IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MARY COFFEY PIERSON,

Plaintiff,

v.

TERRY R. KRAUCUNAS and
RAYMOND GERARD MEJIA, and
AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

Defendants.

OPINION AND ORDER

01-C-225-C

- -

In this civil action for monetary relief, plaintiff Mary Coffey Pierson alleges that defendants Terry R. Kraucunas and Raymond Gerard Mejia mishandled her legal affairs. The case is before the court on defendant American Family Mutual Insurance Company's motion for summary judgment pursuant to Fed. R. Civ. P. 56(b). This court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332. Because I find that the insurance policies either do not cover legal malpractice or explicitly exclude legal malpractice from coverage, defendant's motion for summary judgment will be granted.

For the purpose of deciding defendant American Family's motion for summary

judgment, I find from the parties' proposed findings of fact and the record that the following material facts are undisputed.

UNDISPUTED FACTS

A. Legal Services

Plaintiff Mary Coffey Pierson is a former resident of Wisconsin and is currently residing in Pennsylvania. At all times relevant to this action, defendant Terry R. Kraucunas was licensed to practice law in the state of Wisconsin and maintained the Kraucunas Law Office in Milwaukee, Wisconsin. Defendant Kraucunas is currently residing and working in Indiana. At all times relevant to this action, defendant Raymond Gerard Mejia was an associate attorney at that law office. Defendant Mejia is currently residing in or around Waunakee, Wisconsin. Defendant American Family Mutual Insurance Company is an insurance company doing business in Madison, Wisconsin.

Plaintiff retained the Kraucunas Law Office, S.C. in 1994 to provide legal services in connection with certain trust and estate matters involving plaintiff's aunt, Mary Gloria Scofield, and Ms. Scofield's roommate, Mary Clare Mahoney, and to assist her in becoming appointed guardian of those women. After court hearings in 1995, defendant Mejia told plaintiff that there were no more legal measures that could be taken with respect to Ms. Scofield and Ms. Mahoney, and that they would not be returning with plaintiff to her home

in California.

Plaintiff's remaining contact with Ms. Scofield and Ms. Mahoney was with them in a nursing home in Milwaukee, Wisconsin. This caused great emotional distress to plaintiff because she was unable to help them carry out their stated desire of living with her in California until they died. Instead, she had to visit them in a nursing home where she knew neither woman wanted to live. Visiting them in the nursing home also caused great emotional distress to plaintiff, as the nursing home employees knew that for a period of time she had been restrained from visiting Ms. Scofield and Ms. Mahoney. Ms. Mahoney died in February of 1998 and Ms. Scofield died in May of 1999.

The mishandling of the trust and estate matters by plaintiff's former attorneys, defendants Kraucunas and Mejia, which led to restrictions on Ms. Scofield's and Ms. Mahoney's ability to live with plaintiff, was a life-changing event for her. Plaintiff suffered emotional distress as a direct result of the inability to see these two women.

In her complaint in this case, plaintiff alleges that as a result of the alleged negligence of Kraucunas and Mejia, she incurred substantial additional legal fees in an attempt to rectify problems with the two estates. In addition to this, plaintiff alleges that she suffered significant emotional distress as a result of the lawyers' mishandling of her matter.

Defendant Kraucunas thought legal work would be covered by her policies with American Family "[t]o a certain extent," and she put American Family on notice of the legal

malpractice claims against her because she did not know whether it provided coverage. Kraucunas also put on notice her professional liability carrier, through which she had a professional liability policy in force in 1995.

B. The Insurance Policies

1. The Businessowners Policies

American Family issued a Businessowners policy to "Kraucunas, Raymond J. & Terry R. Kraucunas," and its policy period ran from June 15, 1994 to June 15, 1995. American Family issued a second Businessowners liability policy to "Law Office of Kraucunas, Terry R. Ms.," and its policy period was from November 27, 1994 to November 27, 1995. Both of these policies contain the following coverage language:

> **We** will pay those sums that the insured becomes legally obligated to pay as damages because of **bodily injury** or **property damage** to which this insurance applies. **We** have the right and duty to defend any **suit** seeking those damages. . . . But:
>
> . . .
>
> c. The **bodily injury** or **property damage** must arise from an **occurrence during the policy period . . . .**
>
> Damages because of **bodily injury** include damages for care, loss of services or death resulting at any time from the **bodily injury**.

