THE STATE OF SOUTH CAROLINA
In The Supreme Court

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.

PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Certification of Counsel

The undersigned hereby certifies that Petitioner The South Carolina Property and Casualty Insurance Guaranty Association ("the Association") filed a petition for rehearing with the Court of Appeals and the Court of Appeals ruled on the petition with finality on September 23, 2016. (App. 000339).

Question Presented for Review

Did the Court of Appeals err in concluding that the Association's statutory offset of $376,622 should be deducted from the total amount of stipulated damages of $800,000 instead of being deducted from the Associations' limited obligations under the Act, which are capped at $300,000 for all claims other than worker's compensation, as this Court previously held in *S.C. Prop. and Cas. Ins. Guar. Ass'n v. Brock*, 410 S.C. 361, 764 S.E.2d 920 (2014)?

Statement of the Case

Pursuant to Rule 242 of the South Carolina Rules of Appellate Procedure, the Association seeks certiorari regarding the Court of Appeals decision in *Janette Buchanan and Shana Smallwood, individually, and as Co-Personal Representatives of the Estate of James S. Buchanan v. The South Carolina Property and Casualty Guaranty Association*, Op. No. 5424 (S.C. Ct. App. Filed July 13, 2016)(Shearhouse Adv. Sh. No. 28 at 40) ("Opinion") (App. 000333). The issues detailed in this petition concern the Association's statutory obligation to pay claims asserted by an injured party in an automobile accident when the driver's insurer has become insolvent. Granting the petition is necessary because the Court of Appeals' Opinion is in conflict with prior decisions of this Court. To the extent this Court finds the Opinion is not in conflict, then this case presents a novel question of law for review involving application or construction of the South Carolina Property and Casualty Insurance Guaranty Act, S.C. Code Ann. § 38-31-10 to -170 ("the Act").

Undersigned believes the question is not novel and is subject to the past decisions of this Court, including *Brock*, and ordinary rules of statutory construction which the Court of Appeals misapprehended.

Procedural Background

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; App. 19-20). Scott's vehicle was insured for $1 million by Aequicap Insurance Company ("Aequicap"). (Complaint ¶ 5; App. 20). Mr. Buchanan died at the scene of the accident. (Complaint ¶ 4; App. 19-20).

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; App. 19-20). During the pendency of the wrongful death action, Aequicap was declared insolvent by the courts of Florida. (Complaint ¶ 5; App. 20). 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; App. 20).

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; App. 20; Order Approving Settlement with attached Stipulations and Settlement Agreement Between Parties; App. 56-66). As part of the settlement agreement, the parties stipulated that the amount of damages sustained by Mrs. Buchanan is $800,000[1] and that the Respondents have recovered a total of $376,622 in settlement proceeds from co-defendants' insurance and Workers'

[1] The trial court mistakenly referred to this amount as a "judgment" in its Order. (Order p. 2; App. 9). However, no judgment has ever been entered in the wrongful death suit.

Compensation benefits. (Complaint ¶¶ 7, 10; App. 20-21; Settlement Agreement at ¶¶ 1, 5-6; App. 62-63). The parties further agreed that the obligation of the Association, if any, would be determined by this declaratory judgment action based on the parties' stipulations. (Settlement Agreement at ¶¶ 7, 9; App. 64).

Both parties filed motions for summary judgment. (App. 27; App. 31). A hearing was held on the cross-motions on May 28, 2014, before Judge Doyet A. Early, III (Transcript of Hearing; App. 135-172). 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; App. 8-16). The trial court concluded that the Association's offset is deducted from a claimant's total damages amount rather than the Association's statutory obligation. (*Id.*). The court denied the Association's Motion for Reconsideration of the order on January 22, 2015. (1/22/15 Form 4 Judgment; App. 6-7).

The Association timely appealed from the trial court orders, which were affirmed by the Court of Appeals' Opinion. (App. 333.) The Association petitioned the Court of Appeals for rehearing. (App. 339.) The Court of Appeals denied the request for rehearing. (App. 351.) This petition for writ of certiorari followed.

Summary of Arguments in Support of Petition for Writ of Certiorari

The Court of Appeals erred in holding that the Association's statutory offset should be deducted from a claimant's total "damages" amount rather than the statutory limit on the Association's obligation. (Opinion at 6; App. 338.) This is direct conflict with this Court's decision in *S.C. Prop. and Cas. Ins. Guar. Ass'n v. Brock*, 410 S.C. 361, 764 S.E.2d 920 (2014), which held 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). Further,

even if the Court determines *Brock* does not decide the issue based on the application of the setoff provision in that case, the Court of Appeals ignored the plain language of the Act and adopted a reading that differs from this Court's and cases from a majority of other jurisdictions. The Court of Appeals' decision also ignores the intent of the General Assembly and the underlying purpose of the Association when an insurer becomes insolvent.

