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**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

National Fire Insurance Company of
Hartford, *et al.*;

Plaintiffs,

v.

Richard Jay Lewis, M.D., *et al.*;

Defendants.

Advanced Cardiac Specialists,
Chartered, *et al.*,

Third-Party Plaintiffs,

v.

Medical Protective Company, *et al.*,

Third-Party Defendants.

Medical Protective Company, *et al.*,

Third-Party Counterclaimants,

v.

Advanced Cardiac Specialists,
Chartered, *et al.*,

Third-Party Counterdefendants.

No. CV-11-01220-PHX-GMS

ORDER

1 Several motions relating to insurance coverage are pending before the Court. This
2 order attempts to dispose of all such motions. The motions resolved by this order are
3 more specifically identified below.¹

4 **FACTUAL BACKGROUND**

5 The parties to this case are engaged in an insurance coverage dispute brought in
6 this Court by various insurers.

7 Some of the Defendants to this action² (the “Underlying Plaintiffs”) have filed
8 eight separate complaints in Arizona Superior Court against other Defendants.³ The
9 Defendants in the underlying actions include Richard Jay Lewis, M.D., his spouse Lisa
10 Hara Levin-Lewis, Advanced Cardiac Specialists, Chartered (“ACS”) which employed
11 Dr. Lewis as a cardiologist, Robert M. Siegel, M.D.,⁴ who was the President, sole
12 director, and sole shareholder of ACS, and Dr. Barbara Barker-Siegel, his spouse.

13 The Underlying Plaintiffs allege, with some variation, that during the course of
14 their treatment Dr. Lewis inappropriately viewed and sexually assaulted them. (Doc. 79
15 ¶¶ 15-23; Doc. 111 ¶¶ 15-23.) Underlying Plaintiffs Pummill, Larsen, Landsverk, and
16 Saylor also allege that Dr. Lewis recommended and performed unnecessary pacemaker

16 ¹ The Parties’ requests for oral argument are denied because the parties have had an
17 adequate opportunity to discuss the law and evidence and oral argument will not aid the
18 Court’s decision. *See Lake at Las Vegas Investors Group v. Pac. Malibu Dev.*, 933 F.2d
19 724, 729 (9th Cir. 1991).

19 ² Dena and Shawn Larsen, Franklin and Jennifer Saylor, Collin and Laurie Shook, Julie
20 and Stewart Landsverk, Kellye Pummill, Daniel and Elizabeth Piper, Lauri A. Tupper,
21 and Brooke E. Staley.

20 ³ Prior to the filing of this Order, the Court received notice from the Parties that all claims
21 had been settled between National Fire, Transportation, Medical Protective, Lexington,
22 the Shooks, Tupper, and Staley. (Doc. 256.) This Order will have no effect on them, as
23 the Parties have informed the Court that a joint motion and stipulation for dismissal is
24 forthcoming. (Doc. 256; Doc. 268.) The case, however, remains live as to the other five
25 Underlying Plaintiffs.

24 ⁴ Dr. Robert Siegel died in a plane crash on May 10, 2012. (Doc. 158.) On September 18,
25 2012, the Court granted the motions to substitute Barbara Barker-Siegel, his personal
representative, in the place of Dr. Robert Siegel. (Doc. 264.)

1 surgeries on them. (Doc. 79, Ex. 1 at 10 (Pummill Compl. ¶ 28), 110 (Landsverk Compl.
2 ¶ 17); Doc. 111, Ex. 12 (Saylor Amend. Compl. ¶¶ 16, 24); Doc. 165, Ex. 1 ¶ 30.)

3 All Underlying Plaintiffs bring claims arising from the alleged inappropriate
4 actions of Dr. Lewis, including: (1) Assault and Battery; (2) Negligence—Medical
5 Malpractice; (3) Intentional or Negligent Infliction of Emotional Distress and Invasion of
6 Privacy. (Doc. 79 ¶¶ 24-35; Doc. 111 ¶¶ 24-35, Ex. 12.) The Complaints allege not only
7 that Dr. Lewis and his wife are liable for these three counts, but that ACS, Dr. Siegel, and
8 Dr. Barker-Siegel (collectively, “the ACS Defendants”) are vicariously liable under
9 Arizona law for Dr. Lewis’s actions. (Doc. 79 ¶¶ 25-27, 29, 30-35; Doc. 111 ¶¶ 25-27,
10 29, 30-35, Ex. 12.) The Complaints also state causes of action directly against the ACS
11 Defendants for the negligent hiring, retention, and supervision of Dr. Lewis. (*Id.*)⁵
12 Finally, Pummill, Larsen, Landsverk, and Saylor allege separate claims for medical
13 negligence against Dr. Lewis and the ACS Defendants for performing unnecessary
14 pacemaker surgery on them, as well as derivative negligence claims against the ACS
15 Defendants.

16 On January 6, 2010, Dr. Lewis was indicted on 46 counts of sexual abuse, 14
17 counts of assault, and one count of sexual assault in Arizona state court. (Doc. 139,
18 Lexington SOF ¶ 14; Doc. 183 ¶ 14; Doc. 212 ¶ 14.) Seven of the eight Underlying
19 Plaintiffs were among the listed victims. (Doc. 139, Lexington SOF ¶ 15; Doc. 183 ¶ 15;
20 Doc. 212 ¶ 15.) Dr. Lewis subsequently pled guilty on May 10, 2012, to 18 counts of

21 ⁵ Minor variations exist among the complaints. The Larsens seek to hold only Dr. Lewis
22 liable for intentional infliction of emotional distress, and negligence, Dr. Lewis and ACS
23 liable for assault and battery, and Dr. Siegel liable under A.R.S. § 10-2234 for failure to
24 supervise. (Doc. 79, Ex. 1, Larsen Compl.) In addition, Piper does not seek to hold Dr.
25 Barker-Siegel vicariously or directly liable for any of the claims. (Doc. 79, Ex. 1, Piper
Compl.) For the sake of clarity in the Order, the Court will not constantly make this
distinction between the other six complaints and the two described here, but these
distinctions matter for coverage purposes as will be occasionally referenced throughout
this order.

1 aggravated assault, a class 6 felony, involving the same seven Underlying Plaintiffs.⁶
2 (Doc. 169, Ex.1 at 7-11; Doc. 165, Ex. A at 19-54; Doc. 139, Ex. 1 at 2-15.)

3 Plaintiffs National Fire Insurance Company of Hartford and Transportation
4 Insurance Company (the “General Liability Insurers”) issued separate but essentially
5 identical Businessowner Liability Insurance Policies (“the businessowner policies”) to
6 ACS that collectively cover the period from May 1, 2007, to May 1, 2010. (Doc. 79 ¶¶
7 36-37; Doc. 111, ¶¶ 36-37.) The businessowner policies provide coverage for “bodily
8 injury” caused by a non-excepted “occurrence” during the policy time period. (Doc. 79 ¶
9 38; Doc. 111 ¶ 38.) The General Liability Insurers have undertaken a defense of the ACS
10 Defendants against the underlying complaints under a complete reservation of rights.
(Doc. 79 ¶ 50-51; Doc. 111 ¶ 50-51.)

11 Plaintiff Medical Protective Company issued consecutive claims-made
12 professional liability policies to the ACS Defendants and Dr. Lewis for the period of May
13 1, 2008, through May 1, 2010. (Doc. 137, Medical Protective SOF ¶ 17, 19; Doc. 183 ¶
14 17, 19.) The 2009-10 policy included an Extended Reporting Period Endorsement as to
15 Dr. Lewis with a retroactive date of February 23, 2006. (Doc. 137, Medical Protective
16 SOF ¶ 20; Doc. 183 ¶ 20.) Pursuant to its terms, the 2009-10 policy was cancelled with
17 regard to the ACS Defendants as of March 1, 2010. (Doc. 137, Medical Protective SOF ¶
18 21; Doc. 183 ¶ 21.) The Medical Protective policies contain two distinct insurance
19 agreements: the “physicians” policy and the “corporate” policy. (Doc. 59, Ex. B at 5.)
20 ACS, Dr. Lewis, Dr. Siegel, and Dr. Barker-Siegel are all named insureds under the
21 physicians agreement. (*Id.* at 10-11.) ACS and its agents are insureds under the corporate
22 agreement. (*Id.* at 6-7.)

23 ⁶ Underlying Plaintiff Staley was not among the victims listed on the indictment or in the
24 plea agreement. She has, however, reached a settlement with the insurers. (Dco. 256;
25 Doc. 268.)

