

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, ... Petitioner.

APPENDIX TO THE
PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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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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SC Court of Appeals

**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), 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 (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (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

FILED
BAMBERG COUNTY
2014 SEP 10 PM 12:05
JAMES B. HERS
CLERK OF COURT
BAMBERG, SC

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

Plaintiffs,

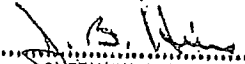
v.

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

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

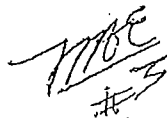
I. THE PLAIN LANGUAGE OF THE STATUTES MANDATES THAT THE ASSOCIATION HAS AN OBLIGATION TO PAY \$300,000 TO THE PLAINTIFF.

MRE
#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.2nd 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.¹

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."²

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,

¹ 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.

² 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. Texfit 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.2nd 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 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.2nd 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

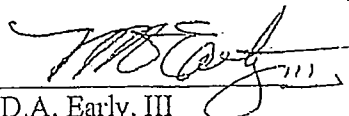
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claimant to \$300,000. If the purpose of the Act is to protect South Carolina citizens from insurance companies who become insolvent, then the Act is remedial and should be liberally construed in favor of payment to the claimant in order to best accomplish 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
2nd 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

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: [Signature]
CLERK OF COURT
BAMBERG COUNTY, SC

SC Bar #: 68525

Telephone #: (803) 245-7700

Fax #: (803) 245-0037

Other:

E-mail: dan@wklawfirm.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)

☒ Contracts ☐ Constructions (100) ☐ Debt Collection (110) ☐ Employment (120) ☐ General (130) ☐ Breach of Contract (140) ☐ Other (199)	☐ Torts - Professional Malpractice ☐ Dental Malpractice (200) ☐ Legal Malpractice (210) ☐ Medical Malpractice (220) Previous Notice of Intent Case # 20 <u>-CP-</u> ☐ Notice/ File Med Mal (230) ☐ Other (299)	☐ Torts - Personal Injury ☐ Assault/Slander/Libel (300) ☐ Conversion (310) ☐ Motor Vehicle Accident (320) ☐ Promises Liability (330) ☐ Products Liability (340) ☐ Personal Injury (350) ☐ Wrongful Death (360) ☐ Other (399)	☐ Real Property ☐ Claim & Delivery (400) ☐ Condemnation (410) ☐ Foreclosure (420) ☐ Mechanic's Lien (430) ☐ Partition (440) ☐ Possession (450) ☐ Building Code Violation (460) ☐ Other (499)
☐ Innate Petitions ☐ PCR (500) ☐ Mandamus (520) ☐ Habeas Corpus (530) ☐ Other (599)	☐ Judgments/Settlements ☐ Death Settlement (700) ☐ Foreign Judgment (710) ☐ Magistrate's Judgment (720) ☐ Minor Settlement (730) ☐ Transcript Judgment (740) ☐ Lis Pendens (750) ☐ Transfer of Structured Settlement Payment Rights Application (760) ☐ Other (799)	☐ Administrative Law/Relief ☐ Reinstate Driver's License (800) ☐ Judicial Review (810) ☐ Relief (820) ☐ Permanent Injunction (830) ☐ Forfeiture-Petition (840) ☐ Forfeiture-Consent Order (850) ☐ Other (899)	☐ Appeals ☐ Arbitration (900) ☐ Magistrate-Civil (910) ☐ Magistrate-Criminal (920) ☐ Municipal (930) ☐ Probate Court (940) ☐ SCDOT (950) ☐ Worker's Comp (960) ☐ Zoning Board (970) ☐ Administrative Law Judge (980) ☐ Public Service Commission (990) ☐ Employment Security Comm (991) ☐ Other (999)
☐ Special/Complex /Other ☐ Environmental (600) ☐ Automobile Arb. (610) ☐ Medical (620) ☐ Other (699)	☐ Pharmaceuticals (630) ☐ Unfair Trade Practices (640) ☐ Out-of-State Depositions (650) ☐ Motion to Quash Subpoena in an Out-of-County Action (660) ☐ Sexual Predator (510)		

Submitting Party Signature: [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 210th 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.	)	COMPLAINT
	)	(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.

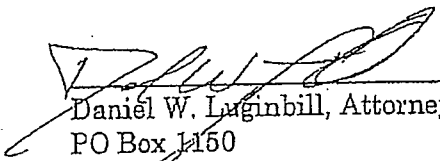
12. The Defendant's obligation to pay the claim is limited to \$300,000 pursuant to S.C. Code Ann. §38-31-60.

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)

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.

) IN THE COURT OF COMMON PLEAS
) SECOND JUDICIAL CIRCUIT

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

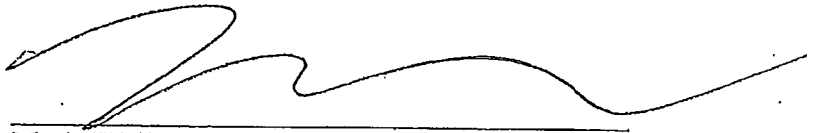
I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Defendants, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, 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
FILED 2/2/14 PM 2:06

MOTION AND ORDER INFORMATION
CLERK OF COURT
BAMBERG, SC
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

JAMES S. HERS
CLERK OF COURT
BAMBERG, SC

FILED
BAMBERG COUNTY
2014 APR 22 PM 2:06

**DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

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: Isaac 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

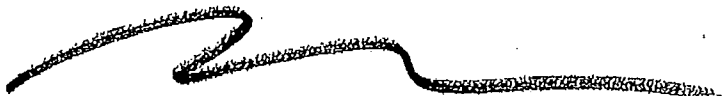
I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Defendants, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, 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
2014 APR 22 PM 2:07
JAMES B. HERR
CLERK OF COURT
BAMBERG, SC

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, et al.

Plaintiff,

vs.

The South Carolina Property & Casualty
Insurance Guaranty Association,

Defendant.

**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@wklawfirm.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

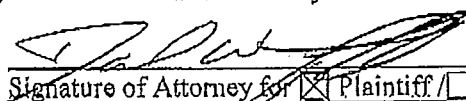
Estimated Time Needed: 30 mins.

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, SCRCP)
☐ 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: \$ _____

Appendix_000031

ROA_00026

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,

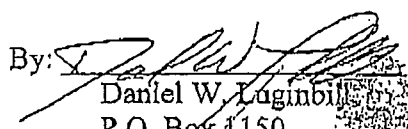
Defendant.

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@wlklawfirm.com
Attorney for Plaintiff

Bamberg, SC

May 14, 2014

2014 MAY 15 AM 10:02

FILED
CLERK OF COURT
BAMBERG, SC

Appendix_000032

ROA_00027

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)
) IN THE COURT OF COMMON PLEAS
COUNTY OF BAMBERG) SECOND JUDICIAL CIRCUIT

Janette Buchanan and Shana) Civil Action No. 2013-CP-05-63
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.)

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

FILED
CLERK OF COURT
2014 MAY 27 PM 5:30

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 424.¹

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

¹. 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).² 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.³

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

² 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.").

³ 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).⁴ 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

⁴ 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.”)⁵ 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

⁵ 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 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. MERS
CLERK OF COURT
BAMBERG, SC

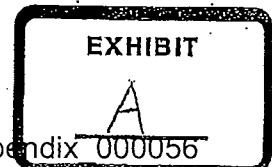
This matter comes before the Court upon the Petition of Janette Buchanan Personal, Personal Representative of the Estate of James Buchanan, deceased, for approval of a Settlement Agreement arising out of a motor vehicle accident that occurred on or about January 7, 2008 on or near US Highway 321, in 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 directed to accept the Settlement Agreement (attached as Exhibit A) in settlement of any and all

Attest.....
CLERK OF COURT
BAMBERG COUNTY, SC

DAE
2014



ROA_00051

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

Handwritten signature and initials, possibly "DDE" and "H2", in dark ink.

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

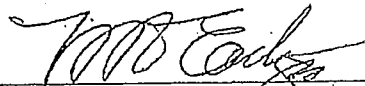
pursuant to the declaratory judgment action shall be allocated towards the wrongful death claim and the remaining Zero and no/100 (\$0.00) Dollars of the settlement proceeds shall be allocated towards the survival claim, which this Court has dismissed with prejudice.

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 Aequivap 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

7-10, 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 travelling 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 Fisoal 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.

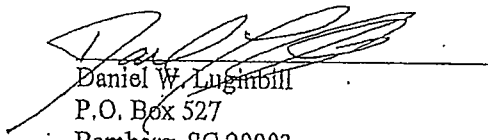
11. The parties also make clear that this is a resolution of a doubtful and disputed claim.

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-

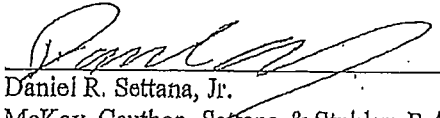
42, which require court approval for any wrongful death settlement. This Agreement has been reached without payment of any funds by the Guaranty Fund on behalf of Defendants Eddie R. Best and Travis Scott, d/b/a Fiscal Transportation to Plaintiff.

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

WE CONSENT:



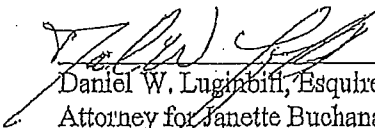
Daniel W. Luginbill
P.O. Box 527
Bamberg, SC 29003
(803) 245-7799
Attorney for Plaintiff Janette Buchanan



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. Luginbuhl, 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	)	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 MEMORANDUM
	)	IN SUPPORT OF
Plaintiffs,	)	SUMMARY JUDGMENT
	)	
v.	)	
	)	
The South Carolina Property and Casualty	)	
Insurance Guaranty Association,	)	
	)	
Defendant.	)	

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.2nd 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.¹

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

¹ It is important to note that all but one of the Association's 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.”²

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.

² 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.2nd 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.2nd 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. HERS
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.¹

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

¹ 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.² 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

² 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
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.

PLAINTIFF'S SUPPLEMENTAL
BRIEF IN SUPPORT OF
FOR SUMMARY JUDGMENT

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.¹ 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.

¹ 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 *Pruzman 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.² 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*

² 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 \$300,000.³

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

³ 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...."

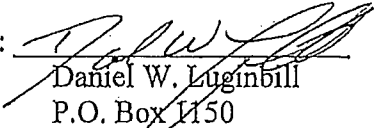
The requirement that a claimant exhaust other policies and the application of the offset provisions of the Act are designed to prevent duplicate recovery by a claimant. "The evident purpose of providing . . . for a reduction of a covered claim 'by the amount of any recovery' from other available insurance 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.

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Bamberg, SC

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

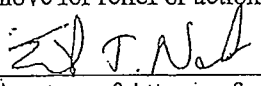
Janette Buchanan and Shana Smallwood, PLAINTIFFS
individually, and as Co-Personal Representatives
of the Estate of James S. Buchanan, BAMBERG, SC
Plaintiff,)

vs.)

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

MOTION AND ORDER INFORMATION

FORM AND COVERSHEET

Plaintiff's Attorney: Daniel W. Luginbill PO Box 1150, Bamberg, SC 29003 Phone: 803-245-7799		Defendant's Attorney: Erik T. Norton 1320 Main Street, Columbia, SC 29201 Phone: 803-255-9552	
☒ 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: <u>Motion for Reconsideration</u> Estimated Time Needed: <u>30 min</u> 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  9/25/2014 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		JUDGE CODE _____	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____		Date: _____	
CLERK'S VERIFICATION			
Collected by: _____ Date Filed: _____ ☐ MOTION FEE COLLECTED: \$ _____ ☐ CONTESTED - AMOUNT DUE: \$ _____			

Appendix_000105

ROA_00100

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 26 AM 8:10
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. *Bairdley 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.¹

Although the remaining 10 cases² 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.

¹ 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).

² 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).

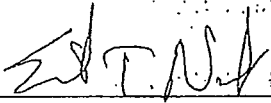
Consequently, because the Association is entitled to offset the full limits of the other coverage, regardless of the settlement amount, claimants are encouraged to resolve those claims for the highest possible amount. In addition, contrary to what is stated in the Order, the Association's exposure is 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

FILED
BAMBERG COUNTY
2014 SEP 26 PM 9:30
JAMES S. SHUMPERT
CLERK OF COURT
BAMBERG, SC 29910

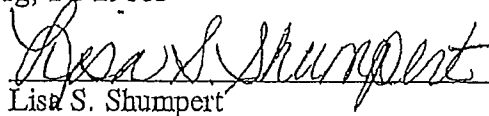
I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Defendant, do hereby certify that I have served all counsel in this action with a copy of the document(s) hereinbelow specified by mailing a copy of the same by United States Mail,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

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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.

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November 5, 2014.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

FILED
BAMBERG COUNTY
2014 NOV 16 AM 10:03
JAMES B. HIERS
CLERK OF COURT
BAMBERG, SC

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

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

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

AFFIRMED IN PART, REVERSED IN PART

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

Appendix_000121

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).¹ 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 \$185,000.²

¹ Mason and Stevens were found to be jointly responsible for the wreck.

² 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) \$25,000.00³
- 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).

³ 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).⁴ 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).

⁴A "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.⁵ 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

⁵Moreover, 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.⁶

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.⁷ 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.⁸ 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.

⁶ 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.

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

⁸ 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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JAMES B. HERS
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 Associations 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

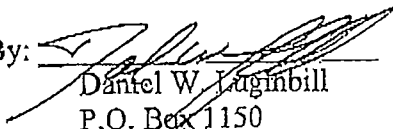
The Association asserts in its brief that claimants are required to exhaust all other claims before recovering from the Association. This is true. However, the Order's finding that the Association's interpretation of the Act to require the setoff be applied to the cap, rather than the amount of the covered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

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Bamberg, SC

November 6, 2014

JAMES B. HERS
CLERK OF COURT
BAMBERG, SC

2014 NOV 10 PM 3:33

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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
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John Nichols, Esquire
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11-07, 2014
Bamberg, South Carolina

By: Kathryn S. Beasley
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CLERK OF COURT
BAMBERG, SC

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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E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>PAGE</u>

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

1 MOTION HEARING

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 Guaranty (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 preview 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
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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

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Brenda J. Sigwald

Brenda J. Sigwald,
Court Reporter and Notary Public
For the State of South Carolina
My commission expires
January 4, 2020

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State of South Carolina

Court of Common Pleas

County of Bamberg

Janette Buchanan and)
Shana Smallwood)
individually and as)
Co-Personal)
Representatives of the)
Estate of James Buchanan)

Plaintiffs,)

v.)

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

Defendant.)

Transcript of Record
2013-CP-05-00063

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

Appendix_000173

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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

RECEIVED

FEB 10 2015

APPEAL FROM BAMBERG COUNTY
Court of Common Pleas

SC Court of Appeals

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

Appendix_000193

ROA_00188

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:

Daniel W. Luginbill, Esquire
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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

RECEIVED

FEB 10 2015

SC Court of Appeals

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 S. HERS
CLERK OF COURT
BAMBERG, SC

2014 SEP 10 PM 12:05

FILED
BAMBERG COUNTY

A TRUE COPY

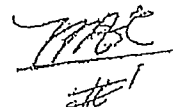
Attest: 
CLERK OF COURT
BAMBERG COUNTY, SC

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.

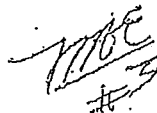
CONCLUSIONS OF LAW

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

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.2nd 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



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.¹

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."²

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,

¹ 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.

² 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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#9

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 part 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

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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.2nd 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.2nd 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

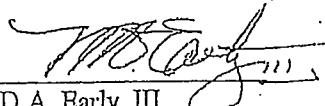
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claimant to \$300,000. If the purpose of the Act is to protect South Carolina citizens from insurance companies who become insolvent, then the Act is remedial and should be liberally construed in favor of payment to the claimant in order to best accomplish 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
2nd Judicial Circuit

Bamberg, SC


August 7, 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 (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (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 _____ day of _____, 20____ 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)

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

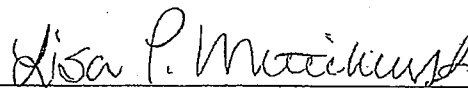
I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for The South Carolina Property and Casualty Insurance Guaranty Association, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified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

Pleadings:

Notice of Appeal

Counsel Served:

Daniel W. Luginbill, Esquire
Wilson & Luginbill, LLC
Post Office Box 1150
Bamberg, SC 29003



Lisa Whitehurst
Administrative Assistant

February 10, 2015

Appendix_000208

ROA_00203

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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

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, ...

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:

Record on Appeal

Counsel Served:

John S. Nichols, Esquire
Bluestein Nichols Thompson & Delgado
Post Office Box 7965
Columbia, SC 29202

Daniel W. Luginbill, Esquire
Wilson & Luginbill, LLC
Post Office Box 1150
Bamberg, SC 29003

A handwritten signature in black ink, appearing to read 'Maria Kieve', written over a horizontal line.

Maria Kieve
Administrative Assistant

November 25, 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

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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.

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STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court err by finding that the Association's statutory offset of \$376,622 should be deducted from the claimant's total amount of alleged or stipulated damages of \$800,000 rather than the Association's mandatory statutory claim limit of \$300,000?

