<sup>5</sup> See also Colorado Ins. Guar. Ass’n v. Menor, 166 P.3d 205, 215 (Colo. App. 2007) (“[T]he Act was intended ‘to give a measure of protection to policyholders and claimants who are faced with financial loss because of the insolvency of certain carriers of property and casualty insurance.’ It was not designed to pay all claims regardless of whether there are other sources of recovery. The Association is a source of “last resort.” Member insurers pay assessments to the Association, derived from premiums of policyholders. Although [insureds] correctly point out that a purpose of the fund is to provide a source of recovery of covered claims when an insurer becomes insolvent, the fund should be reserved to pay insureds of insolvent insurers who have not recovered the same damages from another source. The requirement that a previous insurance recovery reduce the amount owed by the Association serves to protect the limited fund from depletion when the insured has already obtained a recovery for the loss.”) (quoting Strickler v. DeSai, 813 A.2d 650, 656 (Pa. 2002)).

Association's offset should be deducted from its statutory claim limit or a claimant's total amount of damages, all states have guaranty associations created by similar statutes. Therefore, case law from other jurisdictions may be instructive in the absence of South Carolina authority. The majority of other states ruling on this issue agree that the Association's offset is applied to reduce its statutory claim limit rather than a claimant's total amount of damages. These cases are described in more detail in **Appendix A** hereto, and the arguments and analysis are incorporated fully into this memorandum.

The cases cited in Appendix A are instructive as to how other state courts have applied the plain language of their respective Guaranty Association statutes on the issue of whether a court should reduce an association's liability from the maximum statutory obligation or from the plaintiff's total damages amount. For example, in a scenario similar to the one presented to this Court, the Kentucky Court of Appeals held that the reduction should extend from the statutory liability cap and not the plaintiff's damages. Hawkins v. Kentucky Ins. Guar. Ass'n, 838 S.W.2d 410 (Ky. Ct. App. 1992). Hawkins was injured in an motorcycle accident and suffered damages in excess of \$50,000. Id. at 411. Upon the at-fault driver's insurer becoming insolvent, Hawkins received \$25,000 from his uninsured coverage. Id. The Kentucky Association's maximum statutory obligation was only \$25,000, the amount of the at-fault driver's insurance policy. Id. The Kentucky Association argued that its \$25,000 obligation was offset by the \$25,000 in other recovery Hawkins received, resulting in no liability for the Association. Id. The Kentucky court agreed and concluded that the Association had no liability to the claimant when applying the reduction as measured from the statutory maximum obligation. Id. at 412.

Similarly, the Mississippi Court of Appeals concluded that the Mississippi Association

had no liability to a claimant based on the application of the reduction with the statutory cap/limit as the measuring point. Leitch v. Mississippi Ins. Guar. Ass'n, 27 So. 3d 405 (Miss. Ct. App. 2009), aff'd, 27 So. 3d 396 (Miss. 2010). Leitch was injured in an automobile accident and suffered alleged damages in excess of \$3,000,000. The at-fault driver's insurer became insolvent, and Leitch received \$300,000 in uninsured coverage as a result. Leitch then sought to recover the \$300,000 statutory claim limit from the Mississippi Association. The Association argued it was entitled to offset its \$300,000 claim limit by the \$300,000 uninsured coverage Leitch had received, resulting in no liability. The court agreed with the Association, finding that as the most Leitch could have recovered from the Association under the statutes was \$300,000, that amount was to be reduced by the \$300,000 in other coverage he received.

Likewise, several other courts have found that where a claimant's damages exceed the Association's statutory claim limit, the offset is applied to reduce the lesser claim limit despite a claimant's higher total damages amount. See, e.g., Jangula v. Ariz. Prop. and Cas. Ins. Guar. Fund., 88 P.3d 182 (Ariz. Ct. App. 2004) (finding that a claimant's other recovery in the amount of \$15,000 reduced the Arizona Association's statutory claim limit of \$99,900, even though the claimant's damages exceeded \$115,000, resulting in the Association's liability of only \$84,900 rather than the full \$99,900 claim limit); Hetzel v. Clarkin, 772 P.2d 800 (Kan. 1989) (noting that the offset provision "makes it clear" that the Guaranty Association is only liable for the difference between the claimant's other recovery and the statutory cap). As noted by these courts and the others listed in Appendix A, the plain language of the statutes requires that the Association's offset be applied to reduce its statutory claim limit rather than a claimant's total amount of damages.

## CONCLUSION

As set forth above, the right of the Association to offset its statutory claim limit—rather than a claimant's total amount of damages—is well established through the plain language of the Act, legislative intent, and supporting case law from other jurisdictions. Therefore, the Association's offset of \$376,622 should be applied to reduce its \$300,000 statutory claim limit rather than Plaintiffs' total damages of \$800,000. As such, the Association's Motion for Summary Judgment should be granted, the Plaintiffs' Cross-Motion for Summary Judgment should be denied, and this Court should declare that the Association has no liability to Plaintiffs as a result.

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## APPENDIX A

- King v. Jordan, 601 P.2d 273 (Alaska 1979).

This court held that the Alaska Insurance Guaranty Association's offset should be applied to its statutory claim limit. Jordan was injured in a car accident, and she brought a personal injury action against the at-fault driver. The at-fault driver was insured for \$15,000 but his insurer was subsequently declared insolvent. As a result, Jordan settled with her own uninsured carrier for \$12,500. A judgment was subsequently entered against the at-fault driver for \$9,547.94.

The at-fault driver then brought a declaratory judgment action against the Association, arguing it should be required to pay the judgment against him. The Association argued that its "amount payable" was to be reduced by her recovery from her uninsured carrier, and since the other recovery was greater than the judgment amount, it had no liability to Jordan. The court agreed, reducing the Association's liability on the \$9,547.94 judgment by the \$12,500 other recovery, leaving no liability to Jordan.

- Windle v. Alabama Ins. Guar. Ass'n, 591 So. 2d 78 (Ala. 1991).

In this case, the court held that the Alabama Insurance Guaranty Association's offset for a claimant's other recovery reduced its statutory claim limit rather than the claimant's damages amount.

Windle was injured in a car accident, and she sued the insurer for the at-fault driver and her own uninsured/underinsured insurer. She recovered \$20,000.00 from her own insurer. The insurer for the at-fault driver was declared insolvent, and the Alabama Insurance Guaranty Association was brought into the action.

In this case, the Association's maximum statutory obligation was only \$20,000.00, the amount of the policy insuring the at-fault driver. The parties stipulated that Windle's damages exceeded \$60,000.00.

The court was asked to decide how the \$20,000.00 Windle received should affect the Association's liability on the claim. Windle argued it should be applied to her damages of \$60,000.00, leaving the Association responsible for the full \$20,000.00. The Association argued that the \$20,000.00 Windle received offset its statutory maximum of \$20,000.00, resulting in no liability to Windle. The court agreed with the Association, finding that the "covered claim" could only be \$20,000.00 as it was the statutory maximum, and the offset provision clearly states that the other recovery was to reduce the amount payable on the "covered claim." Therefore, the Association's liability was extinguished.

- Jangula v. Ariz. Prop. and Cas. Ins. Guar. Fund., 88 P.3d 182 (Ariz. Ct. App. 2004).

In this declaratory judgment action, the court held that the Arizona Insurance Guaranty Fund's offset for a claimant's other recovery should be applied to reduce its Fund's \$99,900.00 statutory claim limit rather than the claimant's total amount of damages, which exceeded \$115,000.00.

Jangula was injured as a passenger in an automobile, and the parties stipulated that her damages exceeded \$115,000.00. She sued the driver of the automobile, whose insurer was subsequently declared insolvent. She also recovered \$15,000.00 from her own uninsured policy.

As a result of the insolvency, Jangula's claim was lodged against the Fund. She sought a declaration that the \$15,000.00 offset should be applied to her total damages of \$115,000.00, resulting in the Fund being liable to her for its full statutory cap of \$99,900.00. The Fund argued that the offset should instead be applied to reduce its maximum statutory obligation of \$99,900.00. The court agreed with the Fund, finding that it was only liable to Jangula in the amount of \$84,900.00.

- Marra v. Wilson, 2003 WL 367831 (Del. Super. Ct. Feb. 20, 2003).

In this case, the court held that the Delaware Insurance Guaranty Association's offset for a claimant's other recovery reduced its statutory claim limit rather than the claimant's damages amount.

Marra was injured in a car accident and brought suit against the driver and owner of the at-fault vehicle. The insurer for the owner of the vehicle was declared insolvent, and the Delaware Association intervened in the action. As a result of the insolvency, Marra received \$100,000.00 from his own uninsured policy.

The parties then sought the court's determination of whether the Association's offset of \$100,000.00 for the uninsured coverage would apply to reduce Marra's total damages, which the parties stipulated exceeded the available insurance coverage, or the Association's statutory cap of \$300,000.00. The court ruled in favor of the Association, finding that the offset statute unambiguously provides that any amount payable on a covered claim shall be reduced, and that a covered claim can never exceed \$300,000.00. Therefore, the offset is applied to reduce the Association's statutory claim limit, resulting in the Association's liability to Marra of \$200,000.00.

- Lucas v. Illinois Ins. Guar. Fund, 367 N.E.2d 469 (Ill. Ct. App. 1977).

In this declaratory judgment action, the court held that the Illinois Insurance Guaranty Fund's offset for a claimant's other recovery reduced its statutory claim limit rather than the claimant's damages amount.

Lucas was injured in a car accident, and she sued the at-fault owner. After obtaining a judgment against the owner for \$390,000.00, the owner's insurer was declared insolvent. As a result, she recovered \$10,000.00 from her own uninsured carrier.

She then brought a declaratory judgment action, asking the court to determine whether the \$10,000.00 offset should be applied to the Association's maximum statutory obligation of \$20,000.00 (the amount of the policy insuring the at-fault owner) or her total damages amount of \$390,000.00. The court found that the offset statute provides for the offset to reduce the Association's maximum statutory obligation, resulting in the Association's liability to Lucas of \$9,900.00 (\$10,000 less the \$100 deductible).

- Stetcher v. Iowa Ins. Guar. Ass'n, 465 N.W.2d 887 (Iowa 1991).

In this declaratory judgment action, the court affirmed the trial court's ruling that the Iowa Insurance Guaranty Association was entitled to offset a claimant's other recovery from its statutory claim limit rather than her total amount of damages.

Stetcher was a passenger on a motorcycle which was involved in an accident. Her damages exceeded \$75,000.00. The insurer for the motorcycle was declared insolvent. As a result, she received \$25,000.00 from her own uninsured coverage.

Stetcher then sought a declaration that the Iowa Association was liable to her for its statutory maximum of \$50,000.00 (the amount of the policy on the motorcycle). The Association argued that it was entitled to offset its \$50,000.00 cap by the \$25,000.00 of uninsured coverage. Stetcher disagreed because her damages exceeded the policy limits. The trial court agreed with the Association and was affirmed on appeal.

- Hetzel v. Clarkin, 772 P.2d 800 (Kan. 1989).

Although this case deals with a separate issue, the court repeatedly notes that the Kansas Insurance Guaranty Association's offset is applied to reduce its statutory cap.

Hetzel was injured in a car accident. Although the at-fault driver was insured for \$50,000, the insurer was insolvent. As a result, she received \$25,000 from her own uninsured carrier.

The court noted that the offset provision "makes it clear" that the Guaranty Association is only liable for the difference between the claimant's other recovery and the statutory cap. "For example, if Hetzel recovered the \$30,000 uninsured motorist policy limit from Farmers, the Guaranty Association is only liable for an additional \$20,000 (the difference between \$30,000 and the \$50,000 limit on [the at-fault driver's] original policy)."

- Hawkins v. Kentucky Ins. Guar. Ass'n, 838 S.W.2d 410 (Ky. Ct. App. 1992).

In this declaratory judgment action, the court held the Kentucky Insurance Guaranty Association was entitled to offset a claimant's other recovery from its statutory claim limit rather than the claimant's total amount of damages.

Hawkins was a passenger on a motorcycle which was involved in an accident. His claimed damages exceeded \$50,000.00. The insurer for the motorcycle was declared insolvent. As a result, he received \$25,000.00 from his own uninsured coverage.

The Association then sought a declaration that its statutory maximum of \$25,000.00 (the amount of the policy on the motorcycle) was reduced by the \$25,000.00 Hawkins received from uninsured coverage. Hawkins disagreed, arguing that because his damages exceeded \$50,000.00, the Association would still be liable for the full \$25,000.00. The court agreed with the Association, finding that the legislative intent for the offset provision was to allow a credit against the statutory cap. Therefore, the Association had no liability to Hawkins.

- Cooper v. Huddy, 581 So. 2d 723 (La. Ct. App. 1991), writ denied, 585 So. 2d 552 (La. 1991).

Cooper passed away as a result of an automobile accident. His surviving wife brought a wrongful death suit against his insurer, the owner and driver of the other car involved in the accident, and the insurer for the other vehicle. The insurer for the other vehicle was declared insolvent, and both the Pennsylvania Insurance Guaranty Association and the Louisiana Insurance Guaranty Association were added as defendants.

Mrs. Cooper received \$118,280.56 from the Pennsylvania Association. The wrongful death suit proceeded to trial, and the total awarded to Mrs. Cooper was \$291,604.03.

The court was then asked to determine the liability of the Louisiana Association to Mrs. Cooper. Mrs. Cooper argued that the \$118,280.56 she received from the Pennsylvania Association should be credited toward the total amount of her judgment of \$291,604.03, resulting in a liability of the full statutory limit of \$149,900. The Association disagreed, arguing it should instead be applied to reduce its statutory limit of \$149,900. The court agreed with the Association, finding that the statute unambiguously required the offset to be credited toward the Association's statutory limit, resulting in a liability to Mrs. Cooper of \$31,619.44.

- Vokey v. Massachusetts Insurers Insolvency Fund, 409 N.E.2d 783 (Mass. 1980).

Vokey was injured in an automobile accident. In his personal injury action, he obtained a judgment for \$19,520.05. The at-fault driver's insurer was subsequently declared insolvent. As a result, Vokey received \$10,000 in uninsured coverage.

Vokey then sought to recover from the Massachusetts Insurers Insolvency Fund. The at-fault driver's policy limits were \$5,000/person and \$10,000/accident. Vokey argued that he was entitled to receive the unsatisfied portion of his judgment from the Fund. The Fund disagreed, arguing that its liability was at most \$10,000, which was offset by Vokey's \$10,000 uninsured recovery, leaving no liability to Vokey. The Court agreed with the Fund based on the Fund's purpose as a source of last resort and the clear statutory policy requiring the offset to reduce the Fund's liability.

- Yetzke v. Fausak, 488 N.W.2d 222 (Mich. Ct. App. 1992).

This case was resolved on a motion for summary disposition in favor of the Michigan Property & Casualty Guaranty Association. Yetzke suffered damages in an automobile accident. He brought an action against the at-fault driver. The at-fault driver's insurer was subsequently declared insolvent, and the Michigan Association was added as a defendant in the action.

Yetzke received \$25,000 from his own uninsured coverage. The at-fault driver's insurance policy limits were \$20,000. It was stipulated that Yetzke's damages exceeded \$143,000.

The parties sought a determination of the Michigan Association's liability to Yetzke. Yetzke argued that he was owed the Association's full statutory maximum of the \$20,000 policy limits because the offset of the \$25,000 in uninsured coverage should be applied to the entire amount of his claim for personal injuries in excess of \$143,000. The Association argued that its statutory maximum of \$20,000 should be offset by the \$25,000 in uninsured coverage, resulting in no liability to Yetzke. The court agreed with the Association, finding that the offset provision clearly and unambiguously provided that the setoff was to be deducted from the Association's maximum amount of liability rather than a claimant's total damages.

- Cox v. Minnesota Ins. Guar. Ass'n, 508 N.W.2d 536 (Minn. Ct. App. 1993).

In this declaratory judgment action, the court held that the Minnesota Insurance Guaranty Association's offset for a claimant's other recovery reduced its statutory claim limit rather than the claimant's total damages.

Cox was injured in an automobile accident. She and her mother sued the driver and owner of the at-fault vehicle. The insurer for the at-fault vehicle, which had issued \$2,000,000 in coverage for the vehicle, was subsequently declared insolvent. The Florida Insurance Guaranty Association was substituted in the case. The Coxes were awarded \$1,437,131.09 in damages. They subsequently received \$599,900 from the Florida Association.

The Coxes then sought to recover the unpaid portion of the judgment from the Minnesota Association up to its statutory cap. The Minnesota Association argued that

the amount received from the Florida Association should be offset to reduce its statutory cap of \$299,900, leaving no liability to the Coxes. The court found that the offset provision unambiguously required the application urged by the Minnesota Association rather than applying the offset to a claimant's total damages amount.

- Leitch v. Mississippi Ins. Guar. Ass'n, 27 So. 3d 405 (Miss. Ct. App. 2009), aff'd, 27 So. 3d 396 (Miss. 2010).

In this declaratory judgment action, the court found that the Mississippi Insurance Guaranty Association's offset for a claimant's other recovery applied to its statutory claim limit, not the claimant's total damages.

Leitch was injured in an automobile accident. The insurer for the at-fault vehicle was subsequently declared insolvent. As a result, Leitch received \$300,000 from his own uninsured carrier. His alleged damages exceeded \$3,000,000.

Leitch then sought to recover the \$300,000 statutory claim limit from the Mississippi Association. The Association argued it was entitled to offset its \$300,000 claim limit by the \$300,000 uninsured coverage Leitch had received, resulting in no liability on its part. The court agreed with the Association, finding that as the most Leitch could have recovered from the Association under the statutes was \$300,000, that amount was to be reduced by the \$300,000 in other coverage he received.

- Palmer v. Montana Ins. Guar. Ass'n, 779 P.2d 61 (Mont. 1989).

In this declaratory judgment action, the court held that the Montana Insurance Guaranty Association's offset for a claimant's other recovery should be applied to reduce the Association's \$300,000.00 statutory claim limit rather than the claimant's total amount of damages, which exceeded \$1,000,000.00.

Palmer, the claimant, suffered injuries in an automobile accident, and the parties stipulated that his damages exceeded \$1,000,000.00. He sought to recover those damages from the insurer of the manufacturer of the helmet he was wearing at the time of the accident. When that insurer became insolvent, the claim was lodged against the Montana Insurance Guaranty Association. However, because the helmet manufacturer was an Idaho corporation, Palmer was first required to make a claim against the Idaho Insurance Guaranty Fund, and he received \$300,000.00 from that Fund.

Palmer then sought to recover the \$300,000.00 statutory claim limit from the Montana Insurance Guaranty Association as well. The Montana Association argued it was entitled to offset its \$300,000.00 liability by the \$300,000.00 Palmer had already received from the Idaho Fund, resulting in no liability to Palmer. The court agreed, finding that the offset provision was not ambiguous and "additionally limited" the Association's statutory claim limit. Because Palmer had already received \$300,000.00,

the Montana Association's liability was completely offset even though this resulted in a recovery of less than the total amount of Palmer's damages.

- New Hampshire Ins. Guar. Ass'n v. Pitco Frialator, Inc., 705 A.2d 1190 (N.H. 1998).

In this declaratory judgment action, the court held that the New Hampshire Insurance Guaranty Association's offset for a claimant's other recovery should be applied to reduce the Association's \$300,000.00 statutory claim limit rather than the claimant's total amount of damages of \$500,000.00.

A bakery employee suffered injuries in a work-related accident and received over \$300,000.00 in workers' compensation benefits. He then brought suit against the manufacturer of the bakery equipment which allegedly caused the accident. The manufacturer's insurer was declared insolvent while the suit was pending. The employee and the manufacturer settled the suit for \$500,000.00, and the manufacturer paid the employee this sum.

The manufacturer then sought reimbursement from the New Hampshire Guaranty Association due to its insurers' insolvency. The New Hampshire Association argued that it was entitled to offset its \$300,000.00 statutory claim limit by the \$300,000.00 the employee received for workers' compensation. The court agreed, finding that the offset statute "requires" the offset to be applied to reduce the statutory claim limit rather than a claimant's total amount of damages. The court noted that the "amount payable on a covered claim under this chapter" is the statutory claim limit of \$300,000.00, and the offset provision provides that "this \$300,000 'amount payable' must 'be reduced by' the \$300,000 of workers' compensation payments." Again, the Association's liability was completely offset.

- Oglesby v. Liberty Mut. Ins. Co., 832 P.2d 834 (Okla. 1992).

In this action, the United States District Court for the Eastern District of Louisiana certified questions of law to the Oklahoma Supreme Court. One of the certified questions was whether the Oklahoma Guaranty Association's statutory cap would be reduced by a claimant's other recovery. The court found that such amounts would be applied to reduce the Association's \$150,000.00 statutory claim limit.

An employee was killed in a work-related accident. His wife and children began receiving workers' compensation payments. They also brought a suit against the two manufacturers of the equipment which allegedly caused the accident. The insurer for one of the manufacturers was liquidated, and as a result, the Oklahoma Guaranty Association was added as a defendant. His wife moved for summary judgment, seeking a determination of whether the Association was entitled to a credit for the amounts received for workers' compensation or from the insurer of the other manufacturer. The Court agreed with the Association's argument that the recoveries obtained from these other sources must be applied to reduce its \$150,000.00 statutory cap.

- Blackwell v. Pennsylvania Ins. Guar. Ass'n, 567 A.2d 1103 (Pa. Super. Ct. 1989).

In this case, the court held that the Pennsylvania Insurance Guaranty Association's offset for a claimant's other recovery should be applied to reduce the Association's \$300,000.00 statutory claim limit rather than the claimant's total amount of damages, which were at least \$365,000.00.

Blackwell suffered injuries in an automobile accident, and the parties stipulated that her damages exceeded \$365,000.00. The insurer for the tractor trailer that struck the vehicle in which Blackwell was a passenger was subsequently declared insolvent. As a result, Blackwell recovered \$65,000.00 from uninsured motorist policies.

She then asserted a claim against the Pennsylvania Association, seeking \$299,900 (the Association's \$300,000 statutory claim limit less its \$100 deductible). The Association argued that the other recovery of \$65,000 should reduce its statutory claim limit rather than Blackwell's total damages. The court agreed, finding that the offset provision was clear and unambiguous. "Any amount payable on a covered claim" was \$299,900. This amount "shall be reduced by the amount of any recovery." Therefore, the Pennsylvania Association was only liable to Blackwell in the amount of \$234,900.00.

- Virginia Prop. & Cas. Ins. Guar. Ass'n v. Int'l Ins. Co., 385 S.E.2d 614 (Va. 1989).

In this case, the court held that the Virginia Insurance Guaranty Association could reduce the amount it pays on a claim by a claimant's other recovery. Foster was injured in an automobile accident and obtained a \$50,000 judgment against the at-fault driver. The at-fault driver's insurer subsequently became insolvent.

As a result, Foster demanded payment under his own uninsured coverage and from the Virginia Association. The court ruled that Foster was required to exhaust his uninsured coverage before the Association's liability would be triggered and the "Association is entitled to reduce the amount it pays by the amount Foster receives from [his uninsured carrier]."

- Prutzman v. Armstrong, 579 P.2d 359 (Wash. 1978).

In this declaratory judgment case, the court held that the Washington Insurance Guaranty Association's offset for a claimant's other recovery should be applied to reduce its statutory claim limit.

Prutzman was injured in a car accident and sued the at-fault driver. The at-fault driver was insured for \$15,000 but his insurance company subsequently became insolvent.

Prutzman then brought a declaratory judgment action against her own uninsured carrier and the Washington Association. The court was asked to decide the Association's

liability on the at-fault driver's policy in light of Prutzman's own uninsured policy limits of \$15,000. The court held that the Association's liability was the \$15,000 policy limit "minus the amount of any recovery from [Prutzman's] own insurer." Because she had \$15,000 available from her own insurer, the Washington Association had no liability to Prutzman.

STATE OF SOUTH CAROLINA

COUNTY OF BAMBERG

Janette Buchanan, individually,  
and as Personal Representative  
of the Estate of James S. Buchanan,

Petitioner,

v.

Eddie R. Best, Travis Scott d/b/a  
Fiscal Transportation,

Respondents.

IN THE COURT OF COMMON PLEAS

CASE NO: 2008-CP-05-122

ORDER APPROVING SETTLEMENT

FILED  
BAMBERG COUNTY  
2014 FEB 24 PM 3:12  
JAMES S. HERS  
CLERK OF COURT  
BAMBERG, SC

This matter comes before the Court upon the Petition of Janette Buchanan Personal, Personal Representative of the Estate of James Buchanan, deceased, for approval of a Settlement Agreement arising out of a motor vehicle accident that occurred on or about January 7, 2008 on or near US Highway 321, in or around Bamberg County, South Carolina.

The Court has been advised by the parties that Respondents have negotiated a settlement on behalf of the Petitioner. The Court heard testimony regarding the facts of the underlying accident or occurrence, the statutory beneficiaries and heirs at law of James Buchanan, the known claims against the Estate of James Buchanan, and the proposed settlement. Upon review of the Petition for Approval of Settlement and consideration of the evidence before the Court, this Court finds that the proposed Settlement Agreement is fair, reasonable and in the best interests of the statutory beneficiaries, heirs at law and the Estate of James Buchanan, and should be approved.

