

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

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

Appellate Case No. 2021-001229
S.C. Ct. App. Opinion No. 5849
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,.....

Petitioner,

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.

**RETURN TO PETITION
FOR WRIT OF CERTIORARI**

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STATEMENT OF THE CASE

Pursuant to South Carolina Appellate Court Rule (SCACR) 242, South Carolina Second Injury Fund (the Fund) petitions this Court for a writ of certiorari to review the Court of Appeals' 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) (re-hearing denied). The Court of Appeals affirmed the judgment/order of the Court of Common Pleas, Greenville County (Circuit Court) filed December 7, 2018 affirming the Decision and Order of the South Carolina Workers' Compensation Commission (Commission) filed March 29, 2018.¹ Respondent, South Carolina Property and Casualty Insurance Guaranty Association (the Guaranty Association), respectfully asserts that the matter does not merit review by this Court and opposes the petition.

The Employee/Claimant, Michael Quarles, sustained compensable injuries by accident arising out of and in the course of his employment with the Employer, Cryovac Sealed Air Corporation, on December 17, 1999 (R.pp. 439-444). Appropriate medical and temporary disability benefits were provided and the matter was resolved by way of an Order approved by the Commission dated January 6, 2005 pursuant to which the Claimant remains entitled to continuing causally related medical benefits (R.pp. 435-438). An Agreement to Reimburse Compensation entered between the Employer's carrier, Lumbermens Mutual Casualty Company (Lumbermens), and the Fund was approved by the Commission on November 21, 2003 and provided that

¹ South Carolina Code Ann. §42-17-60 (1976, as amended) was amended effective July 1, 2007 so as to provide that appeals from the Commission are directly to the South Carolina Court of Appeals. However, the date of accident/loss in the underlying claim for workers' compensation benefits pre-dates the statutory amendment. Therefore, the appeal in this matter was directly to the Court of Common Pleas pursuant to this Court's holding in Pee Dee Regional Transportation v. S.C. Second Injury Fund, 375 S.C. 60, 650 S.E.2d 464 (2007) and venue was proper in Greenville County in light of the injury by accident in the underlying claim occurring in Greenville County and the Employer's residence being in Greenville County.

Lumbermens shall receive reimbursement in accordance with the terms and provisions of Section 42-9-400 for the cervical spine only (R.p. 445) (emphasis added). The Fund made reimbursement payments to Lumbermens in accordance with the approved Agreement to Reimburse Compensation in numerous installments from November 25, 2003 through January 26, 2014 (R.pp. 446-488; R.p. 546; and R.pp. 686-687).

Lumbermens was liquidated via an Order of the Circuit Court of Cook County, Illinois, County Department, Chancery Division dated May 8, 2013 (R.pp. 420-430). As a result, the Guaranty Association became responsible for the claim pursuant to the terms and provisions of S.C. Code Ann. §38-31-10 et seq. (2019) (the South Carolina Property and Casualty Insurance Guaranty Association Act (Guaranty Act)). According to the deposition testimony of the Guaranty Association's Executive Director, J. Smith Harrison, Jr., this matter is a covered workers' compensation claim under the Guaranty Act for which the Guaranty Association is fully responsible and paying (R.p. 622).

The Guaranty Association

The Guaranty Association is a non-profit unincorporated legal entity created pursuant to S.C. Ann. §38-31-40 (2019) (emphasis added). The Guaranty Association consists of insurers defined as "member insurers" under S.C. Code Ann. §38-31-20(8) (2019) as a condition of their authority to transact business in South Carolina. Similar to the funding mechanisms of the Fund as set forth in S.C. Code Ann. §42-7-310(d)(2) and §42-7-320(B)(3) (1976, as amended), the Guaranty Association is funded via assessments paid by member insurers pursuant to the terms and provisions of S.C. Code Ann. §38-31-40, §38-31-60 and §38-31-140 (2019).²

² The Guaranty Association acknowledges that §42-7-310(d)(2) and §42-7-320(B)(3) also provide for assessments to be paid to the Fund by self-insurers and the State Accident Fund but presumes those entities are being reimbursed on their accepted claims.

Pursuant to §38-31-40, the Guaranty Association is divided into four separate accounts for purposes of administration and assessment. As provided in §38-31-40(a), one of the separate accounts is the “workers’ compensation insurance account.” Section 38-31-60 sets forth the powers and duties of the Guaranty Association. Pursuant to §38-31-60(c), the Guaranty Association shall allocate claims paid and expenses incurred among the four accounts separately and assess member insurers separately for each account in amounts necessary to pay: (i) the obligation of the association under item (a) of this section (i.e. payment of covered claims); (ii) the expenses of handling covered claims; and (iii) other expenses authorized by this chapter (i.e. the Guaranty Act). The Guaranty Association’s workers’ compensation member insurers responsible for assessments necessary to fund its workers’ compensation liabilities are also responsible for payment of assessments necessary to fund the Fund on a continuing basis pursuant to §42-7-310(d)(2) and §42-7-320(B)(3). The Guaranty Association is authorized to recover from the assets of an insolvent insurer and in limited circumstances, certain insureds and affiliates of an insolvent insurer pursuant to S.C. Code Ann. §38-31-90(1) and (2)(a) and (b) (2019).

Pursuant to §38-31-60(b), the Guaranty Association 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 (emphasis added). “Covered claim” is defined under S.C. Code Ann. §38-31-20(8) (2019) which along with §38-31-60, places various limitations on what is considered a covered claim and the Guaranty Association’s liability in certain situations. However, §38-31-60(iv) expressly provides that the Guaranty Association “...shall pay the full amount of any covered workers’ compensation claim.” (emphasis added) (R.pp. 616-617).

