

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

SCOTTSDALE INSURANCE CO.,)	
)	
Plaintiff)	
)	
v.)	Civil No. 95-134-B
)	
ESTATE OF JUDITH M. OSTING,)	
)	
Defendant)	
)	
and)	
)	
BARBARA MURRAY,)	
)	
Party-in-interest)	
)	
and)	
)	
JOHN R. LORENZ and JOHN KEEFE,)	
)	
Intervenors)	

RECOMMENDED DECISION

The plaintiff, Scottsdale Insurance Company (Scottsdale), seeks a declaratory judgment that it is not obligated to defend and indemnify the defendant, the Estate of Judith M. Osting (the Estate), pursuant to the professional liability insurance policies it issued to the late Judith M. Osting. Scottsdale also seeks to bar the party-in-interest, Barbara Murray, and the intervenors, John R. Lorenz and John Keefe, from reaching and applying the proceeds of the policies in conjunction with their separate suits against the Estate. The Court has before it numerous cross-motions for summary judgments by the parties. Scottsdale has moved for summary judgments on its complaint against the Estate and Murray, and against Lorenz and Keefe. Murray has moved for a summary judgment against Scottsdale, as have Lorenz and Keefe. For the reasons

that follow, I conclude that the motions should be denied in part and granted in part.

I. Summary Judgment

A summary judgment is appropriate only “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). An issue is genuine, for these purposes, if “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). “A material fact is one which has the ‘potential to affect the outcome of the suit under applicable law.’” *FDIC v. Anchor Properties*, 13 F.3d 27, 30 (1st Cir. 1994) (quoting *Nereida-Gonzalez v. Tirado-Delgado*, 990 F.2d 701, 703 (1st Cir. 1993)). The Court views the record in the light most favorable to the nonmovant. *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995).

II. Background

For summary judgment purposes only, the parties have stipulated to thirty-five facts and ten accompanying exhibits. The stipulated facts are as follows:

1. Ms. Osting was a Maine licensed substance abuse counselor and registered nurse who treated minor children, Sarah Murray and Emily Murray, from 1991 through 1993.
2. During her treatment of the Murray children, Ms. Osting formed the opinion that the children’s father, Peter Murray, had sexually abused them.
3. Mr. Murray denied this allegation.
4. Ms. Osting reported her opinion to the children’s mother, Barbara Murray.
5. Mrs. Murray accepted Ms. Osting’s opinion that Peter Murray had sexually abused her children.

6. On October 20, 1991, a three-person child protection petition was filed by Barbara Murray, Nancy Pare, and Judith Osting. A copy of the petition is attached as Exhibit A.
7. Drs. Lorenz and Keefe were part of a team that evaluated the Murray children at the request of the Court and the parents. They invited input from Ms. Osting, who declined to participate. The team concluded that the Murray children had not been sexually abused by their father. The team also concluded that Ms. Osting's conclusion was made without appropriate basis.
8. Ms. Osting sent a letter to the Board of Registration concerning Drs. Lorenz and Keefe. A copy of that complaint letter is enclosed in a sealed envelope marked Exhibit B. The letter contains confidential information that the parties agree should not be made public. The letter speaks for itself.
9. On November 22, 1994, Judith Osting was sued by Peter Murray, Jamie Murray, Sarah Murray, Emily Murray, and Barbara Murray. A true copy of the complaint in that matter is attached hereto as Exhibit C.
10. During the discovery process, the Plaintiff's attorney deposed Ms. Osting. This deposition took place on July 13, 1994. The transcript reflects that the deposition began at 8:30 a.m. and finished at 1:25 p.m. Ms. Osting had answered interrogatories on May 26, 1994.
11. In June 1994, Ms. Osting's physical health had deteriorated.
12. In June 1995, Ms. Osting quit working due to her illness. She had been diagnosed with ovarian cancer a year and a half before. By May 1995, it had spread to her lungs, brain, and liver.
13. Prior to the *Peter Murray, et al.* trial, Plaintiff Scottsdale subpoenaed Ms. Osting to appear for a videotaped trial deposition. The videotaped trial deposition was scheduled to take place on July 5, 1995.
14. By the time of the scheduled deposition, Ms. Osting had been diagnosed with terminal cancer.
15. Ms. Osting advised Phil Coffin, counsel for Scottsdale, that she had terminal cancer.
16. Ms. Osting did not appear for her videotaped trial deposition.

