

13-0692

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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CATHY S. GIBSON CLERK
KANAWHA COUNTY CIRCUIT COURT

BETTY J. ADKINS, RAYETTA D. BAUMGARDNER,
DIANA L. BOERKE, LATHA A. BOLEN, CHARLOTTE L. DEAL,
CONSTANCE L. DEVORE, TERESSA D. HAGER,
LORENN A. HANKINS, TAMMY H. CLARK,
PAMELA K. HATFIELD, MARCIE J. HOLTON,
LINDA L. JONES, PATTY S. LEWIS, TERESA LOVINS,
MARTHA J. MARTIN, LOUELLA PERRY,
SHERRY L. PERRY, JANICE PETIT, KIMBERLY A. ROE,
JANICE ROUSH, REBECCA SMITH, BEULAH STEPHENS,
and DEBRA L. WISE,

Plaintiffs,

v.

Civil Action No. 10-C-2282
(Judge Bailey)

WEST VIRGINIA MUTUAL INSURANCE COMPANY,

Defendant.

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Pending before the Court are cross motions for summary judgment filed pursuant to Rule 56 of the West Virginia Rules of Civil Procedure. Having reviewed the pleadings of record, including the exhibits and supplements presented during the hearing, and in considering the oral argument of counsel, the Court makes the following findings of fact and conclusions of law:

1. This declaratory judgment action is brought pursuant to the West Virginia UNIFORM DECLARATORY JUDGMENTS ACT, W. Va. Code, § 55-13-1 *et seq.* [1941].

2. Thirty-three (33) Mesh Plaintiffs asserted medical malpractice claims against Mitchell Nutt, MD ("Nutt") and United Health Professionals, Inc. ("UHP") under WVMIC Medical Professional Liability Policy No. PL100133 (the "Policy").

3. All of the medical incidents occurred during the 2006 and 2007 policy periods.

4. The Mesh Plaintiffs filed claims against Nutt under an extended reporting endorsement ("tail coverage") in 2008, 2009 and 2010.

5. The Mesh Plaintiffs filed claims against UHP under the Policy during the 2010 policy period.

6. WVMIC tendered admitted aggregate policy limits of \$3 million under the extended reporting endorsement for the Nutt claims. See WVMIC Response at p. 9 ("WVMIC has already paid aggregate policy limits based on an extended reporting endorsement issued to Dr. Nutt on March 14, 2008.").

7. The Mesh Plaintiffs reached a confidential settlement with Nutt and UHP whereby WVMIC would pay the sum of \$3 million under the extended reporting endorsement in exchange for a release of Nutt/UHP; and the parties would resolve a coverage dispute for additional monies under the Policy for the UHP claims through this declaratory judgment action. The names of the Mesh Plaintiffs and the terms of the agreement are set forth in the *Release and Settlement Agreement* which is submitted for the record.

8. The Mesh Plaintiffs filed a motion for summary which the parties agree is ripe for consideration. ~~The parties have briefed the issues raised therein and submitted the matter for the~~ Court's consideration.

9. WVMIC filed a cross-motion for summary judgment. The Mesh Plaintiffs assert ~~the cross-motion raises new issues of fact (e.g. intent, parol evidence, mutual mistake, reformation)~~ which are disputed and necessitate additional discovery in the event Mesh Plaintiffs' Motion for Summary Judgment is denied. W. Va. R. Civ. Proc. 56(f); Powderidge Unit Owners Association v. Highland Properties, 196 W.Va. 692, 474 S.E.2d 872, Syl. Pt. 1 (1996). For the reasons set forth below, the Court finds the WVMIC cross-motion for summary

judgment is not ripe for consideration, additional discovery is warranted to resolve the issues presented therein and, more importantly, the cross-motion is rendered moot by the entry of judgment in favor of the Mesh Plaintiffs.