The Fund

South Carolina Code Ann. §42-7-310 (1976, as amended) provided for the establishment, purpose, administration, funding and staff of the Fund. A careful reading of §42-7-310(d)(2) reveals that it does not define the term “carrier” or “insurer” nor does it exclude the Guaranty Association as an entity entitled to reimbursement. Rather, it provides that the term as used in §42-7-310 includes all insurance carriers, self-insurers and the State Accident Fund (emphasis added). Reimbursements to an “employer” or “insurance carrier” are governed by, and made pursuant to, S.C. Code Ann. §42-9-400 and §42-9-410 (1976, as amended). In this case, the approved Agreement to Reimburse Compensation specifically provides that Lumbermens shall receive reimbursement in accordance with the provisions of §42-9-400. (emphasis added) (R.p. 445).

Amendments to the South Carolina Workers’ Compensation Act (Title 42 of the South Carolina Code (1976, as amended)) (Workers’ Compensation Act) effective July 1, 2007 included the enactment of S.C. Code Ann. §42-7-320 (1976, as amended) providing for the termination of the Fund and schedule for the same. Under §42-7-320(A), the Budget and Control Board n/k/a the State Fiscal Accountability Authority (hereinafter referred to collectively as “SFAA”) was required to provide for the efficient and expeditious closure of the Fund with the orderly winding down of the affairs of the Fund so that the remaining liabilities of the Fund are paid utilizing assessments, accelerated assessments, annuities, lost portfolio transfer, or such other mechanisms as are reasonably determined necessary to fund any remaining liabilities of the fund (emphasis added). §42-7-320(B)(3) provides that insurance carriers, self-insurers and the State Accident Fund remain liable for assessments, as determined by SFAA, in order to pay accepted claims and the Fund shall continue reimbursing employers and insurance carriers for claims accepted by the

Fund on or before December 31, 2011 (emphasis added). §42-7-320 does not define the terms “carrier” or “insurer” nor does it exclude the Guaranty Association as an entity entitled to reimbursement.

The record reveals that in executing its statutory responsibilities under §42-7-320, SFAA retained KPMG to provide an actuarial analysis of the Fund’s remaining liabilities and options for funding those liabilities. KPMG produced its initial actuarial report in March 2013 (R.pp. 385-419). One of the funding options proposed by KPMG was a five year/\$60,000,000 per year assessment plan. SFAA adopted and approved a Second Injury Fund Closure Plan with the funding for its remaining liabilities being the five year/\$60,000,000 per year assessment plan proposed by KPMG (R.pp. 712-731; R.pp. 646-657; R.pp. 498-499 and 509). Concerning the administration of the Fund’s continuing operations, SFAA assigned responsibility in that regard to the South Carolina Insurance Reserve Fund (SCIRF). SCIRF’s administrative responsibilities commenced in May 2013 shortly before the Fund’s programs and appropriations terminated July 1, 2013 pursuant to §42-7-320 (R.pp. 630-638). Chris Lombard is the Assistant Director of Claims for SCIRF and in connection therewith, is responsible for the management of the Fund’s operations (R.pp. 628-630). David Stooksbury is the Business/Finance Manager for SCIRF and in connection therewith, is in charge of the Fund’s ongoing assessments under §42-7-320 (R.p. 638; and R.pp. 495-496).

Prior Litigation

Disputes involving the Guaranty Association’s right to reimbursement from the Fund were extensively litigated in connection with workers’ compensation benefits paid by the Guaranty Association to injured employees following the insolvency of Legion Insurance Company and Reliance Insurance Company. That litigation resulted in various decisions and orders issued by

the Commission and the Circuit Court all of which determined the Guaranty Association to be eligible for, and entitled to, reimbursement.

Litigation associated with the claim of Herman Webster, Claimant, v. Webster Plumbing & Gas, Employer, and Subrogation Partners on behalf of Legion Insurance in Liquidation and South Carolina Property and Casualty Insurance Guaranty Association, Carriers, Appellate Case No. 2010-181727, was pending before the Court of Appeals on appeal by the Fund. Prior to a ruling by the Court of Appeals, the Guaranty Association and the Fund entered into a Settlement Agreement and Release dated June 17, 2013 which resulted in dismissal of the Fund's appeal (R.pp. 341-342). The settlement agreement, defined the terms "Legion" and "Reliance" and effectuated the Guaranty Association's release of the Fund on those reimbursement claims "that are either: (A) related to Legion and/or Reliance or: (B) whether related or unrelated to Legion and/or Reliance and/or American Mutual Insurance Company, any and all claims, on which [the Fund] is currently paying to the Guaranty Association as of February 22, 2013, including, but not limited to, the cases of (1) Quick, Grover v. FA Bailey and Sons, Accepted Date: October 1, 1987; Carrier: American Mutual Liability Insurance); (2) Alston, Kenneth v. Bi-lo, (Accepted Date: November 2, 1988; Carrier: American Mutual Liability Insurance); and (3) Lusk, Ray E. v. Bi-lo, (Accepted Date: August 10, 1989; Carrier: American Mutual Liability Insurance) (emphasis added). The settlement agreement further states: "The Parties intend this release to be general and comprehensive in nature and to release: (A) all claims related to Legion and/or Reliance and (B) any and all claims, whether related or unrelated to Legion and/or Reliance, on which the SIF is currently paying the Guaranty Association as of February 22, 2013, whether known or unknown, noticed or unnoticed, asserted or not asserted, accepted or not accepted, existing or potential, including, but not limited to, any claims that may arise pursuant to any "large deductible" policies

issued and/or administered by Legion and/or Reliance, as well as their administrators, trustees, legal representatives, and successors and assigns to the maximum extent permitted by law for which the Guaranty Association assumed responsibility pursuant to S.C. Code Ann. Title 38 Chapter 31 (the Guaranty Act) subsequent to the respective liquidations of the underlying carrier or carriers” (emphasis added) (R.pp. 732-750).