STATEMENT OF THE CASE

The sole issue presented by this appeal and the underlying declaratory judgment action concerns the obligation of the South Carolina Property and Casualty Insurance Guaranty Association ("Association"), if any, for Respondents' wrongful death claim under the statutory regime governing the Association when an insurer becomes insolvent. *See* S.C. Code § 38-31-10, *et seq.* (the "Act" or "Guaranty Act"). (Complaint ¶ 13; R. 16). It is undisputed that the Association's responsibility on Respondents' claim is statutorily limited to \$300,000 pursuant to S.C. Code § 38-31-60. (Complaint ¶¶ 8, 12; R. 15-16). This is the maximum amount the Association may pay on claims under the Act. It is also undisputed that the Association is entitled to a statutorily-mandated offset of \$376,622 for the amount of other insurance coverage received by Respondents as a result of the accident pursuant to S.C. Code § 38-31-100(1). (Complaint ¶¶ 9, 13; R. 15-16).

The parties' positions differ, however, as to how this \$376,622 offset should be deducted based on the \$300,000 statutory limitation of liability for the Association under the Act. (Complaint ¶ 13; R. 16). Respondents maintain that the offset should be deducted from the total amount of their pled damages of \$800,000, resulting in a remainder of \$423,378. The Respondents contend the Association should be liable for its maximum claim limit of \$300,000 as a result. (Complaint ¶¶ 11-12; R. 16). The Association has shown that the offset should be deducted from its maximum statutory limitation of \$300,000, resulting in no liability for the Association here based on the amount of money the Respondents received from other insurance. (Answer; R. 17-21).

Respondents filed a declaratory judgment action on April 12, 2013, alleging the Association was obligated to pay \$300,000 and that the Association was not entitled to receive credit for the payments already received by Respondents from other insurance. (Complaint; R. 12-16). The Association filed an Answer denying the allegations, and then filed a Motion for Summary Judgment on April 22, 2014, asserting that the Act entitles the Association to deduct the \$376,622 offset from its \$300,000 statutory maximum claim obligation. (Association's Motion for Summary Judgment; R. 22-25). Respondents filed a cross-Motion for Summary Judgment on May 14, 2014, asserting that the Association's offset should be deducted from the full amount of the damages prior to any application of the statutory cap. (Respondents' Motion for Summary Judgment; R. 26-28).

The facts are generally not in dispute.¹ 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; R. 14-15). Scott's vehicle was insured for \$1 million by Aequicap Insurance Company ("Aequicap"). (Complaint ¶ 5; R. 15). Mr. Buchanan died at the scene of the accident. (Complaint ¶ 4; R. 14-15).

Janette Buchanan, individually² and as Personal Representative of Mr. Buchanan's Estate ("Mrs. Buchanan"), initiated a wrongful death lawsuit in Bamberg County, South

¹ Respondents and the trial court 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. (Respondents' Memorandum in Support of Summary Judgment at 1; R. 63; Order at 2; R. 4). The Association's obligations are different from those of the Florida Guaranty Fund, and it has not assumed any causes of action made against the Florida Guaranty Fund. Respondents' claim is handled by the Association because the insured was a resident of South Carolina at the time of the accident. S.C. Code § 38-31-20(8)(a).

Carolina, against Best and Scott. (Complaint ¶ 4; R. 14-15). During the pendency of the wrongful death action, Aequicap was declared insolvent by the courts of Florida. (Complaint ¶ 5; R. 15). As a result of Aequicap's insolvency, Mrs. Buchanan's claim was asserted against the Association as provided by S.C. Code § 38-31-60. (Complaint ¶ 6; R. 15).

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; R. 15; Order Approving Settlement with attached Stipulations and Settlement Agreement Between Parties; R. 51-61). As part of the settlement agreement, the parties stipulated that the amount of damages sustained by Mrs. Buchanan is \$800,000² and that the Respondents have recovered a total of \$376,622 in settlement proceeds from co-defendants' insurance and Workers' Compensation benefits. (Complaint ¶¶ 7, 10; R. 15-16; Settlement Agreement at ¶¶ 1, 5-6; R. 57-58). The parties further agreed that the liability of the Association, if any, would be determined via the underlying declaratory judgment action based on the parties' stipulations. (Settlement Agreement at ¶¶ 7, 9; R. 59).

A hearing was held on the cross-Motions on May 28, 2014, before Judge Doyet A. Early, III (Transcript of Hearing; R. 130-167). By Order filed September 10, 2014, the court granted Respondents' Motion for Summary Judgment and denied the Association's Motion for Summary Judgment. (9/10/14 Order; R. 3-11). The court held that the Association's offset is deducted from a claimant's total damages amount rather

² The trial court mistakenly referred to this amount as a "judgment" in its Order. (Order p. 2; R. 4). However, no judgment has ever been entered in the wrongful death suit.

than the statutory cap. (*Id.*). The court denied the Association's Motion for Reconsideration of the order on January 22, 2015. (1/22/15 Form 4 Judgment; R. 1-2).

The Association timely appealed from the trial courts orders.

ARGUMENT

The trial court committed reversible error when it determined that the Association's statutory offset is deducted from a claimant's total damages amount rather than the Association's statutory claim limit. (Order; R. 3-11). As set forth below, the trial court's ruling is contrary to the express terms and purpose of the Act. This Court should reverse the trial court's order and declare that the Association is entitled to deduct the statutory offset from the maximum statutory obligation. Otherwise the cap is rendered superfluous.

I. The Act unambiguously requires that any offset be deducted from the Association's \$300,000 statutory claim limit rather than a claimant's total amount of damages.

The Association is a nonprofit unincorporated legal entity created by the South Carolina legislature pursuant to the Act. *See S.C. Prop. and Cas. Ins. Guar. Ass'n v. Brock*, 410 S.C. 361, 365-66, 764 S.E.2d 920, 922 (2014); *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 § 38-31-60; *see also Brock*, 410 S.C. 361,

365-66, 764 S.E.2d 920, 922; *Builders Transp.*, 307 S.C. at 406, 415 S.E.2d at 424.³

“The primary rule of statutory construction is to ascertain and give effect to the intent of the General Assembly.” *Brock*, 410 S.C. 361, 367, 764 S.E.2d 920, 922; *see also 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)); *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)).

“What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, courts are bound to give effect to the expressed intent of the legislature.” *Brock*, 410 S.C. 361, 367, 764 S.E.2d 920, 922 (*citing McClanahan v. Richland Cnty. Council*, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002)); *see also Anderson*, 397 S.C. at 556-57, 725 S.E.2d at 707 (“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.”) (*citing Mid-State Auto Auction of Lexington, Inc. v. Altman*, 324 S.C. 65, 476 S.E.2d 690 (1996)). “Thus, [courts] must follow the plain and unambiguous language in a statute and have ‘no right

³ *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.”)

to impose another meaning.” *Brock*, 410 S.C. 361, 367, 764 S.E.2d 920, 922 (citing *McClanahan v. Richland Cnty. Council*, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002)).

A. The Order is internally inconsistent, and the trial court failed to identify any ambiguity in the relevant statutes.

The trial court ruled that portions of the applicable statutes are “most ambiguous.” (Order p. 3; R. 5). At the same time, the trial court also found that the “plain language” and the “plain logical interpretation” of the statutes require the statutory offset to be deducted from a claimant’s total damages amount. (Order p. 2-5; R. 4-7). The Order is, therefore, internally inconsistent.

Further, the trial court did not identify the ambiguity in its Order. The South Carolina Supreme Court has held that an ambiguity of a statute must be explained, and a simple finding 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 the reason the trial court failed to articulate or identify any ambiguity is because the statutory scheme, when read as a whole, is unambiguous. Consistent with the Supreme Court’s recent decision in *Brock*, the offset must be applied from the statutory claim limit.

B. The trial court failed to properly address recent decisions of the Supreme Court holding that the applicable provisions of the Act are unambiguous.

The trial court does not cite to a single case for the proposition that the Act or any other state's guaranty act is ambiguous. The trial court also ignored the most recent decision of the Supreme Court of South Carolina on this issue, *S.C. Prop. and Cas. Ins. Guar. Ass'n v. Brock*, 410 S.C. 361, 764 S.E.2d 920 (2014),⁴ and misconstrued the Supreme Court's recent holding in *Hudson v. Lancaster Convalescent Ctr.*, 407 S.C. 112, 754 S.E.2d 486 (2014).

In *Brock*, the Supreme Court examined S.C. Code §§ 38-31-20(8), 38-31-60, and 38-31-100(1), the same provisions at issue in this matter, and unanimously found that the 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. 410 S.C. 361, 764 S.E.2d 920. Specifically, the *Brock* court noted that “[t]he parties disagree on what types of insurance coverage [the Association] may offset **against its obligation** to pay the \$185,000,” and held that pursuant to S.C. Code § 38-31-100(1), the Association “is allowed to offset the full limits of such other coverage **against its obligations** under the Act.” *Id.* at 366, 764 S.E.2d at 922 (emphasis added). This directly contradicts the trial court's finding here that “§ 38-31-100(1) applies the set-off to the ‘covered claim,’ rather than the ‘Association’s obligation.’” (Order p. 4; R. 6).

⁴ Although the *Brock* ruling had not been issued at the time of the Order, it was issued prior to the trial court's ruling on the Motion for Reconsideration of the Order. The Association raised the unambiguous language of the Act prior to the issuance of *Brock* and the Association raised the *Brock* decision on rehearing. *Brock* affirmed the Association's arguments throughout the underlying proceeding that the relevant provisions of the Act are unambiguous and the Association receives an offset for other insurance.

Similarly, the Supreme Court in *Hudson* held the statutory regime governing the Association is not ambiguous. 407 S.C. 112, 754 S.E.2d 486 (2014). Respondents argued, and the trial court agreed, that the *Hudson* holding applied only to S.C. Code § 38-31-60(j), which relates to the Association's ability to sue or be sued, rather than the Act as a whole (Order p. 3; R. 5). Respondents and the trial court read *Hudson* much too narrowly, however.

In *Hudson*, the court was asked to determine the applicability of S.C. Code § 38-31-60(b) (setting forth the Association's obligation on "covered claims") and S.C. Code § 38-31-20(8) (defining "covered claim") to the Association's direct liability referenced in S.C. Code § 38-31-60(j). 407 S.C. at 123-26, 754 S.E.2d at 492-93. The *Hudson* court's recitation of the applicable law evidences that it was construing several different parts of the 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. Thus, although the focus in *Hudson* may have been on a different issue than the one before this Court, the Court found the provisions of the Act to work in harmony. Likewise, S.C. Code § 38-31-60(a)(iv) and

S.C. Code § 38-31-100(1) must be read together as a whole consistent with *Brock* and *Hudson*.

C. The trial court misapplied the Act.

S.C. Code § 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 claim⁵ is in excess of two hundred fifty dollars and is less than three hundred thousand dollars.”⁶ S.C. Code § 38-31-60(a)(iv). Thus, the Association is never *obligated* on any covered claim over the \$300,000 statutory limit. The trial court correctly noted that the Association’s “duty to pay” is limited by this section to \$300,000. (Order p. 4; R. 6).

The inquiry does not end here, however. The Act further provides that the Association’s *obligation* on a covered claim is offset by coverage limits for other insurance for the same facts, injury or loss which gave rise to the claim against the Association. Specifically, the Act states

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

⁵ “Covered claim” is defined as “an unpaid claim, including one of unearned premiums, which arises out of and is within the coverage and is subject to the applicable limits of an insurance policy to which this chapter applies issued by an insurer, if the insurer is an insolvent insurer and (a) the claimant or insured is a resident of this State at the time of the insured event, if for entities other than an individual, the residence of a claimant or insured is the state in which its principal place of business is located at the time of the insured event or (b) the claim is for first-party benefits for damage to property permanently located in this State. . . .” S.C. Code § 38-31-20(8).

⁶ Therefore, after taking into account the \$250 and \$300,000 claim thresholds, the Association’s maximum total obligation is \$299,750.

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

S.C. Code § 38-31-100(1) (emphasis added).⁷ As set forth in *Brock*, this provision is a “condition precedent” to a claimant’s recovery from the Association: “[A] claimant is required to first exhaust all available coverage from solvent insurers, and [the Association] is allowed to offset the full limits of such other coverage against its obligations under the Act.” *Brock*, 410 S.C. 361, 366, 764 S.E.2d 920, 922 (citing S.C. Code § 38-31-100). There is no dispute that the Association is entitled to offset \$376,622 because this amount represents Respondents’ total recovery from other insurance coverage arising from the same facts, injury or loss as their claim against the Association.⁸

The dispute exists as to the application of the offset in light of the statutorily mandated liability cap which limits the Association’s obligation. The trial court found that the \$376,622 offset provided in S.C. Code § 38-31-100(1) applies to reduce a “covered claim” rather than the Association’s “obligation” to pay that claim. (Order p. 4;

⁷ 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.”).

⁸ 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 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. (Order Approving Settlement with attached Stipulations and Settlement Agreement Between Parties; R. 51-61).

R. 6). However, the trial court ignored the language preceding the term “covered claim” in S.C. Code § 38-31-100(1). The section containing the offset provision expressly states that “[a]ny amount payable on a covered claim” is to be reduced by the full limits of the other coverage — here, \$376,622. S.C. Code § 38-31-100(1) (emphasis added). Reading the statutory framework as a whole, the “amount payable on a covered claim” cannot exceed \$300,000, as set forth in S.C. Code § 38-31-60(a). Therefore, in situations where a claimant’s damages exceed the statutory maximum obligation, the starting point is the Association’s statutory claim limit of \$300,000, and the amount to be offset is deducted from the Association’s total potential obligation under the Act—not the alleged damages.⁹

The statute does not contain the term damages. That word is not present in the relevant provisions. Instead, S.C. Code § 38-31-100 repeatedly provides that “[a]ny amount payable on a covered claim” must be offset by the recovery received from other various sources. S.C. Code § 38-31-100(1), (2), (3), and (5). Consistently, S.C. Code § 38-31-100(1)(b) provides that “[t]o the extent that the association’s obligation is

⁹ As further detailed in Section IV, other states agree the starting point is the statutory claim limit, not the damages amount. See, e.g., *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.”); *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).

reduced by the application of this section, the liability of the person insured by the insolvent insurer's policy for the claim must be reduced in the same amount." S.C. Code § 38-31-100(1)(b) (emphasis added). Hence, the offset provision references the reduction of the Association's obligation, an amount which the trial court correctly found cannot be more than \$300,000. Therefore, the trial court's ruling that Section 38-31-100(1) "applies the set-off to the 'covered claim,' rather than the 'Association's obligation'" is completely contradicted by the plain language of the Act. (Order p. 4; R. 6). In sum, when the reduction amount for other insurance exceeds the maximum obligation, the claimant cannot recover from the Association.¹⁰ See *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).

Reading the statute to require the offset to be deducted from a claimant's total amount of claimed damages would render the offset provision meaningless in any situation where the difference between a claimant's damages and the amount received from other available insurance exceeds \$300,000. In such situations, the claimant would automatically receive the \$300,000 claim limit, the Association would receive no credit for other insurance amounts, and the offset provision would 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

¹⁰ See, e.g., *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).

at 707.

The trial court also misconstrues what is meant by “covered claim” and ignores the ordinary meaning of the words “covered claim” when ruling that Respondents’ covered claim is for \$800,000. (Order p. 4; R. 6). While Respondents 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—an amount Respondents admit is \$300,000 at most. By operation of the statutory framework in this situation, a “covered claim” and the Association’s obligation are synonymous. By analogy, in the usual insurance policy context, a party 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 operates in the same manner. The General Assembly adopted the statutory cap and offset provision to limit the obligation of the Association and maximize the benefit and existence of other insurance in favor of the Association. Applying the plain, ordinary meaning of the statute, Respondents’ claim is covered only up to \$300,000, and the offset is applied to reduce the Association’s obligation from that amount, resulting in no obligation for the Association in this matter.

II. Even if the Act is ambiguous, the trial court misconstrued the Legislature’s intent, the relationship between the Act and other statutory regimes, and the effect of the Act on public policy.

The trial court also overlooked the express stated intent of the Legislature. Further, the trial court mistakenly relied on the Tort Claims Act to support its reading of the Guaranty Act. Finally, the trial court erred by finding that reading the statute as intended would result in adverse public policy consequences.

A. The Legislature intended the Association's liability to be limited to \$300,000 with a reduction for any amounts claimants received from other insurance coverage for the same loss.

Because the language of the Act is clear and unambiguous as the Supreme Court found in *Brock* and *Hudson*, there is no need to look beyond the words of the statute for its meaning. See *Anderson*, 397 S.C. at 556, 725 S.E.2d at 706-07. Even if the Act is ambiguous, consideration of the Act's legislative intent supports the Association's position.

The trial court noted that the purpose of the Association is to provide only some protection when an insurance company becomes insolvent. (Order p. 3; R. 5). The trial court, however, mistakenly asserted that the purpose of the offset provision is to prevent double recovery. (Order p. 5, 6, and 8; R. 7, 8, and 10). The trial court erroneously found that the Association should provide Respondents nearly full recovery by paying the maximum obligation of \$300,000 even though Respondents have received other coverage in excess of that amount. *Id.* The purpose of the Association, however, is not to provide claimants with as full a recovery as possible but some recovery subject to the limitations set forth in the Act. *Brock*, 410 S.C. at 367-68, 764 S.E.2d at 923; *Hudson*, 407 S.C. at 124, 754 S.E.2d at 492; and *Carolinas Roofing*, 315 S.C. at 557, 446 S.E.2d at 424.

The South Carolina Legislature amended the offset provision in 2001 to its current form to clarify that the Association's obligation must be offset by any and all coverage that arises from the same facts, injury, or loss that gave rise to the claim against the Association. 2001 S.C. Acts 82. 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 stated its intent that the offset provision would limit the claims asserted against the Association by providing a credit to the Association for other coverage arising from the same facts, injury, or loss as the claim against the Association.

