QUEENESTER BANKS RILEY, FREDONIA BANKS PETERS, AND SYLVIA T. BANKS ROBINSON, EACH INDIVIDUALLY, AND JOINTLY ON BEHALF OF THE ESTATE OF LAWRENCE BANKS	*	**NO. 2001-CA-0498**
	*	**COURT OF APPEAL**
	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
VERSUS		
	*	
MAISON ORLEANS II, INC. AND XYZ INSURANCE COMPANY	* * * * * * *	

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 93-14301, DIVISION "D-5"
Honorable Lloyd J. Medley, Judge
* * * * * *
JUDGE MAX N. TOBIAS, JR.
* * * * * *

(Court composed of Chief Judge William H. Byrnes, III, Judge Charles R. Jones, Judge Patricia Rivet Murray, Judge James F. McKay, III and Judge Max N. Tobias, Jr.)

BYRNES, C.J., CONCURS IN PART AND DISSENTS IN PART
JONES, J. CONCURS IN PART; DISSENTS IN PART
MCKAY, J. CONCURS IN PART AND DISSENTS IN PART

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REVERSED IN PART;
AMENDED IN PART;
AFFIRMED AS AMENDED

Defendants, Maison Orleans II ("Maison Orleans"), and Scottsdale Insurance Company ("Scottsdale"), appeal the judgment of the district court in favor of plaintiffs, Queenester Banks Riley, Fredonia Banks Peters, and

Sylvia T. Banks Robinson, individually and jointly on behalf of the estate of Lawrence Banks ("Mr. Banks"), in the amount of $854,729.00. The plaintiffs have also appealed the district court's granting of the defendants' directed verdict as to the wrongful death claims. For the reasons following, we reverse in part, amend in part, and affirm as amended.

Facts

Lawrence Banks was a resident of Maison Orleans, a nursing home in New Orleans, Louisiana. On 16 February 1993 at approximately 4:30 a.m., Joseph Harris attacked Mr. Banks. Mr. Harris, also a resident of Maison Orleans, suffered from organic brain syndrome and was unable to care for himself or his needs. On this particular morning, Mr. Banks was awaiting his morning paper outside of his apartment when Mr. Harris beat him in the head and face with a steel pipe. At trial, Marquitta Patterson, a phlebotomist for Smith-Kline-Beecham, testified that she saw Mr. Harris hitting Mr. Banks and screamed. At the time of the incident, the attending aids were asleep in the recreational room near the nursing station and a worker from the other side of the building was the first to assist Mr. Banks. Officer Clay Clement of the New Orleans Police Department immediately investigated the incident. Mr. Banks was taken to Lakeland Medical Center/Humana Hospital for emergency medical care.

Prior to his admission to Maison Orleans, Mr. Harris was evaluated by Dr. Richard Richoux, an expert in general and forensic psychiatry. Dr. Richoux confirmed that Mr. Harris' history did not indicate violent behavior and he observed no violent or hostile propensities during the evaluation.

Dr. Richoux noted that Harris had "organic brain syndrome," a condition affecting 75-80% of all nursing home residents and "is pretty much synonymous" with dementia. Dr. Richoux testified that there was no reason to anticipate violent or aggressive behavior from Mr. Harris in the near future and he had no basis to believe that Mr. Harris did not belong in the nursing home. The fact that Mr. Harris was known to "preach" to walls and talk to nonexistent people did not indicate violent tendencies in the context of his condition. There was no reason to order restraints or confine Mr. Harris. Dr. Richoux testified that when he examined Mr. Harris, Mr. Harris was taking Ativan and Hydergine.

Dr. Richoux testified that "wandering behavior is sometimes a problem" among those suffering from organic brain syndrome, but Mr. Harris had not been known to wander. Dr. Richoux explained that such individuals do not normally require someone following them around twenty-four hours a day:

> A. So, probably the most common reason why somebody in a nursing home who has Organic Brain Syndrome might need to be closely

> observed is more along the lines of, if you have the unlocked facility with easy access to the outdoors, and nobody checks on an individual often enough. There have been incidences where people walked out of the door and gone walking down the street in a disorienting manner, but no other reason than that generally.
>
> Q. Not following them around inside the nursing home?
>
> A. No usually. Not unless there's some access to danger, which of course, in any well designed facility. I'm talking about machinery that a confused individual is going to be subject to machinery that they can hurt themselves with or something of that nature.