Current Litigation

The Guaranty Association sought reimbursement from the Fund in accordance with the Agreement to Reimburse Compensation entered between Lumbermens and the Fund pursuant to the terms and provisions of §38-31-60(b), §42-7-310(b), §42-7-320 and §42-9-400 (R.p. 79). The Fund disputed reimbursement contending the Guaranty Association is not an entity statutorily authorized to receive reimbursement; that the Guaranty Association does not pay assessments to the Fund; that the liquidated carrier pursuant to which the Guaranty Association asserts its right to reimbursement, Lumbermens, is in liquidation and is (and has been) in default in payment of its statutory assessments to the Fund thereby barring the claim pursuant to §42-7-310(b)(2); that Lumbermens has not participated in the assessment process subsequent to its liquidation thereby barring the claim under §42-7-310 and §42-7-320; and that the Guaranty Association’s reimbursement claim is barred by reason of the Settlement Agreement and Release dated June 17, 2013 (R.pp. 80-82).³

The Guaranty Association and the Fund, by and through counsel, appeared before the Single Commissioner for a hearing on June 21, 2017 to address the reimbursement claim. Various documentary evidence was submitted and included in the record pursuant to the Administrative Procedures Act (APA). In addition to the APA Submissions, the deposition of David Stooksbury

³ The Guaranty Association and the Fund are the only parties who have participated in the current litigation. Counsel for the Employee/Claimant and Lumbermens were appropriately served with all filings and pleadings.

dated April 26, 2017 with exhibits; the deposition of Christopher Lombard dated March 8, 2017 with exhibits; and the deposition of J. Smith Harrison, Jr. dated March 8, 2017 were submitted and included in the record. The hearing proceeded in the form of oral argument by counsel (R.pp. 157-223).

The Single Commissioner's Decision and Order was filed and served on October 2, 2017. The Single Commissioner thoroughly analyzed the evidentiary record and applicable law, made various findings of fact and conclusions of law, and ordered that the Fund shall make reimbursement to the Guaranty Association for workers' compensation benefits paid by it in this matter in accordance with the terms and provisions of the approved Agreement to Reimburse Compensation. The Fund timely filed and served its Form 30 Request for Commission Review of the Single Commissioner's Decision and Order on October 16, 2017. Oral argument was held before a Full Commission Appellate Panel of the Commission on January 22, 2018. The Appellate Panel issued its Decision and Order dated March 29, 2018 wherein it made the following:

Findings of Fact

1. All parties to this proceeding are subject to, and bound by, the terms and provisions of the South Carolina Workers' Compensation Act.
2. [The Fund] and Lumbermens entered into an Agreement to Reimburse Compensation in accordance with the provisions of §42-9-400 for the cervical spine only that was approved by the Commission on November 21, 2003 and not appealed by either party.
3. As a result of the liquidation of Lumbermens on May 8, 2013, this workers' compensation claim constitutes a "covered claim" for which the Guaranty Association is entirely responsible and considered the insurer having all rights, duties and obligations of Lumbermens as if Lumbermens had not become insolvent.
4. [The Guaranty Association] has paid certain medical benefit expenses for, or on behalf of, the Claimant in connection with this covered workers' compensation claim and remains liable for medical benefits as provided for in the Commission's approved Order dated January 6, 2005.
5. [The Fund] made reimbursement payments to Lumbermens in accordance with the approved Agreement to Reimburse Compensation in numerous installments from November 25, 2003 through January 16, 2014.
6. [The Guaranty Association] is a non-profit unincorporated legal entity and is an association authorized to insure liabilities under the South Carolina Workers' Compensation Act and in particular, is authorized to insure the Employer's workers' compensation liabilities to

the Claimant in this claim thereby meeting the statutory definition of the terms “carrier” or “insurer” in accordance with §42-1-60 and §42-5-20 as those terms are used in §42-9-400 and §42-7-320.

7. [The Guaranty Association] has never been assessed by [the Fund] and is not delinquent or in default with respect to any assessments.
8. [The Guaranty Association], as an unincorporated legal entity, effectively pays assessments to [the Fund] via the assessments paid by its workers’ compensation member insurers, none of whom are delinquent or in default with respect to assessments payable to [the Fund].
9. Lumbermens is not delinquent or in default with respect to any assessments payable to [the Fund] and has paid all assessments owed to [the Fund].
10. [The Fund’s] liability for reimbursement on this claim was considered and included in the five year/\$60,000,000 per year funding mechanism plan adopted by SFAA pursuant to §42-7-320 in connection with which [the Guaranty Association’s] workers compensation member insurers have paid assessments to [the Fund] to fund reimbursement of this claim.
11. The plain, clear and unequivocal language in the Settlement Agreement and Release entered between [the Guaranty Association] and [the Fund] dated June 17, 2013 provides that beyond the Legion and Reliance claims as defined therein; the settlement and release only applied to claims on which [the Fund] was paying [the Guaranty Association] as of February 22, 2013 and does not bar this reimbursement claim or release [the Fund] from its liability for reimbursement on this claim.
12. [The Guaranty Association] was not paying this claim as of February 22, 2013.
13. At no time has [the Fund] reimbursed [the Guaranty Association] in connection with this claim and specifically, [the Fund] was not paying [the Guaranty Association] on this claim as of February 22, 2013.
14. [The Guaranty Association] is statutorily authorized to make a reimbursement claim against [the Fund] and receive reimbursement from [the Fund] for workers’ compensation benefits paid by [the Guaranty Association] in connection with this matter pursuant to, and in accordance with, the Agreement to Reimburse Compensation approved by the Commission on November 21, 2003 which was not appealed by any party.

