SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

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Submitted: March 26, 2004
Decided: July 30, 2004

RE: ***Delaware Insurance Guaranty Association v. David R. Birch, et al.***
C.A. No. 02C-05-026-RFS

Dear Counsel:

This is my decision on Plaintiff, Delaware Insurance Guaranty Association's Motion for Summary Judgment. For the following reasons, Plaintiff's Motion is granted.

STATEMENT OF THE CASE

On January 29, 2001, Jane Roe[1] ("Roe") discovered that she was pregnant after being tested at Bayhealth Medical Center ("Bayhealth"). Although Roe directed Bayhealth not to disclose the information to anyone, the results of the test were nevertheless passed on to Roe's primary care physician, Dr. David R. Birch ("Dr. Birch"). One of his assistants, Janice Curtis ("Curtis") informed Roe's mother of the pregnancy when she visited the office for an

appointment. Curtis also left a message on Roe's mother's answering machine. Roe heard part of the message. Roe intended that the results of her pregnancy test be kept confidential and had not authorized the release of the information.

Thereafter, Roe brought suit in September, 2002 against Dr. Birch, Curtis and Bayhealth. She alleged that they were jointly and severally liable for "intentional or reckless breach of the duty of disclosure [sic], and negligence in facilitating such disclosure." Pl.'s Mot. for Summary Judgment Ex. A ¶15. In addition, she alleges Dr. Birch did not have the proper procedures set in place in his office to ensure the confidentiality of patient information and that he was responsible for the breach of confidentiality by his employee, Curtis, under a theory of *respondeat superior*. *Id*. at ¶'s 13, 15. She claims she suffered "emotional distress and embarrassment, and tension and disruption of harmonious family relationships." *Id*. at ¶ 14.

Following Roe's suit, Dr. Birch notified his medical malpractice insurer. Shortly thereafter, the carrier became insolvent, and the Delaware Insurance Guarantee Association[2] ("DIGA") assumed coverage responsibility. In this declaratory judgment action DIGA alleges that the policy does not cover Dr. Birch for the claim alleged in the Roe action and that it is not obligated to defend Dr. Birch or Curtis against Roe's suit. Nationwide Mutual Insurance Company ("Nationwide"), Dr. Birch's general commercial liability insurer, was added as a defendant to the present action in December of 2002.

DIGA has filed a motion for summary judgment claiming that 1) the policy does not cover acts or omissions of non-physician employees; 2) the acts alleged are not "professional services" as defined by the policy; and 3) the resultant injuries are not of a type covered by the policy. DIGA maintains that Nationwide should cover the underlying claims. Nationwide's

primary argument is that coverage is not available under its professional services exclusion. Dr. Birch and Curtis agree with DIGA that Nationwide is the responsible carrier, as a professional service was not involved. Roe's suit, *Roe v. Birch et al.*, C.A. No. 01C-12-006, Stokes, J., has been stayed pending the result in the present action for declaratory judgment.

DISCUSSION

A. Standard of Review

This Court will grant summary judgment only when no material issues of fact exist, and the moving party establishes that it is entitled to judgment as a matter of law. *Cole v. Delaware League for Planned Parenthood, Inc.*, 530 A.2d 1119, 1124 (Del. 1987). The court views the evidence in a light most favorable to the nonmoving party. *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979). If material issues of fact exist or if the Court determines that it does not have sufficient facts to enable it to apply the law to the facts before it, then summary judgment is not appropriate. *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962). The only issue in this case involves the interpretation of medical malpractice and general liability insurance policies. The Court's interpretation of an insurance policy is a matter of law. *Nat'l Union Fire Ins. Co. v. Fisher,* 692 A.2d 892 (Del. 1997); *Universal Underwriters Ins. Co. v. The Travelers Ins. Co.,* 669 A.2d 45, 47 (Del. 1995). Thus, the Court will resolve this legal issue of contract interpretation. *See Jones v. State Farm Mutual Ins. Co.*, 1998 WL 473041, at *1 (Del. Super. Ct.).