NOW THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that Janette Buchanan, as Personal Representative of the Estate of James Buchanan, is hereby authorized and

A TRUE COPY directed to accept the Settlement Agreement (attached as Exhibit A) in settlement of any and all

Attest.....  
J. B. HERS  
CLERK OF COURT  
BAMBERG COUNTY, SC

DAE

EXHIBIT

A

property or personal injury claims, wrongful death claims, survival claims, liens and subrogation, known and unknown arising from the subject accident on January 7, 2008.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that as a result of the claims made by Petitioner Janette Buchanan, as Personal Representative for James Buchanan, the parties agree that the amount of damages incurred by the Plaintiff against Respondents Best and Scott is agreed to be Eight Hundred Thousand Dollars (\$800,000.00), and the Guaranty Fund hereby acknowledges a claim for payment by the Plaintiff of those damages as limited below. Petitioner will not seek to recover against any personal or corporate assets of Eddie Best, Travis Scott, or Fiscal Transportation, and hereby abandons all claims against said assets. The survival action is dismissed with prejudice. The Plaintiff irrevocably waives any right to seek damages for a survival action against the Defendants. The settlement herein is for the wrongful death cause of action. There are arguments raised by both parties as to the effect of a \$1,000,000 liability policy maintained by the Pelotes and a similar policy available through Strobel Tire Company (a former party in this lawsuit); the applicability of those policies under any potential comparative negligence verdict; and the amount of any set-off for which the Guaranty Fund would be entitled under South Carolina Code Annotated Section 38-31-10 *et seq.* Pursuant to the Settlement Agreement the Guaranty Fund will not assert a set-off for either the full \$1,000,000 Pelote policy or for the Strobel policy, but will assert a set-off for those funds actually received by the Plaintiff from the Pelotes' Carrier under said policy, the amounts received from Strobel Tire, and the net receipt of any Worker's Compensation benefits received by the Plaintiffs. The amount that the Plaintiffs have received constituting a set off is Two Hundred Twenty-Five Thousand Dollars (\$225,000.00) from the Pelote's carrier, \$20,000

from Strobel Tire, and the Worker's Compensation benefits of \$131,622.00 in death and funeral expenses paid to the widow of James Buchanan.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the parties agree that the set-off amount is Three Hundred Seventy-Six Thousand Six Hundred Twenty-Two Dollars (\$376,622.00), which is the total amount received by the Plaintiff as set forth in paragraph 6 of the Stipulations and Settlement Agreement Between the Parties.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the parties agree that one issue remains. That issue is the interpretation as to how much money, if any, to which the Plaintiff is entitled from the Guaranty Fund under the applicable statute. It is the Plaintiff's position that the set-off amount under the applicable statute is deducted from the \$800,000 value of the case (agreed to above) and then any remaining unrecovered funds are reduced to the \$300,000 cap available under the Guaranty Fund statute. It is the Defendants' position that pursuant to statute any amounts received by the Plaintiff are deducted from the Guaranty Fund's \$300,000 maximum exposure, and therefore, if the payments received by Plaintiff from other sources total more than \$300,000, the Guaranty Fund will not pay any money.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the parties agree that either party may file a declaratory judgment action in the Bamberg County Court of Common Pleas to resolve this statutory set-off issue.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Janette Buchanan shall abide by all applicable laws regarding the distribution of these assets and proceeds of this settlement.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that any money collected

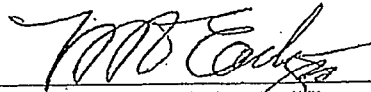
pursuant to the declaratory judgment action shall be allocated towards the wrongful death claim and the remaining Zero and no/100 (\$0.00) Dollars of the settlement proceeds shall be allocated towards the survival claim, which this Court has dismissed with prejudice.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Janette Buchanan, Personal Representative of the Estate of James Buchanan, shall timely deposit the settlement proceeds allocated towards the survival claim in an escrow account in an appropriate financial institution; these funds shall be maintained in said account until the time for filing creditor claims has past, and shall be used to pay any valid claims against the estate of James Buchanan.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that, as set forth at §15-51-42(E), S.C. Code of Laws (as amended), the South Carolina Property and Casualty Insurance Guaranty Association, a/k/a The Guaranty Association, as the person or entity paying the settlement proceeds and all those on whose behalf the payment is made, including Respondents Eddie Best, Travis Scott d/b/a Fiscal Transportation, South Carolina Property and Casualty Insurance Guaranty Association, a/k/a The Guaranty Association, and Aequicap Insurance Company in liquidation, their current and former employees, agents, servants, heirs, successors, insurers, assigns, any and all other persons, firms and corporations, and any other persons who could be responsible because of the actions of the persons on whose behalf the settlement proceeds are being paid, are relieved and discharged from further liability and shall have no obligation or legal duty to see to the appropriate or proper distribution of the settlement proceeds among either the wrongful-death beneficiaries or those entitled to the proceeds of the settlement of the survival action; AND, once payment has been made to the Personal Representative, the obligations of the South Carolina Property and Casualty

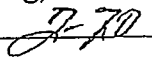
Insurance Guaranty Association, a/k/a The Guaranty Association, as the person or entity making the payment and those on whose behalf the payment is being made, including Respondents Eddie Best, Travis Scott d/b/a Fiscal Transportation, South Carolina Property and Casualty Insurance Guaranty Association, a/k/a The Guaranty Association, and Aequicap Insurance Company in liquidation, their current and former employees, agents, servants, heirs, successors, insurers, assigns and any and all other persons, firms and corporations related to them, and all those who could be responsible for the actions of these persons, are fully and completely released and finally and forever discharged from any further responsibility in connection with the action or actions.

AND IT IS SO ORDERED.



The Honorable Doyet A. Early, III  
Presiding Judge, Second Judicial Circuit

Bamberg, South Carolina

, 2014

STATE OF SOUTH CAROLINA

COUNTY OF BAMBERG

Janette Buchanan, individually, and as  
Personal Representative of the Estate of  
James S. Buchanan,

Plaintiff,

v.

Eddie R. Best, Travis Scott, d/b/a Fiscal  
Transportation, Strobel Tire Company,  
Roger Pelote, and Willie Pelote,

Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO: 2008-CP-05-122

**STIPULATIONS AND SETTLEMENT  
AGREEMENT BETWEEN PARTIES**

Plaintiff Janette Buchanan, individually, and as Personal Representative of the Estate of James S. Buchanan is represented by Daniel W. Luginbill, Esquire. Defendants Eddie R. Best and Travis Scott, d/b/a Fiscal Transportation are now represented by Daniel R. Settana, Jr., Esquire.

By and through their undersigned attorneys the parties in this case stipulate to the following facts and make the following Settlement Agreement as it pertains to this specific lawsuit and no other claims by other parties arising out of the same occurrence:

**FACTS**

This lawsuit and action arises out of an accident on or about January 7, 2008 in Bamberg County, South Carolina. Defendant Eddie Best was driving a logging truck owned by Defendant Travis Scott, d/b/a Fiscal Transportation. Decedent James S. Buchanan was driving a tractor trailer owned by CCC Transportation. Willie Pelote, a former party to this action, was driving a tractor trailer directly behind Defendant Best, in the same direction as Mr. Best. Willie Pelote's brother, Roger Pelote, was also driving a tractor trailer traveling behind Willie Pelote. At the

time of the accident Best and the Pelotes were traveling southbound on US Highway 321. James Buchanan was traveling northbound on US Highway 321.

As Best was traveling southbound, two wheels came off of his trailer tandems and collided with Buchanan's vehicle. Buchanan's tractor trailer then collided with the tractor trailer driven by Roger Pelote. Mr. Buchanan's tractor trailer caught fire. Mr. Buchanan died at the scene as a result of the accident.

Allegations were made after suit was filed that Strobel Tire Company performed work or maintenance on the Fiscal Transportation logging truck.

Suit was filed in the Bamberg County Court of Common Pleas. Sometime thereafter, the insurance carrier for Defendants Eddie Best and Travis Scott, d/b/a Fiscal Transportation, Aequicap Insurance Company, was declared insolvent in the State of Florida. The South Carolina Property and Casualty Insurance Guaranty Association ("The Guaranty Fund") assumed the defense of these two parties. The Guaranty Fund as an entity, and the rights to any recovery by Claimants through the Guaranty Fund, is governed by The South Carolina Property and Casualty Insurance Guaranty Association Act, South Carolina Code Annotated Section 38-31-10, et. seq.

This Agreement is made to avoid a trial in this case as to liability and damages. Said trial was to take place in the Bamberg County Court of Common Pleas.

#### SETTLEMENT AGREEMENT

In an effort to resolve the claims by Plaintiff Janette Buchanan, individually, and as Personal Representative of the Estate of James S. Buchanan the parties, without admitting liability, have reached a settlement agreement, the terms of which are set forth below:

1. The amount of damages incurred by the Plaintiff against Defendants Best and

Scott is agreed to be Eight Hundred Thousand Dollars (\$800,000.00), and the Guaranty Fund hereby acknowledges a claim for payment by the Plaintiff of those damages as limited below.

2. Plaintiff will not seek to recover against any personal or corporate assets of Eddie Best, Travis Scott, or Fiscal Transportation, and hereby abandons all claims against said assets.

3. The survival action is dismissed with prejudice. The Plaintiff irrevocably waives any right to seek damages for a survival action against the Defendants.

4. The settlement herein is for the wrongful death cause of action.

5. There are arguments raised by both parties as to the effect of a \$1,000,000 liability policy maintained by the Pelotes and a similar policy available through Strobel Tire Company; the applicability of those policies under any potential comparative negligence verdict; and the amount of any set-off for which the Guaranty Fund would be entitled under South Carolina Code Annotated Section 38-31-10 et seq. Pursuant to this Settlement Agreement the Guaranty Fund will not assert a set-off for either the full \$1,000,000 Pelote policy or for the Strobel policy, but will assert a set-off for those funds actually received by the Plaintiff from the Pelotes' Carrier under said policy, the amounts received from Strobel Tire, and the net receipt of any Worker's Compensation benefits received by the Plaintiffs. The amount that the Plaintiffs have received constituting a set off is Two Hundred Twenty-Five Thousand Dollars (\$225,000.00) from the Pelote's carrier, \$20,000 from Strobel Tire, and the Worker's Compensation benefits of \$131,622.00 in death and funeral expenses paid to the widow of James Buchanan.

6. The parties agree that the set-off amount is Three Hundred Seventy-Six Thousand Six Hundred Twenty-Two Dollars (\$376,622.00), which is the total amount received by the Plaintiff as set forth in paragraph 6 of this Agreement.

7. The parties agree that one issue remains. That issue is the interpretation as to how much money, if any, to which the Plaintiff is entitled from the Guaranty Fund under the applicable statute. It is the Plaintiff's position that the set-off amount under the applicable statute is deducted from the \$800,000 value of the case (agreed to above) and then any remaining unrecovered funds are reduced to the \$300,000 cap available under the Guaranty Fund statute. It is the Defendants' position that pursuant to statute any amounts received by the Plaintiff are deducted from the Guaranty Fund's \$300,000 maximum exposure, and therefore, if the payments received by Plaintiff from other sources total more than \$300,000, the Guaranty Fund will not pay any money.

8. The parties understand and further agree that there is currently pending a Declaratory Judgment Action in the appellate courts to determine the value of the underlying Aequicap Insurance policy that could reduce the amount of the Guaranty Fund's exposure, and Plaintiff's potential recovery, to \$75,000.00.

9. The parties agree that either party may file a declaratory judgment action in the Bamberg County Court of Common Pleas to resolve this statutory set-off issue.

10. The purpose for this Settlement Agreement is to avoid a lengthy and expensive trial on liability and damages after which the parties would still have remaining the two issues cited in this agreement.

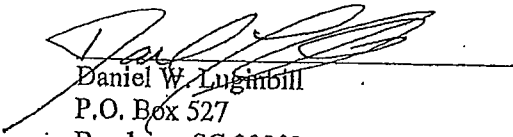
11. The parties also make clear that this is a resolution of a doubtful and disputed claim.

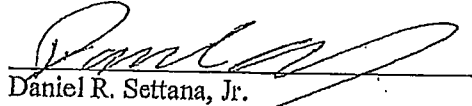
12. The parties agree that any wrongful death settlement for funds is subject to the terms of the South Carolina law governing wrongful death actions, which is contained in S.C. Code Ann. §§15-51-10 through 15-51-60. This includes S.C. Code Ann. §§15-51-41 and 15-51-

42, which require court approval for any wrongful death settlement. This Agreement has been reached without payment of any funds by the Guaranty Fund on behalf of Defendants Eddie R. Best and Travis Scott, d/b/a Fiscal Transportation to Plaintiff.

13. The Guaranty Fund reserves and does not waive any defense.

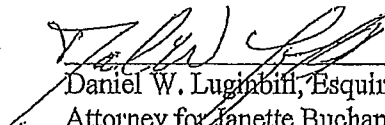
WE CONSENT:

  
Daniel W. Luginbill  
P.O. Box 527  
Bamberg, SC 29003  
(803) 245-7799  
Attorney for Plaintiff Janette Buchanan

  
Daniel R. Settana, Jr.  
McKay, Cauthen, Settana & Stubley, P.A.  
P.O. Drawer 7217  
Columbia, SC 29202  
(803) 256-4645  
Attorney for Defendants Eddie R. Best and Travis Scott, d/b/a Fiscal Transportation

CERTIFICATION OF COUNSEL

I, the undersigned attorney for Janette Buchanan, Personal Representative of the Estate of James Buchanan, hereby certify that I have carefully reviewed and considered the proposed settlement in this matter and I have discussed the proposed settlement with Janette Buchanan, Personal Representative of the Estate of James Buchanan I believe that the settlement is fair, reasonable, and in the best interests of the statutory beneficiaries and the Estate of James Buchanan.

  
Daniel W. Luginbill, Esquire  
Attorney for Janette Buchanan,  
Personal Representative of the  
Estate of James Buchanan

CERTIFICATE OF SERVICE

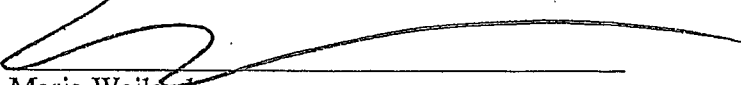
I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Defendant, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail,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

Pleadings:

**Memorandum in Support of Defendant's Motion for Summary Judgment and in Opposition to Plaintiff's Cross-Motion for Summary Judgment.**

Counsel Served:

Daniel W. Luginbill, Esquire  
Wilson, Luginbill & Kirkland, LLC  
P.O. Box 1150  
Bamberg, SC 29003

  
Maria Weiland  
Administrative Assistant

May 23, 2014

STATE OF SOUTH CAROLINA )  
COUNTY OF BAMBERG )

IN THE COURT OF COMMON PLEAS  
SECOND JUDICIAL CIRCUIT  
CASE NO.: 2013-CP-05-63

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

Plaintiffs,

v.

The South Carolina Property and Casualty  
Insurance Guaranty Association,

Defendant.

PLAINTIFF'S MEMORANDUM  
IN SUPPORT OF  
SUMMARY JUDGMENT

Plaintiffs offer the following Memorandum in Support of their Motion for Summary Judgment.

#### FACTS

On January 7, 2008, James S. Buchanan was involved in a motor vehicle accident in Bamberg County, South Carolina. A log truck owned by Travis Scott and driven by Eddie Best had a set of tandem tires come off the axle. This set of tires struck the front of Mr. Buchanan's vehicle, breaking the front axle. As a result, Mr. Buchanan's truck crossed the centerline striking another tractor-trailer. The resulting collision caused Mr. Buchanan's truck to catch fire and he was incinerated in the cab of his truck.

Mr. Scott's vehicle was insured for One Million (\$1,000,000) by Aequicap Insurance Co. (Aequicap). Aequicap went into receivership in the state of Florida. The Defendant has assumed management of claims made against South Carolina insureds for causes of actions made against the Florida Guaranty Fund.

Pursuant to a settlement of the underlying tort case, (Case Number 2008-CP-05-122) which was designed to frame the outstanding issues between the parties, the damages suffered by the Plaintiff are \$800,000. After giving the Association credit for \$376,622 received by the Plaintiffs pursuant to Florida Workers Compensation benefits and settlements with certain co-defendants in the underlying case, there remains a “balance” due to Plaintiffs from the Association of \$423,378, which obviously exceeds the \$300,000 cap of S.C. Code Ann., §38-31-60. Defendants claim that the credits should be applied from the cap, which would leave a balance of zero. Plaintiff asserts the credits are applied to the full amount of known damages, leaving the Association liable for its full statutory limits of \$300,000.

Given the stipulation of facts the parties have entered as part of the wrongful death settlement, there are no issues of material fact in dispute. The only question is one of law for the Court. Both parties have moved for summary judgment, and the court’s decision is one of statutory interpretation only.

## ARGUMENTS

### **I. THE PLAIN LANGUAGE OF THE STATUTES MANDATES THAT THE ASSOCIATION HAS AN OBLIGATION TO PAY \$300,000 TO THE PLAINTIFF.**

The South Carolina Property and Casualty Insurance Guaranty Association Act, S.C. Code Ann, §38-31-10, et seq. (the “Act”), is a remedial statute designed to “protect consumers in the event that their insurer becomes insolvent.” *Hudson v. Lancaster Convalescent Center*, 7543 S.E.2d 486, 407 S.C. 112 (2014). “[The Association’s] purpose is to provide some protection to insureds whose insurance companies become insolvent.” *South Carolina Property and Cas. Ins. Guar. Ass’n v. Carolinas Roofing and*

*Sheet Metal Contractors Self-Insurance Fund*, 446 S.E.2<sup>nd</sup> 422, 424, 315 S.C. 555, 557 (1994).

Examining the text of the applicable statutes reveals portions of the statute are most ambiguous. The Association has asserted that *Hudson, supra*, held that the entire chapter is unambiguous. The case held nothing of the sort, and instead discussed only the ability of the Association to sue or be sued. *Hudson* held that this particular language was unambiguous. *Hudson* did look at the definition of covered claim, but only in the context of determining whether the Association could be liable in suit for its own actions, in this case penalties and interest for not paying a claim due under a policy of workers compensation insurance. The Court held it was liable, declining to limit the Association's liability to the payment of covered claims only.

S.C. Code Ann., §38-31-20 defines "covered claim" as "... an unpaid claim ... which arises out of and is within the coverage ... of an insurance policy ... if the insurer is insolvent ..." The only limitation within the definition is that the claim must be within the coverage limits of the policy written by the defunct insurer. Nothing in the definition of "covered claim" refers to a limit of the Association's liability to pay on a claim. This is logical, as no one making a claim should be allowed to seek an amount greater than what the policy could pay out if it was in full force effect.<sup>1</sup>

S.C. Code Ann. §38-31-60 limits the extent of the Association's liability to pay a claim to \$300,000. §38-31-60(a)(iv) provides, in pertinent part, "The association is obligated to the extent of claims existing before the determination of insolvency ..." This

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<sup>1</sup> It is important to note that all but one of the Associations cases listed in its Appendix A to its brief are cases involving setoff's applied to the policy limit, rather than the statutory limit, despite who they are framed in the brief of the Association.

*obligation* includes only the amount each covered claim is in excess of two hundred fifty dollars and is less than three hundred thousand dollars.” (emphasis added). Under the plain language of this section, it is the duty to pay that is limited, not the amount of the covered claim. This is a critical distinction in determining how to apply the set-offs.

S.C. Code Ann., §38-31-100(1) gives the Association a setoff against “a covered claim” for the full limits of any other coverage from any other insurer that may apply. If there are no limits, then the “claim must be reduced by the total recovery.” Of critical importance to understanding the legislatures intent is the fact that §38-31-100(1) applies the set off to the “covered claim,” rather than the “Associations obligation.”<sup>2</sup>

Applying this framework of statutory language to the facts of this case, there was a claim pending before the insolvency, as the wreck happened prior to the insolvency. Neither party disputes this is a covered claim. The *covered claim* is for \$800,000, per the approved wrongful death settlement. The offsets of §38-31-100(1), \$376,622, are then applied to the \$800,000 claim, leaving a balance of \$423,378. The Association’s *obligation* to pay is then further limited to \$300,000 by action of §38-31-60.

It is clear that the purpose of this section is to prevent a double-recovery by an insured making a claim against a solvent insurer then making the same claim against the Association. By following the plain logical interpretation of the statutory text, this purpose is met, while also fulfilling the main purpose of the Act by providing coverage.

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<sup>2</sup> In this case, the damages were agreed upon and the set off limited to the amounts actually received, rather than policy limits, under the agreement of the parties settling the wrongful death claim. This was done with the intent to better frame the issue to be decided in this declaratory judgment action.

**II. S.C. ANN. §38-31-60 IS IDENTICAL IN FUNCTION TO THE TORT CLAIMS ACT, WHICH APPLIES THE SETOFFS TO DAMAGES, NOT THE CAP.**

A cardinal rule of statutory interpretation is to determine the intent of the legislature. *Jones v. State Farm Mut. Auto. Ins. Co.*, 612 S.E.2d 719, 364 S.C. 222, (Ct. App. 2005). Where the language of an act is ambiguous or gives rise to doubt as to legislative intent, a court may search for that intent beyond the borders of the act itself. *Id.* While Plaintiff contends the relevant language of the statute, while less than artfully drafted, is sufficiently clear to control the facts of this case. To the extent ambiguity remains, looking to similar statutes within South Carolina's statutory framework helps guide the inquiry.

In construing a statute, the court looks to the language as a whole in light of its manifest purpose. *State v. Dawkins*, 352 S.C. 162, 573 S.E.2d 783 (2002); *Adams v. Texfi Indus.*, 320 S.C. 213, 464 S.E.2d 109 (1995). It is well settled that statutes dealing with the same subject matter are *in pari materia* and must be construed together, where possible, to achieve a harmonious result. *Joiner, ex rel. Rivas v. Rivas*, 536 S.E.2d 372, 342 S.C. 102 (2000). §38-31-10, et seq. deals explicitly with the application of limitations on the liability of the state, in this case the non-profit Association created by the State of South Carolina, to persons who have been injured. Accordingly, these statutes must be read together to produce a harmonious treatment of the issues.

There are no reported cases interpreting S.C. Code Ann., §38-31-60. However, there are other limits on the liability of state entities in South Carolina's legislative framework. The South Carolina Tort Claim's Act, S.C. Code Ann., §15-78-10, et seq.,

contains various provisions limiting the liability of state entities for claims made against them. Specifically, S.C. Code Ann., §15-78-120 provides, in pertinent part, “no person shall recover in any action or claim brought hereunder a sum exceeding three hundred thousand dollars because of loss arising from a single occurrence regardless of the number of agencies or political subdivision involved.”

§38-31-100(1) has the same purpose as the Tort Claims Act caps in that it prevents a double recovery as discussed above, and protects the state from unlimited exposure. This interpretation gains further support in §38-31-100(2) in that the section specifically contemplates a claimant being able to recover from more than one Guaranty Association, and that the S.C. Association is entitled to credit for the amount of recovery the claimant receives from such other Association. Again, the purpose of the language is to prevent double recovery, not prevent full recovery, by the claimant. The Association notes this purpose in its brief when it cites to the following language in *Colorado Ins. Guar. Ass’n v. Menor*, 166 P.2<sup>nd</sup> 205, 215 (Colo. App. 2007), “. . . the fund should be reserved to pay insureds of insolvent insurers who have not recovered the same damage from another source.” Here, Plaintiff has not recovered the same damages, rather, the Estate is pursuing the damages still unpaid after applying the setoff and the caps.

The issue of how to apply a setoff from a joint tortfeasor in a Tort Claims Act case was specifically decided in *Smalls v South Carolina Dept. of Educ.*, 528 S.E.2<sup>nd</sup> 682, 339 S.C. 208 (Ct. App. 2000). In *Smalls*, the Court held, “[c]ontrary to Department’s argument, it is not entitled to a set-off from the amount of the cap because Smalls has not recovered all damages awarded by the jury and application of a set-off in this manner would unfairly deprive a plaintiff of the verdict.” *Id.*, at 689, at 222. In *Smalls*, the

Plaintiff's settlements with joint tortfeasors were less than the jury's verdict. Therefore, applying the setoff to the verdict, rather than the cap, did not result in a double recovery and thus "we see no equitable reason to apply the credit in the manner urged by the Department." *Id.*

The same manner of applying setoffs also applies to actions against charitable organizations. S.C. Code Ann., §33-56-180(A) states "[a] person...may recover in an action brought against the charitable organization only the actual damages he sustains in an amount not exceeding the limitations on liability imposed in the South Carolina Torts Claims Act ... ." As *Smalls* sets out the manner in which the cap and set offs are applied to it for Tort Claims Act cases, it follows that the same rule would apply to charitable immunity cases as well.

Of note, nothing in Title 38, Chapter 10 clearly sets out that a claimant may only receive \$300,000 in any event. It only limits the funds payment to a single claimant to \$300,000. If the purpose of the Act is to protect South Carolina citizens from insurance companies who become insolvent, then the Act is remedial and should be liberally construed in favor of payment to the claimant in order to best accomplish that goal. Adopting the interpretation suggested by the Association would prevent full compensation, and in this case, any compensation from the Association. It would also work to dissuade claimants from resolving claims against joint tortfeasors who may have little proportional liability, thus increasing the likelihood of protracted litigation and actually increasing the Fund's exposure. As such, it is against public policy to adopt such an argument.

For the reasons set forth above, Plaintiffs assert that this Court should issue its Order GRANTING Plaintiffs' Motion for Summary Judgment and finding they are entitled to payment from the Association of \$300,000, and directing that Defendant immediately pay same, and to deny Defendant's Motion for Summary Judgment.

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May 27, 2014

STATE OF SOUTH CAROLINA )

COUNTY OF BAMBERG )

IN THE COURT OF COMMON PLEAS

SECOND JUDICIAL CIRCUIT

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

Plaintiffs,

vs.

The South Carolina Property and  
Casualty Insurance Guaranty  
Association;

Defendant.

Civil Action No. 2013-CP-05-63

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

JAMES B. HIER  
CLERK OF COURT  
BAMBERG, SC

2014 JUN 25 AM 10:31

FILED  
BAMBERG COUNTY

Pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, Defendant The South Carolina Property and Casualty Insurance Guaranty Association ("Association"), by and through its undersigned counsel, hereby submits this Supplemental Memorandum in Support of its Motion for Summary Judgment as to the declarations sought by Plaintiffs Janette Buchanan and Shana Smallwood, individually, and as Co-Personal Representatives of the Estate of James S. Buchanan ("Plaintiffs") and in Opposition to Plaintiffs' Cross-Motion for Summary Judgment.

- I. Plaintiffs misconstrue the plain language of the Guaranty Act which unambiguously requires that the subject offset be deducted from the Association's \$300,000 statutory claim limit rather than a claimant's total amount of damages.

Plaintiffs admit that the Association's "duty to pay" a covered claim is limited to \$300,000 pursuant to S.C. Code Ann. § 38-31-60(a)(iv). See Plaintiffs' Memorandum in Support of Summary Judgment at 3-4. Plaintiffs, however, argue that the offset provided in S.C. Code Ann. § 38-31-100(1) applies to reduce a "covered claim" rather than the Association's

obligation to pay that claim. Id. at 4. Plaintiffs do not cite to a single case for this proposition which addresses South Carolina's Association or another state's guaranty association statutory regime.

Furthermore, this argument ignores the plain language of the statute. Specifically, the South Carolina Property and Casualty Insurance Guaranty Act (the "Guaranty Act") provides that "[a]ny amount payable on a covered claim under this chapter **must be reduced** by the full limits of [the] other coverage" received by the Plaintiffs for the same loss. S.C. Code Ann. § 38-31-100(1) (emphasis added). Pursuant to Plaintiffs' own admission, the amount payable on a covered claim can never be more than \$300,000 under the Guaranty Act. Therefore, the offset must be applied to reduce the Association's \$300,000 statutory maximum obligation in this matter.

