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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM BAMBERG COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

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Case No. 2013-CP-05-63
Appellate Case No. 2016-002156

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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.

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# BRIEF OF PETITIONER

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## STATEMENT OF THE ISSUE ON CERTIORARI

Does South Carolina Code section 38-31-100(1) require that the statutorily-mandated offset be deducted from the Association's statutory maximum claim limit of $300,000?

## STATEMENT OF THE CASE

On January 7, 2008, James S. Buchanan was involved in a motor vehicle accident in Bamberg, South Carolina, with a vehicle driven by Eddie R. Best and owned by Travis Scott. (App. 19–20). James Buchanan died at the scene of the accident. (App. 19–20). Scott's vehicle was insured for $1 million by Aequicap Insurance Company ("Aequicap"). (App. 20).

Janette Buchanan, individually and as Personal Representative of Mr. Buchanan's Estate ("Buchanan"), initiated a wrongful death lawsuit against Best and Scott. (App. 19–20). During the pendency of the wrongful death action, Aequicap was declared insolvent by the courts of Florida. (App. 20). As a result of Aequicap's insolvency, Buchanan asserted her claim against the South Carolina Property and Casualty Insurance Guaranty Association (the "Association") as provided by South Carolina Code section 38-31-60. (App. 20).

On April 12, 2013, while the wrongful death action was pending, Buchanan and a co-personal representative of James Buchanan's estate filed a declaratory judgment action alleging the Association was obligated to pay $300,000 pursuant to the South Carolina Property and Casualty Insurance Guaranty Association Act (the "Act") and was not entitled to receive credit for payments already received by Buchanan from other insurance policies. (App. 17–21).

In 2014, the parties settled the wrongful death action. (App. 20, 56–66). As part of the settlement agreement, the parties stipulated that the amount of damages sustained by Buchanan is $800,000 and that she recovered a total of $376,622 in settlement proceeds from co-defendants' insurance and Workers' Compensation benefits. (App. 20–21, 62–63). The parties further agreed that the liability of the Association, if any, would be determined in the declaratory judgment action based on the parties' stipulations. (App. 64).

The Association moved for summary judgment in the declaratory judgment action 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, thus eliminating the Association's liability. (App. 27–30). Buchanan 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 limit. (App. 31–33).

The circuit court held a hearing on the cross-motions for summary judgment on May 28, 2014. (App. 135–72). On September 10, 2014, the circuit court granted Buchanan's motion for summary judgment and denied the Association's motion for summary judgment. (App. 8–16). The circuit court held that the Association's offset must be deducted from a claimant's total damages amount rather than the statutory cap. (*Id.*). The court denied the Association's motion to reconsider on January 22, 2015. (App. 6–7).

The Association appealed, and the Court of Appeals affirmed in a published opinion filed on July 13, 2016. *See Buchanan v. S.C. Prop. & Cas. Ins. Guar. Ass'n*, 417 S.C. 562, 790 S.E.2d 783 (Ct. App. 2016). This Court granted certiorari to review the Court of Appeals' decision.

## ARGUMENT

The issue in this case is one of statutory interpretation, which is a question of law. *Duke Energy Corp. v. S.C. Dep't of Revenue*, 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016). 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), and "is free to decide [the issue] without any deference to the tribunal below," *Duke Energy*, 415 S.C. at 355, 782 S.E.2d at 592.

## I. The plain meaning of section 38-31-100 is that the "amount payable" on a covered claim must be $300,000 or less, and the setoff is therefore deducted from the $300,000 statutory maximum.

