IN THE SUPREME COURT OF MISSISSIPPI

SOUTHERN HEALTHCARE SERVICES, INC.,
MEDFORCE MANAGEMENT, LLC, d/b/a
WILLOWCREEK RETIREMENT CENTER AND
DALESON ENTERPRISE, LLC d/b/a JONES
COUNTY REST HOME — APPELLANTS

VS. — Case No. 2008-CA-00642
CONSOLIDATED WITH 2008-CA-01351

LLOYD'S OF LONDON, CERTAIN
UNDERWRITERS AT LLOYD'S, LONDON,
CARONIA CORPORATION — APPELLEES

APPEAL FROM CAUSE NO. 2006-26-CV8
CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT
JONES COUNTY, MISSISSIPPI

APPELLEES' RESPONSIVE BRIEF

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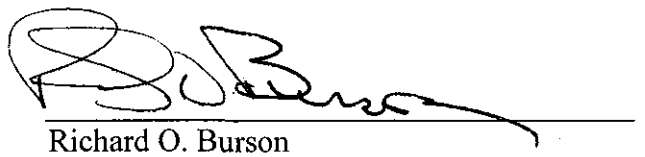
CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualifications or recusal.

1. Plaintiff-Appellant, Southern Healthcare Services, Inc., Sumrall, Lamar County, Mississippi.
2. Plaintiff-Appellant, Medforce Management, LLC d/b/a Willowcreek Retirement Center, Byram, Hinds County, Mississippi.
3. Plaintiff-Appellant, Daleson Enterprise, LLC d/b/a Jones County Rest Home, Ellisville, Jones County, Mississippi.
4. Attorney for Plaintiffs-Appellants, Derek A. Henderson, Attorney at Law, Jackson, Mississippi.
5. Defendant-Appellee, Lloyd's of London, Certain Underwriters at Lloyd's of London, London, United Kingdom.
6. Defendant-Appellee, Caronia Corporation, Houston, Texas.
7. Attorneys for Defendants-Appellees, Richard O. Burson and Grayson Lacey, Gholson Burson Entrekin & Orr, PA, 535 W. 5th Street, P.O. Box 1289, Laurel, MS 39441-1289.

8. Attorney for Defendants-Appellees, Scott D. Braun, Sedgwick, Detert, Moran & Arnold LLP, 1 N. Wacker Drive, Suite 4200, Chicago, IL 60606-2841.

9. Honorable Robert G. Evans, Circuit Court Judge, Smith County, Mississippi.



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STATEMENT OF THE CASE

I. NATURE OF THE CASE

This is a consolidated appeal from two orders of the Circuit Court for the First Judicial District of Jones County, Mississippi, granting summary judgment to Defendants finding no merit as to any of Plaintiffs' claims and finding Southern had breached the insurance contract thereby entitling Underwriters to $701,153.54 in contract damages. Southern Healthcare Services, Inc. ("Southern") filed this suit seeking damages for breach of contract, tortious breach of contract, fraud and bad faith against Certain London Underwriters Subscribing to Policy No. LNH2003066 ("Underwriters") and Caronia Corporation ("Caronia") (collectively "Defendants"). Underwriters provided professional liability insurance to Southern while Caronia was Underwriters' third-party administrator. Medforce Management LLC, d/b/a Willowcreek Retirement Center, and Daleson Enterprise, d/b/a Jones County Rest Home, were named as co-plaintiffs along with Southern (collectively "Plaintiffs"). The Complaint also named as co-defendant Fox-Everett, Inc. ("Fox-Everett"), Southern's broker-agent. Fox-Everett is not a party to this appeal.

II. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

On August 3, 2006, Plaintiffs filed the instant action in the Circuit Court for the First Judicial District of Jones County, Mississippi. The Complaint alleged, *inter alia,* that Defendants "failed and refused to provide coverage and defense costs for all claims against the Plaintiffs as required under the policies," and that Defendants misrepresented Plaintiffs' obligation to pay the deductible amount prior to coverage being provided. (R., at 12).[1]

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[1] Defendants will refer to the first appeal record (Case No. 2008-CA-00642) by citing to that record as R., at [page number]. Defendants will refer to the second appeal record (Case No. 2008-CA-01351) by citing 2 R., at [page number].

Additionally, Plaintiffs alleged that its broker-agent, Fox-Everett, misrepresented the deductible as $25,000 rather than $250,000. (R., at 13).

On September 6, 2006, Defendants removed Plaintiffs' action to the District Court for the Southern District of Mississippi, Hattiesburg Division. On September 12, 2006, Underwriters and Caronia separately filed their answer and affirmative defenses to Plaintiffs' Complaint. Underwriters also filed a Counterclaim for relief against Southern alleging breach of contract for failing to reimburse Underwriters for amounts paid within the deductible. (R., at 34-39). The Counterclaim also sought a declaratory judgment that Southern is required to pay its deductible obligation in connection with five (5) underlying claims asserted against Plaintiffs. (Id).

On May 15, 2007, the District Court remanded Plaintiffs' action back to the Circuit Court for the First Judicial District of Jones County, Mississippi. On August 17, 2007, Defendants filed two motions for summary judgment. Defendants' first motion, their Motion for Summary Judgment, or in the Alternative, for Partial Summary Judgment, sought summary judgment on Plaintiffs' claims for breach of contract, tortious breach of contract, fraud and bad faith. (R., at 130-32). The second motion, Underwriters' Motion for Partial Summary Judgment on the Counterclaim for Relief Against Southern, requested summary judgment on Underwriters' Counterclaim for damages against Southern. (R., at 416-18). Having been fully briefed by both sides, on September 28, 2007, the Circuit Court heard oral arguments on Defendants' two motions.

On March 26, 2008, the Court issued its Final Judgment granting Defendants' motion for summary judgment on Plaintiffs' claims. (R., at 1179-1180). In its Findings of Fact and Conclusions of Law, the Court found that Defendants had fulfilled their obligations under the Policy and never denied coverage to Plaintiffs. (R., at 1169-1178). The Court also found that "no fair-minded juror could reasonably conclude under evidence presented that Defendants

breached any duties owed to Plaintiffs under the terms of the Instant Policy or otherwise acted in a tortious, fraudulent, or any other bad faith manner in their handling of Plaintiffs' five tendered claims made under the Policy." (R., at 1177-78). On April 14, 2008, Plaintiffs timely filed their Notice of Appeal appealing this order.

On July 8, 2008, the Circuit Court issued its Final Judgment On Counterclaim granting Underwriters' motion for summary judgment on Underwriters' Counterclaim. (2 R., at 41-42). In its Findings of Fact and Conclusions of Law, the Court found that Underwriters had met their obligations under the Policy while Plaintiffs failed to fulfill their duties thereby breaching the insurance contract. (2 R., at 29-40). Therefore, the Court found that Southern was "contractually obligated under the terms of the Policy to reimburse Underwriters for the $701,153.54 in defense costs, expenses and settlements advanced within the per claim deductibles." (2 R., at 39). Plaintiffs also appealed this Order, and on August 18, 2008, the Clerk of the Supreme Court consolidated the two appeals.

III. STATEMENT OF FACTS

A. The Insurance Policy

In October 2003, Plaintiffs purchased an insurance policy (policy No. LNH2003066) that was underwritten and administered by Defendants (hereinafter referred to as "Policy"). (R., at 7, 142). This Policy was a combined healthcare general liability and healthcare professional liability policy. (R., at 142). The parties do not dispute that the underlying claims brought against Plaintiffs solely implicate the Policy's professional liability coverage. The instant Policy's coverage period ran from October 7, 2003 to October 7, 2004. (R., at 142.)[2]

[2] Defendants contest any assertion or insinuation by Plaintiffs that the prior year's policy is of any relevance to this matter. The Policy at issue is a claims made policy requiring notice during the Policy's coverage period to trigger coverage. Because Plaintiffs noticed the five underlying claims at issue in this dispute during the instant Policy, the prior year's policy is irrelevant.

The instant Policy contains a deductible in the amount of "$250,000 each claim, Defense Costs included[,]" for professional liability claims made under the Policy. (R., at 142). Southern is the First Named Insured under the Policy. (R., at 133, 142). Under Endorsement No. 1 to the Policy, the deductible is to be paid by the First Named Insured. (R., at 137). The Policy permits Underwriters to "pay all or part of the deductible to settle a claim or suit [on behalf of the insureds]." (R. at 137). However, under the Policy, the "First Named Insured agrees to repay [Underwriters] promptly after [Underwriters] notify the First Named Insured of the settlement." (R., at 137). Finally, under the endorsement entitled Limitation of Coverage to Designated Premises, insurance coverage is extended to both the Medforce (Willow Creek Retirement Center) and Daleson (Jones County Rest Home) premises. (R., at 133).