The Supreme Court of South Carolina has previously noted the Act’s intent for the Association’s liability to be limited as well. As stated in *Brock, Hudson, and Carolinas Roofing*, the purpose of the Association is “to provide **some** protection” to insureds whose insurance companies become insolvent. 410 S.C. at 367-68, 764 S.E.2d at 923; 407 S.C. at 124, 754 S.E.2d at 492; 315 S.C. at 557, 446 S.E.2d at 424 (emphasis added). The Association is a “last resort” for payment when an insurance company is declared insolvent. *Hudson*, 407 S.C. at 124, 754 S.E.2d at 492. Contrary to these decisions, the trial court’s Order unlawfully forces the Association to fully “step in the shoes” of the insolvent insurer. *See 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.”).

The Supreme Court's holdings in these cases correctly depict 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. The Association is not intended as a failsafe to guarantee complete recovery to those unfortunate claimants. See 44 C.J.S. Insurance § 218 ("A claimant, however, will not always be put in the same position [the claimant would have been in had insolvency not occurred], as the association or fund does not completely step into the shoes of the insolvent, and is obligated to pay claims only to the extent provided by statute."); see also *Marra v. Wilson*, 2003 WL 367831, at *5 (Del. Super. Ct. Feb. 20, 2003) ("[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.'").¹¹

¹¹ 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)).

Here, if the offset was applied to reduce the claimant's total "damages" as the trial court ruled, the Association isn't given any credit for the other coverage subject to its maximum statutory obligation. The trial court's ruling directly contradicts the plain meaning of the Act as well as the stated intent of the Legislature.

B. The trial court erroneously relied on the Tort Claims Act.

The trial court further erred in equating the Association with a State entity in analogizing the Guaranty Act to the South Carolina Tort Claims Act, S.C. Code § 15-78-10 *et seq.* ("Tort Claims Act"). (Order p. 5; R. 7). The trial court wrongly reasoned that the Tort Claims Act is instructive in this case because it deals with limitations on the liability of State entities. (Order p. 5; R. 7). The Association is not a State entity, however, 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 § 38-31-40. It is not funded by tax dollars but rather by assessments to its members, which are ultimately passed on to policyholders as increased insurance costs. S.C. Code §§ 38-31-60(c) and 38-31-140. There are no State tax dollars at risk for any action or inaction by the Association. *Id.* 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.

Further, the Tort Claims Act is not instructive in this case because it does not include any statutory offset provisions to lessen the liability of the State measured from the statutory cap on liability for the State. The offsets applied in the Tort Claims Act

context are equitable in nature instead and, therefore, 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, the trial court's reliance on *Smalls* and the equitable setoff applied to the statutory cap in the Tort Claims Act is error as the offset under the Guaranty Act is not discretionary.

Moreover, 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 § 15-38-65 (emphasis added). Likewise, S.C. Code § 33-56-180, on which the trial court also relies 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.¹² S.C. Code § 33-56-180 (emphasis added). In this action, there has been no tort committed by an employee of the Association. The Guaranty Act is not Respondents' sole remedy—they in fact received coverage from other solvent insurers. Nor was the trial court asked to determine the equitable apportionment of liability among joint tortfeasors or to reduce the liability of a wrongdoer. Instead, the trial court was asked to apply the statutory

¹² The Association does not qualify as a "charitable organization." *See* S.C. Code § 33-56-170.

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.

For all of these reasons, the Tort Claims Act cannot provide any guidance as to the construction of S.C. Code § 38-31-100(1), and the trial court’s findings to the contrary are in error.

III. The trial court misapprehends the impact of offsetting other insurance amounts from the Association’s maximum statutory obligation when ruling that doing so would be against public policy.

The trial court held that ruling in favor of the Association would be against public policy based on its mistaken assertion 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 p. 8; R. 10).

This conclusion demonstrates a fundamental misunderstanding of the offset provision. The offset provision 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 § 38-31-100(1) (emphasis added). Claimants therefore must first exhaust their claims against other applicable policies for the same loss **before** being entitled to any recovery from the Association. *Id.*; *see also Brock*, 410 S.C. at 366, 764 S.E.2d at 922 (“**As a condition precedent to recovery** from [the Association], a claimant is required to first exhaust all available coverage from solvent insurers, and [the Association] is allowed to offset the full limits of such other coverage against its obligations under the Act.”) (*citing* S.C. Code § 38-31-100) (emphasis added).

Thereafter, the Association is entitled to an offset “for the **full limits** of such other coverage.” S.C. Code § 38-31-100(1) (emphasis added); *see also Brock*, 410 S.C. at 366, 764 S.E.2d at 922.

Therefore, because the Association is entitled to offset the full limits of the other coverage, claimants are encouraged to recover as much as possible from other insurers and they must look to other solvent insurers first, before making any claim against the Association. Consequently, applying the offset against the statutory cap does not result in increased exposure or litigation for the Association.

IV. The majority of other jurisdictions ruling on this issue apply the offset 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 Association’s offset should be deducted from its statutory claim limit or a claimant’s total amount of damages, almost all of the states have guaranty associations created by similar statutes. Case law from other jurisdictions may be instructive in the absence of South Carolina authority on the issue. 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.¹³

¹³ *See also* 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.”); 44 C.J.S. Insurance § 218 (“A claimant, however, will not always be put in the same position [the claimant would have been in had insolvency not occurred], as the association or fund does not completely step into the shoes of the insolvent, and is obligated to pay claims only to the extent provided by statute.”); 44 C.J.S. Insurance § 221 (“A person seeking payment from an insurance

The trial court inaccurately depicts the cases from other jurisdictions cited by the Association which support its reading of the offset provision. (Order p. 4 n. 1; R. 6). The trial court asserts that only one of the cases listed in Appendix A to the Association's Memorandum in Support of its Motion for Summary Judgment and in Opposition to Respondents' Cross-Motion for Summary Judgment 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 cases cited to the trial court involved the deduction of the offset from the statutory maximum/limit. *Jangula*, 88 P.3d 182, 183, 185 ("Under A.R.S. § 20—667(B) (Ariz. Ct. App. 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*, 2003 WL 367831, at *4-6 (Del. Super. Ct., Feb. 20, 2013) ("[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

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.").

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*, 581 So. 2d 723 (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*, 508 N.W.2d 536 (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).

Although the remaining cases involve the application of the offset to a policy limit, these cases are still instructive here because the statutory limit is the policy limit if the policy limit is less than the statutory cap. S.C. Code § 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.”). Therefore, the same issue before this Court arises in those situations where the damages exceed policy limits which are less than the statutory cap. Consistent with the nine cases cited to the trial court in Appendix A holding that the offset should be deducted from the statutory cap and not the damages amount, the other cases cited in Appendix A dealing with policy limits less than the statutory cap hold that the policy limits become the statutory cap and the offset is applied against the policy limits, not the damages amount. (Appendix A, Memorandum in Support of Defendant’s Motion for Summary Judgment and in Opposition to Plaintiffs’ Cross-Motion for Summary Judgment; R. 42-50).

For example, the Kentucky Court of Appeals held that the reduction should extend from the lesser statutory liability cap of a policy's limits and not the plaintiff's higher damages in *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. 838 S.W.2d 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.

As evidenced by the above cited cases from other jurisdictions, the reading of the offset statute advanced by the Association is widely supported by courts across the country applying offset statutes very similar or identical to South Carolina's. 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 also has 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 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); *see also Brock*, 410 S.C. 361, 764 S.E.2d 920.

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.

In conclusion, although there is no South Carolina case directly addressing the issue at hand, the overwhelming majority of courts from other jurisdictions reviewing similar statutory schemes agree that the Association's offset is applied to reduce its statutory claim limit rather than a claimant's total amount of damages. It is therefore clear that the Act unambiguously requires application of the Association's offset to reduce its statutory maximum rather than a claimant's total damages amount.

CONCLUSION

The Act's plain language, Legislative intent, public policy, and supporting case law from other jurisdictions establish that the Association is entitled to deduct its statutory offset from its statutory claim limit rather than a claimant's total amount of damages. For the foregoing reasons, the Association respectfully requests this Court reverse the circuit court's ruling that the Association is not entitled to deduct its statutory offset from its statutory claim limit and enter judgment for the Association declaring that it has no obligation in this matter.

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November 25, 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-05-00063
Appellate Case No. 2015-000246

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SC Court of Appeals

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):

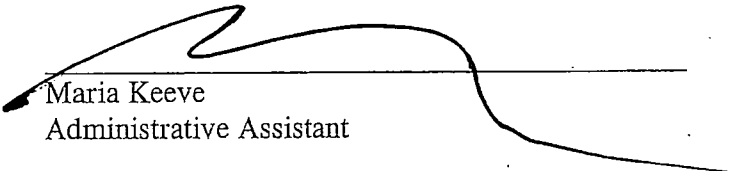
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November 25, 2015

UNITED STATES OF AMERICA

DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF INVESTIGATION

WASHINGTON, D. C. 20535

INVESTIGATION OF CRIMINAL MATTERS

REPORT OF AGENT

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TO WHOM REPORT IS MADE

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COUNTER-STATEMENT OF THE ISSUE ON APPEAL

Did the Trial Court properly hold the statutory offset of \$376,622 under the South Carolina Property and Casualty Insurance Guaranty Association Act should be deducted from the total amount of Respondents' covered claim of \$800,000 against AequiCap, the insolvent insurer, rather than the Association's statutory limit of \$300,000 per covered claim?

COUNTER-STATEMENT OF THE CASE

On January 7, 2008, Respondent James Buchanan was involved in a motor vehicle collision in Bamberg County, South Carolina. A set of tandem tires separated from the axle of a log truck owned by Travis Scott and driven by Eddie Best. The set of tires struck the front of Mr. Buchanan's vehicle, breaking the front axle. Mr. Buchanan's truck crossed the centerline and struck another tractor-trailer. Mr. Buchanan's truck caught fire and he was incinerated in the cab of his truck.

Respondent Janette Buchanan brought a wrongful death action in 2008 against Mr. Best and Mr. Scott. Mr. Scott's vehicle was insured for one million (\$1,000,000) dollars by Aequicap Insurance Co. (Aequicap). *See AequiCap Ins. Co. v. Best*, 2013-UP-116 (S.C. Ct. App. filed March 20, 2013). In 2011, however, Aequicap went into receivership in Florida. *In re Arbitration Between General Sec. Nat. Ins. Co. and AequiCap Prog. Admins.*, 785 F. Supp.2d 411, 423 n. 9 (S.D.N.Y. 2011); *AequiCap Ins. Co. v. Best*, slip at 1 n. 1. The South Carolina Property and Casualty Insurance Guaranty Association (the "Association") assumed management of the claims against AequiCap's insured, Mr. Scott, under the South Carolina Property and Casualty Insurance Guaranty Association Act (the Act). *See* S.C. Code Ann. § 38-31-10 (2002), *et seq.*

Mrs. Buchanan settled the underlying tort case against Mr. Scott and Mr. Best. The parties to the underlying tort case stipulated Mrs. Buchanan's damages were \$800,000. Mrs. Buchanan received a total of \$376,622 in combined workers' compensation benefits and recovery in the tort case from the co-defendants. (R. p.58, ¶ 5).

On April 11, 2013, Respondents filed an action against the Association for a declaration that the Association must pay \$300,000, the limit of its exposure under S.C. Code Ann. § 38-31-60 (2002). Respondents asserted the balance due them after offsetting their recovery (\$376,622) is \$423,378, which exceeds the statutory limit. The Association answered, claiming that the credits for amounts already received should be applied from the cap, which would leave a balance of zero. On April 24, 2014, the Association moved for summary judgment. On May 14, 2014, Respondents also moved for summary judgment. Each party filed memoranda in support of the respective positions.

On May 28, 2014, the circuit court held a hearing on the cross-motions. On September 9, 2014, the court issued an order finding the Respondents' "covered claim" under the AequiCap policy was \$800,000, to which an offset of \$376,622 would be applied under Section 38-31-100(1) (2002), leaving a balance of \$423,378 on the covered claim. The court held the Association's obligation to pay is then limited by the \$300,000 cap as applied to the balance due on the claim.

On September 25, 2014, the Association filed a motion requesting the court reconsider its ruling pursuant to Rules 52 and 59, SCRPC. On January 20, 2015, the court entered an order denying the Association's motion. This appeal follows.

ARGUMENTS

The Trial Court Properly Held the Statutory Offset of \$376,622 under the South Carolina Property and Casualty Insurance Guaranty Association Act Should Be Deducted from the Total Amount of Respondents' Claim of \$800,000 Against Aequicap, the Insolvent Insurer, Rather than the Association's Statutory Limit of \$300,000 per Covered Claim

This matter is before the Court on cross-motions for summary judgment. Under this posture the parties have agreed that the case is before the Court for its decision as a matter of law. *See, e.g., Wiegand v. U.S. Auto. Ass'n*, 391 S.C. 159, 705 S.E.2d 432 (2011) (where cross motions for summary judgment are filed, the parties concede the issue before the appellate court should be decided as a matter of law). Furthermore, the appeal in this case is not from the denial of the Association's motion for summary judgment, for that ruling is never appealable. *See, e.g., Olson v. Faculty House of Carolina, Inc.*, 354 S.C. 161, 580 S.E.2d 440 (2003) (the denial of a motion for summary judgment is not appealable, even after final judgment). Finally, in a case raising a novel issue of law regarding the interpretation of a statute, the appellate court is free to decide the question with no particular deference to the trial court. *Lambries v. Saluda County Council*, 409 S.C. 1, 760 S.E.2d 785 (2014).

I. The Trial Court Correctly Ruled for Respondents

The issue before this Court is whether the trial court erred in granting summary judgment to the Respondents regarding application of the cap provisions of the South Carolina Property and Casualty Insurance Guaranty Association Act (the "Act"). Respondents contend the Association owes \$300,000, which represents the cap applied to

the balance due to Respondents after a setoff for recovery from the co-defendants and from workers' compensation (\$376,622) is applied to Respondents' claim of \$800,000 against AequiCap's insured, Mr. Scott. The Association contends its obligation is zero because the cap is compared to the amount Respondents have already recovered from the co-defendants and from workers' compensation (\$376,622). The trial court agreed with Respondents, and the Association seeks review. This Court should affirm.

Statutory Construction

In recently addressing the Act, the Supreme Court noted:

"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.*

S.C. Property and Cas. Ins. Guar. Ass'n v. Brock, 410 S.C. 361, 366, 764 S.E.2d 920, 922 (2014).

An examination of the text of the statute reveals that the trial court reached the correct result. The Association's responsibility regarding a covered claim is to pay up to the statutory cap after receiving credit against the total claim for any amounts the plaintiff receives. Where the amount of that claim is less than the statutory cap, it may well be that the recovery could take the Association's responsibility to zero. However, where, as here, the claim exceeds not only the cap, but the cap plus amounts recovered from other

sources, the Association must provide coverage up to the statutory cap. That is what the trial court ruled here, and this Court should affirm.

The Act

The Act is found in Chapter 31 of Title 38 of the Code. Section 38-31-20 contains the definitions applicable to the Chapter, and provides:

(8) *"Covered claim" means an unpaid claim ... which arises out of and is within the coverage and is subject to the applicable limits of an insurance policy to which this chapter applies issued by an insurer, if the insurer is an insolvent insurer and (a) the claimant or insured is a resident of this State at the time of the insured event, if for entities other than an individual, the residence of a claimant or insured is the state in which its principal place of business is located at the time of the insured event or (b) the claim is for first-party benefits for damage to property permanently located in this State. * * **

S.C. Code Ann. § 38-31-20(8) (2002) (emphasis added). There is no dispute that AequiCap is an insolvent insurer and that the Respondents are residents of this State.

The Respondents' claim is a "covered claim" under the Act. The claim is (1) "unpaid"; (2) "arises out of and is within the coverage"; and (3) "is subject to the applicable limits of an insurance policy to which this chapter applies issued by an insurer," which was \$1,000,000. *See S.C. Property and Cas. Ins. Guar. Ass'n v. Brock*, 410 S.C. 361, 764 S.E.2d 920 (2014) (discussing Section 38-31-20(8)).

The Act sets forth the powers and duties of the Association in Section 38-31-60, which provides:

The Association:

(a) is obligated to the extent of claims existing before the determination of insolvency and claims arising up to the earliest of the following dates:

(i) thirty days after the determination of insolvency;

(ii) the policy expiration date; or

(iii) the date the insured replaces or cancels the policy.

(iv) Notwithstanding any other provisions of this chapter, except in the case of a claim for benefits under worker's compensation coverage, any obligation of the association to or on behalf of an insured and its affiliates on all covered claims combined shall cease when ten million dollars shall have been paid in the aggregate by the association and any one or more associations similar to the association of any other state or states, to or on behalf of that insured, its affiliates, and additional insureds on covered claims or allowed claims arising under the policy or policies of any one insolvent insurer. If the association determines that there may be more than one claimant having a covered claim or allowed claim against the association, or any associations similar to the association in other states, under the policy or policies of any one insolvent insurer, the association may establish a plan to allocate amounts payable by the association in such manner as the association in its discretion considers equitable.

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)(2002) (emphasis added). The "covered claim" here is \$800,000, the amount of the settlement within the limits of AequiCap's policy. It is thus "in excess of" \$250,000. The obligation, however, is then capped at \$300,000.

