

ORIGINAL

IN THE SUPREME COURT OF OHIO

Paula Eastley, Administrator of
The Estate of Steven Hieneman

Plaintiff-Appellant,

v.

State Farm Fire and Casualty Company

Defendant-Appellee.

Supreme Court
Case No.: 11-0605

On Appeal from the Scioto
County Court of Appeals
Fourth Appellate District
Court of Appeals
Case No. 2009 CA 3309

**MEMORANDUM OF APPELLEE STATE FARM FIRE AND CASUALTY COMPANY
IN OPPOSITION TO JURISDICTION**

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I. THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST

The Ohio Supreme Court should not accept review of this case because it involves a common insurance policy exclusion that has been routinely applied in Ohio and other jurisdictions.

This appeal involves the routine application of a common insurance policy exclusion that has been applied in Ohio and other jurisdictions consistently with the way the Court of Appeals applied it in this case. The Court of Appeals applied a “professional services” exclusion in a standard liability policy to exclude claims against the insured. The application of this exclusion raises no novel legal theory or issue, and does not implicate any great public interest. Rather, the case is one of many in which the court applied a common policy exclusion under well settled insurance construction principles.

State Farm issued a general liability insurance policy – not a medical malpractice policy -- to Defendant Denise Huffman. She owned Tri-State Healthcare, a pain management clinic, which employed Paul Holland Volkman, M.D. as an independent contractor. Steven Hieneman, Plaintiff’s decedent, died at the clinic from an overdose of pain medication. At trial, the jury found that Hieneman died as a result of Dr. Volkman's professional negligence.

State Farm’s Policy contained a professional services exclusion, which excluded coverage for “bodily injury, property damage or personal injury due to rendering or failure to render any professional services or treatments. This includes but is not limited to: . . . d. medical, surgical, dental, x-ray, anasthetical or nursing services or treatments, but this exclusion only applies to an insured who is engaged in the business or occupation of providing any of these services or treatments.” Since

Hieneman's death was due to Dr. Volkman's negligence in providing medical services, the Court of Appeals applied the exclusion.

As is demonstrated below, there is nothing unique about the application of this exclusion to the facts at hand. Ohio and many other courts have applied this exclusion to derivative claims against the principals of the physician who committed the medical malpractice. While Plaintiff attempts to create "great general or public interest" by highlighting the devastating effects of the illegal prescription drug trade, particularly on Scioto County, this is merely incidental to the well settled legal issue involved in State Farm's coverage action. The epidemic of illegal prescription drugs, and the effects of "pill mills" in the community, have nothing to do with the exclusion or the insurance coverage issue before this Court.

The decision of the Court of Appeals rests on established legal principles and is supported by authority in Ohio and other jurisdictions. Further, the Appeals decision comports with the general intent and function of standard liability insurance policies. These policies are not meant to cover professional negligence, and most standard liability policies contain exclusions similar to or the same as the one contained in State Farm's Policy. Numerous courts have determined that this exclusion applies to claims against a professional and any derivative claims against the employer of the professional. Accordingly, this case is not appropriate for Supreme Court review.

II. COUNTER STATEMENT OF THE CASE AND FACTS

a. Statement of the Case

Plaintiff is the Administrator of the Estate of Steven Hieneman, who was a patient at Tri-State Healthcare, a pain management clinic owned by Denise Huffman.

Hieneman died of a narcotics overdose. The narcotics were prescribed by Paul Holland Volkman, M.D, whom Huffman hired as an independent contractor at the clinic.

Plaintiff's Amended Complaint alleged a claim for medical malpractice against Volkman, and a claim for negligence and vicarious liability against Huffman. State Farm issued a business liability policy to Denise Huffman dba Tri-State Healthcare. State Farm intervened in the negligence action, requesting a declaration that State Farm's policy did not cover Plaintiff's claims. The Trial Court bifurcated State Farm's declaratory judgment claims from the tort claims against Dr. Volkman and Huffman. The tort claims proceeded to trial, and the jury concluded that Hieneman died as a result of Dr. Volkman's professional negligence. The jury also found against Huffman on the negligence claim. The jury awarded Plaintiff \$500,000.00 against Huffman and Dr. Volkman, jointly and severally.