1 Plaintiff Lexington Insurance Company (“Lexington”) issued consecutive claims-
2 made Medical Group Professional Liability and Administrative Proceedings Insurance
3 Policies (the “Lexington policies”) to the ACS Defendants that covered “sums that an
4 Insured becomes legally obligated to pay others as damages resulting from a medical
5 incident arising out of professional services.” (Doc. 139, Lexington SOF ¶¶ 17-20, 24;
6 Doc. 183 ¶¶ 17-20, 24; Doc. 212 ¶¶ 17-20, 24.) The Lexington policies picked up where
7 the Medical Protective policies left off and covered the period from March 1, 2010,
8 thorough March 1, 2012. (Doc. 139, Lexington SOF ¶¶ 17-19; Doc. 183 ¶¶ 17-19, Doc.
9 212 ¶¶ 17-19.)

10 The insurers instituted the present declaratory judgment action on June 21, 2011,
11 seeking a declaration that the businessowner policies, the Medical Protective policies,
12 and the Lexington polices do not provide coverage for the allegations contained in the
13 underlying complaints against the Lewis and ACS Defendants, and that the insurers
14 therefore have no duty to defend the Lewis and ACS Defendants in the underlying
15 actions. First, National Fire and Transportation filed a Motion for Summary of Judgment
16 or, in the Alternative, Partial Summary Judgment. (Doc. 78.) Many of the Defendants
17 opposed the motion and filed Motions for Partial Summary Judgment of their own with
18 regard to the businessowner policy coverage: the Larsens (Doc. 108); the Saylor (Doc.
19 109); the Shooks (Doc. 113); the Landsverks (Doc. 115); Pummill (Doc. 117); the Pipers
20 (Doc. 119); Tupper (Doc. 121); Staley (Doc. 123); and the ACS Defendants (Doc. 125).

21 Second, Medical Protective filed a Motion for Partial Summary Judgment. (Doc.
22 136.) The relevant Underlying Plaintiffs opposed. In addition, Underlying Plaintiffs
23 Larsen (Doc. 167) and Saylor (Doc. 184) filed cross-motions for summary judgment.

24 Third, Lexington filed a Motion for Partial Summary Judgment. (Doc. 138.) Once
25 again, many of the Defendants opposed. The Saylor filed a separate Motion for Partial
Summary Judgment against Lexington. (Doc. 188.) Pummill (Doc. 245) and the
Landsverks (Doc. 266) have joined the Saylor’s Motion.

1 resolve on cross-motions for summary judgment. *See Keggi v. Northbrook Prop & Cas.*
2 *Ins. Co.*, 199 Ariz. 43, 46, 13 P.3d 785, 788 (Ct. App. 2000); *Blue Ridge Ins. Co. v.*
3 *Stanewich*, 142 F.3d 1145, 1147 (9th Cir. 1998). Arizona law directs courts to construe
4 an insurance contract “according to [its] plain and ordinary meaning.” *Keggi*, 199 Ariz. at
5 46; *see Aztar Corp. v. U.S. Fire Ins. Co.*, 223 Ariz. 463, 469, 224 P.3d 960, 966 (Ct. App.
6 2010). “If a clause may be susceptible to different constructions . . . [the Court] will first
7 attempt to discern the meaning of the clause by examining the purpose of the exclusion in
8 question, the public policy considerations involved and the transaction as a whole.”
9 *Keggi*, 199 Ariz. at 46 (internal quotations omitted). “Generally, the insured bears the
10 burden to establish coverage under an insuring clause, and the insurer bears the burden to
11 establish the applicability of any exclusion.” *Id.* Only when an insurance contract is
12 actually ambiguous will a court employ other canons of construction, such as construing
13 the ambiguity against the insurer, *see Thomas v. Liberty Mutual Insurance Co.*, 173 Ariz.
14 322, 325, 842 P.2d 1335, 1338 (Ct. App. 1992), or favoring the protection of the interests
15 of injured victims, *see American Family Mutual Insurance Co. v. White*, 204 Ariz. 500,
505, 65 P.3d 449, 454 (Ct. App. 2003).

16 **A. Undisputed Claims**

17 **1. Coverage for the Pummill, Landsverk, Larsen, and Saylor
18 Claims of Unnecessary Pacemaker Surgery**

19 Underlying Plaintiffs Pummill, Landsverk, Larsen, and Saylor have asserted a
20 claim of medical negligence against Dr. Lewis and the ACS Defendants that is separate
21 from the allegations of inappropriate sexual contact. These Underlying Plaintiffs do not
22 dispute that this claim is *excluded* from coverage under the businessowner policies.
23 Likewise, Medical Protective agrees that its physicians policy provides coverage for
24 direct claims against Dr. Lewis arising out of this specific instance of medical negligence.
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1 Medical Protective has also agreed that, with respect to the pacemaker claims, there is
2 coverage for all ACS Defendants under the corporate policy. (Doc. 227 at 2-3.)⁷

3 Lexington also agrees that its policy covers the separate instance of medical
4 negligence. With regard to the Pummill Complaint, Lexington does argue that the
5 unnecessary pacemaker surgery claim is not separate from the claims of sexual
6 misconduct, but those arguments are unavailing. Nothing in the relevant paragraph of the
7 Pummill Complaint references sexual misconduct. (Doc. 79, Ex. 1 at 7 (Pummill Compl.
8 ¶ 17).)

9 Accordingly, Medical Protective is under a duty to defend and indemnify Dr.
10 Lewis against these separate claims of medical negligence, and both Medical Protective
11 and Lexington are under a duty to defend and indemnify the ACS Defendants against
12 these same medical negligence claims.

12 **2. Number of Incidents under Lexington and Medical Protective 13 Policies**

13 Medical Protective and Lexington move for summary judgment that the alleged
14 multiple instances of sexual misconduct perpetrated on each of the potential victims
15 constitutes one incident per victim for coverage purposes under their policies. With
16 regard to the claims arising out of Dr. Lewis's alleged sexual misconduct, no Party
17 opposes the motion. Consequently, to the extent coverage is available under the Medical
18 Protective and Lexington policies, the collective molestations constitute one incident per
19 victim for coverage purposes.
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22 ⁷ As will be discussed further below, there remains a genuine issue of material fact
23 whether Dr. Barker-Siegel is an insured under the Medical Protective policy with regard
24 to the sexual assault claims. Medical Protective, however, while objecting to coverage for
25 Dr. Barker-Siegel under the corporate agreement for the molestation claims, did not
object to coverage for Dr. Barker-Siegel under the corporate agreement for the other
claim of medical negligence.

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3. Coverage for Punitive Damages under Lexington and Medical Protective Policies

Lexington and Medical Protective also move for summary judgment that both the Lexington and Medical Protective policies preclude coverage for punitive damages. No Party opposes this motion, and the Court will grant summary judgment for Lexington and Medical Protective on the issue of punitive damages.

4. Coverage for the Landsverk, Pummill, and Saylor Molestation Claims under the Medical Protective Policies

Medical Protective has moved for summary judgment that the Landsverk, Pummill, and Saylor molestation claims were made outside of the policy period and are therefore not covered. None of these Underlying Plaintiffs opposes this motion. Consequently, Medical Protective is under no duty to defend and indemnify the ACS Defendants or Dr. Lewis for the molestation claims made by Underlying Plaintiffs Landsverk, Pummill, and Saylor.

5. Coverage for the Larsen and Piper Molestation Claims Under The Lexington Policies

Lexington also moves for summary judgment that the Larsen and Piper claims were made outside of its policy period and are therefore not covered. Neither Larsen nor Piper opposes this motion. Consequently, Lexington is under no duty to defend and indemnify the ACS Defendants or Dr. Lewis for claims made by Underlying Plaintiffs Larsen and Piper.

B. Claims for Assault And Battery, Medical Negligence, Intentional or Negligent Infliction of Emotional Distress, and Invasion of Privacy Arising out of Dr. Lewis’s Alleged Sexual Misconduct

The Underlying Plaintiffs assert that the ACS Defendants are vicariously liable—and Dr. Lewis directly liable—for assault and battery, medical malpractice, intentional or negligent infliction of emotional distress, and invasion of privacy arising out Dr. Lewis’s alleged sexual misconduct.

The General Liability Insurers claim that the businessowner policies do not cover any potential liability of their insureds for Dr. Lewis’s actions. They assert that Dr.

1 Lewis's actions did not constitute an "occurrence" under the policies, or that, even if they
2 did, the actions fall squarely within the professional services exception set forth in the
3 policy.

4 Medical Protective contends that none of its professional liability policies provide
5 coverage for Dr. Lewis or the ACS Defendants, either because the conduct at issue falls
6 outside the scope of coverage set forth by the policies or falls within one of the coverage
7 exceptions.

8 Likewise, Lexington asserts that the Lexington professional liability policies do
9 not provide coverage for the ACS Defendants because Dr. Lewis's actions did not
10 constitute a "medical incident arising out of professional services," or that, even if they
11 did, the actions fall within other policy exceptions.