On cross-examination, Dr. Richoux explained that the only thing that he wrote concerning what may have been reported to him by others concerning Mr. Harris' behavior at the nursing home was his notation that: "aid who accompanies him reports no agitated or hostile behavior and none is noted."

When asked by the trial judge whether it would be normal for someone in Mr. Harris' condition to strike someone else with a lead pipe, Dr. Richoux responded:

> No, Your Honor. I would not consider it to be in a normal range. But I would consider it to be very unusual as a manifestation of what I perceive his psychiatric condition to be. It's not something that one expects of a person because they qualify for a diagnosis of Organic Brain Syndrome or Dementia. So, therefore, there's no way to put

> someone – if I diagnose Organic Brain Syndrome or Dementia I don't usually say either to a nursing home or to a care taker, for that matter, "Now, people with this condition frequently get violent so you better watch out."

Dr. Richoux conceded that had the nursing home placed Mr. Harris under twenty-four hour supervision, the incident might not have occurred. However, Dr. Richoux also explained that twenty-four hour supervision means that the patient should be checked frequently, not that the patient be literally followed around and/or kept under constant surveillance.

Eric Wilmore, the Assistant Administrator who ran the nursing home at the time of the incident, explained that the notation in Mr. Harris records, "Unable to care for self. Needs 24-hour supervision," refers to the basic reason that people are in a nursing home to begin with; it is meant "to ensure that they bathe, that they eat, that their medication is given . . . ."

Mr. Wilmore testified that the nursing home does not have the capacity to lock people down and restrain them. In fact, he noted that La. R. S. 40:2010.8A(10) mandates that nursing home residents be free from physical and chemical restraints with certain very limited exceptions inapplicable to the instant case. He stated that Mr. Harris was an appropriate resident for the nursing home:

> Actually, he was pretty typical of a nursing home patient. He was elderly; he suffered from a certain degree of senility, as a lot of nursing home patients

do. He had no history of being violent, being combative or hostile.

Mr. Wilmore testified that Mr. Harris would have been able to get the pipe in the maintenance room and go to where he beat Mr. Banks without being seen by any of the employees even had they been awake. This corroborated Ms. Patterson's testimony that she did not see Mr. Harris pass in the hallway and could not see what was going on some 75 feet down the hallway from the nurses' station where she was. Ms. Patterson testified that when she arrived and while she was there, there was a nurse at the nurses' station "watching call buttons."

Mr. Wilmore testified that Mr. Harris was in room 111, Mr. Banks was next door in room 109, and his office was next to Mr. Banks' room. Consequently, he saw and spoke to Mr. Harris and Mr. Banks on a daily basis. Mr. Wilmore further stated:

Q. When the nurse's aids aren't doing rounds; what can they do? Can they be in the rec room?
A. Yes, they can.
Q. Where are they supposed to be?
A. They should be available for the nurse. If someone pushes one of those call buttons, and the nurse is there to answer the call and send the nurse's assistant to the room.
Q. How available are nurse's aids in the rec room?
A. The rec room, and I imagine the reason they were in there is because it is directly across from me to you form the nurse's station.
Q. So they were available? They were available

there?
A. Yes.
Q. This rec room, is this in line of sight down that hall where the beating took place?
A. Not where the incident occurred, no.
Q. So, if somebody in the rec room would not necessarily be able to see what was going on all the way at the court? [Sic]
A. No.

We note, however, that the record reflects that one of the nursing assistants, Regina Guillory, saw Mr. Harris with the pipe **before** the attack. She asked him for the pipe and he refused to give it up. He then ran though the courtyard and into the lobby where he proceeded to hit Mr. Banks several times in the head. Ms. Guillory claims that Mr. Harris then ran to his room and said, "I got you now, you f---er." Mr. Banks sustained numerous head injuries, lacerations, and fractures and underwent surgery in relation to the beating. Mr. Banks later died on 20 April 1993 of a heart attack.