The application of the offset to the Association's duty to pay a claim, rather than a claimant's total damages amount, is further supported by S.C. Code Ann. § 38-31-100(1)(b). This subsection provides that "[t]o 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 Ann. § 38-31-100(1)(b) (emphasis added). Again, the offset provision explicitly references the reduction of the Association's obligation, an amount which cannot be more than \$300,000. Therefore, Plaintiffs' argument that Section 38-31-100(1) "applies the set off to the 'covered claim,' rather than the 'Associations [sic] obligation'" is completely discounted by the words of the statute itself. See Plaintiffs' Memorandum in Support of Summary Judgment at 4.

In addition, Plaintiffs misconstrue what is meant by a "covered claim" and ignore the ordinary meaning of the words "covered claim" when they assert that their covered claim is

for \$800,000. Id. at 4. While Plaintiffs claimed damages in the amount of \$800,000, their claim is “covered” only to the extent the Association has any obligation to pay the claim, which, again, is admittedly \$300,000 at most. In essence, a “covered claim” and the Association’s obligation are synonymous by operation of the statutory framework. Similarly, in the usual insurance context, one might have a claim for damages from a motor vehicle accident but that claim would only be “covered” to the extent of the insurance company’s policy limits for that claim. The statutory regime is similarly analogous to policy limits. The General Assembly adopted the limits and the reduction to cap the obligation of the Association. Applying the plain, ordinary meaning of the statute’s words, Plaintiffs’ claim is covered only up to \$300,000, and the offset is applied to reduce the amount of the Association’s obligation.

Moreover, although Plaintiffs claim the applicable statutes are “most ambiguous,” they do not identify any ambiguity. See Plaintiffs’ Memorandum in Support of Summary Judgment at 3. An alleged ambiguity of a statute must be explained, and a simple allegation of ambiguity is insufficient:

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 v. Gov’t Employees Ins. Co.*, 405 S.C. 68, 75, 747 S.E.2d 436, 440 (2013). The Association submits that there can be no explanation of how the applicable statutes are capable of more than one meaning or obscure in meaning in any way because their plain language clearly sets forth their one and only meaning—that the amount payable by the Association on Plaintiffs’ covered claim, which Plaintiffs admit cannot be more than \$300,000, must be reduced by the other coverage Plaintiffs received.

II. Plaintiffs misunderstand the South Carolina Supreme Court's recent decision in Hudson v. Lancaster Convalescent Ctr., 407 S.C. 112, 754 S.E.2d 486 (2014), in which the Supreme Court found that the Guaranty Act was not ambiguous.

Plaintiffs argue that Hudson determined only that S.C. Code Ann. § 38-31-60(j) relating to the Association's ability to sue or be sued was unambiguous and that the Association wrongly asserts that the Hudson ruling went beyond that single provision to find that the entire Guaranty Act was not ambiguous. See Plaintiffs' Memorandum in Support of Summary Judgment at 3. However, Plaintiffs fail to understand the full import of the Hudson decision.

In Hudson, the court was asked to determine the applicability of S.C. Code Ann. § 38-31-60(b) (setting forth the Association's obligation on "covered claims") and S.C. Code Ann. § 38-31-20(8) (defining "covered claim") to the Association's direct liability referenced in S.C. Code Ann. § 38-31-60(j). 407 S.C. at 123-26, 754 S.E.2d at 492-93. The court's recitation of the applicable law evidences the fact that it was construing several different parts of the Guaranty Act:

It is axiomatic that "words in a statute must be construed in context," and "the meaning of particular terms in a statute may be ascertained by reference to words associated with them in the statute." Eagle Container Co., LLC v. County of Newberry, 379 S.C. 564, 570, 666 S.E.2d 892, 895 (2008) (citing Mut. Church Ins. Co. v. S.C. Windstorm & Hail Underwriting Ass'n, 306 S.C. 339, 342, 412 S.E.2d 377, 379 (1991)). Further, statutes must be read as a whole and sections which are part of the same general statutory scheme must be construed together and each given effect, if it can be done by any reasonable construction. Higgins v. State, 307 S.C. 446, 415 S.E.2d 799 (1992).

Id. at 124-25; 754 S.E.2d at 492-93. The Hudson court then reached its decision based on its "[r]eading [of] both the covered claims and direct liability statutes together" without finding any ambiguity in the statutory scheme. In short, although the focus in Hudson may have been on a different issue than the one before this Court, the Supreme Court of South Carolina construed various provisions of the Guaranty Act, some of which are at play in this matter, as

recently as January of this year without any difficulty and found the provisions and Guaranty Act to work in harmony. Likewise, S.C. Code Ann. § 38-31-60(a)(iv) and S.C. Code Ann. § 38-31-100(1) must be read together as a whole, giving each one effect, to find that the Association's liability to Plaintiffs cannot be more than \$300,000 and the amount payable by the Association on Plaintiffs' covered claim must be reduced by the other coverage Plaintiffs received, resulting in the Association's statutory cap of \$300,000 being reduced by such other coverage.

**III. Plaintiffs mischaracterize supporting cases from other jurisdictions finding that the offset should be deducted from the Association's statutory claim limit rather than a claimant's total amount of damages.**

Plaintiffs inaccurately depict the cases from other jurisdictions supporting this reading of the offset provision listed by the Association in Appendix A to its Memorandum in Support of Defendant's Motion for Summary Judgment and in Opposition to Plaintiffs' Cross-Motion for Summary Judgment. See Plaintiffs' Memorandum in Support of Summary Judgment at 3 n.1. Plaintiffs assert that only one of the listed cases involved the application of the offset to a statutory limit while the remainder dealt with the application of the offset to a policy limit instead. Id. However, nine of the listed cases involved the application of the offset to the statutory maximum/limit. Jangula v. Ariz. Prop. and Cas. Ins. Guar. Fund., 88 P.3d 182, 183, 185 (Ariz. Ct. App. 2004) ("Under A.R.S. § 20-667(B) (2002), the Fund is obligated to pay Jangula's damages up to the applicable limits of the insolvent insurer's policy or \$99,900, whichever is less. . . . Jangula's allowable recovery from the Fund must be reduced by any amount she has recovered from her own coverage. Because her total recoverable damages exceeded \$115,000, she would be entitled to recover \$99,900 from the Fund if there was no other coverage available. But because she has recovered UIM benefits of \$15,000 from her

own policy, her recovery from the Fund must be reduced by \$15,000. The Fund is obligated, therefore, to pay her \$84,900, and has done so.”); Marra v. Wilson, 2003 WL 367831, at \*4-6 (Del. Super. Ct. Feb. 20, 2003) (“[T]he pertinent part of title 18, section 4212(a) provides that after other potential sources of insurance have been exhausted, ‘[a]ny amount payable on a covered claim under . . . [Delaware’s Insurance Guaranty Act] shall be reduced by the amount of any recovery under such insurance policy.’ The Act further provides that DIGA’s obligations ‘shall be satisfied by paying to the claimant an amount not exceeding \$300,000 . . . .’ Thus it is clear that the Act specifically proscribes the maximum amount a claimant may recover from DIGA; it is equally clear that the Act provides a framework within which DIGA’s liability can be reduced. . . . As section 4212(a) itself states . . . ‘any amount payable on a covered claim under . . . [the Act] shall be reduced . . .’ and section 4208(a)(1)(iii) indicates that such a ‘covered claim’ will never exceed \$300,000, *i.e.* a covered claim will never be a claimant’s full amount of damages. And ‘[w]hen statutory language is both clear and consistent with other provisions of the same legislation and with legislative purpose and intent, a court must give effect to that intent.’ . . . Given Delaware’s statutory framework and this Court’s reading of sections 4212(a) and 4208(a)(1)(iii), combined with what this Court perceives as the policy behind such statutes, the Court finds that the \$100,000 policy tendered by State Farm is properly deducted from DIGA’s \$300,000 limit so that DIGA’s liability to Plaintiffs in this case is \$200,000.”); Cooper v. Huddy, 581 So. 2d 723 (La. Ct. App. 1991), writ denied, 585 So. 2d 552 (La. 1991) (finding that Louisiana’s offset statute unambiguously required application of the Association’s offset for the claimant’s other recovery of \$118,280.56 to reduce the Louisiana Association’s statutory maximum limit of \$149,900, rather than the claimant’s total damages of \$291,604.03, leaving the Association liable to the

claimant for only \$31,619.44); Cox v. Minnesota Ins. Guar. Ass'n, 508 N.W.2d 536 (Minn. Ct. App. 1993) (finding Minnesota's offset statute unambiguously requires the application of the offset after applying the \$299,900 statutory liability limit and, therefore, the claimants' \$299,900 covered claim was offset by the \$599,900 they had received for other coverage, leaving the Minnesota Association with no liability to the claimants); Leitch v. Mississippi Ins. Guar. Ass'n, 27 So. 3d 405, 409 (Miss. Ct. App. 2009), aff'd, 27 So. 3d 396 (Miss. 2010) ("MIGA was entitled to offset its liability with any amount paid by State Farm. State Farm settled its claim with Leitch for the policy limit of \$300,000, which is also the maximum amount for which MIGA may be held liable. Therefore, pursuant to section 83-23-123(1) [Mississippi's offset statute], MIGA was entitled to offset the entire amount of its \$300,000 liability with the \$300,000 State Farm settlement."); Palmer v. Montana Ins. Guar. Ass'n, 779 P.2d 61 (Mont. 1989) (finding that the Montana Association's offset was to be applied to reduce the Association's statutory cap, not the claimant's higher damages amount, as explained in more detail below); New Hampshire Ins. Guar. Ass'n v. Pitco Frialator, Inc., 705 A.2d 1190, 1192-94 (N.H. 1998) ("Despite its seemingly expansive purpose, the statute places several limitations on NHIGA's payment obligations. First, NHIGA's exposure per covered claim is capped at \$300,000. See RSA 404-B:8, I(a). . . . Third, the statute provides: Any person having a claim against an insurer under any provision in an insurance policy other than a policy of an insolvent insurer which is also a covered claim, including but not limited to the provisions of uninsured motorist coverage of any policy, shall be required to exhaust first his right under such policy. Any amount payable on a covered claim under this chapter shall be reduced by the amount of any recovery under such insurance policy. RSA 404-B:12, I (1983). . . . Although the *title* of RSA 404-B:12 suggests that its purpose is merely to prevent

a double recovery, we conclude that the *language* of the provision requires us to subtract the \$300,000 of workers' compensation benefits from NHIGA's \$300,000 statutory cap. . . . Indeed, the '*amount payable* on a covered claim under this chapter' is \$300,000 pursuant to RSA 404-B:(8), I(a); further, this \$300,000 'amount payable' must 'be reduced by' the \$300,000 of workers' compensation payments, according to RSA 404-B:12, I.") (emphasis in original); Oglesby v. Liberty Mut. Ins. Co., 832 P.2d 834, 842 (Okla. 1992) ("[T]he [Association's] obligation is limited to the lesser of \$150,000.00 or the coverage provided in the insolvent insurer's policy. . . . The Oklahoma Guaranty Association insists Oglesby must exhaust her rights against Liberty Mutual and apply the recoveries obtained against the \$150,000.00 statutory cap. We agree."); Blackwell v. Pennsylvania Ins. Guar. Ass'n, 567 A.2d 1103 (Pa. Super. Ct. 1989) (finding that the Pennsylvania Association's offset was to be applied to reduce the Association's statutory cap, not the claimant's higher damages amount, as explained in more detail below); see Appendix A, Memorandum in Support of Defendant's Motion for Summary Judgment and in Opposition to Plaintiffs' Cross-Motion for Summary Judgment.

Although the remaining cases involve the application of the offset to a policy limit, these cases are still instructive here because the policy limit is the statutory limit where the policy limit is less than the statutory cap. S.C. Code Ann. § 38-31-60(a)(iv) ("The association is not obligated to pay a claimant an amount in excess of the obligation of the insolvent insurer under the policy or coverage from which the claim arises."). The same issue before this Court arises in such situations where the damages exceed the policy limits, and the noted courts determined the offset applied to reduce the lesser policy limits rather than the damages amount.

See Appendix A, Memorandum in Support of Defendant's Motion for Summary Judgment and in Opposition to Plaintiffs' Cross-Motion for Summary Judgment.

As evidenced by the cases listed by the Association in Appendix A to its Memorandum in Support of Defendant's Motion for Summary Judgment and in Opposition to Plaintiffs' Cross-Motion for Summary Judgment, the reading of the offset statute advanced by the Association is widely supported by courts across the country applying their respective offset statutes very similar or identical to our own offset statute. For example, in Palmer, the Supreme Court of Montana was asked to decide whether the Montana Association's offset was to be applied to reduce the claimant's total damages or its lesser statutory cap. 779 P.2d 61 (Mont. 1989). Palmer suffered more than \$1,000,000 in damages from a motorcycle accident and received \$300,000 in other recovery for the accident. Id. at 62-63. Palmer then sought to recover the statutory limit of \$300,000 from the Montana Association. Id. Like Plaintiffs here, he argued that the Association's \$300,000 offset should be applied to his total damages of over \$1,000,000, resulting in the Association's liability to him for its full \$300,000 statutory limit. Id. In doing so, Palmer relied on the Association's stated purpose "to avoid financial loss to claimants or policyholders because of the insolvency of an insurer." Id. at 63. The Montana Association argued that the offset statute explicitly requires its \$300,000 offset to be applied to its \$300,000 statutory cap, resulting in no liability to Palmer. Id. at 62. The Montana Supreme Court agreed, finding that the offset statute unambiguously requires such a result:

While the purpose of the act is to "avoid financial loss" to claimants and policyholders because of the insolvency of an insurer, the breadth of this announced goal is limited by the terms of the statute. Section 33-10-105, MCA, provides that the association shall:

(a) be obligated to the extent of the covered claims . . . *but such obligation shall include only that amount of each covered claim which is in excess of \$100 and is less than \$300,000 . . .* (emphasis added).

Recovery under this act, therefore, is **limited** to an amount which exceeds \$100 but is less than \$300,000. The scope of MIGA's coverage is **additionally limited** by the offset provisions of § 33-10-115, MCA:

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

....

MIGA's statutory obligations are not as broad as Palmer suggests. The act's purpose language, while very broad, cannot be given the "effect" as Palmer construes it, in light of the unambiguous language which defines and limits MIGA's obligations.

....

It is the duty of this Court to give effect to the purpose of a statute. LaFontaine v. State Farm Mut. Auto. Ins. Co., 698 P.2d 410 (Mont. 1985). However, if the intent of the legislature can be determined from the plain meaning of statutory words, we will go no further or apply any other means of interpretation. Phelps v. Hillhaven Corp., 752 P.2d 737 (Mont. 1988). We conclude that this language of the statute is clear and unambiguous.

....

The Montana Insurance Guaranty Association was not adopted as a form of reinsurance for every insurer who becomes insolvent. Rather, it is clear the Association was established to soften resulting hardship which may be encountered, under limited circumstances, by a policy holder or claimant when an insurer become insolvent.

Id. at 63-64 (emphasis in bold added). The Montana statute requiring that "[a]ny amount payable on a covered claim under this part shall be reduced" is virtually identical to South Carolina's offset provision requiring that "[a]ny amount payable on a covered claim under this

chapter must be reduced.” Like the Montana statute, our offset statute unambiguously requires application of the Association’s offset to reduce its \$300,000 statutory maximum rather than a claimant’s total amount of damages.

The Superior Court of Pennsylvania has also found that its similar offset provision unambiguously requires application of the offset to the Association’s statutory limit, not the claimant’s damages amount. Blackwell, 567 A.2d 1103 (Pa. Super. Ct. 1989). In Blackwell, Blackwell suffered damages of at least \$365,000 in an automobile accident and received \$65,000 from uninsured coverage as a result. Id. at 1104. Blackwell then sought \$299,900 (\$300,000 statutory claim limit less the \$100 deductible) from the Pennsylvania Association. Id. at 1104-05. She argued the Association “exists to prevent financial loss due to the insolvency of an insurer” and because she would have received more than \$299,900 had the at-fault insurer not become insolvent, the Association’s offset should be applied to her total damages amount rather than the \$299,900 statutory limit to avoid this financial loss for her and effectuate the protection meant to be afforded by the Guaranty Act. Id. at 1105. The Pennsylvania court disagreed, finding that the statutory language expressly provided for the application of the offset to the \$299,900 statutory limit:

Some of the stated purposes of the Act relevant in the instant case are . . . “to avoid financial loss to claimants or policyholders as a result of the insolvency of an insurer.” 40 P.S. § 1701.102(1). To these ends, the Act provides that PIGA is “obligated to make payment on the extent of the covered claims of an insolvent insurer . . . but such obligation shall include only that amount of each covered claim which is in excess of one hundred dollars (\$100), and is less than three hundred thousand dollars (\$300,000).” 40 P.S. § 1701.201(b)(1)(i). **Further**, PIGA is prohibited from paying more than the maximum applicable limits of the insurance coverage which had been provided by the insolvent insurance company. 40 P.S. § 1701.103(5)(c). PIGA’s obligation to pay a covered claim is also subject to the following provision:

*Non-duplication of recovery*

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

40 P.S. § 1701.503(a).

....

PIGA's obligation to Blackwell under 40 P.S. § 1701.201(b)(1)(i) is \$299,900.00. As we have stated, Blackwell's damages are in excess of \$365,000, and the applicable maximum limit on the insurance coverage which had been provided by [the insolvent insurer] was \$6,000,000. The only matter to be resolved is whether PIGA's obligation under 40 P.S. § 1701.201(b)(1)(i) is to be reduced pursuant to 40 P.S. § 1701.503(a), in view of the fact that Blackwell has been able to recover \$65,000.00 from other insurance companies as a result of [the insolvent insurer's] insolvency.

....

Although we understand the arguments set forth by Blackwell, it is axiomatic that where the words of a statutory enactment are clear and unambiguous, courts must construe the statute according to its plain and obvious meaning. Philadelphia Housing Authority v. Pennsylvania Labor Relations Board, 499 A.2d 294 (1985); Garcia v. Community Legal Services Corp., 524 A.2d 980 (1987). We have carefully reviewed the language of 40 P.S. § 1701.503(a), and have found it to be unambiguous as a matter of law. Section 503(a) provides that "any amount payable on a covered claim under this act" which, in this case, has been determined to be \$299,900.00, "shall be reduced by the amount of any recovery" of insurance coverage which has been received by the claimant due to the insolvency of an insurer. In this case, this latter amount equals \$65,000.00. When \$65,000.00 is deducted from the \$299,900.00, PIGA's final obligation is to provide Blackwell with the sum of \$234,900.00.

Id. at 1105 (emphasis in bold added). Again, like the Pennsylvania statute, our offset statute also provides that the amount payable on a covered claim must be reduced by the claimant's other insurance coverage. It is therefore clear that the Guaranty Act unambiguously requires

application of the Association's offset to reduce its statutory maximum rather than a claimant's total damages amount.

**IV. Plaintiffs misunderstand the limited role of the Association.<sup>1</sup>**

Plaintiffs agree that the purpose of the Association is to, in some cases, provide some protection when an insurance company becomes insolvent. See Plaintiffs' Memorandum in Support of Summary Judgment at 2. However, Plaintiffs then assert that the purpose of the offset provision is to prevent double recovery rather than preventing full recovery by a claimant. See Plaintiff's Memorandum in Support of Summary Judgment at 4, 6. As a result, Plaintiffs argue that the Association should provide them as full a recovery as possible by paying the maximum \$300,000 because even though they have received other coverage, they have not recovered their full damages or been made whole. Id. at 4, 6-7.

Despite the Plaintiffs' assertion, it is not the purpose of the Association to provide claimants with as full a recovery as possible. The legislature enacted the Guaranty Act as a "last resort" to provide only "some protection" to those insureds whose insurance companies are declared insolvent. Hudson, 407 S.C. at 124, 754 S.E.2d at 492; 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); see also Marra, 2003 WL 367831 at \*5. ("[I]t was anticipated by the [l]egislature that some claimants would suffer some amount of financial loss due to the insolvency of an insurer [ ] because . . . [the guarantee association]'s obligation to a

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<sup>1</sup> Plaintiffs also mistakenly assert that the Association has assumed the management of claims made against South Carolina insureds for causes of action made against the Florida Guaranty Fund. See Plaintiffs' Memorandum in Support of Summary Judgment at 1. Its obligations are different from those of the Florida Guaranty Fund. The Association has not assumed any causes of action made against the Florida Guaranty Fund. Plaintiffs' claim is handled by the Association because the insured was a resident of South Carolina at the time of the accident. S.C. Code Ann. § 38-31-20(8)(a).

claimant is limited to \$300,000.00 . . . ' Furthermore, at least one treatise has described the purpose behind insurance guaranty acts as 'not completely step[ping] into the shoes of the insolvent . . . [but] obligated to pay claims only to the extent provided by statute.'").

More specifically, the legislature chose \$300,000 as the amount a claimant in such a situation should receive and established limits on recovery from the Association by requiring claimants to seek to recover that \$300,000 from other sources first. See S.C. Code Ann. §§ 38-31-60(a)(iv) and 38-31-100(1); see also Jangula, 88 P.3d at 186 ("The existence of the Fund assures a person in Jangula's position of \$99,900 of coverage. If she recovers \$15,000 from her own UIM insurer . . . she then receives \$84,900 from the Fund, resulting in a total recovery of \$99,900. If the fund did not exist, she would likely recover only the \$15,000 from her own policy, because of the insolvency of the negligent driver's insurer. We are not aware of any statute or public policy that requires . . . substitute liability coverage on a dollar-for-dollar basis for an insolvent insurer. The Fund exists to mitigate the adverse effects caused by the insolvency of insurers, not to fully replace the coverage that would have existed if those insurers were solvent."). If the claimant is able to recover that \$300,000 or more from other sources, like Plaintiffs were able to do here, the Guaranty Act provides that the Association has no liability to the claimant without regard to whether they have recovered their total amount of damages. Id. Therefore, the Association has no liability to Plaintiffs in this matter.

**V. Plaintiffs mistakenly rely on the Tort Claims Act, which is not instructive here.**

Plaintiffs assert that the Guaranty Act deals with limitations on the liability of the State and mistakenly equates the Association with a State entity. See Plaintiffs' Memorandum in Support of Summary Judgment at 5-7. Plaintiffs argue that because the South Carolina Tort

Claims Act, S.C. Code Ann. § 15-78-10 et seq. ("Tort Claims Act"), deals with limitations on the liability of State entities, it is instructive here. Id.

However, the Association is not a State entity, and the Guaranty Act in no way deals with limitations on the liability of the State. Although the Association is created by statute, it is an unincorporated legal entity consisting of all insurers licensed to transact insurance in South Carolina. S.C. Code Ann. § 38-31-40. It is not funded by tax dollars but rather by assessments to its members which are ultimately passed on to policyholders. S.C. Code Ann. §§ 38-31-60(c) and 38-31-140. Because the Association is not a State entity, and the Guaranty Act does not relate to limits on the State's liability, the Tort Claims Act is totally inapplicable here.

In any event, the Tort Claims Act fails to provide guidance here because although it includes a statutory cap for limitations on the State's liability, it does not provide for any statutory offsets. The offsets applied in the Tort Claims Act context are equitable in nature instead and, therefore, are necessarily different from an offset mandated by statute. See Smalls v. South Carolina Dep't of Educ., 339 S.C. 208, 219, 528 S.E.2d 682, 688 (Ct. App. 2000) ("The trial court's jurisdiction to set off one judgment against another is equitable in nature and should be exercised when necessary to provide justice between the parties. A set-off is not necessarily founded upon 'any statute or fixed rule of court, but grows out of the inherent equitable jurisdiction' of the court.") (internal citations omitted). Unlike in Smalls, here there is a statutory directive requiring the offset and setting forth the process for its application. As such, this Court must enforce the Guaranty Act according to its plain meaning.

Furthermore, the equities necessitating an offset in the Tort Claims Act context are not present here. The Tort Claims Act "is the exclusive and sole remedy for any tort committed

by an employee of a governmental entity while acting within the scope of his official duty.”

S.C. Code Ann. § 15-38-65 (emphasis added). Likewise, S.C. Code Ann. § 33-56-180 on

which Plaintiffs also rely and which incorporates the Tort Claims Act, relates only to persons

sustaining injury or dying because of a tort committed by an employee of a charitable

organization acting within the scope of his employment.<sup>2</sup> S.C. Code Ann. § 33-56-180

(emphasis added). Here, there has been no tort committed by an employee of the Association.

This Court is not being asked to determine the equitable apportionment of liability among joint

tortfeasors or to reduce the liability of a wrongdoer. Instead, this Court is being asked to

apply the statutory scheme created by the legislature to provide “some protection” for those

unfortunate insureds whose insurance companies are declared insolvent. Carolinas Roofing,

315 S.C. at 557, 446 S.E.2d at 424.

In short, the Guaranty Act does not deal with limitations on the liability of the State as the Tort Claims Act does. The Tort Claims Act also does not include a statutory offset like the

Guaranty Act. Furthermore, the Tort Claims Act relates to torts committed by State

employees and, therefore, involves equitable principles of apportioning liability among

wrongdoers not at issue here. For all of these reasons, the Tort Claims Act cannot provide any

guidance as to the construction of S.C. Code Ann. § 38-31-100(1), and Plaintiffs’ arguments to

the contrary are without merit.

**VI. Plaintiffs misconstrue the import of the measurement of the reduction from the statutory limit.**

Plaintiffs mistakenly assert that the application of the offset suggested by the

Association would “dissuade claimants from resolving claims against joint tortfeasors who may

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<sup>2</sup> The Association does not qualify as a “charitable organization.” See S.C. Code Ann. § 33-56-170.

have little proportional liability, thus increasing the likelihood of protracted litigation and actually increasing the Fund's exposure." See Plaintiffs' Memorandum in Support of Summary Judgment at 7.

However, this illustrates Plaintiffs' misunderstanding of the offset statute. The offset statute specifically provides that a claimant "is **required to first** exhaust all coverage and limits provided by any" policy covering the same facts, injury or loss. S.C. Code Ann. § 38-31-100(1) (emphasis added). Claimants must first exhaust their claims against other applicable policies for the same loss before being entitled to any recovery from the Association. Thereafter, the Association is entitled to an offset "for the **full limits** of such other coverage." Id. (emphasis added). Because the Association is entitled to offset the full limits of the other coverage, claimants are encouraged to resolve (or try) those claims for the highest possible amount and the Association's exposure is not increased if they fail to do so. Because the Act affords "some protection," caps the obligation of the Association, and provides for a setoff, the Association stands as an insurer of last resort.

In contrast, the position taken by the Plaintiffs—that the offset should be applied to reduce a claimant's total damages amount—would result in an increase in litigation as to the total damages amount. Plaintiffs would be incentivized to seek as much damages as possible to increase their chance of recovery from the Association, decreasing the chances of settlement and increasing the likelihood of jury trials on the damages issue. As such, Plaintiffs' position would create, rather than resolve, the pressure on the Court system. See Hudson, 407 S.C. at 120, 754 S.E.2d at 490 ("Our courts have a long standing policy favoring settlements.").