Certiorari is warranted in this matter. The Court of Appeals' Opinion conflicts with this Court's decision in *Brock* and reads the Act in a manner inconsistent with the plain language of the Act, prior decisions of this Court, and cases from the majority of other jurisdictions deciding this issue.

Concise Arguments in Support of the Petition for Writ of Certiorari

I. The Opinion contradicts this Court's holding in *Brock* and similar cases from a majority of other jurisdictions.

In *Brock*, this Court rightly stated the plain meaning of the Act with regard to the Association's statutory offset when it held 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). The Court of Appeals' Opinion contradicts *Brock*, and the plain language of the Act, by ruling that the Association's statutory offset should be deducted from the "covered claim" amount rather than the Association's "obligation" amount.

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, which in this case would be the stipulated damages amount of $800,000. The definition of covered claim does not speak at all to the amount owed to the insured by the Association, however.

The Act expressly distinguishes the Association's "obligation" from a "covered claim." Specifically, Section 38-31-60 provides that the Association "is considered the insurer to the extent of *its obligation* on the covered claims." (Emphasis added.) 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) (emphasis added). In other words, the express language of the Act provides that the Association's obligation is only the part of the covered claim over $250 and less than $300,000. Therefore, in the present case, the Association's obligation is only $300,000, not the $800,000 stipulated damages amount that comprises the covered claim amount.

The Act further limits the Association's obligation by granting an offset against the obligation by deducting amounts paid from all other available insurance coverage. 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). The plain meaning of Section 38-31-100 is that "any amount payable" is the Association's "obligation" found in Section 38-31-60, which can never exceed the statutory cap of $300,000. Hence, in cases such as this when the amount of the covered claim exceeds $300,000, 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. In this case, the amount of other available coverage exceeds $300,000, so the Association owes no further payment.

The Opinion errs by misreading both *Brock* and the Act 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. This is not a workers' compensation claim. Thus, the language relied upon by the Court of Appeals has no application to this case. The reasoning for its decision is flawed and must be overturned.

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 General Assembly's use of the word "claim" means that the offset should be applied against the claim (*i.e.*, stipulated damages) amount in this case. In fact, the General Assembly'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 General Assembly intended for the offset to be applied against the cap in cases like this one. Hence, 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)).

This Court should join the majority of jurisdictions in finding the statutory cap is the maximum obligation of the Association and that the offset amount is deducted from the total potential obligation. The Association, as dictated by *Brock* and supported by cases from other jurisdiction, has no obligation on the claim in this case.

II. The Court of Appeals' Opinion overlooked the Association's purpose and the public policy underlying the Act.

Should the Court find that the language of *Brock* is not dispositive, this Court should look to the General Assembly'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 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. To the extent the Court finds *Brock* does not specifically address the issue, which the Association believes it does, the Court should decide the question in the first instance and not the Court of Appeals. At the very least, *Brock* demonstrates the setoff is directly tied to the obligation and not the claimed amount. To rule otherwise renders the setoff, the total potential amount of the obligation, and the policy behind the creation of the Association nullities.

Here, the Court of Appeals properly identified that the purpose of the Act is to provide "*some* protection for consumers whose insurers become insolvent." (Opinion at 6; App. 338) (*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)). The Court of Appeals then proceeded to ignore the statutory language and the purpose of the Act. 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, the Court of Appeals 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 General Assembly 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, as previously recognized by this Court, the amendments reflect the General Assembly'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 similarly construe the Act in this instance to lawfully recognize the Association's limitations on liability and setoff credits as adopted by the General Assembly in the Act.

Moreover, other provisions in the Act reflect the General Assembly'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 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 issued by other solvent insurers. It is inconceivable that the General Assembly 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 General Assembly intended for all other insurance coverage to be offset against the $300,000 cap rather than the claim amount. The Court of Appeals failed to recognize the import of these provisions in the Act evidencing the General Assembly's intent for the offset to be applied against the statutory cap rather than the claim amount.

Conclusion

For the foregoing reasons, this Court should grant this petition for writ of certiorari. The decision of the Court of Appeals and the Orders of the trial court should be reversed.

Respectfully submitted,

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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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October 21, 2016

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

Dear Mr. Shearouse:

Enclosed please find the original and seven copies of a Petition for Writ of Certiorari in regard to the above-referenced matter. Also enclosed are two copies of the Appendix. We would ask that you file the original and return a clocked-in copy to us via our courier. Also enclosed is our check in the amount of $100.00 as the required filing fee.

Very truly yours,

Matt Bog

A. Mattison Bogan

AMB:lpw
Enclosures
cc: (all w/enc.)
The Honorable Jenny Abbott Kitchings, SC Court of Appeals
John S. Nichols, Esquire
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