11 **1. Businessowner Policies**

12 **a. "Occurrence" under the Businessowner Policies**

13 The businessowner policies are general liability policies that provide coverage for
14 "bodily injury" . . . caused by an 'occurrence' . . . during the policy period." (Doc. 79,
15 Affidavit Exs. 2 & 3, at NFI00129, NFI00269, TI00103.) The insured under the
16 businessowner policies is ACS. By their terms, the policies also cover Dr. Siegel because
17 he is alleged to be an "executive officer" or "director" of ACS. (*Id.* at NFI00137,
18 NFI00267, TI00111.) In addition, because these claims are for vicarious liability only,
19 Dr. Barker-Siegel is covered as an "employee" of ACS. (*Id.* at NFI00138, NFI00268,
20 TI00112.) Dr. Lewis is not an insured under either policy. None of the parties dispute that
21 the "bodily injury" component of the coverage has been satisfied. Instead, the question is
22 whether Dr. Lewis's actions constitute an "occurrence" under the policies. The policies
23 define "occurrence" as "an accident, including continuous or repeated exposure to
24 substantially the same general harmful conditions." (*Id.* at NFI00142, NFI00282,
25 TI00116.)

1 accident. The General Liability Insurers place great weight on *Continental Insurance Co.*
2 *v. McDaniel*, 160 Ariz. 183, 187, 772 P.2d 6, 10 (Ct. App. 1988), which held that an
3 insurer was not obligated to defend an insured who intentionally engaged in sexual
4 harassment of an employee. The *McDaniel* court determined that general liability
5 coverage for “occurrences” did not encompass intentional wrongdoing by one of the
6 insured. *Id. McDaniel*, however, involved a question of direct liability, and not the
7 question of vicarious liability presented here. Consequently, there has been an
8 “occurrence” under the terms of the businessowner policies.

9 **b. The Professional Services Exclusion**

10 The businessowner policies contain a professional services exclusion. It states:
11 “This insurance does not apply to: . . . ‘Bodily injury’ . . . caused by the rendering or
12 failure to render any professional service.” (Doc. 79, Affidavit Exs. 2 & 3, at NFI00131,
13 NFI00134, NFI00271, NFI00274, TI00105, TI00108.) While the policies do not provide
14 a general definition for professional services, they state that the exclusion “includes but is
15 not limited to . . . Medical [or] surgical . . . services treatment, advice or instruction; [and]
16 any health or therapeutic service treatment, advice or instruction.” (*Id.* at NFI00134,
17 NFI00274, TI00108.)

18 The primary question is whether Dr. Lewis’s actions—which caused the
19 Underlying Plaintiffs’ bodily injuries—amount to the “rendering or fail[ing] to render
20 any professional service.” (*Id.* at NFI00131, NFI00134, NFI00271, NFI00274, TI00105,
21 TI00108.) In general, professional services “refer[] t-----o those services rendered
22 by a person engaging in a recognized discipline that necessarily requires advanced
23 training and specialized knowledge to perform.” *W. Corr. Group, Inc. v. Tierney*, 208
24 Ariz. 583, 588, 96 P.3d 1070, 1075 (Ct. App. 2004). But “in determining whether a
25 service is a professional one, we look at the nature of the involved acts rather than the
title afforded the actor.” *Id.*; *St. Paul Fire & Marine Ins. Co. v. Asbury*, 149 Ariz. 565,
566, 720 P.2d 540, 541 (Ct. App. 1986).

1 Dr. Lewis was ostensibly deploying his “advanced training and specialized
2 knowledge” when he performed the examinations and gave the consultations surrounding
3 the alleged sexual abuse. Medical examinations and consultations certainly qualify as
4 professional services. But, with the exception of the allegations of unwarranted
5 pacemaker surgery, the Underlying Plaintiffs do not allege that Dr. Lewis’s medical
6 treatment caused their injuries. Instead, the underlying complaints detail various forms of
7 molestation that occurred *during* the examinations and treatment. Whether the acts of
8 molestation fall within the professional services exclusion thus depends on whether those
9 acts can be viewed separately under Arizona insurance law from the medical services
10 provided by Dr. Lewis.

11 In *Asbury*, a doctor “manipulated [patients’] clitorises while performing routine
12 gynecological examinations.” 149 Ariz. at 567. The issue was “whether the language
13 ‘providing or withholding of professional services’ (with no applicable policy exclusions)
14 provide[d] coverage for injuries and damages that result from unprofessional acts of a
15 physician.” *Id.* at 566.⁹ The *Asbury* court explicitly rejected the distinction adopted by
16 many courts between the doctor’s professional services (gynecological exam) and
17 unprofessional actions (manipulation of the patients’ clitorises) and held that all of the
18 doctor’s actions fell under the umbrella of “professional services” within the meaning of
19 the policy. *Id.* at 566-67. The court reasoned that the policy provided coverage because
20 the “tortious sexual abuse of the patient [was] intertwined with and inseparable from the
21 [professional] services provided.” *Id.* at 567. In other words, the injuries were “made
22 possible only because there were professional services rendered during this time and
23 others which should have been rendered but were not.” *Id.* A sufficient connection
24 existed between the professional services offered by the doctor and the underlying

25 ⁹ The issue in *Asbury* was whether the doctor’s actions were covered by his professional liability insurance—not whether a professional services exclusion applied. That distinction for present purposes—whether unprofessional acts of sexual abuse can be separated from the provision of professional services—does not make a difference.

1 misconduct because the underlying plaintiffs alleged that the doctor “manipulated their
2 clitorises while performing routine gynecological examinations.” *Id.*

3 This is not to say a doctor is engaged in professional services within the meaning
4 of Arizona insurance law any time he molests a patient in the course of medical
5 treatment. On the contrary, *Asbury* characterized decisions of other courts that did not
6 extend the definition of professional services to cover molestation that occurred during
7 medical treatment as resulting from those courts’ determination that the molestations
8 were insufficiently “intertwined with and inseparable from the [medical] services
9 provided.” It noted that “[o]ne example of noncovered sexual abuse not related to
10 treatment is the case . . . where a physician’s sexual molestation occurred with a patient
11 who was being treated for hand injuries suffered in a wrestling match.” *Asbury*, 149 Ariz.
12 at 567 (citing *Hirst v. St. Paul Fire & Marine Ins. Co.*, 106 Idaho 792, 683 P.2d 440
13 (1984)). According to *Asbury*, no professional service coverage resulted in that instance
14 because presumably the treatment of hand injuries was not sufficiently “intertwined with
15 and inseparable from” the oral sex and masturbation which the doctor performed on a
16 drugged patient against his will during the course of an office visit. *See Hirst*, 106 Idaho
17 at 794, 796.

18 The *Asbury* court did nothing more to clarify just how a court is to determine the
19 dividing line between molestations that are sufficiently “intertwined with and inseparable
20 from” professional services to give rise to coverage, and those that are not. Nevertheless,
21 by distinguishing *Hirst* the court clearly held that sexual assault during medical treatment
22 is not in itself sufficient to qualify as a professional service. Some connection between
23 the type of treatment and the type of molestation is required.

24 In arguing that the professional services exemption placed in the businessowners
25 policy does not exclude coverage to the extent that the ACS Defendants are vicariously
liable for Dr. Lewis’s acts, the Underlying Plaintiffs argue that Dr. Lewis could not have
been providing professional services when he molested the Underlying Plaintiffs because

1 molestation is not a professional service. This is the exact same distinction between
2 professional and unprofessional services rejected in *Asbury*. *Asbury* invites a different
3 line of inquiry: if there is a close nexus between the alleged unprofessional sexual
4 conduct of Dr. Lewis and his proffered professional treatment, Dr. Lewis's actions would
5 qualify as professional services within the meaning of the exception. Each of the
6 underlying claims assert that Dr. Lewis engaged in some variety of the following
7 unprofessional conduct: "exposing Plaintiff's breasts for his personal viewing, fondling,
8 and cupping plaintiff's breasts", "making inappropriate comments about [Plaintiff's]
9 breasts", "having Plaintiff remove all of her clothes including her panties", "staring at
10 [Plaintiff's] vagina, and pulling her legs apart", "manipulating his fingers under her
11 panties and inserting his finger inside the lips of her vagina, feeling and touching all
12 around the area around her vagina", "catheterizing [Plaintiff] without gloves",
13 "conducting examinations with an erection", and "conducting examinations without a
14 chaperone". (Doc. 79 ¶¶ 16-23; Doc. 111 ¶¶ 16-23.) Other complaint-specific accusations
15 include "grabbing [Plaintiff's] right buttock"; and "asking [Plaintiff's] private
16 information about her relationship with her spouse, ramming . . . fingers down
17 [Plaintiff's] throat, squeezing [Plaintiff's] throat, and pulling [Plaintiff's] hair in a very
18 sexual manner". (Doc. 79 ¶¶ 21, 23; Doc. 111 ¶¶ 21, 23.) The Underlying Plaintiffs allege
19 that they "assumed and trusted that [Dr. Lewis] was doing [these things] for legitimate
20 medical reasons." (Doc. 79 ¶¶ 16-23; Doc. 111 ¶¶ 16-23.)

