

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BAMBERG COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

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S.C. SUPREME COURT

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

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.

REPLY BRIEF OF PETITIONER

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INTRODUCTION

Janette Buchanan asks for this Court to rewrite the South Carolina Property and Casualty Insurance Guaranty Association Act (the “Act”) by reading the words “amount payable” out of section 38-31-100(1) of the Act. In particular, Buchanan asks this Court to find the Act’s requirement that the “amount payable on a covered claim . . . must be reduced” by other insurance really should be read to say the “covered claim . . . must be reduced,” entirely eliminating any reference to the amount payable in the Act. *See* S.C. Code Ann. § 38-31-100(1). This Court cannot do so.

Buchanan’s arguments contradict the rules of statutory interpretation, misinterpret the Act and the South Carolina Property and Casualty Insurance Guaranty Association’s (the “Association”) arguments, ignore the purpose of the Act and precedent from South Carolina and other jurisdictions, and necessitate this Court to delete words from the Act. This Court should not—and cannot—rewrite a statute to change the meaning intended by the General Assembly.

Therefore, the Court should reverse the Court of Appeals and circuit court.

ARGUMENT

I. The “amount payable” on a covered claim is the amount of the Association’s maximum statutory obligation—\$300,000—and that amount is reduced by the setoff required by section 38-31-100.

Buchanan urges this Court to decide that the offset required by South Carolina Code section 38-31-100(1) must be applied to reduce the “covered claim” before applying the statutory limit provided by section 38-31-60(a). Buchanan—like the Court of Appeals—misreads both the Act and the Association’s arguments.

First, Buchanan misapprehends the Association’s argument and argues at length that a “covered claim” is not the same as the Association’s “obligation.” *See, e.g.*, (Resp. Br. 7, 11–12,

13). The Association agrees with that statement. Importantly, however, the Act requires that the “*amount payable* on a covered claim” must be reduced—not the “covered claim” itself. S.C. Code Ann. § 38-31-100(1)(a) (emphasis added). The Association’s obligation is the *amount payable* on a covered claim—which is limited to a maximum of \$300,000. S.C. Code Ann. § 38-31-60(a) (“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)); S.C. Code Ann. § 38-31-60(d) (requiring the Association to “pay covered claims *to the extent of the association’s obligation*”). Therefore, when the amount payable is reduced, the Association’s obligation is also reduced. The Association has not argued that its obligation is equal to the total amount of the “covered claim,” because it is not. *See, e.g.*, (Resp. Br. 13) (arguing “the Association equates the terms ‘obligation’ and ‘covered claim’”). In a case such as this one, where the claimant alleges her “covered claim” is \$800,000, the *amount payable* on the alleged covered claim before the setoff is \$300,000. *Id.* That amount is reduced by a setoff of \$376,622, which brings the amount payable—the Association’s obligation—to zero.

Second, the General Assembly drafted the Act in a manner that demonstrates a clear intent for “covered claim” and “amount payable on a covered claim” to have different meanings. The Act defines “covered claim” 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). The definition of “covered claim,” therefore, refers to the full claim and does not include any description of what constitutes the “amount payable” on a covered claim.

Like the Court of Appeals, Buchanan conflates the two clauses in the key sentence in section 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 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 first clause—“Any *amount payable* on a covered claim under this chapter must be reduced by the full limits of . . . other coverage”—applies to this case and requires that the Association’s obligation be reduced by the amount recovered from other sources. *Id.* (emphasis added). The second clause—“where there are no applicable limits, *the claim* must be reduced by the total recovery”—applies only to workers’ compensation insurance, which has no limits. *See id.* (emphasis added); S.C. Code Ann. § 38-31-60(a)(iv); *see also* (Pet. Br. 6–7).

The language used by the General Assembly in each clause demonstrates its intent that the setoff apply to the Association’s \$300,000 maximum obligation. In the first clause, the General Assembly provided that the “amount payable on a covered claim” must be reduced by recovery from other sources. The use of “amount payable” recognizes that the amount payable may not be the full amount of a covered claim. Because the amount payable on a covered claim is limited to \$300,000, the setoff must be applied to the Association’s maximum obligation. In contrast, where the General Assembly intended the setoff to apply to the full amount of the claim, it said so: “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 use of different terms in each clause of section 38-31-100(1) shows the General Assembly intended “amount payable” to have a different meaning than “covered claim.” *See 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))).