After trial, the Trial Court decided State Farm's declaratory judgment claims. The Trial Court granted Plaintiff's Motion for Summary Judgment and denied State Farm's Motion for Summary Judgment on the claims against Huffman, declaring that State Farm's Policy afforded liability coverage to Huffman for Hieneman's death. In a later entry corrected *nunc pro tunc*, the Trial Court granted State Farm's Motion for Summary Judgment on the claims against Dr. Volkman, finding that its policy did not afford liability to him. On appeal, the Court of Appeals overturned the judgment in favor of Plaintiff and against State Farm, holding that the professional liability exclusion barred coverage for Plaintiff's claims against Huffman.

b. Statement of Facts

Huffman established Tri-State Healthcare, a medical clinic, to treat patients suffering from chronic pain. Huffman is not a physician and has no formal medical training. She retained a physician staffing company to hire physicians for the clinic. The physicians would see patients, prescribe pain medications, and, if appropriate, refer the patients to other facilities for testing or to other physicians for treatment. Huffman engaged Dr. Paul Volkman to work at the clinic. Dr. Volkman graduated from the University of Chicago Medical School and was licensed to practice medicine in Illinois and Ohio.

Hieneman became a patient of Dr. Volkman at Tri-State Healthcare for pain management following wrist surgery. On April 20, 2005, Hieneman died as a result of a drug overdose from the acute combined affects of Oxycodone, Diazepam, and Alprazolam. Dr. Volkman had prescribed these drugs to Hieneman the day before he died.

Huffman and Dr. Volkman were criminally indicted in the United States District Court for the Southern District of Ohio. The indictment alleges that Huffman and Dr. Volkman conspired to knowingly, intentionally, and unlawfully distribute and dispense narcotics, causing death, addiction, and serious bodily injury to a number of patients, including Steven Hieneman. In essence, the Indictment alleges that Huffman and Dr. Volkman ran a drug mill, illegally prescribing drugs to addicts for no legitimate medical purpose.

State Farm's Policy excludes coverage for "bodily injury, property damage or personal injury due to rendering or failure to render any professional services or

treatments. This includes but is not limited to: . . . d. medical, surgical, dental, x-ray, anesthetic or nursing services or treatments, but this exclusion only applies to an insured who is engaged in the business or occupation of providing any of these services or treatments.” Plaintiff asserted a medical negligence claim against Dr. Volkman. Plaintiff initially claimed that Huffman was vicariously liable for Hieneman’s death as a result of Dr. Volkman’s conduct. But after discovering that Huffman did not maintain medical malpractice insurance for Tri-State Healthcare, Plaintiff abandoned her vicarious liability claims. Plaintiff amended the Complaint to assert a direct claim of negligence against Huffman. In the medical setting, Ohio recognizes that an owner of a medical facility must exercise reasonable care in the selection and retention of independent-contractor medical staff.¹

At trial, Dr. Russell Stevens, a medical doctor, board certified in anesthesiology and pain medicine, testified that Dr. Volkman had improperly prescribed a fatal dose of drugs to Hieneman. He testified that Dr. Volkman breached the standard of care in treating Hieneman and that this breach resulted in Hieneman’s death. Huffman testified that she employed a physician staffing company to hire physicians for the clinic. She admitted, however, that she did not monitor the professional activities of the doctors once hired. The jury returned verdicts against Dr. Volkman and Huffman. The jury concluded that Dr. Volkman committed malpractice in the rendering of his professional services, causing the death of Steven Hieneman. The jury also found Huffman negligent.

¹ *Albain v. Flower Hospital* (1999), 50 Ohio St.3d 251, 257-58, 553 N.E.2d 1038, 1045, overruled on other grounds *Clark v. Southview Hops. & Family Health Ctr.* (1994), 68 Ohio St.3d 435, 628 N.E.2d 46.

State Farm then requested summary judgment on its declaratory judgment claims against Huffman and Dr. Volkman. State Farm sought summary judgment against Huffman based on the “professional services” exclusion. Although the Trial Court granted summary judgment to State Farm on its claim against Dr. Volkman, the Trial Court denied summary judgment to State Farm on its claim against Huffman and granted Plaintiff’s Motion for Summary Judgment. The Court declared that State Farm’s policy afforded liability coverage to Huffman for Hieneman’s death. The Court of Appeals reversed this decision, and found that the professional liability exclusion applied to Plaintiff’s claims against Huffman.

III. RESPONSE TO PLAINTIFF’S FIRST PROPOSITION OF LAW: THE PROFESSIONAL SERVICES EXCLUSION APPLIES TO DERIVATIVE CLAIMS AGAINST PRINCIPALS IF THE INJURIES ARE DUE TO THE PROFESSIONAL SERVICES.

