IN THE MISSISSIPPI SUPREME COURT
Cause No. 2010-CA-00961

LOUISIANA EXTENDED CARE CENTERS, INC.; LEGACY HEALTH CARE SERVICES, INC.; MAGNOLIA MANAGEMENT CORPORATION; THE ESTATE OF ROBERTA LANE, BY AND THROUGH ALICE HAYES ADMINISTRATRIX; GEORGIA SMITH, AS CONSERVATOR FOR EVA MONTGOMERY; ADAMS COMMUNITY CARE CENTER, LLC; LEGACY HEALTH CARE SERVICES, INC.; LOUISIANA EXTENDED CARE CENTERS, INC.; LEGACY CARE, INC.; MAGNOLIA MANAGEMENT CORPORATION; JOHN STASSI; DAVID STALLARD; ELTO G. BEEBE, JR., EDWARD E. CROW	APPELLANTS/ DEFENDANTS

v.

MISSISSIPPI INSURANCE GUARANTY ASSOCIATION	APPELLEE/ PLAINTIFF

APPEAL FROM THE
CIRCUIT COURT OF MADISON COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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ARGUMENT

By an incorrect interpretation of the Mississippi Insurance Guaranty Association Law ("The Guaranty Act"), Miss. Code Ann. §§83-23-101 *et seq.*, Mississippi Insurance Guaranty Association ("MIGA") hopes to reap a windfall by seeking credit for payments made by insurance carriers providing coverage for injuries that accrued during their respective policy coverage, outside of the insolvent Reciprocal of America (formerly known as Virginia Insurance Reciprocal)("ROA") coverage. MIGA invites this Court to ignore the limiting language of the non-duplication provision, Miss. Code Ann. § 83-23-123, implicating only "covered claims" and hold that claimants are required to exhaust any conceivable insurance policy for any conceivable claim that may be pending. MIGA's interpretation of the Guaranty Act statutes is incorrect and inconsistent with the very purpose of the Act. In keeping with its role of interpreting the laws as passed, this Court should find that only those amounts paid by solvent insurers for "covered claims" will reduce MIGA's liability under the Guaranty Act. Miss. Code Ann. § 83-23-123. The non-duplication provision is meant to ensure that MIGA's payment is not duplicated thereby requiring that all other sources of insurance encompassing the "covered claim" be exhausted prior to looking to MIGA for coverage. *Miss. Ins. Guar. Ass'n v. Byars*, 614 So.2d 959, 963 (Miss. 1993). Since there existed no other insurance implicating injuries for which ROA was liable, any concerns that MIGA's payment on behalf of the insolvent ROA is duplicated are eliminated.

In the instant matter, there existed no solvent coverage for the damages for which MIGA is entitled to pay. The settled claims are not "covered claims" that would reduce MIGA's liability because they did not arise out of and were not within an

insurance policy that had become insolvent. Miss. Code Ann. § 83-23-109 (f). Consequently, MIGA is not entitled to a credit for the payments by the solvent insurers and is required to indemnify Appellants in the amount of $300,000 for each settlement in the cases for the claims that accrued during the ROA coverage period. Nothing in MIGA's brief alters this conclusion.

The central question of this appeal becomes what claims are covered by each of the insurance policies. The answer to this question turns on whether the injuries suffered by the residents of the settled nursing home claims constitute multiple divisible occurrences or collectively a single occurrence. "Whether there was one occurrence or more is determined by the policies' respective terms." *Royal Ins. Co. v. America v. Caliber One Indemnity Co.*, 465 F.3d 614, 621 (5th Cir. 2006). The applicable policies, including the ROA policy, combine multiple occurrences into a single occurrence ***only when the incidents occur within the coverage period and when they include exposure to related acts that are substantially the same general harmful conditions.*** Exhibit A to Supp. R. 113- 250; 371-766; 1147-1976; 2075-2112. That is, the insurers are only contractually obligated to pay for injuries that arise from exposure to related acts within the coverage period. Thus, the policies are reasonably interpreted to exclude acts occurring outside of the policy period.

In the instant matter, the claims brought by Ms. Montgomery and Ms. Lane[1] for the injuries they suffered during their nursing home residencies are distinct, unrelated,

[1] The Estate of Eva Montgomery filed a nursing home action in Mississippi alleging negligence during her residency from June 8, 1993 to July of 2003. During the period Ms. Montgomery was a resident at the nursing home, St. Paul Fire and Marine Insurance Company ("St. Paul"), Reciprocal of America (formerly known as Virginia Insurance Reciprocal ("ROA"), Caliber One Indemnity ("Caliber One"), Colony Insurance Company ("Colony") and Certain Underwriters at Lloyds, London ("Lloyds") issued policies of insurance covering the Defendants. Each policy covered claims arising out of their respective coverage period.

and not part of the substantially same general harmful conditions. Accordingly, the instant claims do not collectively constitute a single occurrence for which both ROA and the solvent insurers are liable. Instead, they constitute multiple occurrences that accrued during the respective policy periods.