Buchanan is asking this Court to effectively delete the words “amount payable” from section 38-31-100(1). Throughout her brief, Buchanan argues the offset must be applied to reduce the “covered claim,” rather than the amount payable on a covered claim. *See* (Resp. Br. 8) (arguing the “‘claim under an insurance policy is . . . reduced by th[e] total recovery from . . . other sources’”); (Resp. Br. 10) (arguing the Association is “allowed to offset the full limits of such other coverage against the ‘covered claim’ under the Act”); (Resp. Br. 11) (arguing “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”); (Resp. Br. 13) (arguing “[t]he Act’s offset provision permits the Guaranty Association to reduce the ‘covered claim’ by the amount Respondents received”); (Resp. Br. 20) (“The ‘covered claim’ is reduced. Not the ‘obligation.’”). These arguments ignore the plain language of section 38-31-100(1).

The Act unambiguously requires that the setoff be applied to the “*amount payable* on a covered claim,” *not* the full amount of the covered claim. S.C. Code Ann. § 38-31-100(1) (emphasis added). Thus, Buchanan interprets the Act as if the words “amount payable” do not exist, and it is Buchanan—not the Association—that wants this Court to rewrite the Act to remove those words. The Court cannot do so. *SC Prop & Cas. Ins. Guar. Ass’n v. Brock*, 410 S.C. 361, 367, 764 S.E.2d 920, 922 (2014) (“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.”); *see also Anderson v. S.C. 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.”).

Finally, Buchanan’s argument on *Brock* is not correct. In *Brock*, the covered claim was \$185,000—less than the \$300,000 limit on the Association’s obligation. *Id.* at 364, 764 S.E.2d at 921. The statutory limit therefore did not apply, and the amount payable on the covered claim was the full amount of the covered claim. The facts differ from the circumstances here, which Buchanan chose to ignore in her analysis. In *Brock*, the Court applied the amount recovered from other sources to the full \$185,000. *Id.* at 366, 764 S.E.2d at 922. Because the covered claim was less than \$300,000, the Court’s application of the setoff to the full amount of the covered claim does not support Buchanan’s argument that the Court must do the same in this case. To the contrary, the Court in *Brock*—citing section 38-31-100—explained the Association “is allowed to offset the full limits of such other coverage *against its obligations under the Act.*” *Id.* (emphasis added). Thus, this Court has already interpreted the Act in accordance with the Association’s arguments in this case. The setoff must be applied to the Association’s obligation, which is limited to the amount payable on a covered claim, established by statute as a maximum of \$300,000. S.C. Code Ann. § 38-31-60(a).

II. The Association’s argument comports with the purpose of the Act to provide “some protection” for consumers.

The parties appear to agree that the purpose of the Act is “to provide some protection to insureds whose insurance companies become insolvent.” *See 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); *see also* (Resp. Br. 10). Contrary to Buchanan’s argument, however, the General Assembly did not intend that protection to provide as close to a full recovery as possible.

Instead, the General Assembly intended to ensure that a claimant can recover *up to \$300,000* even if her insurer becomes insolvent.

This Court has recognized that the Association is a “last resort insurer” designed to provide “some protection” to insureds. *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. That policy, combined with the provision in the Act limiting the Association’s obligation to “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(d), and the requirement that an insured exhaust all other coverage and claims before seeking payment from the Association, S.C. Code Ann. § 38-31-100(1), demonstrates the General Assembly’s intent to ensure that claimants are able to recover up to \$300,000. If a claimant recovers \$300,000 or more from other sources, the purpose of the Act has been fulfilled, and the Association is not obligated to pay any funds to the claimant. Buchanan already has recovered \$376,622 from other sources of coverage. (App. 20–21, 62–63). Therefore, she has received some protection, the severity of her loss has been mitigated, and the last resort—payment by the Association—is not required.¹

III. Buchanan’s discussion of case law from other jurisdictions does not support her interpretation of the Act.

Buchanan spends a substantial portion of her brief distinguishing case law from other jurisdictions that the Association did not cite in its Brief of Petitioner. (Resp. Br. 22–32). The

¹ In her brief, Buchanan relies on the circuit court’s statement that the Association’s interpretation of the Act contravenes public policy because it would “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.” That statement is incorrect. The Act expressly requires claimants to exhaust all other sources of coverage—including policies that provide coverage to joint tortfeasors. S.C. Code Ann. § 38-31-100(1)(a). Consequently, no such policy concern exists.