State Farm’s Policy excludes coverage for “bodily injury, property damage or personal injury due to rendering or failure to render any professional services or treatments. This includes but is not limited to: . . . d. medical, surgical, dental, x-ray, anesthetic or nursing services or treatments, but this exclusion only applies to an insured who is engaged in the business or occupation of providing any of these services or treatments.” Tri-State Healthcare was in the business of providing medical care to patients, so the policy excludes claims for injury “due to” medical services or treatments provided by the clinic. “Due to” means “caused by.”² If an injury is caused by medical services or treatment provided by the clinic, the exclusion is triggered.

² Blacks Law Dictionary, 501 (6th ed., 1990); *United States Fidelity and Guaranty Co. v. St. Elizabeth Medical Center* (1998), 129 Ohio App.3d 45, 53, 716 N.E.2d 1201, 1206.

The jury in this case determined that Hieneman's death was "caused by" Dr. Volkman's medical treatment of Hieneman. Thus, the exclusion applies even though the service and treatment were provided by a third-party contractor, Dr. Volkman.³ The exclusion applies even if the claims against Huffman are couched in terms of negligent hiring, retention, training, or supervision, or in terms of inadequate policies and procedures.⁴

Ohio law requires the application of the exclusion in this context. In *United States Fidelity and Guaranty Company v. St. Elizabeth Medical Center*,⁵ the court held that a professional services exclusion applied to direct negligence claims against a hospital. In that case, Dr. Burt performed unorthodox surgeries on a number of women during the 1970's and 1980's. Lawsuits were brought against Dr. Burt and St. Elizabeth Medical Center ("SEMC"). The suits alleged that SEMC was negligent in continuing Dr. Burt's staff membership and hospital privileges and in permitting Dr. Burt to perform experimental procedures at the hospital.

The USF&G policy issued to SEMC included a professional services exclusion nearly identical to State Farm's exclusion. SEMC argued that the negligence claims against SEMC were independent and distinct from the malpractice claims against Dr. Burt, so the exclusion did not apply. The court disagreed. Regardless of how the claims against SEMC were couched, the injuries were "due to medical services or treatment." "The plain language of the exclusion requires only that the injury be caused by the

³ *St. Elizabeth Medical Ctr.*, 129 Ohio App.3d at 53, 716 N.E.2d at 1207.

⁴ *Id.*

⁵ *Id.*

rendering or failure to render medical or surgical treatment or services. It is not relevant that the physician who renders those services or treatment is a ‘third-party contractor.’”⁶

If the injury caused by SEMC had been independent of the injury caused the rendering of professional services, then the exclusion would not apply. The injury caused by SEMC’s alleged negligence, however, was not independent of the loss caused by the alleged malpractice. The claim against SEMC was dependent on Dr. Burt’s negligence. If Dr. Burt had not been negligent in performing medical services, there would be no loss. Without Dr. Burt’s malpractice, there would be no claim against SEMC.

As in *St. Elizabeth Medical Center*, State Farm’s professional services exclusion applies even though the professional services were performed by a third-party contractor, Dr. Volkman. Moreover, like the claims against SEMC, the negligence claim against Huffman is dependent on the malpractice claim against Dr. Volkman. Hieneman died as a result of an overdose of drugs prescribed by Dr. Volkman. If Dr. Volkman had not prescribed these drugs, Hieneman would not have died. There would be no wrongful death claim against Huffman.

Plaintiff has argued that the exclusion does not apply to Huffman because she is not medically trained and performed no medical services. The exclusion, however, is triggered if an injury is “due to” professional services. Huffman did not have to perform the professional services for the exclusion to apply.⁷ The plain language of the exclusion

⁶ Id.

⁷ Id.

requires only that the injury be caused by the rendering or failure to render medical or surgical treatment or services. It does not matter that the services or treatment were rendered by a 'third-party contractor.'⁸

Plaintiff has also argued that the "commercial activities," or business side of Tri-State Healthcare is distinct from the side of the business that supplies professional services. Commercial activities include "such tasks as securing office space, hiring staff, paying bills and collecting on accounts receivables."⁹ Plaintiff has contended that the claim against Huffman arose out of these commercial activities, so the professional service exclusion is not triggered. This is not true. Securing office space, hiring staff, paying bills and collecting on accounts receivables did not kill Hieneman. Dr. Volkman's malpractice killed Hieneman. The negligence claim against Huffman stems from her duty to exercise reasonable care in the selection and retention of independent-contractor medical staff.¹⁰ The claim against Huffman is dependent on the malpractice claim against Dr. Volkman. If Dr. Volkman had not prescribed these drugs, Hieneman would not be dead. Without Dr. Volkman's negligence, there would be no wrongful death claim against Huffman.

