

IN THE MISSOURI SUPREME COURT

Appeal No. SC 92700

Alice Roberts, et al.,

Appellants,

vs.

BJC Health System d/b/a BJC Healthcare, et al.,

Respondents.

Appeal from the Circuit Court of City of St. Louis
Honorable Robert H. Dierker, Circuit Judge

SUBSTITUTE BRIEF OF RESPONDENT
RECONSTRUCTIVE AND MICROSURGERY ASSOCIATES, INC.

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STATEMENT OF FACTS

Parties and Claims

Plaintiffs Alice Roberts, Kevin Hales, and B. Millsap, the minor daughter of plaintiffs Christy and Tim Millsap (the “Millsaps”), were patients of defendant Reconstructive and Microsurgery Associates, Inc. (“RMA”). (L.F. 26). Plaintiffs alleged that RMA used improper codes to describe medical procedures, resulting in overcharges on the bills for services rendered. (L.F. 24). Plaintiffs further alleged that defendants BJC Health System, Missouri Baptist Medical Center, Sisters of Mercy Health System, and St. John’s Mercy Health System also knowingly overcharged them for services rendered and failed to properly supervise the work of RMA. (L.F. 25).

Plaintiff Kevin Hales was treated by RMA on five occasions at St. John’s Mercy Medical Center in 2000, 2001, and 2002 and at Missouri Baptist Medical Center in 2001. (L.F. 840, S.L.F. 101). Plaintiff Alice Roberts was treated by RMA on five occasions at St. John’s in 2002 and 2003. (S.L.F. 98-99). B. Millsap was treated once by RMA at the St. John’s emergency room and on one other occasion in 2001. (S.L.F. 103). The Millsaps make no claim with respect to that latter visit, when B. had stitches removed. (L.F. 737).

None of the plaintiffs received a bill from RMA and none of the plaintiffs paid anything related to allegedly inflated medical charges to RMA. (L.F. 213 (Hales); 721, 738 (Millsap); 710 (Roberts)). Two of the three plaintiffs were seen by RMA following workplace injuries and their care was paid for by their employers’ respective workers compensation insurance carrier or plan. (L.F. 707 (Roberts); 698 (Hales)). The only

payment made by the Millsaps with respect to the care received by their minor daughter was a \$75.00 fixed co-pay, with all other charges being billed to and paid by Blue Cross. (L.F. 721, 733, 737-8). All of the Plaintiffs testified that they did not lose any money as a result of any of the actions alleged by them in this cause. (L.F. 400, 406, 414).

Case History

The instant cause was initiated on October 12, 2004. (R.S.L.F. 502). After removal to the United States District Court for the Eastern District of Missouri, the Honorable Jean Hamilton dismissed the cause because plaintiffs could not demonstrate standing due to the fact that they had not suffered a concrete injury in fact, including any potential damages. (L.F. 660-69). On May 4, 2005, the District Court granted reconsideration and ruled that 28 U.S.C. § 1447(c) required it to remand the case to state court rather than dismissing it outright. (R.S.L.F. 432-35).

After remand to state court, the parties requested and the trial court agreed that the parties would proceed with “discovery limited to the issue of standing and named plaintiffs’ injury in fact.” The Court would then consider motions for summary judgment on those issues. (L.F. 471-72). The parties took depositions of each one of the plaintiffs and of plaintiffs’ proposed expert, Dr. Raymond Janevicius. (L.F. 682-701; 702-11; 712-26; 727-39; 220-44). Janevicius testified that he did not have an opinion as to whether any of the Plaintiffs had suffered any financial damage as a result of the alleged overbilling for medical services. (L.F. 231, 235-36, 243). On November 17, 2009, RMA filed its motion for summary judgment. (L.F. 10).

On September 9, 2010, the trial court entered an order granting in part and denying in part the motions filed by RMA and the other defendants. (L.F. 1214-23). RMA and each of the other parties filed timely motions asking that the trial court either reconsider or clarify its Memorandum and Order. (L.F. 1224-58). The trial court granted all the motions to reconsider and/or to clarify on December 23, 2010. (L.F. 2).

On March 16, 2011, following reconsideration, the trial court granted summary judgment to all defendants, including RMA, on all of plaintiffs' claims. (L.F. 1260-66). The trial court found that plaintiffs had not suffered any damage and therefore could not establish an essential element for each of their claims. (*Id.*). The plaintiffs appeal from this judgment. (S.L.F. 125-139).