This Court must answer one question: which value serves as the starting point for the setoff required by South Carolina Code section 38-31-100(1)—the total amount of the plaintiff's alleged damages, or the $300,000 statutory maximum provided for in South Carolina Code section 38-31-60(a)? Buchanan argues, and the Court of Appeals found, the starting point is her total amount of alleged damages—the $800,000 settlement. The Association argues the starting point is the $300,000 statutory maximum amount of recovery provided by South Carolina Code section 38-31-60. The Court of Appeals and Buchanan ignore key words in the statute and fail to adhere to the rules of statutory interpretation. The Association's argument, however, gives effect to the plain meaning of all the words in the statute, and this Court should therefore adopt the Association's interpretation.[1]

The Association is a nonprofit unincorporated legal entity created by the South Carolina legislature in 1956 pursuant to the Act. *See S.C. Prop. & Cas. Ins. Guar. Ass'n v. Brock*, 410 S.C. 361, 365–66, 764 S.E.2d 920, 922 (2014); *S.C. Prop. & Cas. Ins. Guar. Ass'n v. Carolinas Roofing & Sheet Metal Contractors Self-Insurance Fund*, 315 S.C. 555, 557, 446 S.E.2d 422, 424 (1994); *Builders Transp. v. S.C. Prop. & Cas. Ins. Guar. Ass'n*, 307 S.C. 398, 406, 415 S.E.2d 419, 424 (Ct. App. 1992). The Association is "composed of persons who are licensed to transact insurance by the Insurance Department and who write certain types of insurance in South Carolina." *Carolinas Roofing*, 315 S.C. at 557, 446 S.E.2d at 424. The purpose of the Association "is to

[1] The parties do not dispute that the Association is entitled to offset Buchanan's $376,622 recovery from other insurance coverage pursuant to section 38-31-100. The only dispute is whether that offset applies to Buchanan's total alleged damages or to the Association's statutory maximum obligation.

provide some protection to insureds whose insurance companies become insolvent." *Id.* 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 Brock*, 410 S.C. at 365–66, 764 S.E.2d at 922; *Builders Transp.*, 307 S.C. at 406, 415 S.E.2d at 424.

"The primary rule of statutory construction is to ascertain and give effect to the intent of the General Assembly." *Brock*, 410 S.C. at 367, 764 S.E.2d at 922; *see also Anderson v. S.C. Election Comm'n*, 397 S.C. 551, 556, 725 S.E.2d 704, 706–07 (2012) (citing *Beaufort Cty. 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 the South Carolina General Assembly's intention in adopting an act to determine the meaning of the act's provisions).

"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. at 367, 764 S.E.2d at 922 (citing *McClanahan v. Richland Cty. 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 to impose another meaning.'" *Brock*, 410 S.C. at 367, 764 S.E.2d at 922 (citing *McClanahan*, 350 S.C. at 438, 567 S.E.2d at 242). "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 Cty.*, 395 S.C. 366, 718 S.E.2d 432, and *Hodges v. Rainey*, 341 S.C. 79, 533 S.E.2d 578 (2000)).

### A. The Court of Appeals misread the Act and conflated the provision that applies to regular insurance claims with the provision that applies to workers' compensation claims.

The Court of Appeals erred by misreading the Act when it stated 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.'" 417 S.C. at 569–70, 790 S.E.2d at 787. The Court of Appeals fails to recognize, however, that the reference to the "claim" in section 38-31-100 refers to payments for workers' 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.

Workers' compensation policies are treated differently under the Act because they do not have set limits and the statutory maximum obligation does not apply. *See* S.C. Code Ann. § 42-5-10 (requiring employers to secure payment of all compensation to employees required by Title 42); S.C. Code Ann. § 38-31-60(a)(iv) (explaining the $300,000 statutory maximum does not apply to workers' compensation claims: "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(1) does not apply to workers' compensation policies because it refers to policy limits: "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 Ann. § 38-31-100(1). 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(1), in contrast, applies *only* to workers' compensation policies because it refers to policies with "no applicable limits." S.C. Code Ann. § 38-31-100(1). Specifically, the second clause provides, "or, where there are no applicable limits, the claim must be reduced by the total recovery." *Id.* This clause cannot refer to an offset against the statutory maximum obligation because the Act expressly excludes workers' compensation claims from the statutory limit.