Section 38-31-60 provides further that the Association:

(b) is considered the insurer to the extent of its obligation on the covered claims and, to this extent, has all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent. However, the association has the right but not the obligation to defend an insured who is not a resident of this State at the time of the insured

event unless the property from which the claim arises is permanently located in this State in which instance the association does have the obligation to defend the insured;

S.C. Code Ann. § 38-31-60(b) (2002) (emphasis added). Thus, the Association steps into the shoes of AequiCap “to the extent of its obligation on the covered claims,” which is \$800,000 (but then limited to \$300,000 maximum exposure).

Next, the statute provides the Association:

(d) shall investigate claims brought against the association and adjust, compromise, settle, and *pay covered claims to the extent of the association's obligation* and deny all other claims and may review settlements, releases, and judgments to which the insolvent insurer or its insureds were parties to determine the extent to which these settlements, releases, and judgments may be properly contested;

S.C. Code Ann. § 38-31-60 (d) (2002) (emphasis added). Thus, the Association must pay a “covered claim,” but the Association’s “obligation” is then limited to \$300,000 for any one “covered claim.”

The Act then provides that if the Association pays on a “covered claim,” the insured of the insolvent insurer is deemed to have assigned any right against the assets of the insolvent insurer, including any person affiliated with the insolvent insurer whose liability obligations to other persons are satisfied in whole or in part by payments made by the Association. S.C. Code Ann. § 38-31-90(1) & (2) (2002). Thus, the Association again steps into the shoes of the insured with regards to recoverable claims back against the insolvent insurer of any affiliated individual for whom the Association has covered a loss.

The offset provision of the Act is found in Section 38-31-100, which provides:

A person, *having a claim under an insurance policy*, whether or not it is a

policy issued by a member insurer, *and the claim under such other policy arises from the same facts, injury, or loss that gave rise to the covered claim against the association, is required to first exhaust all coverage and limits provided by any such policy.* Any amount payable on a covered claim under this chapter must be reduced by the full limits of such other coverage as set forth on the declarations page and the association shall receive a full credit for such limits, or, where there are no applicable limits, *the claim must be reduced by the total recovery.* Notwithstanding the foregoing, no person may be required to exhaust all coverage and limits under the policy of an insolvent insurer.

S.C. Code Ann. § 38-31-100 (1) (2002) (emphasis added). The Respondents' "claim under an insurance policy" (*i.e.*, the other coverage from a solvent insurer and the workers' compensation coverage) is for \$800,000. Respondents were required to "first exhaust" other coverages, which they have done in the amount of \$376,622. Their "claim under an insurance policy" is then reduced by that total recovery from those other sources, leaving a balance of \$423,378 remaining on the "covered claim."

Section 38-31-100 (1) also provides:

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

Section 38-31-100(1)(a) (emphasis added). The Legislature used the term "covered claim," not "obligation," here. The amount payable on Respondent's "covered claim" is \$800,000, the amount of the settlement. That is the amount that must be reduced "by the full and combined policy limits of all joint tortfeasors," which is what was done in this case.

Section 38-31-100(1) next provides:

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

Section 38-31-100(1)(b) (emphasis added). Again, the liability of the person insured by AequiCap was \$800,000, and that liability of that person who should have been covered by the AequiCap policy has been reduced by \$376,622, the amount of the recovery from the joint tortfeasors and the employer. There remains, however, a covered claim against that person who would have been insured by the insolvent insurer, AequiCap, in the amount of \$423,378.

Section 38-31-100 next provides:

A person having a claim which may be recovered under more than one insurance guaranty association or associations similar to the association must be required first to exhaust all coverage and limits in recovery *from the association of the place of residence of the insured* except that, if it is a first-party claim for damage to property with a permanent location, he shall be required first to exhaust all coverage and limits in recovery from the association of the location of the property, and, if it is a workers' compensation claim, he shall be required first to exhaust all coverage and limits in recovery from the association of the residence of the claimant. Any amount payable on a covered claim under this chapter must be reduced by the full amount of recovery from any other insurance guaranty association or associations similar to the association, and the association shall receive full credit for such recovery.

Section 38-31-100(2) (emphasis added). The insured under the AequiCap policy (Eddie Best) is a resident of Orangeburg, South Carolina. The Respondents exhausted the applicable workers' compensation coverage which was credited against their covered claim of \$800,000.

Section 38-31-100 finally provides:

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

S.C. Code Ann. § 38-31-100 (5) (2002) (emphasis added). Respondents have liquidated by settlement their claim against the insured under AequiCap's policy – the liquidated amount is \$800,000. Their claim was a "covered claim." It was *also* a claim within the coverage of AequiCap's policy. Thus, they were required to first exhaust all coverage and limits provided by the solvent insurer, which they have done. The total amount payable under that covered claim was \$800,000, and that amount was "reduced by the full limits of such other coverage," which all parties agree is \$376,622.

DISCUSSION

The Association is a statutory entity designed to provide some protection for the insureds of insolvent insurance companies. *S.C. Property and Cas. Ins. Guar. Ass'n v. Brock*, 410 S.C. 361, 764 S.E.2d 920 (2014); *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 purpose of the Association is to provide payment for the covered claims of insolvent insurers. *S.C. Prop. & Cas. Ins. Guar. Ass'n v. Wal-Mart*

Stores, Inc., 304 S.C. 210, 403 S.E.2d 625 (1991).

As a condition precedent to recovery from the Association, a claimant is required to first exhaust all available coverage from solvent insurers toward the “covered claim,” and the Association is allowed to offset the full limits of such other coverage against the “covered claim” under the Act. *Brock*, citing Section 38-31-100. Here, Respondents exhausted the available coverage from the solvent insurers and applied those amounts to their covered claim against AequiCap’s insured. Once that offset was applied, then the Association’s obligation under the Act remained. The Association is then required to pay the difference between the settlement amount (\$800,000) and the offset amount (\$376,622), which is \$423,378 (but capped at \$300,000). See *Brock*, 410 S.C. at 365, 764 S.E.2d at 922 (the Association paid “the difference between the settlement amount (\$185,000) and the offset amount (\$93,090.45).”).

That is what these statutes plainly say, and that is how the trial court applied them. This should end the inquiry. Respondents proceed, however, to address the specific remaining arguments the Association makes in its brief.

A. Whether the Order Is “Internally Inconsistent” Regarding Ambiguity of the Statute Is Irrelevant

The Association points out that in the order of judgment, the circuit court stated “[e]xamining the text of the applicable statutes reveals portions of the statute are most ambiguous.” (R. p.5) (App. Br. p. 7). The Association then points out that the court found the “plain language” of the statutes requires the offset as applied. The Association

contends that “the order is, therefore, internally inconsistent.” (App. Br. p. 7). The Association contends further that the trial court failed to “identify the ambiguity in the Order” and submits this is because the scheme is, when read as a whole, unambiguous. (App. Br. p. 7). The Association does not, however, explain why any of this matters or what this Court ought to do about this alleged “internal inconsistency.” The Court should not be persuaded to do anything in response to this argument.

As pointed out, the trial court held the “plain language” of the Act mandates that the Association has an obligation to pay \$300,000 to Respondents. (R. p.4). The trial court analyzed the plain language of each provision and held it was “following the plain logical interpretation of the statutory text” in reaching its decision. (R. pp.5-7). Thus, the trial court applied a plain reading of the statute’s language to arrive at the result. The court did not resort to any rules of construction that favored either party. Any statement in the order about ambiguity does not matter and, therefore, makes no difference. *See Jennings v. Jennings*, 401 S.C. 1, 6, 736 S.E.2d 242, 244 (2012) (“whatever doesn’t make any difference, doesn’t matter”).

Respondents have set forth why the plain language of each portion of Section 38-31-100 supports the trial court’s decision. Even if this Court views the order as “internally inconsistent” and decides that something must be done about it, the Court may still affirm a ruling under any reason appearing in the record, Rule 220(c), SCACR. *See also Potomac Leasing Co. v. Otts Market, Inc.*, 292 S.C. 603, 358 S.E.2d 154 (Ct. App. 1987) (the reasoning adopted by the trial court is not binding upon the appellate court if the record discloses a correct result).

This Court should not be persuaded to find the trial court's order to be "internally inconsistent" in a way that requires reversal.

B. The Trial Court Did Not Fail to Properly Address Recent Decisions of the Supreme Court of South Carolina Holding the Applicable Provisions of the Act Are Unambiguous

The Association contends the trial court failed to address *Brock* (a decision that came out after the initial order but before the ruling on reconsideration) and misconstrued *Hudson v. Lancaster Convalescent Center*, 407 S.C. 112, 754 S.E.2d 486 (2014). (App. Br. pp. 8-9). The Association's argument here is similar to its first argument – that the Supreme Court has found the statutory scheme to be unambiguous and that the trial court's ruling is therefore fatally flawed. Again, because the trial court applied the plain text of each part of the Act and arrived at the correct decision, this argument makes no difference in the outcome. *Jennings v. Jennings*.

Moreover, the Association overreads the holdings of both *Brock* and *Hudson*. The holding of *Brock* is that the Act allows the Association to offset all payments the claimant received from any source against the amount of the covered claim (which, in *Brock*, was \$185,000). The Court described the Association's obligation to be \$185,000 (*i.e.*, the entire settlement). The disagreement was over "what types of insurance coverage [the Association] may offset against" *that* obligation.

Unlike *Brock*, the entire settlement (and thus the "covered claim") in this case was \$800,000, which was above the Act's cap. The next step, then, is to apply all amounts recovered as offsets against that amount to yield the sum due from the Association.

Because that amount is over the \$300,000 cap, the next step is to reduce the obligation to pay to that cap. That application of the statutes is consistent in every way with the plain language of the statutes as well as the narrow holding in *Brock*.

The Association reads the words “covered claim” to mean “Association’s *net* obligation,” but *those* words do not appear in the statute. As pointed out above, the “covered claim” means a claim covered under the policy of the insolvent insurer, and it is against *that* amount that the offsets are to be taken. That is, Section 38-31-100(1) expressly provides that it is “the amount payable on a *covered claim*” that may be reduced by sums already recovered, not the amount of the Association’s “obligation under the Act” or “obligation to pay the claim.” The Association essentially asks the Court to rewrite Section 38-31-100(1), but amending this statute is the province of the legislature, not the Court. *American Petroleum Institute v. SC Dept. of Rev.*, 382 S.C. 572, 579, 677 S.E.2d 16, 20 (2009) (“it is not the province of [the] Court to perform legislative functions.”).

It is also not within this Court’s authority to alter the plain meaning of the Act by altering the term “covered claim” to mean “Association’s net obligation under the Act.” *See Alltel Comm., Inc. v. SC Dept. of Rev.*, 399 S.C. 313, 319, 731 S.E.2d 869, 873 (2012) (“Under the plain meaning rule, it not the province of the court to change the meaning of a clear and unambiguous statute.”). Section 38-31-100(1) says what it says, and the meaning of “covered claim” is plain – it is the unpaid claim arising under the coverage set forth within the applicable limits of a policy of an insolvent insurer. Section 38-31-20(8).

As for *Hudson*, the Association concedes “the focus in *Hudson* [was] on a different issue than the one before this Court....” (App. Br. p. 9). That issue was whether Section 38-31-20(8) could be construed as limiting a claim arising from the Association’s own actions (*i.e.*, interest incurred due to failure to pay a lump sum workers’ compensation award). The Supreme Court held the limitation that a “covered claim” would not include interest did not apply where the Association’s liability was direct and not derivative. There is no such issue in this case. *Hudson*, therefore, is meaningfully distinguishable and not relevant.

The Association also contends Section 38-31-100(1) must be read together as a whole with Section 38-31-60(a)(iv) (the cap provision) “consistent with *Brock* and *Hudson*.” (App. Br. pp. 9-10). Respondents agree that these provisions should be read *in pari materia*, but they should also be read plainly, and against the backdrop of the legislative purpose in creating the Association. As the Supreme Court stated in *Hudson*:

[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*, 315 S.C. 555, 557, 446 S.E.2d 422, 424 (1994) (“[The Association’s] purpose is to provide some protection to insureds whose insurance companies become insolvent”). Section 38-31-60(b) provides that [the Association] “is considered the insurer to the extent of its obligation on the covered claims and, to this extent, has all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent....” *When [the Association] steps into the shoes of an insolvent insurer, its liability is derivative of the insolvent insurance company’s direct liability to the consumer.* The legislature has limited this liability to a “covered claim” which is defined by § 38-31-20(8) as “... 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 ... covered claim does not include: ... (h) any claim for interest.”

The legislature has chosen to define a “covered claim” as a claim arising from an insolvent insurer, yet [the Association] asks this Court to read the “covered claims” and its corresponding interest limitation to apply to claims arising from [the Association’s] own actions. We decline to do so.

Hudson, at 124, 754 S.E.2d at 492 (emphasis added). The Association’s derivative liability to the consumer here means the obligation to pay the covered claim under the insolvent insurer’s policy – that claim is \$800,000. The offset provision then permits the Association to reduce the “covered claim” by the amounts Respondents received, and then *that* number is capped at \$300,000 (*i.e.*, the obligation).

In sum, the Court should not be persuaded to reverse the trial court’s ruling based upon the Association’s argument that the court “failed to properly address” *Brock* and *Hudson*. The trial court’s decision is consistent with the Supreme Court’s rulings in those cases and with the plain language of the Act.

C. The Trial Court Did Not Misapply the Act

The Association argues that its “*obligation* on a covered claim is offset by coverage limits for other insurance for the same facts, injury or loss which gave rise to the claim against the Association.” (App. Br. pp. 10-14). The Association reads the term “amount payable on a covered claim” to mean the Association’s obligation under the Act. (App. Br. pp. 12-14). The upshot is that the Association equates the terms “obligation” and “covered claim.” This is a misreading of the statute.

The precise language of the offset provision is as follows:

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.

S.C. Code Ann. § 38-31-100 (1)(emphasis added). The Association contends the bolded language *really* means the Association's "obligation" under the Act. (App. Br. p. 14). But that is not what the statute says plainly.

To begin with, in drafting the statute the General Assembly drew a distinction between the terms "covered claim" and "obligation." The Act provides the Association "shall investigate claims brought against the association and adjust, compromise, settle, and *pay covered claims to the extent of the association's obligation....*" S.C. Code Ann. § 38-31-60 (d) (emphasis added). If the term "obligation" is the same as "covered claim," this provision make no sense.

Analyzing Section 38-31-100(1) sentence by sentence is helpful. The first clause of the first sentence provides: "A person, *having a claim under an insurance policy*, whether or not it is a policy issued by a member insurer...." There is no dispute that Respondents meet this language – they are "a person," and they "have a claim under an insurance policy." Respondents had a claim from the solvent insurer as well as a workers' compensation claim.

The second clause of the first sentence provides: "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....” Again, it is undisputed that the claim against the other solvent insurer and the workers’ compensation carrier arose from the same facts, injury or loss that gave rise to the covered claim against the Association (which derives from the claim against the insolvent insurer, AequiCap).

The third clause of the first sentence then states, “is required to first exhaust all coverage and limits provided by any such policy.” The parties have agreed to limit the Association’s offset to the amounts actually recovered under the other policies. (App. Br. p. 11, n. 8). The phrase “any such policy” means the recovery from the solvent insurer and the workers’ compensation carrier in this case.

The second sentence, which is the operative offset sentence, provides, “**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.” (Bold added). The Association points to this bolded language as the source of its argument that the offset is against the Association’s obligation *after* the cap is applied. This is not correct.

“Any amount payable” is followed by “on a covered claim” – this means the amount payable under the insolvent insurer’s policy because “covered claim” references that insolvent insurer, not the Association. As noted above, “covered claim” is specifically defined in the Act:

“Covered claim” *means an unpaid claim ... which arises out of and is*

*within the coverage and is subject to the applicable limits of an insurance policy to which this chapter applies issued by an insurer, if the insurer is an insolvent insurer and (a) the claimant or insured is a resident of this State at the time of the insured event, if for entities other than an individual, the residence of a claimant or insured is the state in which its principal place of business is located at the time of the insured event or (b) the claim is for first-party benefits for damage to property permanently located in this State. * * **

S.C. Code Ann. § 38-31-20(8) (2002) (emphasis added). The “covered claim” is thus: (a) the “unpaid claim”; (b) “which arises out of and is within the coverage”; and (c) is subject to the applicable limits of an insolvent insurer’s policy. The “covered claim” means the \$800,000 claim against AequiCap’s policy limits of \$1,000,000. “Payable on a covered claim” thus means payable under the AequiCap policy, not by the Association.

If the General Assembly intended the result the Association seeks, it could have drafted the statute as follows:

Any amount payable ~~on a covered claim~~ on the association’s obligation 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~~ obligation must be reduced by the total recovery.

(Strikethrough and underline added). But that is not what the statute says, and this Court should not read it that way.

The Association asserts that :

Reading the statute to require the offset to be deducted from a claimant’s total amount of claimed damages would render the offset provision meaningless in any situation where the difference between a claimant’s damages and the amount received from other available insurance exceeds \$300,000.

(App. Br. p. 13). Precisely. The legislature drafted the statute in this manner, expressing a

policy decision to protect consumers up to \$300,000 against an insolvent carrier where the damages and coverage under an applicable policy exceed that amount. If Respondents' carrier was not insolvent, they could recover all of the remaining balance on the loss up to \$423,378. Under the Act, their recovery of the remaining loss is limited to \$300,000.

This construction of the statute does not render the offset provision "meaningless." Had Respondents received \$600,000 from other sources, then the Association's obligation in this case would have been \$200,000 without concern for the cap. Because Respondents received less than \$500,000 towards their \$800,000 claim, the Association is required to step up at the capped amount.