17. On June 14, 1995, Scottsdale brought a complaint against Judith M. Osting, naming as parties-in-interest Peter Murray, Jamie Murray, Sarah Murray, Emily Murray, and Barbara Murray.
18. That complaint has been superseded by a First Amended Complaint dated August 9, 1995. That complaint was served on the parties-in-interest who have all responded. Defendant was served by publication, subsequently died and was replaced by Personal Representative James G. Elliot by Order dated July 26, 1996.
19. The First Amended Complaint was served on Barbara Murray on November 29, 1995, and answered on December 19, 1995.
20. Trial of the *Murray v. Osting* case was held in U.S. District Court in Bangor in July 1995.
21. The Murray Plaintiffs read Ms. Osting's discovery deposition to the jury.
22. Barbara Murray testified on behalf of the Plaintiffs in the *Peter Murray, et al. v. Osting* litigation.
23. On July 21, 1995, a verdict was entered for Peter Murray *et al.* for \$850,000.
24. The Judgment was satisfied in full by Scottsdale Insurance Company. *See* Satisfaction of Judgment dated October 12, 1995, attached as Exhibit D.
25. On June 28, 1995, Barbara Murray served a Notice of Claim on Judith Osting by regular mail, restricted delivery.
26. Philip M. Coffin, III, Esquire, represented Judith Osting in the *Peter Murray, et al.* case. On July 18, 1995, Mr. Coffin entered his appearance on behalf of Judith M. Osting in Penobscot County Superior Court, CV-95-249, Barbara Murray's notice of claim.
27. On February 23, 1995, Barbara Murray asked Mr. Coffin if she could join in the *Peter Murray, et al.* case. He declined, indicating that he would not agree to waive the prelitigation screening panel requirement.
28. In April 1995, a notice of claim was sent to Mr. Coffin with an acceptance of service. Mr. Coffin declined to accept service.
29. On December 4, 1995, Judith M. Osting died in Tucson, Arizona.
30. Barbara Murray's Complaint was served on December 31, 1996. A copy of

the complaint is attached as Exhibit E.

31. Drs. Lorenz and Keefe filed a lawsuit against Ms. Osting on November 7, 1995. A copy of that complaint is attached as Exhibit F.

32. Scottsdale Insurance Company issued an insurance policy covering Ms. Osting for the period 12/1/89 through 12/1/90, policy no. GLS154649. (*See* Exhibit G.)

33. Scottsdale Insurance Company also issued policy no. GLS154707 covering Ms. Osting for the period 12/1/90 through 12/1/91. (*See* Exhibit H.)

34. Scottsdale Insurance Company also issued policy no. GLS154736 covering Ms. Osting for the period 6/1/91 through 6/1/92. (*See* Exhibit I).

35. Scottsdale Insurance Company also issued policy no. GLS399181 covering Ms. Osting for the period 6/1/92 through 6/1/93. (*See* Exhibit J.)

