

STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

THE HANOVER INSURANCE COMPANY,
on its own behalf and as subrogee of Grand
Rapids Women's Health, P.C., and Kaaren
Dewitt,

Plaintiffs,

vs.

Case No. 14-05830-CKB

HON. CHRISTOPHER P. YATES

GRAND RAPIDS WOMEN'S HEALTH, P.C.;
KAAREN DEWITT; ELIZABETH LUCE;
MICHIGAN PROFESSIONAL INSURANCE
EXCHANGE; JENNIFER HAUCK; and
SHAWN HAUCK,

Defendants.

OPINION AND ORDER GRANTING SUMMARY DISPOSITION IN FAVOR OF
PLAINTIFF HANOVER INSURANCE COMPANY UNDER MCR 2.116(C)(10)

When plaintiffs pursue a common-law negligence claim based upon a clerical worker's error that results in the performance of an unwanted and contraindicated medical procedure, should the insurance coverage be provided by the comprehensive general liability ("CGL") carrier? Plaintiff The Hanover Insurance Company ("Hanover") has disclaimed that obligation under the professional-services exclusion in its insurance policies, but the professional-liability carrier, Defendant Michigan Professional Insurance Exchange ("MPIE"), insists that Hanover must pick up the costs for defense and indemnification arising from the clerical worker's error. The language of the policies issued by Hanover and the analysis in an unpublished decision from our Court of Appeals lead ineluctably to the conclusion that the professional-services exclusion relieves Hanover of any obligation to provide coverage, so the Court must award summary disposition to Hanover under MCR 2.116(C)(10).

“A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint.” Corley v Detroit Bd of Educ, 470 Mich 274, 278 (2004). “In evaluating such a motion, the court considers the entire record in the light most favorable to the party opposing the motion, including affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties.” Id. In this case, the parties do not disagree about the controlling facts. Indeed, because this is a declaratory-judgment action addressing insurance coverage for potential liability arising from a separate civil case pending in the Kent County Circuit Court, the Court should look to the complaint in that underlying civil case in order to resolve the dispute presented in the instant case. See Fitch v State Farm Fire and Cas Co, 211 Mich App 468, 471 (1995).

In the underlying civil action, Hauck v Grand Rapids Women’s Health, Kent County Circuit Court No 14-02768-NO (Johnston, CJ), Jennifer and Shawn Hauck allege that an error by a surgical scheduler, Defendant Kaaren Dewitt, resulted in the performance of a NovaSure procedure that left Ms. Hauck’s uterine lining no longer “able to properly support fetal development,” thereby rendering any future pregnancy prohibitively dangerous for Ms. Hauck and the fetus. See Amended Complaint in Hauck v Grand Rapids Women’s Health, ¶¶ 6-10. The Haucks seek recovery from Kaaren Dewitt and her employer, Defendant Grand Rapids Women’s Health, P.C. (“GRWH”), on a common-law negligence theory, as opposed to a claim for medical malpractice.¹ See id., ¶ 3.

Notwithstanding the characterization of the claim in the underlying action as common-law negligence, rather than medical malpractice, Plaintiff Hanover asserts in this coverage dispute that a professional-services exclusion in its policy language forecloses coverage for Defendants Dewitt

¹ The amended complaint in the underlying civil case also includes a claim against Defendant Elizabeth Luce – the doctor who performed the NovaSure procedure – on a conventional theory of medical malpractice.

and GRWH under the policies Hanover issued to GRWH. Consequently, the outcome of this dispute turns upon the language of the policies Hanover wrote for GRWH. “An insurance policy is similar to any other contractual agreement, and, thus, the court’s role is to ‘determine what the agreement was and effectuate the intent of the parties.’” Hunt v Drielick, 496 Mich 366, 372 (2014). The Court must “‘employ a two-part analysis’ to determine the parties’ intent.” Id. at 373. The Court first must decide “whether ‘the policy provides coverage to the insured,’ and, second, the court must ‘ascertain whether that coverage is negated by an exclusion.’” Id. Here, Hanover has invoked an exclusion in moving for summary disposition, so Hanover “‘should bear the burden of proving an absence of coverage[.]’” Id. Although “‘[e]xclusionary clauses in insurance policies are strictly construed in favor of the insured[.]’” id., “‘[i]t is impossible to hold an insurance company liable for a risk it did not assume,’” id., so all “‘[c]lear and specific exclusions must be enforced[.]’” Id.

Both the CGL policy and the commercial umbrella policy that Plaintiff Hanover wrote for Defendant GRWH contain a professional-services exclusion. The CGL policy excludes claims for “‘[b]odily injury’ . . . arising out of the rendering of or failure to render any professional service: (1) [b]y you; or (2) [o]n your behalf[.]” See Plaintiff’s Response to Defendants’ Motion for Summary Disposition and Plaintiff’s Counter-Motion for Summary Disposition, Exhibit 2.² In similar terms, the Commercial Liability Umbrella Coverage Form excludes claims for “‘[b]odily injury’ . . . due to the rendering or failure to render any professional service[.]” which includes “[m]edical, surgical, dental, x-ray or nursing services treatment, advice or instruction[.]” See id.