For all of the foregoing reasons, the Association respectfully requests this Court to declare that the Association's offset of \$376,622 is applied to reduce its \$300,000 obligation on Plaintiffs' claim, resulting in no liability to the Plaintiffs.

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Columbia, South Carolina

June 22, 2014.

|                         |   |                              |
|-------------------------|---|------------------------------|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
|                         | ) | SECOND JUDICIAL CIRCUIT      |
| COUNTY OF BAMBERG       | ) | CASE NO.: 2013-CP-05-63      |

|                                          |   |                          |
|------------------------------------------|---|--------------------------|
| Janette Buchanan and Shana Smallwood,    | ) |                          |
| Individually and as Co-Personal          | ) |                          |
| Representatives of the Estate of James   | ) |                          |
| S. Buchanan,                             | ) | PLAINTIFF'S SUPPLEMENTAL |
|                                          | ) | BRIEF IN SUPPORT OF      |
| Plaintiffs,                              | ) | FOR SUMMARY JUDGMENT     |
|                                          | ) |                          |
| v.                                       | ) |                          |
|                                          | ) |                          |
| The South Carolina Property and Casualty | ) |                          |
| Insurance Guaranty Association,          | ) |                          |
|                                          | ) |                          |
| Defendant.                               | ) |                          |

Plaintiffs submit the following supplemental brief in support of their Motion for Summary Judgment.

**1. Defendant confuses the definition of a covered claim with the Association's obligation.**

A "covered claim" is "an unpaid claim . . . which arises out of . . . an insurance policy to which this chapter applies issued by an insurer; if the insurer is an insolvent insurer . . . ." S.C. Code Ann. § 38-31-20(8). The definition of a covered claim does not establish a maximum amount for a covered claim; however, the Association's obligation to pay on a covered claim is limited. "This obligation includes only the amount each covered claim is in excess of two hundred fifty dollars and is less than three hundred thousand dollars." S.C. Code Ann. § 38-31-60(a)(iv). Therefore, the logical interpretation of this statutory framework is that a covered claim may exceed \$300,000, but the Association's obligation is capped at \$300,000.

The amount of the damages in this case is \$800,000. The primary tortfeasor was insured by the insolvent insurer. To determine the amount of the covered claim, the funds recovered from the joint tortfeasors and Workman's Compensation benefits (\$376,600) are subtracted from the full amount of damages, leaving an unpaid claim of \$423,400. This is the "covered claim" in this case: an unpaid claim made to an insolvent insurer. After establishing the amount of the covered claim, any offsets that are available by virtue of the insolvency are then applied. Finally, the appropriate cap on the Association's liability is applied. Since the amount of the covered claim in this case, i.e., \$423,400, exceeds the statutory maximum of \$300,000, and there are no offsets created due to the insolvency, the obligation of the Association to pay on the covered claim is reduced to \$300,000.

**2. Defendant misstates the holdings of other state's interpretation of the model act.**

Defendant cites nineteen cases to support its assertion that the offsets should be applied to the statutory maximum, i.e., either the policy limits of the insolvent insurer or the statutory cap of \$300,000, whichever is less, rather than the full amount of the covered claim. Seventeen of the nineteen cases address how to apply the offsets in one of two situations: 1) payments to claimants by uninsured motorist coverage; and 2) payments to claimants by other state guaranty associations. When these holdings are analyzed in light of the plain language of the statute, these cases are easily distinguishable from the issues that are before this Court.

The Act provides that, "any amount payable on a covered claim . . . must be reduced by the full limits of such other coverage . . . and the association shall receive a full credit . . ." S.C. Code Ann. § 38-31-100(1). By definition, a covered claim arises

when two conditions are present: 1) an unpaid claim, and 2) an insolvent insurer. Additionally, according to the Act, the Association receives credit for any amount payable toward the covered claim.

Defendant's supplemental brief highlights the phrases "any amount payable" and "must be reduced" but ignores the qualifier. By removing "on a covered claim," Defendant strains an interpretation that wipes out its obligation, which is an absurd result. When the offset provision is read in its entirety it is apparent that it is not *any payment* that reduces the Association's obligation, rather it is only payments that are *made on a covered claim*. Payments made on a covered claim are only those payments that are triggered by the insolvency of an insurer. The at-fault driver and owner, in this case, would be entitled to a set-off for any amounts collected from the total damages of \$800,000 under the Uniform Contribution of Joint Tortfeasors Act. Thus, the only payment presented to the defunct insurer, and subsequently the Association, is \$423,400. This is, then, the covered claim. The Fund cannot apply the collateral source set-offs twice to avoid its obligation to the claimant.

The Association receives an offset for any payment made to claimant due to the insolvency of the insurer. The cases relied on by the Defendant supports this proposition. For example, payments by uninsured motorist coverage, since they are triggered by an insurer's insolvency, are payments made on a covered claim. Therefore, the Association's obligation on the covered claim is reduced accordingly.

As an example of how the offset provisions should be applied, Defendant cites *Blackwell v. Pennsylvania Insurance Guaranty Association*, 567 A.2d 1103 (Pa. Super. Ct. 1989). This case involved a claimant who was injured in a motorcycle accident and

suffered damages in excess of \$365,000 and received \$65,000 in uninsured motorist coverage. Blackwell sought \$299,900, the maximum amount of \$300,000 minus the \$100 deductible, from the association. The court stated that the association's obligation "shall be reduced by the amount of any recovery of insurance coverage which has been received by the claimant **due to the insolvency of an insurer.**" (emphasis added) *Id.* at 1105.

Uninsured motorist coverage was only available to the claimant due to the insolvency of the insurer; therefore, the association received an offset.<sup>1</sup> Ultimately, Blackwell's covered claim was paid in full up to the statutory cap by combining the payments from his uninsured motorist coverage and the payment from the association – both of which were triggered by the insolvency of the insurer.

The court in *Blackwell* distinguishes its holding from another Pennsylvania case that also involves how payments by uninsured motorist coverage should be credited toward the Association's obligation. This case further repudiates Defendant's interpretation of how payments are applied in the present case. In *Sands v. Pennsylvania Insurance Guaranty Association*, 423 A.2d 1224 (Pa. Super. Ct. 1980), the court held that the state association was not allowed to offset payments from uninsured motorist coverage because the coverage had not been provided due to the insolvency of an insurer.

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<sup>1</sup> Cases involving offsets based on UM coverage are *King v. Jordan*, 601 P.2d 273 (Alaska 1979); *Windle v. Alabama Ins. Guaranty Ass'n*, 591 So.2d 78 (Ala. 1991); *Marra v. Wilson*, 2003 WL 367831 (Del. Super. Ct. Feb. 20, 2003); *Lucas v. Illinois Ins. Guar. Fund*, 367 N.E.2d 469 (Ill. Ct. App. 1977); *Stretcher v. Iowa Ins. Guar. Ass'n*, 465 N.W.2d 887 (Iowa 1991); *Hetzel v. Clarkin*, 772 P.2d 800 (Kan. 1989); *Hawkins v. Kentucky Ins. Guar. Ass'n*, 838 S.W.2d 410 (Ky. Ct. App. 1992); *Vokey v. Massachusetts Insurers Insolvency Fund*, 409 N.E.2d 783 (Mass. 1980); *Yetzke v. Fausak*, 488 N.W.2d 222 (Mich. Ct. App. 1992); *Leitch v. Mississippi Ins. Guar. Ass'n*, 27 So.3d 405 (Miss. Ct. App. 2009); *Blackwell v. Pennsylvania Ins. Guar. Ass'n*, 567 A.2d 1103 (Pa. Super. Ct. 1989); *Virginia Prop. & Cas. Ins. Guar. Ass'n v. Int'l Ins. Co.*, 385 S.E.2d 614 (Va. 1989) and *Prutzman v. Armstrong*, 579 P.2d 359 (Wash. 1978).

Sands was a passenger in a vehicle driven by Davis and was injured in an accident with an uninsured motorist. Sands suffered damages in excess of \$26,000. He received reimbursement for his injuries from Davis's uninsured coverage (\$10,000) and his health insurance (\$6,671.28). He then filed a claim (\$10,000) against Granite under his own uninsured motorist coverage. Subsequently, Granite was declared insolvent.

The association argued that Sands had already recovered \$16,671.28, which was more than his covered claim from other solvent insurers, which offset the association's obligation. The court disagreed. The funds already recovered were not payments due to Granite's insolvency. Rather, the uninsured coverage from Davis's policy was made because the other driver was uninsured. The covered claim was Sands's unpaid claim for uninsured motorist coverage against the now insolvent insurer Granite, and Sands had not made any recovery on that claim. The court goes on to cite several cases that Defendant relies on and distinguishes each from the situation in Sands. *Lucas v. Illinois Ins. Guar. Fund*, 367 N.E.2d 469 (Ill. Ct. App. 1977) (finding that association was entitled to an offset from uninsured coverage from claimant's own carrier when the payment was recovered due to the insolvency of the at-fault driver's insurer) and *Prutzman v. Armstrong*, 579 P.2d 359 (Wash. 1978) (finding payment from claimant's own uninsured coverage due to the insolvency of at-fault driver's insurer extinguished association's liability). These cases pose the same issue the court in *Blackwell* faced: how are payments for uninsured motorist coverage from the claimant's own carrier after the at-fault driver's insurer becomes insolvent credited to the association. That issue is clear — the Association receives an offset for the payments. But that is not the issue before this Court.

Defendant relies on *Leitch v. Mississippi Insurance Guaranty Association*, 27 So.3d 405 (Miss Ct. App. 2009), in support of their flawed argument that any payment reduces the association's obligation. In *Leitch*, the court allowed the association to offset funds recovered from uninsured motorist coverage to the association's obligation. The court reasoned that the uninsured motorist coverage (from a solvent insurer) was triggered by the insolvency of the at-fault driver's insurer, and therefore, it was a payment on a covered claim. This case is instructive because the court distinguishes the arguments in *Leitch* from those in *Mississippi Guaranty Association v. Cole ex rel. Dillon*, 954 So.2d 407 (Miss. 2007), which addresses the issues that are before this Court.

In *Cole*, Wendy Dillon, the mother of Cole, a minor child, sued three defendants for negligent care and treatment during her pregnancy, which she alleged caused injuries to Cole. At the time Dillon filed suit, all three defendants had solvent insurance companies. The hospital's insurer later became insolvent and the state association assumed the defense. Dillon settled with the other two defendants, leaving only the association. The association argued "that any insurance proceeds provided to a claimant from a solvent insurance company should be credited against MIGA's \$300,000 statutory limit of liability on any claim." *Id.* at 411-12. The court disagreed. The payments made by the other defendants were to settle their liability. The court correctly found that they were not made due to the insolvency of an insurer and therefore could not be used to reduce the association's obligation. "The clear and unambiguous key to the definition is that a "covered claim" under the Guaranty Act, relates to circumstances involving a once-solvent insurer that becomes insolvent." *Id.* at 413. Since the payments from the solvent insurers of the joint tortfeasors were not payments on a covered claim, the association

“cannot offset any . . . recovery from . . . insurance payments, since these recovery amounts are not part of a ‘covered claim’ . . . .” *Id.* at 414.

Similarly, payments made by other state guaranty associations are triggered by an insurer’s insolvency and the Association receives credit for the amount paid on the covered claim.<sup>2</sup> Defendant cites *Palmer v. Montana Insurance Guaranty Association*, 779 P.2d 61 (Mont. 1989), in support of their argument that the offset provision should be applied to the statutory maximum as opposed to the total damages. Once again, this case is distinguishable from the case at hand.

In *Palmer*, the claimant suffered damages in excess of \$1,000,000 in a motorcycle accident. He recovered \$300,000 from the Idaho Insurance Guaranty Fund after the helmet maker’s (an Idaho corporation) insurer became insolvent. The court held that the Montana Association was entitled to an offset from its obligation on the covered claim. The reasoning for providing the offset is the same as the payments received from uninsured motorist coverage: a state association’s obligation to pay is triggered by the insolvency of an insurer.

**3. Cases involving payments that are not triggered by an insurer’s insolvency are more instructive and hold that the Association’s obligation is not reduced**

Defendant cites no cases that address how payments from joint tortfeasors or solvent insurers (other than UM payments) should be applied to the Association’s obligation on a covered claim. In *Aztec Well Servicing Company Inc., v. Property and*

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<sup>2</sup> Cases involving offsets based on other state guaranty associations are *Cooper v. Huddy*, 581 So.2d 723 (La. Ct. App. 1991); *Cox v. Minnesota Ins. Guar. Ass’n*, 508 N.W.2d 536 (Minn. Ct. App. 1993); *Palmer v. Montana Ins. Guar. Ass’n*, 779 P.2d 61 (Mont. 1989) and *Oglesby v. Liberty Mut. Ins. Co.*, 832 P.2d 834 (Okla. 1992).

*Casualty Insurance Guaranty Association of the State of New Mexico*, 853 P.2d 726

(New Mex.1993), the court addressed this issue.

Aztec had a primary insurer with policy limits of \$300,000. It also carried excess insurance coverage for losses over \$300,000 up to \$10 million with another carrier that became insolvent. Four claimants were injured in an oil well fire with each having damages in excess of \$300,000. The primary carrier paid its policy limits to Cole, the claimant with the most severe injuries.

Aztec filed claims with the association for the statutory maximum amount of \$100,000 for each claimant. The association argued, "that because Cole recovered more than \$100,000 from another insurance policy, he should receive no recovery under the Act. Aztec asserts that such an interpretation is absurd, and we agree." *Id.* at 730.

The court held that the reasonable interpretation of the statute's language, which is nearly identical to South Carolina's, "is that it requires an offset of proceeds available to the claimant from another insurance policy that is not insolvent and does not constitute a "covered claim" under the Act. In addition, the **offset is applied against the insured's liability, or against the claimant's damages** as the case may be, not against the statutory amount of liability of the Association." (emphasis added) *Id.* at 731.

When the logic of *Aztec* is applied to the facts of the case at hand, if Aequicap Insurance had remained solvent, it would have been liable to Plaintiff under its policy for \$423,400, the remaining amount of the settlement. Because Aequicap became insolvent, however, the Act triggered the liability of the Association. The Association then steps

into the shoes of insolvent insurer, and for all practical purposes it is the insolvent insurer except that the Association is only liable up to \$300,000.<sup>3</sup>

#### **4. Defendant understates the role of the Association**

The Association “is a last resort insurer created by the legislature to protect consumers in the event that their insurer becomes insolvent.” *See* § 38-31-60; *South Carolina Property and Cas. Ins. Guar. Ass’n v. Carolinas Roofing and Sheet Metal Contractors Self-Insurance Fund*, 446 S.E.2d 442, 424 (S.C. 1994). It provides “some protection” to insureds whose insurance companies become insolvent. Defendant’s interpretation of the offset provisions provides Plaintiff with no protection from the insurers insolvency. Plaintiff has exhausted all other insurance policies as required by statute. None of the funds already collected have been due to the insolvency of the insurer. To allow the Association “to offset its obligation as guarantor of the insolvent policies by amounts paid by solvent insurers that fall short of satisfying a claim for indemnification would seriously undercut the protection that the legislature intended to provide.” *Connecticut Ins. Guar. Ass’n v. Union Carbide Corp.*, 585 A.2d 1216 (1991), at 1225. “The Association’s interpretation reduces the coverage afforded by the insolvent policy to the extent of coverage available under the solvent policies even though the loss remains partially unsatisfied.” *Id.* If the Defendant’s method of applying the offset provisions is adopted, the Plaintiff will solely bear the cost of the insolvent insurer, \$423,400, which is not what the legislature intended.

#### **5. Plaintiff does not receive a windfall and there is no duplication of recovery**

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<sup>3</sup> Section 38-31-60(b) provides that Guaranty “is considered the insurer to the extent of its obligations 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....”

The requirement that a claimant exhaust other policies and the application of the offset provisions of the Act are designed to prevent duplicate recovery by a claimant.

“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.” *Id.* at 1225. Plaintiffs’ total damages are \$800,000 and \$376,600 have been recovered from other sources. The insolvency of Aequicap left an unpaid claim of \$423,400. The offset provisions make “certain that parties are not better off under the Guaranty Act than they would have been if the insurer had not become insolvent. Much of the confusion in this area arises from parties arguing . . . that any recovery from any source, while at the same time recovering from the guaranty association, will lead to “double recovery” even if the total recovery is less than the total loss.” *R & R Indus. Park, L.L.C. v. Utah Property and Cas. Ins. Guar. Ass’n*, 199 P.3d 917, 926 (2008). Plaintiffs have not collected the total loss, to the contrary they collected less than half of their total damages. Defendant further claims that if it is required to pay the \$300,000 under the Act, then Plaintiffs will be made whole and this is not the purpose of the Association. This is not true. Even after the Association’s payment the Plaintiffs will still have \$123,400 of unpaid damages, which they would have recovered if Aequicap had remained solvent. Ultimately, the Association’s payment will provide “some protection” from the insolvency of an insurer to the Plaintiffs as the legislature intended.

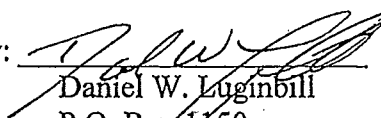
In conclusion, it is only Defendant’s refusal to read the plain definition of “covered claim” into its argument which causes confusion. The covered claim is the

amount of damages remaining after all applicable offsets which is presented to the insolvent insurer for payment. In this case, that amount is \$423,400. This amount exceeds the Association's statutory protections, thus the Association's obligation must be reduced to \$300,000.

For the reasons set forth above, Plaintiffs' Motion for Summary Judgment should be granted and Judgment in the amount of \$300,000 should be entered.

WILSON & LUGINBILL, LLC

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July 2, 2014

STATE OF SOUTH CAROLINA  
COUNTY OF BAMBERG

IN THE COURT OF COMMON PLEAS  
SECOND JUDICIAL CIRCUIT

FILED  
BAMBERG COUNTY  
2014 SEP 26 AM 9:30

CASE NO.: 2013-CP-05-63

Janette Buchanan and Shana Smallwood, <sup>JAMES S. BUCHANAN</sup>  
individually, and as Co-Personal Representatives  
of the Estate of James S. Buchanan, <sup>BAMBERG, SC</sup>  
Plaintiff, )

vs. )

The South Carolina Property and Casualty  
Insurance Guaranty Association, )  
Defendant. )

**MOTION AND ORDER INFORMATION**

**FORM AND COVERSHEET**

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |  |                                                                                                        |  |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|--------------------------------------------------------------------------------------------------------|--|
| Plaintiff's Attorney:<br>Daniel W. Luginbill<br>PO Box 1150, Bamberg, SC 29003<br>Phone: 803-245-7799                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |  | Defendant's Attorney:<br>Erik T. Norton<br>1320 Main Street, Columbia, SC 29201<br>Phone: 803-255-9552 |  |
| <input checked="" type="checkbox"/> <b>MOTION HEARING REQUESTED</b> (attach written motion and complete <b>SECTIONS I and III</b> )<br><input type="checkbox"/> <b>FORM MOTION, NO HEARING REQUESTED</b> (complete <b>SECTIONS II and III</b> )<br><input type="checkbox"/> <b>PROPOSED ORDER/CONSENT ORDER</b> (complete <b>SECTIONS II and III</b> )                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |  |                                                                                                        |  |
| <b>SECTION I: Hearing Information</b><br>Nature of Motion: <u>Motion for Reconsideration</u><br>Estimated Time Needed: <u>30 min</u> Court Reporter Needed: <input checked="" type="checkbox"/> <b>YES</b> / <input type="checkbox"/> <b>NO</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |  |                                                                                                        |  |
| <b>SECTION II: Motion/Order Type</b><br><input checked="" type="checkbox"/> Written motion attached<br><input type="checkbox"/> Form Motion/Order<br>I hereby move for relief or action by the court as set forth in the attached proposed order.<br><div style="display: flex; justify-content: space-between;"><div>Signature of Attorney for <input type="checkbox"/> Plaintiff / <input checked="" type="checkbox"/> Defendant</div><div><u>9/25/2014</u><br/>Date submitted</div></div>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |  |                                                                                                        |  |
| <b>SECTION III: Motion Fee</b><br><input checked="" type="checkbox"/> <b>PAID - AMOUNT: \$ 25.00</b><br><input type="checkbox"/> <b>EXEMPT:</b><br>(check reason)<br><div style="display: flex; flex-wrap: wrap;"><div style="width: 50%;"><input type="checkbox"/> Rule to Show Cause in Child or Spousal Support<br/><input type="checkbox"/> Domestic Abuse or Abuse and Neglect<br/><input type="checkbox"/> Indigent Status<br/><input type="checkbox"/> Motion for Stay in Bankruptcy<br/><input type="checkbox"/> Motion for Publication<br/><input type="checkbox"/> Proposed order submitted at request of the court; or,<br/>reduced to writing from motion made in open court per judge's instructions<br/>Name of Court Reporter: _____<br/><input type="checkbox"/> Other: _____</div><div style="width: 50%;"><input type="checkbox"/> State Agency v. Indigent Party<br/><input type="checkbox"/> Sexually Violent Predator Act<br/><input type="checkbox"/> Post-Conviction Relief<br/><input type="checkbox"/> Motion for Execution (Rule 69, SCRCP)</div></div> |  |                                                                                                        |  |
| <b>JUDGE'S SECTION</b><br><input type="checkbox"/> Motion Fee to be paid upon filing of the attached order.<br><input type="checkbox"/> Other: _____                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |  | JUDGE CODE _____<br>Date: _____                                                                        |  |
| <b>CLERK'S VERIFICATION</b><br>Collected by: _____ Date Filed: _____<br><input type="checkbox"/> <b>MOTION FEE COLLECTED: \$ _____</b><br><input type="checkbox"/> <b>CONTESTED - AMOUNT DUE: \$ _____</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |  |                                                                                                        |  |

STATE OF SOUTH CAROLINA

COUNTY OF BAMBERG

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

Plaintiffs,

vs.

The South Carolina Property and  
Casualty Insurance Guaranty  
Association,

Defendant.

FILED  
BAMBERG COUNTY  
2014 SEP 28 AM 9  
IN THE COURT OF COMMON PLEAS  
SECOND JUDICIAL CIRCUIT  
JAMES B. HERS  
CLERK OF COURT  
BAMBERG, SC  
Civil Action No. 2013-CP-05-63

**DEFENDANT'S MOTION**  
**PURSUANT TO**  
**S.C. R. CIV. P. 52(b) AND 59(e)**  
**REGARDING ORDER FILED**  
**SEPTEMBER 10, 2014**

Pursuant to S.C. R. Civ. P. 52(b) and 59(e), Defendant The South Carolina Property and Casualty Insurance Guaranty Association ("Association") requests that this Court reconsider, alter, amend and/or clarify its Order filed September 10, 2014 ("Order"), denying the Association's Motion for Summary Judgment and granting the Cross-Motion for Summary Judgment of Plaintiffs Janette Buchanan and Shana Smallwood, individually, and as Co-Personal Representatives of the Estate of James S. Buchanan ("Plaintiffs"). The undersigned counsel for the Association received written notice of entry of the Order on September 15, 2014, and this Motion is therefore timely filed.

The Association respectfully requests that the Court reconsider its rulings denying its Motion for Summary Judgment and granting Plaintiffs' Cross-Motion for Summary Judgment, reverse those rulings, and expressly rule on all of the Association's arguments in its favor. The Court should revisit the following:

- (1) factual inaccuracies in its Findings of Facts;

(2) its finding that the plain language of the Guaranty Act requires the subject offset be deducted from a claimant's total amount of damages rather than the Association's \$300,000 statutory claim limit;

(3) its finding that Hudson v. Lancaster Convalescent Ctr., 407 S.C. 112, 754 S.E.2d 486 (2014), was not instructive in this matter;

(4) its failure to address the multitude of case law from other jurisdictions finding that the offset should be deducted from the Association's statutory claim limit rather than a claimant's total amount of damages and improperly concluding that only one of the cases cited by the Association involved the application of the offset to a statutory limit;

(5) its reliance on the South Carolina Tort Claims Act to support deduction of the subject offset from a claimant's total amount of damages rather than the Association's \$300,000 statutory claim limit;

(6) its decision to enlarge the purpose and role of the Guaranty Act and Association beyond the plain language of the statutory scheme adopted by the General Assembly; and

(7) its finding that public policy supported application of the offset from a claimant's total damages.

The grounds supporting the Association's arguments as to each issue for the Court to reconsider are set forth below, expressly incorporating by reference its Motion for Summary Judgment, its Memorandum in Support of its Motion for Summary Judgment and in Opposition to Plaintiffs' Cross-Motion for Summary Judgment (with attachments), its Supplemental Memorandum in Support of its Motion for Summary Judgment and in Opposition to Plaintiffs' Cross-Motion for Summary Judgment, the arguments made at the hearing on May 28, 2014,

before this Court, and such other and further pleadings, motions, and affidavits in the Record and considered by this Court in deciding this motion.

## **I. INACCURACIES IN FINDINGS OF FACTS**

First, the Order mistakenly asserts that the Association has assumed the management of claims made against South Carolina insureds for causes of action made against the Florida Guaranty Fund. (Order p. 2). The Association's obligations are different from those of the Florida Guaranty Fund, and the Association has not assumed any causes of action made against the Florida Guaranty Fund. Plaintiffs' claim is handled by the Association because the insured was a resident of South Carolina at the time of the accident. S.C. Code Ann. § 38-31-20(8)(a).

Next, the Order incorrectly references the underlying tort case as resulting in a both a settlement and a judgment of \$800,000, creating an internal inconsistency. (Order at 2). However, no judgment was entered in the underlying case. Instead, the underlying case was settled, and as part of that settlement, the parties stipulated to \$800,000 as the amount of damages incurred by the Plaintiffs against the tortfeasors in that matter. The Order's references to a judgment, rather than an agreed-upon damages amount, are therefore factually inaccurate or at best confusing. The Association asks this Court to amend its rulings to correct these factual inaccuracies or, alternatively, to clarify the internal inconsistency.

## **II. PLAIN LANGUAGE**

The Order found the plain language of the Guaranty Act mandates application of the Association's offset measured from a claimant's total amount of damages rather than the Association's \$300,000 statutory claim limit, resulting in the Association's liability of \$300,000 in this matter. (Order at 2-5). Specifically, the Court held that "S.C. Code Ann. §

38-31-100(1) gives the Association a setoff against 'a covered claim' for the full limits of any other coverage from any other insurer that may apply." (Id. at 4). Based on this language, the Court concluded that the Association's "set-off [is applied] to the 'covered claim,' rather than the 'Association's obligation.'" (Id. at 4).