21 It would hardly be unexpected for a cardiologist to examine the chest area of a
22 patient. Thus the similarity between a cardiologist inappropriately fondling, examining,
23 or otherwise commenting on the breasts of a patient, and a gynecologist inappropriately
24 manipulating the clitoris of a patient, appears to be rather direct. In both situations, the
25 doctor would have had an apparently legitimate reason to conduct an examination of the
area of the body which he or she allegedly abused. In other words, the alleged
inappropriate sexual touching of the breasts was "intertwined with and inseparable from"

1 the provision of professional services. *Asbury* controls as to these allegations. They
2 constitute professional services and are thus excluded under the exemption to policy
3 coverage.¹⁰

4 Nevertheless, the Underlying Plaintiffs also allege that Dr. Lewis inappropriately
5 touched and viewed other areas of their bodies including their hair, throat, vagina, and
6 buttocks, and that he conducted examinations with an erection. It is true that a
7 cardiologist is concerned with the internal health of the body, which may manifest itself
8 in various internal and external indicators not obvious to the Court. Nevertheless, the
9 connection between cardiology and, for instance, vaginal manipulation is not nearly as
10 direct as the allegations of fondling of the breast. On their face such allegations resemble
11 something closer to *Hirst* than *Asbury*. And nothing provided by the Parties in the record
12 demonstrates whether Dr. Lewis’s examinations of the vaginal area and his patients’ hair
13 or throat were related to his professional work as a cardiologist. By contrasting the
14 gynecologist who inappropriately manipulates the vagina with the doctor treating the
15 hand who sexually assaulted his patient, *Asbury* makes clear that the relation between the
16 sexual assault and the type of medical service offered matters when determining whether
17 an act constitutes a professional service—for purposes of coverage or exclusion. Because
18 the record is not yet clear on whether Dr. Lewis could have been legitimately acting
19 within the purview of a cardiologist when he sought to view, viewed, touched or
20 manipulated the vaginas, buttocks, throat, and hair of the Underlying Plaintiffs, summary
21 judgment as to all of the underlying plaintiffs’ claims is not appropriate. There remains a
22 genuine issue of material fact to be decided.

22 ¹⁰ Saylor alleges that Dr. Lewis engaged in “sexually offensive conduct [that] occur[ed]
23 after medical procedures had been completed.” (Doc. 111, Ex. 12 at 54.) She has attached
24 declarations that Dr. Lewis entered her room after the operation was over and grouped
25 her. (*Id.* at 34-40.) For the reasons discussed, there appears to be a legitimate justification
for a cardiologist to inspect the chest area after installation of a pacemaker.
Consequently, this alleged incident remains intertwined with Dr. Lewis’s treatment.

1 The professional liability insurers in this case criticize *Asbury* and cite cases from
2 other jurisdictions that likewise disapprove. Most persuasively, however, the insurers cite
3 a subsequent Arizona Court of Appeals opinion, *Wilshire Insurance Co. v. S.A.* 224 Ariz.
4 97, 102, 227 P.3d 504, 509 (Ct. App. 2010). In *Wilshire*, a discerning panel of the Court
5 of Appeals noted that, in arriving at its decision, the *Asbury* Court did not consider a
6 policy set forth previously by the Arizona Supreme Court in *Transamerica Insurance*
7 *Group v. Meere*, 143 Ariz. 351, 356, 694 P.2d 181, 186 (1984). In *Meere*, the Supreme
8 Court recognized a public policy that forbids indemnifying a person against loss resulting
9 from his own willful wrongdoing. The *Wilshire* court identified another case, decided
10 after *Asbury*, *Phoenix Control Systems, Inc. v. Insurance Co. of North America*, 165 Ariz.
11 31, 35, 796 P.2d 463, 467 (1990), in which the Supreme Court again relied on the same
12 public policy in interpreting an intentional acts exclusion. Thus, to the extent that the
13 *Wilshire* court criticized *Asbury*, it did so based on its failure to consider *Meere* and the
14 public policy against allowing an insured to be indemnified for a loss resulting from his
15 own intentional wrongdoing. It did not criticize *Asbury* for its sometimes awkward test
16 that distinguishes between professional and non-professional services when assaults
17 occur in the context of medical treatment.

18 “‘When interpreting state law, federal courts are bound by decisions of the state’s
19 highest court.’ . . . In the absence of such a decision, a federal court must predict how the
20 highest state court would decide the issue using intermediate appellate court decisions,
21 decisions from other jurisdictions, statutes, treatises, and restatements as guidance.”
22 *Trishan Air, Inc. v. Fed. Ins. Co.*, 635 F.3d 422, 427 (9th Cir. 2011). Decisions of
23 Arizona’s Court of Appeals are “‘dat[a] for ascertaining state law which are not to be
24 disregarded by a federal court *unless it is convinced by other persuasive data that the*
25 *highest court of the state would decide otherwise.*” *Martinez v. Asarco*, 918 F.2d 1467,
1471 n.4 (9th Cir. 1990) (quoting *Commissioner v. Bosch*, 387 U.S. 456, 465 (1967)
(emphasis in original)). *Meere*, *Phoenix Control*, *McDaniel*, and *Wilshire* are sufficient

1 persuasive data upon which this Court determines that, even in light of *Asbury*, the
2 Arizona Supreme Court would hold void as against public policy any insurance policy
3 provision that would extend coverage to Dr. Lewis, as an insured, for his own intentional
4 wrongdoing that he knew would result in harm to his patients.

5 Nevertheless, to the extent that *Asbury* sets forth a coverage test for sexual assaults
6 inflicted by a physician in the course of medical treatment *as it relates to third parties*
7 *who did not intend such conduct*, the insurers do not present sufficient data upon which
8 this Court can determine that the Arizona Supreme Court would reject *Asbury*. The
9 parties have set forth a few cases from other jurisdictions which have been critical of the
10 admittedly strange relationship between type of professional services and the type of
11 molestation that emerged from *Asbury*. But the mere existence of criticism from other
12 jurisdictions regarding the *Asbury* standard, no matter how valid, does not mean that this
13 Court can ignore long-standing Arizona law. *Asbury* has been the existing law in this
14 state for twenty-six years without its core holding undermined by challenge or criticism
15 from another Arizona court. As *Martinez* indicates, there is benefit in such circumstances
16 of respecting the rule of *stare decisis* until the Arizona Supreme Court decides otherwise.

17 Thus, in the context of the businessowner policies it is sufficient to point out that
18 while *Meere* and *Phoenix Control* do set forth a limited public policy that that forbids
19 indemnifying a person against loss resulting from his own willful wrongdoing, it applies
20 only to potential coverage for an *insured* who acts intentionally. There are no allegations
21 that the ACS Defendants—the insured under the businessowner policies—acted
22 “wrongfully or with a purpose to inflict injury.” *Asbury* consequently controls as to
23 coverage for claims that the ACS Defendants are vicariously liable for Dr. Lewis
24 inappropriately viewing and fondling Underlying Plaintiffs’ breasts. Such actions do
25 amount to professional services by Dr. Lewis and are therefore excluded from the
policies’ coverage. However, questions of fact remain as to whether the other allegations
pertaining to Dr. Lewis’s sexual assaults constitute excluded professional services.

1 The General Liability Insurers are therefore under no duty to indemnify the ACS
2 Defendants for claims that Dr. Lewis fondled, cupped, or otherwise engaged in
3 inappropriate touching of the breast. As to the remaining claims of inappropriate conduct,
4 there remains a genuine issue of material fact and summary judgment is not appropriate.