Procedural History

On 30 August 1993, the plaintiffs filed suit against Maison Orleans, and its insurer, Scottsdale, asserting a survival action, wrongful death claim, negligence claim, and a claim for insurance coverage. An excess insurer, United National Insurance Company, was later added as a defendant. Both insurance companies filed motions for summary judgment asserting policy exclusions for "sexual and physical abuse." United National Insurance

Company was dismissed from the suit and Scottsdale's motion was granted in part.

On 24 May 2000, the jury was dismissed after they were observed talking and passing notes. The matter continued as a bench trial. A final judgment was rendered in favor of the plaintiffs and against Maison Orleans and Scottsdale on the survival and negligence claims for the following:

General Damages	$700,000.00
Special Damages:	
Lakeland Medical Center	117,206.00
Touro Infirmary	33,210.00
Beverly Enterprises	2,112.00
Dennis Mortuary Funeral Expenses	2,143.00
Total	
$854,729.00	

In its reasons for judgment, the trial court stated:

> The harm encountered by Banks falls within the scope of protection afforded by Maison's duty which was breached by its negligence. Here, Maison had a duty to provide supervision of its residents at or about the time of the incident. Defendants do not refute this fact nor do they refute that their on duty staff members were asleep during the time of the incident. Furthermore, the availability of the steel pipe to Harris created an unreasonable risk of harm to Banks. As a result, it is reasonable to conclude that the risks and degree of harm suffered by Banks were not the result of his own actions and could have been significantly reduced if the defendant's staff members had been available.

Although Maison Orleans' motion for directed verdict on the wrongful death claim was granted, it appeals the judgment of the district court on the issues of liability and damages. Scottsdale moved for a new trial or, in the alternative, to modify the judgment, both of which were denied. Scottsdale brings a separate appeal regarding its limitations of coverage and whether the district court awarded the plaintiffs excessive damages. The plaintiffs appeal the district court's granting of Scottsdale's motion for partial summary judgment.

Duty-Risk Analysis

In its first assignment of error, Maison Orleans argues that it did not breach the standard of care imposed on nursing homes, which is of reasonable care considering the patient's mental and physical condition. *Roberson v. Provident House*, 559 So. 2d 838 (La. App. 4 Cir. 1990), *reversed in part on other grounds*, 576 So.2d 922 (La. 1999). It further contends that it did not have a duty to furnish a nurse or attendant to supervise Mr. Harris at all times. *See McCarthy v. Columbia Heights Nursing Home*, Inc., 25,710 (La. App. 2 Cir. 3/30/94), 634 So. 2d 927.

Under the duty-risk analysis, the pertinent inquiries are: 1) whether the conduct of which plaintiff complains was a cause-in-fact of the harm; 2) whether there was a duty on the part of the defendant which was imposed to

protect against the risk involved; 3) whether there was a breach of that duty; and 4) damages. *Eldridge v. The Downtown Hotel*, 492 So. 2d 64 (La. App. 4 Cir. 1986); *Vickner v. Hibernia Bldg. Corp*., 479 So. 2d 904 (La. 1985).

We agree with Maison Orleans's claim that the admission of Mr. Harris into the nursing home did not violate its standard of care. Dr. Richoux testified that that there was nothing in Mr. Harris' presentation to indicate that Maison Orleans would not be an appropriate facility for him. On the other hand, Mr. Banks and his family also expected some reasonable amount of protection for Mr. Banks while in the facility.

We disagree, however, that Maison Orleans' twenty-four hour supervision of Mr. Harris was proper and that sleeping aides in the recreational room that morning was not a direct cause of Mr. Banks' injuries. The uncontroverted evidence indicates that Mr. Harris should have been checked at least every two hours. Even Dr. Richoux testified that had the nursing home had Mr. Harris under twenty-four hour supervision, the accident might not have happened. In addition, had even one aide been awake and on the floor that morning, Ms. Guillory could have sought immediate help when she observed Mr. Harris with the pipe before the attack. Thus, we find that the obvious lack of supervision contributed to Mr. Banks' injuries. Further, had the aides not been asleep, it is reasonable to

assume that Mr. Banks would have been afforded more protection at the time of the incident.