However, critical language from S.C. Code Ann. § 38-31-100(1) (referred to herein as the "offset statute" or "offset provision") was omitted from the Court's recitation and analysis of this provision. Importantly, Section 38-31-100(1) provides as follows: "**Any amount payable on a covered claim under this chapter must be reduced by the full limits of [the] other coverage**" received by the Plaintiffs for the same loss. S.C. Code Ann. § 38-31-100(1) (emphasis added). It is the amount payable by the Association on a covered claim that is reduced—not the covered claim itself.

Plaintiffs argued, and this Court agreed, that the Association's obligation to pay a covered claim is capped at \$300,000 pursuant to S.C. Code Ann. § 38-31-60. (Order at 4). Even though the claimed damages here exceed \$300,000, the Association's amount payable is only \$300,000. That amount payable must be reduced by the amounts Plaintiffs received from other coverage for the same loss as set forth in the plain language of Section 38-31-100(1). Thus, the Association's \$300,000 amount payable must be reduced by the \$376,622 Plaintiffs received from other coverage, resulting in no liability to the Plaintiffs.

Additional language in S.C. Code Ann. § 38-31-100(1) explicitly referencing the reduction of the Association's obligation—rather than the covered claim—was also overlooked in the Court's analysis. Section 38-31-100(1)(b) states as follows: "To the extent that the **association's obligation is reduced** by the application of this section . . . ." S.C. Code Ann. § 38-31-100(1)(b) (emphasis added). Therefore, the Order's conclusion that Section 38-31-

Section 100(1) applies the offset to reduce the "covered claim," rather than the "Association's obligation" is expressly refuted by the words of the statute itself. (Order at 4).

Furthermore, the Order is internally inconsistent in that it is based on the plain language of the Guaranty Act but also finds that "[e]xamining the text of the applicable statutes reveals portions of the statute are most ambiguous." (Order at 3). However, the Order does

not identify which provisions are ambiguous or explain how they are ambiguous as is required for a finding of ambiguity. Bardsley v. Gov't Employees Ins. Co., 405 S.C. 68, 75, 747

S.E.2d 436, 440 (2013). ("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.").

Additionally, although ruling on the plain language of the Guaranty Act, the Court also considers the purpose of the Association and the Guaranty Act and looks to other statutes to construe Section 38-31-100(1). Looking beyond the words of the statute itself is not

appropriate if the offset provision is unambiguous according to its plain meaning. Anderson v. South Carolina Election Comm'n, 397 S.C. 551, 556-57, 725 S.E.2d 704, 707 (2012) ("When

a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning."); Hodges v.

Rainey, 341 S.C. 79, 87, 533 S.E.2d 578, 582 (2000). ("When the language of a statute is clear and explicit, a court cannot rewrite the statute and inject matters into it which are not in

the legislature's language; and there is no need to resort to statutory interpretation or legislative intent to determine its meaning.").

For these reasons, the Association asks the Court to reconsider its ruling that the plain language of the Guaranty Act requires the subject offset be deducted from a claimant's total amount of damages rather than the Association's \$300,000 statutory claim limit. The statute cannot be ambiguous and plain at the same time. Reconsideration is necessary.

### III. HUDSON V. LANCASTER CONVALESCENT CTR.

The Order found that Hudson v. Lancaster Convalescent Ctr., 407 S.C. 112, 754 S.E.2d 486 (2014), found only those portions of the Guaranty Act related to the Association's ability to sue or be sued were unambiguous and only reviewed the definition of "covered claim" in that limited context. (Order at 3). Although the focus in Hudson may have been on a different issue than the one before this Court, the Hudson court construed various provisions of the Guaranty Act, some of which are at play in this matter, as recently as January of this year without any difficulty and found the provisions and Guaranty Act to work in harmony. Likewise, S.C. Code Ann. § 38-31-60(a)(iv) and S.C. Code Ann. § 38-31-100(1) must be read together as a whole, giving each one effect, to find that the amount payable by the Association on Plaintiffs' covered claim is \$300,000, which must be reduced by the other coverage Plaintiffs received. The Association asks the Court to reconsider its treatment of the Hudson case and amend its rulings accordingly. The Order misconstrues Hudson and the Association's reliance on it.

### IV. SUPPORTING CASE LAW FROM OTHER JURISDICTIONS

Even if the statute is ambiguous, the Order misapplies the holdings from supporting case law from other jurisdictions. The Order incorrectly states that only one of the cases from other jurisdictions cited by the Association involved the application of the offset to a statutory

limit. (Order at 4 n.1). Contrary to the Order, nine of the cited cases explicitly involved and supported the application of the offset to the statutory maximum/limit.<sup>1</sup>

Although the remaining 10 cases<sup>2</sup> addressed the application of the offset to a policy limit, these cases are still instructive here because the policy limit acts as the statutory limit where the policy limit is less than the statutory cap. S.C. Code Ann. § 38-31-60(a)(iv). Where the damages exceed the policy limits, the same issue before this Court arises. Again, the cited cases applied the offset to the lesser policy limits/statutory cap rather than a claimant's damages amount.

In any event, the Order does not address any of the nineteen cases cited by the Association in support of its position. Because all of the states have guaranty associations created by identical or similar statutes, these cases from other jurisdictions are instructive in the absence of South Carolina authority. The majority of other states ruling on this very issue agree with the Association's position that that offset provision requires deduction of the offset from the Association's statutory claim limit rather than a claimant's total amount of damages.

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<sup>1</sup> Jangula v. Ariz. Prop. and Cas. Ins. Guar. Fund., 88 P.3d 182, 183, 185 (Ariz. Ct. App. 2004); Marra v. Wilson, 2003 WL 367831, at \*4-6 (Del. Super. Ct. Feb. 20, 2003); Cooper v. Huddy, 581 So. 2d 723 (La. Ct. App. 1991), writ denied, 585 So. 2d 552 (La. 1991); Cox v. Minnesota Ins. Guar. Ass'n, 508 N.W.2d 536 (Minn. Ct. App. 1993); Leitch v. Mississippi Ins. Guar. Ass'n, 27 So. 3d 405, 409 (Miss. Ct. App. 2009), aff'd, 27 So. 3d 396 (Miss. 2010); Palmer v. Montana Ins. Guar. Ass'n, 779 P.2d 61 (Mont. 1989); New Hampshire Ins. Guar. Ass'n v. Pitco Frialator, Inc., 705 A.2d 1190, 1192-94 (N.H. 1998); Oglesby v. Liberty Mut. Ins. Co., 832 P.2d 834, 842 (Okla. 1992); Blackwell v. Pennsylvania Ins. Guar. Ass'n, 567 A.2d 1103 (Pa. Super. Ct. 1989).

<sup>2</sup> King v. Jordan, 601 P.2d 273 (Alaska 1979); Windle v. Alabama Ins. Guar. Ass'n, 591 So. 2d 78 (Ala. 1991); Lucas v. Illinois Ins. Guar. Fund, 367 N.E.2d 469 (Ill. Ct. App. 1977); Stetcher v. Iowa Ins. Guar. Ass'n, 465 N.W.2d 887 (Iowa 1991); Hetzel v. Clarkin, 772 P.2d 800 (Kan. 1989); Hawkins v. Kentucky Ins. Guar. Ass'n, 838 S.W.2d 410 (Ky. Ct. App. 1992); Vokey v. Massachusetts Insurers Insolvency Fund, 409 N.E.2d 783 (Mass. 1980); Yetzke v. Fausak, 488 N.W.2d 222 (Mich. Ct. App. 1992); Virginia Prop. & Cas. Ins. Guar. Ass'n v. Int'l Ins. Co., 385 S.E.2d 614 (Va. 1989); Pruzman v. Armstrong, 579 P.2d 359 (Wash. 1978).

The Association respectfully requests that this Court consider these cases from other jurisdictions interpreting identical or substantially similar Guaranty Act offset provisions and amend its rulings accordingly to expressly address the cases fully and correctly.

#### V. SOUTH CAROLINA TORT CLAIMS ACT

Rather than relying on case law from other jurisdictions construing the identical or substantially similar offset provision in other states' Guaranty Acts, the Order improperly relies on South Carolina's Tort Claims Act's statutory cap for limitations on the liability of the State of South Carolina and its agencies and political subdivisions. (Order at 5-8).

First, the Order is internally inconsistent with its treatment of the Association and Guaranty Act in its discussion of the Tort Claims Act. The Order recognizes that the Association is not a governmental agency. (Order at 6). However, the Order repeatedly refers to the Association as a state entity:

- "Section 38-31-10, et seq. [the Guaranty Act] deals explicitly with the application of limitations on the liability of the state, in this case the non-profit Association created by the State of South Carolina . . . " (Order at 5-6);
- "There are no reported cases interpreting S.C. Code Ann. § 38-31-60 [the Guaranty Act's statutory cap provision]. However, there are other limits on the liability of state entities in South Carolina's legislative framework." (Order at 6); and
- "Section 38-31-100(1) [the Guaranty Act's offset provision] . . . protects the State from unlimited exposure." (Order at 6).

The Association is not a state entity, and the Guaranty Act in no way deals with limitations on the liability of the State.

Although the Order indicates that "[t]his distinction is not important here, as the Court is looking to similar statutes for guidance only," this distinction is critically important. (Order at 6.). Because the Guaranty Act does not deal with limitations on the liability of the State, the

Guaranty Act and the Tort Claims Act are not similar because they do not deal with the same subject matter, policy considerations, or legislative intent. Moreover, they were enacted separately, contain no reference to one another, and are parts of entirely separate and unrelated statutory schemes in different parts of the South Carolina Code. Therefore, the Tort Claims Act cannot provide any guidance in construing the provisions of the Guaranty Act.

Another crucial difference between the Tort Claims Act and the Guaranty Act that the Order failed to consider is the complete lack of an offset provision in the Tort Claims Act. Although the Tort Claims Act includes a statutory cap on liability, it does not include a statutory offset provision and, therefore, is of no guidance when construing the Guaranty Act's statutory offset provision at issue here. The offset provision is what describes and requires the result the Association advances.

The Tort Claims Act is not in any way relevant to the issues before the Court. The Association asks the Court to reconsider its treatment of the Guaranty Association as a State entity and its reliance on South Carolina's Tort Claims Act and amend its rulings accordingly.

#### **VI. PURPOSE OF GUARANTY ACT AND ASSOCIATION**

The Order mistakenly enlarges the limited role and purpose of the Association. Although the Order states that the purpose of the Association is to provide some protection when an insurance company becomes insolvent, it asserts that the purpose of the offset provision is to prevent double recovery rather than preventing full recovery by a claimant. (Order at 3, 5, 6-7, and 8). However, there is no South Carolina statute or case law supporting the Order's statement that the purpose of S.C. Code Ann. § 38-31-100(1) is to prevent double recovery.

Instead, the Supreme Court of South Carolina has expressly addressed the purpose of the Act by finding that the legislature enacted the Guaranty Act as a "last resort" to provide only "some protection" to those insureds whose insurance companies are declared insolvent (and other protections do not exist). Hudson, 407 S.C. at 124; 754 S.E.2d at 492; 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); see also Marra, 2003 WL 367831 at \*5 ("[I]t was anticipated by the [l]egislature that some claimants would suffer some amount of financial loss due to the insolvency of an insurer [ ] because . . . [the guarantee association]'s obligation to a claimant is limited to \$300,000.00 . . . "). Furthermore, at least one treatise has described the purpose behind insurance guaranty acts as "not completely step[ping] into the shoes of the insolvent . . . [but] obligated to pay claims only to the extent provided by statute."); Jangula, 88 P.3d at 186 ("The existence of the Fund assures a person in Jangula's position of \$99,900 of coverage. If she recovers \$15,000 from her own UIM insurer . . . she then receives \$84,900 from the Fund, resulting in a total recovery of \$99,900. If the fund did not exist, she would likely recover only the \$15,000 from her own policy, because of the insolvency of the negligent driver's insurer. We are not aware of any statute or public policy that requires . . . substitute liability coverage on a dollar-for-dollar basis for an insolvent insurer. The Fund exists to mitigate the adverse effects caused by the insolvency of insurers, not to fully replace the coverage that would have existed if those insurers were solvent."). The offset provision and the South Carolina cases regarding the Act, including Hudson, make absolutely no reference to prevention of double recovery, or providing full recovery, as a part of the legislature's intent.

The Association respectfully requests that the Court amend its rulings to effectuate the Association's limited role and purpose by applying the offsets to the statutory cap and not the stipulated settlement amount.

## VII. PUBLIC POLICY

The Order asserts that the application of the offset suggested by the Association would "dissuade claimants from resolving claims against joint tortfeasors who may have little proportional liability; thus increasing the likelihood of protracted litigation and actually increasing the Association's exposure." (Order at 8). This is incorrect, however. The offset statute specifically provides that a claimant "is **required to first** exhaust all coverage and limits provided by any" policy covering the same facts, injury or loss. S.C. Code Ann. § 38-31-100(1) (emphasis added). Claimants therefore must first exhaust their claims against any joint tortfeasors before being entitled to any recovery from the Association. Thereafter, once the other coverage is exhausted, the Association is entitled to an offset "for the **full limits** of such other coverage." Id. (emphasis added).

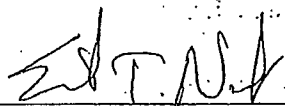
Consequently, because the Association is entitled to offset the **full limits** of the other coverage, regardless of the settlement amount, claimants are encouraged to resolve those claims for the highest possible amount. In addition, contrary to what is stated in the Order, the Association's exposure is not affected if they do not do so.

The Association asks the Court to recognize this effect of the Guaranty Act's exhaustion requirement, which eliminates the purported policy reason to rule in favor of Plaintiffs in this matter, and amend its rulings accordingly.

CONCLUSION

Based on the above, the Association respectfully requests that the Order be amended to grant the Association's Motion for Summary Judgment and deny the Plaintiffs' Cross-Motion for Summary Judgment as set forth herein.

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Columbia, South Carolina  
September 25, 2014.

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson

Mullins Riley & Scarborough LLP, attorneys for Defendant, do hereby certify that I

have served all counsel in this action with a copy of the document(s) hereinbelow

specified by mailing a copy of the same by United States Mail, postage prepaid, to the

following address(es):

Document(s):

**DEFENDANT'S MOTION PURSUANT  
TO S.C. R. CIV. P. 52(b) AND 59(e) REGARDING  
ORDER FILED SEPTEMBER 10, 2014**

Counsel Served:

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\_\_\_\_\_  
Lisa S. Shumpert  
Administrative Assistant

September 25, 2014

STATE OF SOUTH CAROLINA )

COUNTY OF BAMBERG )

IN THE COURT OF COMMON PLEAS  
SECOND JUDICIAL CIRCUIT

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

Plaintiffs,

vs.

The South Carolina Property and  
Casualty Insurance Guaranty  
Association,

Defendant.

Civil Action No. 2013-CP-05-63

**SECOND SUPPLEMENTAL**  
**MEMORANDUM IN SUPPORT OF**  
**DEFENDANT'S MOTION FOR**  
**SUMMARY JUDGMENT AND IN**  
**OPPOSITION TO PLAINTIFFS'**  
**CROSS-MOTION FOR SUMMARY**  
**JUDGMENT AND IN SUPPORT OF**  
**DEFENDANT'S MOTION FOR**  
**RECONSIDERATION**

Pursuant to Rules 52(b), 56, and 59(e) of the South Carolina Rules of Civil Procedure, Defendant The South Carolina Property and Casualty Insurance Guaranty Association ("Association"), by and through its undersigned counsel, hereby submits this Second Supplemental Memorandum in Support of its Motion for Summary Judgment as to the declarations sought by Plaintiffs Janette Buchanan and Shana Smallwood, individually, and as Co-Personal Representatives of the Estate of James S. Buchanan ("Plaintiffs") and in Opposition to Plaintiffs' Cross-Motion for Summary Judgment and in support of its Motion for Reconsideration of this Court's Order filed September 10, 2014.

The Association brings to the attention of this Court the recently-decided opinion of the South Carolina Supreme Court in South Carolina Property and Casualty Insurance Guaranty Association v. Roger Brock, et al, Slip. Op. No. 27458 (Oct. 29, 2014). The Brock opinion is attached hereto and incorporated herein as **Exhibit A**. In Brock, the South Carolina Supreme Court examined S.C. Code Ann. §§ 38-31-20(8), 38-31-60, and 38-31-100(1), the provisions

at issue in this matter, and unanimously found that the Guaranty Act unambiguously allowed the Association to offset its obligation to Brock by all other payments Brock had received from other solvent insurers as a result of the same accident. Further, the Brock court confirmed that the Association's limited role is to provide only "some protection for the insureds of insolvent insurance companies" rather than making claimants whole. Slip. Op. No. 27458 at \*5-6 (citing 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)).

For these reasons and those stated in filings and arguments already before this Court, the Association believes that the Brock decision is instructive to the issues in this matter and asks that the Court consider it when ruling on the Association's pending Motion for Reconsideration. The Association respectfully requests this Court to declare that the applicable offset of \$376,622 is applied to reduce the Association's maximum \$300,000 statutory obligation on Plaintiffs' claim, resulting in no liability or recovery to the Plaintiffs from the Association.

NELSON MULLINS RILEY & SCARBOROUGH LLP

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Columbia, South Carolina  
November 5, 2014.

FILED  
BAMBERG COUNTY  
2014 NOV 15 AM 10:03  
JAMES B. HIERS  
CLERK OF COURT  
BAMBERG, SC

**THE STATE OF SOUTH CAROLINA**  
**In The Supreme Court**

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.

Appellate Case No. 2013-000402

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Appeal from Charleston County,  
R. Markley Dennis, Jr., Circuit Court Judge

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Opinion No. 27458  
Heard April 2, 2014 – Filed October 29, 2014

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**AFFIRMED IN PART, REVERSED IN PART**

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Howard A. VanDine, III, A. Mattison Bogan, Erik T.  
Norton and Tara C. Sullivan, all of Nelson Mullins Riley  
& Scarborough, LLP, of Columbia, for Appellant/  
Respondent.

Andrew D. Gowdown and Timothy J.W. Muller, of  
Rosen, Rosen & Hagood, LLC, of Charleston, for  
Respondent/Appellant.

---

EXHIBIT

A

**JUSTICE PLEICONES:** This appeal concerns the construction and application of the South Carolina Property and Casualty Insurance Guaranty Association Act (the Act), S.C. Code Ann. §§ 38-31-10 to -170 (2002 and Supp. 2013), and specifically the exhaustion/non-duplication provision in section 38-31-100(1). Roger Brock (Brock) was a passenger in a car involved in a wreck and sustained severe injuries. Brock settled his claim, but before payment was made, the insurance carrier responsible for the claim was declared insolvent and the claim was assumed by the South Carolina Property and Casualty Insurance Guaranty Association (Guaranty). Guaranty and Brock moved for summary judgment on the issue whether Guaranty may offset payments from solvent insurance carriers against Brock's settlement under section 38-31-100. The circuit court found section 38-31-100 was ambiguous and granted partial summary judgment to both parties, holding that Guaranty may offset some but not all of the benefits received by Brock from solvent insurance carriers. We disagree that section 38-31-100 is ambiguous and hold that the unambiguous language of section 38-31-100 provides that Guaranty may offset all payments from all solvent insurers made to Brock as a result of this wreck.

### FACTS

Brock was passenger in a vehicle driven by Brian Mason (Mason), which was involved in an accident with a logging truck, driven by Ryan Stevens (Stevens).<sup>1</sup> At the time of the accident, Stevens was insured through the owner of the logging truck, Malachi Sanders's (Sanders), policy issued by Aequicap Insurance Company (Aequicap).

Brock sustained severe injuries as a result of the wreck and filed suit. Soon after the litigation began, Brock settled his claim against Stevens and Sanders with Aequicap for \$185,000 for the release of all claims.

Shortly after the settlement was reached but before Brock received any payment, Aequicap was declared insolvent. Because Aequicap was an insurer licensed to do business in the State of South Carolina and the insured was a resident of South Carolina, the claim was referred to Guaranty. As a result, Brock made demand on Guaranty for payment of the full settlement amount of \$185,000.<sup>2</sup>

---

<sup>1</sup> Mason and Stevens were found to be jointly responsible for the wreck.

<sup>2</sup> See §§ 38-31-10 to 38-31-60.

As a result of the wreck, Brock received the following amounts directly from or paid on his behalf by solvent insurers:

- a. Liability Coverage from Nationwide Ins. Co.  
(Mason's Policy) \$22,500.00
- b. Payments for the provision of medical care by 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<sup>3</sup>
- d. Personal Injury Protection from Progressive Ins. Co.  
(resident relative coverage through Brock's parents' carrier) \$5,000.00

Total: \$93,090.45

In the trial court, Guaranty asserted entitlement to offset all payments from the solvent insurers pursuant to section 38-31-100(1). As a result, Guaranty paid Brock \$91,909.55, the difference between the settlement amount (\$185,000) and the offset amount (\$93,090.45). Brock alleged that he was entitled to the remaining \$93,090.45, arguing that this would not lead to duplicative recovery. The circuit court found that section 38-31-100(1) was ambiguous, and held that Guaranty could not offset the benefits received under Mason's policy or the amount paid by Brock's medical insurance. The court did allow offset of the uninsured motorist (UM), and personal injury protection (PIP) benefits. As a result, the court ordered Guaranty to pay Brock an additional \$63,090.45.

### STANDARD OF REVIEW

The parties agree that the issue is solely one of statutory interpretation. "Questions of statutory interpretation are questions of law, which we are free to decide without any deference to the court below." *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011).

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<sup>3</sup> This uninsured motorist coverage was triggered by Aequicap's insolvency which rendered Stevens an uninsured motorist.

## DISCUSSION

This case is one of first impression and concerns the construction and application of the Act's exhaustion provision, section 38-31-100(1).

Guaranty is an unincorporated, non-profit legal entity. Because Guaranty is a creature of statute, its duties, liabilities, and obligations are controlled by the terms and conditions set forth in the Act, § 38-31-60. Pursuant to the Act, Guaranty must pay certain "covered claims," as the term is defined in section 38-31-20(8).<sup>4</sup> As a condition precedent to recovery from Guaranty, a claimant is required to first exhaust all available coverage from solvent insurers, and Guaranty is allowed to offset the full limits of such other coverage against its obligations under the Act. § 38-31-100.

Both parties agree that the \$185,000 settlement entered into by Aequicap qualifies as a "covered claim" for which Guaranty is responsible under section 38-31-20(8). The parties disagree on what types of insurance coverage Guaranty may offset against its obligation to pay the \$185,000. The exhaustion provision provides in relevant 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. Notwithstanding the foregoing, no person may be required to exhaust all coverage and limits under the policy of an insolvent insurer.

§ 38-31-100(1) (emphasis supplied).

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<sup>4</sup> A "covered claim" is "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. . . ." § 38-31-20(8).

Brock contends the circuit court erred in permitting Guaranty to offset any of the insurance benefits. Conversely, Guaranty contends the circuit court erred by holding that Guaranty was not able to offset the proceeds of Mason's policy and the amount of medical insurance benefits provided to Brock. We agree with Guaranty that the Act unambiguously provides that Guaranty may offset all the proceeds received by Brock in this case.

"All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." *McClanahan v. Richland Cnty. Council*, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002). "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.* Thus, we must follow the plain and unambiguous language in a statute and have "no right to impose another meaning." *Id.*

Applying section 38-31-100(1), Brock received payments under the medical, UM, and PIP insurance coverages, as well as from Mason's policy. These claims were paid "under an insurance policy," and the claims arise from "the same facts, injury or loss" that gave rise to the \$185,000 settlement. Thus, this \$185,000 covered claim should, under § 38-31-100(1), be offset by the full limits of these policies.

As we find section 38-31-100(1) unambiguous, the trial court erred in turning to other jurisdictions' applications of their own provisions.<sup>5</sup> We also disagree with Brock and the ruling below that allowing set-off in this case offends the "collateral source rule."

The trial court and Brock misconstrue the applicability of the collateral source rule. The collateral source rule provides that a tortfeasor has no right to any mitigation of damages because of payment or compensation received by the injured person from a source wholly independent of the wrongdoer. *Johnston v. Aiken Auto Parts*, 311 S.C. 285, 428 S.E.2d 737 (Ct. App. 1993). This scenario is not comparable to the traditional application of the collateral source rule, since Guaranty is neither the wrongdoer nor the insurer of a wrongdoer, but is instead a statutory entity that

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<sup>5</sup>Moreover, the jurisdictions which have found their statutes to be ambiguous have statutes that contain different language than section 38-31-100(1). Compare Utah Code § 31A-28-213 (Supp. 2008) and 8 V.S.A. § 3619(a) (2013) with § 38-31-100(1).

exists to provide some protection for the insureds of insolvent insurance companies. *See 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) ("The Guaranty Association's function is to provide protection for insureds in the event their insurance carriers become insolvent."). Therefore, we do not agree with the circuit court or Brock that allowing Guaranty to offset the payments from solvent insurers in this case would effectively permit a tortfeasor to benefit from the victim's decision to carry insurance and violate the collateral source rule.<sup>6</sup>

Finally, we note that on appeal, Guaranty argues it should be entitled to an offset of the policy limit of \$25,000 from Mason's liability insurance policy rather than the \$22,500 that Brock accepted.<sup>7</sup> This offset would be permitted under our reading of section 38-31-100(1), since it provides that "the covered claim under this chapter must be reduced by the full limits of such other coverage . . . and [Guaranty] will receive full credit for such limits." However, in the circuit court, Guaranty asserted it was seeking to offset only \$22,500 in liability coverage and not the full policy limits.<sup>8</sup> Thus, the argument that Guaranty may offset the full \$25,000 is not preserved since it was not raised below. *Nationwide Mut. Ins. Co. v. Hunt*, 327 S.C. 89, 488 S.E.2d 339 (1997). Therefore, Guaranty is entitled to set-off only \$22,500 in liability coverage. Accordingly, we reverse the circuit court and hold that Guaranty is entitled to offset the full \$93,090.45 paid by solvent insurers.

**AFFIRMED IN PART, REVERSED IN PART.**

**TOAL, C.J., BEATTY, KITTREDGE and HEARN, JJ., concur.**

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<sup>6</sup> The circuit court held that allowing set-off of the medical insurance benefits would effectively penalize Brock for carrying medical insurance. To the contrary, Brock was not prohibited from using the cost of medical care he received as a component of his damages in arriving at the negotiated settlement. Thus, in establishing his damages, Brock was not penalized by his procurement of medical insurance, the danger sought to be guarded against by the collateral source rule.

<sup>7</sup> This is the only coverage for which Guaranty argues it is entitled to offset more than Brock actually received.

<sup>8</sup> If Guaranty were seeking offset of the full \$25,000 limit of the policy below, it would have only paid Brock \$89,409.45, which would have reflected the \$25,000 offset plus the other benefits received under the medical, PIP, and UM coverage.