A. WVMIC Medical Professional Liability Policy No. PL100133

10. The Policy is a “claims-made” policy originally purchased by UHP from WVMIC on January 1, 2005.

11. The Policy has been renewed each year with a “policy period” defined on the declarations page as beginning on January 1st and ending on December 31st of a given year. The parties stipulate that a true and accurate copy of the relevant portions of the Policy for each policy period are submitted for the record as exhibits to *WVMIC’s Response in Opposition to Plaintiffs’ Motion for Summary Judgment and Cross-Motion for Summary Judgment*: (2005 Policy – Exhibit L); (2006 Policy – Exhibit M); (2007 Policy – Exhibit N); (2008 Policy – Exhibit I); (2009 Policy - Exhibit J); (2010 Policy - Exhibit K).

12. Nutt left the employment of UHP and was cancelled as an insured under the Policy by way of an amendatory endorsement effective March 14, 2008. See Plaintiff’s Motion for Summary Judgment as Exhibit 2 (101). WVMIC issued an *Extended Reporting Endorsement* (“tail coverage”) for all claims filed against Nutt after the termination date. See Plaintiff’s MSJ Exhibit 2 (99-100).

13. WVMIC has paid aggregate policy limits of \$3 million for the claims against Nutt under the extended reporting endorsement.

14. The issue pending before the Court is whether WVMIC must provide additional coverage for the Mesh Plaintiff claims filed against UHP under the 2010 Policy (Exhibit K).

15. WVMIC contends that all of the Mesh Plaintiff claims, against Nutt and UHP, were satisfied from the extended reporting endorsement and no additional coverage is available for UHP under the Policy.

16. The Mesh Plaintiffs contend there is an additional \$6 million in coverage under the Policy for the claims asserted against UHP.

17. The parties stipulate and concede the Policy provisions are clear and unambiguous. The Court concurs and makes the legal determination that the Policy provisions are not ambiguous. Riffe v. Home Finders Associates, Inc., 205 W.Va. 216, 517 S.E.2d 313, Syl. Pt. 2 (1999) ("The interpretation of an insurance contract, including the question of whether the contract is ambiguous, is a legal determination [...].")

18. Where the provisions of an insurance policy contract are clear and unambiguous they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended. Mylan Labs. Inc. v. Am. Motorists Ins. Co., 226 W.Va. 307, 700 S.E.2d 518, Syl. Pt. 2 (2010); Keffer v. Prudential Ins. Co., 153 W.Va. 813, 172 S.E.2d 714, Syl. (1970).

19. Given the policy is not ambiguous, the Court will not rewrite the terms of the Policy; instead, the Court will enforce the Policy as written without reference to extrinsic evidence. Payne v. Weston, 195 W.Va. 502, 507, 466 S.E.2d 161, 166 (1995) (Cleckley, J.) ("It is only when the document has been found to be ambiguous that the determination of intent through extrinsic evidence become a question of fact.")

20. Since the Policy is not ambiguous; and there is no genuine issue of fact to be tried by a jury, summary judgment is appropriate without further discovery. Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York, 148 W.Va. 160, 133 S.E.2d 770, Syl. Pt. 3 (1963).

B. The Insuring Agreement

21. The Court's analysis of coverage begins, as do all insurance coverage questions, with the *insuring agreement* of WVMIC MPL Policy No. PL100133, which states:

"The company will pay those sums the *insured* becomes legally obligated to pay as damages because of a *claim* that is a result of a *medical incident* which occurs on or after the *retroactive date* applicable to such insured and which is first reported by the insured during the *policy period*."

(2005 Policy – Exhibit L-7); (2006 Policy – Exhibit M-7); (2007 Policy – Exhibit N-8); (2008 Policy – Exhibit I-7); (2009 Policy - Exhibit J-7); (2010 Policy - Exhibit K-7).

22. The Policy defines an *insured* as "the person or entity specified as the insured in the Schedule of Insureds" or "the professional corporation...created for the medical practice of the insured unless otherwise excluded by endorsement." (2005 Policy – Exhibit L-12); (2006 Policy – Exhibit M-12); (2007 Policy – Exhibit N-13); (2008 Policy – Exhibit I-11); (2009 Policy - Exhibit J-11); (2010 Policy - Exhibit K-11).

23. UHP is the "professional corporation" during each of the policy periods and, therefore, is an insured under the Policy for all times relevant to this action.