5 **2. Medical Protective Policies**

6 **a. The Physicians Policy**

7 The physicians policy covers Dr. Lewis and the ACS Defendants and insures them
8 against “all loss arising from a health care occurrence.” (Doc. 137 ¶ 22; Doc. 165 ¶ 22.)
9 That policy defines “health care occurrence” as “any act in the furnishing of professional
10 services which results in injury.” (Doc. 137 ¶ 23; Doc. 165 ¶ 23.) “Professional services’
11 means treatment or peer review.” (Doc. 137 ¶ 24; Doc. 165 ¶ 24.) “Treatment’ means
12 health care services rendered to a patient[, including] medical [or] surgical . . . services.”
13 (Doc. 137 ¶ 25; Doc. 165 ¶ 25.) To the extent that the policy coverage is geared to
14 “professional services,” the standards set forth in *Asbury* apply. Nevertheless, as
15 explained in greater detail above, to the extent that the physicians policy extends
16 coverage to Dr. Lewis for his intentional acts that he knew would harm others, such
17 policy provisions are void as prohibited by public policy under Arizona law. *See Meere*,
18 143 Ariz. at 356; *Phoenix Control Systems*, 165 Ariz. at 35. There is no coverage for Dr.
19 Lewis under the physicians policy for allegations of sexual assault.

20 Further, while some vicarious liability claims against the ACS Defendants fall
21 within the physicians policy, it also contains a number of exclusions. One of these is
22 Exclusion D, which bars coverage for “any vicarious liability for the acts of a physician.”
23 (Doc. 137 ¶ 42; Doc. 165 ¶ 42.) Dr. Lewis is a physician. Nothing in Exclusion D limits
24 the acts of a physician to the provision of professional services (thus implicating the
25 *Asbury* distinctions). This exclusion therefore applies to bar all claims that the ACS
Defendants are vicariously liable for actions committed by Dr. Lewis while he was
treating his patients. Because Exclusion D clearly prohibits vicarious liability for all acts

1 of a physician, factual issues surrounding Dr. Lewis’s touching of the vaginal area are not
2 material to coverage under the physicians policy, as opposed to the businessowner
3 policies. Consequently, Medical Protective is under no duty to defend or indemnify Dr.
4 Lewis or the ACS Defendants under the physicians policy.

5 **b. The Corporate Policy**

6 The corporate policy covers ACS and its agents. (Doc. 59, Ex. B at 6.) The policy
7 defines an agent as “a person who was acting within the scope of his or her duties as . . .
8 an administrator.” (*Id.* at 7.) The parties do not dispute that Dr. Siegel is an agent under
9 the corporate agreement because the Underlying Plaintiffs have alleged that he is a
10 director and stockholder in ACS. (*Id.*; Doc. 79 ¶¶ 9-10; Doc. 111 ¶¶ 9-10.) Neither do
11 they dispute that Dr. Lewis is not covered under the corporate policy. But there is
12 disagreement on whether Dr. Barker-Siegel qualifies as an agent and therefore has
13 coverage under the corporate policy. Indeed, coverage for Dr. Barker-Siegel appears to
14 be a hotly contested issue, at least judging by the amount of paper devoted to the subject
by Medical Protective and the Larsen defendants.¹¹ As it stands, none of the relevant

15 ¹¹ In its response to Medical Protective’s Motion for Partial Summary Judgment (Doc.
16 164) and separate Motion for Summary Judgment against Medical Protective (Doc. 167),
17 the Larsen defendants asserted that Dr. Barker-Siegel was covered under the corporate
18 agreement (Doc. 164 at 8; Doc. 167 at 2). Medical Protective responded in its reply in
19 support of its Motion for Partial Summary Judgment that there were, however, no
allegations in any of the underlying complaints that Dr. Barker-Siegel acted in the
capacity of an “administrator” or “committee member” within the definition of the
policy. (Doc. 243 at 7-8; Doc. 59, Ex. B at 6.)

20 Subsequently, the Larsen defendants included in their reply in support of their separate
21 Motion for Summary Judgment an argument sounding in Arizona property law to support
22 extending coverage under the corporate agreement to Dr. Barker-Siegel. (Doc. 244 at 5-
23 6.) The inclusion of this argument in the Larsen reply brief prompted Medical Protective
24 to file a Motion to Strike this new argument raised by the Larsens in their reply brief.
(Doc. 249 at 2-4.) The Court does not consider arguments raised for the first time in a
25 reply. *See Delgadillo v. Woodford*, 527 F.3d 919, 930 n.4 (9th Cir. 2008) (“Arguments
raised for the first time in [the] reply brief are deemed waived.”); *Marlyn Nutraceuticals,
Inc. v. Improvita Health Prods.*, 663 F. Supp. 2d 841, 848 (D. Ariz. 2009) (“The Court
need not consider Defendants' position, however, since it was first raised in their reply
brief ... Thus, even if the argument has merit, this Court cannot appropriately consider it,

1 Underlying Plaintiffs have provided evidence in their motions as to Dr. Barker-Siegel's
2 role or duties at ACS. As the parties moving affirmatively for summary judgment that Dr.
3 Barker-Siegel is covered under the corporate policy, they bear the burden to present
4 facts—not mere allegations—to support that claim. *See Alanco Tech., Inc. v. Carolina*
5 *Cas. Ins. Co.*, No. CV-04-789-PHX-DGC 2005 WL 6242303 at *4 n.4 (D. Ariz. May 19,
6 2005) (requiring party moving for summary judgment on question of insurance coverage
7 to have provided evidence that policy covered a certain entity); Fed. R. Civ. P. 56(e)
8 (stating that the party opposing or brining a motion summary judgment “may not rest
9 upon the mere allegations or denials of [the party's] pleadings, but ... set forth specific
10 facts showing that there is a genuine issue for trial”); *Celotex Corp. v. Catrett*, 477 U.S.
11 317, 322 (1986) (stating that summary judgment is appropriate against a party who “fails
12 to make a showing sufficient to establish the existence of an element essential to that
13 party's case, and on which that party will bear the burden of proof at trial”). They have
14 not done so. Accordingly, Dr. Barker-Siegel is not covered under the corporate policy.

15 The coverage terms of the corporate policy are identical to the physicians policy
16 and therefore cover claims against ACS and Dr. Siegel arising out of Dr. Lewis's
17 inappropriate sexual touching and/or viewing of the breasts under the analysis provided
18 above. The record is insufficient to determine whether coverage extends for claims that
19 Dr. Lewis inappropriately touched other areas of the body. Proceeding with the question
20 of coverage for the covered claims requires an examination of the “General Exclusions”
21 provisions because there is no vicarious liability exception in the corporate policy.
22 General Exception A excludes from coverage claims for “any loss arising from any of the
23 following acts committed by, or at the direction of, an insured”: (1) “any malicious act or
24 intentional tort”, (2) “any sexual activity, behavior or conduct, whether under the guise of
25 treatment or not”, and (3) “any criminal act or willful violation of any law, statute or
since Plaintiffs did not have the opportunity to respond.”) Accordingly, the Motion to
Strike is granted.

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3. Lexington Policies

a. Medical Incidents Arising out of Professional Services.

The Lexington policies provide the following coverage for all ACS Defendants:¹² “We will pay those sums that an Insured becomes legally obligated to pay others as damages resulting from a medical incident arising out of professional services.” (Doc. 139, Lexington SOF, ¶ 24; Doc. 183, ¶ 24; Doc. 212, Lexington Response, ¶ 24.) The Lexington policies define “medical incident” as “any act, error or omission in the providing of or failure to provide professional services to any one patient.” (Doc. 139, Lexington SOF, ¶ 25; Doc. 183, ¶ 25; Doc. 212, Lexington Response, ¶ 25.) “Professional services” mean, in relevant part, “[m]edical, surgical, . . . or other health care services.” (Doc. 139, Lexington SOF, ¶ 25; Doc. 183, ¶ 25; Doc. 212, Lexington Response, ¶ 25.)

To the extent that the policies reference professional services, *Asbury* controls and there is coverage for claims that the ACS Defendants are vicariously liable for Dr. Lewis’s groping and fondling of Underlying Plaintiffs’ breasts. As with the businessowner policies, there remains a genuine issue of material fact as to whether Dr. Lewis was engaged in cardiological treatment when he touched other areas of the Underlying Plaintiffs’ bodies. There is thus coverage under the Lexington policy for some of the assault claims, and there may be coverage for the other claims. As discussed below, however, all of the touching involved falls within the policy exceptions.

b. The Criminal Acts and Statutory Violation Exclusions

The Lexington policies include exclusions that prohibit coverage for “any medical incident, claim or suit arising out of” two excepted categories of behavior: “[d]ishonest, fraudulent, criminal or malicious acts” (the “criminal acts exclusion”), and “violation of

¹² Dr. Lewis is not among the insured.