B. Underlying Lawsuits

During the instant Policy's coverage period, October 7, 2003 to October 7, 2004, Plaintiffs noticed five (5) claims under the Policy. (R., at 8-9). Underwriters, through their third-party administrator Caronia, issued standard "Acknowledgement of Suit[,] Reservation of rights" letters to Plaintiffs acknowledging receipt of the claims and reserving Underwriters' rights under the Policy (R., at 234-48).

Defendants provided defense to Plaintiffs in the five (5) underlying matters and eventually facilitated a resolution in each. Specifically, between December 2006 and August 2007, Underwriters settled the *Huffmaster*, *Arrington*, *Christoffer*, and *Landrum* claims on behalf of Plaintiffs. (*See* Appellants' Brief at 13; 2 R., at 28). In October 2006, the claims asserted against Plaintiffs in the *Owens* matter were voluntarily dismissed by the plaintiffs in that lawsuit. Thus, Plaintiffs need only reimburse Underwriters for the minimal defense costs incurred in the handling of that matter. Plaintiffs do not dispute that Defendants resolved all five underlying claims. (*See* Appellants' Brief at 13). To date, Underwriters have paid the following amounts

per claim in defense costs and settlements within the per claim deductibles in an effort to resolve all five claims brought against Plaintiffs:

Claim (Plaintiff Name)	Defendant[3]	Amount Underwriters Paid Within Deductibles
Arrington	Southern, Daleson	$ 154,741.08
Christoffer	Southern, Daleson	$ 122,409.29
Huffmaster[4]	Medforce (d/b/a WCRC)	$ 172,640.64
Landrum	Daleson (d/b/a JCRH)	$ 248,650.00
Owens	Southern (d/b/a WCRC)	$ 2,712.53
Total		**$ 701,153.54**

(2 R., at 25-28).

Out of the five resolved claims, only the *Landrum* claim was settled above the Policy's $250,000 deductible amount. The claim exceeded the Policy's deductible by $65,852.83 and Underwriters have paid this amount and will obviously not be seeking reimbursement as any amounts paid above the deductible are Underwriters' obligation under the Policy.[5] Plaintiffs have not reimbursed Underwriters for the defense costs and settlement amounts incurred in any of the underlying lawsuits. (*See* Appellants' Brief at 16-17).

SUMMARY OF THE ARGUMENT

This Court should affirm the Circuit Court's grant of summary judgment in favor of Defendants on Plaintiffs' breach of contract, tortious breach of contract, fraud and bad faith claims. Furthermore, this Court should affirm the Circuit Court's summary judgment order finding Plaintiffs in breach of the Policy and thereby awarding Underwriters $701,154.53 in contract damages. To put it simply, this dispute represents nothing more than Plaintiffs' determined attempt to avoid having to pay the amounts due they had agreed to pay under the Policy (i.e., the deductibles). Under Mississippi law, when an insurance policy is clear and

[3] Willow Creek Retirement Center ("WCRC"); Jones County Rest Home ("JCRH").

[4] Underwriters have received additional invoices relating to the defense of the *Christoffer* and *Huffmaster* claims for which they will pay.

[5] For the *Landrum* claim, Plaintiffs initially paid defense counsel directly in the amount of $1,350. This initial payment explains why the amount Underwriters paid within the deductible is $248,650 rather than $250,000 – the Policy's full deductible.

unambiguous, it is the trial court's duty to determine the meaning and effect of such a policy, and then construe as it is written. *Jackson v. Daley*, 739 So. 2d 1031, 1041 (Miss. 1999). Here, the Circuit Court correctly found that there was no genuine issue of material fact in the underlying dispute between Plaintiffs and Defendants. The Court then applied the Policy's clear and unambiguous terms and correctly held that Defendants fulfilled all their obligations under the Policy. Crucially, not only did the Circuit Court determine that Defendants fulfilled their obligations under the Policy, the court also determined that Plaintiffs – not Underwriters – breached the insurance contract. Consequently, the Circuit Court found that Underwriters are entitled to reimbursement from Southern for Southern's failure to repay Underwriters for the amounts they advanced under the deductible.

There is no genuine issue of material fact as to whether Defendants breached the Policy: they did not. Thus, summary judgment was proper. First, the Policy clearly provides for a $250,000 per claim deductible to be paid by the First Named Insured, Southern. Plaintiffs now fully concede this point. Second, the Policy clearly places the obligation of paying the deductible on the First Named Insured, Southern. Stated another way, the Policy does not require that Underwriters pay the $250,000 deductible on behalf of Plaintiffs. This point – that Underwriters were not obligated to pay the deductible on behalf of Plaintiffs – is critical in demonstrating why Plaintiffs' argument fails.

On appeal, Plaintiffs' breach of contract and bad faith claims are now entirely based on one position: that Defendants materially breached the Policy when Defendants, in multiple reservation of rights letters, informed Plaintiffs of their obligation to pay for the first $250,000 of defense and indemnity expenses per the Policy's deductible. It appears that Plaintiffs believe Defendants were required to pay Plaintiffs' defense costs and settlement amounts incurred within

the $250,000 per claim deductibles and then only allowed to seek reimbursement from Plaintiffs at a later date. Under the Policy's clear and unambiguous language, this belief is incorrect.

Of course, the Policy did permit Underwriters to advance defense costs, expenses and settlement amounts within the deductible using Underwriters' own funds. In fact, this is precisely what happened in the present case. After realizing that the deductible was actually $250,000, and not $25,000, Plaintiffs refused to further pay the deductible amount for each of the five (5) underlying claims. Accordingly, Defendants stepped in and chose to advance the deductible amounts in order to settle Plaintiffs' suits and protect Plaintiffs' interest, setting aside reimbursement for a later date. Specifically, Defendants defended and then settled four of the five suits brought against Plaintiffs; the fifth claim was resolved without any indemnity payment. To date, Defendants have advanced and paid $701,153.54 in defense costs, expenses and settlements within the per claim deductibles to successfully resolve all five suits. Therefore, Defendants never breached the Policy but rather fulfilled all of their obligations under the Policy by resolving the five claims brought against their insured. Finally, because Defendants actually provided coverage to Plaintiffs and resolved the five claims, Plaintiffs' bad faith argument must also fail. Indeed, what better evidence is there of the absence of breach of contract or bad faith, than the Circuit Court's award of contract damages on Underwriters' counterclaim.

The Circuit Court also correctly found that Underwriters had fulfilled all their duties to Plaintiffs under the Policy, and as such, were due reimbursement from Plaintiffs for any amounts advanced within the Policy's $250,000 per claim deductible. Again, the facts are not in dispute. Underwriters chose to advance defense and settlement costs within the Policy's deductible on behalf of Plaintiffs. Once this occurred, the Policy clearly required Southern to promptly

reimburse Underwriters upon notice of the advancements.[6] Plaintiffs do not dispute that Underwriters resolved the five underlying claims. Nor do Plaintiffs contest that they have yet to reimburse Underwriters for the amounts advanced under the Policy. Thus, because there is no genuine issue of material fact and the Policy clearly provides for reimbursement for amounts advanced by Underwriters, the Circuit Court correctly granted summary judgment in favor of Underwriters on their Counterclaim.

Finally, Plaintiffs' argument that the Policy is ambiguous is both mistaken and irrelevant. First, there is no contradiction or ambiguity in the Policy. The Policy and its individual provisions are to be read as a whole. *See Cherry v. Anthony, Gibbs, Sage*, 501 So. 2d 416, 419 (Miss. 1987). There are three endorsements applicable to whether payments made within the Policy's deductible erode the Policy's per claim limit. (When these three endorsements are read together, it becomes clear that payments made within the Policy's deductible do not erode the Policy's limit of $500,000 per claim. Endorsements are a useful tool during contract formation in that endorsements allow the parties to modify or expand the terms and conditions of the original contract. Thus, a policy is not ambiguous simply because it utilizes endorsements, a feature common to many insurance contracts. Second, assuming for argument's sake that the Policy is ambiguous on the issue of erosion, under Mississippi case law, only the ambiguous term or provision is construed against the drafter – not the entire Policy.

