

NORTH CAROLINA:

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

WAKE COUNTY:

04 CVS 009072

NATIONWIDE MUTUAL FIRE
INSURANCE COMPANY,
Plaintiff,

v.

GLENNVIEW MEMORIAL PARK,
INCORPORATED,
Defendant.

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MEMORANDUM OF DECISION, ORDER AND DECLARATORY JUDGMENT

THIS MATTER is before the Court on Defendant Glennview Memorial Park, Inc.'s ("Glennview") motion for partial summary judgment on the issue of liability. This declaratory judgment action involves a dispute over whether the Plaintiff, Nationwide Mutual Fire Insurance Company ("Nationwide") was required to provide a defense to Glennview in connection with a civil action brought against Glennview in Durham County.

The motion was heard at the April 6, 2005, non-jury civil session of the Wake County Superior Court. The Court heard arguments of counsel and took the matter under advisement. The Court has now had the time to reflect on the arguments of counsel, review the memoranda of law submitted by both parties, the Affidavit of Eric Michaux, the Responses of Nationwide to Glennview's Requests for Admission, and other matters of record. This matter is now ripe for disposition. For the reasons set in this Memorandum of Decision, the Court will grant Glennview's motion for partial summary judgment.

At the outset, the Court will set out the general principles of law applicable to an insurer's obligation to provide a defense and the consequences of failure to live up to the obligation:

1. An insurer has an obligation to provide a defense to its insured if there is any possibility that any of the claims in the underlying lawsuit might be covered under the terms of the

policy. *Waste Management v. Peerless Ins. Co.*, 315 N.C. 688, (1986). In this case, Nationwide refused to defend on the basis of a "professional services" exclusion.

2. If an insurer unjustifiably refuses to provide a defense, then the insurer waives the policy provisions defining the duties and obligations of the insured and is precluded from asserting its policy defenses. *Ames v. Continental Casualty Co.*, 79 N.C. App. 530, disc. rev. denied, 316 N.C. 730, (1986).

3. If a judgment is entered against the insured and the insurer has wrongfully refused to defend, the insurer is obligated to pay the judgment, as well as any costs that have been incurred *Naddao v. Allstate Ins. Co.*, 139 N.C. App. 311, (2000) by the insured..

Accordingly, when an insurance company makes a decision to refuse to defend a civil action against its insured, the decision, if wrong, carries serious consequences.

UNDISPUTED MATERIAL FACTS

1. Glennview operates a cemetery in Durham, North Carolina.

2. Between September 14, 1999 and September 14, 2002, Glennview was insured by Nationwide Commercial General Liability Policy number 61 32 PR 875391-3001 ("the Policy"). Both parties attached the same copy of the Policy to their memoranda of law and there is no dispute about the contents of the Policy.

3. The Policy provided coverage and a duty to defend for "bodily injury and property damage" as follows:

SECTION I - COVERAGES

COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

a. 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 will have the right and duty to defend the insured against any "suit" seeking those damages. . . .

SECTION V - DEFINITIONS

3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time. * * *

15. "Property damage" means:

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. . . .

4. The Policy also contains a page entitled "EXCLUSION - DESIGNATED PROFESSIONAL SERVICES." There is not, however, a description of any professional services on this page of the Policy and the word "Cemetery" does not appear anywhere on the page.

5. In January 2002, Glennview was sued in Durham County Superior Court by Charles and Dorothy Miles (the "Miles Lawsuit"). The complaint in that action asserted a variety of claims against Glennview and two other defendants related to the burial of the Miles' seven year old daughter Lanesha in April 2000, and the maintenance and location of her gravesite and headstone between April 2000 and December 2001.

6. The Miles alleged, among other things, that they entered into a contract with Fisher Funeral Parlor ("Fisher") for a funeral service and burial for their daughter. As part of their contract with Fisher, they purchased a gravesite from Glennview. The gravesite was apparently not marked at the time of the burial in April 2000.

7. According to the Miles' Complaint, when the Miles returned to the cemetery to visit their daughter's grave on her birthday in July 2000, they were unable to locate the exact gravesite. As a result, the Miles purchased a monument for their daughter's grave from Joseph Parker in April 2001. Mr. Parker informed the Miles in July 2001 that the monument was ready and would be properly installed on the correct gravesite.

