IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

FRANCES MCINTOSH and **DONALD MCINTOSH**	:	
Plaintiffs,	:	
v.	:	C.A. No. 01C-07-148 CLS
LIBERTY MUTUAL FIRE INSURANCE COMPANY,	:	
Defendant.	:	

Submitted: October 15, 2003
Decided: November 19, 2003

On Defendant Liberty Mutual Fire Insurance Company's
Motion for Summary Judgment.
GRANTED in part, DENIED in part

MEMORANDUM OPINION

Andrew G. Ahern III, Esquire, Joseph W. Benson, P.A., Wilmington, Delaware, Attorney for Plaintiffs.

Colin M. Shalk, Esquire, Casarino, Christman & Shalk, P.A., Wilmington, Delaware, Attorney for Defendant.

SCOTT, J.

I. INTRODUCTION

Defendant Liberty Mutual Fire Insurance Company ("Liberty") has filed a Motion for Summary Judgment. Upon consideration of the evidence presented at oral argument and a review of Liberty's motion and plaintiffs' response, this court concludes Liberty's motion should be **GRANTED** in part and **DENIED** in part.

II. BACKGROUND

Plaintiff Frances McIntosh provided child care services to minor Anthony Luis Baez ("Anthony"). Frances McIntosh was not a licensed day care provider. Frances McIntosh received compensation for the child care services. While under Frances McIntosh's care on August 13, 1999, Anthony drowned in plaintiffs' above-ground swimming pool. Anthony's parents brought suit against plaintiffs for the wrongful death of Anthony on December 29, 2000. Plaintiffs sought indemnity under their homeowner's insurance policy from Liberty. Liberty denied coverage, basing its decision on the "business" exclusion of the policy. Plaintiffs filed suit against Liberty on July 13, 2001 seeking indemnity and defense coverage from Liberty. On June 23, 2003, Liberty filed a Motion for Summary Judgment. On July 31, 2003, plaintiffs filed their response. Oral argument on the motion was held October 15, 2003.

III. STANDARD OF REVIEW

The court will grant summary judgment only if there are no genuine issues of material fact "and the moving party must show he is entitled to judgment as a matter of law."[1] In determining whether there is a genuine issue of material fact, the evidence must be viewed in the light most favorable to the non-moving party.[2] Summary judgment, therefore, is appropriate only if, after viewing the evidence in the light most favorable to the non-moving party, the court finds no genuine issue of material fact.[3]

IV. DISCUSSION

Liberty argues there are no genuine issues of material fact. Liberty points to the exclusion in plaintiffs' homeowner's policy denying coverage for bodily injury "arising out of or in connection with a 'business' engaged in by an 'insured.'"[4] Additionally, plaintiffs' policy includes an endorsement stating "If an 'insured' regularly provides home day care services to a person other than the 'insureds' and

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[1] *Deakyne v. Selective Insurance Co.*, 728 A.2d 569, 570 (Del. Super. 1997) (internal citation omitted).

[2] *Moore v. Sizemore*, 405 A.2d 679 (Del. 1979.

[3] *Guy v. Judicial Nominating Com'n.*, 659 A.2d 777, 780 (Del. Super. 1995); *Figgs v. Bellevue Holding Co.*, 652 A.2d 1084, 1087 (Del. Super. 1994).

[4] 1. Coverage E – Personal Liability and Coverage F – Medical Payments, p. 27 of policy.

receives monetary or other compensation for such services, that enterprise is a 'business'. . .[5]

Plaintiffs counter that summary judgment is inappropriate because genuine issues of material fact are present. Plaintiffs raise the issue of whether the payment received by Frances McIntosh was necessarily "compensation" and, therefore, that she was engaged in a "business." Additionally, plaintiffs argue Donald McIntosh was not engaged in childcare services with Frances McIntosh and, therefore, coverage under the insurance policy should not be denied to him. Plaintiffs point to the language in their policy excluding coverage for claims arising from the "business" of an insured, and note that only where the policy excludes coverage for any insured should coverage for all insureds be denied even if just one insured engaged in a "business."