Furthermore, Respondents are not being made whole - far from it. Their damages totaled \$800,000 against which they received only \$376,622 from other sources. Of the \$423,378 balance remaining, they may only recover \$300,000 from the Association, leaving them responsible for the remaining \$123,378 themselves. The Act is consumer protection legislation and is supposed to provide "last resort" insurance coverage.

Hudson. The trial court's ruling serves that goal - the Association's position does not.

What the Association advocates would render these provisions perfunctory in any case where there are other sources of coverage that provide at least \$300,000 towards the covered claim. Nothing in the statutory scheme supports that result. The Association is intended to provide some form of coverage for any consumer who is injured. *Hudson*. In exchange for this consumer protection, the legislature requires two things: (1) the consumer must pursue all other avenues of payment before turning to the Association;

and (2) in *then* responding, the Association must provide coverage, but *that* obligation is limited to a cap of \$300,000. It is not the consumer's overall recovery on a covered claim that is capped at \$300,000 total, but the amount the Association must pay in order to cover damages that would have been covered by the insolvent insurer.

That is the result required by the Act, and that is the result the trial court reached. This Court should affirm.

II. The Trial Court Did Not Misconstrue Legislative Intent or Public Policy Underlying the Act

The Association contends the trial court overlooked the legislature's "express stated intent," "mistakenly relied on the [South Carolina] Tort Claims Act" to support the court's conclusions under the Act, and erred "by finding that reading the statute as intended would result in adverse public policy consequences." (App. Br. p. 14). These arguments exaggerate, overstate or misstate what the trial court actually did. They should not persuade this Court to reverse.

A. The Legislature's Intent

The Association contends that the 2001 amendment to the Act was intended "to clarify that the Association's *obligation* must be offset by any and all coverage that arises from the same facts, injury, or loss that gave rise to the claim against the Association." (App. Br. p. 15). The Association's argument, however, is based upon the erroneous premise that the offset is to be applied to its obligation. (App. Br. p. 15-18).

The Association asserts "the language of the Act is clear and unambiguous" as

found in *Brock* and *Hudson*. Of course, neither of those cases made such a sweeping pronouncement of the entire Act but, rather, explained the specific portions then before the Court. Even so, the “clear and unambiguous” language of the relevant statute provides that the offset is *not* against the Association’s obligation, but against the Respondent’s “covered claim” against AequiCap. S.C. Code Ann. § 38-31-100(1)(a) (“Any amount payable on a *covered claim* under this chapter must be reduced by the full and combined limits of all joint tortfeasors.”). The “covered claim under this chapter” refers to the “covered claim” as defined by the Act under Section 38-31-20(8), that 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 issued by an insurer....” The “unpaid claim” is the claim against AequiCap, which in this case is \$800,000.

The Association next points to the “preamble” to the 2001 Act which amended this statutory scheme as support for its view that the legislature intended to “[provide] a credit to the Association for other coverages arising from the same facts, injury, or loss as the claim against the Association.” (App. Br. pp. 15-16).

The preamble of an Act is not part of the effective portion of a statute, although it may supply the guide to the meaning of an act. *Mitchell v. City of Greenville*, 411 S.C. 632, 770 S.E.2d 391 (2015). The preamble to the 2001 Act is lengthy, and informs that the Act was intended, among other things:

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....

Act No. 82, 2001 S.C. Acts preamble. The Association believes the phrase "limitations on claims" means the offset provision "would limit the claims asserted against the Association by providing a credit to the Association for other coverage arising from the same facts, injury, or loss as the claim against the Association." (App. Br. pp. 15-16). The Association's argument here reads too much into this preamble.

Respondents do not disagree that through the Act and the 2001 amendment, the legislature intended to require an offset against a "covered claim" before a claimant could then turn to the Association – the intent was to ensure the Association was not a first line insurer but would provide coverage for a "covered claim" only after a claimant has exhausted all other available sources. If exhausting those other sources first fully satisfied the covered claim, then the Association would owe nothing since the claimant would be made whole from those other sources. Otherwise, after exhausting those other sources, the claimant could then turn to the Association to fill the uncovered gap, but only up to the statutory limitation of \$300,000.

Comparing the 2001 amendment Section 38-31-100 to the prior version of the statute is helpful. The 2001 amendment did the following to Section 38-31-100:

- (A) Added the last sentence to Part (1), which provides "Notwithstanding the foregoing, no person may be required to exhaust all coverage and limits under the policy of an insolvent insurer."
- (B) Added to Part (1) the provisions of subparts (a) and (b), which state:
 - (a) "A claim under a policy providing liability coverage to a person who may be jointly and severally liable with or a joint tortfeasor with the person

covered under the policy of the insolvent insurer that gives rise to the covered claim must be considered to be a claim arising from the same facts, injury, or loss that gave rise to the covered claim against the association. Any amount payable on a covered claim under this chapter must be reduced by the full and combined policy limits of all joint tortfeasors.”

(b) “To the extent that the association’s obligation is reduced by the application of this section, the liability of the person insured by the insolvent insurer’s policy for the claim must be reduced in the same amount.”

(C) Part (2) was amended slightly for verbiage, and the following sentence added:

“Any amount payable on a covered claim under this chapter must be reduced by the full amount of recovery from any other insurance guaranty association or associations similar to the association, and the association shall receive full credit for such recovery.”

(D) Part (4) was amended to add the underlined language as follows: “No claim held by an insurer, reinsurer, insurance pool, or underwriting association based on an assignment or on rights of subrogation, or otherwise, may be recovered from a claimant or asserted in any legal action against a person insured under a policy issued by an insolvent insurer or the association except to the extent the amount of the claim exceeds the obligation of the association under this chapter.”

(E) Part (5) was amended to strike words and add underlined language as follows: “A

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

- (F) Part (6) was added to provide, "A person having a claim against an insolvent insurer under any provision in an insurance policy is limited to ten million dollars aggregate payout from the association."
- (G) Part (7) was added to provide, "A person having a net worth of greater than twenty-five million dollars and having a claim against an insolvent insurer under any provision in an insurance policy may not make a claim against the association."

None of these amendments to Section 38-31-100 support the Association's view that its capped obligation under the Act must be reduced by any other recovery. Rather, the Association is entitled to credit against the "covered claim," which here is \$800,000.

Nothing in the preamble contradicts the trial court's reading of the express terms of the offset provision. And nothing in the preamble expresses any intent that the offset

must be applied only to the Association's capped obligation under the Act. The Court should not be persuaded to read the preamble to the 2001 amendment to Section 38-31-100 to include something that simply is not there. And even if the Court could divine such language from the preamble to the 2001 amendment, that preamble may serve only to guide the meaning of the Act and is not a part of the effective portion of the statute. *Mitchell*.

The Association next contends the trial court's order "unlawfully forces the Association to fully 'step in the shoes' of the insolvent insurer" in contrast to the expressed legislative intent as allegedly set forth in *Brock and Hudson*. (App. Br. p. 16). This simply is not so. Although the Association presents these rulings as parenthetical "holdings," these cases must be examined in detail.

1. *S.C. Prop. & Cas. Ins. Guar. Ass'n v. Wal-Mart Stores*

First, the Association points to *S.C. Prop. & Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc.*, 304 S.C. 210, 403 S.E.2d 625 (1991), asserting the Supreme Court found "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." (App. Br. p. 16). This is a misstatement of the holding in *Wal-Mart*.

In *Wal-Mart*, Transit Casualty Insurance Company provided workers' compensation coverage for all of Wal-Mart's stores throughout the country. A dispute arose between Wal-Mart and Transit about the compensation policies and Wal-Mart filed a declaratory judgment action in Arkansas in February 1985 to establish its rights under the policies. In December 1985, however, Transit was declared insolvent and its license

to transaction business in South Carolina was revoked.

In 1988 the Eighth Circuit Court of Appeals ruled the contract was illegal and unenforceable and hence void. The Court found that Transit's agent had materially misrepresented various facts to be reported to regulatory agencies in order to meet a flat guaranteed premium for coverage, thereby violating various state statutory laws. The Court found both Transit and Wal-Mart were aware of the illegality of the agreement and applied the doctrine of *in pari delicto*, with the result that the parties were in the same position as if the contract had never been executed.

In the meantime, the Association had received notification of Transit's insolvency and began to process Wal-Mart's workers' compensation claims.¹ Between January 1986 and November 1988 the Association handled 36 claims against Transit's Wal-Mart coverage and paid benefits for 13 of those claims. In September 1988, however, the Association received notice of the Eighth Circuit's decision that the contract was illegal. The Association then sent all of the claim files to Wal-Mart in November 1988. The Association filed an action to recover the expenses incurred and payments it had made on Wal-Mart's behalf, asserting the claims were not "covered" as required under the Act.

Wal-Mart alleged the Association's payments were proper, and counterclaimed to require the Association to continue coverage. The parties filed cross-motions for summary judgment as to liability. The trial court granted the Association's motion for partial summary judgment on the ground Wal-Mart was collaterally estopped by the

¹ The Supreme Court added that the legislature created the Association in 1956, and its "purpose ... is to provide payment for the covered claims of insolvent insurers." *Wal-Mart*, at 212, 403 S.E.2d at 626.

Eighth Circuit decision from denying the illegality and unenforceability of the workers' compensation agreement with Transit. The trial court rejected Wal-Mart's *in pari delicto* defense.

On appeal, the Supreme Court affirmed the ruling that Wal-Mart could not relitigate the validity of the workers' compensation contract. Regarding the *in pari delicto* defense, the Supreme Court stated:

Wal-Mart argues that [the Association] stands in the shoes of Transit *and that it cannot recover because of Transit's bad acts*. We find that this is not the intent of the statutes.

Wal-Mart, at 215, 403 S.E.2d at 628 (emphasis added). In light of the ultimate outcome of the case, the Supreme Court's finding regarding the intent of the statutes is directed to the language Respondent's emphasized, not the language about the Association standing in the shoes of Transit. This becomes apparent when the remainder of this part of the opinion is examined. The Supreme Court continued:

Section 38-31-60(b) provides in pertinent part:

[The Association] is considered the insurer to the extent of its obligation on the covered claims and, to this extent, has all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent.

[The Association] has no rights or obligations to claims which are not covered. The trial court found, therefore, that *when it was determined that the claims were not covered*, [the Association] could not be considered the insurer nor could it be bound by Transit's actions.

Id. (emphasis added). Thus, it was the finding that the "claims were not covered" that took the Association out of Transit's shoes – the Court was not making a broad pronouncement that the legislature did not intend to place the Association in the shoes of

an insolvent insurer for all purposes.

The Supreme Court next stated:

Wal-Mart argues that its position is based on § 38-31-90(1) rather than § 38-31-60. This section states that [the Association] has no cause of action against the insured except for amounts that would have been paid by the insolvent insurer. Wal-Mart argues that Transit would not have paid anything because of the illegal contract and therefore [the Association] cannot recover anything from Wal-Mart.

We find that this section, as all others in this article, is triggered by a “covered claim.” *Without a covered claim*, the insolvent insurer would not be liable for payment of any claims. We therefore agree with the decision of the trial court.

Id. (emphasis added). The key, therefore, is that there was no “covered claim,” and under those facts, the Association would not stand in the shoes of Transit at all, much less to the point that the Association could not recover because of Transit’s bad acts.

The Association plucks language from *Wal-Mart* out of context to argue the trial court unlawfully forced the Association to “stand fully in the shoes” of AequiCap. This Court should not be persuaded to read *Wal-Mart* in such an incorrect and improper way.

2. *Hudson v. Lancaster Convalescent Center And SC Property and Cas. Ins. Guar. Ass’n v. Brock*

The Association argues *Hudson v. Lancaster Convalescent Center*, 407 S.C. 112, 754 S.E.2d 486 (2014) and *SC Property and Cas. Ins. Guar. Ass’n v. Brock*, 410 S.C. 361, 764 S.E.2d 920 (2014) demonstrate the legislature intended the Association’s “liability to be limited” under the Act. (App. Br. p. 16).

Under the Association’s reading of the Act, *Brock* and *Hudson*, the Association

becomes a “no resort” payor *any* time there is a payment from another source that combines to exceed \$300,000. The legislature could have written the Act in that manner, but it chose not to do so. Instead, the legislature provided that the Association steps into the liability of AequiCap, *Hudson*, which is \$800,000. The offsets are then applied, leaving the balance of liability for the covered claim. The caps then reduce that amount.

The Association asserts it “is not intended as a failsafe to guarantee a complete recovery to those unfortunate claimants” of insolvent insurers. (App. Br. p. 17). Respondents do not quarrel with this, and neither did the trial court. No “complete recovery” is being guaranteed here, nor is a “complete recovery” being made. As noted above, Respondents are being left without any recovery of \$123,378 after the caps under the Act are applied to the balance of the covered claim against AequiCap.

The Association concludes that the trial court’s ruling results in the Association not being “given any credit for the other coverages subject to its maximum statutory obligation.” (App. Br. p. 18). Again, this is not so. The trial court gave the Association credit for the other sources of recovery against the “covered claim,” which in this case is \$800,000. After giving the credit, the balance remaining on the covered claim was \$423,378, and that is the Association’s “statutory obligation” under the Act. Only then does the cap provision reduce that obligation to \$300,000.

This Court should not be persuaded to misread section 38-31-60, *Brock* and *Hudson* to find that the Association steps up only if a claimant “be left without **any** potential source of recovery when an insurer becomes insolvent.” (App. Br. p. 17). Instead the Court should affirm the trial court’s ruling.

B. The Trial Court's Use of the Tort Claims Act as Persuasive Authority Does Not Mandate Reversal

The trial court noted the following in its order:

As [the Association] 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.

(R. p.8). The trial court then turned to cases construing the mechanics of the Tort Claims Act to assist the court in applying the Act in this case. The Association does not explain how the trial court's analysis, even if misguided, would lead to a different result in this case. The Court should not be persuaded to reverse on this ground.

Courts often turn to other sources for guidance in how to apply a statutory scheme. The trial court here looked at how the offsets were applied in Tort Claims cases for guidance as to how the offset provisions under the Guaranty Act should work. An examination of those cases reveals the trial court correctly applied the statute in this case.

Under South Carolina law, the entire assessment of damages is considered in determining a setoff. See *Truesdale v. S.C. Highway Dept.*, 264 S.C. 221, 234-235, 213 S.E.2d 740, 746-747 (1975), *overruled on other grounds by McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985) (applying this rule to a jury verdict); *Smalls v. S.C. Dep't of Educ.*, 339 S.C. 208, 221-22, 528 S.E.2d 682, 689 (Ct. App. 2000) (same). Once the setoff is subtracted from the total amount, the other reductions are made. This is because the purpose of setoff is generally to prevent double recovery. *Truesdale*, 264 S.C. at 235, 213 S.E.2d at 747.

In *Truesdale*, the plaintiff's claim against the South Carolina Highway

Department was statutorily capped at \$10,000. 264 S.C. at 225, 213 S.E.2d at 741. The trial court nevertheless allowed the jury to determine the plaintiff's "full measure of damages" solely for the purpose of determining whether the trial defendant would be entitled to a setoff in the amount of the plaintiff's covenant not to sue a joint tortfeasor. *See id.* at 235, 213 S.E.2d at 746. The consideration for the covenant not to sue was \$6,000.

The Highway Department argued that the jury should not be permitted to find damages more than the statutory cap of \$10,000, and that the setoff should be applied to the \$10,000 so that the Highway Department's liability was limited to only \$4,000. The Supreme Court found such an approach to be "completely unsound." *Id.* at 234, 213 S.E.2d at 746. Rather, it found that the trial court properly protected the rights of both parties by allowing the jury to fully assess the plaintiff's damages at \$35,000, and then applying the setoff to that full amount of damages. *See id.* at 235, 213 S.E.2d at 746-47. The Court observed that, "in the absence of it being determined what the full measure of damages is, it cannot be determined whether a joint feisor is or not entitled to an offset of the consideration for a covenant not to sue." *Id.* at 235, 213 S.E.2d at 746.

The Court in *Truesdale* found the proper method of applying the setoff was to reduce the total verdict by the amount of the \$6,000 consideration for the covenant not to sue. *See id.* After the offset was applied and the verdict was reduced to \$29,000, the Court then applied the statutory cap to reduce the verdict against the defendant to the statutory cap of \$10,000. *See id.* at 235, 213 S.E.2d at 747. The Court explained that this method effectuated the purpose of preventing a double recovery: "Since the purpose of

allowing an offset or credit for the consideration of a covenant not to sue is to prevent double recovery the department in the present case would have been entitled to pro tanto relief if, but only if, the total damages had been found to be something less than \$16,000." *Id.*

The *Smalls* case similarly applied the setoff to the total verdict before taking other reductions. 339 S.C. at 221-23, 528 S.E.2d at 689. In *Smalls*, suit arose out of an accident in which a child was struck and killed by a car while crossing the road. *See id.* at 213-14, 528 S.E.2d at 685. Her parents sued the driver, the driver's employer, and the Department of Education. They settled with the driver and his employer for \$100,000, which was divided \$90,000 to the wrongful death claim and \$10,000 to the survival claim. They went to verdict against the Department of Education and the jury awarded damages of \$600,000 for wrongful death and \$310,000 for survival damages. *See id.* at 214, 528 S.E.2d at 685. Fault was apportioned 18% to the child and 82% to the Department of Education. *See id.* At that time, the Tort Claims Act imposed a statutory cap of \$250,000 for each claim. *See id.* at 215, 528 S.E.2d at 685.

