THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
Dec 06 2021
S.C. SUPREME COURT

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

Appellate Case No. 2021-001229
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.

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Andrew F. Lindemann
LINDEMANN & DAVIS, 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
Leesville, South Carolina 29070
(803) 317-2171

Counsel for Petitioner

TABLE OF CONTENTS

ARGUMENTS

I. The South Carolina Court of Appeals erred as a matter of law 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 Petitioner South Carolina Second Injury Fund ("Fund") contends on appeal that the Workers' Compensation Commission, as affirmed by the Circuit Court and the Court of Appeals, 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, this 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 by arguing that *Brock* involves a "different context" and did not involve a workers' compensation claim. That is a distinction without a difference. *Brock* is cited for its legal description of the Guaranty Association and its purpose, and that description is accurate and should be preclusively binding in this litigation – despite the fact that

the Court of Appeals erroneously determined that the Guaranty Association is an "insurer" which it is not.

In its response brief, despite agreeing that it is not an "insurance company," the Guaranty Association suggests 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: “[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.” 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 authorized to insure liabilities under the Workers’ Compensation Act.” *See*, Respondent’s Return, p. 15.

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 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, nonetheless, 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 Return, p. 13. 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 *Farmer v. CAGC Ins. Co.*, 424 S.C. 579, 819 S.E.2d 142 (Ct. App. 2018), but that reliance is misplaced. The Court of Appeals 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 include the ability to conduct litigation to determine if certain claims are not "covered claims" but are 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 a third 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.[1]

As the Fund has pointed out, 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." S.C. Code Ann. § 38-31-90(2). Section 38-31-90(2) does not include language which allows for the Guaranty Association to make a claim against the Second Injury Fund. The Guaranty Association counters by arguing that the rights of recovery stated in Section 38-31-90(2) are "not exclusive." Not surprisingly, the Guaranty Association offers no case law or other authority to support that bald, unsubstantiated assertion.[2] That construction of Section 38-31-90(2) as being "not exclusive" is also at clear odds with the rule of statutory construction known as "expressio unius est exclusion alterius," which 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).

---

[1] To reiterate, 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").

[2] The Guaranty Association curiously cites to *Hudson v. Lancaster Convalescent Center*, 407 S.C. 112, 754 S.E.2d 486 (2014), as "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." *See*, Respondent's Return, p. 17. *Hudson*, however, does not even address that issue, let along "refute" it. Instead, in addressing Section 38-31-60(j), this Court explained that "we hold that Guaranty [Association] may be held directly liable for its own actions." 754 S.E.2d at 491. As this Court made clear in its opinion, *Hudson* involved a "direct action" against the Guaranty Association "for its own actions" -- as were explicitly distinguished by this Court from the "derivative liability of an insolvent insurer." 754 S.E.2d at 491-492. Thus, *Hudson* has no bearing on the issues raised in the current appeal which is not a direct action asserted against the Guaranty Association for its own acts or omissions.

The Guaranty Association relies instead on Section 38-31-60(l), which provides: "The association may perform any other acts necessary or proper to effectuate the purpose of this chapter." S.C. Code Ann. § 38-31-60(l). Relying on that provision, the Guaranty Association insists that its "reimbursement claim is inextricably linked to its obligation to adjust and pay the claim." *See*, Respondent's Return, p. 13. That is not the case. There is a distinct difference between paying a covered claim and later seeking reimbursement for that payment from a third party, including a governmental fund such as the Second Injury Fund. Again, the Guaranty Association Act recognizes that distinction. The Act speaks to the Guaranty Association's right to seek reimbursement from a third party in Section 38-31-90(2), but there is no recognized right to seek reimbursement from the Second Injury Fund. It was error for the Commission and the lower courts to expand the Guaranty Association's rights of reimbursement beyond what the Guaranty Association Act explicitly permits.

Finally, the Fund points out in its petition that the Guaranty Association and the Second Injury Fund are funded in similar ways -- both by assessments 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 – one statutorily-created fund paying another statutorily-created fund where both are funded from the same source. In response, the Guaranty Association previously made the unsubstantiated and false argument in the Court of Appeals that its workers' compensation member insurers will be required to "fund" the Quarles claim "twice." The Guaranty Association has now abandoned that position. In its place, the Guaranty

Association now makes a claim that its members are subject to "double assessment." That is also misleading and inaccurate. 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. Thus, in reality, it is the Guaranty Association – by seeking reimbursement from the Second Injury Fund without returning any assessments to its members – that is actually fostering the "double assessment situation" of which it complains.

