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SC Court of Appeals

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.

Second Injury Fund Operations of the South Carolina Insurance
Reserve Fund f/k/a 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/Defendant.

PETITION FOR REHEARING

The Appellant Second Injury Fund Operations of the South Carolina Insurance Reserve Fund f/k/a South Carolina Second Injury Fund petitions the South Carolina Court of Appeals for a rehearing of the Court's recent decision in *South Carolina Property and Casualty Insurance Guaranty Association v. South Carolina Second Injury Fund*, Op. No. 5849 (S.C. Ct. App. filed August 18, 2021).

The grounds for the Appellant's petition for rehearing are addressed in detail in the supporting memorandum filed herewith and incorporated herein.

The Appellant's petition for rehearing is based on the Court's decision in *South Carolina Property and Casualty Insurance Guaranty Association v. South Carolina Second Injury Fund*, Op. No. 5849 (S.C. Ct. App. filed August 18, 2021); the supporting memorandum filed herewith; the briefs and Record on Appeal; Rule 221(a), SCACR; Rule 224, SCACR; and other rules of court.

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Property and Casualty Insurance Guaranty Association, ... Carrier/Defendant.

MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

The Second Injury Fund Operations of the South Carolina Insurance Reserve Fund f/k/a South Carolina Second Injury Fund ("Fund") has petitioned this Court for a rehearing of the recent decision *South Carolina Property and Casualty Insurance Guaranty Association v. South Carolina Second Injury Fund*, Op. No. 5849 (S.C. Ct. App. filed August 18, 2021). The Appellant respectfully submits that the following points were overlooked or misapprehended by this Court:

I.

As to the first issue raised on appeal, this Court affirmed the Workers' Compensation Commission and the Circuit Court in ruling that "the Guaranty Association meets the statutory definition of insurer or carrier and is entitled to seek reimbursement from the [Second Injury] Fund." Slip Op. at 6. While this Court states the various arguments made by the Fund, the Court does not provide any analysis of nor refute any of those arguments. Instead, the Court has decided this issue of statutory construction by citing to a single line from a Supreme Court decision that *neither party* found worthy of citing in their briefs to this Court and that neither of the lower tribunals cited in their decisions. This Court focuses *solely* on the Supreme Court's decision in *Hudson v. Lancaster Convalescent Center*, 407 S.C. 112, 754 S.E.2d 486 (2014), where the Court writes: "Guaranty is a last resort insurer created by the legislature to protect consumers in the event

that their insurer becomes insolvent." 754 S.E.2d at 492.[1] That one sentence does not establish that the Supreme Court actually construes the Guaranty Association as an "insurer" in the literal and legal sense of the term. In fact, this Court's reading of *Hudson* as establishing that the Guaranty Association is an "insurer" should be reconsidered in light of a later decision of the Supreme Court, also decided in 2014, where the Court actually identifies 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). This Court entirely overlooked the *Brock* decision which is not discussed or even cited in this Court's decision. It is *Brock* that described from a legal standpoint the nature of the Guaranty Association, and the Supreme Court was sure to explain that the Guaranty Association is *not the insurer of the wrongdoer*. On rehearing, the Court is respectfully requested to address and apply the correct law from the Supreme Court as to what kind of legal entity the Guaranty Association is

[1] The *Hudson* case, in fact, is not cited or referenced any place in the entire Record on Appeal, demonstrating that the Guaranty Association never relied on that decision at any stage of this litigation. As discussed below, the Guaranty Association denies that it is an insurer, which is a point that was overlooked by this Court.

and to conclude, as the Supreme Court has, that it is not an insurer in the legal sense.

Additionally, even the *Hudson* decision does not hold the Guaranty Association to be an insurer in the legal sense. After using the word "insurer," the Supreme Court in *Hudson* proceeds to address the applicable law:

> Section 38-31-60(b) provides that Guaranty "is considered the insurer to the extent of its obligation on the covered claims and, to this extent, has all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent...." When Guaranty steps into the shoes of an insolvent insurer, its liability is derivative of the insolvent insurance company's direct liability to the consumer. The legislature has limited this liability to a "covered claim" which is defined by § 38-31-20(8) as "... an unpaid claim ... which arises out of ... an insurance policy to which this chapter applies issued by an insurer, if the insurer is an insolvent insurer ... covered claim does not include: ... (h) any claim for interest."

