UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

KADLEC MEDICAL CENTER, *et al.*	CIVIL ACTION
versus	No. 04-997
LAKEVIEW ANESTHESIA ASSOCIATES, *et. al.*	SECTION: I/3

ORDER AND REASONS

Before the Court are two motions for summary judgment filed on behalf of intervenors, Allstate Insurance Company ("Allstate") and State Farm Fire and Casualty Company ("State Farm").[1] The intervenors seek summary judgment declaring that they owe no coverage and are not obligated to defend their insureds, Dr. William Preau and Dr. Alan Parr, in a lawsuit brought against Drs. Preau and Parr, among others, by Kadlec Medical Center and Western Professional Insurance Company (collectively "Kadlec"). For the following reasons, intervenors' motions are **GRANTED**.

Background

In the underlying lawsuit, Kadlec sued defendants, Lakeview

[1] Rec. Doc. No. 53, intervenor Allstate's motion for summary judgment. Rec. Doc. No. 84, intervenor State Farm's motion for summary judgment.

Anesthesia Associates ("LAA"), Lakeview Medical Center, L.L.C., d/b/a Lakeview Regional Medical Center ("LRMC"), and Drs. William Preau, Allan Parr, Mark Dennis, and David Baldone, alleging claims for intentional misrepresentation, strict liability misrepresentation, negligent misrepresentation, and negligence. Kadlec's claims arise out of statements or omissions allegedly made or omitted by defendants in professional letters of referral for another physician.[2] With respect to Dr. Parr, Kadlec asserts only a claim for negligence. As to Dr. Preau, Kadlec asserts a claim for negligence as well as claims for intentional misrepresentation, strict liability misrepresentation, and negligent misrepresentation.

During the time span covered in plaintiffs' complaint, Allstate insured Dr. Parr under a Deluxe Homeowners Policy and a Personal Umbrella Policy.[3] Similarly, State Farm insured Dr. Preau under a Homeowners Policy and a Personal Liability Umbrella Policy.[4] While Allstate's and State Farm's motions involve different policies, the parties' arguments are substantially similar because the insurance policies at issue involve similar provisions. Both Allstate and State Farm argue that based on the

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[2] Rec. Doc. No. 1.

[3] Rec. Doc. No. 53, exhibit 1, Deluxe Homeowners Policy, No. 011320106, and exhibit 2, Personal Umbrella Policy, No. 095790205.

[4] Rec. Doc. No. 84, exhibit C, Homeowners Policy, No. 18-E1-3620-5. and exhibit D, Personal Liability Umbrella Policy, No. 18-BA-1319-1.

allegations of Kadlec's complaint, they owe no coverage and that they have no duty to defend Drs. Parr and Preau under the policies at issue.

Intervenors contend that Kadlec's allegations against defendants include a conspiracy to conceal the impairment and unfitness to practice medicine of Dr. Robert Berry, another doctor in the insureds' anesthesiology practice. Therefore, intervenors argue that they have no duty to defend their insureds based on the provisions of the policies at issue because: 1) the policies require an "occurrence" to trigger coverage and there has been no occurrence, i.e. an "accident" as occurrence is defined in the policies; 2) the allegations made by Kadlec only involve intentional acts and the policies exclude coverage for intentional acts and/or omissions;[5] and 3) the allegations made by Kadlec against Drs. Parr and Preau only involve business activities and the policies exclude coverage based on business pursuits.

Kadlec's complaint alleges, *inter alia*, the following: Drs. Parr, Preau, Dennis, and Baldone are licensed physicians and shareholders of LAA. In January, 1997, LAA hired Dr. Berry as an anesthesiologist. Sometime in late 2000, LAA became aware that Dr. Berry was withdrawing narcotics medications from LRMC. On March

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[5] Despite intervenors' arguments that plaintiffs have alleged a conspiracy and asserted only intentional torts, plaintiffs have asserted claims for negligence and negligent misrepresentation in addition to their intentional misrepresentation and strict responsibility misrepresentation claims. Perhaps most notably, plaintiffs have only asserted a negligence claim against Dr. Parr.