B. Disclosure of Confidential Information: Medical Malpractice or Ordinary Negligence

Martin v. Baehler, 1993 WL 258843 (Del. Super. Ct.) addresses the issue of whether the

unauthorized release of confidential information by a doctor qualifies as malpractice or as ordinary negligence. It involved a fact situation similar to the present case. There, the defendant's employee informed plaintiff's relatives that she was pregnant without authority to do so. The judge found that the plaintiff could advance a cause of action for the tort of breach of confidentiality. Furthermore, the court held that the cause of action was not a medical malpractice claim under Chapter 68 of Title 18.

18 *Del. C.* § 6801 defines "medical negligence"[3] to mean "any tort or breach of contract based on health care or professional services rendered, or which should have been rendered, by a health care provider to a patient." Chapter 68 of Title 18, dealing with Health Care Medical Negligence Insurance and Litigation, was meant to streamline the adjudication of medical malpractice claims and to ensure that professional health care insurance is available at a reasonable cost. *DeFilippo v. Beck*, 520 F.Supp. 1009, 1011 (D. Del. 1981). In finding that breach of confidentiality was not malpractice and thus did not give rise to a cause of action under 18 *Del. C.* § 6801, the *Martin* Court followed the reasoning of a New York Court of Appeals case, *Tighe v. Ginsberg*, 540 N.Y.S.2d 99 (N.Y. Ct. App.1989). *Martin,* 1993 WL 258843, at *4.

In *Tighe*, the court stated, "[a]lthough in a general sense a doctor furnishes medical care to patients, clearly not every act of negligence toward a patient constitutes medical malpractice." 540 N.Y.S.2d at 100. The court went on to point out that in fulfilling his duty not to disclose confidential information without a patient's consent, the doctor was not required to utilize "the skills which had he had been taught in examining, diagnosing, treating or caring for the plaintiff as his patient." *Id*. at 101. Also helpful in determining what constitutes malpractice and what does not is *Borrillo v. Beekman Downtown Hospital*, 537 N.Y.S.2d 219, 220 (N.Y. Supr. 1989),

in which the court stated:

> "The distinction between ordinary negligence and malpractice turns on whether the acts or omissions complained of involve a matter of medical science or art requiring special skills not ordinarily possessed by lay persons or whether the conduct complained of can instead be assessed on the basis of the common everyday experience of the trier of facts." Where the matter requires the consideration of the professional skill and knowledge of the practitioner or the medical facility, the more specialized theory of medical malpractice applies.

(citations omitted).

In general, record-keeping and in particular, insuring the privacy of those records and of other client information, is a service provided in many businesses as part of the administration of the business. It is not a task that is peculiar to the medical profession, although the importance of a doctor's duty to maintain patient confidentiality is well-recognized in society. *See Tighe*, 540 N.Y.S.2d at 101. In keeping with the reasoning in *Martin* and with the reasoning in *Tighe*, the Court finds that a breach of patient confidentiality is not medical malpractice, and, thus, it is not a "medical incident" for the purposes of the medical malpractice policy, nor is it a professional health or medical service for the purposes of the general liability policy.

1. The malpractice policy

Under the malpractice policy, the Insuring Agreement ("the Agreement") provides that the insurance company "agrees with the named insured to pay on behalf of the insured all sums which the insured shall be obligated to pay as damages because of (a) bodily injury or property damage to which this insurance applies caused by a medical incident. . . ." Pl.'s Mot. Ex. B at 13. The Agreement goes on to define a "medical incident" as,

> any act or omission:
> (1) in the furnishing of any professional health care service immediately incident to the care of patients including but not limited to, the furnishing of food, beverages, medications or appliances in connection with such services and the

> postmortem handling of human bodies by the insured, any employee of the insured, or any person acting under the personal direction, control or supervision of the insured . . ..

Id.

Since the Court has determined that a doctor's breach of confidentiality is not a tort arising during the provision of a professional service for the purposes of medical malpractice liability, it cannot also consider it an "act or omission . . . in the furnishing" of a professional health care service. An unauthorized disclosure of patient confidential information is not a "medical incident" and the malpractice policy does not provide coverage for any damages arising from this action. Since no coverage exists under the medical malpractice policy for Roe's alleged claims, DIGA is not required to defend Dr. Birch or Curtis against Roe's lawsuit. *See* Pl.'s Mot. for Summary Judgment Ex. B at 4 ("Company shall have the right and duty to defend any claim against the insured for damages payable under this policy . . . .")[4]

2. The General Liability Policy

Nationwide's policy provides the following:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury," "property damage," "personal injury" or "advertising injury" to which this insurance applies. We will have the right and duty to defend any 'suit' seeking those damages.