Hudson, 754 S.E.2d at 492.

The Fund discussed this very statutory language in its briefs to this Court. Section 38-31-60(b) provides that the Guaranty Association "is considered the insurer *to the extent of its obligations on 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). (Emphasis added). This language does not state that the Guaranty Association is considered an "insurer" for purposes of seeking reimbursement from the Second Injury Fund. That

interpretation would disregard the explicit limiting language "to the extent of its obligations on covered claims." That limiting language provides that the Guaranty Association is considered an "insurer" only with respect to its "obligations on covered claims," which consists of its *liabilities* to consumers and not its ability to file claims or seek reimbursement from third parties such as the Second Injury Fund. *See, Buchanan v. South Carolina Property and Casualty Insurance Guaranty Association*, 424 S.C. 542, 819 S.E.2d 124, 126 (2018) (recognizing that the Guaranty Association's liability is derivative of an insolvent insurer's direct liability to a consumer on a "covered claim"). Thus, the Guaranty Association enjoys "all rights, duties, and obligations of the insolvent insurer" but only with respect to its liability for covered claims.

As the Fund has pointed out, this construction of the limiting language in 38-31-60(b) is clear from the plain and ordinary language used. Nonetheless, other provisions of the South Carolina Property and Casualty Insurance Guaranty Association Act, S.C. Code Ann. § 38-31-10, *et seq*., further support that interpretation. Specifically, the Guaranty Association Act includes a section that expressly defines (and thus limits) the Guaranty Association's rights to recover the amount of any "covered claim" from third parties. Section 38-31-90(2) authorizes the Guaranty Association to recover the amount of any "covered claim" against certain insureds with a high net worth or against "an affiliate of the insolvent

insurer." The Second Injury Fund is not listed and does not fit the description of those entities stated in Section 38-31-90(2). Importantly, the Guaranty Association Act does not include any other provision authorizing the Guaranty Association to recover the amount of any "covered claim" from any other entity, including the Second Injury Fund. As a "creature of statute," the Guaranty Association's right to seek recovery is limited to what the Guaranty Association Act expressly authorizes. *See*, *Duke Power Co. v. Laurens Electric Cooperative, Inc.*, 344 S.C. 101, 543 S.E.2d 560, 562 (Ct. App. 2000) ("creatures of statute … only have such authority as the legislature has given them"). That does not include a claim for reimbursement from the Second Injury Fund. Obviously, if the General Assembly intended to authorize a claim for reimbursement from the Second Injury Fund, it would have expressly provided for such. It did not do so.

In short, this Court's reliance on the single line from the *Hudson* decision is misplaced. A much more comprehensive analysis is required for a proper interpretation of a complex statutory scheme. The Guaranty Association, as confirmed by the Supreme Court in *Brock*, is not actually an insurance company.

This Court is further requested to address the statutory construction arguments that the Fund raised in its briefs. As indicated, the Court merely restates the Fund's different arguments in its opinion (Slip Op. at 5-6), but the Court never

actually analyzes those arguments, relying instead on that single line from the *Hudson* decision which is misconstrued.

To briefly recap those arguments, the Fund has pointed out that the Guaranty Association has denied that it is an insurance company throughout this litigation. *See*, Guaranty Association's Full Commission Brief, p. 17 ("SCPCIGA does not purport to be an insurance company"); Guaranty Association's Circuit Court Brief, p. 18 (same). (R. 114, 149). Thus, even the Guaranty Association does not claim to be an "insurer" in the legal sense of the term.

Moreover, as the Fund explains in its brief, Section 42-9-400(a) of the Workers' Compensation Act provides for reimbursement by the Second Injury Fund to an "employer or his insurance carrier" which paid the "awards of compensation and medical benefits provided by this title." S.C. Code Ann. § 42-9-400(a). Similarly, Section 42-7-320, which authorizes the winding down of the Second Injury Fund, provides that "[t]he fund shall continue reimbursing *employers and insurance carriers* for claims accepted by the fund on or before December 31, 2011." S.C. Code Ann. § 42-7-320(B)(3). (Emphasis added). Section 42-7-310(d)(2), however, defines "carrier" as "all insurance carriers, self-insurers and the State Accident Fund." S.C. Code Ann. § 42-7-310(d)(2). The term "insurance carrier" is not defined to include the Guaranty Association.