Furthermore, construing this particular provision governing erosion against Defendants would have no beneficial effect on Plaintiffs' argument. None of the five claims resolved by Defendants even came close to approaching the Policy's $500,000 per claim limit. In other words, whether or not defense expenses paid within the deductible erode the Policy's limit is irrelevant because the Policy's limits were never even close to being implicated by these five

[6] In a letter sent to Southern on July 10, 2006, Defendants provided notice to Plaintiffs that Underwriters were seeking reimbursement for defense costs incurred by Underwriters within the Policy's per claim deductible.

claims. Thus, even if construed against Defendants, Southern would still have to satisfy the Policy's deductible. Plaintiffs' attempts to search the Policy for any allegedly ambiguous provision, regardless of is applicability to the present dispute, demonstrate that Plaintiffs seek to avoid having to pay for amounts incurred with the Policy's per claim deductible.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews a circuit court's order granting summary judgment *de novo*. *City of Jackson v. Perry*, 764 So. 2d 373, 376 (Miss. 2000). Rule 56(c) of the Mississippi Rules of Civil Procedure provides that summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Miss. R. Civ. P. 56(c). A defendant may move for summary judgment at any time. Miss. R. Civ. P. 56(b).

While the evidence presented must be viewed in the light most favorable to the non-movant, if after review of such evidence, it is clear that the movant is entitled to a judgment as a matter of law, summary judgment should be entered in his favor. *Sligh v. The First National Bank of Holmes County*, 735 So. 2d 963, 965 (Miss. 1999). Even though the movant has the initial burden of showing that there is no genuine issue of material fact, the non-moving party, if he is to avoid summary judgment, must affirmatively bring forth evidence which is legally sufficient to make apparent the existence of triable fact issues. *See Erby v. North Mississippi Center*, 654 So. 2d 495, 499 (Miss. 1995). "Summary judgment is mandated where the non-moving party fails to show evidence sufficient to establish the existence of an essential element of his case." *Sligh*, 735 So. 2d at 965 (citing *Wilburn v. Stennett, Wilkinson & Ward*, 687 So. 2d 1205, 1214 (Miss. 1996)). The determinative language of Rule 56 is that there must exist

genuine issues of material fact; the mere presence of fact issues does not preclude the entry of summary judgment if the fact issues are not material to the outcome of the claim. *Shaw v. Burchville*, 481 So. 2d 247, 252 (Miss. 1985).

II. DEFENDANTS NEITHER BREACHED THE INSURANCE POLICY NOR ACTED IN BAD FAITH OR FRAUDULENTLY

A. Defendants Did Not Breach the Insurance Contract

At the heart of Plaintiffs' breach of contract and bad faith arguments is that Defendants allegedly breached the insurance contract by failing to pay for the deductible on Plaintiffs' behalf when Plaintiffs first presented their claims to Defendants. This argument is incorrect for three reasons. First, under the clear and unambiguous terms of the insurance policy, the Policy provides for a $250,000 per claim deductible. Second, Underwriters are not obligated under the terms of the Policy to pay this deductible on behalf of the Plaintiffs; that obligation falls on Plaintiffs, specifically Southern, as the First Named Insured.[7] Third, and most importantly, Underwriters and Caronia fulfilled all their obligations under the contract by advancing Underwriters' funds to defend and settle the five (5) underlying claims asserted against Plaintiffs.

1) The Insurance Policy Clearly Provides for a $250,000 Deductible

The most basic of rule of contract construction is that the mutual intent of the parties governs, and their intent is to be ascertained from an objective reading of the words of the contract. *See, e.g., Mississippi Transportation Commission v. Ronald Adams Contractor, Inc.*, 753 So. 2d 1077, 1084 (Miss. 2000) (citing *Hoerner v. First National Bank of Jackson*, 254 So. 2d 754, 759 (Miss. 1971); *Rubel v. Rubel*, 75 So. 2d 59 (Miss. 1954); *Cooper v. Crabb*, 587 So. 2d 236, 239, 241 (Miss. 1991). The words of the contract itself are by far the best way to

[7] Underwriters deny that they ever demanded "prepayment" of the entire $250,000 deductible "up front." As set forth in the acknowledgement of suit/ reservation of rights letters issued for each of the underlying claims, Defendants simply noted the amount of the Policy's per claim deductible. As will be explained in Section II-A-4-i, Plaintiffs' repeated assertions that Defendants demanded lump sum prepayments in the amounts of $250,000 before acting under the Policy is patently false.

ascertain the intent of the parties. *Mississippi Transportation Commission*, 753 So. 2d at 1084 (citing *Warwick v. Gautier Utility District*, 738 So. 2d 212, 215 (Miss. 1990)). "Insurance policies are matters of contract and the interpretation of insurance contracts is according to the same rules which govern other contracts." *Krebs v. Strange*, 419 So.2d 178, 181 (Miss. 1982).

In the present case, the Policy language is clear in that there is a $250,000 deductible per claim. Specifically, the Declaration Page of the Policy states that the deductible for professional liability is "$250,000 each claim, Defense Costs included." (R., at 142). Furthermore, Endorsement No. 1 provides that it is Southern's obligation, as the First Named Insured, to pay this deductible for each claim:

> *Section* ***V. DEDUCTIBLE*** *of the* ***HEALTHCARE PROFESSIONAL LIABILITY CLAIMS MADE COVERAGE PART FOR LONG TERM CARE FACILITIES*** *is deleted in its entirety and replace[d] with the following:*
>
> ***V. DEDUCTIBLE***
>
> *A. The First Named Insured shall be responsible for the deductible amount shown in the Declarations, WHICH DEDUCTIBLE AMOUNT SHALL BE IN ADDITION TO AND SHALL NOT ERODE THE APPLICABLE LIMITS OF INSURANCE SHOWN IN THE DECLARATIONS. Expenses* ***we*** *incur in investigating and defending claims and* ***suits*** *are included in the deductible.*
>
> * * *

(R., at 137) (double underline emphasis added).

The Circuit Court correctly found that the Policy clearly contained a $250,000 per claim deductible for professional liability claims. (R., at 1174). Additionally, Plaintiffs now concede that the Policy provides for a $250,000 per claim deductible. *See* Appellants' Brief at 8 ("The policy is crystal clear that the only insured subject to the $250,000 deductible was Southern."). Thus, it is now undisputed that the policy contains a $250,000 per claim deductible that includes defense costs.

2) *Underwriters' Obligations Under the Policy Do Not Require Underwriters to Pay the $250,000 Deductible on Behalf of the Plaintiffs*

It is the trial court's duty to determine the meaning and effect of an insurance policy if the policy is clear and unambiguous. *Jackson v. Daley*, 739 So.2d 1031, 1041 (Miss. 1999) (citing *Overstreet v. Allstate Ins. Co.,* 474 So.2d 572, 575 (Miss. 1985)). If the Policy is clear and unambiguous, then the Court should construe it as written. *Id.* (citing *Lowery v. Guaranty Bank & Trust Co.,* 592 So.2d 79, 82 (Miss. 1991)). In an unambiguous contract for insurance, the clear Policy language controls, and the Court is not allowed to look beyond the four corners of the contract in order to revise the Policy. *See, e.g., Mississippi Farm Bureau Mut. Ins. Co. v. Walters*, 908 So.2d 765, 769 (Miss. 2005) ("if the contract is not ambiguous the Court can not write in terms not contemplated by the parties") (citations omitted).

The crux of Plaintiffs' argument on appeal is that "Underwriters and Caronia materially breached the Policy when they demanded 'prepayment' of the $250,000 per claim deductible from Daleson and Medforce." Appellants' Brief at 12. In other words, it appears that Plaintiffs believe Defendants were required to pay Plaintiffs' defense costs and settlement amounts incurred within the $250,000 per claim deductibles and then only allowed to seek reimbursement from Plaintiffs at a later date. As will be explained in Section II-A-4-i, Defendants never demanded prepayment, but only informed Plaintiffs of their obligation under the Policy. To the extent that Defendants "demanded prepayment" by advising Plaintiffs that they were responsible for payment of defense costs incurred up to $250,000, Defendants were well within their rights to do so based on the clear language of the Policy.

Under the terms of the Policy, the First Named Insured, Southern, is responsible for the deductible, including defense costs incurred until the deductible has been paid in full. Again, Endorsement No. 1 provides:

Section ***V. DEDUCTIBLE*** *of the* ***HEALTHCARE PROFESSIONAL LIABILITY CLAIMS MADE COVERAGE PART FOR LONG TERM CARE FACILITIES*** *is deleted in its entirety and replace[d] with the following:*

> ***V. DEDUCTIBLE***
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> *A. The First Named Insured shall be responsible for the deductible amount shown in the Declarations, WHICH DEDUCTIBLE AMOUNT SHALL BE IN ADDITION TO AND SHALL NOT ERODE THE APPLICABLE LIMITS OF INSURANCE SHOWN IN THE DECLARATIONS. Expenses* ***we*** *incur in investigating and defending claims and* ***suits*** *are included in the deductible.*
>
> * * *
>
> *C.* ***We*** *may pay all or part of the deductible to settle a claim or suit. The First Named Insured agrees to repay* ***us*** *promptly after* ***we*** *notify the First Named Insured of the Settlement.*
>
> * * *

(R., at 137) (double underline emphasis added).