8. Mr. Parker is not an employee of Glennview. The Miles' Complaint does not allege that any employee of Glennview had any involvement in the installation of Lanesha Miles' monument in July 2001, nor does the Miles' Complaint allege that the Miles contacted anyone at Glennview about the installation of the grave marker in July 2001. The Miles' Complaint simply alleges that "they were informed by Defendant Parker that the monument was ready and would be properly

installed on the correct gravesite as identified by Defendant Glennview."

9. When the Miles returned to the cemetery to place flowers on their daughter's grave in July 2001, they found the marker installed on a grave in the general area of their daughter's burial site. They placed flowers on what they believed to be her grave.

10. When the Miles returned to the cemetery to place flowers on their daughter's grave on December 25, 2001, however, they discovered that their daughter's monument had been removed from the gravesite where it had been originally installed and "thrown to the side and that another monument had been installed where Lanessa's monument had once stood." The complaint alleged that employees of Glennview had "removed Lanessa's monument from its site without any notice to Plaintiffs."

11. The Miles became understandably distraught at this discovery and attempted (apparently without success) to contact all of the defendants on Christmas Day 2001 to find out what had happened and why.

12. According to the Miles' Complaint, on December 26, 2001, Dorothy Miles was informed by an employee of Glennview that Mr. Parker had not paid Glennview a fee to install the grave marker, and that the marker had been installed on the wrong grave, which employees of Glennview discovered when another monument came in to be installed on the grave where Lanessa's monument had been improperly installed.

13. The Miles' Complaint alleged that as a result of the conduct of all the defendants, the plaintiffs suffered extreme mental anguish and emotional distress and "required psychological and medical care." The complaint asserted claims against all defendants for breach of contract, negligence, negligent infliction of emotional distress, gross negligence, negligent interference with a dead body, unfair and deceptive trade practices, and punitive damages.

14. Counsel for the Miles notified Nationwide of the lawsuit and sent Nationwide a copy of the complaint on July 12, 2002.

15. A representative of Nationwide called the president of Glennview on July 17 or 18, 2002 and asked him to explain what happened. According to Nationwide's summary of this conversation, which Nationwide attached to its brief as part of Exhibit 4, Nationwide was informed that "Mr. Parker came into the cemetery at night and placed the marker on the wrong grave. So when the insured [Glennview] got the correct marker in for that grave, they put the plaintiff's marker aside . . .

Glennview Memorial has forbid [sic] Mr. Parker from entering their cemetery, because he has done this before."

15. Nationwide refused to defend Glennview in the lawsuit, and denied both coverage and a defense in a letter dated July 30, 2002. The only reason given by Nationwide for its refusal to defend was a "Professional Services" exclusion.

16. The Miles Lawsuit was tried to a jury in Durham County in May 2004. The Miles obtained a jury verdict against Glennview on May 5, 2004.

17. Judgment was entered against Glennview on May 14, 2004 in the amount of \$180,000, and on July 1, 2004, the Court entered an additional judgment against Glennview for attorneys' fees in the amount of \$40,000, plus costs of \$1,860. Prejudgment interest was awarded at the legal rate from the date the lawsuit was filed. Glennview's appeal bond was set at \$250,000.

18. On June 2, 2004, counsel for Glennview notified Nationwide of the outcome of the Miles Lawsuit and demanded that Nationwide pay the judgment or indemnify Glennview, make arrangements to post the appeal bond, prosecute the appeal on behalf of Glennview and reimburse Glennview for the expenses Glennview had incurred in defending the Miles Lawsuit.

19. Nationwide responded on June 17, 2004, and denied any obligation to defend, pay the judgment, post the appeal bond or pay for the appeal.

20. Nationwide filed this action on June 28, 2004, seeking a declaratory judgment that it had no duty to defend Glennview in the Miles Lawsuit under the terms of the Policy.

21. Glennview counterclaimed for breach of Nationwide's duty to defend, bad faith, and unfair and deceptive trade practices on August 2, 2004. Glennview seeks, among other things, a declaratory judgment that Nationwide did have a duty to defend Glennview under the terms of the Policy.

22. Glennview filed a motion for partial summary judgment on February 2, 2005. Glennview seeks summary judgment on the declaratory judgment claims in Nationwide's complaint and in Glennview's counterclaim. Glennview has not moved for summary judgment on Glennview's Second and Third Claims for Relief.