13, 2001, LAA became aware that Dr. Berry had a drug impairment problem and by letter dated March 27, 2001, LAA terminated Dr. Berry with cause due to his practicing medicine in an impaired state. In June, 2001, Drs. Dennis and Preau wrote letters of recommendation for Dr. Berry. Relying in part on those letters, Kadlec Medical Center hired Dr. Berry as an anesthesiologist. Then, Dr. Berry, while working at Kadlec and impaired by drug use, caused a patient to suffer extensive brain damage. Kadlec ultimately settled a medical malpractice lawsuit brought by the patient's family in the State of Washington for 7.5 million dollars.[6]

Analysis

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Once the moving party carries its burden of proving that there is no material factual dispute, the burden shifts to the nonmovant "to show that summary judgment should not lie." *Hopper v. Frank,* 16 F.3d 92, 96 (5th Cir. 1994). While the court must consider the evidence with all reasonable inferences in the light

[6] *See* Rec. Doc. No. 1.

most favorable to the nonmovant, the nonmoving party must come forward with specific facts showing that there is a genuine issue for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986); *Webb v. Cardiothoracic Surgery Associates of North Texas,* 139 F.3d 532, 536 (5th Cir. 1998). This requires the nonmoving party to do "more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec.*, 475 U.S. at 586, 106 S. Ct. at 1356. The nonmoving party must "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986); *Auguster v. Vermillion Parish School Board,* 249 F.3d 400, 402 (5th Cir. 2001).

An insurer's duty to defend an insured is broader than its duty to indemnify. *Yount v. Maisano,* 627 So. 2d 148, 153 (La. 1993). "The insurer's duty to defend suits brought against its insured is determined by the allegations of the injured plaintiff's [complaint], with the insurer being obligated to furnish a defense unless the [complaint] unambiguously excludes coverage." *Id.* (citing *American Home Assurance Co. v. Czarniecki*, 230 So. 2d 253 (La. 1969)). "[I]f, assuming all the allegations of the [complaint] to be true, there would be both (1) coverage under the

policy and (2) liability to the plaintiff, the insurer must defend the insured regardless of the outcome of the suit. Additionally, the allegations of the [complaint] are liberally interpreted in determining whether they set forth grounds which bring the claim within the scope of the insurer's duty to defend the suit brought against its insured." *Id.* (citing *Benoit v. Fuselier,* 195 So. 2d 679 (La. App. 3d Cir. 1967)).

With respect to exclusions contained in an insurance policy, "[p]olicies should be construed to effect, not deny, coverage." *Yount*, 627 So. 2d at 151 (citing *Breland v. Schilling,* 550 So. 2d 609, 610 (La. 1989) and *Borden, Inc. v. Howard Trucking Co.,* 454 So. 2d 1081 (La. 1984)). Any ambiguity in an insurance policy exclusion should be narrowly construed in favor of coverage. *Id.* (citing *Great American Ins. Co. v. Gaspard*, 608 So. 2d 981 (La. 1992)). Finally, "it is the insurer's burden to show that a loss falls within a policy exclusion." *Louisiana Maintenance Servs., Inc. v. Certain Underwriters at Lloyd's of London*, 616 So. 2d 1250, 1252 (La. 1993).

I. *Dr. Parr's Allstate Insurance Policies*

Dr. Parr's Deluxe Homeowners Policy contains the following exclusion:

> 12. We do not cover bodily injury or property damage arising out of the past or present business activities of an insured person.