The Businessowners policies define "bodily injury" as "bodily harm, sickness, or disease sustained by a person, including death resulting from any of these at any time." The policies define "property damage" as:

a. physical injury to tangible property, including all resulting loss of use of that property; or

b. loss of use of tangible property that is not physically injured. **Property damage** does not include loss by theft or disappearance.

"Occurrence" is defined in the policies as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

The Businessowners policies exclude from coverage "punitive or exemplary damages." In addition, the policies provide the following exclusion from coverage:

> **We** will not pay for damages due to **bodily injury** or **property damage** arising out of the rendering of or the failure to render professional services by an **insured**, who is a(n):
>
> . . .
>
> (8) attorney, accountant, or fiduciary . . . .

2. The Dwelling Policies

American Family issued a Dwelling policy to "Kraucunas, Raymond J. & Terry R.," and its policy period ran from September 22, 1994 to September 22, 1995. American Family also issued a Dwelling policy to "Kraucunas, Raymond J. & Terry R.," and its policy period was from April 5, 1994 to April 5, 1995. These policies provided that:

> **COVERAGE A - Dwelling**
> We Cover:
>
> 1. the dwelling on the Described Location shown in the Declarations, used principally for dwelling purposes, including structures attached to the dwelling;
> 2. materials and supplies located on or next to the Described Location used to construct, alter or repair the dwelling or other structures on the Described

Location; and

3. if not otherwise covered in this policy, building equipment and outdoor equipment used for the service of and located on the Described Location.

. . .

COVERAGE B - Other Structures
We cover other structures on the Described Location, set apart from the dwelling by clear space. This includes structures connected to the dwelling by only a fence, utility line, or similar connection.

. . .

COVERAGE C - Personal Property
We cover personal property, usual to the occupancy as a dwelling and owned or used by you or members of your family residing with you while it is in the Described Location.

3. The Homeowners Policy

American Family issued a Homeowners policy to "Kraucunas, Raymond J. & Terry R.," and its policy period was from June 24, 1994 to April 4, 1995. The Homeowners policy contains the following coverage language:

> **We** will pay, up to **our limit**, compensatory damages for which any **insured** is legally liable because of **bodily injury** or **property damage** caused by an occurrence covered by this policy. **We** will defend any suit, even [if] it is groundless, false or fraudulent, provided the suit resulted from **bodily injury** or **property damage** not excluded under this coverage.

The Homeowners policy defines "bodily injury" as "bodily harm, sickness or disease. It includes required care, loss of services and resulting death." The policy defines "property damage" as "physical damage to or destruction of tangible property, including loss of use of this property." "Occurrence" is defined by the policy as:

> [A]n accident, including continuous or repeated exposure to substantially the same general harmful condition, which results, during the policy period, in:
> a. **Bodily injury**; or
> b. **Property damage.**

The Homeowners policy excludes from coverage injury or damage "arising out of rendering or failing to render professional services." The policy also excludes from coverage injury or damage "arising out of **business** pursuits of any **insured** . . . , except: (1) activities which are usual to non-**business** pursuits . . . ." The policy defines "business" as "any profit motivated full or part-time employment, trade, profession or occupation and including the use of any part of any premises for such purposes."

4. <u>The Personal Liability Umbrella Policy</u>

American Family issued a Personal Liability Umbrella policy to "Kraucunas, Terry & Raymond," and its policy period was from June 19, 1994 to June 19, 1995. The Umbrella policy contains the following coverage language:

> **We** will pay, up to **our limit**, compensatory damages for which an insured becomes legally liable for **injury** caused by an **occurrence** covered by this policy. This coverage applies only to damages in excess of the **primary limit**.