The parties also have submitted for the Court's consideration separate statements of those factual issues they believe remain apart from the above stipulations. Naturally, the merits of these contested statements must be weighed by the Court in ruling on the motions, but a brief recitation of them seems appropriate at this time. Scottsdale contends that the only issues possibly remaining for purposes of summary judgment are those related to Osting's refusal to cooperate in prior litigation, and the prejudice that resulted therefrom.¹ Barbara Murray contends that other uncontroverted facts exist and should bear upon the Court's ruling on the motions, namely that the trial in *Peter Murray, et al. v. Osting* was "hotly contested" and that Osting's

¹ As Barbara Murray correctly points out in her letter to the Court dated October 16, 1997, Scottsdale's attempt to submit additional evidence in its recitation of the remaining issues is inappropriate at this stage of the proceedings, and is contrary to the agreement reached between the parties and the Court. Although the Court is willing to consider generally Scottsdale's statement of remaining issues, it will not consider the affidavit of attorney Philip M. Coffin, III, or any other new evidence submitted by Scottsdale or other parties in ruling on the motions.

lawyer presented a vigorous defense; that prior to that trial, Peter Murray’s lawyer had received information from Scottsdale that Osting was terminally ill and near death; that, subsequent to service of Barbara Murray’s notice of claim against Osting, no discovery has been done on the case between the parties, and that both sides have relied in this litigation on the information gleaned from the prior *Peter Murray, et al. v. Osting* suit; and that Osting’s lawyer failed to request her cooperation or involvement in the suit brought by Barbara Murray. The intervenors, Lorenz and Keefe, contend various issues remain for the Court’s consideration, including: whether Osting’s conduct was negligent or intentional for purposes of defamation law; whether Scottsdale was prejudiced by Osting’s conduct or, instead, by her illness and eventual death; and whether Osting’s conduct “arose out of” the rendering of professional services.

III. Discussion

It is well settled that:

Under Maine’s general law of contracts, the interpretation of a contract is a question for the factfinder only if the court first determines that the contract is ambiguous, a question of law. Because exclusions from coverage in insurance contracts are not favored and must be stated clearly and unambiguously, ambiguities in such contracts must be resolved against the insurer. However, this latter rule of construction is a rule of last resort which must not be permitted to frustrate the intention the parties have expressed, if that can otherwise be ascertained, and a court may not rewrite the contract when the language employed is free of doubt.

Golden Rule Ins. Co. v. Atallah, 45 F.3d 512, 516 (1st Cir. 1995) (internal quotations and citations omitted).

A. *Scottsdale’s first motion for a summary judgment*

Scottsdale moves for a summary judgment on its complaint, contending that it is not obligated to defend or indemnify the Estate because: (1) the policies it issued to Osting require, as a condition of coverage, that the insured cooperate in the defense of any claim brought against her; and (2) the policies exclude coverage for any dishonest, fraudulent, or malicious act or omission on the part of the insured. Because Osting failed to satisfy the condition precedent for coverage, and because she engaged in conduct that falls within the policies' exclusion clauses, Scottsdale contends it is entitled to a declaration that it need not defend or indemnify the Estate. The Estate takes no position on Scottsdale's motion, relying instead on party-in-interest Murray's opposition to it. Murray responds that neither of Scottsdale's contentions in support of the motion are availing because there is no evidence that Scottsdale ever sought, prior to her death, Osting's cooperation in Barbara Murray's suit, and because Barbara Murray's claim, based on negligence and professional malpractice, falls within the coverage of the professional liability policies issued by Scottsdale to Osting.

The general rule is that an insurer's duty to defend is determined by the allegations contained within the four corners of the complaint. *American Policyholders' Ins. Co. v. Cumberland Cold Stor. Co.*, 373 A.2d 247, 249 (Me. 1977) (citations omitted). Resolution of the issue generally depends on whether the complaint states facts that appear to bring the claim of damage within the policy coverage. *Id.* (citation omitted). An insurer's duty to defend may be decided summarily and in favor of the insured "if there exists any legal or factual basis, which could be developed at trial, that would obligate the insurer to pay under the policy." *U.S. Fidelity & Guar. Co. v. Rosso*, 521 A.2d 301, 303 (Me. 1987) (citations omitted). On the other hand, an insured's duty to indemnify may depend on the actual facts or legal theory behind the underlying

action against the insured by the injured party, and, in that case, it is necessary for a court to decide the duty to defend issue before considering the duty to indemnify. *Id.* (citation omitted). There are circumstances, however, such as those involving a failure on the part of the insured to cooperate, where a declaratory judgment may simultaneously be entered as to both the duty to defend and the duty to indemnify. *Id.* & n.1.