Clearly, Defendants are not obligated to pay the deductible on behalf of the Plaintiffs. Southern, as the First Named Insured, bears that responsibility. Furthermore, it is clear that defense costs are included in the $250,000 per claim deductible. This does not necessarily mean that Plaintiffs were obligated to pay ***all*** defense costs incurred in defense of the suits brought against them. Instead, Plaintiffs were required to pay only the first $250,000 as it was incurred in defense costs and/or settlement awards in the form of their per claim deductibles.

The Policy defines Underwriters' payment responsibility as being limited "only to the amount of damages in excess of any deductible amounts." (R., at 198). The Deductible Liability Insurance Endorsement provides:

> *A. Our obligation under the Bodily Injury Liability, Property Damage Liability, Medical Expense and Medical Incident Coverages to pay damages on your behalf applies only to the amount of damages in excess of any deductible amounts stated in the Schedule above as applicable to such coverages.*
>
> * * *

> D. *We may pay any part or all of the deductible amount to effect settlement of any claim or "suit" and, upon notification of the action taken, you shall promptly reimburse us for such part of the deductible amount as has been paid by us.*

(*Id.*) (double underline emphasis added).

The Policy permits Underwriters to advance all or part of the deductible amount in order to settle Plaintiffs' claims, although the Policy does not require Underwriters to do so. Underwriters are required to pay defense costs only after Plaintiffs have exhausted the $250,000 per claim deductible. Contrary to what Plaintiffs would have this Court believe, Subsection D of the Deductible Liability Insurance Endorsement does not establish a duty for Underwriters to pay the deductible on behalf of Plaintiffs. In fact, if anything, it demonstrates the parties' intentions that, subject to limited exceptions such as this, Plaintiffs are responsible for the deductible amounts as a prerequisite to obtaining financial contribution from Underwriters under the Policy.

Aside from the fact that the Policy's clear and unambiguous terms place responsibility for payment of the deductible on Plaintiffs, Mississippi has clear law on this issue. It is common knowledge that a deductible is the amount of insurance that is to be incurred by the insured. *See, e.g., Thomas v. Deviney Const. Co.*, 458 So.2d 694, 695 (Miss. 1984) ("the insurance policy issued by [the insurer] provided for a deductible of $100,000. In other words, it provided that [the insured] was responsible for the first $100,000 damage its vehicles did to users of Mississippi highways"); *see also* Black's Law Dictionary 413 (6th ed. 1990) (defining a deductible as "[t]he portion of an insured loss to be borne by the insured before he is entitled to recovery from the insurer.").[8] In addition, Plaintiffs initially paid their defense counsel directly in accordance with their duty under the Policy. (R., at 762). Plaintiffs continued to pay defense counsel directly until they realized that their deductible was $250,000 instead of $25,000. (*Id*).

[8] Several other jurisdictions have described the function of deductibles in a similar manner. "Generally, the functional purpose of a deductible, which is frequently referred to as self-insurance, is to alter the point at which an insurance company's obligation to pay will ripen." *International Bankers Ins. Co. v. Arnone*, 552 So.2d 908, 911 (Fla. 1989) (citing *American Nurses Assoc. v. Passaic General Hosp.*, 484 A.2d 670, 673 (N.J. 1984).

Thus, at the outset, it appears as though Plaintiffs understood their obligations under the Policy with respect to payment of the per claim deductible.

To whatever degree Plaintiffs were confused as to the deductible's amount is of no consequence to Defendants because, in Mississippi, a person is charged with knowing the contents of any document that he or she executes. *See, e.g., Massey v. Tingle*, 867 So. 2d 235, 240 (Miss. 2004) (citing *Russell v. Performance Toyota, Inc.*, 826 So. 2d 719, 726 (Miss. 2002)). Furthermore, if, as Plaintiffs allege, their agent-broker, Fox-Everret, somehow misrepresented the deductible's amount, any liability falls solely on Fox-Everett and is of no consequence to Defendants. Therefore, Defendants cannot be held liable for damages resulting from Plaintiffs' unfamiliarity with their Policy prior to purchasing it and making five separate claims under it. Southern is a sophisticated party as it is a Mississippi corporation in charge of managing Daleson and Medforce, two Limited Liability Companies that operate long-term care facilities.

3) Defendants' Fulfilled Their Contractual Obligations Under the Policy By Having Defended the Suits Brought Against the Plaintiffs and Facilitated an Ultimate Resolution in Each

Defendants fulfilled their obligations under the Policy. To understand how this was done, it is necessary to demonstrate what duties Defendants owed to Plaintiffs under the Policy.

As established in the preceding sections, the Policy clearly provides for a $250,000 per claim deductible to be paid by Southern, as the First Named Insured, and Underwriters are not obligated under the terms of the Policy to pay this deductible on behalf of Plaintiffs. The Policy also laid out Underwriters' financial obligations to Plaintiffs. First, the Deductible Liability Insurance Endorsement provides that Underwriters' were to provide coverage to Plaintiffs "only to the amount of damages in excess of any deductible amounts." (R., at 198). Next, the Supplementary Payments and Defense Costs Within the Limits of Liability Endorsement stated that "we [Underwriters] will pay the following Supplementary Payments and defense Costs . . .

." (R., at 201). Thus, in addition to paying Plaintiffs for damages in excess of the deductible, Underwriters were also required to pay any defense costs incurred above the $250,000 deductible. Additionally, under Endorsement No. 1, Underwriters could choose to advance amounts within the deductible amount to settle claims brought against Plaintiffs under the Policy and seek reimbursement at a later date.

Now that Defendants' obligations under the Policy are clear, it is undisputable that Defendants fulfilled their obligations under the Policy, and the Circuit Court was correct in holding as such as a matter of law. After being put on notice of the claims made by Plaintiff under the Policy, Defendants timely notified Plaintiffs that coverage would be provided subject to reservations of rights, a valid and appropriate option under Mississippi law. *See, e.g., Moeller v. American Guar. and Liability Ins. Co.,* 707 So. 2d 1062, 1069 (Miss. 1996). Plaintiffs specifically requested that particular defense counsel assist in their defense of the suits brought against Plaintiffs, and Defendants honored their request. Defendants reminded Plaintiffs that the First Named Insured, Southern, was obligated under the Policy to pay the $250,000 per claim deductible. (R., at 234-48). While Plaintiffs initially paid their defense counsel directly in accordance with their duty under the Policy, they stopped payment once they realized that their per claim deductible was $250,000 instead of $25,000. Having not satisfied their deductible obligations under the Policy, Plaintiffs then demanded contribution without regard to their failure to pay their deductibles.

Although Plaintiffs refused to pay amounts incurred under the per claim deductible, Defendants stepped in and elected to advance the deductible amounts in order to settle Plaintiffs' suits and protect Plaintiffs' interests, setting aside reimbursement for a later date. Crucially, Defendants defended and resolved all the claims asserted against Southern and its subsidiaries, Daleson and Medforce. Thus, Plaintiffs' argument that Defendants sought prepayment of the

entire amount of the deductible "up front" and thereby bankrupted these two entities is without merit. Specifically, Defendants defended and then settled four of the five suits brought against Plaintiffs while the fifth claim was resolved without any indemnity payment. To date, Underwriters have advanced and paid $701,153.54 in defense costs, expenses and settlements within the per claim deductibles to successfully resolve all five suits. (2 R., at 25-28). Furthermore, Underwriters have to date paid $65,852.83 in excess of the per claim deductibles, for which Underwriters are not entitled to reimbursement. Therefore, it is clear that Defendants have fulfilled their obligations under the Policy. They have never denied coverage to Plaintiffs. Indeed, they actually chose to advance amounts within the Policy's $250,000 per claim deductibles in order to protect Plaintiffs' interests and expeditiously settle the lawsuits brought against Plaintiffs.