## CERTIFICATE OF SERVICE

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

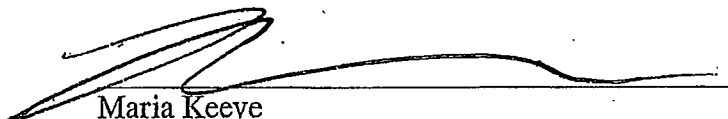
Document(s):

**Second Supplemental Memorandum in Support of Defendant's Motion for Summary Judgment and in Opposition to Plaintiff's Cross-Motion for Summary Judgment in Support of Defendant's Motion for Reconsideration**

Counsel Served:

Daniel W. Luginbill, Esquire  
Wilson, Luginbill & Kirkland, LLC  
P.O. Box 1150  
Bamberg, SC 29003

The Honorable Doyet A. Early III  
Post Office Box 90  
Bamberg, SC 29003



Maria Keeve  
Administrative Assistant

November 5, 2014

STATE OF SOUTH CAROLINA )  
COUNTY OF BAMBERG )

IN THE COURT OF COMMON PLEAS  
SECOND JUDICIAL CIRCUIT  
CASE NO.: 2013-CP-05-63

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

Plaintiffs,

v.

The South Carolina Property and Casualty  
Insurance Guaranty Association,

Defendant.

PLAINTIFF'S REPLY  
TO DEFENDANT'S MOTION  
TO RECONSIDER

Plaintiffs offer the following Reply to Defendant's Motion to Reconsider pursuant to Rule 52(b) and 59(c) SCRPC. Each element raised in the Motion is addressed individually below. For the reasons set forth, Plaintiff's assert Defendant's Reconsider should be DENIED.

1. **Factual Inaccuracies**

Plaintiffs assert that the Order previously entered in this case on September 10, 2014 is thorough, complete and the content of same was shared with Defendant prior to its execution by the Court. Any alleged errors of fact could, and should, have been brought out then. Defendants complain that the Order's description of the basis of the Association's duties is factually inaccurate. The argument, however, draws a distinction without a difference. Taken at face value, the inaccuracy complained of would not affect the application of law to the other undisputed facts of this case.

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CLERK OF COURT  
BAMBERG, SC

Likewise, the fact that a judgment has not been entered onto the judgment rolls of Bamberg County in no way affects the application of fact to law in this action. The settlement agreement that ended the underlying tort action speaks for itself.

**2. Plain Language Findings**

Defendant's arguments in this section are no different than what was presented in its two prior memorandums. The Court discussed the definitions of "covered claim" and "any amount payable on a covered claim" and rejected the Association's interpretation. While the Association is free to request the Court reconsider its position, it offers no new case law to support that position. Rather, it merely asks the Court to reverse its prior position. The assertion that the Court failed to consider that the statutory language stating "to the extent that the associations obligation is reduced by the application of this section..." is simply not accurate. The Court made the distinction that S.C. Code §38-31-60 caps the Association's obligation to pay at \$300,000, but that the set-off provisions of S.C. Code §38-31-100(1)(b) apply to the "covered claim." Accordingly, the Court did consider the language highlighted in the Motion to Reconsider, and correctly ruled against the Association.

**3. *Hudson v. Lancaster Convalescent Ctr.***

Again, the Association offers no new case law or statutory guidance on how the Court interpreted this case. Rather, it simply requests the Court adopt its view of the case. Plaintiffs believe the Court correctly interpreted and applied *Hudson* to the facts of this case.

Similarly, the Defendant's Supplemental Memorandum drawing attention to the case of *South Carolina Prop. and Cas. Ins. Guaranty Assoc. v. Brock*, Slip Op. 27458,

seems to say that this case stands for the proposition that the Association's role is to always provide only "some protection." There is no dispute that the role of the Association is to provide some protection, not full protection. The dispute in this case is merely over how the set-off should be applied. In *Brock*, the Court applied the set-off to the full amount of the covered claim. Nowhere in the language of *Brock* is there a reference to applying the set-off provision of S.C. Code Ann., §38-31-100 to the "covered claim" rather than the maximum amount payable. Rather, the case stands only for the provision that all sums paid or payable from any form of insurance are to be set-off from the amount of *the covered claim*. If the Court were interpreting the set-off to be applied to the obligation as the Association asserts, it could have very clearly said so in *Brock*. Instead, it applied the set-off to the covered claim. For this reason, *Brock* is instructive, and supports this Court's finding that the Association is obligated to pay \$300,000 in this case.

#### **4. Supporting Case Law From Other Jurisdictions.**

The Court evaluated each of the numerous cases interpreting the model language. Each state has modified the model language in various ways, including South Carolina. The Court correctly found that the majority of the cases seek to prevent plaintiffs from seeking to double recover for injuries, just as the South Carolina statute does. The Court's interpretation of the South Carolina statutes, and case law, is consistent with achieving this goal. Accordingly, the Court's initial ruling was correct and Defendant's Motion to Reconsider should be denied.

#### **5. Tort Claims Act**

The Court's review of the S.C. Tort Claims Act was perfectly appropriate in that it examines one way in which South Carolina has implemented a statutory damages cap. The Court acknowledges the differences between the state or political subdivision and the Association, which is a statutorily created private entity, but found the Tort Claims Act cases instructive, but not controlling. Similarly, the charitable organization caps were also reviewed and found to be instructive, but not controlling, in determining legislative intent. The Court made no error in considering these statutory schemes in interpreting S.C. Code §38-31-10 et seq. Therefore, the Defendant's Motion to Reconsider should be denied.

6. **Purpose of the Guaranty Act and Association**

Defendant asserts that the Court's order improperly expands the role and purpose of the Association. Specifically, the Association takes issue that the Guaranty Act was interpreted to have as part of its purpose both protection for insureds and prevention of windfalls from double recovery. Relying on *Hudson*, the Defendant asserts that the Legislature intended to only offer some protection, i.e. it was the purpose to prevent full recovery in some way. This is a perverse reading of the case law. The Act does not attempt to ensure every claimant receives only partial compensation. Rather, it prevents exhaustion of the available funds from just a few catastrophic claims. While it is axiomatic that some claimants will not receive compensation given the \$300,000 cap, it is not the goal of the legislation. The Act is still remedial in nature. While full compensation cannot be ensured, it is still a goal of remedial legislation such as the Act. While asserting there is no reference to double recovery, the cases relied upon clearly

discuss that issue. Applying the offsets to the value of the covered claim, rather than the statutory cap accomplishes all of the stated goals of the Guaranty Act.

#### **7. Public Policy**

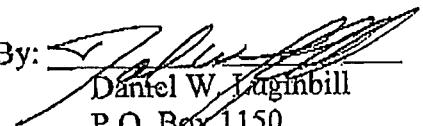
The Association asserts in its brief that claimants are required to exhaust all other claims before recovering from the Association. This is true. However, the Order's finding that the Association's interpretation of the Act to require the setoff be applied to the cap, rather than the amount of the covered claim, would increase the likelihood of protracted litigation is also accurate.

Rather than settle with a potential defendant who has little or no liability, but a large policy, Claimants would be encouraged to go to trial against any potential defendants and seek a verdict against each defendant individually. By doing so, a jury would apportion fault, and the Association conceivably would not get credit for any amounts over the actual judgment entered. If all settlement amounts are to be deducted from the cap, there is no incentive to settle with any defendant. Rather, the claimant should proceed to trial and attempt to persuade the jury that the defendant covered by the Association was primarily at fault, thus maximizing the ability to collect on the judgment.

#### **CONCLUSION**

Plaintiffs assert that the Court's Order in this case was an accurate and well-reasoned decision, made after a full briefing of the issues by the parties, and after oral arguments. The Association's Motion for Reconsideration offers no new arguments or new case law. Plaintiffs request the Court consider the issues raised in the Motion and this reply, and deny the Motion, without the need for further hearings on the matters.

WILSON & LUGINBILL, LLC

By: 

Daniel W. Luginbill  
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Attorney for Plaintiff

Bamberg, SC

November 6, 2014

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BAMBERG, SC

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STATE OF SOUTH CAROLINA )

COUNTY OF BAMBERG )

**CERTIFICATE OF MAILING**

I, Kathryn S. Beasley, paralegal to Daniel W. Luginbill, counsel for plaintiff in the case of *Janette Buchanan and Shana Smallwood, et al. v. The South Carolina Property and Casualty Insurance Guaranty Association*, Case #13-CP-05-63, do hereby certify that I have served the foregoing **Plaintiff's Reply to Defendant's Motion to Reconsider**, by mailing a copy U. S. mail, first class delivery, postage prepaid to the attorney(s) or person(s) at the address(es) indicated as follows:

Howard VanDine, III, Esquire  
Nelson, Mullins, Riley & Scarborough, LLP  
Post Office Box 11070  
Columbia, South Carolina 29211

John Nichols, Esquire  
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11-07, 2014

Bamberg, South Carolina

By: Kathryn S. Beasley  
Kathryn S. Beasley, Paralegal to  
Daniel W. Luginbill, Counsel for  
Wilson & Luginbill, LLC  
Post Office Box 1150  
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(803) 245-7799

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CLERK OF COURT  
BAMBERG, SC

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BAMBERG COUNTY

1 State of South Carolina ) In the Court  
2 County of Bamberg ) Of Common Pleas

3 Docket No. 2013-CP-05-63  
4

5  
6 Jeanette Buchanan and Shana, )  
7 Smallwood Individually and as )  
8 Co-Personal Representatives of )  
9 The Estate of James S. Buchanan, )  
10 Plaintiff, )

11 vs. )

Transcript of Record

12 South Carolina Property and )  
13 Casualty Insurance Guaranty )  
14 Association, )  
15 Defendant. )

16 May 28, 2014  
17 Bamberg, South Carolina

18 B E F O R E:

19 The Honorable Doyet A. Early III, Judge.

20 A P P E A R A N C E S:

21 Daniel Luginbill, Esquire  
22 Attorney for the Plaintiffs

23 Howard Van-Dine, Esquire  
24 Tara C. Sullivan, Esquire  
25 Attorneys for the Defendant

Brenda J. Sigwald, Circuit Court Reporter  
For the Honorable R. Knox McMahon  
P.O. Box 206, Jackson, South Carolina 29831

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(REPORTER'S NOTE: There were no exhibits  
entered during this hearing.)

## MOTION HEARING

1  
2 THE COURT: Okay. Motion for Summary Judgment. Do  
3 we pay nothing or do we pay 300?

4 You say nothing.

5 You say 300.

6 What's the word claim mean?

7 MS. SULLIVAN: The word claim means \$300,000.

8 THE COURT: All right. Well, let's say this case  
9 had not been settled. Let's say we tried and the jury  
10 returned a verdict of \$800,000.

11 MS. SULLIVAN: There's no difference, Your Honor.

12 THE COURT: No difference. Why is that?

13 MS. SULLIVAN: Because there's a statutory scheme  
14 that's set up to explain what the South Carolina Property  
15 and Casualty Insurance Guarantee Associations operations  
16 are and those obligations are the same whether it's a  
17 settlement of 800,000 or it's a judgment of 800,000. The  
18 most it could be liable is \$300,000; and it's further  
19 limited by the offsets, which admittedly we received and  
20 the statute says that the offsets were taken from that  
21 300,000, not the total damages.

22 THE COURT: Any case law on that?

23 MS. SULLIVAN: Yes, Your Honor.

24 THE COURT: You've given me some in your brief.

25 MS. SULLIVAN: There's none in South Carolina on

1 this very specific point, but of the cases out in the  
2 country, there are nineteen states that agree with us and  
3 that's the majority -- the vast majority of the cases that  
4 have ruled on this specific issue.

5 THE COURT: All right. Go ahead and make your  
6 argument. I didn't mean to interrupt your argument.

7 MS. SULLIVAN: That's all right. If it's okay,  
8 we'll just jump right in. Well the facts underlying the  
9 dispute are not receded. Mr. Buchanan passed away as a  
10 result of an automobile accident in January of 2008. Ms.  
11 Buchanan brought the wrongful death action against the  
12 driver and owner of the vehicle that's alleged to be at  
13 fault, Equicap Insurance Company insured that allegedly at  
14 fault vehicle, and it was declared insolvent while that  
15 wrongful death action was pending. So Ms. Buchanan's claim  
16 was then lodged against the association.

17 The association is a nonprofit, unincorporated  
18 legal entity created by statute -- to protect citizens who  
19 may have somebody 's -- who's carrying --

20 Well, it's actually to provide some protection.

21 THE COURT: Some protection. Okay.

22 MS. SULLIVAN: Yes, sir.

23 THE COURT: I'm listening.

24 MS. SULLIVAN: And the wrongful death case has been  
25 settled. As part of that settlement the parties agree that

1 the amount of damages sustained by Ms. Buchanan are  
2 \$800,000.

3 THE COURT: Right.

4 MS. SULLIVAN: And the plaintiffs recovered a total  
5 of \$376,622 from alleged joint tortfeasors and then  
6 worker's comp benefits. And we also agree that the  
7 Guarantee Associations liability on the claim would be  
8 decided by this declaratory judgment action and both sides  
9 have filed motions for summary judgment.

10 There's -- the issue to be decided is that very  
11 narrow issue that you recognized, Your Honor. It's the  
12 associations liability on the claim. It's undisputed that  
13 our statutory maximum limit is \$300,000. Both sides agree  
14 on that. It's undisputed that we have a 376,000, roughly,  
15 offset of that amount. The only issue is whether that  
16 offset is subtracted from the \$800,000 in total damages or  
17 the --

18 THE COURT: -- cap of 300.

19 MS. SULLIVAN: Yes, Your Honor.

20 THE COURT: Well, let's look at the statute.

21 MS. SULLIVAN: And the statute's plain language  
22 says that, "Any amount payable on a covered claim is what  
23 is to be reduced."

24 THE COURT: Well, let's just read it. It says, "A  
25 person having a claim" -- what is the claim? Is that this

1 \$800,000 claim?

2 MS. SULLIVAN: That particular claim would be  
3 whatever claim they have against any other insurance  
4 policy. So it's not -- it's not the claim we're talking  
5 about here against the association. That says, "having a  
6 claim under insurance policy, whether or not it is a policy  
7 issue by a member insured and the claim under such other  
8 policy arises from the same facts, injury or loss which  
9 give rise to the covered claim against the association."

10 So that claim in that clause is talking about their  
11 claims against other people. The claims here against  
12 worker's comp and the claims against the alleged joint  
13 tortfeasors.

14 THE COURT: Let me read that clearly.

15 "A person having a claim under a policy," insurance  
16 policy, "whether or not it is a policy issued by the member  
17 insurer and the claim under such policy arises from the  
18 same facts, injury, or loss which gives rise to the covered  
19 claim against the association is required to first exhaust  
20 all coverage and limits" -- which they have done, have they  
21 not?

22 MS. SULLIVAN: They have, Your Honor.

23 THE COURT: "Any amount payable on the covered  
24 claim," i.e. the \$376,000.

25 MS. SULLIVAN: Well, no, Your Honor --

1 THE COURT: Strike that -- "any amount payable,"  
2 which I assume could be the 800,000.

3 MS. SULLIVAN: It's not, Your Honor. The any  
4 amount payable on a covered claim cannot be more than  
5 \$300,000.

6 The statute that we might want to talk about before  
7 we jump into 38-31-100 is 38-3160(a), and that sets forth  
8 the associations obligations on covered claims and it  
9 specifically says --

10 THE COURT: Do you have that in your brief?

11 MS. SULLIVAN: Yes, Your Honor. And I have a copy  
12 of it if you would like --

13 THE COURT: If you would, please. That would be  
14 easier.

15 (WHEREUPON the copy was handed to the Court.

16 THE COURT: Where do you want me to go?

17 MS. SULLIVAN: It's 31-38-60(a).

18 THE COURT: 60(a).

19 MS. SULLIVAN: Yes. "The association is obligated  
20 to the extent of claims existing before the determination  
21 of insolvency."

22 And then you jump down and it says -- it's the  
23 second paragraph under four: "This obligation includes only  
24 the amount each covered claim is in excess of \$250 and is  
25 less than \$300,000."

1           So the covered claim by definition or the amount  
2 payable on a covered claim cannot be more than \$300,000.  
3 That's the statutory cap. And so when we talk about the  
4 offset provision, 38-31-100, it's referring back to this  
5 limitation.

6           **THE COURT:** "This obligation includes only the  
7 amount each covered claim is in excess of 250 and is less  
8 than 300,000."

9           So the obligation you're saying is no more than 300  
10 and you have an offset of 376, hence 0.

11           **MS. SULLIVAN:** Yes, Your Honor.

12           **THE COURT:** All right.

13           **MS. SULLIVAN:** And so that's the statutory cap and  
14 the statute we were just discussing is the offset, which is  
15 a further limitation on the cap. So back to 38-31-100, it  
16 says, "Any amount payable on a covered claim," which we  
17 just saw, "can't be more than \$300,000, must be reduced by  
18 the full limits of such other coverage."

19           So the other policies that they received recovery  
20 under, that amount needs to be deducted from the statutory  
21 cap.

22           **THE COURT:** Okay.

23           **MS. SULLIVAN:** So it's our position that the  
24 statute's plain language when construed together to give  
25 both of the limits effect is that there is no ambiguity.

1 The offset needs to be taken from the statutory cap, not  
2 from the plaintiff's amount of damages, which could never  
3 be the amount payable on a covered claim. The association  
4 would never be liable for \$800,000. It's only liable up to  
5 that \$300,000 amount.

6 THE COURT: So if he had no other insurance then as  
7 an offset, you'd be liable the 300, notwithstanding the  
8 fact that it was 800?

9 MS. SULLIVAN: I'm sorry, Your Honor?

10 THE COURT: If he had no offset -- in other words,  
11 if he hadn't settled with anyone else, you would only --  
12 and if we had a jury verdict and he got a million dollars,  
13 you'd only be liable for the 300.

14 MS. SULLIVAN: Correct, Your Honor.

15 THE COURT: Under any circumstances.

16 MS. SULLIVAN: Right. That's exactly right. And  
17 that's really the role of the association. It's a limited  
18 role. We are not here to make everyone whole. It's just  
19 to soften the blow in the event that an insurance company  
20 goes insolvent. And the way that the legislature set that  
21 up is that other insurance companies need to bear the brunt  
22 of that burden. And so we are liable up to \$300,000 unless  
23 the claimant can get \$300,000 from somewhere else. And so  
24 if -- here, for example if she didn't receive the worker's  
25 comp or the insurance money from those other joint

1 tortfeasors, we would be paying 300,000; \$300,000 is the  
2 amount that the legislature decided was a good number for a  
3 claimant in such a situation to receive. And that she has  
4 received.

5 THE COURT: Now tell me about the cases from other  
6 jury duties. Are they interpreted as you are arguing right  
7 here?

8 MS. SULLIVAN: Yes, Your Honor.

9 THE COURT: But it's never been interpreted in  
10 South Carolina.

11 MS. SULLIVAN: It has not. It has not, Your Honor,  
12 but --

13 THE COURT: Well, Mr. Luginbill says, "Well, we  
14 don't have anything in South Carolina. We have to go and  
15 look to see what the Tort Claims Act does and how they  
16 handle situations like this because it's similar."

17 MS. SULLIVAN: Well, it's really not, Your Honor.  
18 The Guarantee Association is not a state agency as it is  
19 claimed in plaintiff's memo. It's created by statute, but  
20 it's not a state agency. It's not a political subdivision  
21 and so the Tort Claims Act, which is, of course, only  
22 from -- only applicable to state agencies just isn't  
23 applicable here and it's not instructive. It's just a  
24 totally different statutory scheme. And the -- also, they  
25 don't have offset provision in the Tort Claims Act. They

1 have a cap, but the offset that they talk about in the  
2 context of the Tort Claims Act is based on equitable  
3 principles.

4 THE COURT: Based on this general standards of law  
5 where you can't have a double recovery.

6 MS. SULLIVAN: Right. And that's not what we have  
7 here. We have the statutory framework that we have to  
8 abide by. So the Tort Claims Act really just doesn't -- it  
9 just doesn't speak to the argument that we have here, Your  
10 Honor. And the cases from the other jurisdictions -- all  
11 the States have statutorily created Guarantee Associations.  
12 They're all mostly based on the National Commissioners and  
13 Insurance Guarantee Associations Model Act, and so they're  
14 all very similar.

15 THE COURT: Is ours based on that act?

16 MS. SULLIVAN: Yes.

17 THE COURT: -- or on that association?

18 MS. SULLIVAN: Yes. It's not exactly what it says,  
19 but a lot of them are not exactly the model act. They have  
20 slight variations, but they're generally the same language.  
21 And the of the nineteen cases that I sited, nine of them  
22 apply directly to the statutory maximum where the damages  
23 exceeded that and the Court said, "I'm sorry that your  
24 damages are more than that, but the statute says we have to  
25 take it from the statutory cap." It's a further limitation

1 on the statutory cap, the offset is.

2 And the other cases of those nineteen dealt with  
3 issues where the policy limits were less than the statutory  
4 cap and the association isn't obligated up to the statutory  
5 cap if the policy limits were less than that. The policy  
6 limits of the insolvent policy now. And so if the  
7 insolvent policy was 150, the statutory cap is 300, the  
8 statutory cap in that situation is 150.

9 THE COURT: It wouldn't give them more than they  
10 would have had if they had been solvent.

11 MS. SULLIVAN: Right. Right, Your Honor. And so  
12 in that situation, the statutory limits are the statutory  
13 cap. And so there, it's the same situation. The damages  
14 exceeded the statutory cap policy limits. And the Court's  
15 said, "The statute's require us to take it from the  
16 statutory cap policy and not the higher amount of damages."

17 And so we have our own statutes that require it.  
18 We have other cases interpreting it from other  
19 jurisdictions that support our interpretation of it. And  
20 another, just policy reason behind it is litigation. It's  
21 going to -- if we are going to put the number that we're  
22 subtracting from as the total amount of damages, we're  
23 going to have a lot more litigation on what those damages  
24 are. There's going to be a disincentive to settle those  
25 amount of damages because plaintiffs are going to want them

1 to be as high as possible because the offset -- you know,  
2 by the time the offset would be applied, they still get the  
3 full 300.

4 And plaintiffs say here that our position would  
5 actually require more litigation because it would  
6 disincenterize (phonetic) claimants from settling a joint  
7 tortfeasors, but that ignores the fact that they're  
8 required to resolve those kinds of joint tortfeasors first,  
9 before seeking recovery from the association.

10 So that -- our position does not increase the  
11 likelihood of attractive litigation as they claim.

12 THE COURT: Thank you.

13 MS. SULLIVAN: Thank you, Your Honor.

14 THE COURT: Mr. Luginbill?

15 MR. LUGINBILL: Thank you, Your Honor. I'm going  
16 to start with in reverse order. Because just -- because  
17 that's what's on my mind. Our position on the increased  
18 litigation is exactly taking this case as an example. If  
19 we took the position that they assume, what I should have  
20 done was not file suit against anybody else but the driver  
21 and the owner of this truck, and kept it under that policy.  
22 Then I could have collected my \$300,000 as soon as that  
23 company went belly up. There's no release signed --

24 THE COURT: If you didn't go after the other  
25 people --

1 MR. LUGINBILL: I could have then --

2 THE COURT: -- then you would have a \$300,000  
3 offset off of the 800 and you got up to 800 together.

4 MR. LUGINBILL: Exactly. That's what it's going to  
5 foster. Why would I go look for any other money if it's  
6 just a bottom dollar-for-dollar just going to give it back  
7 to the state? So it's -- and more to the point, I've got  
8 no incentive to maximize my recovery from my joint  
9 tortfeasors. I could let them out for \$25,000. They'll  
10 settle that, that fast, get a covered non-execute from  
11 their insured and I'll get the rest of it from the fund.

12 So to say that it's not going to increase or that  
13 it's not counter-productive to take this approach is  
14 completely ignoring how cases are actually litigated in  
15 real life.

16 THE COURT: Yeah, but the statute doesn't -- does  
17 it mention increased litigation or possible litigation  
18 or --

19 MR. LUGINBILL: It doesn't.

20 THE COURT: It does not?

21 MR. LUGINBILL: It does not. It doesn't talk about  
22 it one way or the other. But I think when you're  
23 interpreting an ambiguous situ -- a statute, and contrary  
24 to what they say, this is an ambiguous statute, then that's  
25 appropriate for the Courts to look at.

1           Secondly, let's talk about these other cases and  
2 the statutory cap. The nineteen cases --

3           **THE COURT:** Hold on a second before you go any  
4 further.

5           Ms. Sullivan, what if he had done that? What if he  
6 had, "Heck I'm just going sue your insured."

7           And y'all say that the case is worth \$300,000 or  
8 probably \$800,000, and you could address -- he's got a good  
9 point there. If he sued y'all first, you pay him the 300  
10 and then he goes after the other people involved, mechanics  
11 and whoever else was involved and he gets an \$800,000  
12 verdict and then he's got a \$300,000 setoff there with  
13 them. So he gets the whole 800.

14          **MS. SULLIVAN:** That's not how it works, Your Honor.

15          **THE COURT:** How does it work?

16          **MS. SULLIVAN:** The statute requires him to exhaust  
17 their other coverage first. That's what 38-31-100 does.  
18 The name of the statute is Exhaustion of Other Coverage and  
19 Claims. It says --

20          **THE COURT:** So you're not even on the hook until  
21 they exhaust every other possible contributor or other  
22 insurance.

23          **MS. SULLIVAN:** Exactly.

24          **THE COURT:** So that's your response to that.

25          **MS. SULLIVAN:** Exactly. So why would they go look?

1 Because they have to look for other money before they're  
2 entitled to any recover from us.

3 THE COURT: Thank you.

4 Mr. Luginbill?

5 MR. LUGINBILL: Thank you, Your Honor.

6 Again, the reality of it is these other monies,  
7 they're all going to say we do not have any liability. We  
8 have no liability whatsoever. Our offer is zero. Now,  
9 there, you've exhausted it.

10 THE COURT: Then you litigate it. Go ahead.

11 MR. LUGINBILL: I want talk about these other  
12 cases, Your Honor, because I believe that the fund is  
13 taking liberties with what they actually say and there's no  
14 other way to do this but go through the cases. The  
15 summaries -- her summaries, they are not, I think, fairly  
16 illustrative of the actual cases. In --

17 THE COURT: These are the cases from all other  
18 jurisdictions?

19 MR. LUGINBILL: This is the Appendix A cases.

20 Most of them, the vast majority of them are  
21 under-insured cases, meaning you get in a wreck, at fault  
22 driver carrier goes belly up. You then become -- that  
23 becomes an uninsured by statute. That is now an uninsured  
24 vehicle, so your uninsured coverage has to pay and they  
25 pay.