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 reasoning of the Court of Appeals is deeply flawed. The Court did not consider any of these substantives issues raised and briefed by the parties. The Court merely listed the various arguments made by the Fund but did not provide any analysis of nor refute any of those arguments. Instead, the Court of Appeals relied *solely* on this Court's decision in

Hudson v. Lancaster Convalescent Center, 407 S.C. 112, 754 S.E.2d 486 (2014), where this Court referred to the Guaranty Association as a "last resort insurer." 754 S.E.2d at 492. As this Court clearly explained in *Brock*, which was issued later in 2014, there was no intent by this Court to categorize the Guaranty Association as an "insurance company" or "insurer" in the legal or literal sense of the term, but that is how the Court of Appeals has interpreted and applied the "last resort insurer" reference from *Hudson*. A writ of certiorari should be issued so that this confusion between *Hudson* and *Brock*, which resulted in the Court of Appeals' erroneous decision in this case, may be clarified.

II. The South Carolina Court of Appeals erred in concluding that the Guaranty Association had "effectively" paid assessments to the Second Injury Fund and is therefore eligible to seek reimbursement from the Second Injury Fund.

The second issue on appeal is simple and straight forward. 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. There has been no "position shift" as claimed. Instead, the Guaranty Association attempts to obfuscate and deflect on what is a straight forward issue. The Court of Appeals resorted to a "legal fiction" by concluding 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 "effective" payment of assessments has no basis in the statutory scheme created by the General Assembly. In other words, the Court of Appeals resorted to what is fairly described as a "legal fiction" in an attempt to justify a result that the statutory scheme does not permit. In effect, the analysis is simple: the

Guaranty Association pays no assessments and thus is not qualified to seek reimbursement from the Fund.

III. The South Carolina Court of Appeals 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 and the Court of Appeals, 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, including the Court of Appeals, 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).

In previous briefs and filings, the Guaranty Association completely disregarded the Fund's argument. It made no attempt to give any meaning to the series of co-equal modifying clauses. It made no attempt to address the language "whether known or unknown, noticed or unnoticed, asserted or not asserted, accepted or not accepted, existing or potential." For the first time in this litigation, the Guaranty Association does not simply ignore this issue, but its construction of the release language continues to strike or read out co-equal modifying clauses

that describe the claims that are released. The Guaranty Association suggests that the language cited above applies only to subset (A) of claims, those being "all claims related to Legion and/or Reliance." However, if that were true, the language “whether known or unknown, noticed or unnoticed, asserted or not asserted, accepted or not accepted, existing or potential" would have been inserted as part of subset (A) rather than after subset (B) of claims was identified.

The Fund submits, nonetheless, that each of the phrases or clauses 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 referenced in subset (B) immediately before that phrase appears. The subset (B) of claims is actually modified by two clauses that start with the word "whether." The first "whether" clause states: "whether related or unrelated to Legion and/or Reliance, on which the SIF is currently paying the Guaranty Association as of February 22, 2013." The second "whether" clause states: "whether known or unknown, noticed or unnoticed, asserted or not asserted, accepted or not accepted, existing or potential." Both of the "whether" clauses modify subset (B) consisting of "any and all claims." The second "whether" clause does not modify only subset (A) of claims as the Guaranty Association now argues. There is certainly nothing in the language or the positioning of the clause that supports the Guaranty Association's newly asserted construction of the language as a whole.

Without question, the release language was intended to and does include unknown and future claims whether related or unrelated to the claims of Legion and/or Reliance on which the Fund was paying as of February 22, 2013. 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 unknown and future claims within the scope of the release. It bears repeating, however, that 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 discussion, the Petitioner Second Injury Fund Operations of the South Carolina Insurance Reserve Fund f/k/a South Carolina Second Injury Fund respectfully renews its request that this Court grant its petition for a writ of certiorari.

Respectfully submitted,

LINDEMANN & DAVIS, P.A.

BY: *s/ Andrew F. Lindemann*

ANDREW F. LINDEMANN #13030
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920

-and-

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

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

December 6, 2021