Plaintiff further argues that because Huffman could not be defined as a "professional" under Ohio law, then claims against her cannot be excluded by the professional services exclusion. This defies logic. It is the nature of the claims that

⁸ Id.

⁹ See Plaintiff's Memorandum, p. 11.

¹⁰ *Albain v. Flower Hospital* (1990), 50 Ohio St. 3d 251, 257-58, 553 N.E.2d 1038, 1045, overruled on other grounds; *Clark v. Southview Hosp. & Family Health Ctr.* (1994), 68 Ohio St.3d 435, 628 N.E.2d 46.

define the application of the exclusion, not what the particular defendant uses to describe herself. It well established law in numerous jurisdictions that the professional services exclusion is triggered whenever an injury is caused by the rendering of professional services, even if the claim is framed as negligent hiring, retention, training or supervision, or in terms of inadequate policies or procedures.¹¹

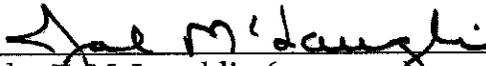
Plaintiff is seeking to transform State Farm's business policy into a medical malpractice policy. But a medical malpractice policy covers claims related to professional services and treatment provided by the clinic, but only claims related to professional services and treatment. The liability policy is intended to cover claims in connection with the business, aside from the professional services, such as a patient slipping and falling while entering the clinic. By design, malpractice policies and business liability policies cover mutually exclusive risks. Plaintiff's attempt to secure medical malpractice coverage from a standard liability policy should be rejected.

¹¹ See *Miller's Casualty Company of Texas v. Flores* (N.E. 1994), 117 N.W. 712, 876 P.2d 227 (if an injury results from the rendering of professional services, then the exclusion applies regardless of the legal theory of liability pursued; also, hiring, training, and retaining medical personnel is, in and of itself, a professional service, and thus injuries arising from the negligent hiring, training, and retaining of medical personnel is excluded); *Duncanville Diagnostic Center, Inc. v. Atlantic Lloyds Insurance Company*, (Tex. Civ. App., 1994), 875 S.W.2d 788 (court held that a young girl's death could not have resulted from the negligent hiring, training, supervision, or the negligent failure to institute adequate policies and procedures without the negligent rendering of professional medical services); *American Rehabilitation and Physical Therapy v. American Motorists, Insurance Company*, (Pa. Super. 2003), 829 A.2d 1173, reversed on other grounds (2004), 578 Pa. 154, 849 A.2d 1202 (court held that training, supervising, and monitoring employees who assist in medical treatment to patients is integral to and part of these medical services, so, the claims were excluded from coverage); *National Fire Insurance Company of Hartford v. Kilfoy* (Ill. App. Ct., 2007), 375 Ill. App.3d 530, 874 N.E.2d 196 (the court held that hiring, supervising, and administrating the business fell within the definition of professional services and, therefore, was excluded from coverage); *Rayburn v. State Farm Fire and Casualty Company*, Case No. CV-05-05479RLB, 2006 WL 162646 (W.D. Wash., Jan. 20, 2006) (the court held that where an exclusion precluded coverage of a claim, the exclusion also excludes coverage of dependent claims); *State Automobile Mutual Insurance Company v. Alpha Engineering Services, Inc.*, (W.Va., 2000), 208 W.Va. 713, 542 S.W.2d 876, (West Virginia Supreme Court concluded that a professional services exclusion excludes claims based on negligent hiring and retention, finding that as long as the injury is caused by the rendering or failure to render professional services, the professional services exclusion applies regardless of the legal theory of liability employed).

IV. CONCLUSION

Based on the above arguments, State Farm respectfully requests this Court to decline to accept jurisdiction of this appeal.

Respectfully submitted,



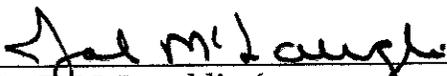
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served upon the following by U.S. mail, postage prepaid, on this the _____ day of May, 2011 to :

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