1           What they have done is try to bootstrap the  
2   argument that that is now the statutory cap. The policy  
3   limits of the at-fault driver become the statutory cap.  
4   The difference in that argument and why that argument is  
5   not logically sound is that in this case, we have joint  
6   tortfeasors that are applying the setoff, not the at-fault  
7   driver. So you get your 25,000 from your own UM carrier,  
8   and let's say you have, again, \$50,000 in damages, but you  
9   only have \$25,000 of coverage from the at-fault driver, you  
10   get 25,000 for your UM. That's -- that is all they're  
11   supposed to get. That's cease all you would have got had  
12   he remained insured. So the fund doesn't have any  
13   liability there. I agree with that.

14           That's not the same situation as you have a million  
15   dollars in damage and you get 200,000 from another. The  
16   at-fault policy still has not paid and the fund steps into  
17   the shoes of the at-fault policy.

18           Now, they say, specifically going back to the most  
19   recent case, a 2014 case, that they don't stand in the  
20   shoes. Well, they do stand in the shoes. That's exactly  
21   what that case says, subject to the limitations. They have  
22   all the rights, duties, and obligations of the --

23           **THE COURT:** Let me ask you this: If the company  
24   had not gone on solvent, how much coverage was there.

25           **MR. LUGINBILL:** One million dollars.

1           **THE COURT:** And you settled it for 800 and split  
2     that among everybody or you settle it with the other two  
3     tortfeasors and you got an \$800,000 verdict and then you  
4     have that setoff up to 370 and then owe you the 300 up to  
5     the million, right?

6           **MR. LUGINBILL:** That's right.

7           **THE COURT:** But by the fact of them going insolvent  
8     now and the fund takes over and --

9           **MR. LUGINBILL:** And the State has come up with a  
10    way to balance that, making the person as whole as they can  
11    while not exhausting the available coverage, exactly like  
12    what you do when a Tort Claims Act entity is sued. You try  
13    to make the person who's injured somewhat whole while  
14    balancing the need to not have an uncapped, unlimited  
15    amount of coverage on the part of the State.

16          **THE COURT:** Well, what if you had had \$800,000  
17    coverage and the other two -- you got two other carriers?

18          **MR. LUGINBILL:** Two other carrier -- well, three  
19    counting comp provided. She received comp from --

20          **THE COURT:** I thought they just had minimum  
21    coverage.

22          **MR. LUGINBILL:** If -- if each of them had minimum,  
23    there were just other cars?

24          **THE COURT:** Uh-huh.

25          **MR. LUGINBILL:** All that would change in this

1 scenario would be the amount that they've contributed.

2 THE COURT: So, in effect if they contribute, let's  
3 they 50,000, then you would owe them 250?

4 MR. LUGINBILL: That's their position.

5 THE COURT: That's your position.

6 MS. SULLIVAN: Uh-huh.

7 THE COURT: Your position was you would get up to  
8 the 800 and they would owe you a full 300.

9 MR. LUGINBILL: Correct.

10 And I think that -- now I want to get really to  
11 what I think is the key of the statutory interpretation of  
12 it and I think you just take them in order.

13 The first thing you have to look at is section 20,  
14 which is the definition statute.

15 THE COURT: Hold on a second. Do I have that up  
16 here?

17 MR. LUGINBILL: I'll just give you -- there are  
18 three statutes that I think are important, Your Honor.  
19 It's 20, 60, and 100.

20 THE COURT: All right. Ms. Sullivan, you have 20?

21 MS. SULLIVAN: I do, Your Honor.

22 THE COURT: All right. Which part of 20,  
23 Mr. Luginbill?

24 MR. LUGINBILL: Under the covered claim, which is  
25 subsection 8.

1           **THE COURT:** I'm sorry, 8, Covered Claim, means an  
2 unpaid claim.

3           **MR. LUGINBILL:** Start right there. That is an  
4 unpaid claim. What is a claim? A claim is a claim for  
5 damages. Nowhere in the definition of covered claim does  
6 it limit it to \$300,000 or to the policy limits or anything  
7 else. It just defines claim. There's an incident; a  
8 person is hurt; they make a claim back against that  
9 insurance carrier.

10           So you if take -- and then it talks about -- and  
11 it's important because you go onto the next page and  
12 there's A through H of --

13           **THE COURT:** What it does not include.

14           **MR. LUGINBILL:** What it doesn't include. And this  
15 legislature could have easily put in subsection I, "Any  
16 claims above 300,000," but they didn't. A claim is a  
17 claim. It's a claim for money damages, it's a result of an  
18 incident of some sort, resulting in -- in this case,  
19 personal injury. It could also be property damage, but in  
20 this case, it's personal injury. So a claim is a claim is  
21 a claim, just like any other case.

22           Then you go to the subsection 60, in which we've  
23 already discussed, but now read that same language using --  
24 with a little better understanding of the term covered  
25 claim, "The obligation includes" -- and that's the

1 obligation of the fund to pay -- "includes only the amount  
2 each covered claim is in excess of \$250 and less than 300.  
3 It's not defining covered claim there. It's limiting what  
4 you can get. You have a claim. Whether it's for a dollar,  
5 we don't have to pay it, it's too small for us to bother  
6 with it.

7           **THE COURT:** Well that was my first question with  
8 Ms. Sullivan is what is a claim.

9           **MR. LUGINBILL:** That's why you go back to 20. I  
10 think you start with 20 and a claim is a claim. And when  
11 you read that paragraph in that light, you come up with the  
12 obligation, which again, "The obligation of the fund to pay  
13 includes only the amount of each covered claim, the full  
14 amount of damages presented to the carrier, which is now  
15 defunct is in excess of \$250 and less than \$300" or, excuse  
16 me \$300,000.

17           And then they say you have to pay all the worker's  
18 comp and it goes onto other parts that aren't relevant to  
19 this inquiry. So to me, that's very -- that part is easy.

20           And then you go to the further protection that the  
21 state has under 31-100, or that the fund has -- and that's  
22 the exhaustion of other insurance policies.

23           So essentially what they say is, the obligation to  
24 pay is the obligation to pay is limited to 100 -- the claim  
25 is reduced, in this case 800 --

1 THE COURT: Where are you reading now?

2 MR. LUGINBILL: Going back to 60 just briefly, "The  
3 obligation includes only the amount of each covered claim  
4 in excess of 250 and less than 300,000."

5 Our position is you take the full amount of the  
6 damages and then 38-31 --

7 THE COURT: Hold on a second.

8 (WHEREUPON there was a pause in the proceedings.)

9 THE COURT: I'm sorry.

10 MR. LUGINBILL: That's all right, Judge.

11 38-100 -- 38-31-100 acts on the claim itself. 38-

12 THE COURT: 38-100, which subsection.

13 MR. LUGINBILL: Subsection 1, "A person having a  
14 claim under a policy," yada, yada, yada, "must be reduced  
15 by the full limits of such other coverage. Any amount  
16 payable on a covered claim under this chapter must be  
17 reduced by the full limits of such other coverage. On a  
18 covered claim."

19 Again, so that is the full amount of damages. The  
20 claim that was presented to the now defunct carrier. In  
21 this case, it's 800,000. So if we have to reduce that by  
22 the other -- in this case, it's actual funds received  
23 because that was the agreement and that's the way we  
24 structured the agreement to help frame this argument. So  
25 they get a credit for the 346 that was paid, no question

1 about it, 364 or whenever it was. They get --

2 THE COURT: And they'd owe you the balance if it  
3 wasn't for the cap.

4 MR. LUGINBILL: Correct. What that does is it  
5 reduces the amount of the claim. Now, the claim is for 400  
6 and something --

7 THE COURT: Well it doesn't reduce the amount of  
8 the claim, it reduces their responsibility on the claim.  
9 The claim remains the same there.

10 MR. LUGINBILL: Well, if you're looking at just how  
11 this action were treated, it does reduce the claim. In  
12 other words, your claim is for a set pot of damages, in  
13 this case \$800,000. 38-31-100 says, "We're going to reduce  
14 that pot of damages by any other monies that you could have  
15 or should have gotten and see what's left. Then if you  
16 still have money owed by what's left, we're going to make  
17 sure that we don't have to pay millions and millions of  
18 dollars by 38-31-60, which then reduces it to no more than  
19 \$300,000."

20 THE COURT: So in this case, under your analysis,  
21 the claim was 800, it's reduced by 376, that leaves what  
22 four and a quarter, somewhere in that neighborhood and they  
23 don't have to pay that, they're limited by statute to 300.

24 MR. LUGINBILL: Exactly. And I think that's  
25 exactly how it's intended. If you used covered claim -- if

1 you defined covered claim as a full amount of damages, this  
2 statute works beautifully.

3 THE COURT: I don't define it, the legislature  
4 defines it, so we have to go back and read it. "Covered  
5 claim means an unpaid claim which arises out of and is  
6 within the coverage."

7 MS. SULLIVAN: Your Honor, if I may?

8 THE COURT: Hold on one second. You through,  
9 Mr. Luginbill?

10 MR. LUGINBILL: There's one other thing I wanted to  
11 add, Judge is that in the -- in their footnotes -- and I  
12 put this in the memorandum --

13 THE COURT: Whose footnotes?

14 MR. LUGINBILL: In the -- the footnotes that they  
15 have, there's one particular --

16 THE COURT: What footnote, whose --

17 MR. LUGINBILL: Five of their memorandum.

18 THE COURT: Hold on a second. What page is it on?

19 MR. LUGINBILL: I want to say it's -- on page ten,  
20 Your Honor.

21 THE COURT: Footnote 5 says see Colorado Insurance  
22 Guarant (verbatim) versus Menor?

23 MR. LUGINBILL: Correct. And if this is  
24 interpreting a very similar statute, and they're offering  
25 it as the association is a source of last resort, so

1 picking it up in the middle, "Member insurers pay  
2 assessments to the association derived from the premium of  
3 policy holders. Although insureds correctly point out that  
4 the purpose of the fund -- well, the source of recovery of  
5 claims, then insured become insolvent, the fund should be  
6 reserved to pay insureds of insolvent insureds who have not  
7 recovered the same damages from another source. The  
8 requirement that an insurance recovery reduce the amount  
9 owed by the association serves to protect the limited fund  
10 from depletion when the insureds have already obtained  
11 recovery for the loss."

12           That's what all these UIM cases are talking about.  
13 You already collected your damages, you don't get a second  
14 bite at the apple. That's the double recovery prevention  
15 that these statutes are trying to prevent. You can't get  
16 our 25 and your UM. You can't double recover. Here you've  
17 got separate damages and the key language is, "same damages  
18 from another source." "Same damages." I'm not recovering  
19 the same damages from two different -- two times. I'm  
20 recovering part of my damages from one and I'm asking them  
21 to pay the rest of it as a covered claim, which is what the  
22 statute requires.

23           **THE COURT:** Thank you. Ms. Sullivan?

24           **MS. SULLIVAN:** I think the argument about what a  
25 covered claim means or what a claim means is kind of

1 missing a point. The statute says any amount payable on a  
2 covered claim. So it's not just the covered claim, it's  
3 how much we have to pay, the amount payable. And it's  
4 admitted that our obligation is no more than \$300,000.

5 THE COURT: I agree with that. You don't have to  
6 pay more than 300.

7 MS. SULLIVAN: So that's our --

8 THE COURT: Where is the offset coming from?

9 MS. SULLIVAN: So that's our amount payable. The  
10 words of the statute say, "Any amount payable on a covered  
11 claim must be reduced."

12 THE COURT: I --

13 MS. SULLIVAN: So we could never have an amount  
14 payable of 800,000. Our obligation, as defined by 60 and  
15 as admitted is no more than 300. So the amount payable on  
16 a covered claim is 300 and that's the number that has to be  
17 reduced. Whether the claim is for a billion dollars, our  
18 amount payable is still just 300.

19 Now, with -- Mr. Luginbill talked a little bit  
20 about what the legislature, you know, could have done by  
21 including it in 20 -- and I admit 20 is not the clearest on  
22 this.

23 THE COURT: They could have made it a lot clearer.

24 MS. SULLIVAN: Well, what they could have done,  
25 Your Honor, if they wanted to -- if they wanted the number

1 to be reduced from the total amount of damages, they could  
2 have said that. They could have said, "The amount of  
3 damages claimed must be reduced by the full limits of the  
4 other recovery."

5 They don't. They say, "Any amount payable on a  
6 covered claim."

7 The statute doesn't mention damages, it doesn't  
8 talk about the total amount claimed. It talks about how  
9 much we have to pay and reducing that number.

10 THE COURT: Okay.

11 MS. SULLIVAN: And they also say that the statute  
12 is ambiguous, but, of course, Your Honor, you can't just  
13 say that a statute is ambiguous. If you find it ambiguous,  
14 you have to explain why it's ambiguous. And I have not  
15 heard that yet, how this statute is ambiguous.

16 There's also been a distinction made about that  
17 this is not uninsured coverage that's been offset. There's  
18 no question that we have the offset, so it doesn't matter  
19 if it's uninsured coverage or not --

20 THE COURT: It's just where the offset is offset  
21 from 800 or 300.

22 MS. SULLIVAN: Exactly. And 38-31-100(a) -- I'm  
23 not sure you have 38-31-100 or not yet.

24 THE COURT: Yes, ma'am, I do.

25 MS. SULLIVAN: Okay. If you look at

1 38-31-100(1)(a), so it's the first inset --

2 THE COURT: A claim under a policy?

3 MS. SULLIVAN: Yes. Mr. Luginbill referenced that  
4 this money is coming from -- the other recovery is coming  
5 from joint tortfeasors and so that's different from  
6 uninsured. Well, it's not. This provision specifically  
7 says that any amount payable on a covered claim must be  
8 reduced by the full and combined limits of all joint  
9 tortfeasors. It says that as a matter of law that joint  
10 tortfeasors automatically fall under one and the joint  
11 tortfeasor recovery has to reduce the amount the  
12 association is obligated to pay.

13 So it specifically references joint tortfeasors in  
14 this situation.

15 THE COURT: Anything else?

16 MR. LUGINBILL: Just to respond to that, if I can  
17 briefly, Your Honor.

18 THE COURT: Mr. Luginbill?

19 MR. LUGINBILL: As to the ambiguity, we just talked  
20 about the ambiguity. Is it -- what does a covered claim  
21 mean and what is it deducted from mean and the amount  
22 payable mean; and those are all -- that is the ambiguity of  
23 the statute. But again, again going to (1)(A), she just  
24 talked about it. It's the amount payable on the covered  
25 claim is what must be reduced and then you apply the cap.

1           **THE COURT:** Well, if it wasn't ambiguous, it  
2 certainly is now, listening to the two of y'all.

3           **MS. SULLIVAN:** Well, Your Honor, if I could just  
4 ask just one more --

5           **THE COURT:** And I don't mean that flippant. It's  
6 just an interesting concept and it's an interesting  
7 argument and both of you have presented it very well and  
8 it's just -- I've never had one under this particular  
9 statute. I've never had one even practicing law over here.

10           When did the fund come in existence?

11           **MS. SULLIVAN:** In the 60's.

12           **THE COURT:** So it's been around a while.

13           **MR. VAN-DINE:** Your Honor, it was actually created  
14 in late 60's early 70's and under situation -- because a  
15 lot of companies started going insolvent at that time and  
16 they needed to come up with something. So nationally they  
17 came up with this system and they did a model act which was  
18 sent to each state. Each state's legislature, of course,  
19 likes to put its on touch on everything and so they changed  
20 certain languages, but the provisions that we're talking  
21 about here are predominantly the provisions that have been  
22 around since the --

23           **THE COURT:** Well it's interesting that it's been  
24 around since the 60's why has it never been decided by our  
25 courts. But anyway...

1           **MR. VAN-DINE:** Your Honor, I just don't think it's  
2 ever come up in South Carolina. I've been doing work with  
3 this association for 25 years and frankly, this is one of  
4 the first times that anybody's ever raised this issue here  
5 in South Carolina.

6           **THE COURT:** Well, I guess I was lucky, I never had  
7 a company that went insolvent when I was dealing with them.

8           Okay. First of all, let me thank both of you for  
9 excellent arguments, excellent briefs, excellent  
10 presentation and preparedness. I appreciate it. I'm just  
11 going to have to take it under advisement.

12           The cases that you've listed in your appendix, is  
13 that include in your memorandum?

14           **MS. SULLIVAN:** The copies of the cases are not. I  
15 have copies that I have marked on if you would like to have  
16 those.

17           **THE COURT:** Well, what I would like you to do is go  
18 back to your office and get your paralegal or whoever and  
19 just get me a clean copy of each one of them and just send  
20 it to me. Don't e-mail it because we tried to copy a memo  
21 this morning and it came out nothing but numbers.

22           **MS. SULLIVAN:** I can do that, Your Honor. If I  
23 could also have some more time to submit a supplemental  
24 brief in response to plaintiff's memo that we just received  
25 yesterday evening?

1           THE COURT: That will be fine. I'll give you  
2 thirty days?

3           MS. SULLIVAN: Thank you.

4           THE COURT: Mr. Luginbill, you need additional  
5 time?

6           MR. LUGINBILL: I don't, Your Honor.

7           THE COURT: When you send those cases, ma'am, just  
8 send Mr. Luginbill a copy of it, obviously. I'm going to  
9 take it under advisement. I'll give you thirty days. It's  
10 a very interesting question of law.

11           Thank y'all both very much.

12           MS. SULLIVAN: Thank you, Your Honor.

13           \* \* \* \* \* END OF TRANSCRIPT \* \* \* \* \*

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1 State of South Carolina )

2 County of Aiken )

Certificate of Reporter

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6 I, THE UNDERSIGNED, Brenda J. Sigwald,  
7 Official Court Reporter for the Eleventh Judicial Circuit  
8 of the State of South Carolina, do hereby certify that I  
9 reported the proceedings in the captioned case in the Court  
10 of Common Pleas in and for the State of South Carolina on  
11 the 28th day of 2014.

12 I FURTHER CERTIFY that the 32 foregoing pages,  
13 constitute a true, accurate and complete transcript of said  
14 hearing.

15 I FURTHER CERTIFY that I am neither kin, counsel,  
16 nor of interest to any party hereto.

17 IN WITNESS WHEREOF, I have hereunto set my hand and  
18 seal at Aiken County, this 5th day of August 2014.

19  
20  
21 *Brenda J. Sigwald*

22 Brenda J. Sigwald,  
23 Court Reporter and Notary Public  
24 For the State of South Carolina  
25 My commission expires  
January 4, 2020



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State of South Carolina  
County of Bamberg

Court of Common Pleas

Janette Buchanan and )  
Shana Smallwood )  
individually and as )  
Co-Personal )  
Representatives of the )  
Estate of James Buchanan )

Plaintiffs, )  
v. )

Transcript of Record  
2013-CP-05-00063

The South Carolina )  
Property and Casualty )  
Insurance Guaranty )  
Association, )  
Defendant. )

November 13, 2014  
Bamberg, South Carolina

B E F O R E:

The Honorable Doyet A. Early, III, Judge.

A P P E A R A N C E S:

Daniel W. Luginbill, Esquire  
Attorney for the Plaintiffs

A. Mattison Bogan, Esquire  
Attorneys for the Defendant

Bethanie K. Creppon  
Circuit Court Reporter

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(No Witnesses.)

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1           (The following proceedings were held November  
2       13, 2014.)

3           THE COURT: All right. Mr. Luginbill and  
4       Mr. --

5           MR. BOGAN: Matt Bogan, Your Honor.

6           THE COURT: Mr. Bogan, how are you doing?

7           MR. BOGAN: Fine, Judge. Thank you.

8           THE COURT: This is rule 59 (e)?

9           MR. BOGAN: Yes, sir.

10          THE COURT: All right. Tell me why I should  
11       change my order.

12          MR. BOGAN: The October 29th decision of the  
13       Supreme Court called Brock vs. South Carolina  
14       Property and Casualty Guaranty Association, my  
15       client, there's --

16          THE COURT: October 29, 2014?

17          MR. BOGAN: Yes, sir. It was 15 days ago.  
18       Remittor issues today.

19          THE COURT: Which was issued -- so subsequent  
20       to my order; right?

21          MR. BOGAN: Yes, sir. That's right, Your  
22       Honor. It was issued about two and a half weeks  
23       after your order in this case.

24          But we had argued the grounds that the statute  
25       was unambiguous. All the arguments are consistent

1 with the opinion that came out in that case in  
2 Brock, Your Honor. And for all of the reasons we  
3 proffered before, we now think they're reaffirmed.

4 THE COURT: You think that case has made it  
5 clear there's -- it backs up your position before  
6 where --

7 MR. BOGAN: Yes, sir, it does. And I have  
8 copies, if I can hand it up to you and your clerk.  
9 And I submitted a supplemental memorandum to Your  
10 Honor --

11 THE COURT: You did.

12 MR. BOGAN: -- but there's a copy.

13 Again, Your Honor, in May, held a lengthy  
14 summary judgment hearing. Subsequently in  
15 September, you issued an order ruling in favor of  
16 the plaintiff. And two of the rulings Your Honor  
17 made, one was that the statute was most ambiguous,  
18 to quote Your Honor's order. We had argued that it  
19 was plain and unambiguous and that Your Honor had to  
20 construe the entire statutory scheme.

21 On October 29th, the Supreme Court, construing  
22 these same statutes and the scheme, in Brock, on  
23 page 5 and 6, Your Honor, of that order, held that  
24 the statutory scheme is unambiguous and language is  
25 plain.

1 THE COURT: So the Supreme Court disagreed with  
2 me? Now, who should take precedence?

3 MR. BOGAN: Your Honor, I'll leave that to you  
4 to decide. But I think that in light of that  
5 ruling, that we -- that the order should be altered  
6 and amended. Now, Your Honor --

7 THE COURT: So Judge Dennis and I agree that it  
8 was ambiguous and Justice Pleicones disagrees with  
9 me and Judge Dennis?

10 MR. BOGAN: Judge Dennis did not rule it  
11 ambiguous in the Brock case previously, he just  
12 ruled --

13 THE COURT: Well, he got reversed.

14 MR. BOGAN: He ruled against us on the  
15 calculation of what money was owed, Your Honor,  
16 which you did as well, which is another ground that  
17 I want to visit here.

18 So, first, putting aside the issue of  
19 ambiguity, I think that is resolved by the Brock  
20 case. I also think the math is resolved by Brock.  
21 I think if you look at taking the directive of the  
22 Supreme Court in Brock, that you have to read the  
23 scheme as a whole that it's plain and unambiguous.

24 As Your Honor will recall, this has to do with  
25 whether my client, the Guaranty Association, owes

1       \$300,000 or owes zero. That's the math. And what's  
2       the measuring point, Your Honor? I think if you  
3       look at the Brock decision, which interpreted  
4       38-31-60, 38-31-100 and 38-31-20, those are the  
5       three statutes that are in play, and those cover  
6       what's a covered claim, what's the offset, and  
7       what's the limit of the obligation of the  
8       Association.

9               And the obligation of the Association is  
10       limited to \$300,000, period. It's between \$250 and  
11       \$300,000. And the question is, where do you apply  
12       the offset? Do you apply the offset, as the  
13       plaintiff would contend, from the damages or do you  
14       apply it from the cap, the limit? And those are my  
15       words, the cap.

16              Your Honor, I submit that Brock makes it  
17       difficult to find anything but that you apply it  
18       from the cap, because a covered claim -- the  
19       Association -- any time there's an amount of damage,  
20       which was the stipulation here, the underlying  
21       settlement, the damage was \$800,000. But once  
22       Equicap, the underlying insurance company, came  
23       insolvent, then come into the statutory regime of  
24       the Guaranty Association. And once you come under  
25       that scheme under 38-31-60 (a) IV, the liability and

1 the obligation of the Association is limited to  
2 \$300,000.

3 Page 5 in Brock, the Supreme Court says --  
4 maybe it's page 4. It says: The Guaranty  
5 Association --

6 THE COURT: Hold on a second.

7 MR. BOGAN: I'm sorry, Your Honor.

8 THE COURT: Tell me where to go.

9 MR. BOGAN: Just under discussion on page 4.  
10 The pages aren't numbered. It's printed from the  
11 court's website.

12 But under discussion, second full paragraph --

13 THE COURT: Starting with guaranty?

14 MR. BOGAN: Yes, sir. And then second  
15 sentence: Because Guaranty is a creature of  
16 statutes, its duties, liabilities and obligations  
17 are controlled by the terms and conditions set forth  
18 in the act, citing 38-31-60. And that statute, Your  
19 Honor, in Subsection (a) IV, limits the obligation  
20 to \$300,000. And so you have a covered claim after  
21 insolvency. You come in and the cap is \$300,000.  
22 So the measuring point always is \$300,000.

23 Then you next turn to 38-31-100, Your Honor,  
24 and that is the setoff. And that is the issue that  
25 was decided in Brock: How do you apply the setoff?

1       It wasn't measuring it from the cap, because in  
2       Brock the covered claim was only \$185,000, Your  
3       Honor. I don't contend otherwise. I mean, that was  
4       different math there. But when looking in Brock and  
5       how the setoff was applied, the Court said that if  
6       you look at the monies received -- and it uses  
7       received, I think, three or four times in this  
8       opinion. And here, Mr. Buchanan, the plaintiff,  
9       received \$376,000. And it's pretty elementary; they  
10      told me that 376- is more than 300-. So we're --  
11      our liability is zero when you apply the cap.

12           THE COURT: Well, it says: We agree with  
13      Guaranty that the Act provides that Guaranty may  
14      offset all the proceeds received by Brock.

15           MR. BOGAN: And I think you're substituting  
16      that sentence, the name Buchanan, when it applies  
17      here --

18           THE COURT: He or she received more than 300-,  
19      so --

20           MR. BOGAN: 376,000, Your Honor.

21           THE COURT: So you're home free.

22           MR. BOGAN: Well, that would be my contention,  
23      Your Honor.

24           THE COURT: I wish we had Brock before we  
25      argued it before.

1 MR. BOGAN: We argued the same points that we  
2 argued in Brock.

3 THE COURT: I understand that.

4 MR. BOGAN: Yes, sir.

5 THE COURT: I was like Judge Dennis; I  
6 disagree.

7 Mr. Luginbill, how do I get around Brock?

8 MR. LUGINBILL: Pretty easily, actually.

9 THE COURT: Well, tell me.

10 MR. LUGINBILL: Brock doesn't have anything to  
11 do with our case. If anything, it helps -- quite  
12 frankly, Judge, if anything, it helps my case.

13 Again, I don't disagree with how he's framing  
14 the case. We agreed to a stipulated damages amount  
15 of \$800,000 in this case to frame this  
16 appropriately. They're not seeking setoffs against  
17 total insurance policies, I'm not claiming the thing  
18 is worth \$5 million; we agreed that the covered  
19 claim is \$800,000. We did that so that when they  
20 get credit for the \$300-and-whatever-it-was-thousand  
21 that the plaintiffs have received in this case,  
22 there was still more than \$300,000 left unpaid.