Mr. Harris was also a cause-in-fact of the injuries suffered by Mr. Banks. Mr. Harris and Mr. Banks were both under the custody and care of Maison Orleans, which had a duty to protect Mr. Banks against the attack upon him. We find that Maison Orleans breached its duty because Mr. Harris was able to retrieve a pipe from the premises and attack Mr. Banks while the attending aides were asleep. Thus, we agree with the trial court's imposition of liability upon Maison Orleans. This assignment of error lacks merit.

Comparative Fault

Maison Orleans next argues that the district court erred in failing to assess some degree of fault to Mr. Harris. It relies on *Watson v. State Farm Fire and Cas. Ins. Co.*, 469 So. 2d 967, 974 (La. 1985), wherein the Court stated:

> In assessing the nature of the conduct of the parties, various factors may influence the degree of fault assigned, including (1) whether the conduct resulted from inadvertence or involved an awareness of danger, (2) how great a risk was created by the conduct, (3) the significance of what was sought by the conduct, (4) the capacities of the actor, whether superior or inferior, and (5) any extenuating circumstances which might require the actor to proceed in haste without proper thought. And, of course, as evidenced by concepts such as

> last clear chance, the relationship between the fault/negligent conduct and the harm to the plaintiff are considerations in determining the relative fault of the parties.

The trial court held that Mr. Banks' injuries resulted from the conduct of Mr. Harris *and* the absence of reasonable supervision owed to Mr. Banks as a resident of the nursing home. No question exists that but for the actions of Mr. Harris, Mr. Banks would not have been injured. However, the risk created by Maison Orleans also contributed to the plaintiffs' damages. Mr. Harris was able to retrieve a pipe and, according to trial testimony, he was not properly supervised per the facility's own guidelines. The district court was impressed by the fact that the aides were asleep, and we agree that this was a major factor. The risk created was not slight and Maison Orleans cannot evade responsibility for its actions by arguing that Mr. Harris was solely at fault as an intentional tortfeasor.

Recently, the Louisiana Supreme Court decided *Wallmuth v. Rapides Parish School Board,* 2001-1779, 2001-1780 (La. 4/3/02), 813 So. 2d 341, which gives us guidance in comparing the fault of the intentional tortfeasor to that of the negligent tortfeasor. There, the court found that the allegedly negligent tortfeasor (school board) was not at fault for the plaintiff's injuries because of the spontaneous nature and unforeseeability of the intentional

tortfeasor's actions, which the allegedly negligent tortfeasor could have neither foreseen nor prevented by exercising a reasonable degree of supervision. *Id.* at pp. 11-12, 813 So. 2d at 348-49. We find, however, the present situation distinguishable.

It is axiomatic that a nursing home operates to protect its residents from injury to a reasonable degree. In the case at bar, but for the sleeping employees and the failure to provide appropriate supervision to Mr. Harris, Maison Orleans could have prevented some, if not all, of Mr. Bank's injuries. It is significant that one of Maison Orleans' employees saw Mr. Harris with the pipe before the attack, yet did nothing to summon assistance. However, we agree with Maison Orleans and find that the trial court erred in failing to assign some percentage of fault to Mr. Harris, the intentional tortfeasor.

Therefore, we reduce Maison Orleans' liability to the highest possible percentage that our law would allow. We find that percentage to be 75%; accordingly, we assess Mr. Harris with 25% of the fault associated with Mr. Banks' injuries.

Damages

The defendants argue that the award for general damages in the

amount of $700,000.00 was excessive, relying on the testimony of Dr. Maynard Garrett, an expert witness in the field of general surgery, who testified that Mr. Banks "made an amazing recovery." However, the evidence also showed that Mr. Banks sustained not only a closed head injury and fractured skull, but also significant facial fractures which required four surgical procedures; he was unable to eat by mouth because his jaw was wired shut, was in severe pain, and also became very depressed. His daughters testified that he underwent an entire personality change after the attack. The record establishes that the final two months of this elderly gentleman's life were made completely miserable by this incident.