1 any statute, ordinance, rule or regulation” (the “statutory violation exclusion”).¹³ (Doc.
2 139, Lexington SOF, ¶¶ 28, 30; Doc. 183, ¶¶ 28, 30; Doc. 212, Response to Lexington
3 SOF, ¶¶ 28, 30.) Dr. Lewis pled guilty to aggravated assault against seven of the eight
4 plaintiffs in this case: Larsen, Saylor, Shook, Landsverk, Pummill, Piper, and Tupper.
5 (Doc. 169, Exhibit 1, p. 7-11; Doc. 165, Exhibit A, p. 19-54; Doc. 139, Exhibit 1, p. 2-
6 15.) Aggravated assault is a class 6 felony under Arizona law. A.R.S. §§ 13-1203,
7 1204(A)(4), 1204(D). Dr. Lewis pled guilty to “recklessly caus[ing] injury” to the seven
8 Underlying Plaintiffs “while [their] capacity to resist was substantially impaired by virtue
9 of the doctor-patient relationship.” (Doc. 165, Exhibit A, p. 34-50.)

10 Unless specifically stated otherwise in the policy agreement, criminal act and
11 statutory violation exclusions apply to both intentional and reckless criminal conduct.
12 *Am. Family Mut. Ins. Co. v. White*, 204 Ariz. 500, 503-04, 65 P.3d 449, 452-53 (Ct. App.
13 2003) (rejecting the position that a violation of law exclusion applied only to intentional
14 criminal conduct). Arizona law precludes a “defendant convicted in a criminal
15 proceeding . . . from subsequently denying in any civil proceeding brought by the victim .
16 . . . against the criminal defendant the essential allegations of the criminal offense of which
17 he was adjudged guilty.” A.R.S. § 13-807.

18 The Underlying Plaintiffs have brought civil claims for assault and battery,
19 medical malpractice, intentional or negligent infliction of emotional distress, and invasion
20 of privacy against the ACS Defendants on the theory that they are vicariously liable for
21 Dr. Lewis’s actions. Some of these vicarious liability claims against the ACS Defendants
22 fall squarely within the criminal acts and statutory violation exclusions because they are

23 ¹³ Lexington also cites the “intended acts exclusion,” which removes coverage for
24 “[d]amages or harm expected or intended from an insured’s standpoint.” (Doc. 139,
25 Lexington SOF, ¶ 29; Doc. 183, ¶ 29; Doc. 212, Response to Lexington SOF, ¶ 29.)
Because there are no allegations that the insureds in question—the ACS Defendants—
intended or expected the injuries suffered by the Underlying Plaintiffs, the intended acts
exclusion is not in play.

1 claims “arising out of . . . criminal . . . act[s] . . . [and] violation[s] of a[] statute,
2 ordinance, or regulation”—the assaults committed by Dr. Lewis (Doc. 139, Lexington
3 SOF, ¶¶ 28, 30; Doc. 183, ¶¶ 28, 30; Doc. 212, Response to Lexington SOF, ¶¶ 28, 30.)
4 For these purposes, the assaults encompass any inappropriate touching, obviating the
5 need to draw an *Asbury* distinction for coverage purposes. Even if the touching of areas
6 other than the breasts is covered, it would fall within the criminal acts exception. Still,
7 there are allegations that Dr. Lewis made inappropriate comments about the Underlying
8 Plaintiffs’ breasts or inappropriately asked them to disrobe. These actions are not
9 necessarily criminal, although they may be “malicious” or violate a statute within the
10 meaning of the policy. The Court lacks information from the Parties on that issue.
11 However, all of the Underlying Plaintiffs who alleged inappropriate comments also
12 alleged that all of Dr. Lewis’s misconduct violated criminal law. (Doc. 79, Ex. 1 at 9, 27,
13 46, 73, 92; Doc. 111, Ex. 1 at 55.) It is the allegations of the complaint that determine
14 insurers’ duties at this stage. *See Lennar Corp. v. Auto-Owners Ins. Co.*, 214 Ariz. 244,
15 261, 151 P.3d 538, 543 (Ct. App. 2007). The Underlying Plaintiffs placed all of their
16 allegations squarely within the exception.

16 Lexington is under no duty to indemnify the ACS Defendants against the claims
17 brought by the Underlying Plaintiffs for assault and battery, medical malpractice,
18 intentional or negligent infliction of emotional distress, and invasion of privacy arising
19 out of Dr. Lewis’s criminal misconduct.

19 **C. Negligent Hiring, Retention, and Supervision Claims**

20 The Underlying Plaintiffs bring claims directly against the ACS Defendants for
21 the negligent hiring, retention, and supervision of Dr. Lewis. The General Liability
22 Insurers again claim that they have no duty to indemnify or defend ACS and the Siegels
23 against the direct liability claims because the claims derive from actions that either do not
24 constitute an occurrence or fall within the professional services exclusion. Medical
25 Protective likewise objects to coverage for the derivative claims under both the

1 physicians and corporate policies. Lexington similarly contends that the direct liability
2 claims do not fall within the policy’s coverage.

3 **1. The Businessowner Policies**

4 **a. An “Occurrence”**

5 As discussed above, the businessowner policies define “occurrence” as “an
6 accident, including continuous or repeated exposure to substantially the same general
7 harmful conditions.” (Doc. 79, Affidavit Exs. 2 & 3, at NFI00142, NFI00282, TI00116.)
8 The policies do not cover injuries “expected or intended from the standpoint of the
9 insured.” (*Id.* at NFI00131, NFI00271, TI00105.) The parties’ dispute centers on whether
10 the negligence claims against ACS and the Siegels fall within the “continuous or repeated
11 exposure to . . . harmful conditions” category of occurrences.

12 While there does not appear to be specific Arizona law that covers the present
13 circumstances, a similar situation appeared in the recent case of *Interstate Fire & Cas.*
14 *Co., Inc. v. Roman Catholic Church of the Diocese of Phoenix*, CV-09-01405-PHX-
15 NVW, 2011 WL 587163 (D. Ariz. Feb. 8, 2011). There, an insurer claimed that it did not
16 have to defend or indemnify the Diocese of Phoenix against various negligence claims
17 brought by plaintiffs who were the victims of molestation. *Id.* at *3. The insurer argued
18 that facts giving rise to the claims, such as negligent supervision, hiring, retention, and
19 failure to report, did not amount to an “occurrence” under the Diocese’s general liability
20 policy.¹⁴ Judge Wake rejected that claim: “As to whether there was an ‘accident or a
21 happening or event or a continuous or repeated exposure to conditions,’ the Court finds
22 that the conduct underlying the various negligence-based claims, namely, failure to
23 prevent sexual molestation, qualifies as an ‘exposure to conditions’ and thus falls within

24 ¹⁴ Occurrence was defined in the policy as “an accident or a happening or event or a
25 continuous or repeated exposure to conditions which unexpectedly and unintentionally
results in personal injury, or damage to property during the policy period.” *Diocese of
Phoenix*, 2011 WL 587163 at *2. None of the parties contend that the minor differences
in the definitional language are important to this case.

1 the definition of ‘occurrence.’” *Id.* at *7. Other courts have taken the same approach in
2 molestation cases. *See Interstate Fire & Cas. Co. v. Archdiocese of Portland in Oregon*,
3 35 F.3d 1325, 1239 (9th Cir. 1994) (“[T]he terms of the policy make clear that . . . it is
4 the repeated ‘exposure’ of the boy to the negligently supervised priest, resulting in injury,
5 that provides the basis for indemnification.”); *Guideone Ins. Co. v. St. Andrews Episcopal*
6 *Church*, CV-03-2222-PCT-MHM (D. Ariz. Mar. 31, 2006) (refusing to grant summary
7 judgment on issue of insurance coverage for failure to supervise claim because the
8 actions could constitute an occurrence).

9 The present dispute is analogous to the clergy cases, which the Court finds
10 persuasive. The Underlying Plaintiffs allegedly suffered physical invasions because of
11 the carelessness of the ACS Defendants. Thus by allegedly hiring, retaining, and then
12 failing to supervise Dr. Lewis, the ACS Defendants “exposed” the Underlying Plaintiffs
13 to the “harmful condition” of sexual assault and battery. The actions giving rise to the
14 negligence claims constitute an “occurrence” within the meaning of the businessowner
15 policies.

16 **b. The Professional Services Exclusion.**

17 The General Liability Insurers again assert that the professional services exclusion
18 applies to bar coverage. The exclusion applies to “[b]odily injury” . . . caused by the
19 rendering or failure to render any professional service. This includes but is not limited to .
20 Supervisory . . . services; . . . Medical, surgical . . . advice or instruction; [and] any health
21 or therapeutic service treatment advice or instruction.” (Doc. 79, Affidavit Exs. 2 & 3, at
22 NFI00131, NFI00134, NFI00271, NFI00274, TI00105, TI00108.) While the policy does
23 not define supervisory services, claims that the ACS Defendants negligently supervised
24 and retained Dr. Lewis fall squarely in that portion of the professional services exclusion.
25 No party explains how an action for negligent retention would be separate from a claim
for negligent supervision. There is therefore no coverage for those claims since they are
specifically barred under the policy. As to the negligent hiring claim, the exercise of

1 hiring an employee is not necessarily the same thing as supervising an employee.
2 Therefore, given the canons of construction for insurance policies, the Court cannot
3 conclude that the negligent hiring claim falls within the supervisory services section of
4 the professional services exception. *See Thomas v. Liberty Mut. Ins. Co.*, 173 Ariz. 322,
5 325, 842 P.2d 1335, 1338 (Ct. App. 1992) (construe ambiguity against insurer).