The Deluxe Homeowners Policy in turn provides that "Business" is

defined as: "a) any full or part-time activity of any kind engaged in for economic gain, including the use of any premises for such purposes."[7]

Similarly, Dr. Parr's Personal Umbrella Policy states:

> Coverage applies only to an occurrence arising out of: 1) personal activities of an insured. Activities related to any **business** or **business property** of an **insured** are not covered.[8]

The Personal Umbrella Policy further provides that "Business - means any full or part-time activity of any kind engaged in for economic gain.[9]

Allstate contends that it owes no coverage and that it has no duty to defend Dr. Parr because Kadlec's claim against Dr. Parr occurred and arose out of his business activities as an anesthesiologist and shareholder of LAA. Dr. Parr does not argue that the business exclusion is unclear or ambiguous. Rather, Dr. Parr argues that any alleged inaction on his part cannot be considered a business activity or arise out of a business activity because, despite plaintiffs' allegations, he had no duty to act.

Whether Dr. Parr is ultimately found liable for the negligence alleged is of no consequence to a resolution of Allstate's motion. Allstate's duty to defend depends on whether plaintiffs' alleged injuries, as articulated in the complaint, arise out of Dr. Parr's

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[7] Rec. Doc. No. 53, exhibit A.

[8] Rec. Doc. No. 53, exhibit B.

[9] Rec. Doc. No. 53, exhibit B, pp.2-4.

business pursuits. *See Yount*, 627 So. 2d at 153; *Cassanova v. Marullo*, 1996 WL 243555, *2 (E.D. La. May 9, 1996).

As explained above, Allstate's duty to defend arises from the allegations in Kadlec's complaint which the court must accept as true for the purpose of deciding whether Allstate has a duty to defend. *See Yount*, 627 So. 2d at 153. Kadlec's negligence claim against Dr. Parr is founded on an alleged duty to disclose which arises out of Dr. Parr's professional and ethical duties as a physician.[10] Kadlec does not allege that Dr. Parr owed or breached any personal duty.

In *Cassanova v. Marullo*, the court found that the defendants' homeowners insurance policies did not provide coverage because of a business pursuits exclusion similar to the business exclusions in Dr. Parr's policies. Civ.A.No. 94-376, 1996 WL 243555, *2 (E.D. La. May 9, 1996). Dr. Parr seeks to distinguish *Cassanova* because, in that case, the insured "acted" in a manner that could be construed to be a business pursuit and, in this case, Dr. Parr did *not* act. *See* 1996 WL 243555, *1-*2. The Court finds Dr. Parr's distinction unpersuasive.

The *Cassanova* court's reasoning, and the Louisiana case law on

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[10] Dr. Parr suggests that this Court cannot conclude that Kadlec's claims fall within a business pursuits exclusion when a state court has already determined in a separate action that Dr. Parr's professional liability insurer owed no coverage under a professional services provision. Any alleged difference in determinations is not incompatible. The terms of Dr. Parr's professional liability insurance are not before this Court and most likely involve different provisions and definitions.

which it relied, was that but for the profession of the insureds, they would not have been in a position to act as they did. *Id.* (citing *Desormeaux v. Romero*, 560 So. 2d 658 (La. App. 3d Cir. 1990); *MVG v. Lucas*, 590 So. 2d 1322 (la. App. 1st Cir. 1991); *Jim Carey Distributing Co. v. Zinna*, 589 So. 2d 526 (La. App. 1st Cir. 1991); *Felder v. Despinasse*, 564 So. 2d 1331 (La. App. 4th Cir. 1990); *Riley v. McGee*, 427 So. 2d 509 (La. App. 3d 1983)). While Kadlec's lawsuit alleges inaction or a failure to act on the part of Dr. Parr, the reasoning of the *Cassanova* court applies. But for Dr. Parr's employment as a physician and a shareholder in LAA with Dr. Berry, Kadlec's negligence claim against him would not exist because Dr. Parr would not have been in a position to disclose any information. *Id.; see also Jim Carey Distributing Co. v. Zinna*, 589 So. 2d 526, 528-29 (La. App. 1st Cir. 1991). Accordingly, the Court finds that Kadlec's claim against Dr. Parr arises out of his business activities and that both insurance policies exclude coverage.