The Umbrella policy defines "injury" as "**bodily injury**, **personal injury**, or **property damage**. The policy defines "bodily injury" as "bodily harm, sickness or disease. It includes required care, loss of services and resulting death. **Bodily injury** does not include: . . .

c. emotional or mental distress, mental anguish, mental injury, or any similar injury unless it arises out of actual bodily harm to a person." The Umbrella policy defines "property damage" as:

> a. Physical harm to tangible property, including all resulting loss of use of that property; or
> b. Loss of use of tangible property that is not physically injured.

The Umbrella policy defines "occurrence" as "[u]nder Personal Liability Coverage, an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period, in **personal injury** and/or **property damage**."

The Umbrella policy contains the following exclusions from coverage:

> **Business. We** will not cover **business** pursuits or **business property** of an insured . . . . However, this exclusion does not apply to:
> a. Activities which are usual to non-**business** pursuits . . . .
>
> . . .
>
> **Professional Liability. We** will not cover the rendering or failure to render professional services.
>
> . . .
>
> **Punitive Damages. We** will not cover punitive or exemplary damages.

The Umbrella policy defines "business" as "any profit motivated full or part-time employment, trade, profession or occupation, except **farming/ranching**, and including the

use of any part of any premises for such purposes." The Umbrella policy also contains a Defense Provision, providing that "[i]f a suit is brought against an **insured** for damages because of **injury** caused by an **occurrence** to which this policy applies, **we** will provide a defense at **our** expense by counsel of **our** choice."

The Umbrella policy has $1,000,000 per occurrence limits. The policy lists car liability insurance, homeowners liability insurance and rental dwelling liability insurance in the Schedule of Underlying Insurance on the policy declarations page.

OPINION

A. Standard for Summary Judgment

To prevail on a motion for summary judgment, the moving party must show that even when all inferences are drawn in the light most favorable to the non-moving party, there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); McGann v. Northeast Illinois Regional Commuter Railroad Corp., 8 F.3d 1174, 1178 (7th Cir. 1993). Summary judgment may be awarded against the non-moving party only if the court concludes that a reasonable jury could not find for that party on the basis of the facts before it. Hayden v. La-Z-Boy Chair Co., 9 F.3d 617, 618 (7th Cir. 1993), cert. denied, 511 U.S. 1004 (1994). If the nonmovant fails to make a showing sufficient to establish the

existence of an essential element on which that party will bear the burden of proof at trial, summary judgment for the moving party is proper. Celotex, 477 U.S. at 322.

B. Interpretation of Insurance Contracts

The construction of an insurance contract is a question of law, and thus properly decided on a motion for summary judgment. Kennedy v. Washington National Ins. Co., 136 Wis. 2d 425, 428, 401 N.W.2d 842, 844 (Ct. App. 1987). Wisconsin insurance policies are governed by Wisconsin law. Lexington Ins. Co. v. Rugg & Knopp, Inc., 165 F.3d 1087, 1091 (7th Cir. 1999). Interpretation of the language of an insurance policy is governed by the same rules of construction that govern other contracts. Peace v. Northwestern National Ins. Co., 228 Wis. 2d 106, 120, 596 N.W.2d 429, 435 (1999) (citing Weimer v. Country Mutual Ins. Co., 216 Wis. 2d 705, 721, 575 N.W.2d 466, 472 (1998)). The primary objective in interpreting a contract is to ascertain and carry out the intentions of the parties. General Casualty Co. of Wisconsin v. Hills, 209 Wis. 2d 167, 175, 561 N.W.2d 718, 722 (1997).

