

STATE OF MAINE
CUMBERLAND, ss.

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CUMBERLAND, SS
CLERK'S OFFICE

SUPERIOR COURT
CIVIL ACTION
Docket No. CV-05-358

2007 FEB -8 A 7: 56

TED - CUM - 3/7/2007

MIDDLESEX MUTUAL ASSURANCE
COMPANY,

Plaintiff,

v.

DECISION AND JUDGMENT

ELEANOR B. HANDLER M.D. and
ELEANOR B. HANDLER M.D. P.A.,

DONALD L. GARBRECHT
LAW LIBRARY

Defendants.

MAY 16 2007

Middlesex Mutual Assurance Company (Middlesex) insured the defendants under a Businessowners Liability Policy which provides coverage for "oral or written publication of material that slanders or libels a person . . .," but excludes coverage for injury "arising out of oral or written publication of material if done by or at the direction of the insured with knowledge of its falsity."

When the defendants' business relationship to share space, services and personnel with August C. Schwenk M.D. deteriorated and dissolved, Dr. Handler sent several letters to doctors and hospital authorities in the Belfast area. In the letters she variously described Dr. Schwenk's conduct as egregious, unprofessional, unethical, actionable and illegal.

In a response to a lawsuit by Dr. Handler lawsuit, based on the dissolution of their business relationship, Dr. Schwenk asserted a counterclaim for defamation. Middlesex appeared and defended Handler on the counterclaim.

By agreement, the parties took their case to arbitration where the arbitrator found for Dr. Schwenk and awarded him \$30,000 on the counterclaim. The issue here is the extent of indemnification by Middlesex.

In his modified award, the arbitrator found that Dr. Handler's statements were "defamation *per se*." In the original findings of fact and conclusions, the arbitrator found Handler's letters in question to be "clearly defamatory in nature." ¶ 37. He further found that Dr. Handler admitted "all of the statements and that they "were made with the intent to harm defendant's good name and reputation . . . they were more than statements of mere opinion." ¶ 37(4). The arbitrator also found that Dr. Schwenk was unable to quantify his loss of income from the *per se* defamatory published letters and noted that he was not required to do so. Citing, *Farrell v. Kramer*, 193 A.2d 561 (Me. 1963) and *Rippert v. Bemis*, 672 A.2d 82 (Me. 1986). He awarded \$30,000 for damages "as a result of the defamatory statements." Subsequent to the filing of the decision, Middlesex paid \$15,000 of the award. Middlesex asserts that although Dr. Schwenk was damaged by Handler's statements, Dr. Handler is not protected for calling Schwenk's actions "illegal" because at her deposition she agreed they were not illegal and coverage is not available for a statement made "with knowledge of its falsity."

Both parties have filed motions for summary judgment.

Notwithstanding Handler's statement of illegality as defamatory, the arbitrator did not specify that any part of the award was or was not based on particular statements. Middlesex's unilateral decision to apportion the award is without basis in law or fact.

The court finds, based on undisputed facts that Middlesex has not demonstrated any basis to support a division of the award as they have done. The burden of proving allocation of damages between covered and non-covered claims is on the insurer. *Liberty Mut. Ins. Co. v. Metropolitan Life Ins. Co.*, 260 F.3d 54 (1st Cir. 2001). The insurer may not meet this burden by engaging in speculation as to what the fact finder was

thinking when he returned a general verdict. *Lavender v. Grange Mut. Cas. Co.*, 1979 Ohio App. LEXIS 10921.

In Maine the Law Court has also decided that the burden to apportion or allocate damages rests on the defendant, or in this case upon Middlesex, as the party asserting that it is responsible for only a portion of the award. See, *Lovely v. Allstate Insurance Co.*, 658 A.2d 1091 (Me. 1995). Since Middlesex has not met its burden of proving allocation of damages, summary judgment is appropriate declaring that Middlesex must indemnify Dr. Handler for the full amount of the award.

The clerk will make the following entry as the Order and Judgment of the court:

- A. Plaintiff Middlesex Mutual Assurance Company's Motion for Summary Judgment is denied.
- B. Defendants/Counterclaim-Plaintiffs Eleanor B. Handler M.D. and Eleanor B. Handler M.D. P.A. Motion for Summary Judgment is granted.
- C. The clerk will enter judgment for defendants/counterclaim plaintiffs in the amount of \$15,000 as the balance to be paid on the arbitration award, plus interest and costs as allowed by statute and rule.
- D. No attorneys' fees are awarded.

SO ORDERED.

DATED: February 7, 2007



Thomas E. Delahanty II
Justice, Superior Court

MIDDLESEX MUTUAL ASSURANCE COMPANY - PLAINTIFF

SUPERIOR COURT

CUMBERLAND, ss.

Docket No PORSC-CV-2005-00358

Attorney for: MIDDLESEX MUTUAL ASSURANCE COMPANY

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DOCKET RECORD

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Filing Document: COMPLAINT

Minor Case Type: DECLARATORY JUDGMENT

Filing Date: 06/14/2005

Docket Events:

06/14/2005 FILING DOCUMENT COMPLAINT FILED ON 06/14/2005
DECLARATORY JUDGMENT WITH ATTACHED EXHIBITS A-F (JW)

06/14/2005 Party(s): MIDDLESEX MUTUAL ASSURANCE COMPANY
ATTORNEY - RETAINED ENTERED ON 06/14/2005
Plaintiff's Attorney: JOHN WHITMAN

06/17/2005 Party(s): MIDDLESEX MUTUAL ASSURANCE COMPANY

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Printed on: 02/12/2007