Notably, Plaintiffs concede that Underwriters successfully resolved the five underlying tort claims brought against Plaintiffs. *See* Appellants' Brief at 13 ("[a]lthough they eventually provided coverage to resolve the five tort claims . . . ."). As such, Defendants appropriately resolved all five suits with no adverse judgments having been rendered against Plaintiffs. Thus, it is unclear what harm, if any, Plaintiffs have incurred as a result of Defendants' alleged breach of contract. Specifically, Plaintiffs have failed to allege that any delay in coverage led to a default judgment being entered against Plaintiffs. Likewise, Plaintiffs never alleged that the so-called "prepayment" demand or delay in coverage led to extra expenses being incurred by defense counsel in resolving the five claims. Indeed, Plaintiffs refused to continue paying defense counsel. Nor have Plaintiffs asserted that the settlements effected by Defendants were on unfavorable terms because of any alleged delay.

Plaintiffs' sole claim for harm stems from their allegation that Defendants' reservation of rights letters somehow "forced [Daleson and Medforce] into bankruptcies." Appellants' Briefs

at 13. This argument is nothing more than a red herring. Interestingly, the Plaintiffs that did seek bankruptcy protection bore no financial obligations under the Policy's terms. In fact, Southern is the only Plaintiff that was contractually obligated to pay the $250,000 per claim deductible amounts on behalf of all insureds under the Policy. Southern did not seek bankruptcy protection. Furthermore, Underwriters paid defense expenses and settlements on behalf of Daleson and Medforce. Thus, any suggestion that Defendants contributed to Daleson's and Medforce's decision to seek bankruptcy protection – a business decision – is completely irrelevant as to whether Underwriters fulfilled their obligations under the Policy. Additionally, Plaintiffs' bankruptcy argument suffers from major causation problems as it is quite speculative to assert that because the two bankruptcies followed Defendants' issuance of the reservation of rights letters, that such letters "forced" these two entities into bankruptcy.

4) Plaintiffs' Remaining Arguments Are Erroneous

Several of the arguments asserted by Plaintiffs in their Appellants' Brief consist of irrelevant or mistaken arguments that Defendants must briefly address.

i) Defendants Never Conditioned Coverage on Prepayment of the $250,000 Deductible

Plaintiffs assert that Underwriters, through its third-party administrator Caronia, demanded "prepayment" of the full $250,000 deductible as a condition precedent to Underwriters providing any defense or indemnification to Daleson and Medforce. *See* Appellants' Brief at 8-9. This argument is both misleading and incorrect.

First, by turning to the language of the reservation of rights letters, it is clear that Underwriters never demanded "prepayment" of the $250,000 deductible from Daleson and Medforce. For example, on December 7, 2004, Caronia, on behalf of Underwriters, issued an "Acknowledgement of Suit[,] Reservation of Rights" letter to Daleson (d/b/a Jones County Rest Home) concerning the *Arrington* matter. (R., at 234). This letter initially provided that "[w]e

acknowledge receipt of this law suit and will provide indemnification and defense to Southern Healthcare Services, Inc., d/b/a Jones County Rest Home, Joyce Fikes, Larry Fortenberry and Daleson Enterprises, through the London Underwriters Professional Liability Policy." (*Id.*) The letter further stated, "[a]s you are aware Southern Healthcare Services, Inc., d/b/a Jones County Rest Home has a $250,000 deductible for each and every Professional Liability claim. Therefore, the first $250,000 of indemnity and/ or claims related expenses will be paid directly by Southern Healthcare Services, Inc., d/b/a Jones County Rest Home." (R. at 235).

Clearly, Underwriters never conditioned Underwriters' defense, investigation or indemnity obligations on Plaintiffs making a $250,000 prepayment to Underwriters. Rather, the letter simply acknowledged receipt of the *Arrington* claim and set forth the Policy's terms and conditions, including, among other things, the Policy's $250,000 per claim deductible to be paid by Southern, as the First Named Insured. Reservation of rights letters, which are standard practice in communications between insurers and their insureds, are entirely appropriate under Mississippi law. *See, e.g.*, *Moeller,* 707 So. 2d at 1069 ("Unquestionably, the insurance carrier has a right to offer the insured a defense, while at the same time reserving the right to deny coverage in event a judgment is rendered against the insured.") (citations omitted). Furthermore, Caronia's letter acknowledges that Defendants had already begun to take action on the *Arrington* matter. Specifically, Caronia noted that "[w]e have retained the firm of Currie, Johnson, Griffin, Gaines & Myers, to represent Southern Healthcare Services, Inc., d/b/a Jones County Rest Home . . . ." (R. at 235.) Likewise, the letter also reported that Caronia had assigned Anne Everett, its investigator, to begin investigation of the matter. (*Id.*) Therefore, the notion that Defendants somehow demanded prepayment from Plaintiffs and refused to act under the Policy until receiving a lump-sum payment of $250,000 is false. Rather, Underwriters, through Caronia, responded to Plaintiffs' claim by issuing a standard reservation of rights letter noting the Policy's

terms and conditions as well as Defendants' recent actions to bring defense counsel and an investigator into the matter.

ii) The $250,000 Deductible Applies to Claims Asserted Against Daleson and Medforce Even Though These Two Entities Themselves Are Not Responsible for Paying the Deductible

In their brief, Plaintiffs assert that "Underwriters' Policy obligations to defend and indemnify Daleson and Medforce are not conditioned upon prepayment of the deductible by Southern, and the Policy is clear that Daleson and Medforce have no obligation to pay any part of the deductible." Appellants' Brief at 9. Although Plaintiffs' argument is not entirely clear, Plaintiffs are incorrect to the extent that they believe the $250,000 deductible does not apply to claims asserted against Daleson (d/b/a Jones County Rest Home) or Medforce (d/b/a Willow Creek Retirement Home). As discussed above, the Policy provides for a per claim $250,000 deductible to be paid by the First Named Insured, Southern Healthcare. Similarly, it is undisputed that claims asserted against Daleson or Medforce are covered under the Policy.[9] Specifically, the Section entitled "Limitation of Coverage to Designated Premises Endorsement" includes the Daleson and Medforce premises as covered entities. (R., at 133).

Nonetheless, the Policy unequivocally requires payment of the deductible no matter who the claim is asserted against. In the Declarations Page, under the section entitled Deductible, the Policy specifically states that for General Liability/Professional Liability claims, the deductible is "$250,000 **each** claim, Defense Costs included." (R., at 142) (emphasis added). Thus, for any claim, whether it be against Southern or the covered premises (Daleson and Medforce), the deductible clearly has to be paid. To assert that only claims brought against the First Named Insured, Southern, require payment of a deductible is simply absurd. This would be equivalent

[9] Obviously, Underwriters do not and have never disputed that Daleson and Medforce are covered under the Policy. In fact, Underwriters defended and settled the five underlying claims asserted against Daleson and Medforce on behalf of these two entities.

of arguing that, under an automobile insurance policy, a parent need not pay the deducible when a teenage son gets in a car accident simply because the son is listed as an other named insured, rather than the First Named. Furthermore, Plaintiffs understood that the deductible provision obviously applied to claims asserted against Daleson and Medforce because Southern initially paid their defense counsel directly until realizing that the deductible was $250,000. (R., at 762).

B. Defendants Did Not Engage in Bad Faith

"Good faith is the faithfulness of an agreed purpose between two parties, a purpose which is consistent with justified expectations of the other party. The breach of good faith is bad faith characterized by some conduct which violates standards of decency, fairness or reasonableness." *Cenac v. Murry*, 609 So.2d 1257, 1272 (Miss. 1992) (citing *Restatement (Second) of Contracts* § 205, 100 (1979)). "A party may thus be under a duty not only to refrain from hindering or preventing the occurrence of conditions of his own duty or the performance of the other party's duty, but also to take some affirmative steps to cooperate in achieving these goals." *Id.* (quoting Farnsworth, Contracts, § 7.17, 526-27 (1982)).

The undisputed facts demonstrate that Defendants did not breach their duty of good faith and fair dealing in carrying out the terms and conditions of the Policy and thus have not committed bad faith. Defendants fulfilled their obligations under the Policy and protected Plaintiffs' interests by defending the five claims brought against Plaintiffs, thereby facilitating a resolution in each. Furthermore, Defendants have gone one step further in that they elected to advance defense costs and settlement amounts within the Policy's $250,000 per claim deductible in order to settle four of the five claims brought against Plaintiffs. Additionally, Underwriters paid defense fees in the fifth claim, the *Owens* matter, which was eventually voluntarily dismissed. Thus, Defendants never hindered or prevented the performance of either the Plaintiffs' or the Defendants' duties under the Policy.