Conclusions of Law

1. Under S.C. Code Ann. §42-3-180 (1976, as amended) and §42-7-310(b), the Commission has jurisdiction to determine this dispute between [the Guaranty Association] and [the Fund] concerning reimbursement and arising under Title 42.
2. Under §38-31-20(8) and §38-31-60(iv), this matter involves a claim for workers’ compensation benefits in connection with which [the Guaranty Association] is responsible for paying the full amount as a result of the liquidation of Lumbermens and specifically, is liable and responsible for paying medical benefits under the Workers’ Compensation Act for, or on behalf of, the Claimant in accordance with Commission’s approved Order dated January 6, 2005.
3. Under §38-31-60(b), [the Guaranty Association] is considered the insurer on this covered workers’ compensation claim and to this extent, has all rights, duties and obligations of Lumbermens as if Lumbermens had not become insolvent and specifically, has the right to reimbursement from [the Fund] in accordance with the terms and provisions of the

Agreement to Reimburse Compensation approved by the Commission on November 21, 2003.

4. Under §38-31-40, §42-1-60 and §42-5-20, [the Guaranty Association] is an unincorporated association authorized by the Commission to insure liabilities under the Workers' Compensation Act; is, and has been, authorized to insure the remaining workers' compensation benefit liabilities of the Employer to the Claimant in this matter; and is, therefore, the Employer's "insurance carrier" as the term is used in §42-9-400 and §42-7-320. Moreover, the South Carolina Supreme Court's decision in Brock v. South Carolina Property and Casualty Insurance Guaranty Association, 410 S.C. 361, 764 S.E.2d 920 (2014) (involving a policy of liability insurance rather than a policy of workers' compensation insurance under which [the Guaranty Association] is fully responsible for covered claims) is not applicable to this matter.
5. Under §42-7-310 and §42-7-320, Lumbermens has paid all assessments owed and payable to [the Fund] and is not delinquent or in default with respect to payment of any assessments to [the Fund]; and its non-participation in the assessment process subsequent to its liquidation is not material given that it is not in default or delinquent with respect to payment of its assessments; the fact that its assessments would go to zero once it went into liquidation and stopped paying claims and the assessments paid by [the Guaranty Association's] member workers' compensation insurers in accordance with the five year/\$60,000,000 per year funding plan adopted by SFAA in connection with which [the Fund's] liability for reimbursement on this claim was considered and included.
6. Under §42-7-310 and §42-7-320, [the Guaranty Association], as an unincorporated association, effectively pays assessments to [the Fund] via the assessments paid by its workers' compensation member insurers which specifically include assessments levied by [the Fund] in accordance with the five year/\$60,000,000 per year funding plan adopted by SFAA which considered and included [the Fund's] liability for reimbursement on this particular claim.
7. Under §42-7-310 and §42-7-320, none of [the Guaranty Association's] workers' compensation member insurers are delinquent or in default with respect to assessments payable to [the Fund].
8. 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 Fund] dated June 17, 2013 does not bar [the Guaranty Association's] claim for reimbursement in this matter nor does it effectuate a release of [the Fund's] liability for reimbursement in this matter and the amount of the monetary consideration is of no consequence.
9. Under §38-31-60, the terms and provisions of §38-31-90 and §38-31-100 are not exclusive with regard to [the Guaranty Association's] rights of recoupment and setoff and do not abrogate or limit the rights of Lumbermens under the Workers' Compensation Act which [the Guaranty Association] maintains pursuant to §38-31-60(b).
10. Under §38-31-60, §42-9-400, §42-7-310, §42-7-320, §42-1-60 and §42-5-20; [the Guaranty Association] is an entity statutorily authorized to make a reimbursement claim against [the Fund] in this matter and to receive reimbursement from [the Fund] for workers' compensation benefits paid for, or on behalf of, the Claimant in this matter and is entitled to reimbursement from [the Fund] in accordance with the terms and provisions of the

unappealed Agreement to Reimburse Compensation approved by the Commission on November 21, 2003.

11. Under §38-31-60(b), the rights of the liquidated carrier under the Workers' Compensation Act which [the Guaranty Association] maintains are not limited exclusively to matters pertaining to the defense by [the Guaranty Association] of ongoing claims. Alternatively, [the Guaranty Association's] reimbursement claim is inextricably linked to its obligation for payment of this fully covered workers' compensation claim and as such, is part and parcel of [the Guaranty Association's] obligation for payment of this covered claim and its defense thereof.
12. Under §42-7-310 and §42-7-320 and in light of the foregoing Findings of Fact Nos. 7 – 10 and Conclusions of Law Nos. 5 – 8; any assertion that [the Guaranty Association's] reimbursement claim is barred due to a failure to pay assessments, directly or otherwise, is without merit.

Based on the foregoing, the Appellate Panel affirmed the Decision and Order of the Single Commissioner dated October 2, 2017 in its entirety and ordered that the Fund shall make reimbursement to the Guaranty Association for workers' compensation benefits paid in this matter in accordance with the terms and provisions of the approved Agreement to Reimburse Compensation.

The Fund appealed to the Circuit Court via a Petition/Notice of Appeal filed April 26, 2018. The parties were heard by the Circuit Court on October 30, 2018. The Circuit Court issued its order filed December 7, 2018. The Circuit Court held that the Commission's findings of fact and conclusions of law are supported by substantial evidence in the record; are not affected by any error of law; are not clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; are not arbitrary or capricious; and are not characterized by an abuse of discretion or clearly unwarranted exercise of discretion. Accordingly, the Circuit Court affirmed the Commission's Decision and Order. The Court of Appeals affirmed the Circuit Court's judgement/order without dissent.

ARGUMENTS

- I. **The Court of Appeals made no error of law in affirming the Circuit Court’s judgement/order which affirmed the Commission’s findings of fact and conclusions of law that the Guaranty Association meets the statutory definition of the Employer’s “insurer” or “carrier” thereby authorizing it to seek and receive reimbursement from the Second Injury Fund.**

The cardinal rule of statutory construction is that words used therein must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand its operation. Wright v. Colleton County, 301 S.C. 282, 391 S.E.2d 564 (1990). The language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose. Multi-Cinema, Ltd. v. S.C. Tax Commission, 292 S.C. 411, 357 S.E.2d 6 (1987). Statutes dealing with same subject matter are *in pari materia* and must be construed together if possible to produce a single harmonious result. Beaufort County v. S.C. State Election Commission, 395 S.C. 366, 371, 718 S.E.2d 432, 435 (2011) *citing* Joiner ex rel. Rivas v. Rivas, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000).