23 So the question becomes, do you -- it's the  
24 same question we had in this case when we argued it  
25 back in May: Do you apply the setoffs for monies

1 received from the covered claim or do you apply it  
2 from the obligation or cap in this case? And in  
3 looking at Brock, there is, actually, a little bit  
4 of language that, I think, helps me.

5 If you go to the second full page of the  
6 argument after discussion, third paragraph down  
7 where it applies the actual section --

8 THE COURT: Hold on. Tell me where we are.

9 MR. LUGINBILL: That would be the paragraph  
10 starting, applying section 38-31-101.

11 THE COURT: Hold on. I'm not reading it.  
12 Line: Section 38-31-101, Brock received payments  
13 under the medical UM and PIP coverages?

14 MR. LUGINBILL: Correct. These claims were  
15 paid under an insurance policy. So in this case  
16 they're trying to determine whether or not PIP and  
17 even health insurance should be applied to the  
18 setoff. And the answer in the -- Brock says the  
19 answer is yes, but it doesn't answer the question of  
20 what to apply it to until you get down to the last  
21 sentence in that paragraph: Thus, the \$185,000  
22 covered claim should be offset by the full limits of  
23 these policies; not the obligation, the covered  
24 claim.

25 And again, what the Association argued in its

1       brief, even though they haven't argued here orally,  
2       is that the purpose of the fund is to make sure  
3       nobody gets full compensation, but to make sure  
4       everybody gets a little compensation to provide some  
5       coverage. That's the position that they're taking.

6               Our position is this is a remedial statute and  
7       if you can provide full coverage under the statutory  
8       scheme, you should; if the claim is just too big,  
9       then the cap kicks in. That's what we have here.  
10       The claim is, in this case, actually worth more than  
11       \$300,000, even after giving them the offsets against  
12       the covered claim. So the cap kicks in. It's a,  
13       first, you reduce the total value, the total  
14       damages, by all the other money you've received,  
15       then, if it's still greater than the covered claim,  
16       the max obligation, then you reduce the obligation  
17       down to the \$300,000. I don't think Brock does  
18       anything to affect what we argued earlier, except  
19       that last sentence that you apply the offsets to the  
20       covered claim. And that's the statutory language.  
21       The offsets are applied to the covered claim.

22               And if you think about it, it's just kind of  
23       common sense, Judge. What they're trying to say is,  
24       we have a finite amount of money to help people  
25       whose insurance companies have gone belly-up. We

1 don't want to exhaust everything we have on one  
2 really catastrophic claim. So what we do is, we  
3 say, we're not going to mess with the little cases.  
4 If it's not more than \$250,000, you're just going to  
5 have to eat that, we're not going to bother with it;  
6 and if it's worth more than -- but we're never going  
7 to pay out more than \$300,000 because we have to  
8 collect this finite sum of money.

9 So your obligations, you as the injured  
10 plaintiff, are to go out, find as much other money  
11 as you can, and if you're still left holding the bag  
12 after all of that, then we'll step into the shoes of  
13 the liability carrier that's gone belly-up and we  
14 will pay up to \$300,000 for whatever is left.

15 THE COURT: All right.

16 MR. BOGAN: Your Honor, thank you very much.  
17 Briefly in reply --

18 (Brief interruption.)

19 MR. BOGAN: Thank you, Judge. In taking  
20 Plaintiff's position a little bit out of order, the  
21 idea that the Association would provide some  
22 protection, that's not just my idea or my position,  
23 that's quoting the Supreme Court on page 6, the top  
24 of page 6 of the Brock --

25 THE COURT: I don't have page numbers.

1 MR. BOGAN: I'm sorry. It's the very last  
2 page, Your Honor.

3 Quoting and citing prior cases, it exists to  
4 provide some protection for insureds of insolvent  
5 insurance companies. So --

6 THE COURT: Yeah. But let's go back to the  
7 language of the statute.

8 MR. BOGAN: Okay.

9 THE COURT: Well, the person having a claim  
10 under an insurance policy, we've got that here --

11 MR. BOGAN: Yes, sir.

12 THE COURT: -- when the claim under such policy  
13 arises from the same facts, injury, et cetera, et  
14 cetera --

15 MR. BOGAN: No question about that.

16 THE COURT: -- gave rise to the covered claim  
17 against the Association.

18 MR. BOGAN: Okay. And here's where --

19 THE COURT: You and Dan differ.

20 MR. BOGAN: Well, the plaintiff has portrayed  
21 to the Court that the \$800,000 damages number is a  
22 covered claim. That's not accurate, Your Honor.

23 THE COURT: Why is that not accurate?

24 MR. BOGAN: Well, because it was stipulated  
25 that \$800,000 was the damage amount. But then you

1 have to look at the statutory scheme 38-30-160,  
2 which you didn't just read then. But it's in the  
3 statutory scheme that talks about the obligation and  
4 its extent on a covered claim. The covered claim  
5 here can only amount to \$300,000; it can never be  
6 more. So even though the damages -- damages, that's  
7 the keyword -- were \$800,000 --

8 THE COURT: What section are you referring to?

9 MR. BOGAN: 38-31-60, which isn't quoted in the  
10 opinion; it was cited by the Court --

11 THE COURT: Cited by --

12 MR. BOGAN: -- under discussions. Cited, but  
13 not quoted. It's quoted in our Motion for Summary  
14 Judgment, Your Honor, at the bottom of page 3 -- or  
15 5, rather, Your Honor.

16 THE COURT: Read the language that you think --  
17 you got a copy of it, Mr. Luginbill?

18 MR. LUGINBILL: Your Honor, I have the copy of  
19 the definition section which has covered claim in  
20 it.

21 THE COURT: Is that the same one that you're  
22 reading?

23 MR. BOGAN: But that's in section 20, Your  
24 Honor. That's not what I'm reading to you. But  
25 that would be --

1 THE COURT: This is -- anybody got 60?

2 MR. LUGINBILL: Yes, sir.

3 MR. BOGAN: That will be helpful to you, Your  
4 Honor.

5 THE COURT: We did this all before, didn't I?

6 MR. BOGAN: Yes, sir, you did.

7 THE COURT: Mr. Bogan, you're referring me to,  
8 where, 60?

9 MR. BOGAN: Yes, sir.

10 THE COURT: Subsection --

11 MR. BOGAN: 60 -- (a) IV, Your Honor.

12 THE COURT: This obligation includes only the  
13 amount each covered claim is in excess, is that  
14 where we are?

15 MR. BOGAN: Yes, sir. In excess of -- \$250 is  
16 less than 300,000. So the covered claim is limited  
17 to \$300,000, the obligation on that.

18 MR. LUGINBILL: The obligation --

19 THE COURT: That's your position, that's where  
20 it's limited to the --

21 MR. BOGAN: Yes, sir. I think that's fully  
22 supported by Brock and the interpretation of the  
23 Supreme Court finding it unambiguous and that the  
24 Association was entitled to a setoff for the other  
25 monies received.

1           THE COURT: All right. Well, do me a favor.  
2           Let me have a copy of your Motion for Summary  
3           Judgment, your memo. Mr. Luginbill, I have your  
4           memo. And I'll just have to take it under  
5           advisement and read Brock again or read it --

6           MR. LUGINBILL: And, Your Honor, if I can, just  
7           to point you -- briefly, my argument would be --  
8           their argument is the covered claim can never be  
9           more than \$300,000. That's what he just argued to  
10          you. If the legislature wanted to limit a covered  
11          claim to \$300,000, then \$300,000 would appear in the  
12          definition of covered claim, and it does not. All  
13          it says is it's an unpaid claim arising out of and  
14          within the coverage and is subject to the applicable  
15          limits of an insurance policy.

16          THE COURT: But when he goes to 60 though, you  
17          still got the covered claim, as you defined, but it  
18          then defines what the obligation of the guaranty  
19          fund is.

20          MR. LUGINBILL: To pay against a covered claim.  
21          It doesn't change the definition of covered claim.  
22          It just says, we will only pay a covered claim up to  
23          \$300,000.

24          THE COURT: All right.

25          MR. LUGINBILL: So why that's important is when

1       you go to 100, which is the setoff -- and I can hand  
2       that to you, Judge, so you have it. When you go to  
3       100, it applies the setoff to the covered claim. So  
4       it goes covered claim, then setoff, and if after  
5       that you are still over the max obligation, then the  
6       cap kicks in and the Association only has to pay up  
7       to \$300,000.

8               Brock doesn't help with any of that because the  
9       covered claim was only 185,000. But the language in  
10      Brock, which I pointed out, they said they applied  
11      the setoff to the covered claim.

12             THE COURT: Well, Brock says they applied the  
13      setoff to the amount recovered.

14             MR. BOGAN: Which in the funds received, Your  
15      Honor -- and Plaintiff -- funds in isolation, which  
16      the Court can't read it in the phone booth, read one  
17      section, you got to read it together. That's the  
18      instruction in Brock from the Court.

19             THE COURT: All right. Well, I'm going to have  
20      to go back and reread -- well, not reread, but apply  
21      Brock to our facts and see if it gets any clearer.  
22      Mr. Bogan, give me a copy of --

23             MR. BOGAN: Yes, sir, I'm going to. And I'm  
24      sorry I don't have a stapler, Your Honor, but all  
25      these things are filed and the plaintiff has a copy.

1 THE COURT: Just send me a copy.

2 -- END OF TRANSCRIPT OF RECORD --

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## C E R T I F I C A T E

STATE OF SOUTH CAROLINA  
COUNTY OF LEXINGTON

I, the undersigned, Bethanie K. Creppon, Circuit Court Reporter for the Second Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the captioned cause, relative to appeal in the Common Pleas Court for Bamberg County, South Carolina, on the 13th of November, 2014.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

April 21, 2015

/s/Bethanie K. Creppon  
Circuit Court Reporter

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

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.

NOTICE OF APPEAL

The South Carolina Property and Casualty Insurance Guaranty Association ("Association") hereby appeals from the following orders and/or judgments of the circuit court in the above matter: (1) the Order granting the Motion for Summary Judgment filed by Respondents Janette Buchanan and Shana Smallwood, individually and as Co-Personal Representatives of the Estate of James S. Buchanan ("Respondents"), and denying the Association's Motion for Summary Judgment filed September 10, 2014 ("Summary Judgment Order") (attached as Exhibit A); and (2) the Form 4 Judgment in a Civil Case denying the Association's Motion for Reconsideration of the Summary Judgment Order filed January 22, 2015 ("Reconsideration Order") (attached as Exhibit B).

The Association received written notice of entry of the Summary Judgment Order on September 15, 2014, and timely served its Motion for Reconsideration on September

RECEIVED

FEB 10 2015

SC Court of Appeals

25, 2014. The Association received written notice of entry of the Reconsideration Order on January 29, 2015, and, therefore, this Notice of Appeal is timely.

NELSON MULLINS RILEY & SCARBOROUGH LLP

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Attorneys for Appellant The South Carolina Property  
and Casualty Insurance Guaranty Association

Columbia, South Carolina

February 10, 2015.

Other Counsel of Record:

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

# ***Exhibit A***

FEB 10 2015

SC Court of Appeals

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF BAMBERG ) SECOND JUDICIAL CIRCUIT  
CASE NO.: 2013-CP-05-63

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

Plaintiffs,

v.

The South Carolina Property and Casualty  
Insurance Guaranty Association,

Defendant.

ORDER GRANTING  
PLAINTIFFS' MOTION  
FOR SUMMARY JUDGMENT  
AND DENYING DEFENDANT'S  
MOTION FOR SUMMARY  
JUDGMENT

FILED  
BAMBERG COUNTY  
2014 SEP 10 PM 12:05  
JAMES B. HERS  
CLERK OF COURT  
BAMBERG, SC

A TRUE COPY

Attest:   
CLERK OF COURT  
BAMBERG COUNTY, SC

This matter was before me on Cross-Motions for Summary Judgment filed by both parties. The Plaintiffs were represented by Daniel Luginbill and the Defendant was represented by Howard A. VanDine, III and Tara C. Sullivan.

There is no dispute of material fact, and the issues before the Court are purely matters of law. Accordingly, Summary Judgment is the appropriate mechanism to resolve the dispute. However, the facts of the case must be set forth to accurately apply them to the applicable law in this case. Accordingly, I make the following:

FINDINGS OF FACTS

On January 7, 2008, James S. Buchanan was involved in a motor vehicle accident in Bamberg County, South Carolina. A log truck owned by Travis Scott and driven by Eddie Best had a set of tandem tires come off the axle. This set of tires struck the front of Mr. Buchanan's vehicle, breaking the front axle. As a result, Mr. Buchanan's truck crossed the centerline striking another tractor-trailer. The resulting collision caused Mr. Buchanan's truck to catch fire and he was incinerated in the cab of his truck.

  
JTB

Mr. Scott's vehicle was insured for One Million (\$1,000,000) by Aequicap Insurance Co. (Aequicap). Aequicap went into receivership in the state of Florida. The South Carolina Property and Casualty Guaranty Association (The Association) has assumed management of claims made against South Carolina insureds for causes of actions made against the Florida Guaranty Fund.

Pursuant to a settlement of the underlying tort case, (Case Number 2008-CP-05-122), which was designed to frame the outstanding issues between the parties, the damages suffered by the Plaintiff are \$800,000. After giving the Association credit for \$376,622 received by the Plaintiffs pursuant to Florida Workers' Compensation benefits and settlements with certain co-defendants in the underlying case, there remains a "balance" due to Plaintiffs from the full amount of the Judgment of \$423,378, which obviously exceeds the \$300,000 cap of S.C. Code Ann., §38-31-60. The Association claims that the credits should be applied from the cap, which would leave a balance of zero. Plaintiff asserts the credits are applied to the full amount of the judgment, leaving the Association liable for its full statutory limits of \$300,000.

Given the stipulation of facts the parties have entered as part of the wrongful death settlement, there are no issues of material fact in dispute. The only question is one of law for the Court. Both parties have moved for summary judgment, and the court's decision is one of statutory interpretation only.

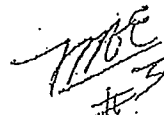
#### CONCLUSIONS OF LAW

**I. THE PLAIN LANGUAGE OF THE STATUTES MANDATES THAT THE ASSOCIATION HAS AN OBLIGATION TO PAY \$300,000 TO THE PLAINTIFF.**

The South Carolina Property and Casualty Insurance Guaranty Association Act, S.C. Code Ann, §38-31-10, et seq. (the "Act"), is a remedial statute designed to "protect consumers in the event that their insurer becomes insolvent." *Hudson v. Lancaster Convalescent Center*, 7543 S.E.2d 486, 407 S.C. 112 (2014). "[The Association's] purpose is to provide some protection to insureds whose insurance companies become insolvent." *South Carolina Property and Cas. Ins. Guar. Ass'n v. Carolinas Roofing and Sheet Metal Contractors Self-Insurance Fund*, 446 S.E.2<sup>nd</sup> 422, 424, 315 S.C. 555, 557 (1994).

Examining the text of the applicable statutes reveals portions of the statute are most ambiguous. The Association has asserted that *Hudson, supra*, held that the entire chapter is unambiguous. The case held nothing of the sort, and instead discussed only the ability of the Association to sue or be sued. *Hudson* held that those relevant portions of the statute were unambiguous. *Hudson* did look at the definition of "covered claim," but only in the context of determining whether the Association could be liable in suit for its own actions, specifically penalties and interest for not paying a claim due under a policy of workers' compensation insurance. The Court held it was liable, declining to limit the Association's liability to the payment of covered claims only.

S.C. Code Ann. § 38-31-20 defines "covered claim" as "... an unpaid claim ... which arises out of and is within the coverage ... of an insurance policy ... if the insurer is insolvent ... ." The only limitation within the definition is that the claim must be within the coverage limits of the policy written by the defunct insurer. Nothing in the definition of "covered claim" refers to a limit of the Association's liability to pay on a

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claim. This is logical, as no one making a claim should be allowed to seek an amount greater than what the policy would pay out if it was in full force and effect.<sup>1</sup>

S.C. Code Ann. § 38-31-60 limits the extent of the Association's liability to pay a claim to \$300,000. Section 38-31-60(a)(iv) provides, in pertinent part, "The association ... is obligated to the extent of claims existing before the determination of insolvency ... ." This *obligation* includes only the amount each covered claim is in excess of two hundred fifty dollars and is less than three hundred thousand dollars." (emphasis added). Under the plain language of this section, it is the Association's duty to pay that is limited, not the amount of the covered claim. This is a critical distinction in determining how to apply the set-offs.

S.C. Code Ann., § 38-31-100(1) gives the Association a setoff against "a covered claim" for the full limits of any other coverage from any other insurer that may apply. If there are no limits, then the "claim must be reduced by the total recovery." Of critical importance to understanding the legislature's intent is the fact that § 38-31-100(1) applies the set-off to the "covered claim," rather than the "Association's obligation."<sup>2</sup>

Applying this framework of statutory language to the facts of this case, there was a claim pending before the insolvency, as the wreck happened prior to the insolvency. Neither party disputes this is a covered claim. The *covered claim* is for \$800,000, per the approved wrongful death settlement. The off-sets of § 38-31-100(1), totaling \$376,622,

---

<sup>1</sup> It is important to note that all but one of the cases listed by the Association in Appendix A to its brief are cases involving setoffs applied to the policy limit, rather than the statutory limit, despite how they are framed in the brief of the Association.

<sup>2</sup> In this case, the damages were agreed upon and the set-off limited to the amounts actually received, rather than policy limits, under the agreement of the parties settling the wrongful death claim. This was done with the intent to better frame the issue to be decided in this declaratory judgment action.

are then applied to the \$800,000 claim, leaving a balance of \$423,378. The Association's obligation to pay is then further limited to \$300,000 by action of § 38-31-60.

It is clear that the purpose of this section is to prevent a double-recovery by an insured making a claim against a solvent insurer then making the same claim against the Association. By following the plain logical interpretation of the statutory text, this purpose is met, while also fulfilling the main purpose of the Act by providing coverage.

**II. S.C. CODE ANN. § 38-31-60 IS IDENTICAL IN FUNCTION TO THE TORT CLAIMS ACT, WHICH APPLIES THE SETOFFS TO DAMAGES, NOT THE CAP.**

A cardinal rule of statutory interpretation is to determine the intent of the legislature. *Jones v. State Farm Mut. Auto. Ins. Co.*, 612 S.E.2d 719, 364 S.C. 222, (Ct. App. 2005). Where the language of an act is ambiguous or gives rise to doubt as to legislative intent, a court may search for that intent beyond the borders of the act itself. *Id.* To the extent ambiguity remains, looking to similar statutes within South Carolina's statutory framework helps guide the inquiry.

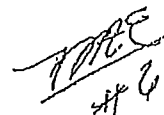
In construing a statute, the court looks to the language as a whole in light of its manifest purpose. *State v. Dawkins*, 352 S.C. 162, 573 S.E.2d 783 (2002); *Adams v. Texfi Indus.*, 320 S.C. 213, 464 S.E.2d 109 (1995). It is well settled that statutes dealing with the same subject matter are *in pari materia* and must be construed together, where possible, to achieve a harmonious result. *Joiner, ex rel. Rivas v. Rivas*, 536 S.E.2d 372, 342 S.C. 102 (2000). Section 38-31-10, et seq. deals explicitly with the application of limitations on the liability of the state, in this case the non-profit Association created by

the State of South Carolina, to persons who have been injured. Accordingly, these statutes must be read together to produce a harmonious treatment of the issues.

There are no reported cases interpreting S.C. Code Ann., §38-31-60. However, there are other limits on the liability of state entities in South Carolina's legislative framework. As Defendant has pointed out in argument and in its brief, the Association is not a governmental agency, but rather a separate entity created by statute. This distinction is not important here, as the Court is looking to similar statutes for guidance only.

The South Carolina Tort Claim's Act, S.C. Code Ann., § 15-78-10, et seq., contains various provisions limiting the liability of state entities for claims made against them. Specifically, S.C. Code Ann., § 15-78-120 provides, in pertinent part, "no person shall recover in any action or claim brought hereunder a sum exceeding three hundred thousand dollars because of loss arising from a single occurrence regardless of the number of agencies or political subdivisions involved."

Section 38-31-100(1) has the same purpose as § 15-78-120 in that it prevents a double recovery as discussed above, and protects the State from unlimited exposure. This interpretation gains further support in § 38-31-100(2), which specifically contemplates a claimant being able to recover from more than one Guaranty Association, and that the S.C. Association is entitled to credit for the amount of recovery the claimant receives from such other Association. Again, the purpose of the language is to prevent double recovery, not prevent full recovery, by the claimant. The Association admits this purpose in its brief when it cites to the following language from *Colorado Ins. Guar. Ass'n v. Menor*, 166 P.2<sup>nd</sup> 205, 215 (Colo. App. 2007), "... the fund should be reserved

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to pay insureds of insolvent insurers who have not recovered the same damage from another source." Here, Plaintiff has not recovered the same damages, rather, the Estate is pursuing the damages still unpaid after applying the set-off and the caps.

The issue of how to apply a set-off from a joint tortfeasor in a Tort Claims Act case was specifically decided in *Smalls v South Carolina Dept. of Educ.*, 528 S.E.2<sup>nd</sup> 682, 339 S.C. 208 (Ct. App. 2000). In *Smalls*, the Court held, "[c]ontrary to Department's argument, it is not entitled to a set-off from the amount of the cap because Smalls has not recovered all damages awarded by the jury and application of a set-off in this manner would unfairly deprive a plaintiff of the verdict." *Id.*, at 689, at 222. In *Smalls*, the Plaintiff's settlements with joint tortfeasors were less than the jury's verdict. Therefore, applying the set-off to the verdict, rather than the cap, did not result in a double recovery and thus "we see no equitable reason to apply the credit in the manner urged by the Department." *Id.*

The same manner of applying set-offs also applies to actions against charitable organizations. S.C. Code Ann., § 33-56-180(A) states "[a] person...may recover in an action brought against the charitable organization only the actual damages he sustains in an amount not exceeding the limitations on liability imposed in the South Carolina Torts Claims Act ... ." As *Smalls* sets out the manner in which the cap and set-offs are applied to it for Tort Claims Act cases, it follows that the same rule would apply to charitable immunity cases as well. While not controlling, *Smalls* and its progeny have a logic that the Court finds persuasive and harmonious to the statutes at issue here.

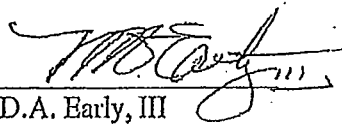
Of note, nothing in Title 38, Chapter 10 clearly sets out that a claimant may only receive \$300,000 in any event. It only limits the Association's payment to a single

claimant to \$300,000. If the purpose of the Act is to protect South Carolina citizens from insurance companies who become insolvent, then the Act is remedial and should be liberally construed in favor of payment to the claimant in order to best accomplish that goal. Adopting the interpretation suggested by the Association would prevent full compensation, and in this case, any compensation from the Association. It would also work to dissuade claimants from resolving claims against joint tortfeasors who may have little proportional liability, thus increasing the likelihood of protracted litigation and actually increasing the Association's exposure. As such, it is against public policy to adopt such an argument.

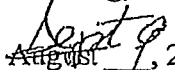
For the reasons set forth above, Plaintiff's Motion for Summary Judgment is GRANTED. Defendant's Motion for Summary Judgment is DENIED. The Association shall pay \$300,000 within thirty (30) days of service of this Order.

AND IT SO ORDERED

By: \_\_\_\_\_

  
D.A. Early, III  
Presiding Judge  
2<sup>nd</sup> Judicial Circuit

Bamberg, SC

  
August 1, 2014

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF BAMBERG )

CERTIFICATE OF MAILING

I, Bari J. Crider, secretary to Daniel W. Luginbill, counsel for plaintiff in the case of Janette Buchanan and Shana Smallwood, et al. v. The South Carolina Property and Casualty Insurance Guaranty Association, Case #13-CP-05-63, do hereby certify that I have served the foregoing Order Granting Plaintiffs' Motion for Summary Judgment and Denying Defendant's Motion for Summary Judgment, by mailing a copy U. S. mail, first class delivery; postage prepaid to the attorney(s) or person(s) at the address(es) indicated as follows:

Tara Sullivan, Esquire  
Howard VanDine, III, Esquire  
Nelson, Mullins, Riley & Scarborough, LLP  
PO Box 11070  
Columbia, S. C. 29211

Sept. 11, 2014

Bamberg, SC

By: Bari J. Crider  
Bari J. Crider, Secretary to  
Daniel W. Luginbill, Counsel for Plaintiff  
Wilson & Luginbill, LLC  
P. O. Box 1150  
Bamberg, SC 29003  
(803) 245-7799

# ***Exhibit B***

STATE OF SOUTH CAROLINA  
COUNTY OF BAMBERG  
IN THE COURT OF COMMON PLEAS

## JUDGMENT IN A CIVIL CASE

CASE NO. 2013 CP-05-63

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

The South Carolina Property and Casualty Insurance  
Guaranty Association

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant  
or  
☐ Self-Represented Litigant

## DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:** ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court; Defendant's Motion to Reconsider is DENIED.

## ORDER INFORMATION

This order ☐ ends ☐ does not end the case.  
Additional Information for the Clerk:

## INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

| Judgment in Favor of<br>(List name(s) below) | Judgment Against<br>(List name(s) below) | Judgment Amount To be Enrolled<br>(List amount(s) below) |
|----------------------------------------------|------------------------------------------|----------------------------------------------------------|
|                                              |                                          | \$                                                       |
|                                              |                                          | \$                                                       |
|                                              |                                          | \$                                                       |

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

0136  
Judge Code

1/20/15  
Date

**For Clerk of Court Office Use Only**

This judgment was entered on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ and a copy mailed first class or placed in the appropriate attorney's box on this 22 day of Jan, 2015 to attorneys of record or to parties (when appearing pro se) as follows:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
**ATTORNEY(S) FOR THE PLAINTIFF(S)**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
**ATTORNEY(S) FOR THE DEFENDANT(S)**

B. H.  
**CLERK OF COURT**

**Court Reporter:**

**ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.**

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

**RECEIVED**

FEB 10 2015

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

SC Court of Appeals

Case No. 2013-CP-05-00063

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:

Notice of Appeal

Counsel Served:

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Lisa Whitehurst  
Administrative Assistant

February 10, 2015

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

**RECEIVED**  
NOV 25 2015  
SC Court of Appeals

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.

**CERTIFICATE OF COUNSEL**

The undersigned certifies that the Record on Appeal contains all material  
proposed to be included by any of the parties and not any other material.

<signature block next page>

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November 25, 2015.