Scottsdale's first contention in support of its motion--that Osting's failure to cooperate in the defense of the claims against her in the *Peter Murray, et al.* trial means that Scottsdale is not now required to defend and indemnify the Estate--is unavailing. Courts have held that the willful failure of an insured to cooperate with the insurer concerning material matters is a breach of a condition precedent of the policy that precludes recovery. *See* Barry R. Ostrager & Thomas R. Newman, *Handbook on Insurance Coverage Disputes* § 2.08(a) (8th ed. 1995). Typically, in order to avoid coverage on the ground of lack of cooperation:

[T]he insurer must demonstrate that it acted diligently in seeking to bring about the insured's cooperation . . . that the efforts employed by the insurer were reasonably calculated to obtain the insured's cooperation . . . and that the attitude of the insured, after his cooperation was sought, was one of willful and avowed obstruction.

Id. (citations omitted). Scottsdale has failed to demonstrate in its motion and supporting materials that such efforts were made by it toward Osting concerning the defense of Barbara Murray's pending suit as to permit the entry of a summary judgment in its favor on this ground.

The insurance policies issued by Scottsdale to Osting provide that:

[T]he insured shall cooperate with the company and upon the company's request, assist in making settlements, in the conduct of suits . . . and the insured shall attend hearings and trials and assist in securing and giving evidence and obtaining the attendance of witnesses.

Although there may be some evidence, as set forth in the affidavit of James M. Nuzum, a claims adjuster for Scottsdale, to support its contention that Osting did not cooperate in the defense of *Peter Murray, et al.*'s suit against her, Scottsdale has offered little or no evidence to support a finding that, as a matter of law, Osting failed to cooperate in the defense of Barbara Murray's suit. Osting died approximately six months after Barbara Murray served her notice of claim on her, and, aside from the inadmissible affidavit of attorney Philip M. Coffin, III, *see infra* note 1, Scottsdale's argument focuses almost entirely on the facts supposedly developed in the *Peter Murray, et al.* suit. Barbara Murray's suit remains in an early stage, with little or no discovery having been conducted by the parties, so it is problematic for Scottsdale to claim that, because of Osting's prior actions in a suit that actually was litigated to a final judgment, it need not defend or indemnify against this suit. Also, due to Osting's death at an early stage of the proceedings, Scottsdale faces a difficult hurdle in proving, if required, that it has been prejudiced by Osting's actions. This argument is unpersuasive.

Scottsdale's alternative argument in support of its motion is that no coverage exists for Osting's actions because they fall within a specific policy exclusion for "any dishonest, fraudulent, criminal or malicious act or omission" Scottsdale points out that during the *Peter Murray, et al.* trial, evidence was presented showing that Osting falsified her credentials, falsely reported the substance of her conversations with Maine's Department of Human Services, likely fabricated reported disclosures by the Murray children that their father had molested them, and maliciously pursued the revocation of Peter Murray's parental rights even after he was vindicated by a panel of psychologists.

I again conclude that, although such facts may have been revealed in the *Peter Murray, et*

al. suit, and although such an argument may have been relevant to the issue of indemnification in that prior action, this contention appears to be largely irrelevant for purposes of Barbara Murray's pending suit. Scottsdale relies on evidence from the prior trial, but does not offer specific support regarding Osting's conduct *vis-a-vis* Barbara Murray's current claim. I cannot conclude that such evidence, if relevant, conclusively demonstrates that such conduct falls, as a matter of law, within the applicable policies' exclusions.