The *Smalls* court determined that the proper method of applying credit for the plaintiff's pretrial settlement was to subtract the settlement amount from the jury's verdict before reducing the verdict in the amount of plaintiff's comparative fault or the statutory cap. *See id.* at 221, 528 S.E.2d at 689. Applying that method to the survival claim, for example, the court started with the jury's verdict of \$310,000, subtracted the settlement credit of \$10,000, and then subtracted the 18% negligence of the plaintiff (\$54,000), leaving a verdict of \$246,000. *See id.* at 222, 528 S.E.2d at 689. The court followed a

Michigan case, *Rittenhouse v. Erhart*, 380 N.W.2d 440 (Mich. 1986), which had used this approach in a comparative fault case and had reasoned that the jury's verdict represented the total amount of damages suffered by the plaintiff and the fault allocations were only among the parties at trial. *See id.*

As in *Truesdale*, the defendant in *Smalls* argued that the setoff should be deducted from the amount of the cap, not the amount of the jury's verdict. *See id.* at 222, 528 S.E.2d at 689. The Court of Appeals disagreed, holding that "because Smalls has not recovered all damages awarded by the jury[,] application of a set-off in this manner would unfairly deprive a plaintiff of the verdict." *Id.* The court noted that the amount of the pre-trial settlement, plus the amount received from the Department of Education, "still does not rise to the full level of damages awarded by the jury. Therefore, Smalls has not obtained a double recovery, and we see no equitable reason to apply the credit in the manner urged by the Department." *Id.* at 222-23, 528 S.E.2d at 689.

The principles announced in *Truesdale* and *Smalls* are equally applicable in this case: Any setoff under the statute should be deducted from the total "covered claim" before applying the statutory cap. The cap under the Guaranty Act is akin to the comparative negligence finding in *Smalls* or statutory cap applied in *Truesdale* in that they are all mechanisms for reducing the plaintiff's full amount of damages before turning to payments due from the party before the court. Any settlement credit should therefore be deducted from the full amount of the Respondents' covered claim, \$800,000, not from the cap under the Act.

Even if the trial court erred by using Tort Claims Act cases to guide the trial court

on how to apply the offset under the Guaranty Act, the trial court arrived at the correct result required by the plain language of the statute. An appellant must demonstrate not only error but resulting prejudice. *Keller v. Pearce-Young-Angel Co.*, 253 S.C. 395, 399, 171 S.E.2d 352, 355 (1969) (“The burden is, of course, upon the appellant to show not only error but resulting prejudice.”). *See also Jennings v. Jennings*, 401 S.C. 1, 6, 736 S.E.2d 242, 244 (2012) (“whatever doesn’t make any difference, doesn’t matter”).

This Court should reject the Association’s contention that somehow the trial court’s use of Tort Claims cases for guidance renders the trial court’s order fatally defective.

III. The Trial Court’s Decision Did Not Violate Public Policy

The trial court stated:

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.

(R. pp.9-10). The Association does not challenge these holdings in its brief.

The trial court then stated:

Adopting the interpretation suggestion 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 proportionate 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.

(R. p.10). The Association contends that these statements are erroneous because exhaustion of claims against others is a "condition precedent to recovery" from the Association. (App. Br. pp. 20-21). This Court should not be persuaded to reverse based upon this argument.

Once again, the Association does not explain why this ruling, even if error, should justify reversing the trial court's order based upon a plain reading of the Act. As noted above, an appellant must demonstrate not only error but resulting prejudice. *Keller v. Pearce-Young-Angel Co.*, 253 S.C. 395, 399, 171 S.E.2d 352, 355 (1969) ("The burden is, of course, upon the appellant to show not only error but resulting prejudice."). Without prejudice, any error makes no difference in the result. *See Jennings v. Jennings*, 401 S.C. 1, 6, 736 S.E.2d 242, 244 (2012) ("whatever doesn't make any difference, doesn't matter").

In this case there is no claim that Respondents did not look first to other available sources for recovery for their covered claim – they, in fact, did so. After exhausting those sources, the Respondents turned to the Association, who had the obligation to respond to the remainder of the covered claim. That obligation was then capped at \$300,000.

The Association "is a last resort insurer created by the legislature *to protect consumers* in the event that their insurer becomes insolvent." *Hudson*, 407 S.C. at 124, 754 S.E.2d at 492 (emphasis added). Consumer protection is at the heart of this statutory scheme. It is not designed to insulate the Association to the point that it may only respond to claims where the total recovery from all sources is \$300,000 or less. Had the General Assembly desired such a result it would have been a simple matter to draft the legislation

in that fashion.

Whether the trial court correctly described public policy concerns or not, the trial court arrived at the correct result. Rule 220(c), SCACR. *See also Potomac Leasing Co. v. Otts Market, Inc.*, 292 S.C. 603, 358 S.E.2d 154 (Ct. App. 1987) (the reasoning adopted by the trial court is not binding upon the appellate court if the record discloses a correct result). Accordingly, this Court should not be persuaded to reverse the trial court's decision even if the Court finds the trial court misapplied the policy concerns underlying the Act.

IV. The Holdings of a Majority of Other Jurisdictions Do Not Support Reversal

The Association argues that 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." (App. Br. p. 21). The trial court noted that "all but one of the cases listed by the Association" in its brief to the circuit court "are cases involving setoffs applied to the policy limit, rather than the statutory limit, despite how they are framed in" the Association's brief. (R. p.6, n. 1). The trial court's view of those decisions was correct and this Court should affirm.

The Association contends that "nine of the cases cited to the trial court involved the deduction of the offset from the statutory maximum/limit." (App. Br. p. 22). The Association contends remaining cases (including a case from Kentucky) are instructive. (App. Br. pp. 25-30). Respondents thus provide this Court with a discussion of why each of those cases is distinct from this case in meaningful ways.

A. **Arizona.** The Association first cites to *Jangula v. Arizona Property and Cas. Ins. Guar. Fund*, 88 P.3d 182 (Ariz. Ct. App. 2004). Arizona's scheme, however, is different from South Carolina's statute in a very meaningful way.

The Arizona statute obligated the Fund to pay damages "up to the applicable limits of the insolvent insurer's policy or \$99,900, whichever is less." A.R.S. § 20-667(B)(2002). Additionally, prior to 1998, the Arizona statute provided:

Where more than one policy may be applicable, a policy issued by the insolvent insurer shall be deemed to be excess coverage. The claimant shall be required to exhaust all rights under other applicable coverage or coverages. Any amount *payable on a covered claim* shall be reduced by the amount of such recovery under other applicable insurance.

A.R.S. § 20-673(C) (1997) (emphasis added). The Arizona Supreme Court construed the last sentence of pre-1998 subsection (C) to require only that the amount of the claimant's total damage claim be reduced by the amount paid under other insurance policies, but that the other payments would not be offset against the Fund's obligation. *Arizona Property & Casualty Insurance Guaranty Fund v. Herder*, 751 P.2d 519, 523-525 (Ariz. 1988). The Court concluded that the phrase "amount payable on a covered claim" referred to "the total amount payable as damages for the claimant's injuries caused by the covered occurrence," *not* to the extent of the Fund's obligation. *Id.* at 523. A reduction in the "amount payable on a covered claim" would reduce the total amount of the damage claim, but if the total damages still exceeded the Fund's maximum obligation (the lesser of \$99,900 or the limits of the insolvent insurer's policy), the amount paid by the Fund would not be reduced.²

² This result in *Herder* is identical to the result the trial court reached in this case.

Significantly, in 1998 the Arizona legislature amended § 20-673(C) (2002) to add this sentence: "Any recovery pursuant to this article shall be reduced by the amount of the recovery under the claimant's insurance policy." The section now provides:

Where more than one policy may be applicable, a policy issued by the insolvent insurer shall be deemed to be excess coverage. The claimant shall be required to exhaust all rights under other applicable coverage or coverages. *Any recovery pursuant to this article shall be reduced by the amount of the recovery under the claimant's insurance policy.* Any amount payable on a covered claim shall be reduced by the amount of such recovery under other applicable insurance.

A.R.S. § 20-673(C) (1997) (emphasis added). The *Jangula* Court held the *new* language in the 1998 amendment "changed the interpretation announced in *Herder*." 88 P.3d at 184. The Court stated:

The word "recovery" in this context customarily means the amount of money received by a claimant after asserting a claim or pursuing an action for damages. See BLACK'S LAW DICTIONARY 1280 (7th ed. 1999) (defining "recovery" as an "amount awarded in or collected from a judgment or decree"). The referenced "article" is Article 6 of Chapter 3 of Title 20 of the Arizona Revised Statutes. Article 6 establishes the Fund and defines its obligations. See A.R.S. §§ 20-661 to -680. A "recovery pursuant to this article" is defined as the smallest of (1) the claimant's damages, (2) the face amount of the policy issued by the insolvent insurer, or (3) \$99,900. See A.R.S. §§ 20-661(3) (defining covered claim) and 20-667(B) (limiting coverage to lesser amount of covered claim, face amount of policy, or \$99,900).

Jangula, at 185. Thus, the amended statute specifically required the result in *Jangula*.

There has been no similar amendment to South Carolina's Act. *Jangula* and its discussion of *Herder* actually support the trial court's ruling in this case.

B. **Delaware.** The Association next points to *Marra v. Wilson*, 2003 WL

than to plaintiffs' total amount of damages).

901 A.2d at 311 (emphasis added). Like the Supreme Court of New Jersey, this Court should not follow the unpublished trial court decision in *Marra* when construing the Act.

C. **Louisiana.** The Association cites to *Cooper v. Huddy*, 581 So.2d 723 (La. Ct. App. 1991) in support of its argument. The issue in *Cooper* was whether the Louisiana Insurance Guaranty Act (LIGA) was entitled to an offset for amounts the claimants had already recovered from the Pennsylvania Insurance Guaranty Association (PIGA). The relevant portion of LIGA provided:

(2) Any person having a claim which may be recovered under more than one insurance guaranty association or its equivalent shall seek recovery first from the association of the place of residence of the insured except that if it is a first party claim for damage to property with a permanent location, he shall seek recovery first from the association of the location of the property, and if it is a workmen's compensation claim, he shall seek recovery first from the association of the residence of the claimant. *Any recovery under this Part shall be reduced by the amount of recovery from any other insurance guaranty association or its equivalent.*

LSA-R.S. 22:1386 (2) (emphasis added). The Louisiana Court found "no ambiguity in the provision of LSA-R.S. 22:1386(2) which states that '[a]ny recovery under this Part [which in this case is \$597,719.64] shall be reduced by the amount of recovery from any other insurance guaranty association or its equivalent.'" 581 So.2d 727-728.

Cooper is meaningfully distinct from this case. Unlike the issue in *Cooper*, the issue here is not an attempt to offset payment under the Act by payments recovered under another state's Insurance Guaranty Association Act.

Furthermore, South Carolina has a similar provision as the one at issue in *Cooper*,

but South Carolina's statute is *different* from the Louisiana statute in a meaningful way.

Under South Carolina's version of the Act:

(2) A person having a claim which may be recovered under more than one insurance guaranty association or associations similar to the association must be required first to exhaust all coverage and limits in recovery from the association of the place of residence of the insured except that, if it is a first-party claim for damage to property with a permanent location, he shall be required first to exhaust all coverage and limits in recovery from the association of the location of the property, and, if it is a workers' compensation claim, he shall be required first to exhaust all coverage and limits in recovery from the association of the residence of the claimant. *Any amount payable on a covered claim* under this chapter must be reduced by the full amount of recovery from any other insurance guaranty association or associations similar to the association, and the association shall receive full credit for such recovery.

S.C. Code Ann. § 38-31-100(2) (2005) (emphasis added). Thus, South Carolina's statute uses the phrase "amount payable on a covered claim" rather than "recovery under this Part." *Cooper*, therefore, does not support the Association's argument in this case.

D. **Minnesota.** The Association cites to *Cox v. Minnesota Ins. Guar. Assoc.*, 508 N.W.2d 536 (Minn. Ct. App. 1994) in support of its position. *Cox*, however, dealt with whether the Minnesota Insurance Guaranty Association (MIGA) was entitled to offset its limit of liability against an amount the claimant had already recovered from another guaranty association, the Florida Insurance Guaranty Association (FIGA). The provision at issue provided:

Any person having a claim which may be recovered under more than one insurance guaranty association or its equivalent shall seek recovery first from the association of the state of residence of the insured.
* * * *Any recovery under this chapter* shall be reduced by the amount of recovery from any other insurance guaranty association or its equivalent.

Minn. Stat. § 60C.13, subd. 2 (emphasis added). The Court of Appeals found “the plain meaning of ‘recovery under this chapter’ can only mean MIGA’s obligation to a claimant as created and defined by Chapter 60C. ‘Recovery’ is the amount arrived at after applying the liability limit set forth in 60C.09, subd. 3.” *Cox*, at 541. Thus, MIGA was entitled to offset claimant’s recovery from FIGA from the amount claimant could recover from MIGA under the Minnesota statute. Unlike the issue in *Cox*, this case does not involve an attempt to offset payment under the Act by payments recovered under another state’s Insurance Guaranty Act.

Furthermore, South Carolina’s statute is different from the Minnesota statute in a meaningful way. As noted above, under South Carolina’s version of the Act:

Any amount payable on a covered claim under this chapter must be reduced by the full amount of recovery from any other insurance guaranty association or associations similar to the association, and the association shall receive full credit for such recovery.

S.C. Code Ann. § 38-31-100(2) (2005) (emphasis added). Thus, South Carolina’s statute uses the phrase “amount payable on a covered claim” rather than “recovery under this chapter.” *Cox*, therefore, does not support the Association’s argument in this case.

E. **Mississippi.** The Association cites to *Leitch v. Mississippi Ins. Guar. Assoc.*, 27 So.3d 405 (Miss. Ct. App. 2009), *aff’d* 27 So.3d 396 (Miss. 2010) in support of its claim. *Leitch*, however, is distinct in a meaningful way from this case.

Leitch was involved in a collision with a truck owned by H-G & F Co., Inc., and driven by Jack L. Dillard, an H-G&F employee of H-G & F. At the time of the wreck, the truck was insured by Reliance Insurance Company, which was later declared an insolvent

insurer within the meaning of Mississippi's Insurance Guaranty Act. Leitch initially sued Dillard and H-G & F, and later added his uninsured motorist ("UM") carrier, State Farm, seeking recovery under his UM policy's limit of \$300,000. Leitch and State Farm settled for \$300,000, and Leitch continued to maintain his claims against H-G & F and Dillard. Leitch then filed a declaratory judgment action against the Mississippi Insurance Guaranty Association ("MIGA"), seeking a ruling that any award received from his own UM coverage did not reduce MIGA's obligation.

MIGA moved for summary judgment, arguing that, pursuant to Mississippi Code Section 83-23-123, MIGA's obligation must be reduced by State Farm's payment of UM benefits, and since State Farm's payment of \$300,000 was equal to MIGA's entire statutory limit of \$300,000, MIGA had no further obligation. The trial court agreed, and granted MIGA's motion for summary judgment. Leitch appealed, and the Court of Appeals affirmed.

The Supreme Court granted Leitch's petition for writ of certiorari to address the Supreme Court's prior opinion in *Mississippi Insurance Guaranty Association v. Cole ex rel. Dillon*, 954 So.2d 407 (Miss.2007). The Supreme Court concluded that Leitch's claim for UM benefits was a "covered claim" under MIGA. The Court then noted that for MIGA to have a statutory obligation and authority to pay, any "claim" against a solvent insurer that is the same as the "covered claim" against MIGA must first be exhausted. Miss. Code Ann. § 83-23-123(1) (Rev.1999) ("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....") (emphasis by the Court). The Court stated:

The case before us today presents a plaintiff who made a claim against State Farm (a solvent insurer) *which is the same* as the "covered claim" he now pursues against MIGA. The maximum amount payable on a "covered claim" is \$300,000. Miss. Code Ann. § 83-23-115(1)(a)(iii). According to the statute, "[a]ny amount payable on a covered claim ... shall be reduced by the amount of any recovery under [the State Farm] policy." Miss. Code Ann. § 83-23-123(1). Accordingly, MIGA is statutorily required to reduce the "amount payable on [Leitch's] covered claim ... by the amount of any recovery under [the State Farm] insurance policy."

Leitch, at 400 (emphasis added). *Leitch* therefore involved a claim against a plaintiff's UM carrier because the defendant's insurer became insolvent. That UM carrier stepped into the shoes of the insolvent insurer to adjust Leitch's claim, and thus the claim against State Farm was "the same as the 'covered claim' he [pursued] against MIGA." The Mississippi Court held that under those circumstances, MIGA was entitled to a complete offset against any amount recoverable under the Act.

This case does not involve a similar situation. Respondents did not file claims against a UM carrier for it to step into the shoes of AequiCap. Had they done so, their claim would have been the identical claim they assert against the Association (*i.e.*, looking to two sources to step into AequiCap's shoes). *Leitch* is meaningfully distinct and should not persuade this Court to reverse the trial court.

F. **Montana.** The Association next cites to *Palmer v. Montana Insurance Guaranty Ass'n*, 779 P.2d 61 (Mont.1989). (App. Br. pp. 24, 26-28). In *Palmer*, the Supreme Court of Montana held that the Montana Insurance Guaranty Fund (MIGA) was entitled to offset its obligation to the plaintiff by the maximum amount recoverable by the plaintiff from the Idaho Insurance Guaranty Fund (IIGF), the primarily-labile insurance

guaranty association. The court observed that MIGA "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." *Id.* at 64. The offset therefore involved recovery from another Association. Furthermore, Montana's offset provision stated, "Any recovery under this part shall be reduced by the amount of recovery from any other insurance guaranty association or its equivalent." § 33-10-115(2), M.C.A. *Palmer*, therefore, is meaningfully distinct from this case.