Under Mississippi law governing bad faith, an insured may recover punitive damages from its insurer if "[t]he insurer lacked an arguable or legitimate basis for denying the claim, *and* [] [t]he insurer committed a willful or malicious wrong, or acted with gross and reckless disregard for the insured's rights." *Jenkins v. Ohio Casualty Ins. Co.*, 794 So. 2d 228, 232-33 (Miss. 2001) (quoting *State Farm Mut. Auto. Ins. Co. v. Grimes*, 722 So. 2d 637, 641 (Miss. 1998)). The insured bears a heavy burden in establishing that the insurer had no reasonably arguable basis to deny the claim. *Windom v. Marshall*, 926 So. 2d 867, 872 (Miss. 2006).

Plaintiffs have completely failed to present anything even resembling a *prima facie* case for bad faith. It should first be noted that Plaintiffs have potentially abandoned their claim for bad faith against Defendants. Though Plaintiffs bear the burden of establishing a genuine issue of material fact as to the existence of bad faith, they have nonetheless failed to cite to any case authority supporting their allegation that Defendants' actions somehow constitute bad faith. Of course, this is an uphill battle for Plaintiffs because Underwriters never actually denied coverage. Instead, Underwriters defended and ultimately resolved the five underlying claims asserted against Daleson and Medforce. *See* Appellants' Brief at 13. Underwriters resolved these five claims by advancing Underwriters' funds to defend and settle the claims within the Policy's deductibles. Next, Plaintiffs only allegations of bad faith consist of statements that Defendants' conduct was "quintessential bad faith" or "the epitome of bad faith" without any support. Appellants' Brief at 13, 14. These two statements (one of which is buried in a footnote) consist of nothing more than conclusory allegations containing no case law or factual support.

Finally, this Court must review *de novo* the circuit court's grant of summary judgment in favor of Defendants on Plaintiffs' bad faith claim. *See City of Jackson*, 764 So. 2d at 376. However, that a circuit court found as a matter of law that Underwriters complied with terms of the contract and deserve contract damages for Plaintiffs' breach, should, at a minimum, be

considered *prima facie* evidence that Defendants acted reasonably and in good faith under the Policy. Setting that point aside, there clearly is no genuine issue of material fact as to whether Defendants' engaged in bad faith in defending, settling or otherwise resolving the five claims brought against Plaintiffs. Thus, the Circuit Court's ruling on this issue should be affirmed.

C. Defendants Did Not Act Fraudulently

It appears from Appellants' Brief that Plaintiffs are no longer pursuing their claim for fraud against Underwriters or Caronia for there is no assertion or even mention of fraud anywhere in their brief. As the Court is well aware, "[f]ailure to cite authority in support of claims of error precludes this Court from considering the specific claim on appeal." *Boutwell v. Boutwell*, 829 So.2d 1216, 1223 (Miss. 2002)(citing *Pickering v. Indus. Masina I Traktora,* 740 So.2d 836, 848 (Miss.1999)). Consequently, Plaintiffs' failure to raise this issue in its brief or cite any authority in support thereof precludes the Court from considering on appeal the issue of whether Defendants acted fraudently. Nevertheless, to whatever extent these allegations remain, Defendants briefly address them.[10]

For purposes of this appeal, Plaintiffs must demonstrate the there was a genuine issue of material fact as to whether Defendants' actions under the Policy constituted fraud. *See* Miss. R. Civ. P. 56(b). Under Mississippi law, in order to succeed on their fraud claim, Plaintiffs must prove by clear and convincing evidence, among other elements, that Defendants made a material misrepresentation which injured Plaintiffs. *See, e.g., Franklin v. Lovitt Equip. Co., Inc.*, 420 So.2d 1370, 1373 (Miss. 1982).

While Plaintiffs alleged in their Complaint that Defendants "falsely represented to the Plaintiffs that, among other things, the enormous deductible must be paid up front in order to

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[10] While the Court is precluded from considering the fraud issue due to Plaintiffs' failure to adequately brief the same, Defendants briefly address this issue out of an abundance of caution only, in the event that the Court wishes to provide a brief analysis of this issue in its Opinion. See, e.g., *Boutwell*, 829 So.2d at 1223.

obtain coverage and that defense costs are included in the policy limits," deliberately misconstrue the operation of the Policy. As already explained, Plaintiffs are ultimately responsible for the amounts incurred within the $250,000 per claim deductible. Once the $250,000 per claim deductible has been met, all remaining defense and settlement costs are paid for by Defendants without reimbursement. (R., at 198). Additionally, the terms of the Policy provide that Underwriters are only responsible for the damages and defense expenses in excess of the per claim deductible. *(Id.)* Therefore, even if Defendants had represented what Plaintiffs allege,[11] Plaintiffs' fraud claim must fail as it is an accurate interpretation (that Plaintiffs are responsible for payment of amounts within the deductible as they are incurred) of the terms and conditions of the Policy. Accordingly, the circuit court properly concluded that Defendants did not act fraudulently as a matter of law and this ruling should be affirmed.

III. THE INSURANCE POLICY REQUIRES PLAINTIFFS TO REIMBURSE UNDERWRITERS FOR DEFENSE COSTS, EXPENSES AND SETTLEMENT AMOUNTS INCURRED WITHIN THE $250,000 PER CLAIM DEDUCTIBLE

Underwriters brought their Counterclaim against Southern to obtain reimbursement for the defense costs and damages advanced under the deductible and incurred in funding a defense to Plaintiffs' five (5) claims under the Policy. The Circuit Court correctly applied the clear and unambiguous terms of the Policy to the facts and ruled in favor of Underwriters finding that Southern was required to reimburse Underwriters $701,153.54 for amounts Underwriters advanced on Southern's behalf. This ruling should be affirmed for two reasons. First, under the Policy's plain terms, Southern must reimburse Underwriters for amounts incurred within the Policy's per claim deductible. Second, Defendants have fully performed their duties under the Policy while Southern has failed to fulfill its contractual obligations to reimburse Underwriters.

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[11] Of course, as explained in Section II-A-4-i, Defendants dispute that the reservations of rights letters somehow demanded a $250,000 lump sum "prepayment" before Defendants would take any action on behalf of Plaintiffs.

A. Under the Plain Terms of the Insurance Policy, Southern Must Reimburse Underwriters for Amounts Incurred Within the Per Claim Deductible

The most basic of rule of contract construction is that the mutual intent of the parties governs, and their intent is to be ascertained from an objective reading of the words of the contract. *See, e.g., Mississippi Transportation Commission v. Ronald Adams Contractor, Inc.*, 753 So. 2d 1077, 1084 (Miss. 2000) (citing *Hoerner v. First National Bank of Jackson*, 254 So. 2d 754, 759 (Miss. 1971); *Rubel v. Rubel*, 75 So. 2d 59 (Miss. 1954); *Cooper v. Crabb*, 587 So. 2d 236, 239, 241 (Miss. 1991). If a contract is clear and unambiguous, then the trial court should construe it as written. *Jackson v. Daley*, 739 So. 2d 1031, 1041 (Miss. 1999) (citing *Lowery v. Guaranty Bank & Trust Co.*, 592 So. 2d 79, 82 (Miss. 1991)).

It is clear from Endorsement No. 1 that the Policy provides for a $250,000 per claim deductible, defense costs included, to be paid by Southern, as the First Named Insured. Plaintiffs agree and have stated that the Policy is "crystal clear" on this point. *See* Appellants' Brief at 8 ("The policy is crystal clear that the only insured subject to the $250,000 deductible was Southern.").

Next, the Deductible Liability Insurance Endorsement further defines each party's respective obligations under the Policy:

> *A. Our obligation under the Bodily Injury Liability, Property Damage Liability, Medical Expense and Medical Incident Coverages to pay damages on your behalf <u>applies only to the amount of damages in excess of any deductible amounts</u> stated in the Schedule above as applicable to such coverages.*
>
> * * *
>
> *D. <u>We may pay any part or all of the deductible amount to effect settlement of any claim or "suit" and, upon notification of the action taken, you shall promptly reimburse us for such part of the deductible amount as has been paid by us.</u>*

(R., at 198) (double underline emphasis added).

From the language of this Endorsement, it is clear that Underwriters' payment responsibility is limited only to payment of damages in excess of the $250,000 per claim deductible. However, as has been previously noted, Underwriters chose to advance the deductible amount in order to settle any claim or suit brought against Plaintiffs, as allowed under subsection D of the Deductible Liability Insurance Endorsement. Under such circumstances, subsection D makes clear that Plaintiffs must promptly reimburse Underwriters for the defense costs, expenses, and settlement amounts advanced up to the $250,000 deductible amount.