Discussion of Applicable Legal Principles

The issue of whether the Policy required Nationwide to defend Glennview is determined by interpreting the language of the Policy, which is a question of law that may be resolved by the Court on a motion for summary judgment. *Waste Management v. Peerless Insurance Co.*, 315 N.C. 688, 691, (1986). At the

oral arguments, it is the Court's recollection that both parties requested that the Court grant each summary judgment on the issue of providing a defense.

In North Carolina, an insurer's duty to defend is much broader than its duty to indemnify. An insurer's duty to defend is measured by the facts alleged in the pleadings in the underlying action. When the pleadings state facts demonstrating that the alleged injury is covered by the policy, then the insurer has a duty to defend, regardless of whether the insurer might ultimately be liable. *Waste Management, supra*.

Allegations of facts that describe a hybrid of covered and excluded events, or pleadings that disclose a mere possibility that the alleged injury is covered, are enough to impose a duty to defend on the insurer. *St. Paul Fire & Marine Ins. Co. v. Vigilant Ins. Co.*, 919 F.2d 235, 240 (4th Cir. 1990) (in North Carolina, insurer avoids its duty to defend only if "the facts are not even arguably covered by the policy").

To determine whether an insurer has a duty to defend, the policy provisions must be analyzed and compared with the facts alleged in the underlying action. The pleadings in the underlying action are read side-by-side with the policy to determine whether the events and injuries alleged are arguably covered or clearly excluded. *Waste Management*, 315 N.C. at 691-92. Any doubt as to coverage is to be resolved in favor of the insured. *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 735, (1998).

Where the insurer knows or reasonably could ascertain facts that, if proven, would make a case of possible coverage under its policy, the duty to defend remains and is not discharged, even if the facts alleged in the underlying complaint appear to negate coverage. *Waste Management* at 691-92.

The only situation in which an insurer has no duty to defend is when the allegations in the pleadings plainly indicate that the event in question is not covered, and the insurer has no knowledge of the facts otherwise. An insurer may not, however, refuse to defend based on information outside the pleadings if any plausible reading of the pleadings suggests the possibility of coverage. *Waste Management, supra*.

An insurer has a duty to defend where any one of the claims set out in the underlying complaint is arguably covered by the policy. *Waste Management* at 691. Where a combination of covered and non-covered claims are alleged in the underlying complaint, the insurer has a duty to defend the entire case. *Duke Univ. v. St. Paul Mercury Ins. Co.*, 95 N.C. App. 663, 681, (1989).

Reduced to essentials, Glennview need only show that one of the Miles' claims was "arguably" covered, or, put another way, that there was a "potentiality" of coverage on any of the claims, for Nationwide to have a duty to defend. *Imperial Casualty & Indemnity Co. v. Radiator Specialty Co.*, 862 F. Supp. 1437, 1444 (E.D.N.C. 1994), *aff'd*, 67 F.3d 534 (4th Cir. 1995).

In North Carolina, "exclusions from liability are not favored, and are to be strictly construed against the insurer." *Southeast Airotive Corp. v. U.S. Fire Ins. Co.*, 78 N.C. App. 418, 420, (1985). Exclusions should be "strictly construed to provide the coverage which would otherwise be afforded by the policy." *Durham City Bd. of Educ. v. National Union Fire Ins. Co.*, 109 N.C. App. 152, 156, (1993).

In North Carolina, the duty to defend also encompasses the duty pay a judgment entered in a case the insurer wrongfully refuses to defend. If an insurer breaches its duty to defend, the insurer is estopped from denying coverage in an action by the insured to recover the amounts the insured has become obligated to pay, as well as any other damages caused by the insurer's unjustified refusal to defend. *Ames v. Continental Casualty Co.*, 79 N.C. App. 530, 538, *disc. rev. denied*, 316 N.C. 730 (1986).

An insurer who wrongfully refuses to defend a suit against its insured is liable to the insured for sums expended in payment or settlement of the claim, for reasonable attorneys' fees, for other expenses of defending the suit, for court costs, and for other expenses incurred because of the refusal of the insurer to defend. *Jamstown Mutual Ins. Co. v. Nationwide Mutual Ins. Co.*, 277 N.C. 216, 219 (1970).