G. New Hampshire. The Association next cites to *New Hampshire Ins. Guar. Ass'n v. Pitco Frialator, Inc.*, 705 A.2d 1190 (N.H. 1998). New Hampshire's statute, however, is considerably different from South Carolina's version of the IGA. For instance, "covered claim" is defined as "a *net* unpaid claim ... which arises out of and is within coverage and *not in excess of* the applicable limits of an insurance policy to which this chapter applies issued by an insurer, if such insurer after the effective date of this chapter is declared insolvent..." N.H.R.S.A. § 404-B:5, IV (emphasis added). Under South Carolina's statute, however, a "covered claim" means "an unpaid claim ... which arises out of and is within the coverage and *is subject to* the applicable limits of an insurance policy to which this chapter applies issued by an insurer, if the insurer is an insolvent insurer...." S.C. Code Ann. § 38-31-20(8) (2002) (emphasis added). The "powers and duties" provision of the New Hampshire version of the Act is also significantly different. The Act provides:

The association shall... [b]e obligated to the extent of the covered claims

existing prior to the determination of insolvency and arising within 30 days after the determination of insolvency, or before the policy expiration date if less than 30 days after the determination, or before the insured replaces the policy or causes its cancellation, if he does so within 30 days of the determination, but such obligation shall include only that amount of each covered claim which is less than \$300,000 except that the association shall pay the full amount of any covered claim arising out of a workmen's compensation policy, provided however RSA 281-A:37 shall not apply to payments or settlements made pursuant to this chapter. In no event shall the association be obligated to a policyholder or claimant in an amount in excess of the obligation of the insolvent insurer under the policy from which the claim arises.

N.H.R.S.A. § 404-B:8, I.(a). In light of these differences *Pitco Frialator* is meaningfully distinct from this case.

H. **Oklahoma.** The Association cites to *Oglesby v. Liberty Mut. Ins. Co.*, 832 P.2d 834 (Okla. 1992). (App. Br. p. 25). The Oklahoma statute at issue, however, provides, "Any obligation of the association to defend an insured shall cease upon the payment or tender by the association of an amount equal to the lesser of the covered claim obligation limit of the association or the applicable policy limit...." 36 Okl. St. Ann. § 2007(A)(2). It is on the basis of this statute that the Court held the Oklahoma Guaranty Association's "obligation is limited to the lesser of \$150,000.00 or the coverage provided in the insolvent insurer's policy."

It is true that the offset provision under Oklahoma's statute is the same as the provision in South Carolina. See 36 Okl. St. Ann. § 2012. However, the Court made clear that its analysis was also "pursuant to § 2007"; South Carolina's Act contains no similar provision. *Oglesby*, then, is meaningfully distinct from this case.

I. **Pennsylvania.** The Association next cites *Blackwell v. Pennsylvania Ins.*

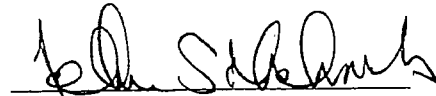
of these cases are distinct from this case in very meaningful ways.

The plain language of South Carolina's Act supports the trial court's ruling. This Court should not be persuaded to reverse that decision.

CONCLUSION

For the reasons stated this Court should affirm the trial court's decision in this case.

Respectfully submitted,



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December 2, 2015

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.

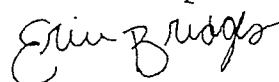
The South Carolina Property and Casualty
Insurance Guaranty Association, ... Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served
counsel for the Appellant with a copy of the *Final Brief of Respondents* and *Certificate*
of Compliance by mailing copies of the same by United States Mail with first class
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STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BAMBERG COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

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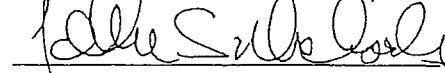
CERTIFICATE OF COMPLIANCE

With the consent of Appellant's counsel, Respondent removed a reference to a document that had not been presented to the lower court. Otherwise, pursuant to Rule 211(a), SCACR, I certify that the *Brief of Respondents* complies with the provisions of Rule 211(b), SCACR, and with the August 13, 2007, Supreme Court Order regarding personal data identifiers.

/Signature page attached

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BAMBERG COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2013-CP-05-63

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.

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SC Court of Appeals

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ARGUMENT

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

A. The trial court misapplied the Guaranty Act.

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

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

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

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

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

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

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

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

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

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

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

The association has no obligation to pay a claimant's covered claim . . . if:

(1) the insured had primary coverage at the time of the loss with a solvent insurer equal to or in excess of three hundred thousand dollars and applicable to the claimant's loss . . .

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

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

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

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

\$1,000,000 policy, rather than the amount payable by the Association. Respondents' Brief at pp. 18-19. However, the statutory offset provision itself plainly reduces the amount payable by the Association, not the liability of the insolvent insurer. The express language of S.C. Code § 38-31-100(1) shows that it reduces the amount paid by the Association, not the insolvent insurer: "Any amount payable on a covered claim under this chapter must be reduced by the full limits of such other coverage as set forth on the declarations page and the association shall receive a full credit for such limits" S.C. Code § 38-31-100(1) (emphasis added). It is clear from this highlighted language that this statutory offset is providing credit to the Association, whose maximum obligation is \$300,000.

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

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

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

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

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

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

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

Respondents argue that the Association "overreads" the holdings in *Brock* and *Hudson*. *Brock*, 410 S.C. 361, 764 S.E.2d 920; *Hudson v. Lancaster Convalescent Center*, 407 S.C. 112, 754 S.E.2d 486 (2014). Respondents' Brief at p. 13. Both *Brock* and *Hudson*, however, support the Association's position that the statutory offset reduces the Association's \$300,000 obligation to Respondents. As set forth above, the *Brock* court interpreted S.C. Code §§ 38-31-60 and 38-31-100(1), the same provisions at issue here, and unanimously found the statutory offset reduces the Association's obligation. 410 S.C. 361, 764 S.E.2d 920. While Respondents are correct that the Association's obligation was less than the statutory cap in the *Brock* matter, the *Brock* holding nevertheless supports the application of the statutory offset to the Association's obligation. In *Brock*, the Association was obligated to pay Mr. Brock \$185,000 as it was the lesser of his insolvent insurer's policy limits, his damages, or the Association's statutory maximum of \$300,000. 410 S.C. at 364, 764 S.E.2d at 921; *see also* S.C. Code §§ 38-31-20(8) and 38-31-60(a)(iv). The statutory offset was applied to reduce the Association's \$185,000 statutory obligation to Mr. Brock. 410 S.C. at 365-67, 764

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

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

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

The trial court erred by ruling that the Guaranty Act is "identical in function" to the Tort Claims Act, and erroneously reasoned by analogy that the only purpose of the Guaranty Act's offset provisions is to prevent double recovery. (Order pp. 5-8, R. 7-10). However, the Tort Claims Act contains no statutory offset or exhaustion provision, and the Guaranty Act's offset provisions do more than just limit double recovery. These errors and others by the trial court caused it to misinterpret the Guaranty Act by crediting offsets against the total damages amount rather than crediting the offsets against the Association's statutory cap of \$300,000. The trial court therefore must be reversed.

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

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

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

Association to offset the full limits of an insurance policy covering the injury at issue, regardless of whether that policy actually pays the claimant the full limits. *See* S.C. Code § 38-31-100(1) (“Any amount payable on a covered claim under this chapter must be reduced by the full limits of such other coverage as set forth on the declarations page of such other coverage . . .”). The Guaranty Act also limits the aggregate amount of a claimant’s recovery from the Association to ten million dollars, regardless of the amount of their damages, and precludes some individuals from ever making a claim against the Association based solely on their net worth. *See* S.C. Code §§ 38-31-100(6) and (7).

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

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

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

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

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

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

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

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

As set forth in the Association's Brief, the majority of other jurisdictions ruling on the issue before this Court agree with the Association's position in this matter. In fact, nine state courts have applied the offset to reduce their respective association's full statutory cap rather than a claimant's higher damages amount. Appellant's Brief at pp. 22-25. Ten other state courts have applied the offset to reduce their respective association's statutory cap based on the insolvent insurer's policy limits (where the limits were less than the association's full statutory cap and, therefore, the policy limits were the statutory limits) rather than a claimant's higher damages amount. (Appendix A, Memorandum in Support of Defendant's Motion for Summary Judgment and in Opposition to Plaintiffs' Cross-Motion for Summary Judgment; R. 42-50).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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November 25, 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-05-00063
Appellate Case No. 2015-000246

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SC Court of Appeals

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):

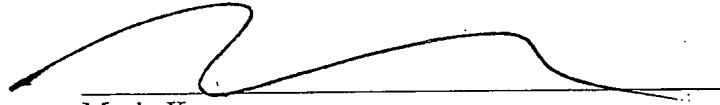
Pleadings:

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A handwritten signature in black ink, appearing to read 'Maria Keeve', written over a horizontal line.

Maria Keeve
Administrative Assistant

November 25, 2015

THE STATE OF SOUTH CAROLINA
In The 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.

Appellate Case No. 2015-000246

Appeal From Bamberg County
Doyet A. Early, III, Circuit Court Judge

Opinion No. 5424
Heard May 4, 2016 – Filed July 13, 2016

AFFIRMED

Howard A. Van Dine, III, Allen Mattison Bogan, Erik
Tison Norton, and Tara C. Sullivan, all of Nelson
Mullins Riley & Scarborough, LLP, of Columbia, for
Appellant.

John S. Nichols, of Bluestein Nichols Thompson &
Delgado, LLC, of Columbia; and Daniel W. Luginbill, of
Wilson & Luginbill, LLC, of Bamberg, for Respondents.

LOCKEMY, C.J.: In this declaratory judgment action, the South Carolina
Property and Casualty Insurance Guaranty Association (the Association) appeals

the trial court's order granting summary judgment in favor of Janette Buchanan and Shana Smallwood, individually and as co-personal representatives of the estate of James Buchanan (Respondents). On appeal, the Association argues the trial court erred in finding the Association's statutory offset of \$376,622 should be deducted from the claimant's total amount of stipulated damages of \$800,000 rather than the Association's mandatory statutory claim limit of \$300,000. We affirm.

FACTS/PROCEDURAL HISTORY

On January 7, 2008, James Buchanan was involved in a motor vehicle accident in Bamberg, South Carolina, caused by a vehicle driven by Eddie Best and owned by Travis Scott. Scott's vehicle was insured for one million dollars by AequiCap Insurance Company (AequiCap). Mr. Buchanan died at the scene of the accident.

Mrs. Buchanan, individually and as the personal representative of Mr. Buchanan's estate, initiated a wrongful death lawsuit in Bamberg County against Best and Scott, both of whom were South Carolina residents. During the pendency of the wrongful death action, a Florida court declared AequiCap insolvent. As a result of AequiCap's insolvency, the Association assumed management of the claims against AequiCap's South Carolina insureds pursuant to the South Carolina Property and Casualty Insurance Guaranty Association Act (the Act).¹

Mrs. Buchanan, Scott, and Best reached a settlement in the wrongful death lawsuit, and the trial court approved the settlement on February 24, 2014. As part of the settlement agreement, the parties stipulated that Mrs. Buchanan sustained \$800,000 in damages. Respondents recovered a total of \$376,622 from workers' compensation benefits and the codefendants' insurance.

On April 11, 2013, Respondents filed an action against the Association for a declaration that the Association must pay \$300,000, the limit of its exposure under S.C. Code Ann. § 38-31-60 (2015). Respondents asserted the balance due to them after offsetting their \$376,622 recovery was \$423,378, which exceeded the statutory limit. The Association answered, claiming the credit for the \$376,622 already received should be applied to its \$300,000 statutory cap, which would reduce its obligation to zero. The Association and Respondents filed cross-motions for summary judgment.

¹ See S.C. Code Ann. §§ 38-31-10 through -170 (2015).

On May 28, 2014, the trial court held a hearing on the cross-motions. On September 9, 2014, the trial court granted Respondents' summary judgment motion and denied the Association's motion. In its order, the trial court found the plain language of the Act mandated that the Association pay Respondents \$300,000. The trial court found Respondents' "covered claim" under the AequiCap policy was \$800,000, to which an offset of \$376,622 would be applied under section 38-31-100(1) of the South Carolina Code (2015), leaving a balance of \$423,378 on the covered claim. The trial court held the Association's obligation to pay the balance due on the claim was then limited by the \$300,000 cap set forth in section 38-31-60. The Association filed a motion for reconsideration, which the trial court denied. This appeal followed.

STANDARD OF REVIEW

"Where cross motions for summary judgment are filed, the parties concede the issue before us should be decided as a matter of law." *Wiegand v. U.S. Auto. Ass'n*, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011). "Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo." *Lambries v. Saluda Cty. Council*, 409 S.C. 1, 7, 760 S.E.2d 785, 788 (2014) (quoting *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008)). "In a case raising a novel issue of law regarding the interpretation of a statute, the appellate court is free to decide the question with no particular deference to the lower court." *Id.* at 7-8; 760 S.E.2d at 788 (quoting *Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 466, 636 S.E.2d 598, 605 (2006)). "The appellate court is free to decide the question based on its assessment of which interpretation and reasoning would best comport with the law and public policies of this state and the Court's sense of law, justice, and right." *Id.* at 8, 760 S.E.2d at 788 (quoting *Sloan*, 380 S.C. at 467, 636 S.E.2d at 605-06)).

LAW/ANALYSIS

The Association argues the Act unambiguously requires that any offset be deducted from the Association's \$300,000 statutory claim limit rather than a claimant's total amount of damages on a covered claim. We disagree.

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute." *Id.* "Where the statute's language is

plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Id.* "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." *Id.* (quoting Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1992)). "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 Cty. Council*, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002).

"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.'" *Hudson ex rel. Hudson v. Lancaster Convalescent Ctr.*, 407 S.C. 112, 124, 754 S.E.2d 486, 492 (2014) (quoting *Eagle Container Co., LLC v. Cty. of Newberry*, 379 S.C. 564, 570, 666 S.E.2d 892, 895 (2008)). "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." *Id.* at 124–25, 754 S.E.2d at 492–93.

"[The Association] is a last resort insurer created by the legislature to protect consumers in the event that their insurer becomes insolvent." *Id.* at 124, 754 S.E.2d at 492. Section 38-31-60(b) states the Association "is considered the insurer to the extent of its obligation on the covered claims and, to this extent, has all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent." "Because [the Association] is a creature of statute, its duties, liabilities, and obligations are controlled by the terms and conditions set forth in the Act." *S.C. Prop. & Cas. Ins. Guar. Ass'n v. Brock*, 410 S.C. 361, 365–66, 764 S.E.2d 920, 922 (2014). "Pursuant to the Act, [the Association] must pay certain 'covered claims,' as the term is defined in section 38-31-20(8) [of the South Carolina Code (2015)]." *Id.* at 366, 764 S.E.2d at 922. 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 issued by an insurer, if the insurer is an insolvent insurer." § 38-31-20(8). However, the Association's obligation to pay covered claims "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) (2015).

"As a condition precedent to recovery from [the Association], a claimant is required to first exhaust all available coverage from solvent insurers, and [the Association] is allowed to offset the full limits of such other coverage against its obligations under the Act." *Brock*, 410 S.C. at 366, 764 S.E.2d at 922. Regarding the exhaustion and offset of coverage from solvent insurers, section 38-31-100(1) provides as follows:

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.

(emphases added).

We find section 38-31-100(1) is unambiguous and the plain reading of section 38-31-100(1) requires that any recovery from solvent insurers be deducted from the total amount of the covered claim rather than from the Association's \$300,000 statutory cap.

Before seeking compensation from the Association, Respondents exhausted the coverage available from solvent insurers, as required by section 38-31-100(1), by recovering \$376,622 from workers' compensation benefits and the codefendants' other insurance policies. We find the trial court properly determined section 38-31-100(1) mandated that the \$376,622 Respondents recovered from the solvent insurers be deducted from the \$800,000 payable on the covered claim. *See* § 38-31-100(1) ("Any amount payable on a covered claim under this chapter must be reduced by the full limits of such other coverage, . . . or, where there are no applicable limits, the claim must be reduced by the total recovery.").

We find the language "[a]ny amount payable on a covered claim under this chapter" in section 38-31-100(1) refers to the total amount of damages suffered under the covered claim. In addition, we find the phrase "[a]ny amount payable on a covered claim under this chapter" is not synonymous with "the Association's obligation on a covered claim"—which would be either the policy limits if the limits were less than or equal to \$300,000, or a maximum of \$300,000 if the policy limits exceeded \$300,000. See § 38-31-60(b) (providing the Association "is considered the insurer to the extent of its obligation on the covered claims and, to this extent, has all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent"); § 38-31-60(a)(iv) (stating the Association's obligation to pay covered claims "includes only the amount each covered claim is in excess of two hundred fifty dollars and is less than three hundred thousand dollars"). In our view, if the legislature had intended the statutory cap to be reduced by the recovery, it could have drafted the statute to read "the Association's obligation under this chapter must be reduced by the total recovery." However, instead, the legislature said that "the claim must be reduced by the total recovery." § 38-31-100(1) (emphasis added). We find our reading of section 38-31-100(1) is consistent with the Act's purpose of providing some protection for consumers whose insurers become insolvent. See *S.C. Prop. & Cas. Ins. Guar. Ass'n v. Carolinas Roofing & Sheet Metal Contractors Self-Ins. Fund*, 315 S.C. 555, 557, 446 S.E.2d 422, 424 (1994) ("[The Association's] purpose is to provide some protection to insureds whose insurance companies become insolvent.").