Therefore, the Court of Appeals failed to properly interpret the plain language of the Act when it held the General Assembly's use of the word "claim" means that the offset should be applied against the total amount of the covered claim in this case. To the contrary, the General Assembly's use of the word "claim" when referring to workers' compensation claims where the statutory maximum is not applicable, while expressly limiting the Association's payment to "any amount payable on a claim" for all other policies where the statutory maximum applies, demonstrates that the General Assembly intended for the offset to be applied against the Association's maximum obligation in cases like this one. Hence, the Court of Appeals erroneously interpreted the Act, and its decision must be reversed.

### B. The plain language of the Act requires that the offset be deducted from the $300,000 maximum on the Association's liability under the Act.

The Association "is obligated to the extent of claims existing before the determination of insolvency." S.C. Code Ann. § 38-31-60(a). Section 38-31-60 further provides that "the [A]ssociation . . . is considered the insurer to the extent of its obligation on the covered claims and, to this extent, has all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent." S.C. Code Ann. § 38-31-60(b). Section 38-31-60 refers to the duties and obligations of the Association; therefore, the plain meaning of subsection 31-38-60(b) is that the

Association "is considered the insurer to the extent of [*the Association's*] obligation on the covered claims." *Id.*; *see also* S.C. Code Ann. § 38-31-60(d) (providing the Association "shall investigate claims brought against the association and adjust, compromise, settle, and pay covered claims to the extent of the [A]ssociation's obligation" (emphasis added)).

A "covered claim" is defined by the Act 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." S.C. Code Ann. § 38-31-20(8). However, the extent of the Association's obligation on a covered claim is limited—it "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). Thus, where an insurer becomes insolvent after a plaintiff's claims arise, the Association may be required to pay up to a maximum of $300,000 "to provide some protection" to the plaintiff. *Brock*, 410 S.C. at 367–68, 764 S.E.2d at 923; *Carolinas Roofing*, 315 S.C. at 557, 446 S.E.2d at 424. $300,000 is the maximum extent of the Association's obligation under the Act.

If a plaintiff recovers from other sources, however, that recovery must be set off from the amount of the Association's obligation. S.C. Code Ann. § 38-31-100. Section 38-31-100(1) 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.

S.C. Code Ann. § 38-31-100(1) (emphasis added). The statutory framework—when read as a whole—is clear that the "amount payable" on a covered claim is the extent of the Association's obligation, subject to the maximum obligation. The Act limits the Association's obligation to "only the amount each covered claim . . . is less than [$300,000]." S.C. Code Ann. § 38-31-60(b). Accordingly, reading the Act as a whole and construing its sections together, the Association can never be required to pay more than $300,000 on a covered claim, and a person seeking payment from the Association on a covered claim can never recover more than $300,000. *Anderson*, 397 S.C. at 556, 725 S.E.2d at 707. The "amount payable" on a covered claim, therefore, is limited to a maximum of $300,000, and any setoff must be applied to the $300,000 limit rather than total the amount of the covered claim.[2]

Buchanan has argued throughout this litigation that the "amount payable" on a covered claim is the full amount of the covered claim—the total amount of damages in this case—and the setoff therefore applies to that amount. Buchanan's argument, as adopted by the Court of Appeals, renders the words "amount payable" meaningless and reads the phrase out of the statute. The setoff provision states, "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 full credit for such limits."[3] S.C. Code Ann. § 38-31-100(1) (emphasis added). Under the Court of Appeals' interpretation, the amount payable on a covered claim is

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[2] If the amount of damages—or the "covered claim"—is less than the $300,000, the limit does not apply and the "amount payable" is the full amount of the claim.

[3] Although the offset statute provides that the Association may set off the full policy limits of other coverage—not simply the recovery received 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. (App. 56–66).

equal to the amount of the covered claim. S.C. Code Ann. § 38-31-20(8) (defining a covered claim as "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").

