

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**
Case No. 10-20039-CIV-UNGARO

DIAMOND STATE INSURANCE
COMPANY,

Plaintiff,

v.

HIS HOUSE, INC., *et al.*,

Defendants.

ORDER ON MOTION FOR SUMMARY JUDGMENT

THIS CAUSE is before the Court on Plaintiff's Motion for Summary Judgment.

(D.E. 68.)

THIS COURT has considered the Motion and the pertinent portions of the record and is otherwise fully advised in the premises.

I. Procedural Background

On January 14, 2009, Defendants Jossalyn and Michael Crawford, as personal representatives of the Estate of M.C., (the Crawfords) filed a wrongful-death lawsuit in state court against Defendant His House, Inc. (His House) relating to the death of their infant son, M.C. Plaintiff Diamond State Insurance Company (Diamond State), an insurer of His House, filed the instant action seeking a declaration that it owes no duty to defend or indemnify His House for the claim and now moves for a summary judgment. The Crawfords and His House oppose the Motion.

II. Factual Background

The following facts are undisputed. On February 6, 2007, the Broward Department of Children and Families removed M.C. from Jossalyn Crawford's home.¹ (D.E. 1 p. 71.) M.C. was ultimately placed in the care and custody of His House and its agent, foster-care-mother Kristen Glaspy. (D.E. 1 pp. 71–72.) Glaspy fed M.C. around 12:00 a.m. on February 15, 2007 and last saw her alive around 12:30 a.m. (D.E. 1 p. 72.) Around 5:00 a.m., Glaspy found M.C. deceased in bed. (D.E. 1 p. 72.)

His House immediately notified the police. (D.E. 70-1 p. 22; 70-3 p. 62.) And the Miami-Dade Medical Examiner Department began an investigation into the cause of M.C.'s death. (D.E. 70-2 p.2) In July 2007, His House received a copy of the Medical Examiner's Report. (D.E. 70-1 p. 14.) The report concluded the cause of death was an accidental suffocation by blanket. (D.E. 70-2 p. 2.)

After receiving the report in July 2007, His House anticipated a claim and reported the incident to its insurers through its insurance broker.² (D.E. 70-1 pp. 25, 40–43.) In October 2007, His House learned that ChildNet, Inc. (another entity involved in M.C.'s

¹ The facts regarding M.C.'s death are taken from the allegations of the Crawfords' amended complaint in the underlying state court action. The allegations are in accord with the undisputed factual record. (D.E. 70-4 pp. 35–41.)

² Almost a year after His House initially notified its insurers, counsel for His House sent a letter to an additional insurer, New Hampshire Insurance Company, which referenced the notice sent in July 2007 and stated: "A claim was anticipated." (D.E. 70-1 pp. 42–44; 70-2 p. 27.) And when asked, in her deposition and in reference to this letter, whether His House "anticipated a claim" when it notified its insurers in July 2007, His House's corporate representative answered "yes." (D.E. 70-1 p. 44.)

care) had received a notice of intent to sue from the representatives of M.C.'s estate. (D.E. 70-1 pp. 30–32.) His House received a copy of a letter sent from the attorney representing M.C.'s estate to ChildNet, Inc. and the Department of Children and Families³ which stated: “This correspondence is to advise you that litigation in this matter is imminent and that you have a duty to preserve all evidence that is in your possession” (D.E. 70-1 pp. 50–51; 70-2 pp. 41–44.)

Around a year after first notifying its insurers, His House decided to switch insurance brokers and insurers and executed an application for liability coverage from Diamond State on June 30, 2008. (D.E. 70-1 pp. 43–44 & 68; 70-17.) During the application process, His House informed Diamond State of the incident involving M.C.'s death. (D.E. 70-1 pp. 68–70.) No evidence suggests, however, that Diamond State represented its policy would cover claims arising from the incident.

Diamond State approved the application and issued policy number SSB0583939 to His House. (D.E. 68-1.) The policy included both professional liability and commercial general liability coverage provisions, which state the following in pertinent part:

PROFESSIONAL LIABILITY DECLARATIONS

* * *

Item 3. Policy Period: From: June 30, 2008 To: June 30, 2009

³ The letter states “M.C. was in the custody and care of DCF and/or ChildNet at the time of her death.” (D.E. 70-2 p. 42.) M.C.'s estate was apparently not yet aware of His House's involvement

* * *

Item 7. Retroactive Date: October 22, 2003

* * *

SECTION 1 - PROFESSIONAL LIABILITY COVERAGE

1. Insuring Agreement

We will pay those sums that the insured becomes legally obligated to pay as “compensatory damages” as a result of a “wrongful act.” This insurance applies to injury only if a “claim” for damages to which no other insurance applies, because of the injury is first made against the insurer and reported to us during the “policy period.” This insurance does not apply to injury caused by a wrongful act that ... was committed before the Retroactive Date shown in the Declarations or after the “policy period.”