ARGUMENT

THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT TO DEFENDANT RMA BECAUSE PLAINTIFFS SUFFERED NO DAMAGE OR INJURY-IN-FACT FROM ALLEGEDLY INFLATED MEDICAL BILLS IN THAT THIRD PARTIES OTHER THAN PLAINTIFFS RECEIVED AND PAID THE ALLEGEDLY INFLATED BILLS. (Responding to sole point relied on).

A. Standard of Review.

When considering an appeal from summary judgments, appellate review is essentially de novo. *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). Summary judgment may be affirmed on any appropriate theory that is supported by the record. *Keylien Corp. v. Johnson*, 284 S.W.3d 606, 608 (Mo. Ct. App. 2009).

B. Summary Judgment Was Appropriate Whether The Question Is Characterized As One Of Standing Or One Of Proof Of Damages.

1. Summary Judgment Was Appropriate Because Plaintiffs Lacked Standing.

The issue decided by the trial court in this cause was simple. Plaintiffs' claims allege that defendants inflated the bills for medical services provided by the defendants, and so it is the payment of the bills alone that is the supposed harm. The question of who had paid the bills in question and who by extension was potentially damaged and entitled to sue was clearly framed for the trial court. It is undisputed that plaintiffs did not receive and did not pay any of the allegedly inflated bills for medical care rendered by the defendants, including RMA. Because none of the plaintiffs had suffered damage arising

from the alleged misconduct of the defendants, they could not, as a matter of law, maintain their claims.

Plaintiffs point to a variety of insurance-related doctrines to claim that they, and not the insurers who actually paid the bills in question, have standing. All of these doctrines and theories, including collateral source, real party in interest, and subrogation, are irrelevant. Plaintiffs had health insurance (or were covered by workers compensation insurance), they did not have insurance to protect them from alleged overcharges for medical services. Because plaintiffs did not pay the allegedly inflated bills themselves and did not obtain and/or pay for insurance against such an occurrence, they have no claim against the entities that supposedly issued the inflated charges on any grounds.

In moving for summary judgment, the defendants posited this as an issue of standing. In ruling in defendants' favor, the trial court instead characterized the issue as one of a failure of proof of damage, an essential element for each of plaintiffs' claims. Regardless of how one characterizes the issue, as one of standing or as one of failure of proof of the element of damages, the uncontested facts show that the harm alleged—if any occurred—was suffered by persons other than the plaintiffs. The trial court correctly concluded that plaintiffs could not act as private attorneys general to pursue a remedy for harm suffered by others. The order of summary judgment should be affirmed.

The undisputed facts that are material to this cause are few but are vital to understanding that plaintiffs are attempting to obtain recovery for financial harm that was suffered by third parties. First, it is undisputed that none of the plaintiffs received a bill from RMA and it is further undisputed that none of the plaintiffs paid anything related to

allegedly inflated medical charges to RMA. (L.F. 213 (Hales); 721, 738 (Millsap); 710 (Roberts)). Second, it is undisputed that two of the three plaintiffs were seen by RMA following workplace injuries and that their care was paid for by their employers' respective workers compensation insurance carrier or plan. (L.F. 707 (Roberts); 698 (Hales)). Third, it is undisputed that the only payment made by the Millsaps with respect to the care received by their minor daughter was a \$75.00 fixed co-pay, with all other charges being billed to and paid by Blue Cross. (L.F. 721, 733, 737-8). Fourth, all of the Plaintiffs testified that did not lose any money as a result of any of the actions alleged by them in this cause. (L.F. 400, 406, 414).

The plaintiffs are in the legally untenable position of alleging claims for damages without having suffered any ascertainable loss. Plaintiffs have failed to show “a sufficiently concrete interest in the outcome of their suit to make it a case or controversy.” *Schaeffer v. Kleinknecht*, 604 S.W.2d 751, 752 (Mo. Ct. App. 1980), quoting *Singleton v. Wulff*, 428 U.S. 106 (1976). As defendants contended below, this deprived plaintiffs of standing and even if this court disagrees with the trial court regarding its alternative characterization of the issue as one of proof of damages, it can and should nevertheless affirm on the ground that plaintiffs lack standing.