The Court of Appeals' interpretation gives no effect to the words "amount payable" in section 38-31-100(1). Instead, the Court of Appeals found the setoff must be applied to the full amount of the covered claim. The plain language of the statute contradicts the Court of Appeals' opinion. Courts must interpret a statute in a manner that gives effect to all words in the statute, and the General Assembly does not use meaningless or superfluous language in statutes. *CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (providing appellate courts must read a statute "so 'that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous,' for '[t]he General Assembly obviously intended [the statute] to have some efficacy, or the legislature would not have enacted it into law'" (alteration in original) (quoting *State v. Sweat*, 379 S.C. 367, 376, 665 S.E.2d 645, 650 (Ct. App. 2008), *aff'd*, 386 S.C. 339, 688 S.E.2d 569 (2010))).

Contrary to Buchanan's arguments, the Association is not asking the Court to rewrite section 38-31-100(1). *See* (Return to Pet. for Cert. p. 11). Rather, the Association is asking the Court to give effect to all the words in the statute. If the General Assembly intended the statute to be interpreted in the manner urged by Buchanan and adopted by the Court of Appeals, it would have drafted the statute to provide that "*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."[4] The General Assembly instead provided that the "*amount payable* on a covered claim" must be reduced. S.C. Code Ann. § 38-31-100(1) (emphasis added). "Amount payable on a covered claim," therefore, *must* mean something different than "covered claim." Thus, Buchanan's and the Court of Appeals' interpretation fundamentally alters the meaning of section 38-31-100(1). The plain language of the Act dictates that the amount payable on a covered claim is limited to $300,000 or less, § 38-31-60(a), and the setoff therefore must be applied to the $300,000 maximum obligation. Further, this Court has already interpreted the setoff provision in accordance with the Association's argument: "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 (emphasis added).

The parties do not dispute that Buchanan may have been able to recover $800,000 from Aequicap if Aequicap had remained solvent. However, that amount is not payable by the Association, because the Association can never be required to pay more than $300,000. If a covered claim is greater than $300,000, the amount payable on that covered claim is $300,000. Therefore, the starting point for the setoff calculation is the $300,000 maximum obligation because that is the amount payable on Buchanan's claim prior to setoff, which defines the extent of the Association's liability. Because Buchanan has already recovered $376,622, the entire amount

[4] *Cf. Blackwell v. Pa. Ins. Guar. Ass'n*, 567 A.2d 1103, 1106 (Pa. Super. Ct. 1989) (interpreting the same statutory language and arguments and explaining, "If the Legislature had intended the result urged by Blackwell in the present case, they could have easily achieved it by simply stating . . . that 'a covered claim under this act shall be reduced by the amount of any recovery . . .' of alternative insurance coverage. This they did not do. Instead, the statute mandates that 'any amount payable on a covered claim shall be reduced by the amount of any recovery . . .' of alternative insurance coverage" (alterations in original)).

payable by the Association must be offset, and Buchanan cannot receive any money from the Association.

### C. Courts in other jurisdictions interpreting the same statutory language have found the plain meaning of the statute requires a setoff to be deducted from the statutory maximum obligation.

Courts in several other states have interpreted the plain language of similar statutes in the same manner as the Association. For example, the Superior Court of Pennsylvania has interpreted Pennsylvania's similar offset provision to unambiguously require application of the offset to the Association's statutory limit, not the amount of the covered claim. *Blackwell*, 567 A.2d 1103. In *Blackwell*, the plaintiff 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 the statutory maximum of $299,900 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 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 and effectuate the protection meant to be afforded by the Act. *Id.* at 1105. The court disagreed, finding that the statutory language expressly provided for the application of the offset to the $299,900 statutory limit. *Id.* at 1105. The court explained the Pennsylvania act provides that the Association 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)." *Id.* (quoting 40 Pa. Cons. Stat. § 1701.201(b)(1)(i)). Moreover, the Pennsylvania Association's obligation to pay a covered claim is subject to the following provision, which is nearly identical to the South Carolina offset provision:

> 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.*

*Id.* (emphasis added) (quoting 40 Pa. Cons. Stat. § 1701.503(a)).