² The exhibit cited by the Court includes only the terms of the exclusions. The CGL policy in its entirety is attached as Exhibit C to Plaintiff Hanover’s amended complaint. The exclusion on which Hanover relies can be found at page 52 of the “Businessowners Coverage Form.” Likewise, the Commercial Liability Umbrella Coverage Form is contained in Exhibit C to Hanover’s amended complaint, and the pertinent exclusion can be found on page 5 of that document.

The defendants contend that the professional-services exclusions do not apply to the alleged common-law negligence of Defendant Dewitt because her acts merely encompassed the preparation of surgical forms with the erroneous inclusion of a NovaSure procedure. But that approach, which essentially limits the professional-services exclusions to claims against professionals for malpractice, cannot be squared with Michigan law or the language of the exclusions themselves. As our Supreme Court has clearly explained, “an insurer’s duty to defend and indemnify does not depend solely upon the terminology used in a plaintiff’s pleadings.” See Allstate Ins Co v Freeman, 432 Mich 656, 662 (1989). “Rather, ‘it is necessary to focus on the basis for the injury and not the nomenclature of the underlying claim in order to determine whether coverage exists.’” Id. at 662-663. Applying these principles, our Court of Appeals has held – albeit in an unpublished decision – that a professional-services exclusion bars coverage for claims predicated upon the negligence of clerical workers in a doctor’s office when the injury ultimately resulted from a doctor’s rendering of treatment or failure to render treatment. White v Auto-Owners Inc Co, No 265380, slip op at 4-5 (Mich App March 16, 2006) (unpublished decision). There, “a misplaced record or a telephone or facsimile message may have initiated the problem,” but the injury that the plaintiff in the underlying case “suffered was the result of improper follow-through after a medical procedure, which encompasses the failure to render a medical service.” Id. Similarly, in the instant case, although negligence by Defendant Dewitt in the preparation of surgical forms may have initiated the problem, the injury suffered by the Haucks, *i.e.*, infertility, resulted from the performance of a NovaSure procedure, which manifestly constitutes the rendering of a professional service.³ See id.

³ The defendants would have the Court analyze Defendant Dewitt’s negligence in a vacuum, limiting the inquiry to the clerical nature of her acts. But her alleged negligence without Dr. Luce’s resulting performance of the NovaSure procedure would have caused no injury to the Haucks.

The defendants characterize the analysis of our Court of Appeals in the unpublished decision in White as inapposite because the underlying negligence claim in White was made only against the practice, not the clerical workers. But that amounts to a distinction without a difference. In White, as in the instant case, the underlying action involved a claim based upon the alleged negligence of clerical staff that led to a catastrophic injury due to the rendering or failure to render a professional service. See White, No 265380, slip op at 4-5. And in White, as in the instant case, the insurance company that wrote the CGL policy cited the professional-services exclusion to defeat coverage for the claim predicated upon the negligence of the clerical worker. Finally, in White, as in the instant case, the insurance policy had been issued to the practice, rather than the individual clerical worker. At most, Defendant Dewitt constitutes an insured under her employer's policy, so the professional-services exclusion applies to her in exactly the same manner as it applies to her employer. Thus, the Court cannot distinguish White from the instant case on the basis that an individual clerical worker has been sued in the underlying civil action.

Finally, the defendants hint that Defendant Dewitt may not have insurance coverage under the professional-liability policy written for Dr. Luce and GRWH by Defendant MPIE. But the extent of coverage afforded to Dewitt under the MPIE policy has no bearing upon the Court's interpretation of the CGL and umbrella policies written by Plaintiff Hanover. And in any event, the MPIE policy written for Dr. Luce, which is attached as Exhibit D to Hanover's amended complaint, includes an "Employees as Additional Insureds Endorsement." Therefore, the specter of an uninsured clerical worker does not hang over this coverage dispute. Instead, this coverage dispute represents nothing more than a cost-shifting endeavor by MPIE at Hanover's expense. The Court cannot countenance such an effort in the face of clearly applicable exclusions in the CGL and umbrella policies issued

by Plaintiff Hanover. Accordingly, the Court must grant summary disposition to Hanover pursuant to MCR 2.116(C)(10) and declare that Hanover owes no duty to defend or indemnify either GRWH or Dewitt in connection with the underlying suit brought by Jennifer and Shawn Hauck in the Kent County Circuit Court.⁴

IT IS SO ORDERED.

This is a final order that resolves the last pending claim and closes the case.

Dated: December 3, 2014



HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge

⁴ The award of summary disposition concerns Count One of Plaintiff Hanover's Amended Complaint for Declaratory Judgment and Other Relief, which invokes only the professional-services exclusion. Because the Court has ruled in favor of Hanover on that claim, the Court need not resolve the remaining counts in Hanover's amended complaint. In addition, the Court's ruling includes the denial of the defendants' competing motions for summary disposition. In a properly framed action for declaratory relief pursuant to MCR 2.605, there can be only one winner. That winner in this case is Hanover.