24. In addition, UHP is specified in the Schedule of Insureds under the Policy during the 2007, 2008, 2009 and 2010 policy periods. (2007 Policy – Exhibit N-2); (2008 Policy – Exhibit I-2); (2009 Policy - Exhibit J-2); (2010 Policy - Exhibit K-2). Therefore, UHP is an insured by virtue of the Schedule of Insureds for the policy periods which so specify.

~~25. UHP is not "otherwise excluded by endorsement" as an insured.~~

26. The Court finds, by the clear and unambiguous provisions of the Policy, that UHP is an *insured* during each policy period relevant to this action including, but not limited to, the 2010 Policy period.

27. The Policy defines a *claim* as “a written demand for money or services arising out of medical incident.” (2005 Policy – Exhibit L-11); (2006 Policy – Exhibit M-11); (2007 Policy – Exhibit N-12); (2008 Policy – Exhibit I-10); (2009 Policy - Exhibit J-10); (2010 Policy - Exhibit K-10).

28. It is undisputed that all the Mesh Plaintiffs filed a claim under the 2010 Policy.

29. The Policy defines a *medical incident* as “any act, series of acts, failure to act, or series of failures to act arising out of the rendering of, or failure to render, professional services, to any one person by an insured or any person not otherwise excluded for whose acts or omissions an insured is legally responsible which results in damages, claim or suit.” (2005 Policy – Exhibit L-13); (2006 Policy – Exhibit M-13); (2007 Policy – Exhibit N-14); (2008 Policy – Exhibit I-12); (2009 Policy - Exhibit J-12); (2010 Policy - Exhibit K-12).

30. It is undisputed that all the Mesh Plaintiffs suffered a medical incident during the 2006 and 2007 policy periods.

31. The Policy defines *retroactive date* as “that date specified as such on the Policy Declarations.” (2005 Policy – Exhibit L-14); (2006 Policy – Exhibit M-14); (2007 Policy – Exhibit N-15); (2008 Policy – Exhibit I-12); (2009 Policy - Exhibit J-12); (2010 Policy - Exhibit K-12).

32. The retroactive date designated in the 2010 policy declarations for UHP is **January 1, 2002**. (2010 Policy - Exhibit K-12). The same retroactive date is found in the 2007 policy period (Exhibit N-2), the 2008 policy period (Exhibit I-2) and the 2009 policy period (Exhibit J-2). In addition, WVMIC introduced the 2010 renewal application as an exhibit to its cross motion (Exhibit O) which references a retroactive date for UHP as January 1, 2002. Whether the renewal application is extrinsic evidence or a component of the Policy is an unresolved issue, not germane to the court’s decision here. However, reference to the same

supports the plain language of the Policy, and the finding of fact by the Court, that UHP's retroactive date is January 1, 2002.¹

33. The Court finds that the Mesh Plaintiffs claims against UHP are covered under the 2010 Policy insuring agreement. The Mesh Plaintiff claims against UHP resulted from medical incidents which occurred after the retroactive date applicable to UHP and were first reported during the 2010 policy period. UHP has coverage for the Mesh Plaintiff claims under the 2010 Policy.

C. Aggregate Limit of Insurance

34. Having determined there is coverage for the Mesh Plaintiff claims against UHP under the 2010 Policy, the Court must now address the limits of coverage under the same.

35. The 2010 Policy contains the following provision related to the aggregate limit of insurance available to the Mesh Plaintiffs:

The limit of insurance specified in the policy declarations for each insured as the "annual aggregate" is the total limit of the Company's liability for damages for that insured resulting from all covered medical incident(s) during the policy period.

(2010 Policy - Exhibit K-12). The 2010 policy declarations specifies an aggregate annual limit of \$3 million. (2010 Policy - Exhibit K-12).

36. WVMIC contends the aggregate limit is calculated by the year in which the claim is filed. The Mesh Plaintiffs disagree and contend the aggregate limit is calculated by the year in which the medical incident occurred.