Steele v. Hospital Corp. of America, 36 F.3d 69 (9th Cir. 1994), is instructive. The plaintiffs in *Steele* alleged a medical overbilling scheme on the part of the defendants, and sued under state and federal RICO statutes. Under RICO, the plaintiffs had to show that they had suffered a “financial loss” to establish standing. Just as in the instant case, all of the medical bills at issue had been paid by third parties—private insurance

companies in that case, workers' compensation and a private insurer in this. *Id.* at 70. The district court granted summary judgment to defendants. *Id.*

The Ninth Circuit held that plaintiffs had not suffered a financial loss and could not demonstrate standing to bring their RICO claims, affirming the district court's grant of summary judgment to defendants. *Id.* at 70-71. In affirming the district court, the appeals court referred to its opinion in *Oscar v. University Students Co-op Ass'n*, 965 F.2d 783 (9th Cir. 1992), where it had explained the meaning of "financial loss" with a hypothetical:

If Oscar's Maserati was smashed, or her house was burned down, she is injured in a variety of ways. However, if her insurance pays the full cost of replacing these items, she has suffered no *financial* loss.

Id. at 787 n.5 (emphasis in original). Here, the only harm that plaintiffs are alleged to have suffered is financial. They do not allege that they were physically or emotionally harmed by defendants. However, just as with the plaintiffs in *Steele*, the instant plaintiffs have suffered no financial loss—and hence no loss at all—from an alleged overbilling scheme where third parties received and paid all of the bills. Plaintiffs' efforts to escape the simple logic of this analysis are unavailing.

Plaintiffs argue that they are the real party in interest and therefore have standing to assert their claims. One case they cite in support of this proposition, *Protection Sprinkler Company v. Lou Charno Studio, Inc.*, 888 S.W.2d 422 (Mo. Ct. App. 1994), holds that the insurer for a party that entered into a settlement agreement does not have standing to sue to enforce the settlement agreement unless the actual party to the

agreement assigns its interests to the insurer. *Id.* at 424. Plaintiffs' position is not analogous to that of the insured in *Protection Sprinkler*, however, as there is no contractual right for Plaintiffs to assign to the third-party payors.

Indeed, any contention that the third party payors here were merely paying a "loss" and that any right of action remained with plaintiffs does not survive the least scrutiny. This is not casualty or liability insurance paying after an auto accident or an act of professional malpractice that harmed plaintiffs, this is health and workers' compensation insurance paying for a service that was properly rendered to plaintiffs. The third-party payors here were not paying a "loss", they were paying claims for ordinary medical expenses. Plaintiffs' assertion that they had a claim arising from the alleged overcharging that accrued to them and has remained theirs in the absence of an assignment is contrary to the facts of this case and the controlling law. Whether or not this court agrees with the trial court that this is an issue of damages and not of standing, the trial court's grant of summary judgment should be affirmed.

2. Summary Judgment Was Appropriate Because The Plaintiffs Cannot Prove The Essential Element Of Damages For Any Of Their Claims.

The trial court, as noted above, viewed the issue before it as one of proof of damages. At no time, however, do Plaintiffs assert what harm, if any, befell them as the supposed victims of this scheme to overcharge for medical services. Throughout the long history of this case, plaintiffs' damages claim remained just that, a bare claim. The type of damage suffered was never identified, and the amount of damage was never quantified.

The trial court correctly found that plaintiffs offered no actual proof of damage. (L.F. 1262-64). This failure of proof doomed plaintiffs' claims because damage is an essential element of each one of the causes of action directed at RMA: fraud (Count I), *MLJ Inv., Inc. v. Reid*, 905 S.W.2d 900, 901-02 (Mo. Ct. App. 1995); fraudulent concealment/failure to disclose (Count II), *Kansas City Downtown Minority Dev. Corp., v. Corrigan Assoc. Ltd. P'ship, et al.*, 868 S.W.2d 210, 218-19 (Mo. Ct. App. 1994); negligent misrepresentation (Count III), *Ziglin v. Players MH, L.P.*, 36 S.W.3d 786, 790-91 (Mo. Ct. App. 2001); breach of fiduciary duty (Count IV), *Koger v. Hartford Life Ins. Co.*, 28 S.W.3d 405, 411 (Mo. Ct. App. 2000); breach of contract (Count V), *Fidelity Nat. Title Ins. Co. v. Tri-Lakes Title Co., Inc.*, 968 S.W.2d 727, 730 (Mo. Ct. App. 1998); breach of duty of good faith and fair dealing (Count VI), *Koger*, 28 S.W.3d at 413; violation of the Missouri Merchandising Practices Act (Count VII), *Ziglin*, 36 S.W.3d at 790; negligence (Count XXV), *Meadows v. Friedman RR Salvage Warehouse, Div. of Friedman Bros. Furniture*, 655 S.W.2d 718, 720 (Mo. Ct. App. 1983); and civil conspiracy (Count XXVI), *Mackey v. Mackey*, 914 S.W.2d 48, 49 (Mo. Ct. App. 1996). In the absence of any concrete evidence of actual damage, the plaintiffs resorted to what the trial court termed "mere sophistry." (L.F. 1265). Plaintiffs continue their efforts to argue their damages from evanescence to existence in this Court, but their arguments have no more merit on appeal than they did in the trial court.