A review of Barbara Murray's notice of claim and subsequent complaint reveals that her allegations of negligence and professional malpractice on the part of Osting are within the risk insured against by Scottsdale, and that there is a potential basis for her recovery. *American Policyholders' Ins. Co.*, 373 A.2d at 249. The applicable policies cover those claims which "arise out of any negligent act, error or omission in rendering or failure to render professional services." "Professional services," as defined in the policy's description of hazards, appears to exclude anything other than alcohol and drug abuse counseling. I thus conclude that a duty to defend the Estate on the part of Scottsdale exists in this case.

I do not decide, however, that a duty to indemnify on the part of Scottsdale necessarily exists with respect to Murray's claim, concluding that such a duty will depend on the actual facts or legal theory behind the underlying action as developed against the Estate by Murray at trial. *Concord General Mut. Ins. Co. v. Hale*, 952 F. Supp. 31, 32 (D. Me. 1997) (citing *American Policyholders' Ins. Co.*, 373 A.2d at 251). It is possible, of course, that a judgment eventually may be entered in the case that Scottsdale would not be obligated to satisfy. *American Policyholders' Ins. Co.*, 373 A.2d at 250. For the time being, however, Scottsdale has failed to demonstrate that there exists no legal or factual basis which could be developed at a trial that

would obligate it to pay under the policies it issued to Osting. *U.S. Fidelity & Guar. Co.*, 521 A.2d at 303. Finally, I do not reach the issue, not briefed by Scottsdale but enumerated in its complaint, relating to the amount of liability coverage that may be available should Murray's suit prove successful. As discussed *infra*, Pt. III.B, I believe it premature to declare the amount of coverage that may be available to satisfy a potential judgment. Accordingly, I recommend that the Court deny Scottsdale's motion for a summary judgment.

B. Barbara Murray's motion for a summary judgment

For the same reasons she opposed Scottsdale's motion for a summary judgment, Barbara Murray contends that she is entitled to a summary judgment in her favor on the complaint. She contends that by defending the *Peter Murray, et al.* suit against Osting, Scottsdale has waived any claim that it is not obligated to defend and indemnify any other action against the Estate, and should be estopped from attempting to argue so now. She also claims that she is entitled to a summary judgment based on the provisions of Maine's reach-and-apply statutes, 24-A M.R.S.A. §§ 2903, 2904 (1990). Finally, she contends that the Court should determine that, based on the language of the applicable policies, between \$1 million and \$3 million are available to satisfy a possible judgment in her favor. The Estate takes no position on her motion.

Murray first contends that the doctrines of waiver and estoppel apply to this case. Murray maintains that because Scottsdale defended Osting in the *Peter Murray, et al.* suit, and in view of the fact that it paid in full the \$850,000 judgment rendered therein, Scottsdale waived its right to deny a defense and coverage in this case, and should be estopped from doing so.

"Waiver is the voluntary and knowing relinquishment of a right, . . . and may be shown

by a course of conduct signifying a purpose not to stand on a right, and leading, by a reasonable inference, to the conclusion that the right in question will not be insisted upon." *Department of Human Servs. v. Brennick*, 597 A.2d 933, 935 (Me. 1991) (internal quotations and citations omitted). "[E]stoppel . . . is concerned with essentially objective factors [and] flows from the actual consequences produced by the conduct of A upon B regardless of whether A subjectively intended the consequences, and which resulted because, objectively evaluated, B has justifiably relied upon A's conduct." *Id.* (internal quotations and citation omitted).