37. The Court agrees with the Mesh Plaintiffs. The plain language of the Policy specifically references aggregates limits by the year in which a medical incident occurs. The Policy specifically states there is a \$3 million aggregate limit for "*all covered medical*

¹ In oral argument before this court on the cross motions for summary judgment WVMIC argued that the question of the applicable retroactive date for UHP is the critical issue to be decided by this court. This court agrees.

incident(s) during the policy period.” The Mesh Plaintiff medical incidents occurred over the span of two policy periods. Therefore, the limit of coverage for medical incidents occurring in 2006 is \$3 million and the limit of coverage for medical incidents occurring in 2007 is \$3 million. The Court finds there is a total of \$6 million in coverage for claims made against UHP.

38. There is no other reasonable construction of the Policy language. WVMIC’s position is untenable because none of the medical incidents occurred during the 2010 policy period. The Policy clearly states that the aggregate limit is calculated on an annual basis predicated upon the date of the medical incident(s); not on the date a medical claim(s) is filed.

39. The Court’s finding is supported by reference to earlier versions of the Policy. WVMIC previously calculated the annual aggregate by the year in which claims were filed in 2005, 2006, 2007:

The Limit of Insurance specified in the Policy Declarations for each insured as the “annual aggregate” is the total limit of our liability for damages for that insured resulting from any and all medical incident(s) *which are first reported* during the policy period.

(2005 Policy – Exhibit L-10) (2006 Policy – Exhibit M-10) (2007 Policy – Exhibit N-11). The emphasized language was deleted from the 2008, 2009 and 2010 policy periods. (2008 Policy – Exhibit I-9); (2009 Policy – Exhibit J-9); (2010 Policy – Exhibit K-9). WVMIC could have, but chose not to, calculate the aggregate limit by the year in which the claims were filed during the 2010 policy period. Instead, WVMIC purposefully amended its policy provisions and changed the methodology in which the annual aggregate is calculated beginning in 2008.

40. WVMIC argues that aggregating limits of liability based on the year in which medical incidents occur transforms the 2010 Policy from a claims-made policy to an occurrence policy. The Court finds the WVMIC argument is without merit.

41. A “claims made malpractice insurance policy” is defined as a policy which “covers claims which are reported during the policy period, meet the provisions specified by the policy, and are for an incident which occurred during the policy period, or occurred prior to the policy period, as is specified by the policy.” W. Va. Code § 33-20D-2(b) [1991] (Supp. 2011); Auber v. Jellen, 196 W.Va. 168, 174, 469 S.E.2d 104, 110 (1996) (“An ‘occurrence’ policy protects a policyholder from liability for any act done while the policy is in effect, whereas a ‘claims-made’ policy protects the holder only against claims made during the life of the policy.”). Nothing in the statutory definition suggests a methodology in which aggregate limits is calculated.

42. The insuring agreement makes clear the Policy is a claims made policy as defined under West Virginia law. The “limit of liability” does not alter the insuring agreement. The calculation of the aggregate limit is a separate and distinct provision which sets a ceiling on the amount of insurance proceeds available; not whether the claim is covered under the insuring agreement. WVMIC has the ability to define the methodology of calculating the limit of liability by the year in which the medical incident occurred *or* the year in which the claim is first made. Neither impacts coverage; it simply limits the amount of coverage available.

D. The Sharing Endorsement

43. Having determined that the Mesh Plaintiff claims against UHP are covered under the 2010 Policy, with aggregate limits of \$6 million, the Court must now consider WVMIC’s argument that an *amendatory endorsement* excludes coverage for UHP under the Policy.

44. WVMIC argues that a restrictive endorsement under the 2010 Policy requires Nutt and UHP to “share” policy limits of \$3 million. Since WVMIC has already paid \$3 million in coverage, WVMIC argues its obligation under the Policy is satisfied.

45. The 2010 Policy contains an amendatory endorsement entitled "*Shared Limit Endorsement - Insured Paramedical Employees*" (Exhibit K-3) which reads:

Insured paramedical employees shall not have separate limits of liability, but shall share in the limits of liability of each insured(s). Any damages covered by the policy and paid on behalf of an insured paramedical employee shall be applied against the limits of liability applicable to the insured(s), in such order and manner as we deem appropriate.