Def. Nationwide's Answering Brief Ex. A, Businessowners Liability Coverage at 1.

Excluded from coverage in the policy are:

> "Bodily injury," "property damage," "personal injury" or "advertising injury" due to rendering or failure to render any professional service. This includes but is not limited too . . . Medical, surgical, dental, x-ray or nursing services or treatment; Any health service or treatment . . . ."

Id. at 4.

According to the reasoning in *Martin*, a breach of patient confidentiality is not a tort

based on a professional service. Since the Court has interpreted a doctor's breach of confidentiality to not qualify as a medical incident based upon the fact that it does not involve professional medical services, it must be found that the same breach is not excluded from the general liability policy for the same reason. As record keeping is incidental to the running of any business, any liability arising from a doctor's failure to keep his patient information private is not excluded from coverage under this general liability policy's professional service exclusion. Keeping patient information private is not a professional healthcare service.

Not only is this result supported by finding the claim is not one for medical negligence but it is also required by the insurance contact. One treatise reviewed the subject of exclusionary clauses under comprehensive or commercial general liability policies and reported the following:

> Liability policies typically eliminate coverage for injury or damage that results from the rendering or the failure to render a professional service. The phrase *professional services* has been broadly defined as services involving specialized skill of a predominantly mental nature . . . . It is the nature of the services being performed, that controls, so the exclusion can be inapplicable to the acts of a professional who was not acting in his professional capacity . . . . The business aspects of a professional practice, however, do not constitute professional activities . . . . It has been held that in determining whether or not a particular act or failure to act constitutes a professional service, one should look not to the title of the party performing the act, but to the act itself. . . . The fact that a professional services exclusion is typically written to encompass liability arising out of any professional services "including supervisory, inspection or engineering services" does not mean that any supervisory or inspection service is not covered. Reading the exclusion as a whole, supervisory and inspection services are merely examples of professional services.

Allen D. Windt, 2 *Insurance Claims and Disputes*, § 11:16 (4th ed. 2003).

In this regard, the difference between nonprofessional and professional services depends upon whether "trained judgment" was involved. *See Guar. Nat'l. Ins. Co. V. North River Ins. Co.*, 909 F.2d 133, 137 (5th Cir. 1990). The Louisiana Supreme Court considered a general

liability carrier's responsibility in *Tyler v. Touro Infirmary*, 223 So.2d 148 (La. Supr.1969), *overruled on other grounds by Garlington v. Kingsley*, 289 So.2d 88 (La. Supr. 1974). There, a surgeon left a sponge in a patient which required a second operation to remove it. During the initial surgery, a surgical nurse miscounted the sponges. The business carrier argued that the risk was excluded under a professional services clause as the making of sponge counts before and during the surgery was professional in nature.

The Court looked at the policy provisions which did not apply to injury, due to:

The Rendering of or Failure to Render

1) Medical, surgical . . . or nursing service or treatment, ...
2) Any service or treatment conducive to health or of a professional nature.

In ruling against the carrier, the opinion stated:

> In ascertaining whether making a sponge count is a necessary service of a professional nature, it is essential to initially determine whether the exclusion from coverage provisions are applicable to all services performed by doctors, interns, nurses or other hospital personnel even though the act is purely of an administrative nature . . . or whether the exclusion is confined to those services rendered which are strictly of the sort requiring professional skill and judgment . . . the parties intended to exclude from coverage only actions for injuries based on malpractice and professional services rendered by physicians, surgeons, nurses and other professional personnel . . . . The counting of sponges was not the rendition of a nursing service . . . . The simple function of counting the sponges used by the doctor during the operation and also the counting of the number of sponges recovered from the patients body does not convert the mere mechanical counting into a professional service. It cannot be regarded as the rendition of medical or surgical service or treatment; it is not a treatment, and it is neither a service of professional nature . . . .