In addition to conferring the rights of the insolvent insurer (to the extent of its obligation on the covered claims), §38-31-60(d) directs that the Guaranty Association “shall investigate claims brought... and adjust, compromise, settle and pay covered claims to the extent of the Association’s obligation and deny all other claims.” Among its enumerated affirmative powers, §38-31-60 (j) provides that the Guaranty Association may sue (or be sued) and §38-31-60(l) authorizes it to perform any other acts necessary and proper to effectuate the purpose of the Guaranty Act (emphasis added); *see also* Farmer v. CAGC Insurance Company, 424 S.C. 579, 587-588; 819 S.E.2d 142, 146 (Ct. App. 2018) (rehearing denied) (motion to dismiss petition for cert. granted April 25, 2019) *holding* the statutory directive under §38-31-60(d) (2018) requiring that the Guaranty Association “shall investigate claims brought against the association and adjust,

compromise, settle, and pay covered claims to the extent of the [Guaranty Association's] obligation and deny all other claims..." and §38-31-60(l) authorizing the Guaranty Association to "perform any other acts necessary or proper to effectuate the purpose of [the Guaranty Act]," allow it to take affirmative/offensive action not specifically enumerated under the Guaranty Act with respect to its handling and payment of a covered claim.

As part of its obligation to adjust and pay this fully covered workers' compensation claim, the Guaranty Association is entitled to assert Lumbermens' existing right of reimbursement. It is self-evident that the Guaranty Association would have no reason to assert the Lumbermens' right to reimbursement but for its obligation to pay the claim imposed by §38-31-60(b). Therefore, the Guaranty Association's reimbursement claim is inextricably linked to its obligation to adjust and pay the claim, and is a necessary and proper action to effectuate the Guaranty Act's purpose of paying this fully covered workers' compensation claim.

There is no language in §38-31-90 or S.C. Code Ann. §38-31-100 (1976, as amended) which abrogates the insolvent insurer's rights under the Workers' Compensation Act which the Guaranty Association assumes pursuant to §38-31-60(b) or its powers pursuant to §38-31-60(l). The Fund fails to reference any language to that effect. Instead, the Fund references the statutory construction principle of "expression unius est exclusion" to support its misguided assertion that the Guaranty Association's rights of recoupment and offset as provided in §38-31-90 and §38-31-100 are exclusive. The Guaranty Association's rights of recoupment and offset as provided for in §38-31-90 and §38-31-100 are not dispositive in determining whether the Guaranty Association is statutorily authorized to receive reimbursement from the Fund and the Fund's argument ignores the clear, unequivocal and broad language in §38-31-60(b) and §38-31-60(l).

Contrary to the Fund’s assertion, §42-7-310 does not define the term “carrier” nor does it exclude the Guaranty Association as an insurance carrier or entity entitled to reimbursement. Rather, it merely provides that the term as used in §42-7-310(d)(2) includes all insurance carriers, self-insurers and the State Accident Fund in the context of the payment of assessments to the Fund (emphasis added). In this instance, the approved Agreement to Reimburse Compensation specifically provides that reimbursements are to be made in accordance with the provisions of §42-9-400 (emphasis added). §42-9-400(a) states in pertinent part that “...such employer or insurance carrier shall be reimbursed from the Second Injury Fund as created by §42-7-310...” (emphasis added). §42-7-320(B)(3) requires the Fund to continue reimbursing employers and insurance carriers for claims accepted by it on or before December 31, 2011.

S.C. Code Ann. §42-1-60 (1976, as amended) defines the term “carrier” or “insurer” as “any person or fund authorized under S.C. Code Ann. §42-5-20 (1976, as amended) to insure under this title (Title 42) and includes self-insurers.” §42-5-20 states in pertinent part that “[e]very employer who accepts the provisions of this title relative to the payment of compensation shall insure and keep insured his liability thereunder in any authorized corporation, association, organization or mutual insurance association formed by a group of employers so authorized...” (emphasis added). The term “insure” is defined in Black’s Law Dictionary, Abridged Fifth Edition, as “[t]o make sure or secure, to guarantee, as to insure safety to anyone. To engage to indemnify a person against pecuniary loss from specified perils or possible liability.” Under §38-31-60(b), The Guaranty Association is considered the insurer to the extent of its obligation on the covered claims and the uncontradicted record establishes that this matter involves a covered workers' compensation claim for which it is responsible for paying the full amount under §38-31-60(iv).

Concerning whether the Guaranty Association is authorized under §42-5-20 to insure liabilities under the Workers' Compensation Act thereby meeting the statutory definition of the term "carrier" or "insurer" under §42-1-60 and as used in §42-9-400 and §42-7-320; it is self-evident that the Guaranty Association would not be responsible for paying this claim and would have no reason to seek reimbursement if it was not so authorized. Substantial evidence in the record establishes that the Commission has authorized the Guaranty Association to insure liabilities under the Workers' Compensation Act and there is no evidence in the record to the contrary (R.pp. 620-622). In this regard, it was appropriate for the Commission to take judicial notice of routine decisions and actions by the Commission with respect to the Guaranty Association's data reporting obligations and benefit liabilities on covered workers' compensation claims in carrying out the Commission's administrative and adjudicative responsibilities under Chapters 3 and 5 of the Workers' Compensation Act. In short, the uncontradicted and substantial evidentiary record, and applicable statutory provisions, establish the Guaranty Association as an association authorized to insure liabilities under the Workers' Compensation Act and in particular, authorized to insure the Employer's liabilities in this fully covered workers' compensation claim.