If damages covered by the policy are awarded, or a settlement is made with our consent, against one or more insured paramedical employees and one or more insured(s), the total limit of liability available to the insured paramedical employees and such insured(s) shall not exceed the limit of liability then available under the policy to such insured(s). If damages covered by the policy are awarded, or a settlement is made with our consent, against one or more insured paramedical employees, but not against any insured(s), the limit of liability available to the insured paramedical employees shall equal the average of the limits of liability then available under all policy(ies) issued by us and providing coverage to such insured(s) but in no event will the limit be greater than the limit carried by the individual insured(s).

46. "Where the policy language involved is exclusionary, it will be strictly construed against the insurer in order that the purpose of providing indemnity not be defeated." Wrenn v. West Virginia Dept. of Transp., Div. of Highways, 224 W.Va. 424, 686 S.E.2d 75, Syl. Pt. 2 (2009).

47. The plain language of the restrictive endorsement amends the Policy and requires paramedical employees to share limits with each insured. The term "paramedical employee" is not otherwise defined in the Policy. However, it is clear that UHP is not a paramedical employee; UHP is the named policyholder (Exhibit K-1), specified as a named insured in the Schedule of Insureds attached to the policy declarations (Exhibit K-2) and defined as an insured because it is the "professional corporation" (Exhibit K-11). The *Shared Limit Endorsement* under the 2010 Policy does not exclude coverage for the Mesh Plaintiff claims against UHP.

48. WVMIC requests this Court to apply the *Shared Limit Endorsement* under the 2008 Policy which defines UHP as a “sharing party” (Exhibit I-3) and references Nutt and UHP as sharing parties in the policy declarations (Exhibit I-2).

49. The Court declines to adopt the position asserted by WVMIC as inconsistent with the plain language of the Policy.

50. The Mesh Plaintiff claims against UHP were all filed in 2010; therefore, the 2010 *Shared Limit Endorsement* is applicable. WVMIC concedes as much by taking the position that the Court should only look to the 2010 Policy to determine coverage. See *WVMIC Response* at p.5 (“It was not until 2010 that the Plaintiffs made claims against UHP within the meaning of the applicable policies.”); Id. at p.10 (“The only Policy where coverage can be disputed is the 2010 Policy.”); Id. at p.12 (“[I]t is undisputed that the Plaintiffs gave notice of all their claims against UHP after January 1, 2010.”); Id. at p.13 (“The only policy period subject to dispute is the 2010 Policy.”). Id. at p.13 (the “2008 Policy and 2009 Policy are not applicable to Plaintiffs claims and *should not be subject to further consideration by the Court.*” (emphasis added). The 2010 Policy version of the “*Shared Limit Endorsement – Insured Paramedical Employees*” (Exhibit K-3) clearly applies to paramedical employees; not UHP.²

~~51. Further, Nutt is not defined as an insured under the 2010 Policy. It is undisputed~~
that Nutt was terminated from the WVMIC policy in 2008 after his separation from employment with UHP. The 2010 Policy does not list Nutt in the Schedule of Insureds. Even if UHP was required to share limits with other insureds under the 2010 Policy; there is nothing to suggest UHP must share limits with Nutt. Nutt is not referenced nor mentioned anywhere in the 2010 Policy.

² Webster defines “paramedical” as “concerned with supplementing the work of highly trained medical professionals.”

52. Moreover, UHP changed its limits from “shared” to “separate” by amendatory endorsement dated January 30, 2008 (Exhibit H). The amendatory endorsement states:

The policy is hereby amended as follows:

In consideration of an additional premium of \$42,847.00, it is agreed and understood that the Policy Declaration has been amended to change the corporate limits from Shared to Separate, effective 01/01/2008, at the request of the Insured.