An analogous case to this was decided in *Freeman Health System v. Wass*, 124 S.W.3d 504 (Mo. Ct. App. 2004). The patient in *Freeman* brought a class action under the Missouri Merchandising Practices Act claiming that the hospital had overcharged

him. While the patient in *Freeman* was uninsured and was directly billed for the services rendered to him, he did not pay. *Id.* at 505-06. The trial court dismissed his MMPA claim and the Court of Appeals affirmed, holding that the patient had failed to suffer “an ascertainable loss of money . . . [as] a prerequisite to recovery” under the MMPA. *Id.* at 507. The appeals court rejected arguments that the patient might have to pay charges in the future or that he was entitled to injunctive relief in the event of future overcharging. *Id.*

Plaintiffs here actually find themselves in a worse position both factually and legally than the patient in *Freeman*. They received no bill and made no payment. There is no possibility of residual liability, because the health and workers compensation carriers paid all the disputed charges. The patient in *Freeman* received a bill that he was directly responsible for and did not pay it, and because he had not paid he could not state an MMPA claim. The plaintiffs at bar did not even receive a bill, and certainly made no payment, and pursuant to *Freeman* are barred from making a claim stemming from the alleged overcharges.

Plaintiffs also rely on *Plubell v. Merck & Co.*, 289 S.W.3d 707 (Mo. Ct. App. 2009), another MMPA case, for the proposition that they have suffered cognizable damage, at least under that statute. *Plubell* was a class certification case, and was not decided on the merits. *Id.* at 707. Moreover, the plaintiffs in *Plubell* suffered quantifiable monetary damages because the lead plaintiff actually purchased a product that was marketed as being worth more than it actually was. *Id.* at 716. *Plubell* provides no support for plaintiffs’ position.

As the trial court correctly recognized, damages are an essential element of each one of plaintiffs' claims. The trial court also correctly concluded that where the undisputed facts proved that the plaintiffs had paid no part of the allegedly inflated medical bills at issue (and third parties had), plaintiffs could not possibly prove, as a matter of law, that they were damaged. The order granting summary judgment to RMA and the other defendants should therefore be affirmed.

3. Plaintiffs' Contention That They Suffered Damage Because They "Incurred" The Charges At Issue Has No Support In The Law.

With the facts and the law against them, Plaintiffs try to manufacture legally cognizable damages that will salvage their claims. Plaintiffs argue that they "incurred" the charges that were ultimately billed to and paid by third parties and were therefore liable for the allegedly inflated charges. This assertion has no support in the law. One case cited by Plaintiffs, *Brown v. Van Noy*, 879 S.W.2d 667 (Mo. Ct. App. 1994), has nothing to do with damages as an element of a tort or contract claim. The *Brown* case concerns the issue of proof of the reasonableness of claimed medical expenses and the way expenses are measured. *Id.* at 676. The same is true of *Berra v. Danter*, 299 S.W.3d 690, 695-96 (Mo. Ct. App. 2009), which addressed the question of whether the plaintiff, who had paid his medical bills, could claim the amount he was billed or the amount that he actually paid as damages.