"Under the law, . . . a factual issue of whether multiple acts are sufficiently related to constitute one occurrence of loss only arises where the applicable policy language unambiguously states that multiple acts may be treated." *Universal Underwriters Ins. Co. v. Ford*, 734 So.2d 173, 178 (Miss. 1999). The policies at issue here do not unambiguously state that multiple injuries may not result in multiple occurrences. There is no language that specifically rebuts Defendants' contention that each injury constitutes a separate occurrence implicating only the insurance coverage effective at the time of the injury. *Id.* "Where there is doubt as to the meaning of an insurance contract, it is universally construed most strongly against the insurer, and in favor of the insured." *Id.* at 176.

In construing similar insurance policies to determine whether the injuries suffered by a nursing home resident during her three-year residency for which there existed multiple policies were single or multiple occurrences, the United States Fifth Circuit Court of Appeals stated:

> The numerous independent grounds of negligence that were alleged to have occurred throughout the residency cannot be unified as repeated exposure to substantially the same conditions. The acts and omissions that caused [the resident's] Stage IV pressure sore, pneumonia, and other injuries that allegedly resulted in her death are divisible from the acts and

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The Estate of Roberta Lane filed a nursing home action in Mississippi alleging negligence during her residency from 1989 to 1998. During the period Ms. Montgomery was a resident at the nursing home, St. Paul Fire and Marine Insurance Company ("St. Paul") and Reciprocal of America (formerly known as Virginia Insurance Reciprocal ("ROA") issued policies of insurance covering the Defendants. Each policy covered claims arising out of their respective coverage period.

> omissions and [the resident's] resulting injuries during [another insurer]'s policy period.

Royal Ins. Co. of America v. Caliber One Indemnity Co., 465 F.3d 614 (5th Cir. 2006). H.T. 18-22; R.E. 4. Expert testimony revealed that employees were negligent at different times during different periods of coverage causing discrete injuries to the resident. The "breaches of the standard of care and the resulting injuries are divisible from the acts of negligence that occurred a year later that caused pneumonia, and a massive, infected Stage IV pressure sore and resulting sepsis, leading to [the resident's] death." *Id.* Significantly, the Appellate Court confirmed that:

> Each carrier is responsible up to its occurrence limits, for all damages emanating from [occurrences] that occur during the insurer's policy period. All [occurrences] occurring outside a carrier's policy are covered by the insurer on the risk at the time of the [occurrence].

Id. at 625 [clarifications included](citing to *Soc'y of the Roman Catholic Church of the Diocese of Lafayette and Lake Charles, Inc. v. Interstate Fire & Cas. Co.*, 26 F.3d 1359, 1366 (5th Cir. 1994)). The cause here requires the same result.

MIGA is correct in stating that its obligations cannot be greater than those of the insolvent insurer under the Policy. (MIGA brief, p. 12; Miss. Code Ann. § 83-23-115(b)). Pursuant to primary and excess policies insuring the nursing home with coverage from August 1, 1995 to September 1, 1999, ROA was contractually obligated to pay for injuries that arise from exposure to related acts within the coverage period. Exhibit A to Supp. R. 1147-1184; 1185-1216; 217-250; 1248-1313. From August 1, 1995 until September 1, 1999, Ms. Montgomery suffered from falls, scratches, abrasions, and bruises, pressure ulcers, infections, a fractured finger on September 20, 1997 and seven falls with three of them occurring between September 27, 1998 and October 25,

1998, with the final fall resulting in a hip fracture. It is only these discrete injuries for which ROA was obligated to pay. Accordingly, stepping into the shoes of ROA, MIGA statutorily assumed these obligations.

Pursuant to the policies, had it not become insolvent, ROA would not be liable for the injuries that the nursing home residents suffered outside of their coverage period. In fact, any settlement by ROA would necessarily be limited to the incidents and injuries that fell within its coverage period. These do not include the injuries suffered by the nursing home residents during the coverage periods of the solvent insurance policies. Certainly, ROA would not be liable for the 27 falls Ms. Montgomery suffered from August 10, 1993 to July 19, 1995, the skin breakdown developed by Ms. Montgomery on December 10, 1999 and on August 27, 2000, an assault wherein a male resident hit Ms. Lane on the head and face on May 11, 1995, nor a sexual assault by a male resident; all injuries occurring during the solvent insurers' coverage periods.