Although I conclude that Scottsdale must defend the Estate against Barbara Murray's claim, *see* discussion *infra*, Pt. III.A, I do so for reasons apart from Murray's contentions with respect to the equitable doctrines of waiver and estoppel. Contrary to Murray's contention, I conclude that she has failed to generate sufficient evidence to support a finding that, as a matter of law, Scottsdale waived its right to deny coverage in this matter. "Whether a party has waived a contractual right is a question of fact." *Williams v. Ubaldo*, 670 A.2d 913, 916 (Me. 1996) (citation omitted). Murray offers little evidence to meet her burden of proving this affirmative defense, other than to point out that Scottsdale defended and paid the judgment in the *Peter Murray, et al.* case. Because Scottsdale denies that its subjective intent was to relinquish the right, and in view of the fact that it supports this denial with the Nuzum affidavit, Murray must offer more than mere allegations to show there remains no issue of Scottsdale's true intent here. This she has failed to do, and for this reason, summary judgment is inappropriate on the waiver issue specifically. *See Tondreau v. Sherwin & Williams Co.*, 638 A.2d 728, 730 (Me. 1994) (summary judgment inappropriate where issue regarding intent of parties exists).

Murray's contention with respect to the doctrine of equitable estoppel also should fail. In

order to make out such an affirmative defense, Murray must show: (1) that Scottsdale engaged in unreasonable conduct, and (2) that Murray reasonably relied on that conduct to her detriment. *Roberts v. Maine Bonding & Cas. Co.*, 404 A.2d 238, 241 (Me. 1979). Murray has failed to demonstrate that Scottsdale's conduct in defending the *Peter Murray, et al.* litigation and in eventually satisfying the judgment therein was unreasonable. Murray also has failed to show that any fraudulent or misleading conduct on the part of Scottsdale occurred. Finally, she has failed to demonstrate how Scottsdale induced her to rely on the conduct to her own detriment. *Id.* at 241. No factual showing of detrimental reliance being made, I recommend that the Court deny a summary judgment on this ground, as well.

Murray also contends that the language of Maine's reach-and-apply statutes mean that she is entitled to a judgment as a matter of law. This argument is misplaced, however. Maine's reach-and-apply statutes provide for a civil action by a judgment creditor against a judgment debtor's insurer to reach and apply insurance money. *State Farm Mut. Auto. Ins. Co. v. Lucca*, 838 F. Supp. 670, 672 (D. Me. 1993). 24-A M.R.S.A. § 2903 applies to insurers who insure persons against "accidental loss or damage on account of personal injury or death or on account of accidental damage to property" 24-A M.R.S.A. § 2904 applies "[w]hensoever any person, . . . recovers a final judgment against any other person for any loss or damage specified in section 2903," Considering the procedural posture of Murray's claim, the reach-and-apply statutes appear to be irrelevant to the present case considering that, among other things, Murray is not yet a judgment creditor. A summary judgment should be denied on this ground, as well.

Finally, Murray contends that because the various policies issued by Scottsdale over the

years to Osting cover her claim, she is entitled to a declaration by the Court that, if successful in her suit, she will be entitled to a minimum recovery of \$1 million and a potential recovery of \$3 million. Relying on the language of the professional liability policies covering Osting in 1991, 1992, and 1993, Murray contends that her claim is a separate one within the policies' definitions, and that she will be entitled to at least \$1 million recovery thereunder.² In response, Scottsdale maintains that even if the policies in question do cover Murray's claim, it will at most be liable for a payment of \$1 million.

Because I conclude that it is premature to declare whether Scottsdale must indemnify against Murray's suit, I think it inappropriate, if not impossible, to decide this issue at this juncture. The parties have offered limited evidence and argument in support of their respective positions on this important issue of law, and it appears likely that the Court will need to look to the cause of the injury to determine whether there are multiple occurrences or simply multiple injuries from one occurrence in her case. *Honeycomb Systems, Inc. v. Admiral Ins. Co.*, 567 F. Supp. 1400, 1405 (D. Me. 1983). Resolution of the issue appears best reserved for a later determination, if necessary. In my estimation, Murray's claim for a declaration as to the precise coverage potentially available for her claim should be denied at this time.