After offsetting the \$376,622 recovery against the \$800,000 covered claim, the remaining unpaid amount on the covered claim was \$423,378, which was within the limits of Scott's one million dollar policy with AequiCap but exceeded the \$300,000 statutory cap on the Association's obligation to pay. Section 38-31-60(a)(iv) required the Association to pay \$300,000 of this outstanding amount. Accordingly, we hold the trial court properly applied the \$376,622 offset to the \$800,000 payable on the covered claim and did not err in ordering the Association to pay Respondents \$300,000.

CONCLUSION

Accordingly, the decision of the trial court is

AFFIRMED.

WILLIAMS and MCDONALD, JJ., concur.

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

JUL 27 2016

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.

**APPELLANT'S PETITION FOR REHEARING
OF THE COURT'S JULY 13, 2016 OPINION**

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Introduction

Pursuant to Rule 221(a), SCACR, Appellant South Carolina Property and Casualty Guaranty Association (“Appellant” or “Association”) respectfully submits this petition for rehearing of this Court’s July 13, 2016 memorandum opinion No. 5424 (“the Opinion”). As explained more fully below, the Opinion misapprehends or overlooks significant points of law that, when properly considered, require reversal of the Court’s order affirming the trial court’s grant of summary judgment in favor of Respondents Janette Buchanan and Shana Smallwood, Individually and as Co-Personal Representatives of the Estate of James S. Buchanan (“Respondent” or “Buchanan”).

Argument

The Opinion erred by determining that the Association’s statutory offset should be deducted from a claimant’s total “damages” amount rather than the statutory limit of the Association’s responsibility. (Opinion at 6.) First, the Opinion misapprehends the plain language of the Guaranty Act (the “Act”), and the Court’s decision is inconsistent with recent decisions of the South Carolina Supreme Court limiting the Association’s obligation to pay a covered claim. (*Id.* at 5-6.) Moreover, the Opinion is out of step with the majority of jurisdictions that have considered the same language.

Second, this Court determined that no ambiguity exists despite reading the plain language differently than the South Carolina Supreme Court, cases from a majority of other jurisdictions and the conclusions of learned treatises. This Court should reconsider its Order after construing the language consistent with *S.C. Prop. and Cas. Ins. Guar. Ass’n*, 410 S.C. 361, 764 S.E.2d 920 (2014), cases from other jurisdictions, other legal authority, and the public policy underlying the

Act. The Court's decision creates ambiguity where the Supreme Court found none to exist previously.

I. The Opinion misapprehends the plain language of the Act and contradicts *Brock*.

When purporting to consider the plain meaning of the Act, the Opinion ignores the actual language in the Act limiting the obligation of the Association for payment of a covered claim. The Opinion also fails to read the statute as a whole and ignores the South Carolina Supreme Court's holding in *Brock*. Specifically, the Opinion overlooks the effect of the words "any amount payable" in the offset provision and misreads the Act's limitations on the Association's obligations to pay a covered claim.

Under the Act, a "covered claim" is defined in relevant part as:

"Covered claim" means an unpaid claim, including one of unearned premiums, which arises out of and is within the coverage and is subject to the applicable limits of an insurance policy to which this chapter applies issued by an insurer, if the insurer is an insolvent insurer and (a) the claimant or insured is a resident of this State at the time of the insured event, if for entities other than an individual, the residence of a claimant or insured is the state in which its principal place of business is located at the time of the insured event or (b) the claim is for first-party benefits for damage to property permanently located in this State.

S.C. Code Ann. § 38-31-20. Therefore, the definition of "covered claim" includes all amounts owed to the insured by an insolvent insurer. The definition of covered claim does not speak at all to the amount owed to the insured by the Association.

Instead, the Act addresses the obligation of the Association as to the amount payable on a covered claim to insureds of insolvent insurers in Sections 38-31-60 and 38-31-100. In Section 38-31-60, which sets forth the Association's powers and duties, the Act specifically limits the Association's obligation to pay a covered claim even before the offset provision is applied.

Specifically, Section 38-31-60 provides that the Association “is considered the insurer to the extent of *its obligation* on the covered claims,” demonstrating that the Association’s obligation is distinct from the covered claim. The Opinion fails to acknowledge this portion of the Act. In fact, the Act expressly defines the Association’s obligation as only a portion of the covered claim, stating: “[The Association’s] 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). In other words, the express language of the Act provides that the Association’s obligation can never be more than \$300,000 while a covered claim could exceed this amount. Therefore, the Association’s obligation cannot be synonymous with the definition of covered claim, as the Opinion rules, and can never exceed \$300,000.

Because the Association’s obligation can never exceed \$300,000, the amounts of other coverage must be offset against the obligation amount, not the covered claim amount. The South Carolina Supreme Court held as much in *Brock*, stating that the Association “is allowed to offset the full limits of such other coverage against its *obligations* under the Act.” 410 S.C. at 366, 764 S.E.2d at 922 (emphasis added). Because the Act in Section 38-31-60 defines the Association’s obligation such that it can never exceed \$300,000, the holding in *Brock* means that the offset must be deducted from the statutory cap of \$300,000.

Similarly, the Act’s offset provision, Section 38-31-100, provides in relevant part:

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(a)(emphasis added). Again, as in Section 38-31-60, the Legislature differentiates what the Association is required to pay from the amount of the covered claim. Had

the Legislature intended for the offset to be applied against the covered claim, it could have simply provided that “[T]he amount of a covered claims must be reduced...” Instead, the Legislature wrote the Act to say that “[A]ny amount payable on a covered claim must be reduced,” thereby differentiating what the Association must pay from the amount of a covered claim and establishing the possibility that no amount will be paid on a covered claim. Therefore, the plain meaning of Section 38-31-100 is that “any amount payable on” is synonymous with the “obligation” of the Association in Section 38-31-60, which can never exceed the statutory cap of \$300,000. Hence, the amounts of available coverage must be offset against the statutory cap, which is the same thing as the Association’s obligation or the amount payable by the Association, when the amount of the covered claim exceeds \$300,000, as in this case.

The Opinion misreads Section 38-31-100 when it says that “if the Legislature had intended the statutory cap to be reduced by the recovery, it could have drafted [§ 38-31-100(1)] to read ‘the Association’s *obligation* under this chapter must be reduced by the total recovery.’ However, instead, the Legislature said that ‘the *claim* must be reduced by the total recovery.’” (Opinion at 6.) The Opinion fails to recognize, however, that the reference to the “claim” in Section 38-31-100 refers to payments for worker’s compensation claims only.

Worker’s compensation policies are treated differently under the Act because they do not have set limits and the statutory cap does not apply. See S.C. Code Ann. § 42-5-10 (requiring employers to secure payment of all compensation to employees required by Chapter 42); S.C. Code Ann. § 38-31-60(a)(iv) (“However, the association shall pay the full amount of any covered worker’s compensation claim.”). Section 38-31-100 is no exception. The first clause of Section 38-31-100 does not apply to worker’s compensation policies because it refers to the policy limits, stating: “[A]ny 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,..." As explained above, this clause calls for a reduction of "any amount payable on a covered claim," or the Association's obligation, which can never be more than \$300,000 under the Act. *See* S.C. Code Ann. § 38-31-60(a)(iv).

The second clause of Section 38-31-100, on the other hand, applies *only* to worker's compensation policies because it refers to policies with "no applicable limits." Specifically, the second clause provides, "...or, where there are no applicable limits, the claim must be reduced by the total recovery." Of course, this clause could not refer to an offset against the statutory cap because there the Act expressly excludes worker's compensation claims from the statutory cap.

Therefore, the Opinion is wrong when it says the Legislature's use of the word "claim" means that the offset should be applied against the claim amount in this case. In fact, the Legislature's use of the word "claim" when referring to worker's compensation claims where the cap is not applicable while expressly limiting the Association's payment to "any amount payable on a claim" for all other policies where the cap applies demonstrates that the Legislature intended for the offset to be applied against the cap in cases like this one where the cap is the extent of the Association's obligation.

Finally, the Opinion fails to consider cases from other jurisdictions consistently interpreting the exact same language from Section 38-31-100 to mean that the amount of other available coverage should be offset from the statutory cap rather than the amount of the covered claim. *See Jangula v. Ariz. Prop. & Cas. Ins. Guar. Fund*, 207 Ariz. 468, 471, 88 P.3d 182, 185 (Ct. App. 2004) (finding that Arizona's offset statute unambiguously required application of the Arizona Property and Casualty Insurance Guaranty Fund's offset for the claimant's other recovery of \$15,000 to reduce the Arizona Fund's statutory maximum limit of \$99,900, rather than the

claimant's total damages of \$115,000, leaving the Fund liable to the claimant for only \$84,900); *Marra v. Wilson*, No. CIV.A. 00C-08-019RRC, 2003 WL 367831, at *5-6 (Del. Super. Feb. 20, 2003) (finding that Delaware's offset statute unambiguously required application of the Association's offset for the claimant's other recovery of \$100,000 to reduce the Delaware Association's statutory maximum limit of \$300,000, rather than the claimant's total damages, leaving the Association liable to the claimant for only \$200,000); *Leitch v. Miss. Ins. Guar. Ass'n*, 27 So. 3d 405, 410 (Miss. Ct. App. 2009), *aff'd*, 27 So. 3d 396 (Miss. 2010) (finding that Mississippi's offset statute unambiguously required application of the Association's offset for the claimant's other recovery of \$300,000 to reduce the Mississippi Association's statutory maximum limit of \$300,000, rather than the claimant's total damages, leaving the Association with no liability to the claimant); *Palmer v. Montana Ins. Guar. Ass'n*, 239 Mont. 78, 79-82, 779 P.2d 61, 62-64 (1989) (finding that Montana's offset statute unambiguously required application of the Association's offset for the claimant's other recovery of \$300,000 to reduce the Montana Association's statutory maximum limit of \$300,000, rather than the claimant's total damages of more than \$1,000,000, leaving the Association with no liability to the claimant); *New Hampshire Ins. Guar. Ass'n v. Pitco Frialator, Inc.*, 142 N.H. 573, 580, 705 A.2d 1190, 1194 (1998) (finding that New Hampshire's offset statute unambiguously required application of the Association's offset for the claimant's other recovery of \$300,000 to reduce the Montana Association's statutory maximum limit of \$300,000, rather than the claimant's total damages of \$500,000, leaving the Association with no liability to the claimant); *Oglesby v. Liberty Mut. Ins. Co.*, 832 P.2d 834, 843-45 (Okla. 1992) (finding that Oklahoma's offset statute unambiguously required the claimant to exhaust her rights for other recovery and to apply the recoveries obtained against the Oklahoma Association's statutory maximum limit of \$150,000, rather than the claimant's total damages of

\$450,000); *Blackwell v. Pennsylvania Ins. Guar. Ass'n*, 390 Pa. Super. 31, 34, 567 A.2d 1103, 1103-05 (1989) (finding that Pennsylvania's offset statute unambiguously required application of the Association's offset for the claimant's other recovery of \$65,000 to reduce the Pennsylvania Association's statutory maximum limit of \$300,000, rather than the claimant's total damages of \$365,000, leaving the Association liable to the claimant for only \$234,900 (\$300,000 - \$65,000, less a \$100 deductible)).

Therefore, this Court has subverted the will of the General Assembly by failing to read Section 38-31-100 in conjunction with Sections 38-31-20 and 38-31-60 and *Brock*, along with the courts in at least seven other jurisdictions, to find that the amounts of other available insurance should be offset against the statutory cap of \$300,000 rather than the amount of the covered claim.

II. This Court's Opinion overlooked the Association's purpose and the public policy underlying the Act.

To the extent an ambiguity now exists based on this Court's unique reading of the Act's language, this Court should look to the Legislature's intent and the policy underlying the Act to construe the offset provision. See *Anderson v. S.C. Election Comm'n*, 397 S.C. 551, 556, 725 S.E.2d 704, 706-07 (2012) ("The primary rule of statutory construction is to ascertain and give effect to the intent of the General Assembly."). As set forth below, the policy considerations underlying the intent of the Act require this Court to find that the amounts of other available coverage should be offset from the statutory obligation instead of the covered claim amount.

In the Opinion, this Court properly identified that the purpose of the Act is to provide "some protection for consumers whose insurers become insolvent." Opinion at 6 (citing *S.C. Prop. & Cas. Ins. Guar. Ass'n v. Carolinas Roofing & Sheet Metal Contractors Self-Ins. Fund*, 315 S.C. 555, 557, 446 S.E.2d 422, 424 (1994)(emphasis added)). However, the Opinion misconstrued the overall purpose of the Act, which is to maximize the offsets to the Association for the benefit of

South Carolina insureds as a whole. As explained below, this Court erred when it overlooked the purpose of the Association and the underlying public policy of the Act.

While attempting to provide some protection for insureds of insolvent insurers, the Legislature also has recognized the financial repercussions on South Carolina insureds when claims are made against the Association. In 2001, the Act was amended to expand limitations on claims by requiring exhaustion of all other available coverages prior to submitting a claim to the Association and providing an offset to the Association for these coverages. *See* 2001 S.C. Acts 82 (stating in the “preamble” to the amendment that its purpose was “to amend Section 38-31-100. . . . relating to procedures for asserting claims and to limitations to claims, so as to require exhausting all coverage and claims and providing credit to the Guaranty Association under certain conditions.”) Thus, the amendments reflect the Legislature’s intent to limit the Association’s responsibilities, thereby protecting South Carolina insureds from increasing premiums resulting from insolvent insurers while offering some limited protection to insureds of insolvent insurance companies. *Brock*, 410 S.C. at 367-68, 764 S.E.2d at 923 (holding that the Association is “a statutory entity that exists to provide some protection for the insureds of insolvent insurance companies”); *Hudson v. Lancaster Convalescent Ctr.*, 407 S.C. 112, 124, 754 S.E.2d 486, 492 (finding that the Association is a “last resort”). Therefore, this Court should construe the Act to maximize the Association’s limitations on liability and credits under the Act.

Moreover, other provisions in the Act reflect the Legislature’s express intent to allow the Association to receive credits and offsets against the statutory cap rather than the claim amount. For example, Section 38-31-60(a) provides that “The association has no obligation to pay a claimant’s covered claim, except a worker’s compensation claim, if (1) the insured had primary coverage at the time of his loss with a solvent insurer equal to or in excess of three hundred

thousand dollars and applicable to claimant's loss." Importantly, this provision is in no way dependent upon the claim amount: if the insured has applicable primary coverage in equal to or in excess of \$300,000, the Association has no obligation to pay the claim.

While Respondent did not have applicable *primary* coverage available in excess of \$300,000, he did recover in excess of \$300,000 from secondary policies. It is inconceivable that the Legislature intended insureds who have applicable primary coverage equal to or in excess of \$300,000 to be treated less favorably than those recovering under third party policies. Therefore, Section 38-31-60(a) demonstrates that the Legislature intended for all other insurance coverage to be offset against the \$300,000 cap rather than the claim amount. This Court failed to recognize the import of these provisions in the Act evidencing the Legislature's intent for the offset to be applied against the statutory cap rather than the claim amount.

Conclusion

For the foregoing reasons, Appellant respectfully submits that rehearing is warranted and that this Court should reverse its ruling affirming the trial court's grant of summary judgment in favor of Respondents.

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July 27, 2016

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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SC Court of Appeals

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

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

Respondent,

v.

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

Appellant.

PROOF OF SERVICE

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

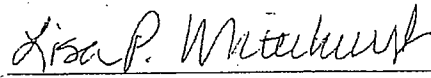
Pleadings:

Appellant's Petition for Rehearing of the Court's July 13,
2016 Opinion

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A handwritten signature in cursive script, reading "Lisa P. Whitehurst", written over a horizontal line.

Lisa P. Whitehurst
Administrative Assistant

July 27, 2016

rec'd 9/24/16
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The South Carolina Court of Appeals

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

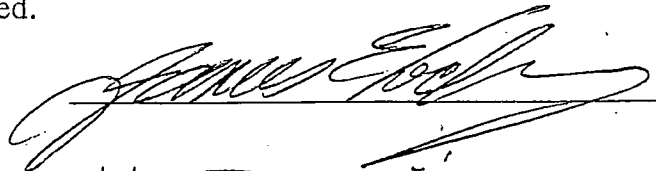
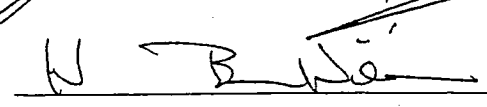
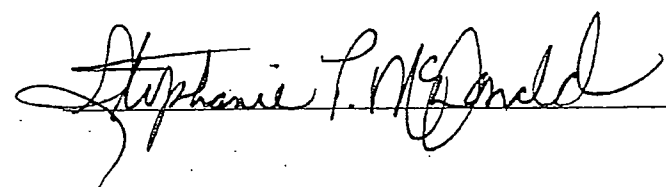
v.

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

Appellate Case No. 2015-000246

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C.J.
 J.
 J.

Columbia, South Carolina

cc:

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Allen Mattison Bogan, Esquire

FILED
September 23, 2016

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Tara C. Sullivan, Esquire
Daniel W. Luginbill, Esquire
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The Honorable Doyet A. Early, III