THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2019-000020
Case No. 2018-CP-23-2580

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

v.

South Carolina Second Injury Fund,..... Appellant,

In Re:

Michael Quarles..... Employee/Claimant,

v.

Cryovac Sealed Air Corporation, Employer, and Lumbermens Mutual Casualty Company in Liquidation/South Carolina Property and Casualty Insurance Guaranty Association,..... Carrier/Defendants.

REPLY BRIEF OF APPELLANT

Andrew F. Lindemann
LINDEMANN, DAVIS & HUGHES, P.A.
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920

Robert M. Cook, II
THE ROBERT COOK LAW FIRM, LLC
Post Office Box 3575
Batesburg-Leesville, South Carolina 29070
(803) 317-2171

Counsel for Appellant

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I. The Workers' Compensation Commission, as affirmed by the Circuit Court, erred in ruling that the Guaranty Association meets the statutory definition of "insurer" or "carrier" and thereby is entitled to seek reimbursement from the Second Injury Fund.

The Appellant South Carolina Second Injury Fund ("Fund") contends on appeal that the Workers' Compensation Commission, as affirmed by the Circuit Court, committed reversible error in ruling that the Respondent South Carolina Property and Casualty Insurance Guaranty Association ("Guaranty Association") meets the statutory definition of "insurer" or "carrier" and thereby is entitled to seek reimbursement from the Second Injury Fund.

In responding to the Fund's position, it is important for this Court to recognize that the Guaranty Association, depending on the issue at hand, argues inconsistently that it is an insurer or an "association of insurers" or a statutory entity. Importantly, the South Carolina Supreme Court has already identified the Guaranty Association for what it is under the law: an "unincorporated, non-profit legal entity" which is "neither the wrongdoer *nor the insurer of a wrongdoer*, but is instead a statutory entity that exists to provide some protection for the insureds of insolvent insurance companies." *South Carolina Property and Casualty Insurance Guaranty Association v. Brock*, 410 S.C. 361, 764 S.E.2d 920, 922-923 (2014). (Emphasis added). The Guaranty Association tries to deflect or disassociate itself

from that description, but that description is accurate and should be preclusively binding in this litigation.

In its response brief, the Guaranty Association appears to now argue that it meets the definition of "carrier" or "insurer" as set forth in Section 42-1-60 of the Workers' Compensation Act. The term "carrier" or "insurer" is defined in Section 42-1-60 as "any person or fund authorized under Section 42-5-20 to insure under this title and includes self-insurers." S.C. Code Ann. § 42-1-60. The Guaranty Association appears to argue that it is a "fund authorized under Section 42-5-20." It cites to the following language in Section 42-5-20: "any authorized corporation, association, organization, or mutual insurance association formed by a group of employers so authorized." S.C. Code Ann. § 42-5-20(A). The Guaranty Association, indeed, highlights the word "association" in that language. Thus, it claims that it is an "association" that is "authorized to insure liabilities under the Workers' Compensation Act." *See*, Respondent's Brief, p. 19.

However, this reliance on Section 42-5-20 is entirely misplaced. That provision allows for "a group of employers" to form a "corporation, association, organization, or mutual insurance association" to "insure and keep insured" the workers' compensation liability of the employers. The Guaranty Association does not serve that purpose, nor is it formed by a group of employers to insure those employers' workers' compensation liability. The flaw in the Guaranty

Association's argument becomes abundantly clear by mere reference to Section 42-5-20(B), which is part of the same statute that states:

> A corporation, association, organization, or mutual insurance association formed pursuant to Section 42-5-20 may not be considered a licensed insurer pursuant to Chapter 31, Title 38 and may not participate in or receive benefits or protection from the South Carolina Property and Casualty Insurance Guaranty Association.

S.C. Code Ann. § 42-5-20(B). Thus, the "association" described in Section 42-5-20 cannot be reasonably construed as inclusive of any guaranty association. In short, as the Fund argues, the Guaranty Association does not meet the statutory definition of "carrier" or "insurer" as set forth in Section 42-1-60.

In its opening brief, the Fund also pointed out that the General Assembly re-defined the term "carrier" in Section 42-1-560 to explicitly include an "association ... liable for the payment of compensation and other benefits under this title," which arguably includes a guaranty association. S.C. Code Ann. § 42-1-560(a). As the Fund argues, this shows that the General Assembly understands that the general definition of "carrier" in Section 42-1-60 does not include a guaranty association; otherwise, it would not be necessary to provide a unique and expanded definition of "carrier" for purposes of Section 42-1-560 alone. In its response brief, the Guaranty Association does not refute this argument. Importantly, the Supreme Court has held that "[t]he Workers' Compensation Act should be read *in pari materia* when possible." *United Technologies v. South Carolina Second*

Injury Fund, 318 S.C. 213, 456 S.E.2d 901, 904 (1995). *See also*, *Hudson v. Townsend Saw Chain Co.,* 296 S.C. 17, 370 S.E.2d 104 (Ct. App. 1988). Thus, to read Sections 42-1-60 and 42-1-560 *in pari materia*, it must be concluded that the General Assembly has deliberately chosen to define "carrier" more broadly to include an "association" in Section 42-1-560. But, the General Assembly did not use that broad definition of "carrier" in the sections related to reimbursement from the Second Injury Fund. That supports the position that a guaranty association is not included in the definition of "carrier" as used in Sections 42-7-310, 42-7-320, and 42-9-400. *See also*, *Merchants Mut. Ins. Co. v. South Carolina Second Injury Fund*, 277 S.C. 604, 291 S.E.2d 667 (1982) (holding that the Second Injury Fund statute is a statute of creation that must be strictly construed).