² The language of the policies concerning coverage states as follows:

**COVERAGE SUMMARY/DECLARATION
LIMITS OF LIABILITY**

\$1,000,000	Each Claim	This is the most the Company will pay for damages because of each claim or suit.
\$3,000,000	Aggregate	This is the Company's total limit of liability for all damages, subject to the provision respecting each claim.

Although I conclude that Scottsdale must defend the Estate against Murray's suit, I recommend that the Court deny Murray's motion for a summary judgment based on the specific contentions she raises in her motion. Thus, I recommend that her motion be granted in as much as it seeks an adjudication that Scottsdale must defend the Estate against her action, but denied as to all other material respects.

C. *Lorenz and Keefe's motion for a summary judgment*

The intervenors, Drs. John R. Lorenz and John Keefe, move for a summary judgment in their favor based on their complaint; they also move for a summary judgment against Scottsdale based on Scottsdale's complaint. They contend that Scottsdale must defend and indemnify the Estate because the policies Scottsdale issued to Osting cover their claim based on tortious conduct which arose out of Osting's professional relationship with the Murray children.³ Finally, Lorenz and Keefe claim that the policy coverage should be construed by the Court as to permit a recovery of \$1 million to \$3 million for their claim. The Estate takes no position on the motion, while Barbara Murray supports it.

As stated previously, an insurer's duty to defend is determined by the allegations contained within the four corners of the complaint. *American Policyholders' Ins. Co.*, 373 A.2d at 249. Lorenz and Keefe contend that Osting's complaint to the board contained defamatory statements about them as professionals, was grossly negligent, and was submitted in bad faith. Defamation consists of: (1) a false and defamatory statement concerning another; (2) an

³ Lorenz and Keefe are licensed clinical psychologists who commenced an action against Osting in Maine Superior Court in November 1995. Their complaint seeks damages for defamation allegedly committed by Osting when she filed a complaint against them with the state licensing board for psychologists.

unprivileged publication to a third party; (3) fault amounting at least to negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. *Lester v. Powers*, 596 A.2d 65, 69 (Me. 1991). A communication is defamatory "if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Bakal v. Weare*, 583 A.2d 1028, 1029 (Me. 1990).

After a review of the summary judgment record and the cases cited by the parties, I conclude that Lorenz and Keefe's complaint fails to state facts that would bring the claim of damage within the policy coverage. *American Policyholders' Ins. Co.*, 373 A.2d at 249. Although I agree with the intervenors' contention that defamation can be based on negligent conduct, *see Lester*, 596 A.2d at 69; Restatement (Second) of Torts §§ 577, 580B, comments g, h (1977), Osting's conduct in filing a complaint with the board simply does not appear to have "arise[n] out of any negligent act, error or omission in rendering or failure to render professional services," as required by the policy.

Osting's conduct does not appear to be covered by the policy in view of my determination that her complaint to the board was not made as part of any *professional* service rendered to a patient. "Professional services" are defined in the policy as excluding anything other than alcohol and drug abuse counseling. Osting's complaint to the board simply does not appear to fall within the definition of "professional services" as commonly understood or as other courts have defined the term. *Brackett v. Middlesex Ins. Co.*, 486 A.2d 1188, 1190 (Me. 1985) (policy language must be construed according to its plain and commonly accepted meaning); *see also Usner v. Strobach*, 591 So. 2d 713, 728 (La. App. 1991); *Inglewood Radiology Med. Group, Inc.*

v. Hosp. Shared Servs., 266 Cal. Rptr. 501, 503 (Cal. App. 2d 1989); *Buckner v. Physicians Protective Trust Fund*, 376 So. 2d 461, 463-464 (Fla. Dist. Ct. App. 1979) (all discussing definitions of terms similar to "professional services" or "arising out of" in context of professional liability insurance coverage). There thus does not appear to exist a legal or factual basis, which could be developed at trial, that would obligate the insurer to pay under the policy. *U.S. Fidelity & Guar. Co.*, 521 A.2d at 303. Finally, for the same reasons discussed above regarding Barbara Murray's motion, *see* discussion *infra* Pt. III.B, I recommend that the Court not find that a duty to indemnify exists as a matter of law at this time. Because I so conclude, the intervenors' contention regarding the actual limits of the policy is not reached. Accordingly, I recommend that the Court deny the intervenors' motion for a summary judgment based both on their complaint and on Scottsdale's complaint.