Plaintiffs also cite *Burwick v. Wood*, 959 S.W.2d 951, 952 (Mo. Ct. App. 1998), but that case concerns the strict statutory interpretation of the 1994 version of § 492.590 R.S.Mo. and the use of "incurring" in that statute. There is no discussion of "incurred" as

a basis for damages in *Burwick* and no indication that the court contemplated a separation between “incurred” and the situation where a party may have some theoretical possibility of having to make a payment but no actual likelihood of payment exists. Surely, in *Burwick*, if there was no real possibility that a party would actually have to pay deposition costs because, for example, they had already been paid in full by another party, the use of “incurred” in the statute would not have been interpreted to result in double-payment of those costs. Yet that is precisely the interpretation that is urged by plaintiffs with respect to *Burwick* and the other cases cited by them on this point.

Although plaintiffs do not cite them, there are cases that look at the question if a party can be reimbursed for “incurred” expenses that they will never actually have to pay. In *S.E.C. v. Comserv Corp.*, 908 F.2d 1407 (8th Cir. 1990), the Eighth Circuit Court of Appeals considered whether a former director of a corporation had “incurred” legal expenses within the meaning of the Equal Access to Justice Act, 28 U.S.C. § 2412, and was therefore entitled to an award of attorney’s fees after prevailing over the claims of the Securities and Exchange Commission. The director had not paid any of his legal expenses. Instead, the director had an indemnification agreement with his former corporation, was protected by Minnesota’s statutory indemnification provisions, and all of his attorney’s fees were paid for by the corporation’s insurer. The appeals court held that the director had not “incurred” attorney’s fees where he “was never exposed to unconditional liability for legal fees in the SEC litigation.” *Id.* at 1413, 1416. In the instant case, plaintiffs were likewise never exposed to unconditional liability for the medical expenses at issue, and so even if there is significance to the difference between

“incurred” and “paid” for standing or damages purposes, plaintiffs neither incurred nor paid any of the supposedly inflated charges.

At least one insurmountable legal obstacle exists to the argument of two plaintiffs that they had “incurred” any medical expenses relevant to this cause. It has been previously noted that plaintiffs Roberts and Hales had their medical care covered by their respective employers’ workers compensation insurance. Under Missouri law, no health care provider, including RMA, “shall bill or attempt to collect any fee or any portion of a fee for services rendered to an employee due to a work-related injury.” § 287.140.13(1) R.S.Mo. Separately, § 287.140.4 R.S.Mo. excludes employees from any dispute over medical charges and establishes a dispute resolution process through Missouri’s Division of Workers’ Compensation. RMA was barred by statute from attempting to collect from either Ms. Roberts or Mr. Hales any portion of any charge for services that RMA rendered with respect to their workplace injuries. Consequently, even if plaintiffs’ argument that they “incurred” the medical charges that they did not pay and thus suffered damage has even the slightest merit—which it does not—two of the three named plaintiffs cannot even contend that they “incurred” charges where RMA was legally unable to seek payment from them.

Plaintiffs cite in their statement of facts to the testimony of their expert, Raymond Janevicius, but now appear to concede by omission from their argument that his testimony does not help their case. Dr. Janevicius expressly stated that he had no opinion “as to the actual damages suffered by each plaintiff.” (L.F. 231). He further testified that he had “no opinion today about what money damages these three plaintiffs have

suffered.” (L.F. 240). The testimony of Dr. Janevicius in fact highlights the weakness of plaintiffs’ position. Plaintiffs contend that they “incurred” medical charges and thus suffered damage, when in fact all this argument does is confirm that plaintiffs have no factual proof of damages, only a series of legal ploys designed to excuse them from having to demonstrate actual damage. Dr. Janevicius’ testimony only substantiates this, indicating that wrong was done and harm was suffered without any showing whatsoever that plaintiffs suffered the harm. While it is true that *someone* was likely damaged if plaintiffs’ allegations are correct, it is equally true that plaintiffs are not that someone.

At bottom, none of the cases cited by plaintiffs support their contention that their potential or theoretical exposure to having to pay allegedly inflated medical bills caused damage that is a necessary element of all their claims. Thus, even if one accepts the premise of plaintiffs’ ruminations on the distinction between “incurred” and “paid”, and accepts the further premise that Plaintiffs somehow “incurred” the medical expenses by making a contingent promise to pay the expenses that was never and can never be realized, there is still no support in case law for plaintiffs’ claim that an “incurred” but inchoate obligation equals standing or damage.

4. Collateral Source Rule Does Not Apply Where Plaintiffs Have Not Received A Payment From A Collateral Source In Mitigation Of Damage.