Because there is no genuine issue of material fact with respect to whether the allegations against Dr. Parr arise solely out of his business activities, the Court finds that, as a matter of law, Allstate owes no coverage to and has no duty to defend Dr. Parr under the policies at issue.[11]

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[11] Because the Court determines that Dr. Parr's acts (or inactions) are not covered under the terms of either insurance policy based on the business activities exclusions, it need not reach the issue of whether or not the

II. *Dr. Preau's State Farm Insurance Policies*

Throughout the period of time covered in Kadlec's complaint, State Farm insured Dr. Preau under two policies, a Homeowners Policy and a Personal Liability Umbrella Policy. The Homeowners Policy contains a business pursuits exclusion which states in part:

> 1. Coverage L [Personal Liability] and Coverage M [Medical Payments to Others] do not apply to:
> b. **bodily injury** or **property damage** arising out of **business** pursuits of any **insured** or the rental or holding for rental or any part of any premises by any insured.[12]

The Personal Liability Umbrella Policy contains a similar exclusion which provides that insurance will not be provided "for any loss caused by your [the insured's] **business** operations or arising out of **business property** . . . ."[13]

Dr. Preau argues that the business pursuit exclusions in his policies do not apply because his "decision to write a letter of recommendation was not necessarily a business decision."[14] However, Kadlec's complaint alleges that Dr. Preau wrote a professional letter of recommendation falsely attesting to Dr. Berry's capabilities as an anesthesiologist. Kadlec also alleges that Dr.

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intentional acts exclusion or the lack of an "occurrence" under the policies excuses Allstate from a duty to defend or coverage.

[12] Rec. Doc. No. 84, exhibit C, Section II - Exclusions, p. 16. Section II(1)(b) of the Homeowners Policy includes certain exceptions to the business activities exclusion which are not applicable and have not been argued by the parties.

[13] Rec. Doc. No. 84, exhibit D, p. 4. The business activities exclusion in the Personal Liability Umbrella Policy contains certain exceptions which are not applicable and which have not been argued by the parties.

[14] Rec. Doc. No. 108, p.6.

Preau violated his professional duties when he failed to disclose certain information.

The allegations of the complaint are controlling for the purpose of determining State Farm's duty to defend. Whether Dr. Preau actually wrote the letter as a personal favor is not material to the resolution of State Farm's motion. *See Cassanova*, 1996 WL 243555, *2.

The allegations of Kadlec's complaint make clear that the acts or failure to act on the part of Dr. Preau arise out of his business activities as a physician and a shareholder in LAA. Because State Farm's duty to defend Dr. Preau is determined by the allegations of Kadlec's complaint, the Court finds that there is no genuine issue of material fact with respect to whether Dr. Preau was engaged in a business activity when he failed to disclose certain information and when he authored the letter of recommendation on Dr. Berry's behalf as plaintiffs allege.[15] Accordingly, under the terms of both policies at issue, State Farm is not obligated to provide Dr. Preau with coverage or a defense.

For the above and foregoing reasons,

IT IS ORDERED that Allstate Insurance Company's motion for summary judgment is **GRANTED**.

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[15] Because the Court determines that Dr. Preau's acts are not covered under the terms of either insurance policy based on the business activities exclusions, it need not reach the issue of whether or not the intentional acts exclusion or the lack of an "occurrence" under the policies excuses State Farm from a duty to defend or coverage.

IT IS FURTHER ORDERED that State Farm Fire and Casualty Company's motion for summary judgment is **GRANTED.**

IT IS ORDERED, ADJUDGED, AND DECREED that no coverage and no duty to defend the defendant-insureds, Dr. Alan Parr and Dr. William J. Preau, III, exists on the part of the intervenors, Allstate Insurance Company and State Farm Fire and Casualty Company pursuant to the policies it issued their insureds.

New Orleans, Louisiana May 9, 2005.

LANCE M. AFRICK
UNITED STATES DISTRICT JUDGE