In addition, as the Fund argues in its opening brief, the Guaranty Association Act does not include any provision authorizing the Guaranty Association to recover the amount of a "covered claim" from the Second Injury Fund. The Guaranty Association claims to be authorized to "take an affirmative/offensive action not specifically enumerated under the Guaranty Act with respect to its handling and payment of a covered claim." *See*, Respondent's Brief, p. 17. It insists that this includes an *implied* right to seek reimbursement from the Second Injury Fund -- even though that is not *expressly* authorized in the Guaranty Association Act or in the Workers' Compensation Act. For this premise, the

Guaranty Association relies on this Court's decision in *Farmer v. CAGC Ins. Co.*, 424 S.C. 579, 819 S.E.2d 142 (Ct. App. 2018), but that reliance is misplaced. This Court in *Farmer* certainly did not authorize a claim for reimbursement from the Second Injury Fund nor did it read Section 38-31-60(l) as authorizing such action. The *Farmer* case merely held that statutory powers granted to the Guaranty Association included the ability to conduct litigation to determine if certain claims were not "covered claims," but rather self-insured claims or claims from a policy of retroactive insurance, neither of which the Guaranty Association is allowed to pay. That case had nothing to do with making a reimbursement claim against the Second Injury Fund or asserting any right of payment against another party. In sum, it bears repeating that had the General Assembly intended to authorize a claim by the Guaranty Association for reimbursement from the Second Injury Fund, it would have expressly provided for such. It did not do so.

Finally, the Fund points out in its opening brief that Guaranty Association and the Second Injury Fund are funded in similar ways -- both from workers' compensation insurers. Thus, in practical terms, allowing the reimbursement by the Guaranty Association from the Second Injury Fund would be circuitous action that is largely a meaningless exercise and a waste of resources that substantially originate from the same source. As the Fund argues, the General Assembly obviously did not intend to allow for such circuitous litigation that fosters only

administrative inefficiencies. In response, the Guaranty Association makes the unsubstantiated, misleading, and patently false argument that its workers' compensation member insurers will be required to "fund" the Quarles claim "twice." The Quarles claim, however, will be paid once -- that should be clear and undisputed. Moreover, contrary to the Guaranty Association's suggestion, the Fund cannot collect assessments from workers' compensation carriers and then retain those funds without making reimbursements that are owed. Instead, the Second Injury Fund Closure Plan provides as follows: "If funds derived from the Second Injury Fund assessment remain after all of the Fund's liabilities and expenses are extinguished or satisfied, the remaining funds shall be returned to those who paid a Second Injury Fund assessment." *See*, Second Injury Fund Closure Plan, ¶ 2.7. (R. 720). That means that, if the Fund is successful with this appeal, any funds that may have been assessed from the individual members of the Guaranty Association as part of the overall global pool of assessable claims, which assessments may have contingently included the underlying claim of Quarles as a matter of accounting procedure, will be returned on a pro rata basis, along with any other unused assessment funds. Those funds will not be paid to the Guaranty Association because it does not participate in the assessment mechanism that capitalizes the Fund, but rather to the workers' compensation insurers that are members of the Guaranty Association.

In short, the same workers' compensation insurers who fund both the Guaranty Association and the Second Injury Fund will not be required to fund or pay the same claim twice. Yet, the reimbursement claims pursued by the Guaranty Association are fostering the very administrative inefficiencies and meaningless and circuitous litigation that the General Assembly was obviously trying to prevent.

II. The Workers' Compensation Commission, as affirmed by the Circuit Court, erred in ruling that the Quarles claim was not released based on the unambiguous language contained in the Settlement Agreement and Release entered between the Guaranty Association and the Second Injury Fund dated June 17, 2013.

The Second Injury Fund contends that the current claim for reimbursement of workers' compensation benefits paid to Michael Quarles was included in a prior settlement agreed to by the Guaranty Association and the Fund. The Fund points out that the Workers' Compensation Commission, as affirmed by the Circuit Court, construed Paragraph 3 of the Settlement Agreement and Release to extinguish the Fund's liability only with respect to claims on which the Fund was paying the Guaranty Association as of February 22, 2013. The lower tribunals focused solely on the phrase "on which the SIF is currently paying the Guaranty Association as of February 22, 2013" in Paragraph 3. (R. 262-263). In so doing, the tribunals ultimately gave no meaning to and effectively struck the modifiers of the word

"claims" that followed, including "whether known or unknown, noticed or unnoticed, asserted or not asserted, accepted or not accepted, existing or potential." (R. 263).