Association does not rely on the majority of the cases distinguished by Buchanan, and nothing in those cases supports Buchanan's argument.

The Association instead relies on three cases: *Blackwell v. Pennsylvania Insurance Guaranty Association*, 567 A.2d 1103 (Pa. 1989); *Marra v. Wilson*, No. CIV.A. 00C-08-019RRC, 2003 WL 367831 (Del. Super. Ct. Feb. 20, 2003); and *New Hampshire Insurance Guaranty Association v. Pitco Frialator, Inc.*, 705 A.2d 1190 (N.H. 1998). Buchanan all but concedes *Blackwell* and *Marra* support the Association's argument. (Resp. Br. 24–25, 31–32). Rather than distinguish those cases, Buchanan simply urges this Court to ignore them. (*Id.*). *Blackwell* and *Marra* are indistinguishable from this case and are directly on point with the issue raised by the Association. *See Blackwell*, 567 A.2d at 1105 (finding the plain language of the Pennsylvania act required that the setoff be applied to the statutory maximum obligation—the “amount payable on a covered claim”—rather than the total amount of the covered claim); *Marra*, 2003 WL 367831, at *5 (finding the language “any amount payable on a covered claim . . . must be reduced” requires an offset to be deducted from the statutory limit, not the total amount of the covered claim). Both cases support a finding that the setoff must be applied to the Association's maximum obligation and that Buchanan is not entitled to recover from the Association. *Id.*

Buchanan attempts to distinguish *Pitco Frialator* based on non-substantive differences in the language used in the New Hampshire guaranty act. The slight differences in language do not change the interpretation of the statutes. For example, the amount of a covered claim cannot exceed the insolvent insurer's policy limits under either statute. *Compare* S.C. Code Ann. § 38-31-20(8) (“‘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”) *with* N.H.

Rev. Stat. Ann. § 404-B:5, IV (“‘Covered claim’ means a net unpaid claim, in excess of \$50 (after application of all deductions or commissions as provided for by any contract of insurance) including one for unearned premiums, 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 . . .”).²

Similarly, both states limit the obligation of their respective guaranty associations to a maximum of \$300,000. *Compare* S.C. Code Ann. § 38-31-60(a) (“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. . . . 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. However, the association shall pay the full amount of any covered workers’ compensation claim.”) *with* N.H. Rev. Stat. Ann. § 404-B:8, I (“The association shall: (a) Be 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 . . .”).

² Buchanan emphasizes the word “net” in the New Hampshire statute, but the statute itself explains what it means by a “net” unpaid claim—the amount remaining “after application of all deductions or commissions as provided for by any contract of insurance.” N.H. Rev. Stat. Ann. § 404-B:5, IV. That provision does not relate to the application of a statutory maximum and is not relevant to the issue in this case.

The superficial differences in the wording of the New Hampshire statutes do not materially alter their meaning. The New Hampshire guaranty act includes the same requirements as the South Carolina Act, and *Pitco Frialator* therefore supports the Association’s arguments. See *Pitco Frialator*, 705 A.2d at 1194 (“[W]e 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 [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.”).

Accordingly, this Court should reject Buchanan’s argument and interpret the Act in accordance with its plain meaning and the rationale applied by the courts in *Blackwell*, *Marra*, and *Pitco Frialator*.

CONCLUSION

Based on the plain language of the Act, the intent of the General Assembly, and decisions in other jurisdictions interpreting similar provisions, this Court should reverse the Court of Appeals and circuit court and hold that the setoff in section 38-31-100(1) applies to the amount payable by the Association, which is limited to a maximum of \$300,000. Because Buchanan has already recovered more than \$300,000, she is not entitled to any recovery from the Association.

[signature on following page]

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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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