In connection with its argument that the Guaranty Association is not an insurance carrier authorized to receive reimbursement, the Fund cites this Court's decision in South Carolina Property and Casualty Insurance Guaranty Association v. Brock, 410 S.C. 361, 764 S.E.2d 920 (2014) for the proposition that the Guaranty Association is not an insurance carrier entitled to reimbursement.⁴ Notably, the Fund has previously conceded that Brock was decided in a different context (R.p. 93; and R.p. 126) and its reliance on Brock is misplaced. This Court's statement in

⁴ The Fund asserts that the Guaranty Association has conceded it is not an "insurance company" but erroneously asserts that it claims a statutory entitlement reserved only for insurance companies (petition for writ of cert. at page 8). The Guaranty Association only conceded that it is not an "insurance company" but maintains, as was held by the Commission and affirmed by the Circuit Court and Court of Appeals, that it is the Employer's "insurance carrier" as the term is defined under §42-1-60 and §42-5-20, and used in §42-9-400 and §42-7-320.

Brock that the Guaranty Association is “...neither the wrongdoer nor the insurer of a wrongdoer, but it is instead a statutory entity that exists to provide some protection for the insureds of insolvent insurance companies” was made in the context of its analysis of the Guaranty Association’s rights to certain offsets provided under the Guaranty Act in connection with a policy of liability insurance. 764 S.E.2d at 922 – 923. Brock did not involve a workers' compensation claim or a policy of workers’ compensation insurance in connection with which the Guaranty Association would be responsible for paying the full amount and, therefore, is clearly distinguished from the current matter. More specifically, Brock did not involve a workers' compensation claim in connection with which §42-1-60 and §42-5-20 would apply.⁵

The Fund makes much of the Court of Appeals’ citation of this Court’s opinion in Hudson v. Lancaster Convalescent Center, 407 S.C. 112, 754 S.E. 2d 486 (2014). It is readily apparent from the Court of Appeals opinion that it did not focus “solely” on Hudson in deciding the statutory authorization issue. Rather, the Court of Appeals’ opinion reflects a thorough analysis of the Commission’s rationale and reasoning, as affirmed by the Circuit Court, based on applicable statutory provisions and the evidentiary record.

Hudson is instructive far beyond the Court of Appeals’ citation for the proposition that the Guaranty Association is a last resort insurer created by the legislature to protect consumers in the event their insurer becomes insolvent. Hudson was decided in the context of a workers’ compensation claim unlike Brock or Buchanan. As the Fund points out, Hudson (like Brock and Buchanan), did not decide the Guaranty Association’s status as an “insurer” or “carrier” as defined under §42-1-60 and §42-5-20, and used in §42-9-400 and §42-7-320; but it substantiates the

⁵ The Fund’s reliance on this Court’s holding in Buchanan v. South Carolina Property and Casualty Insurance Guaranty Association, 424 S.C. 542, 819 S.E.2d 124 (2018) for the same proposition is also misplaced as Buchanan is distinguished from, and inapplicable to, the current matter for the same reasons.

reasoning and rationale of the Commission in deciding the statutory authorization issue as affirmed by the Circuit Court and Court of Appeals. In that regard, Hudson references the language in §38-31-60(j) (1976, as amended) that the Guaranty Association “may sue or be sued” as a clear indication of the legislature’s intent for the Guaranty Association to both enforce its own direct claims, and be held directly liable for its own actions (emphasis added). 754 S.E.2d at 491. Hudson further diminishes the Fund’s already unpersuasive argument effectively refuting the assertion that the Guaranty Association’s rights of recovery/recoupment/offset are limited to those provided under §38-31-90 and §38-31-100. This leaves the Fund relying on the terms and provisions of S.C Code Ann. §42-1-560 (1976 as amended) (the third party/subrogation statute under the Workers’ Compensation Act) and its “circuitive litigation” argument; neither of which have any merit.

Section 42-1-560 sets forth the rights and remedies of the parties to a workers’ compensation claim that also involves third party liability. Section 42-1-560(a) does not “re-define” the term “carrier” as defined pursuant to §42-1-60 and §42-5-20, and used in §42-7-320 and §42-9-400. Rather, by use of the term “hereinafter,” §42-1-560(a) merely specifies those entities, including the employer, to which the term “carrier” refers in §42-1-560 (emphasis added). Reimbursement from the Fund in connection with this claim is governed by §42-9-400 and §42-7-320, and has absolutely nothing to do with §42-1-560.

Concerning the “circuitive litigation” argument, the Fund continues to conveniently ignore the fact that while denying reimbursement, it has collected, and continues to collect, assessments from the Guaranty Association’s workers’ compensation member insurers to fund its reimbursement obligation on this particular claim while those member insurers are also paying separate assessments to the Guaranty Association to fund the Guaranty Association’s obligations on this particular claim (R.p. 432; and R.p.p. 546-549, 552 and 554; *see also* Commission’s unappealed

finding of fact no. 10 and conclusions of law nos. 5 and 6). The immediate double assessment situation this produces is plain to see. The Fund is essentially arguing that it be allowed to collect assessments from the Guaranty Association's workers' compensation member insurers to fund reimbursement of the claim but retain the money without making reimbursement while the Guaranty Association's workers' compensation member insurers pay assessments to the Guaranty Association to fund payment of the claim with no right to reimbursement. The "circuitive litigation" argument is without merit.

II. The Court of Appeals made no error of law connected to the issue of assessments in affirming the Circuit Court's judgement/order which affirmed the Commission's reimbursement award to the Guaranty Association.