With the collateral source rule, the plaintiffs try to take an evidentiary rule and turn it into a substantive rule of damages in hopes of salvaging their claims. Plaintiffs also seek to use the collateral source rule to block any consideration of the payments made by third parties for their medical care. Because the plaintiffs did not receive any

payment from a collateral source in compensation for or in mitigation of a loss that they had suffered, the collateral source rule is inapplicable.

Under Missouri law—notwithstanding the numerous citation to foreign jurisdictions put for by plaintiffs—the collateral source rule is procedural, not substantive, in nature. In *Smith v. Shaw*, 159 S.W.3d 830 (Mo. banc 2005), the Missouri Supreme Court held plainly that in this state, the collateral source rule is “a rule of *evidence*” (emphasis in the original) that “prevents an alleged tortfeasor from attempting to introduce evidence at trial that the plaintiff’s damages will be covered, in whole or in part, by the plaintiff’s insurance.” *Id.* at 832. “The collateral source rule prevents a tortfeasor from reducing his liability to an *injured* person by proving that payments were made to the person from a collateral source.” *Id.* (emphasis added).

The collateral source rule under Missouri law does not create damages where none exist, it addresses only the introduction of evidence of insurance payments at trial to prevent a plaintiff from being punished for steps taken to mitigate a loss. Here, no loss occurred because plaintiffs received the health insurance benefits they had bargained for. They never bargained for insurance protection from being overcharged for medical care.

Plaintiffs cite to *Washington ex rel. Washington v. Barnes Hospital*, 897 S.W.2d 611 (Mo. banc 1995). However, plaintiffs fail to note that the court in *Washington* addressed the application of the collateral source doctrine only in discussing the admissibility of evidence of payments from a collateral source in mitigation of damages at trial. *Washington*, like the collateral source rule itself, is irrelevant to this case. Moreover, *Washington*, which concerned the amount of recovery for brain damage to an

infant, is like the other Missouri cases cited by plaintiffs in that they all concerned claims of physical injury. *See, e.g., Kickham v. Carter*, 335 S.W.3d 83 (Mo. 1960) (injuries from auto accident); *Ford v. Gordon*, 990 S.W.2d 83 (Mo. Ct. App. 1999) (same). Plaintiffs' reliance on the collateral source rule underscores, yet again, the difference between them and the bona fide plaintiffs in cases like *Kickham* and *Ford*. The plaintiffs in those cases suffered identifiable damages while the present plaintiffs can cite only inapplicable legal theories in an effort to generate damages.

Plaintiffs contend that the collateral source rule also operates to bar the trial court from considering who paid the medical bills. Simply put, the collateral source rule is inapplicable here as an evidentiary matter because the plaintiffs have suffered no harm for which they received compensation, in whole or in part, from a collateral source. They did not have "medical overcharging" insurance that paid to mitigate their losses arising from inflated bills. Instead, plaintiffs had their various medical expenses paid for by third parties pursuant to insurance contracts of differing types. If, as a substantive matter, those third parties were somehow overcharged in the process, that harm does not transfer to Plaintiffs, but remains with the third parties. As a procedural matter, the collateral source rule offers no protection to plaintiffs because they were not insured against the loss they claim to have suffered. As with plaintiffs' other legal arguments that likewise attempt to lead the Court to overlook the simple facts in this case, plaintiffs' contentions concerning the collateral source rule are completely without merit.

C. Conclusion.

The undisputed facts prove that the plaintiffs suffered no harm arising in any way from the misconduct they allege. Whether this Court considers this as a question of standing or as one of the nonexistence of proof of the essential element of damages, the trial court's grant of summary judgment to RMA and the other defendants was legally correct and should be affirmed. For all the foregoing reasons, RMA respectfully requests that this Court affirm the judgment of the trial court.

Respectfully submitted,

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CERTIFICATE PURSUANT TO RULES 84.06(c) and 84.06(g)

The undersigned counsel for Respondent RMA hereby states:

- 1) The foregoing brief contains 4,992 words as counted by Microsoft Word, excluding the cover, certifications, and the signature block, which is within the applicable limitations in length set forth in Rule 84.06(b); and
- 2) The electronic copy of this brief has been scanned for viruses, and the virus-scanning software has reported that the disk is virus-free.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 26th day of September, 2012, the foregoing was filed electronically with the Clerk of Court to be served by operation of the Court's electronic filing system upon the following:

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