The initial inquiry is whether the award for the specific injuries and their effects under the particular circumstances of the injured person is a clear abuse of the "much discretion" of the trier of fact. *Lomenick v. Schoeffler*, 250 La. 959, 200 So. 2d 127 (1967). Only if an abuse of discretion is found does the reviewing court refer to prior awards and then only for the purpose of determining the highest or lowest point, which is reasonably within that discretion. *Youn v. Maritime Overseas Corp.*, 623 So. 2d 1257 (La. 1993) *certiorari denied*, 510 U. S. 1114 (1994); *Coco v. Winston Industries, Inc.*, 341 So. 2d 332 (La. 1976). In effect, the award or apportionment must be so high or so low in proportion to the injury or fault

that it "shocks the conscience." *Moore v. Healthcare Elmwood, Inc.*, 582 So. 2d 871 (La. App. 5 Cir. 1991).

In *Bernard v. Lott*, 95-0167 (La. App. 4 Cir. 12/28/95), 666 So. 2d 702, the district court awarded the plaintiff $200,000.00 for a closed head injury; this Court, however, declared the award inadequate and pronounced that, based upon the survey of the appropriate case law, "the lowest general damage award is $750,000." *Id.* at pp. 11-12, 666 So. 2d at 708. In the instant case, the general damage award of $700,000.00, while on the high side in light of the duration of the injuries, was well within the discretion of the district court. Therefore, we will not disturb the award for general damages on appeal because it does not shock the conscience in a way that purports to manifest error by the district court.

In their cross appeal, the plaintiffs argue that the district court erred in its analysis of the quantum for a closed head injury. The plaintiffs support their argument by citing *Bernard v. Lott*, *supra*, wherein the district court awarded the plaintiff, a head trauma patient with personality change and emotional instability, $200,000.00 in general damages associated with the injury. However, this Court raised the award to $750,000.00.

Bernard is distinguishable from the instant case because Ms. Bernard's IQ dropped from 113 while in high school to 83 after her accident.

Her most severe deficiencies were in the areas of concentration and memory, which affected all aspects of her life. Unlike in the instant case, we found that the district court in *Bernard* erred in not considering the weight of the numerous expert medical testimonies as to Ms. Bernard's condition, whether preexisting and aggravating or a direct result from her head-on collision. In the matter *sub judice*, we are of the opinion that all of the medical testimony on behalf of Mr. Banks' condition was considered by the district court and that the quantum was well within its discretion. The plaintiffs were also awarded $117,206.00 for expenses incurred for treatment of Mr. Banks' at Lakeland/Humana Hospital. Maison Orleans argues that no bills from Lakeland/Humana were introduced and that the evidence introduced by the Banks to prove the bill constituted hearsay.

At trial, the plaintiffs submitted a letter from Medicare verifying the lien against Mr. Banks for his treatment at Lakeland/Humana in the above amount. The Medicare statement was introduced because, according to the record, the billing records were destroyed due to the age of the account. Along with the medical records was the testimony of Dr. Maynard Garrett who testified at trial that he was the treating physician who performed two surgeries at Lakeland/ Humana on Mr. Banks associated with the incident at Maison Orleans.

Plaintiffs bear the burden of proof as to all elements of damages in their lawsuits. *Winston v. Flamingo Casino*, 99-0209 (La. App. 4 Cir. 9/22/99), 746 So. 2d 622, 624. The district court found that the plaintiffs met their burden of proving the medical expenses incurred although there was no submission of a medical bill directly from Lakeland/Humana. We find that the trial court was not manifestly erroneous to rely on the Medicare letter to support the award of $117,206.00 to the plaintiffs because the original records were destroyed.

Maison Orleans further asserts that the district court erred in awarding the plaintiffs expenses for treatment of Mr. Banks at Touro Infirmary and funeral expenses. Maison Orleans contends that the treatment at Touro Infirmary was due to the heart attack, from which Mr. Banks subsequently died.

In reviewing the factual findings, an appellate court is limited to a determination of manifest error. *Arceneaux v. Dominique*, 365 So. 2d 1330 (La. 1978), *writ denied*, 374 So. 2d. 660 (La. 1979); *Fleming v. American Auto. Association, Inc.*, 99-1638 (La. App. 4 Cir. 6/21/00), 764 So. 2d 274. An appellate court, while it must give great weight to a trial court's factual findings, is not bound by reasonable inferences. *Jones v. Northbrook Ins. Co.*, 544 So. 2d 742 (La. App. 3 Cir. 1989).