In its latest position shift with respect to the assessment issue that initially surfaced in its petition for rehearing by the Court of Appeals, the Fund asserts that the Court of Appeals, along with the Circuit Court and Commission, engaged in a "legal fiction" by finding and concluding that the Guaranty Association effectively pays assessments to the Fund via its workers' compensation member insurers. In its Form 55 Answer filed with the Commission, the Fund asserted that the Guaranty Association was barred from reimbursement because it does not pay assessments and pursuant to §42-7-310(d)(2) as a result of Lumbermens' alleged default in payment of assessments. Subsequent discovery in the way of the deposition testimony of David Stooksbury, SCIRF's business manager in charge of the Fund's operations as it relates to assessments, testified clearly and unequivocally that Lumbermens is not in default or delinquent with respect to payment of its assessments and that Lumbermens has paid all amounts assessed (R.p. 535). He also testified that if a carrier goes under and stops paying claims, the assessment goes to zero (R.p. 535). The Fund made no assertion of the claim being barred under §42-7-310(d)(2) as a result of Lumbermens purported default in payment of assessments during oral

argument before the Single Commissioner and has effectively abandoned that position given its failure to include such in its Form 30 exceptions from the Single Commissioner's Decision and Order. Ham v. Mullins Lumber Co., 193 S.C. 66, 7 S.E.2d 841 (1940). During oral argument before the Single Commissioner, the Fund reasserted its position that the Guaranty Association is barred from reimbursement because it does not pay assessments and also asserted that the reimbursement claim is barred under §42-7-310 and §42-7-320 as a result of Lumbermens non-participation in the assessment process subsequent to its liquidation. In proceedings before the Appellate Panel, which it also maintained before the Circuit Court and Court of Appeals, the Fund modified its position by asserting that the Guaranty Association's failure to "directly" participate in the assessment process barred the reimbursement claim.

The uncontradicted and substantial evidentiary record reflects that the Fund has never assessed the Guaranty Association (R.pp. 702-703; R.p. 589; and R.p. 556). Pursuant to §38-31-40, the Guaranty Association is an unincorporated entity and its workers' compensation member insurers pay assessments to the Fund (R.p. 616; and R.pp. 538-539). In connection therewith, it should also be noted that any theoretical assessment on the Guaranty Association would not alter or affect the total sum of assessments raised on an annual basis by the Fund under the pre-July 1, 2013 funding mechanism set forth in §42-7-310 or the post-July 1, 2013 funding mechanism plan adopted by SFAA pursuant to §42-7-320. Rather, the only variable would be what entities were paying and in what amounts (R.pp. 702-706; and R.pp. 563-564). The record further reflects that the Guaranty Association's workers' compensation member insurers have paid assessments in accordance with the five year/\$60,000,000 per year funding mechanism plan adopted by SFAA in connection with which the Fund's liability for reimbursement on this particular claim was considered and included (R.p. 387; and R.pp. 546-579, 552, 554). There is no indication that any of the Guaranty

Association's workers' compensation insurers are delinquent in payment of assessments to the Fund (R.pp. 537-539). The Fund has assessed, and will continue to assess, the Guaranty Association's workers' compensation member insurers for its obligations on this claim. There is no delinquency in payment of those assessment including payment of the assessments associated with the five year \$60,000,000 per year funding plan adopted by SFAA which considered and included the Fund's liability for reimbursement on this particular claim.

Remarkably, the Fund asserted before the Circuit Court and Court of Appeals that the foregoing substantial evidence was not relevant despite raising the issue of the Guaranty Association's non-participation in the assessment process as a defense to the reimbursement claim. Confronted with the overwhelming evidence of participation in the assessment process by the Guaranty Association's workers' compensation member insurers to include payment of assessments to fund if liability on this particular claim, the Fund apparently based this assertion on the Guaranty Association not "directly" paying assessments notwithstanding the fact that it has never assessed the Guaranty Association. The Fund's latest position shift on this issue is equally remarkable as its argument has no basis in law or fact. The only statutory provision which conditions reimbursement upon payment of assessments is the amendment to §42-7-310(d)(2) which became effective June 25, 2003 and provides that if an employer or insurance carrier fails to pay assessments, they shall be barred from any recovery from the Fund on all claims without exception until the assessment is paid along with any penalty associated therewith. The uncontradicted evidence in the record, along with the findings of fact and conclusions of law of the Commission as affirmed by the Circuit Court and Court of Appeals, reflect that neither Lumbermens or any of the Guaranty Association's workers' compensation member insurers are

delinquent in assessments to the Fund.⁶ In addition, the uncontradicted record reflects, as was found by the Commission and affirmed by the Circuit Court and Court of Appeals, that the Guaranty Association has never been assessed by the Fund and is not delinquent or in default with respect to any assessments.

The Fund is left with nothing more than an equitable argument which the Guaranty Association fully countered with overwhelming evidence demonstrating that its workers' compensation member insurers have paid assessments to the Fund specifically including assessments to fund reimbursement on this particular claim, all the while leaving them responsible for paying assessments to the Guaranty Association necessary to fund this particular claim while the Fund denies reimbursement. It is beyond the pale to assert that the Court of Appeals, Circuit Court and Commission engaged in "legal fiction" by addressing the Fund's equitable argument; much less made a reversible error of law in doing so. There is absolutely no legal or factual basis to substantiate any assertion that the reimbursement claim in this matter should be barred based on anything pertaining to the payment of assessments.

III. The Court of Appeals made no error of law in affirming the Circuit Court's judgement/order which affirmed the Commission's findings of fact and conclusions of law that the June 17, 2013 Settlement Agreement and Release does not bar the Guaranty Association's reimbursement claim.

The Fund asserts that the Settlement Agreement and Release dated June 17, 2013 bars the claim for reimbursement or otherwise releases the Fund from its liability for reimbursement on this claim (R.pp 258-271). In this regard, the Fund notes specific provisions in the Settlement

⁶ As a result of the uncontradicted record establishing that neither [the insolvent insurer] or any of the Guaranty Association's workers' compensation member insurers are in default or delinquent with respect to payment of assessments, it was not necessary for the Commission to address whether the pertinent statutory amendment to §42-7-310(d)(2) effective June 25, 2003 should be applied retroactively in this claim with an underlying date of accident/injury on December 17, 1999. Moreover, the Fund has abandoned any position in that regard as such was not included in its Form 30 exceptions. Ham v. Mullins Lumber Company, 193 S.C. 66, 7 S.E.2d 841(1940) and Green v. City of Columbia, 311 S.C. 78, 427 S.E.2d 685 (Ct. App. 1993).