Moreover, the ROA policy states that any act or omission, together with all related acts or omissions in the furnishing of such services shall be considered one medical incident. The claim for causing a fall occurring on August 10, 1993 (outside of the ROA coverage) is in no way related to a claim for causing a urinary tract infection on August 14, 1997 (within the ROA coverage). H.T. 16-17; R.E. 4; Supp. R. 31-51; 121-155; 354-377; 390-419. Thus, pursuant to the very terms of the policy, ROA would not be responsible for the fall occurring outside of the ROA coverage. The same conclusion holds true for all the claims and injuries settled with the solvent insurers. Contrary to MIGA's assertion, the claims against ROA and MIGA are not the same as nor related to the claims against the solvent insurers. (MIGA Brief, p. 21). The settlements involved

injuries that were distinct and divisible from those covered by the ROA policy. Any interpretation to the contrary is simply incorrect.

The Lane and Montgomery Complaints allege numerous and separate acts of negligence by the employees of the nursing homes in providing nursing care to Ms. Lane and Ms. Montgomery during their residencies. The Complaints allege that the residents suffered separate and distinct injuries as a result of the action and inactions of the nursing home employees. Specifically, while Ms. Montgomery was a resident at Adams County Nursing Center she suffered: falls on at least fifty-four (54) occasions from 08/10/93 through 12/9/99; multiple injuries received between 01/30/95 and 08/04/99 including scratches, abrasions, and bruises; dehydration in 12/94 and on 02/01/01; weight loss (over the period of 10/24/95 – 12/21/99); pressure ulcers/skin breakdown on various occasions from 10/10/95 through 08/27/00; contractures in 12/00; UTI on 08/14/92; infections on 07/01/96, 12/21/98, and 11/21/00; multiple incidents of failure by the facility to follow physician's orders; and fraudulent, incomplete, or inaccurate documentation throughout the residency. H.T. 16-17; R.E. 4; Supp. R. 31-51; 121-155; 354-377; 390-419.

Similarly, while Ms. Lane was a resident at Heritage Manor, she suffered: falls in May 1996, December 1996, March 1997, September 1997, September 1998, October 16, 1998 and a fall which resulted in a fractured hip on October 25, 1998; a fractured finger in September 1997; a Stage II stasis ulcer in June 1996; a Stage II wound or abrasion in June 1998; an ear infection in November 1997 and several incidents of hyperglycemia and hypoglycemia at various times during her residency. H.T. 16-17; R.E. 4; Supp. R. 31-51; 121-155; 354-377; 390-419. As indicated above, each of these

incidents constitute a separate and unrelated occurrence as defined by the applicable insurance policies.

For support, MIGA cites to *Cooper v. Missey,* 881 So.2d 889 (Miss. App. 2004). However, a closer reading of the court's analysis supports a decision favorable to Defendants in this matter. In *Cooper*, a guest who was a victim of an assault at the social host's home brought a personal injury action against that host for the failure to obtain medical treatment for the guest. The Court of Appeals held that the three occasions on which the social host moved the guest did not constitute separate occurrences of negligence for the purpose of the policy. *Id.* at 895. In *Cooper*, there was only one negligent act; that is, the failure to render aid and/or a delay in seeking medical attention. Unlike the Lane and Montgomery cases, which involved multiple acts leading to multiple injuries throughout the residents' stay, the *Cooper* victim did not seek to recover for multiple acts of negligence. The *Cooper* victim did not argue that the host was negligent in physically moving him from the house to three different locations around the property. Instead, Cooper argued that the host was negligent in not seeking immediate medical attention. *Id.* Such is not the case here. Defendants seek recovery for multiple acts of negligence causing multiple and discrete injuries to the residents.

The same holds true for its reliance on *North American Specialty Ins. Co. v. Royal Surplus Lines Ins. Co.*, 541 F.3d 552 (5th Cir. 2008). In *North American Specialty*, the issue was whether the liability arising from a suit against a nursing home involved a single covered event or multiple discrete events thereby preventing the stacking of policy limits from multiple, but not overlapping, policies. The policy stated that "all related 'medical incidents' arising out of the providing of or failure to provide professional health care services to any one person shall be considered one 'medical

incident'". *Id.* at 558. The policy specifically stated that "[t]wo or more claims arising out of a single act, error, omission or occurrence or a series of related acts, errors, omissions or occurrence[s] shall be treated as a single claim." The court focused on the key word "related" in rendering its decision. As the policies did not clarify the meaning of the term "related," the court construed the term to mean "having a logical or causal connection." *Id.*