We find merit in Maison Orleans' argument. Dr. William Newman, a pathologist who testified by a videotaped deposition, testified that Mr. Banks died of a heart attack. He further testified that while Mr. Banks' injuries could have contributed to his heart condition, his injuries were not the cause of death. The district court concluded:

> [T]his court finds that there is conflicting evidence that Banks' cause of death was directly a result of the February 16th beating. The coroner's report and Dr. William Newman's testimony were persuasive and convinced the court that Banks died of a heart attack due to arterial sclerosis. Plaintiff's [sic] evidence failed to substantiate more than a weak circumstantial connection of plaintiff's [sic] injuries resulting from the 1993 beating and his death more than two months later. Thus, without more, plaintiff's [sic] claim for wrongful death fails.

As will be established below, the district court correctly dismissed the wrongful death claim. Therefore, if the district court was correct in finding that the death of Mr. Banks was not a result of the beating, it erred in awarding damages for treatment at Touro Infirmary and funeral expenses paid to Dennis Mortuary. Consequently, we reverse the award of $35,353.00 for expenses paid to Touro Infirmary and Dennis Mortuary.

Wrongful Death Claim

Each of the plaintiffs, as Mr. Banks's beneficiaries, filed a wrongful death claim against Maison Orleans pursuant to LA. C. C. art. 2315.2. The

claims were dismissed by the trial court by a directed verdict in favor of Maison Orleans. The plaintiffs request review of the district court's judgment dismissing their claim.

In its Reasons for Judgment, the district court concluded that the testimony of Dr. William Newman, coupled with the coroner's report, evidenced that Mr. Banks died from a heart attack. Further, the record reflects that the plaintiffs failed to provide convincing evidence to contradict Dr. Newman's testimony.

The issue to be resolved by a reviewing court is not whether the trier of fact was right or wrong, but whether the factfinder's conclusion was a reasonable one. *Cosse v. Allen-Bradley Co.*, 601 So. 2d 1349, 1351 (La. 1992); *Housley v. Cerise*, 579 So. 2d 973, 976 (La. 1991). Based on the record before us, we find that the district court's conclusion that Mr. Banks died of a heart attack is a reasonable one and that the district court did not err in making such a finding and dismissing the claim for wrongful death.

Insurance Coverage

On 27 October 1999, the district court partially granted Scottsdale's motion for summary judgment to enforce its limitation of coverage. The partial summary judgment granted prior to trial clearly was not a final judgment absent certification as such by the trial court. See La. C. C. P. arts.

1915 and 966(E). Therefore, the trial judge had the discretion to change the substance of that interlocutory ruling at any time prior to the rendering of the final judgment. See *Carner v. Carner*, 97-128, p. 5 (La. App. 3 Cir. 6/18/97), 698 So. 2d 34, 36. The final judgment held Scottsdale liable in solido with Maison Orleans without stating Scottsdale's policy limitations of $25,000.00. Scottsdale's motion for new trial seeking to reform the judgment to include the limitation was denied by the trial judge, whose comments on the record indicate that he erroneously believed that the partial summary judgment had been made final. Scottsdale applied for supervisory review of the trial court's denial of its motion for new trial, and this Court denied the writ application citing an adequate remedy on appeal. Scottsdale separately appeals this issue, which is opposed by the plaintiffs and Maison Orleans.

At its summary judgment hearing, Scottsdale argued that the insurance policy on behalf of Maison Orleans contained a sexual and/or physical abuse exclusion and separate endorsement for coverage for such incidents in the amount of $25,000.00. Maison Orleans and the Banks argue that the district court erred in granting the summary judgment as to Scottsdale's insurance limitations. We can dispose of the issue by reviewing the insurance policy in question and either amend or maintain the district

court's final judgment in accordance with our finding.