Thus, the Policy's terms and conditions clearly and unambiguously establish the following: (1) an obligation on Southern, as the First Named Insured, to pay a $250,000 per claim deductible that includes defenses costs; (2) an obligation on Underwriters to pay for any damages, including defense costs and expenses, incurred in excess of the $250,000 per claim deductible; and (3) an obligation on Southern, as the First Named Insured, to promptly reimburse Underwriters if Underwriters advance defense costs, expenses, and settlement amounts within the $250,000 deductible for each and every claim.

B. Because Defendants Fully Performed Their Obligations Under the Contract, Plaintiff Must Now Render Performance By Reimbursing Defendants

Underwriters have fully performed all their duties owed to Plaintiffs under the Policy while Southern has not fulfilled its contractual obligation to reimburse Underwriters for amounts advanced on Plaintiffs' behalf.

1) Underwriters Have Fully Performed Their Obligations Under the Policy

The trial court correctly found that Underwriters performed their obligations under the Policy thus entitling Underwriters to reimbursement from Plaintiffs. During the instant Policy's coverage period, October 7, 2003 to October 7, 2004, Plaintiffs voluntarily tendered five (5) separate claims under the Policy to Defendants. Defendants then timely notified Plaintiffs that coverage would be provided subject to reservations of rights. Plaintiffs specifically requested

that particular defense counsel assist in their defense of the suits brought against Plaintiffs, and Defendants honored their request. Plaintiffs began directly paying their defense counsel but then quickly stopped after learning that the deductible was $250,000 rather than $25,000. Underwriters then fulfilled their duties under the Policy by electing to advance the deductible amounts in order to settle Plaintiffs' suits and protect Plaintiffs' interests, setting aside reimbursement for a later date. Defendants defended and then settled four of the five suits brought against Plaintiffs, and the fifth claim was resolved without any indemnity payment.

To date, Defendants have advanced and paid $701,153.54 in defense costs, expenses and settlements within the per claim deductibles to successfully resolve all five suits. Obviously, Underwriters are not requesting reimbursement for the $65,852.83 paid in excess of the per claim deductibles as this amount was clearly Underwriters' obligation under the Policy. Thus, it is clear that Underwriters have met their obligations under the Policy. Underwriters never denied coverage to Plaintiffs but rather advanced funds so as to protect Plaintiffs' interests and expeditiously settle the suits brought against Plaintiffs.

2) Plaintiffs Have Failed to Perform Their Obligations Under the Policy

Under Mississippi law, the necessary elements for a breach of contract claim are: (1) the existence of a valid and binding contract; (2) that a party has broken or breached; (3) the breach of which has damaged the claimant monetarily. *Warwick v. Matheney*, 603 So. 2d 330, 336 (Miss. 1992). A material breach occurs "where there is a failure to perform a substantial part of the contract or one or more of its essential terms or conditions, or if there is such a breach as substantially defeats the purpose of the contract." *Ferrara v. Walters*, 919 So. 2d 876, 886 (Miss. 2006) (quoting *Gulf South Capital Corp. v. Brown*, 183 So. 2d 805, 805 (Miss. 1966)) (internal quotations and alterations omitted).

Plaintiffs have failed to live up to their duties owed to Underwriters under the Policy and as such are in material breach of the Policy. Specifically, following Underwriters' advancement of defense and settlement costs within the per claim deductibles, Plaintiffs failed to provide any reimbursement to Underwriters as required by the Policy. Failing to reimburse Underwriters the $701,153.54 it is owed amounts to "fail[ing] to perform a substantial part of the contract or one of its essential terms or conditions . . ." and is thus a material breach. *Ferrara*, 919 So. 2d at 886. Plaintiffs do not dispute that they have yet to reimburse Underwriters for any of the amounts advanced within the per claim deductibles. (*See* Appellants' Brief at 16-17.) Interestingly, Plaintiffs also do not dispute that the plain language of the Policy requires reimbursement by the insured for amounts advanced by the insurer within the per claim deductible.

Finally, in their brief, Plaintiffs assert that Southern is entitled to "set-off its damages against any damages claimed by Underwriters." Appellants' Brief at 16. This argument is irrelevant because a setoff would only be appropriate if Defendants had actually breached the insurance contract. Here, as has been established in the preceding sections, Defendants did not breach the insurance contract because Defendants fulfilled their obligations to Plaintiffs under the Policy. Therefore, Plaintiffs are not entitled to any setoff.

To summarize, Plaintiffs, specifically Southern, have materially breached the Policy by failing to reimburse Underwriters the amount it is due for advancement of defense and settlement costs made on Southern's behalf. Thus, the Circuit Court correctly granted summary judgment to Underwriters on their Counterclaim for damages and that ruling should be affirmed.

IV. PLAINTIFFS' ARGUMENT THAT THE INSURANCE POLICY IS AMBIGUOUS IS BOTH INCORRECT AND IMMATERIAL

Plaintiffs' argument that the Policy is ambiguous is both incorrect and immaterial to the present dispute. First, the Policy, when read as a whole, provides that any payments made within

the Policy's deductible do not erode the Policy's limits. Second, even assuming, *arguendo*, that these two provisions are ambiguous, that ambiguity is immaterial to the present dispute concerning payment of deductibles and reimbursement.

A. The Policy Is Not Ambiguous as to the Issue of Erosion of Policy Limits

"It has long been the law in Mississippi that in construing particular provisions in a contract, a court will look to the document as a whole." *Cherry v. Anthony, Gibbs, Sage*, 501 So. 2d 416, 419 (Miss. 1987). Mississippi law has recognized that the parties may modify or supplement their original contract through the use of endorsements. *See, e.g., Id.* at 418-19 (reading a Standard Amount Coverage Endorsement in conjunction with the policy as a whole); *Banks v. Southern Farm Bur. Cas. Co.*, 912 So. 2d 1094, 1098 (Miss. Ct. App. 2005) (affirming summary judgment for insurers and noting that the insured would have been aware of the policy's unambiguous disability income endorsement had the insured read the policy).

The Policy is not ambiguous as to the issue of whether defense costs or payments made within the deductible erode the Policy's limits. At the outset, Defendants note the applicable limits on coverage. In the Declarations Page, the Policy provides for a limit of $500,000 per claim for any claims arising from liability due to "Medical Incident," "Personal and Advertising Injury," or "Combined Single Limit (BI/PD)." (R., at 142). Thus, for any single claim resulting from a Medical Incident, the most for which Underwriters would have to indemnify Plaintiffs is $500,000.

The first section of the Policy discussing erosion is the Supplementary Payments and Defense Costs Within the Limits of Liability Endorsement ("Supplementary Payments Endorsement"), which states:

> Subject to the Deductible Liability Insurance Endorsement provisions of this policy, it is agreed that we will pay the following Supplementary Payments and Defense Costs, which will be included within, not in addition to and will erode, the Limits of Liability of the policy.

(R., at 201) (double underline emphasis added).

A review of the above-quoted language reveals three points. First and foremost, the Supplementary Payments Endorsement is subject to the Deductible Liability Insurance Endorsement ("Deductible Liability Endorsement"). Second, Underwriters agree to pay certain defense costs under the Supplementary Payments Endorsement. Third, the defense costs paid under this Endorsement do erode the Policy's $500,000 per claim limit. Keeping these points in mind, the language of the Deductible Liability Endorsement is as follows:

> *A. Our obligation under the Bodily Injury Liability, Property Damage Liability, Medical Expense and Medical Incident Coverages to pay damages on your behalf applies only to the amount of damages in excess of any deductible amounts stated in the Schedule above as applicable to such coverages.*
>
> * * *

(R., at 198) (double underline emphasis added).

As is clear from the language of the Deductible Liability Endorsement, Underwriters agree to pay damages only for amounts that exceed any deductible amounts. In other words, Underwriters are not obligated to pay for costs, whether defense or indemnity, until the deductible has been satisfied. Upon reading the Deductible Liability Endorsement together with the Supplementary Payments Endorsement, it becomes clear that when the Supplementary Payments Endorsement stated that defense costs erode the Policy's limits, it was only referring to defense costs in excess of the Policy's deductible. This is so because the Supplementary Payments Endorsement is subject to the Deductible Liability Endorsement. And because the Deductible Liability Endorsement only requires Underwriters to pay for costs in excess of any deductibles, the Supplementary Payments Endorsement is thereby modified to only require Underwriters to pay for supplementary payments and defense costs above the deductible. Thus,

when the Supplementary Payments Endorsement provides for erosion, it is only providing for erosion once the deductible had been paid.