The court found the Pennsylvania Association's "obligation" to Blackwell—or the "amount payable" on the covered claim—was the $299,900 statutory limit. *Id.* The court then considered whether the statutory offset must be applied to the $299,900 obligation or the total amount of Blackwell's damages.[5] *Id.* Applying the plain meaning of the Pennsylvania act, the court found the statute was "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, [the Association]'s final obligation is to provide Blackwell with the sum of $234,900.00.

*Id.* at 1105.

The Supreme Court of New Hampshire has interpreted the statutory offset applicable to New Hampshire's guaranty association in the same manner. *See N.H Ins. Guar. Ass'n v. Pitco Frialator, Inc.*, 705 A.2d 1190, 1194 (N.H. 1998). The New Hampshire Association's exposure per covered claim is also limited to a maximum of $300,000, *id.* at 1192 (citing N.H. Rev. Stat. Ann. § 404–B:8), and New Hampshire's offset provision is similar to the South Carolina provision:

> Any person having a claim against an insurer under any provision in an insurance policy other than a policy of an insolvent insurer which

[5] Similar to this case, the applicable policy limit in *Blackwell* was higher than the damages amount and the statutory limit. *Id.*

> 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.*

N.H. Rev. Stat. Ann. § 404-B:12 (emphasis added). The New Hampshire Supreme Court explained that the "amount payable on a covered claim" is the statutory maximum obligation, and the plain language of the offset provision therefore requires an offset to be deducted from the statutory limit, not the amount of damages:

> Although the title of [N.H. Rev. Stat. Ann.] 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 [the Association]'s $300,000 statutory cap. Indeed, the "amount payable on a covered claim under this chapter" is $300,000 pursuant to [N.H. Rev. Stat. Ann.] 404–B:8, I(a); further, this $300,000 "amount payable" must "be reduced by" the $300,000 of workers' compensation payments, according to [N.H. Rev. Stat. Ann.] 404–B:12, I.

*Pitco Frialator*, 705 A.2d at 1194.

Finally, the Superior Court of Delaware applied the same interpretation to the statutory offset provision applicable to the Delaware Insurance Guaranty Association. *See Marra v. Wilson*, No. CIV.A. 00C-08-019RRC, 2003 WL 367831 (Del. Super. Ct. Feb. 20, 2003). Relying in part on *Blackwell*, the court found that that the language "any amount payable on a covered claim . . . shall be reduced" requires an offset to be deducted from the statutory limit, not the total amount of the covered claim. *Id.* at *5 (citing Del. Code Ann. tit. 18, § 4212).

Each of these courts found the plain meaning of the setoff provision requires that the amount received from other insurance coverage must be deducted from the statutory maximum obligation, not the total amount of the covered claim. This Court should follow the same

reasoning, apply the plain meaning of section 38-31-100, and rule that the setoff must be deducted from the Association's $300,000 statutory maximum obligation.

## II. The Association's interpretation of the Act comports with legislative intent, the purpose of the Act, and public policy.

Should the Court find the plain meaning of the Act is unclear, it must look to the General Assembly's intent and the policy underlying the Act to interpret the offset provision. *Anderson*, 397 S.C. at 556, 725 S.E.2d at 706 ("The primary rule of statutory construction is to ascertain and give effect to the intent of the General Assembly."). The purpose of the Act is to provide claimants *some* recovery—subject to the limitations set forth in the Act—not to provide them with a full or nearly full recovery. *Brock*, 410 S.C. at 367–68, 764 S.E.2d at 923; *Hudson ex rel. Hudson v. Lancaster Convalescent Ctr.*, 407 S.C. 112, 124, 754 S.E.2d 486, 492 (2014); *Carolinas Roofing*, 315 S.C. at 557, 446 S.E.2d at 424. A finding that the offset must be applied to the statutory limit comports with the Act's purpose. It ensures that a claimant can obtain some recovery—$376,622 in this case—but does not require the Association to pay the full statutory limit where the claimant recovered more than that amount from other sources.