The relevant portion of the insurance policy reads:

> This policy does not apply to any injury sustained by any person arising out of or resulting from sexual and/or physical abuse by:
>
> 1 any Insured;
> 2. any employee of any Insured or
> 3. any person performing volunteer services for or on behalf of the Insured; or
> 4. any other person.
>
> The Company shall not have any duty to defend any suit against the Insured seeking damages on account of such injury.
>
> The intent of this endorsement is to exclude all injuries sustained by any person, including emotional distress, arising our of sexual and/or physical abuse, including but not limited to sexual and/or physical abuse caused by negligent employment, investigation, supervision, or reporting to the proper authorities, or failure to so report, or retention, of a person for whom any insured is or ever was legally responsible.
>
> All other terms and conditions remain unchanged.

However, the policy also contains a separate coverage endorsement that contains an expansion of coverage, affording coverage in the amount of $25,000.00 for each claim for sexual and/or physical abuse. The endorsement reads as follows:

> I. COVERAGES - SEXUAL AND/OR PHYSICAL ABUSE LIABILITY

> The company will pay on behalf of the **insured** all sums which the **insured** shall become legally obligated to pay as damages because of injury to any person arising out of sexual/and or physical abuse, caused by one of the **insured's employees**, and the Company shall have the right and duty to defend any suit against the insured seeking such damages, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and such settlement of any claim or suit as it deems expedient, but the Company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the Company's liability has been exhausted.

Interpretation of an insurance contract is usually a legal question that can be properly resolved in the framework of a motion for summary judgment. *Jones v. Yacht Club*, 96-300 (La. App. 3 Cir. 10/23/96), 682 So. 2d 816, *citing Wallace v. Huber*, 597 So. 2d 1247 (La. App. 3 Cir. 1992). Furthermore, it is well settled that in an absence of a conflict with the laws or public policy, insurers have the right to limit their liability and to impose whatever conditions they please upon their policy obligations under the policy. *Fruge v. First Continental Life and Accident Ins. Co*., 430 So. 2d 1072, 1077 (La. App. 4 Cir.), *writ denied*, 438 So. 2d 573 (La. 1983), *citing Oceanis, Inc. v. Petroleum Distributing Co.*, 292 So. 2d 190, 192 (La. 1974).

Although the term "abuse" is not defined in the policy, taking that term in its usual meaning and context, we cannot agree that this incident

constituted "sexual or physical abuse." Physical abuse, as opposed to simple assault, is generally the act of a person in control, dominance, or authority who misuses his position to harm or mistreat a person over whom he exercises such control. The act of one nursing home resident attacking a fellow resident is not abuse because the element of control is lacking. Moreover, we do not agree that the beating of Mr. Banks by Mr. Harris is equivalent to physical abuse *caused by* a Maison Orleans *employee*, when the liability of the Maison Orleans is actually based on negligence: the failure of its employees to properly supervise the residents. Negligence does not equate to abuse. Finally, to the extent that the insurance policy provision is ambiguous, we are obliged to construe the ambiguities in favor of the insured to effect, not deny, coverage. *See Doerr v. Mobil Oil Company*, 00-0947, p. 5 (La. 12/19/00), 774 So. 2d 119, 124 (and cases cited therein). It is undisputed that Scottsdale's policy has a $1,000,000.00 limit on coverage for personal injury due to the negligence of Maison Orleans.

We find, therefore, that the district court erred in applying the exclusions of the insurance policy to the instant case by partially granting the motion for summary judgment. Accordingly, we reverse and set aside the partial judgment previously entered by the trial court. In addition, because the final judgment of the district court holds Scottsdale responsible

in solido with Maison Orleans for the entire amount of damages, and those damages are less that the limits of the insurance policy, we need not amend the judgment in that regard.

Decree

For the reasons stated herein, we amend the judgment of the district court to assess Maison Orleans II with 75% of the liability and Mr. Joseph Harris with 25% of the liability. In addition, we amend the judgment to reduce the amount of total damages to $819,376.00, by deleting the special damages awarded for treatment at Touro Infirmary and funeral expenses paid to Dennis Mortuary. Further, we

reverse the partial summary judgment in favor of Scottsdale Insurance Company. In all other respects, the judgment is affirmed. Each party is to bear its own costs of this appeal.

REVERSED IN PART
AMENDED IN APART;
AFFIRMED AS AMENDED