6 The General Liability Insurers stress that because Dr. Lewis caused the injuries to
7 the Underlying Plaintiffs while he was engaged in an excluded activity—*Asbury*'s mixed
8 professional services—“derivative” legal claims such as negligent hiring are likewise
9 excluded from coverage. The Underlying Plaintiffs and the ACS Defendants object,
10 insisting that the principle of severability and separation of insureds, combined with the
11 narrowness of the professional services exception in the Businessowner Policies, keep the
12 negligence claims out of the exclusion.

13 As a general matter, Arizona law is clear that negligence claims deriving from an
14 excluded activity are themselves typically excluded. *See, e.g., Am. Family Mut. Ins. Co.*
15 *v. White*, 204 Ariz. 500, 508, 65 P.3d 449, 457 (Ct. App. 2003) (denying coverage for
16 claim of negligent supervision against parents of child who engaged in excluded
17 activity—violation of criminal law—because the negligent supervision claim “derives
18 from the claim against Travis, which is excluded”); *Behrens v. Aetna Life & Cas.*, 153
19 Ariz. 301, 302, 736 P.2d 385, 386 (Ct. App. 1987) (a claim for negligent entrustment or
20 supervision was inseparable from the excluded negligent operation of a boat);
21 *Lumbermens Mut. Cas. Co. v. Kosies*, 124 Ariz. 136, 138, 602 P.2d 517, 519 (Ct. App.
22 1979) (“It is evident that negligent entrustment as a distinct and specific cause of action is
23 not exclusive of, but rather is derived from, the more general concept of ownership,
24 operation and use of a motor vehicle.”). In other words, the “focus of an exclusion should
25 be the injury, not the pleaded cause of action.” *White*, 204 Ariz. at 508, 65 P.3d at 457
(citing *Nw. G.F. Mut. Ins. Co. v. Norgard*, 518 N.W.2d 179, 184 (N.D. 1994)). When the
allegations raised against the party seeking coverage do not exist separate and apart from

1 the excluded action, there is no coverage. *See Colony Ins. Co. v. Events Plus, Inc.*, 585 F.
2 Supp. 2d 1148, 1155 (D. Ariz. 2008).

3 The contractual language here excludes from coverage any bodily injury “caused
4 by the rendering or failure to render any professional service.” Dr. Lewis allegedly used
5 the provision of professional services to cloak his tortious conduct, which “caused”
6 bodily injuries to the Underlying Plaintiffs. And the Court determined above that Dr.
7 Lewis was engaged in professional services under the terms of the businessowner policies
8 when he engaged in inappropriate sexual touching of the breast area. As Arizona law
9 makes clear, courts will not engaging in strained hair-splitting where the alleged
10 negligence of a party is entirely dependent on the actions of another party. The negligent
11 conduct of ACS and the Siegels cannot be divorced from the excluded conduct of Dr.
12 Lewis. Nevertheless, the *Asbury* distinction made earlier applies with equal force here.
13 Allegations that Dr. Lewis inappropriately touched other areas of the body may not be
14 sufficiently intertwined with medical treatment to qualify as professional services. It
15 follows that negligence claims deriving from that conduct would likewise not be
16 excluded.

16 The Underlying Plaintiffs and ACS Defendants rely heavily on *Diocese of*
17 *Phoenix*, in which Judge Wake refused to apply an assault-and-battery exception to
18 derivative negligence claims against the Diocese. 2011 WL 587163 at *10-11. That
19 reliance is misplaced. The assault and battery exclusion at issue in *Diocese of Phoenix*
20 was significantly narrower than the professional services exclusion. There, the policy
21 “expressly preclude[d] coverage for ‘liability of *any Assured* for assault and battery
22 committed by or at the direction of *such Assured*. . . .” *Id.* at *9 (emphasis in original).
23 Judge Wake found the clause to be quite limited in application: only assaults and batteries
24 committed at the direction of the Diocese would be excluded. *Id.* at *10-11. He
25 contrasted the *Diocese of Phoenix* clause with the clause in *White*, which excluded
“bodily injury or property damage arising out of . . . violation of any criminal law for

1 which any insured is convicted,” 204 Ariz. at 503, 65 P.3d at 452. *Diocese of Phoenix*,
2 2011 WL 587193 at *9. He concluded,

3
4 Had the clause instead excluded all claims arising out of an assault or battery, such
5 a clause could have excluded from coverage claims of derivative liability of all
6 innocent co-insureds for the tortfeasor's acts because derivative negligence claims
7 arguably “arise out of” the underlying act. Without such language, though, all
8 derivative liability claims cannot be so categorically excluded. Rather, in the
9 assault and battery clause at issue here, the exclusion of liability attaches only to
10 the person who committed or directed the act and only excludes coverage for the
11 tortfeasor. As such, the Court concludes that the clause only precludes coverage of
12 the direct liability of any insured who commits or directs an assault or battery.
13 Because the derivative claims against the Diocese are not premised on allegations
14 that the Diocese committed or directed an assault or battery, the claims do not fall
15 within the assault and battery exclusion.

16
17 *Id.* at *10.

18 The professional services exception contained in the businessowner policies bears
19 little resemblance to the assault and battery exception of *Diocese of Phoenix*. There is no
20 extra language in the businessowner policies that requires the ACS Defendants
21 themselves to have committed the injury-causing offense. The professional services
22 exception means what it says—no coverage for injuries “*caused by the rendering or*
23 *failure to render any professional service,*” (Doc. 79, Affidavit Exs. 2 & 3, at NFI00131,
24 NFI00134, NFI00271, NFI00274, TI00105, TI00108) (emphasis added), no matter how
25 they are asserted.

26 The Underlying Plaintiffs nonetheless insist that the “Separation of Insureds”
27 clause in the businessowner policies requires the Court to determine whether the ACS
28 Defendants were engaged in professional services when they hired Dr. Lewis, rather than
29 resting on the determination that Dr. Lewis was engaged in professional services when he
30 allegedly caused the injuries. For support, they cite *United Services Automobile Ass’n v.*
31 *DeValencia*, 190 Ariz. 436, 949 P.2d 525 (Ct. App. 1997), where several children were

1 molested by a minor child of a couple who provided day care. The victims brought
2 intentional tort claims against the child and negligent supervision claims against the
3 family. The homeowners' policy at issue in *DeValencia* excluded coverage for injuries
4 "arising out of or in connection with a business engaged in by an insured." *Id.* The
5 *DeValencia* court held that the policy did not exclude the minor child's actions, even
6 though the actions would not have occurred but for the parents' business activities. *Id.* at
7 438, 949 P.2d at 527. In the eyes of the Underlying Plaintiffs and ACS Defendants,
8 *DeValencia* means that the ACS Defendants themselves must have performed
9 professional services for the exclusion to apply. Once again, they ignore important
10 limiting language in the *DeValencia* policy. That language—"business engaged in by *an*
11 insured"—expressly required that each insured himself be engaged in business. No such
12 limitation is present in the professional services exclusion. Absent the "an insured"
13 limitation, an exclusion generally bars coverage for claims derivative of excluded
14 activities. *See e.g., White*, 204 Ariz. at 507-08, 65 P.3d at 456-57; *Allstate Ins. Co. v.*
Kim, 121 F. Supp. 2d 1301, 1308 (D. Haw. 2000) (citing cases).

15 In sum, because the claims against the ACS Defendants for negligent retention,
16 and supervision fall squarely within the professional services exception, there is no duty
17 to indemnify any of those claims. With regard to the negligent hiring claim, there remains
18 an issue of material fact. There is no coverage for negligent hiring with regard to
19 allegations of inappropriate touching of the breasts, because that claim derives from
20 actions taken by Dr. Lewis under the guise of professional medical services, and the
21 professional services exclusion applies. As for the claims that Dr. Lewis inappropriately
22 touched other areas of the body, the record is insufficient to determine whether the
23 derivative negligent hiring claim likewise falls within the professional services exclusion.