The rule of statutory construction known as "expressio unius est exclusion

alterius" is particularly appropriate to this analysis. That rule provides that "to express or include one thing implies the exclusion of another, or of the alternative." *Hodges v. Rainey*, 341 S.C. 79, 533 S.E.2d 578, 582 (2000). As noted, the term "carrier" is defined in Section 42-7-310(d)(2) as "all insurance carriers, self-insurers, and the State Accident Fund." S.C. Code Ann. § 42-7-310(d)(2). The term "carrier" is likewise 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. A guaranty association is not specifically included in either definition, and thus, consistent with "expressio unius est exclusion alterius," the failure to identify a guaranty association compels the conclusion that the General Assembly intended that a guaranty association *not be treated* as a "carrier" for purposes of the Second Injury Fund reimbursement. Quite simply, had the General Assembly intended to include a guaranty association as a "carrier" that could seek reimbursement from the Second Injury Fund, it certainly would have so stated in explicit terms.

In fact, as the Fund has shown but this Court overlooked, reference to another section of the Workers' Compensation Act strongly supports that very construction. Section 42-1-560 governs the subrogation rights of a "carrier" against third parties. Section 42-1-560(a) specifically provides:

> The respective rights and interests of the injured employee, or, in the case of his death, his dependents and

> any person entitled to sue therefor, and of the employer or person, *association*, corporation or carrier *liable for the payment of compensation and other benefits under this title, hereinafter called the "carrier,"* in respect to the cause of action and the damages recovered shall be as provided by this section.

S.C. Code Ann. § 42-1-560(a). (Emphasis added). Specifically, with regard to Section 42-1-560, the General Assembly re-defined the term "carrier" to explicitly include an "association … liable for the payment of compensation and other benefits under this title," which would thus include a guaranty association. This shows that the General Assembly understood that the general definition of "carrier" in Section 42-1-60 does not include a guaranty association; otherwise, it would not have been necessary to provide a unique and expanded definition of "carrier" for purposes of Section 42-1-560 alone. This also shows that the General Assembly did not intend for a guaranty association to be included in the definition of "carrier" as used in Sections 42-7-310, 42-7-320, and 42-9-400 with respect to reimbursement from the Second Injury Fund because quite simply the General Assembly did not utilize the same expanded definition of "carrier" as it used in Section 42-1-560.

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 further 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).

Finally, as the Fund points out in its briefs, both the Guaranty Association and the Second Injury Fund are funded in similar ways. The Guaranty Association is funded by assessments collected from member insurers, and for purposes of the Guaranty Association's "workers' compensation insurance account," those assessments are collected from workers' compensation carriers. *See*, S.C. Code Ann. § 38-31-60(c). Similarly, the Second Injury Fund is funded by assessments collected from the very same workers' compensation carriers. *See*, S.C. Code Ann. § 42-7-310(d). 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. The General Assembly obviously did not intend to

allow for such circuitous litigation that fosters only administrative inefficiencies. The Court did not consider or address this additional point of statutory construction.

In sum, the applicable provisions of the Workers' Compensation Act and the Guaranty Association Act do not authorize the Guaranty Association to seek reimbursement from the Second Injury Fund. The Guaranty Association is not an "insurer" or "carrier" under the Workers' Compensation Act which can pursue a claim for reimbursement. On rehearing, this Court is respectfully requested to reverse the lower tribunals and ruled that the reimbursement claim for benefits paid to Michael Quarles should be barred.

II.

As its second issue on appeal, the Fund contends that the Guaranty Association does not qualify as an "insurance carrier" to whom reimbursement may be made because the Guaranty Association does not pay any assessments to the Second Injury Fund. By explicit language, reimbursement from the Second Injury Fund is restricted to those employers and carriers which are current in the payment of those assessments. *See*, S.C. Code Ann. § 42-7-310(d)(2). As this language in the statutory scheme provides, because the Guaranty Association does

not pay assessments, it cannot be eligible for reimbursement from the Second Injury Fund.[2]