Finding the negligent acts alleged were "related", the court noted that the plaintiff in the underlying suit against the insured nursing home alleged a "pattern and practice of ongoing neglect," not a series of discrete events and serious bodily injuries which were "proximately caused by the continuing negligence" of the insureds. *Id.* The complaint further referred to the nursing home's "continuing course of repeated negligence." Because there was no evidence of discrete unrelated injuries leading to discrete individualized damages, the acts giving rise to liability in the underlying suit were "related" and constituted one medical incident. *Id.* By contrast, the facts alleged and the evidence presented in the instant underlying nursing home suits involve discrete acts and omissions by the staff causing distinct injuries with each act or omission. H.T. 16-17; R.E. 4; Supp. R. 31-51; 121-155; 354-377; 390-419. Accordingly, MIGA's reliance on *North American Specialty* is misplaced.

MIGA's reliance on *Madison Materials Co., Inc. v. St. Paul Fire & Marine Ins. Co.*, 523 F.3d 541 (5th Cir. 2008) is equally misplaced. In *Madison Materials*, an insured employer brought a state court action against the insurer seeking employee dishonesty insurance coverage for the entire amount that the insured's employee had embezzled throughout a 10-year period. The insurer claimed that the 10-year embezzlement activities that spanned multiple insurance contracts constituted a single occurrence

thereby limiting recovery to the limits of liability to a single policy period. *Id.* at 542. Conversely, the insured argued that the myriad acts of theft over almost a decade constituted a single occurrence of employee dishonesty in *each* policy period. *Id.*

A reading of the plain language of the policy convinced the Fifth District Court of Appeals' that there was only one occurrence of employee dishonesty. *Id.* at 543. The policy defined occurrence as "an act or series of related acts involving one or more 'employees.'" Recognizing that Mississippi courts have found that an occurrence is determined by the cause or causes of the resulting injury, the Appellate Court held that the related acts of embezzlement throughout the decade of the insurer's coverage constituted only one cause of the injury sustained by the insured – that is, the employee's dishonesty. *Id.* As there was but a single cause of the insured's financial injury, the policy stated that the multiple related acts were treated as a single occurrence of employee dishonesty over the ten-year period. Notably, the insured did not dispute that the multiple acts of embezzlement during a single policy period constitute a single occurrence, but rather insisted that there was a single occurrence of employee dishonesty in each policy period. *Id.* at 544. The Court disagreed with the insured and held that the embezzlement scheme fit the policy's definition of occurrence because it was a "series of related acts involving one or more employees." *Id.* The case is distinguishable from the instant matter for several reasons.

First, the *Madison Materials* policy's definition of occurrence is distinct from the ones at issue here. Second, there was no dispute that the multiple acts of embezzlement constituted a single policy period. By contrast, that is the very issue presented by this appeal. Third, and finally, unlike *Madison Materials*, there is more than one cause for each of the injuries sustained by Ms. Lane and Ms. Montgomery. For

instance, the breaches of the standard of care causing the falls suffered by Ms. Montgomery from 1993 to 1995 are different than the breaches of the standard of care causing pressure ulcers and infections. Supp. R. 361-387; 405-420. Certainly, there exists more than one cause for the numerous injuries Ms. Lane and Ms. Montgomery suffered during their residencies at the nursing home. "These breaches of the standard of care and the resulting injuries are divisible from the alleged acts of negligence" that occurred during the solvent insurance coverage. *Royal Insurance*, 465 F.3d at 623.

Thus, the gist of the authority cited by MIGA does not support its position that there is but one claim involved in the Lane and Montgomery cases. Instead, the authority and the provisions of the insurance policies demonstrate that there are numerous distinct and divisible claims throughout the nursing home residencies. These claims and injuries do not collectively involve one broad "medical incident". As such, the nursing home claims that were settled do not trigger the ROA coverage and are not "covered claims" as defined under the Guaranty Act. Moreover, there exists no solvent insurance coverage for the injuries that accrued during the ROA coverage as they do not constitute exposure to substantially same general harmful conditions pursuant to the policies. Consequently, MIGA is not entitled to a credit for the payments by the solvent insurers and is required to indemnify Defendants in the amount of $300,000 for each settlement in the Lane and Montgomery cases for the claims that accrued during the ROA coverage. MIGA invites this Court to misinterpret the applicable statues, their purpose, and the terms of the pertinent insurance policies in an effort to improperly absolve its statutory obligations. This Court should decline MIGA's invitation to do so.

For the reasons stated above, Defendants respectfully request that this Court reverse the Circuit Court's grant of MIGA's Motion for Summary Judgment and denial of

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Appellants' Reply Brief has been furnished to the following via Federal Express, on this the 30th day of June 2011:

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