See WVMIC's Response in Opposition to Plaintiffs' Motion for Summary Judgment and Cross-Motion for Summary Judgment, Exhibit O. The amendatory endorsement does not amend the retroactive date for UHP specified in the policy declarations of January 1, 2002. (Exhibit I-2). Consistent with the amendatory endorsement, each successive policy period references UHP in the policy declarations as owning separate limits with a retroactive date of January 1, 2002. (2009 Policy - Exhibit J-2); (2010 Policy - Exhibit K-2). Finally, the 2010 renewal application, introduced by WVMIC in its cross motion (Exhibit O), specifically references UHP with separate limits including a retroactive date of January 1, 2002.

53. WVMIC argues that, despite the plain language of the Policy, UHP did not intend to purchase separate limits of coverage for the medical corporation. However, extrinsic evidence of intent is not relevant in the absence of ambiguity. Blake v. State Farm Mut. Auto. Ins. Co., ~~224 W.Va. 317, 323, 685 S.E.2d 895, 901 (2009)~~ (“~~It is only when the document has been found to be ambiguous that the determination of intent through extrinsic evidence become a question of fact.~~”) WVMIC has represented to the Court that its Policy is not ambiguous. Therefore, it may not seek reformation of the same by introduction of extrinsic evidence of intent.

54. Finally, accepting WVMIC's position, that UHP did not intend to purchase coverage for the medical corporation for acts prior to January 1, 2008, effectively renders UHP uninsured for all medical incidents occurring prior to January 1, 2008. The Court refuses to

construe the Policy to reach such an absurd result. D'Annunzio v. Security-Connecticut Life Ins. Co., 186 W.Va. 39, 410 S.E.2d 275, Syl. Pt. 2 (1991).

55. Finally, the Mesh Plaintiffs correctly point out that an insured under an extended reporting endorsement is treated differently than an insured under the Policy. The 2008 *Extended Reporting Endorsement* ("tail coverage") (Plaintiff's MSJ Exhibit 2 (99-100)) contains a separate, self-contained "limit of liability" which "does not reinstate" the limits of insurance in the policy declarations. (2010 Policy – Exhibit K-15).

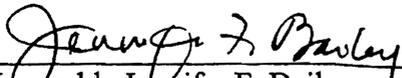
56. The plain language of the Policy provides coverage for Nutt under the *Extended Reporting Endorsement* and separate coverage for UHP under the 2010 Policy.

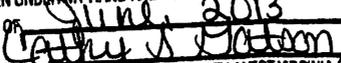
It is hereby **ORDERED** and **DECREED** by the Court, pursuant to the authority vested by the West Virginia UNIFORM DECLARATORY JUDGMENTS ACT, W. Va. Code, § 55-13-1 *et seq.* [1941], and with the consent by the parties to the jurisdiction of the Court, that there is six million dollars (\$6,000,000.00) in coverage under WVMIC Medical Professional Liability Policy No. PL100133 for the claims asserted by the Mesh Plaintiffs against United Health Professionals, with post-judgment interest to accrue thereon at the rate of seven percent (7%) per annum from the date of the entry of this Order.

~~Pursuant to the agreement by the parties, neither pre-judgment interest nor attorney fees~~
will be awarded.

This matter is ORDERED dismissed from the docket of this Court.

Entered this the 30th day of May, 2013.


Honorable Jennifer F. Bailey
Circuit Court of Kanawha County

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 3
DAY OF June, 2013

CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN THE SUPREME COURT OF OF APPEALS OF WEST VIRGINIA

BETTY J. ADKINS, et al,

Plaintiffs/Respondents,

vs.

No.:
(Circuit Court of Kanawha County
Civil Action No. 10-C-2282)

WEST VIRGINIA MUTUAL INSURANCE
COMPANY, MITCHELL E. NUTT, M.D., and
UNITED HEALTH PROFESSIONALS, INC.,

Defendants/Petitioners.,

CERTIFICATE OF SERVICE

I, I. Matthew Mains, counsel for Defendant, West Virginia Mutual Insurance Company, do hereby certify that I served a true and correct copy of the foregoing "Notice of Appeal" upon the following by hand-delivery, this 24th day of June, 2013:

Paul T. Farrell, Jr., Esquire
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Honorable Jenniefer Bailey, Judge
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Charleston, WV 25301



I. Matthew Mains, Esquire (WV #11854)