The record is clear that the Guaranty Association pays no assessments to the Second Injury Fund. Nonetheless, this Court ruled that "the Guaranty Association *effectively* paid assessments to the Fund via the assessments paid by its member insurers and is, thus, eligible to seek reimbursement from the Fund." Slip Op. at 8. (Emphasis added). The Court has made the same error as the lower tribunals. While it is true that workers' compensation member insurers of the Guaranty Association are sources of funding for the Second Injury Fund, those insurers are not paying those assessments *for or on behalf of* the Guaranty Association. They are paying those assessments because they individually qualify as "insurance carriers" which are statutorily responsible to pay assessments to the Second Injury Fund pursuant to Sections 42-7-310 and 42-7-320. There is no "effective" payment of assessments on behalf of the Guaranty Association, and nothing in the statutory scheme supports that conclusion. The "effective payments" rationale constitutes nothing more than a judge-made "legal fiction."

[2] It is worth noting that Section 42-7-320 also provides that "[i]nsurance carriers, self-insurers, and the State Accident Fund remain liable for Second Injury Fund assessments, as determined by the State Fiscal Accountability Authority, in order to pay accepted claims." S.C. Code Ann. § 42-7-320(B)(3). Again, in Section 42-7-320, the Guaranty Association is not identified as an entity responsible for paying assessments to cover the reimbursable claims.

As its reasoning, the Court explains that "there was no indication that any of the member insurers were delinquent in their payment of assessments to the Fund." Slip Op. at 8. With that statement, the Court indicates that the delinquency of a member controls whether the Guaranty Association is entitled to seek reimbursements. In other words, because the Guaranty Association's eligibility to seek reimbursement is tied to its members' conduct, presumably the failure of a member to pay its assessments would make Guaranty Association ineligible to seek reimbursement. That is the logical end of the Court's analysis, which shows the fallacy of the Court's ruling. The Guaranty Association should not be tied to the actions *or inactions* of its members – and certainly not without explicit direction from the General Assembly in that regard.

In short, the statutory scheme requires an "insurance carrier" to pay assessments to have a right to seek reimbursement. If the Guaranty Association is to be considered an "insurance carrier" under this statutory scheme, then it is required to meet all the requirements of the scheme, including the payment of assessments – and not by means of the legal fiction of "effective payments." The Guaranty Association pays no assessments to the Second Injury Fund, and as a result, it clearly is not entitled to seek reimbursement from the Fund.

III.

As an additional basis for denying the Guaranty Association's claim for reimbursement from the Second Injury Fund, the Fund relies upon the Settlement Agreement and Release entered between the Guaranty Association and the Second Injury Fund dated June 17, 2013. (R. 258-271). The Fund contends that the current claim for reimbursement of workers' compensation benefits paid to Michael Quarles was included in that settlement, and thus, any liability by the Fund for reimbursement was fully released.

The Commission, as affirmed by the Circuit Court, found that the Settlement Agreement and Release entered between the Guaranty Association and the Second Injury Fund dated June 17, 2013, was not ambiguous. The Commission ruled:

> Based on the plain, clear and unequivocal language contained therein and any reasonable construction thereof, the Settlement Agreement and Release entered between the Guaranty Association and the Second Injury Fund dated June 17, 2013 does not bar SCPCIGA's claim for reimbursement in this matter nor does it effectuate a release of SCSIF's liability for reimbursement in this matter.

(R. 39). This Court agrees that "the claim was not released based on the unambiguous language contained in the settlement agreement and release entered between the Guaranty Association and the Fund." Slip Op. at 10. Thus, this Court also found that Release to be unambiguous.

However, this Court makes the very same mistake that the lower tribunals made. This Court concludes that "the settlement and release applied only to those claims on which the Fund was paying the Guaranty Association as of February 22, 2013, and the Guaranty Association was not paying Quarles' claim as of that date." Slip Op. at 10. To reach that conclusion, the Court deliberately -- and with no explanation -- reads key language out of the release language and gives undue preference to a single modifying phrase in a series of co-equal modifying phrases. Like the lower tribunals, this Court focuses only on the phrase, "on which the SIF is currently paying the Guaranty Association as of February 22, 2013," and concludes that any other claims that existed on that date or came into existence after that date were beyond the scope of the release. Ultimately, this Court concludes that only claims already known to the Second Injury Fund and on which payments were being made by February 22, 2013, fell within the scope of the release.