Agreement and Release, the Guaranty Association's knowledge of the Lumbersmen's claims to specifically include this claim as of June 17, 2013 and the fact that the Guaranty Association had set up reserves and paid benefits on this particular claim prior to June 17, 2013. (R.pp. 431-434). In a fashion similar to its arguments on the statutory authorization and assessment issues, the Fund distorts the context and ignores critical and specific limiting language that is clear and unambiguous.

The Fund asserts that the Court of Appeals, along with the Circuit Court and Commission, erred as matter of law in failing to recognize the parties' express intent that the Settlement Agreement and Release was "general and comprehensive in nature," erred in failing to give it the "broadest meaning" and erred in focusing on the phrase "on which the Fund is currently paying the Guaranty Association as of February 22, 2013." The Fund argues that the Court of Appeals, along with the Circuit Court and Commission, gave undue preference to a single modifying phrase in a series of co-equal modifying phrases. The Fund erroneously asserts that the Court of Appeals, along with the Circuit Court and Commission, concluded that only claims already known to the Fund on which payments were being made as of February 22, 2013 fell within the scope of the release. The Fund also erroneously asserts that the alleged legal errors by the Court of Appeals, along with the Circuit Court and Commission, led to "reading key language entirely out of the release" thus rendering the language in the Settlement Agreement and Release relied on by the Fund meaningless or superfluous. These erroneous assertions expose the flaw in the Fund's argument.

The Settlement Agreement and Release specifically defined the "Legion" and "Reliance" claims. The Guaranty Association concedes that the language relied on by the Fund would apply to all "Legion" and "Reliance" claims as defined in the Settlement Agreement and Release so as

to release all “Legion” and “Reliance” claims regardless. However, the current claim is not a “Legion” or “Reliance” claim. It is precisely claims that are not “Legion” or “Reliance” claims to which the limiting phrase “on which the [the Fund] is currently paying the Guaranty Association as of February 22, 2013” applies. To accept the Fund’s argument, this Court would be required to “read entirely out” the phrase “on which [the Fund] is currently paying the Guaranty Association as of February 22, 2013” and render it meaningless and superfluous. As the Fund points out, such would constitute an error of law. The Court of Appeals, along with the Circuit Court and Commission, did not read out, or render meaningless or superfluous, the language relied on by the Fund; and made no error of law.

The plain, clear and unequivocal language in the agreement reflects that beyond the Legion and Reliance claims as defined therein; the settlement and release applied only to those claims on which [the Fund] was paying the Guaranty Association as of February 22, 2013 (emphasis added). The uncontradicted evidentiary record reflects that Lumbermens was not liquidated until May 8, 2013; that the Guaranty Association was not paying this claim as of February 22, 2013 and that at no time has the Fund reimbursed the Guaranty Association in connection with this claim (R.pp. 661-664; and R.pp. 613-614). This plain, clear and unequivocal language, and any reasonable construction thereof; does not effectuate a bar to the Guaranty Association’s reimbursement claim in this matter or release the Fund from liability for reimbursement. Whether the Guaranty Association was aware of this claim or had set up reserves as of June 17, 2013 is of no relevance or consequence.

In its petition at page 17, the Fund posits: “[w]hat then could be the purpose of the modifiers ‘unknown,’ ‘not asserted,’ ‘not accepted,’ or ‘potential’?” The Fund goes on in footnote no. 5 to assert that the Court of Appeals provides no answer and that the question cannot be answered in a

way that allows the Guaranty Association to prevail. The answer to the question has been clear to all except the Fund. The Guaranty Association asserted before the Court of Appeals, and re-asserts herein, what was apparently plain and obvious to the Court of Appeals, Circuit Court and the Commission, to wit: that such apply only to the “Legion” and “Reliance” claims, and to the claims that are not “ Legion” or “Reliance” with the limiting phrase “on which [the Fund] is currently paying the Guaranty Association as of February 22, 2013.” Contrary to its own legal argument that reading entirely out a phrase in the prior settlement agreement so as to render it meaningless and superfluous would constitute an error of law; the Fund is asking this Court to do precisely that (i.e. read entirely out the phrase “on which [the Fund] is currently paying the Guaranty Association as of February 22, 2013” thereby rendering it meaningless and superfluous).

CONCLUSION

The Fund’s assertion that it seeks to ensure claims made by the Guaranty Association are legally reimbursable so that the remaining funds are legally disbursed and avoid seeking further assessments that may very well not be legally justified strikes a disingenuous tone given the fact it has already assessed the Guaranty Association’s workers’ compensation member insurers based on the Fund’s liability for this claim and other similarly situated claims involving insolvent insurance carriers. The Fund also mischaracterizes the Guaranty Association as “another governmental entity” in asserting that the funds remaining in the Second Injury Fund should not be used to benefit the Guaranty Association ignoring the uncontradicted (and unappealed) fact that it has collected assessments from the Guaranty Association’s workers’ compensation member insurers to fund this claim and the double assessments being incurred to fund the claim. While this case will undoubtedly impact other claims by the Guaranty Association where the Fund has collected assessments to fund reimbursement but refused reimbursement, those matters involve

the same interested parties limited to the Fund, the Guaranty Association and the Guaranty Association's workers' compensation member insurers. In the final analysis, this claim and similarly situated claims involve the limited question of how payment of the claims is ultimately funded. Therefore, the Fund's assertion of "utmost public importance" is grossly overstated. For these reasons and those set forth hereinabove, the Guaranty Association respectfully requests that the Fund's petition for a writ of certiorari be denied.

Respectfully submitted,
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