D. Scottsdale's second motion for a summary judgment

Scottsdale moves for a summary judgment against Lorenz and Keefe based on its complaint, contending that there is no coverage under the policy for their claim concerning defamation. The Estate takes no position on the motion. For the reasons discussed above concerning the intervenors' motion, *see* discussion *infra* Pt. III.C, I recommend that the Court grant Scottsdale's motion.

As discussed above, I conclude as a matter of law that the statements made by Osting to the state licensing board about Lorenz and Keefe did not arise from the rendering of any professional service and, thus, do not fall within the policy's coverage. The record reveals that Osting had concluded her professional involvement with the Murray children, and her letter to the board about the professional abilities of Lorenz and Keefe touched upon a number of cases

apart from the Murray case. I agree with Scottsdale's reliance on *Niedzielski v. St. Paul Fire & Marine Ins. Co.*, 589 A.2d 130 (N.H. 1991), and its statement that "professional liability coverage is determined, not by the professional status of the actor, but by the nature of the tortious act." *Id.* at 132. The mere fact that Osting was a licensed substance abuse counselor and registered nurse at the time she wrote the letter does not, in and of itself, mean that such conduct falls within the policy's coverage, especially in view of my determination that the policy was meant to insure against claims arising from Osting's substance abuse counseling only. Contrary to the intervenors' contention, I do not find the language of the policy to be ambiguous on this matter, and thus believe the Court need not construe the policy against the insurer. *Golen Rule Ins. Co.*, 45 F.3d at 516. Reasonable persons would not define "professional services" as including Osting's conduct in writing to a state licensing board a letter containing defamatory statements against Lorenz and Keefe. *Niedzielski*, 589 A.2d at 133.

Scottsdale's alternative argument in support of its motion is that because Osting's statements to the board were, according to the intervenors' own complaint, dishonest and malicious, their claim falls within the exclusion clause of the policy. As noted previously, the applicable policy excludes coverage for "any dishonest, fraudulent, criminal or malicious act or omission of the insured." Although this contention appears to have some merit, I believe Scottsdale's stronger argument is that the policy simply does not insure against the statements made by Osting outside of her counseling. In any event, I recommend that the Court grant Scottsdale's motion for a summary judgment against the intervenors.

IV. Conclusion

For the foregoing reasons, I recommend to the Court that it instruct the Clerk to enter a judgment as follows: The plaintiff, Scottsdale's, motion for a summary judgment (Docket # 26) against the defendant, the Estate, and against the party-in-interest, Barbara Murray, is **DENIED**. Scottsdale has a duty to defend the Estate against Barbara Murray's action. That portion of Scottsdale's complaint seeking a declaration by the Court on its duty to indemnify, and that portion seeking a declaration with respect to the amount of coverage that is available to satisfy future judgments, is **DISMISSED WITHOUT PREJUDICE**. So much of Barbara Murray's motion for a summary judgment (Docket # 41) against Scottsdale seeking a declaration that Scottsdale must defend the Estate against her suit is **GRANTED**, but her motion is **DENIED** as to all other material aspects. The intervenors, Lorenz and Keefe's, motion for a summary judgment (Docket # 69) against Scottsdale is **DENIED**. Scottsdale's motion for a summary judgment against Lorenz and Keefe (Docket # 77) is **GRANTED**. Scottsdale has no duty to defend or indemnify the Estate against Lorenz and Keefe's claim.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Eugene W. Beaulieu
United States Magistrate Judge

Dated on October 30, 1997.