However, by interpreting that language in that limited manner, this Court fails to apply the "broadest meaning" as the parties agreed was proper in Paragraph 7.[3] But more significantly, this Court gives absolutely no effect to and effectively strikes the additional modifiers of the word "claims" that followed, including

[3] Paragraph 7 of the Release provides: "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).

"whether known or unknown, noticed or unnoticed, asserted or not asserted, accepted or not accepted, existing or potential." Those modifying terms demonstrate that claims that were not even known or existing as of February 22, 2013, as well as claims on which payments were not being made as of that date, were nonetheless intended to be included within the scope of the release. Otherwise, the language "whether known or unknown, noticed or unnoticed, asserted or not asserted, accepted or not accepted, existing or potential" would be utterly meaningless. In other words, if limited to claims already being paid on February 22, 2013, those claims would obviously be "known," "asserted," "accepted" and "existing." What then could be the purpose of the modifiers "unknown," "not asserted," "not accepted," or "potential"?[4] Each of those terms would be superfluous, and yet, that is precisely how this Court and the lower tribunals have read the release language. The Court has erroneously ignored many of the modifiers of the word "claims" which, when properly read, brought the Quarles claim clearly and unambiguously within the scope of the Release.

As well established rules of construction require, the scope of the Release must be read to include all claims "whether known or unknown, noticed or

[4] In its briefs, the Fund actually asked this very question: "What then could be the purpose of the modifiers 'unknown,' 'not asserted,' 'not accepted,' or 'potential'?" The Guaranty Association provides no answer. Likewise, this Court provides no answer. In actuality, that question cannot be answered in such a way that allows the Guaranty Association to prevail. Instead, for the Guaranty Association to prevail, those additional modifiers must be ignored and read out of the agreement, which is precisely what has happened at each stage of this litigation.

unnoticed, asserted or not asserted, accepted or not accepted, existing or potential." That is the proper reading of the Release, and one that comports with the direction from the Supreme Court that "an interpretation that gives meaning to all parts of the contract is preferable to one which renders provisions in the contract meaningless or superfluous." *Stevens Aviation, Inc. v. DynCorp International LLC*, 407 S.C. 407, 756 S.E.2d 148, 153 (2014).

In short, this Court has erred as a matter of law in reading key language entirely out of the Release. On rehearing, the Court is respectfully requested to construe the Release as it was actually written and so that *all parts* of the Release are given effect and meaning. The only proper reading of the Release requires the conclusion that the Quarles claim -- which was known to the parties at the time of execution -- was fully released by the prior settlement.

CONCLUSION

Based on the foregoing discussion, the Appellant Second Injury Fund Operations of the South Carolina Insurance Reserve Fund f/k/a South Carolina Second Injury Fund respectfully requests that the Court rehear its decision in this case. It is also respectfully requested that the Court consider hearing oral argument in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Section (d)(1) of the Supreme Court's Order RE: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (issued August 25, 2021), the undersigned employee of Lindemann & Davis, P.A., counsel for the Appellant, does hereby certify that service of the **Petition for Rehearing** and the **Memorandum in Support of Petition for Rehearing** in the above-captioned matter was made upon all counsel of record by email only at the below listed email addresses this the 2nd day of September 2021:

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September 2, 2021

Via Email Only
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Email: ctappfilings@sccourts.org

RE: South Carolina Property and Casualty Insurance Guaranty Association v. Second Injury Fund Operations of the South Carolina Insurance Reserve Fund f/k/a South Carolina Second Injury Fund
Appellate Case Number: 2019-000020
Civil Action Number: 2018-CP-23-2580
Our File Number: 104.10063

Dear Ms. Kitchings:

In accordance with Section (b)(2) of the Supreme Court's Order RE: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (issued August 25, 2021), please find enclosed for filing by email only the **Petition for Rehearing** and the **Memorandum in Support of Petition for Rehearing** in the above referenced matter. Copies are being served upon all counsel of record pursuant to Section (d)(1) of the same order.

I have not enclosed a filing fee because the Appellant is an entity of the State of South Carolina and is exempt. If you have any questions, please advise.

Sincerely,

LINDEMANN & DAVIS, P.A.

Andrew F. Lindemann

AFL/jmb
Enclosures

cc: J. Hubert Wood, III, Esquire *(w/ Enclosures, Via Email Only)*
Robert M. Cook, II, Esquire *(w/ Enclosures, Via Email Only)*