1. Whether plaintiffs were engaged in a "business" of providing day care services.

The court finds the endorsement to plaintiffs' homeowner's policy controls. The endorsement clearly states that receiving monetary compensation for care of a non-relative in the home is a "business."[6] Plaintiffs' counsel argued that payment received was not for "services" provided but was reimbursement for expenses and,

[5] Endorsement HO 04 96 04 91 to policy.

[6] *Id.*

therefore, was not "compensation." The court rejects this argument. Because the policy is clear, the court need not reach the issue of whether it is necessary for a profit motive to exist before a pursuit can be considered a "business."

The court thus concludes Frances McIntosh was engaged in a business of providing day care services and the endorsement of the McIntosh's homeowner's insurance policy applies. Therefore, Liberty's Motion for Summary Judgment is **GRANTED** to the extent that coverage is denied as to Frances McIntosh.

2. Whether coverage is owed to Donald McIntosh under plaintiffs' homeowner's insurance policy.

Case law from other jurisdictions shows the exact wording in the insurance policy may be critical to whether insurance coverage is denied to a particular insured. The Court of Appeals of Maryland held that only when a policy excludes coverage for incidents arising from the "business" of any insured may the insurance company deny coverage for an insured who is not engaged in the "business."[7] In that case, the court held that when the policy excludes coverage for an insured, the exclusion must be applied separately to each insured.[8] The court has reviewed other cases involving denial of insurance coverage for incidents

[7] *Litz v. State Farm Fire & Cas. Co.*, 695 A.2d 566, 574-75 (Md. 1997).

[8] *Id.,* (determining that husband was owed a defense unless and until it was determined that he was involved in the day care business).

resulting from provision of home day services and finds that the insurance policies in question either included the word any or there was only one insured involved.[9]

The court finds the reasoning in *Litz* persuasive. The court rejects Liberty's counsel's argument that there is no distinction between the use of an and any in the insurance policy of plaintiffs.

After reviewing plaintiffs' policy[10], the court finds that their policy excludes coverage for an insured engaged in a 'business.'[11] Plaintiffs have presented evidence that Donald McIntosh took no part in the care of Anthony. Viewing the evidence in a light most favorable to plaintiffs, the court finds plaintiffs have raised

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[9] *Delaware Ins. Guar. Ass'n. v. Valley Forge Ins. Co.*, 1992 WL 147998 at *2 (Del. Super.) (presence of any denied coverage to wife not engaged in business pursuit as well); *Carroll v. Boyce*, 640 A.2d 298, 299 (N.J. Super. App. Div. 1994) (policy refers to any insured); *McCloskey v. Republic Ins. Co.*, 559 A.2d 385 (Md. App. 1989) (policy refers to any insured); *Haley v. Allstate Ins. Co.*, 529 A.2d 394, 395 (N.H. 1987) (policy refers to an insured, but only one person was home owner and day care provider) (emphasis supplied).

[10] The court notes that some pages of the McIntosh's homeowner's insurance policy in question were omitted from the copy provided to the court. The court finds that the relevant portions of the policy were included and the omissions are not necessary to a discussion of the coverage under the policy for the incident in question.

[11] *Supra* at notes 4 and 5.

a genuine issue of material fact as to whether Donald McIntosh was engaged in the "business" of providing day care services.

The court thus finds a genuine issue of material fact exists as to whether Donald McIntosh is entitled to coverage under plaintiffs' homeowner's insurance policy, precluding summary judgment on this issue.

V. CONCLUSION

For the above reasons, the court finds that Frances McIntosh was engaged in a "business." The court also finds that a genuine issue of material fact exists with respect to whether Donald McIntosh is entitled to insurance coverage under plaintiffs' homeowner's insurance policy. Therefore, Liberty's Motion for Summary Judgment is **GRANTED** to the extent that coverage is denied as to Frances McIntosh and **DENIED** to the extent that an issue of material fact exists as to whether Donald McIntosh is entitled to coverage.

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Calvin L. Scott, Jr.
Superior Court Judge