The language of an insurance policy should be interpreted according to its plain and ordinary meaning as understood by a reasonable person in the position of the insured. Kremers-Urban Co. v. American Employers Ins. Co., 119 Wis. 2d 722, 735, 351 N.W.2d 156, 163 (1984). It is well established that terms in an insurance policy are ambiguous if

they are fairly susceptible to more than one reasonable interpretation when read in context. Peace, 228 Wis. 2d at 154, 596 N.W.2d at 450. Whether an ambiguity exists in an exclusion from coverage depends upon the meaning that the words used to describe the exclusion would have to a reasonable person of ordinary intelligence in the position of the insured. Kozak v. United States Fidelity & Guaranty Co., 120 Wis. 2d 462, 467, 355 N.W.2d 362, 364 (Ct. App. 1984). If coverage is ambiguous, the policy is construed in favor of coverage and exclusions are construed narrowly against the insurer. Smith v. Atlantic Mutual Ins. Co., 155 Wis. 2d 808, 811, 456 N.W.2d 597, 598 (1990). However, this principle does not allow a court to eviscerate an exclusion that is clear from the face of the insurance policy. Whirlpool Corp. v. Ziepert, 197 Wis. 2d 144, 152, 539 N.W.2d 883, 886 (1995).

Plaintiff does not allege that her damages fall under the definition of "property damage." Instead, she claims that her damages fall within the definition of "bodily injury" as that term is used in the insurance policies. Plaintiff contends that she suffered "bodily injury" in the form of emotional distress as a result of the mishandling of her legal affairs. Defendant American Family contends that emotional distress is not included in the phrase "bodily injury" and, even if defendants' conduct created bodily injury, plaintiff's claim would be negated by the limited coverage of the policies and the exclusions contained within them.

I need not reach the question whether emotional distress constitutes "bodily injury"

under the insurance contracts. The two businessowners policies specifically exclude from coverage "**bodily injury** . . . arising out of the rendering of or the failure to render professional services by an **insured**, who is a(n): . . . (8) attorney . . . ." The two dwelling policies do not contain such an exclusion, but nowhere does it appear that they provide coverage for bodily injury or professional liability; rather, the dwelling policies apply to property damage. The homeowners policy specifically excludes from coverage injury or damage "arising out of **business** pursuits of any **insured** . . . , except: (1) activities which are usual to non-**business** pursuits . . . ." The policy defines "business" as "any profit motivated full or part-time employment, trade, profession or occupation and including the use of any part of any premises for such purposes." The personal liability umbrella policy also provides specifically that it "will not cover the rendering or failure to render professional services." A reasonable person of ordinary intelligence in the position of the insured would not expect these policies to cover professional liability claims.

By considering the plain meaning of the six insurance policies, it is clear that none of the policies creates a duty on behalf of defendant American Family to defend or indemnify defendants. Plaintiff asks this court to reform one of the businessowners policies to find coverage for professional liability. Although the facts reveal that defendant Kraucunas thought legal work would be covered by her policies with American Family "[t]o a certain extent"; that she put American Family on notice of the legal malpractice claims against her;

and that she also put her professional liability carrier on notice of plaintiff's lawsuit, Kraucunas has not joined in plaintiff's request to reform the insurance policy.

To establish standing to request reformation of the contract between defendant Kraucunas and defendant American Family, plaintiff would have to establish that she is a third-party beneficiary to that contract. Mercado v. Mitchell, 83 Wis. 2d 17, 28, 532 N.W.2d 532, 538 (1978). In order to be considered a third-party beneficiary, plaintiff would have to show that the parties entered into the contract "directly and primarily for [her] benefit," and that the benefit is more than merely incidental to the contract. Id. "The general rule [is] that liability policies do not confer third-party beneficiary status upon injured parties . . . ." Id. Because plaintiff is neither a party to the insurance contract nor a third-party beneficiary, she has no standing to seek reformation of the contract. Id.

ORDER

IT IS ORDERED that the motion of defendant American Family Mutual Insurance Company for summary judgment is GRANTED. IT IS DECLARED that the insurance contracts defendant Kraucunas purchased from defendant American Family Mutual Insurance Company do not require defendant to defend or indemnify defendant Kraucunas.

Defendant American Family Mutual Insurance Company is DISMISSED from this case.

Entered this ____________ day of November, 2001.

BY THE COURT:

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BARBARA B. CRABB
District Judge