Further examples of circumstances which did not require special skill and were not excluded by a professional services clause include: *Gulf Ins. Co. v. Gold Cross Ambulance Serv. Co.*, 327 F. Supp. 149, 152 (W.D. Okla. 1971) (ambulance service held not to be a professional

service); *Imperial Cas. & Indem. Co. v. Home Ins. Co. Of Manchester, N.H.,* 727 F. Supp. 917 (M.D. Pa. 1990) (although professional services exclusion would apply to allegations that nurse and guard failed to provide adequate medical treatment, insurer was not relieved of obligation concerning claims of denial of medication and treatment; such actions were not professional in nature).

On the other hand, claims were excluded from coverage in the following cases: *Antles v. Aetna Cas. and Sur. Co.*, 34 Cal. Rptr. 508 (Cal. Dist. Ct. App. 1963) (injury resulted when heat lamp being used in chiropractor's treatment fell on patient); *Alpha Therapeutic Corp. v. St. Paul Fire and Marine Ins. Co.*, 890 F.2d 368 (11th Cir. 1989) (error of medical technician in transcribing test results was a professional services error).[5]

Here, the phrase "professional service" in the Nationwide policy refers to those special skills which are required in providing health care. The policy is designed to exclude only professional services. They are mental in nature; trained judgments are required. The purpose of the business liability policy is to protect the insured against business risks. For a busy doctor's office, one exposure is the possible offhand disclosure of patient information which may occur outside the rendering of care.

Furthermore, as indicated, Dr. Birch did not treat or provide medical services to Roe. The medical test was done separately by Bayhealth. Curtis did not exercise a "trained judgment" concerning any skills related to providing Roe with professional services or treatment. Unlike the medical technician in the *Alpha* case, where the transcription is as important as the test, Curtis' disclosure of the pregnancy was a business or ministerial act rather than a medically related one. Also, as distinct from the circumstances in the *Antles* decision, Curtis' action was

not part of a program of care. What Curtis did was something any unskilled or untrained employee could do.

CONCLUSION

Considering the foregoing, Plaintiff's Motion for Summary Judgment is granted.[6]

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

cc: Prothonotary

ENDNOTES

1. An Order allowing Roe to file her complaint under a fictitious name was entered on August 20, 2002 by this Court.

2. Dr. Birch originally had medical malpractice insurance through PHICO Insurance Company ("PHICO"); however, PHICO was declared insolvent by the Commonwealth Court of Pennsylvania and DIGA assumed all of its rights and obligations. Dr. Birch's policy was written by PHICO and is referred to in Plaintiff's brief as the PHICO policy; however, for the purposes of simplicity the Court will refer to it as "the policy."

3. *Martin* was decided in 1993. In 1998, § 6801 was amended and "Medical negligence" was substituted for "Malpractice." 71 *Del. Laws*, c. 373, § 1 (1998). The wording of the definition was also changed slightly, but the meaning remains the same.

4. Of course, an insurer's duty to defend depends on whether the allegations of the complaint state claims which are covered risks. *See Continental Casualty Co. v. Alexis I. duPont School Dist.*, 317 A.2d 101, 103 (Del. Super. Ct.1974). Here, perhaps from the special circumstances of the case, no claims are alleged for a breach of a standard medical care nor for a medical incident. *See U.S. Fidelity and Guar. Co. v. Armstrong*, 479 So.2d 1164 (Ala. Supr.1985) (insurer was under a duty to defend engineering company and its employee, notwithstanding "professional services" exclusion, since there was no allegation in complaint as to rendering or failure to render professional services). On the other hand, the Roe complaint does claim personal injury caused by an offense arising out of Dr. Birch's business which would be covered under his businessowners policy. If proven at trial, Roe's claim for emotional distress and other damages would be Nationwide's responsibility, unless the professional services exclusion bars coverage.

5. Nationwide quoted the case of *Am. Rehab. and Physical Therapy, Inc. v. Am. Motorist Ins. Co.*, 829 A.2d 1173 (Pa. Super. Ct. 2003). The trial court found that the use of a heating pad during physical therapy and the training of those employing it were professional services excluded under an owner's liability policy. This case is consistent with the idea that services integral to a regimen of care are part of professional services. Where services are rendered in this context, certainly an argument exists that those rendering them must be properly trained. This is not our case, and this decision was reversed on other grounds by the Supreme Court of Pennsylvania reported at 849 A.2d 1202 (Pa. 2004).

6. Other arguments need not be addressed, considering how the opinion is decided.