The South Carolina General Assembly 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. *See* 2001 S.C. Acts 82. In the preamble to the Act, the General Assembly 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 General Assembly 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.

This Court has previously noted the Act's intent for the Association's liability to be limited. As the Court stated in *Brock*, *Hudson*, and *Carolinas Roofing*, the purpose of the Association is "to provide *some* protection" to claimants when insurance companies become insolvent. *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; *Carolinas Roofing*, 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. However, the Association does not fully "step in the shoes" of the insolvent insurer. *See S.C. Prop. & 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); *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.").

The Court's statements in these cases correctly depict the General Assembly's intent to limit the Association's liabilities. The Association steps in for an insolvent insurer only to reduce the inequity that would occur should claimants be left without *any* potential source of recovery. The Association is not intended as a failsafe to guarantee a specific level of recovery to 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.").

The Colorado Court of Appeals—in interpreting the Colorado Insurance Guaranty Association Act, which includes provisions similar to the South Carolina Act—explained the Colorado legislature's intent to conserve resources to protect the financial stability of the Colorado Association:

> For example, a "covered claim" under the Act "does not include any first-party claim by an insured whose net worth exceeds ten million dollars." Colo. Rev. Stat. § 10-4-503(4). Section 10-4-508(1)(a) . . . provides that [the Association] shall "[b]e obligated to the extent of the covered claims existing prior to a determination of insolvency . . . but such obligation shall include only that amount of each covered claim which is in excess of one hundred dollars and is less than one hundred thousand dollars," excluding workers' compensation claims. Section 10-4-508.5 . . . addresses the upper limits of [the Association]'s total liabilities and how payments may be allocated between claimants under certain circumstances. Section 10-4-511(4) . . . provides that [the Association] can recover the amount of any covered claim paid for liability obligations incurred by an insured whose net worth is over $25 million. We conclude that these limitations of [the Association]'s obligations all further the purposes of the Act by ensuring that [the Association]'s resources are equitably distributed among claimants or policyholders.

*Colorado Ins. Guar. Ass'n v. Menor*, 166 P.3d 205, 214 (Colo. App. 2007).

Because a purpose of the Colorado act was to conserve resources available to the Colorado Association to pay claimants and policyholders, the court interpreted the setoff provision to require that a recovery from another source must be deducted from the Association's statutory limit, not the total amount of the covered claim:

> 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.

*Id.* at 215 (quoting *Strickler v. Desai*, 813 A.2d 650 (Pa. 2002)). Each of the provisions cited by the Colorado court has a counterpart in the South Carolina Act.

Similar to the Colorado Act, the South Carolina Act is intended to provide some recovery for claimants while conserving resources for other claimants. To give effect to that legislative intent, the only possible interpretation of section 38-31-100(1) is that the setoff must be deducted from the $300,000 statutory limit. Because Buchanan recovered $376,622 from other sources, that recovery is properly setoff from the $300,000 limit to conserve Association resources for other claimants who may not be able to recover greater than $300,000 from solvent insurers. Accordingly, this Court should interpret the Act in conformity with the legislative intent.

## CONCLUSION

Based on the plain language of the Act and the intent of the General Assembly, this Court should reverse the Court of Appeals and trial court and hold that section 38-31-100(1) requires the setoff to be applied to the $300,000 limit on the Association's obligation. Because Buchanan has already recovered $376,622, she is not entitled to any recovery from the Association.

Respectfully submitted,

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Columbia, South Carolina

October 9, 2017.

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

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Case No. 2013-CP-05-00063
Appellate Case No. 2016-002156

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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.

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PROOF OF SERVICE

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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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