Finally, turning to Endorsement No. 1, it is clear that this Endorsement does not actually conflict with the Supplementary Payments Endorsement, and thus, there is no ambiguity. Endorsement No. 1 provides:

> *Section* ***V. DEDUCTIBLE*** *of the* ***HEALTHCARE PROFESSIONAL LIABILITY CLAIMS MADE COVERAGE PART FOR LONG TERM CARE FACILITIES*** *is deleted in its entirety and replace[d] with the following:*
>
> ***V. DEDUCTIBLE***
>
> *A. The First Named Insured shall be responsible for the deductible amount shown in the Declarations, WHICH DEDUCTIBLE AMOUNT SHALL BE IN ADDITION TO AND SHALL NOT ERODE THE APPLICABLE LIMITS OF INSURANCE SHOWN IN THE DECLARATIONS. Expenses* ***we*** *incur in investigating and defending claims and* ***suits*** *are included in the deductible.*
>
> * * *

(R., at 137) (double underline emphasis added).

Endorsement No. 1 makes clear, in no uncertain terms, that payments made within the deductible by the First Named Insured "do not erode the applicable limits of insurance [as] shown in the declarations." And, as demonstrated above, the Supplementary Payments Endorsement, as modified by the Deductible Liability Endorsement, only calls for erosion of the Policy limits upon Underwriters paying for defense costs and supplementary payments above the Policy's deductible. These two provisions are not contradictory. One provides for erosion when payments are made **above** the deductible (the Supplementary Payments Endorsement), while the other does not provide for erosion for payments made **within** the deductible.

It is thus clear that Plaintiffs' ambiguity argument is incorrect. The Policy does not become ambiguous simply because there is one phrase saying "will erode" while another says "shall not erode." Instead, the Policy provides that any payments made within the deductible

will not erode the Policy's limits while payments made above the deductible – once Underwriters' coverage obligations to pay defense and indemnity expenses begin – will erode the limits. This framework would be expected for a Policy that in essence functions like an excess insurance policy. Therefore, reading the three endorsements as a whole – as is required under Mississippi law – demonstrates that the Policy is clear and unambiguous on the issue of erosion.

B. Any Alleged Ambiguity Is Immaterial and Irrelevant to the Present Dispute

Defendants maintain that the Policy is not rendered ambiguous on the issue of erosion because the three applicable endorsements, when read as a whole, do not contradict each other. Nevertheless, even assuming for the sake of argument that the Policy is somehow ambiguous on the issue of erosion of Policy limits, it is wholly irrelevant to the present dispute for several reasons.

First, like many jurisdictions, Mississippi has a general rule of contract interpretation that construes an ambiguous provision or term within an insurance policy against the one who drafted the policy. *Anglin v. Gulf Guar. Life Ins. Co.*, 956 So. 2d 853, 861 (Miss. 2007). However, this rule only construes against the drafter the ambiguous term or provision, *not* the entire policy. If it is determined that the "policy language is ambiguous, such *provisions* are to be resolved in favor of the non-drafting party-the insured." *Id.* (internal citations and quotations omitted) (emphasis added). After all, the Supreme Court has long held that "in a case where language of an otherwise enforceable contract is subject to more than one fair reading, *we will give <u>that language</u> the reading* most favorable to the non-drafting party." *Leach v. Tingle*, 586 So. 2d 799, 802 (Miss. 1991) (citing *Stampley v. Gilbert*, 332 So. 2d 61, 63 (Miss. 1976)) (emphasis added). Thus, assuming the Policy is ambiguous as to the issue of erosion of Policy limits, only the provisions governing erosion would be construed against Underwriters – not the entire Policy.

Therefore, Plaintiffs are not relieved of their obligation to pay the amounts due under the Policy's per claim deductible simply because of one alleged ambiguity dealing with policy limits.

Next, even if the provisions governing erosion were construed against Defendants, that construction would not benefit Plaintiffs' argument and is thus wholly irrelevant to the present dispute. First, none of the five claims resolved by Defendants have even come close to approaching the Policy's $500,000 per claim limit. Specifically, four of the five suits involved were resolved within the Policy's deductible. These cases are over and done with, and none even came close to approaching the Policy's $500,000 limit. For the only claim settled above the Policy's deductible, the *Landrum* claim, the deductible was only exceeded by $65,852.83. Again, this amount is not even close to the Policy's $500,000 per claim limit. Whether or not defense expenses paid within the deductible erode the Policy's limit is irrelevant in this dispute because the Policy's underlying limits never even came close to being implicated by these five claims. Thus, even if construed against Defendants, Southern would still have to satisfy the $250,000 per claim deductible.

Finally, Defendants believe that the three endorsements described above, read as a whole, provide that defense payments (or any other payments) made within the deductible <u>do not</u> erode the Policy's limits. However, Plaintiffs are asking that this Court construe these provisions against Defendants. Taking Plaintiffs' argument to its logical conclusion, Plaintiffs are actually requesting for erosion to apply for payments made within the deductible, which would mean less coverage would be available to the Insured. It is incredulous that Plaintiffs here are requesting the Policy be construed against the drafter – Underwriters – even though Underwriters' drafting and interpretation of the Policy benefits Plaintiffs. Most insureds seek to have ambiguous terms

or provisions construed against the insurer in order to provide for or expand coverage – not to reduce its availability.

CONCLUSION

"[C]ontracts are solemn obligations and this Court is obligated to give[] them effect as written." *Ferrara v. Walters*, 919 So. 2d at 876, 882 (Miss. 2006) (quoting *I.P. Timberlands Operating Co. v. Denmiss Corp.*, 726 So. 2d 96, 108 (Miss. 1969). In the end, this case represents nothing more than Plaintiffs' attempts to avoid having to pay Underwriters for the amounts advanced within the Policy's per claim deductible. Plaintiffs have failed to identify any genuine issues of material fact in this case. This is because the parties are essentially in agreement over the facts of this case.

The Policy clearly provides for a $250,000 per claim deductible, to be paid by the First Named Insured. And like most policies, this Policy places the obligation of payment of the deductible on the insured, which here is Southern. Additionally, Underwriters were permitted under the Policy to advance defense and settlement costs within the Policy's deductible on behalf of Plaintiffs. And, of course, this is precisely what happened: Defendants advanced defense and settlement costs within the Policy's deductible to resolve the five claims asserted against Plaintiffs. Plaintiffs' central argument, that Defendants breached the Policy when they initially instructed Plaintiffs to cover their own per claim deductibles, is simply incorrect. The Policy clearly and unambiguously places the obligation of payment of the deductible on Southern – not Underwriters. Thus, it is not a material contract breach to merely point out the application of a clear and unambiguous provision of the policy, even if such action "forces" one of the parties to seek the protection of the bankruptcy courts.

Instead, it is Plaintiffs who have breached their duties under the Policy by refusing to reimburse Underwriters for the amounts advanced within the per claim deductibles. As such,

because Defendants have fulfilled their obligations under the contract while Southern has failed to reimburse Underwriters, the Circuit Court correctly granted summary judgment to Underwriters on their counterclaim.

It is telling that Plaintiffs no longer dispute that the Policy provides for a $250,000 deductible. Likewise, Plaintiffs do not even dispute that, under the Policy, the insured is required to reimburse Underwriters for amounts advanced within the Policy's deductible. Instead, Plaintiffs argue that Southern is not obligated to reimburse Underwriters because Defendants materially breached the contract, and a material breach relieves the non-breaching party of having to perform its obligations under the contract. Therefore, should this Court find Defendants did not breach the Policy, under Plaintiffs' own argument, Southern must automatically reimburse Underwriters for amounts advanced and paid for within the Policy's deductibles.

Finally, Plaintiffs' argument that the Policy is ambiguous is incorrect and immaterial to the present dispute. The Policy is not ambiguous when the relevant provisions governing erosion are read as a whole. Moreover, even assuming, *arguendo*, that these provisions were somehow ambiguous, only the ambiguous provisions – not the entire Policy – would be construed against the drafters. Finally, construing these provisions against Underwriters will have no effect on the present dispute because the Policy limits were never implicated by the underlying claims. In reality, Southern has simply scoured the Policy in search of any two provisions that might appear to contradict one another. Thus, Plaintiffs' flawed ambiguity argument is nothing more than their attempt to void the Policy and get around their responsibility to pay the per claim deductibles as required.

For the forgoing reasons, this Court should affirm the Circuit Court's judgments granting summary judgment to Defendants on Plaintiffs' claims and awarding Underwriters contract damages in the amount of $701,153.54.

CERTIFICATE OF SERVICE

I, Richard O. Burson, hereby certify that I have this date served a true and correct copy of Appellees' Record Excerpts to the following via United States Mail, postage prepaid:

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This the 31st day of December, 2008.

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