23 **c. Reimbursement For General Liability Insurers**

24 The General Liability Insurers assert their entitlement to reimbursement of the
25 defense expenses they have incurred defending the ACS Defendants in the underlying

1 cases. National Air and Transportation have provided for the defense of ACS and the
2 Siegels under a complete reservation of rights. (Doc. 79 ¶¶ 50-51; Doc. 111 ¶¶ 50-51.)
3 Pursuant to this Order, the General Liability Insurers have no duty to indemnify the ACS
4 Defendants against the following claims: (1) vicarious liability for assault and battery,
5 medical malpractice, intentional or negligent infliction of emotional distress, and invasion
6 of privacy relating to Dr. Lewis’s alleged groping and fondling of the Underlying
7 Plaintiffs’ breasts; (2) vicarious liability for medical negligence arising out of Dr. Lewis’s
8 recommendation of unnecessary medical procedures for Underlying Plaintiffs Ms.
9 Pummill, the Landsverks, and the Saylor; and (3) direct liability for negligent retention,
10 and supervision. In Arizona, however, “if any claim alleged in the complaint is within the
11 policy's coverage, the insurer has a duty to defend the entire suit, because it is impossible
12 to determine the basis upon which the plaintiff will recover (if any) until the action is
13 completed.” *W. Cas. & Sur. Co. v. Int’l Spas of Ariz., Inc.*, 130 Ariz. 76, 80, 634 P.2d 3, 6
14 (Ct. App. 1981); *see also Scottsdale Ins. Co. v. Van Nguyen*, 158 Ariz. 476, 477–78, 763
15 P.2d 540, 541–42 (Ct. App. 1988) (an uncovered, concurrent cause of harm does not
16 defeat coverage if there is a separate, covered cause of harm); *Lennar Corp. v. Auto-*
17 *Owners Ins. Co.*, 214 Ariz. 255, 261, 151 P.3d 538, 544 (Ct. App. 2007). The General
18 Liability Insurers have not been discharged from their duty to defend claims arising out
19 of Dr. Lewis’s alleged groping of other parts of the body. They therefore remain under a
20 duty to defend the entire suit.

2. Medical Protective Policies

21 The Parties have agreed that the Medical Protective physicians policy does not
22 provide coverage for Dr. Siegel and Dr. Barker Siegel with regard to the derivative
23 negligence claims. Therefore any coverage for ACS Defendants would fall under the
24 corporate policy. The terms of the corporate agreement cover the negligence claims
25 against ACS and Dr. Siegel arising out of Dr. Lewis’s alleged groping of the breasts
under the analysis provided with regard to the businessowner policies. Those negligence

1 claims cannot be separated from the underlying covered conduct. And for the reasons
2 discussed earlier with the vicarious liability claims, none of the General Exclusions apply
3 to the underlying conduct. Nor are there any applicable exclusions for supervisory
4 services. Consequently, ACS and Dr. Siegel retain coverage under the corporate
5 agreement. As with the businessowner policies, however, a factual question remains with
6 regard to coverage for claims that Dr. Lewis groped areas of the Underlying Plaintiffs'
7 bodies besides the breasts. To summarize, there is no coverage for Dr. Siegel and Dr.
8 Barker-Siegel under the physicians agreement for the derivative negligence claims. There
9 is coverage for ACS and Dr. Siegel under the corporate agreement for those claims to the
10 extent they arise out of Dr. Lewis's inappropriate touching of the breasts.

11 **3. Lexington Policies**

12 As determined above with regard to the vicarious liability claims, Dr. Lewis's
13 conduct, at least in part, qualifies as a "medical incident arising out of professional
14 services." (Doc. 139, Lexington SOF, ¶ 24; Doc. 183, ¶ 24; Doc. 212, Lexington
15 Response, ¶ 24.) Nevertheless, the criminal act and statutory violation exclusions apply
16 with equal force here to all claims of sexual misconduct made by the Underlying
17 Plaintiffs. Claims that the ACS Defendants were negligent in hiring, retaining, and
18 supervising Dr. Lewis cannot exist separate and apart from his alleged criminal conduct.
19 The derivative negligence claims thus qualify as "suit[s] arising out of . . . criminal . . .
20 act[s] . . . [and] violation[s] of a[] statute, ordinance, or regulation." (Doc. 139, Lexington
21 SOF, ¶¶ 28, 30; Doc. 183, ¶¶ 28, 30; Doc. 212, Response to Lexington SOF, ¶¶ 28, 30.)
22 Because the Underlying Plaintiffs have alleged that all of Dr. Lewis's inappropriate
23 sexual misconduct constituted violations of criminal law, the exception applies across the
24 board and the Court need not draw the *Asbury* distinctions. The Underlying Plaintiffs and
25 ACS Defendants pursue the "separation of insureds" line of argument again here, but the
Court rejects it for the reasons discussed above. The plain language of the policy
excludes all suits "arising out of" the excluded activities.

1 Plaintiffs' breasts. However, because there remains a genuine issue of material fact
2 concerning coverage for the other allegations of misconduct, National Fire and
3 Transportation must continue to defend the entire suit against the ACS Defendants.

4 Medical Protective has a duty to defend and indemnify ACS and Dr. Siegel against
5 the Underlying Plaintiffs' derivative negligence claims arising out of Dr. Lewis's
6 inappropriate touching of the breasts. And because a genuine issue of fact remains as to
7 coverage for the remaining claims of inappropriate contact, Medical Protective must
8 continue to defend the ACS Defendants against the entire suit.

9 Lexington is under no duty to indemnify the ACS Defendants against the
10 derivative negligence claims brought by all Underlying Plaintiffs.

11 National Fire and Transportation are under no duty to indemnify the ACS
12 Defendants with respect to the negligent retention and supervision claims. National Fire
13 and Transportation likewise do not have a duty to indemnify the ACS Defendants against
14 the negligent hiring claims arising out of Dr. Lewis's alleged inappropriate touching of
15 the breasts. A genuine issue of fact remains regarding coverage for other inappropriate
16 touching, and so National Fire and Transportation remain under a duty to defend the
17 entire suit.

18 **IT IS HEREBY ORDERED** that the Motion for Summary of Judgment or, in the
19 Alternative, Partial Summary Judgment filed by Plaintiffs National Fire Insurance
20 Company of Hartford and Transportation Insurance Company (Doc. 78) is **granted in
21 part and denied in part.**

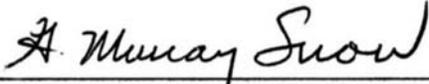
22 **IT IS FURTHER ORDERED** that

- 23 1. The Motion for Partial Summary Judgment filed by Defendants Dena and
24 Shawn Larsen (Doc. 108) is **DENIED.**
- 25 2. The Motion for Partial Summary Judgment filed by Defendants Franklin and
Jennifer Saylor (Doc. 109) is **DENIED.**

- 1 3. The Motion for Partial Summary Judgment filed by Defendants Collin and
2 Laurie Shook (Doc. 113) is **DENIED as moot.**
- 3 4. The Motion for Partial Summary Judgment filed by Defendants Julie and
4 Stewart Landsverk (Doc. 115) is **DENIED.**
- 5 5. The Motion for Partial Summary Judgment filed by Defendant Kellye Pummill
6 (Doc. 117) is **DENIED.**
- 7 6. The Motion for Partial Summary Judgment filed by Defendants Daniel and
8 Elizabeth Piper (Doc. 119) is **DENIED.**
- 9 7. The Motion for Partial Summary Judgment filed by Defendant Lauri A. Tipper
10 (Doc. 121) is **DENIED as moot.**
- 11 8. The Motion for Partial Summary Judgment filed by Defendant Brooke E.
12 Staley (Doc. 123) is **DENIED as moot.**
- 13 9. The Motion for Partial Summary Judgment filed by Defendants Advanced
14 Cardiac Specialists, Chartered, Barbara Barker-Siegel, and Robert M. Siegel
15 (Doc. 125) is **DENIED.**
- 16 10. The Motion for Partial Summary Judgment filed by Plaintiff Medical
17 Protective Company (Doc. 136) is **granted in part and denied in part.**
- 18 11. The Motion for Partial Summary Judgment filed by Plaintiff Lexington
19 Insurance Company (Doc. 138) is **granted in part and denied in part.**
- 20 12. The Motion for Partial Summary Judgment filed by Defendants Dena and
21 Shawn Larsen (Doc. 167) is **granted in part and denied in part.**
- 22 13. The Motion for Partial Summary Judgment filed by Defendants Franklin and
23 Jennifer Saylor (Doc. 184) is **granted in part and denied in part.**
- 24 14. The Motion for Partial Summary Judgment filed by Defendants Franklin and
25 Jennifer Saylor (Doc. 188) is **granted in part and denied in part.**
15. The Motion to Strike Reply to Response to Motion for Summary Judgment
filed by Medical Protective is **GRANTED.**

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Dated this 28th day of September, 2012.



G. Murray Snow
United States District Judge