Not surprisingly, in its response brief, the Guaranty Association makes the exact same error. The Guaranty Association, in fact, completely disregards the Fund's argument. It makes *no attempt* to give any meaning to the series of co-equal modifying phrases. The Guaranty Association make no attempt to address the language "whether known or unknown, noticed or unnoticed, asserted or not asserted, accepted or not accepted, existing or potential." In its opening brief, the Fund explained that, if the release was limited to claims already being paid on February 22, 2013, as the Guaranty Association insists, those claims would obviously be "known," "asserted," "accepted" and "existing." The Fund thus asked: What then could be the purpose of the modifiers "unknown," "not asserted," "not accepted," or "potential"? The Guaranty Association never answers that question. The reason for that is obvious: the Guaranty Association has no answer. In order for the Guaranty Association to prevail, those additional modifiers must be ignored and read out of the agreement.

Of course, the Guaranty Association does not have that option just as the Commission and the Circuit Court did not have that option. The Fund submits that each of the phrases at issue can be read together. The phrase "on which the SIF is

currently paying the Guaranty Association as of February 22, 2013" is a reference to the claims of Legion and/or Reliance which is immediately referenced before that phrase appears. Moreover, there is no denying that the release language was intended to and does include future claims whether related or unrelated to the claims of Legion and/or Reliance. That gives effect to the modifiers "unknown," "not asserted," "not accepted," or "potential." That also gives effect to the rules of interpretation set forth in Paragraph 7, including the following: "As to the matters released herein, as set forth in paragraph numbered "3" above, the Parties agree that the terms of this Settlement Agreement and Release are to be given the ***broadest meaning*** such that the interpretation and construction do substantial justice to the intent of the Parties." (R. 265). (Emphasis added). The Guaranty Association argues for a narrow construction of the modifying language -- so narrow, in fact, that the Guaranty Association chooses to ignore key language that demonstrates the clear intent to include future claims within the scope of the release. However, the parties, including the Guaranty Association, had agreed *literally* to the "broadest meaning" that can be given to the operative language. The parties also explicitly agreed that the Release was "general and comprehensive in nature." (R. 262). Now, after collecting $2.9 million, the Guaranty Association wants to renege on that agreement and argues for a narrow construction that entirely disregards key language. This Court should not allow that result.

CONCLUSION

Based on the foregoing analysis, the Appellant Second Injury Fund Operations of the South Carolina Insurance Reserve Fund f/k/a South Carolina Second Injury Fund respectfully renews its request that the Court reverse the order of the South Carolina Workers' Compensation Commission, as affirmed by the Circuit Court, and order that the South Carolina Property and Casualty Insurance Guaranty Fund is barred from recovering reimbursement from the Second Injury Fund for benefits paid to Michael Quarles.

Respectfully submitted,

LINDEMANN, DAVIS & HUGHES, P.A.

BY: _____

ANDREW F. LINDEMANN #13030
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920
Email: andrew@ldh-law.com

-and-

ROBERT M. COOK, II # 66296
THE ROBERT COOK LAW FIRM, LLC
Post Office Box 3575
Batesburg-Leesville, South Carolina 29070
(803) 317-2171
Email: robcook1965@yahoo.com

Counsel for Appellant Second Injury Fund Operations of the South Carolina Insurance Reserve Fund f/k/a South Carolina Second Injury Fund

October 16, 2019

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CERTIFICATE OF COUNSEL

The undersigned counsel for the Appellant certifies that the Final Reply Brief of Appellant complies with Rule 211(b), SCACR.

LINDEMANN, DAVIS & HUGHES P.A.

BY: _____

ANDREW F. LINDEMANN #13030
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920
Email: andrew@ldh-law.com

-and-

ROBERT M. COOK, II # 66296
THE ROBERT COOK LAW FIRM, LLC
Post Office Box 3575
Batesburg-Leesville, South Carolina 29070
(803) 317-2171
Email: robcook1965@yahoo.com

Counsel for Appellant Second Injury Fund Operations of the South Carolina Insurance Reserve Fund f/k/a South Carolina Second Injury Fund

October 16, 2019

CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Appellant certifies that the Final Reply Brief of Appellant complies with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

LINDEMANN, DAVIS & HUGHES P.A.

BY: _____

ANDREW F. LINDEMANN #13030
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920
Email: andrew@ldh-law.com

-and-

ROBERT M. COOK, II # 66296
THE ROBERT COOK LAW FIRM, LLC
Post Office Box 3575
Batesburg-Leesville, South Carolina 29070
(803) 317-2171
Email: robcook1965@yahoo.com

Counsel for Appellant Second Injury Fund Operations of the South Carolina Insurance Reserve Fund f/k/a South Carolina Second Injury Fund

October 16, 2019