CONCLUSIONS OF LAW

Based upon the undisputed material facts, the Court concludes as a matter of law that:

Nationwide received timely notice of the Miles lawsuit from the Miles' attorney on July 12, 2002. Nationwide has not asserted that notice was untimely, nor was Nationwide's refusal to defend based on an assertion that notice was not timely or otherwise improper.

Nationwide's decision not to defend Glennview in the Miles Lawsuit was based solely on the "Professional Services" Exclusion that Nationwide contended was applicable. Since that is the only basis on which Nationwide refused to defend, Nationwide has waived any other grounds it might have asserted.

The Miles clearly alleged in their complaint that they had suffered damages both because of bodily injury (which includes sickness or disease) and property damage. These allegations were sufficient to trigger Nationwide's duty to defend, unless a Policy exclusion specifically and clearly excluded the claims from coverage. The claims alleged by the Miles are not excluded from coverage on two grounds:

First, the Court concludes that the policy does not contain an exclusion for "Professional Services" and thus, there can be no "Professional Services" exclusion in this case.

Second, even if somehow another Court's interpretation could be "stretched" to imprint a "Professional Services" exclusion into the blank spaces of the contract, the alleged wrongful conduct of Glennview with respect to the Miles gravesite and removal of the headstone does not constitute "Professional Services" under any stretch of the imagination.

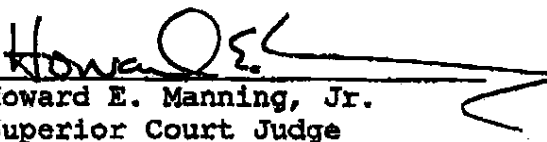
For a professional services exclusion to apply, the claims in the underlying lawsuit must arise solely from the furnishing or failure to furnish services for which professional training is a prerequisite to performance. The determination of whether a particular act or omission falls within the scope of a professional services exclusion depends on the nature of the activity rather than the position of the person responsible for the act or omission. Locating a gravesite, signing a contract with funeral home to provide a gravesite, digging a grave, installing a monument and the other job responsibilities of the Glennview employees is not "professional" conduct under the policy. *Duke University v. St. Paul Fire & Marine Ins. Co.*, 96 N.C. App. 635, 641, (1990).

In conclusion, the Court will not breathe life into an exclusion that does not exist. Simply put, Nationwide breached its duty to defend Glennview under the policy in this case. Glennview's motion for partial summary judgment on its First Counterclaim shall be granted.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED:

1. Glennview's motion for partial summary judgment on its First Counterclaim is granted.
2. Nationwide's motion for summary judgment and for a declaratory judgment that it is not required to defend under the policy is denied and Nationwide's declaratory judgment claim is dismissed.
3. Nationwide is to post the \$250,000 appeal bond in Durham County Superior Court Case No. 02 CVS 00428 within ten (10) days of the date of this Order.
4. Nationwide is to assume the cost of Glennview's appeal in the Miles Lawsuit.
5. Nationwide is required to indemnify Glennview for the amount of the judgment in the Miles Lawsuit, including pre- and post-judgment interest, or for any reasonable settlement of the Miles Lawsuit, which would be any amount up to or less than the judgment; and
6. Nationwide is required to pay the costs that Glennview has incurred, including attorneys' fees, in defending the Miles Lawsuit, in pursuing the appeal of the Miles Lawsuit, and in prosecuting this action.
7. Glennview is to submit affidavits to the Court within 30 days establishing the amount of the costs Glennview has incurred, including attorneys' fees, in defending the Miles Lawsuit, in pursuing the appeal of the Miles Lawsuit, and in prosecuting this action.
8. This Court retains jurisdiction over this matter for purposes of assessing costs and other matters related to this action.
9. Glennview's Second and Third Claims for Relief remain for further proceedings.

This the 26th day of April, 2005.


Howard E. Manning, Jr.
Superior Court Judge

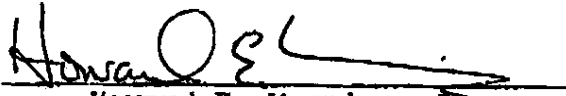
CERTIFICATE OF SERVICE

This is to certify that the foregoing MEMORANDUM OF DECISION, ORDER AND DECLARATORY JUDGMENT was served this date, by facsimile, pursuant to Rule 5, b, North Carolina Rules of Civil Procedure sent as follows:

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This the 26th day of April, 2005.


Howard E. Manning, Jr.
Superior Court Judge