* * *

2. Exclusions

This insurance does not apply to:

* * *

- s. Any “claim”, “suit” or “wrongful act” that might result in a “claim” or “suit”, of which any insured had knowledge or could have reasonably foreseen, at the signing date of the application for this insurance.

* * *

SECTION VI - DEFINITIONS

* * *

- 4. “Claim” means a written demand upon the insured for “compensatory damages”, including, but not limited to, the service of “suit” or institution of arbitration proceedings against the insured. “Claim” includes reports of accidents, acts, errors, occurrences, offenses or omissions which may give rise to a “claim” under this policy. ...

* * *

11. "Suit" means a civil proceeding in which damages for injury to which this insurance applies are alleged. "Suit" includes an arbitration proceeding alleging such damages to which you must submit or submit with our consent.
12. "Wrongful act" means any act, error or omission in the furnishing of professional social services. It includes the furnishing of food, beverages, medications or appliances in connection with those services. All "wrongful acts" committed in the furnishing of professional social services to any one person will be considered own "wrongful act." ...

* * *

COMMERCIAL GENERAL LIABILITY COVERAGE

* * *

SECTION 1 - COVERAGES

COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement
 - a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" ... to which this insurance applies.

* * *

- b. This insurance applied to "bodily injury" ... only if:

* * *

- (1) The "bodily injury" occurs during the policy period

(D.E. 68-1.)

On January 14, 2009, the Crawfords filed the underlying lawsuit. The parties

dispute whether the claims against His House are covered under the policy.

III. Summary Judgment Standard

Summary judgment is authorized under Federal Rule of Civil Procedure (“Rule”) 56 only when the moving party meets its burden of demonstrating that “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.” When determining whether the moving party has met this burden, the court must view the evidence and all factual inferences in the light most favorable to the non-moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Rojas v. Florida*, 285 F.3d 1339, 1341-42 (11th Cir. 2002).

The party opposing the motion may not simply rest upon mere allegations or denials of the pleadings; after the moving party has met its burden of proving that no genuine issue of material fact exists, the non-moving party must make a sufficient showing to establish the existence of an essential element to that party’s case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrell*, 477 U.S. 317 (1986); *Poole v. Country Club of Columbus, Inc.*, 129 F.3d 551, 553 (11th Cir. 1997); *Barfield v. Brierton*, 883 F.2d 923, 933 (11th Cir. 1989). If the record presents factual issues, the court must not decide them; it must deny the motion and proceed to trial.

Envtl. Def. Fund v. Marsh, 651 F.2d 983, 991 (5th Cir. 1981).⁴ Summary judgment may be inappropriate even where the parties agree on the basic facts, but disagree about the inferences that should be drawn from these facts. *Lighting Fixture & Elec. Supply Co. v. Cont'l Ins. Co.*, 420 F.2d 1211, 1213 (5th Cir. 1969). If reasonable minds might differ on the inferences arising from undisputed facts then the court should deny summary judgment. *Impossible Elec. Techniques, Inc. v. Wackenhut Protective Sys., Inc.*, 669 F.2d 1026, 1031 (5th Cir. 1982); see *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (“[T]he dispute about a material fact is ‘genuine,’ . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.”).

Moreover, the party opposing a motion for summary judgment need not respond to it with evidence unless and until the movant has properly supported the motion with sufficient evidence. *Adickes*, 398 U.S. at 160. The moving party must demonstrate that the facts underlying all the relevant legal questions raised by the pleadings or otherwise are not in dispute, or else summary judgment will be denied notwithstanding that the non-moving party has introduced no evidence whatsoever. *Brunswick Corp. v. Vineberg*, 370 F.2d 605, 611-12 (5th Cir. 1967). The Court must resolve all ambiguities and draw all justifiable inferences in favor of the non-moving party. *Liberty Lobby, Inc.*, 477 U.S. at 255.

⁴ Decisions of the United States Court of Appeals for the Fifth Circuit entered before October 1, 1981, are binding precedent in the Eleventh Circuit. See *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981).

IV. Discussion

Diamond State seeks a summary judgment declaring it owes no duty to defend or indemnify His House under the policy's professional liability or commercial general liability coverages. The parties agree Florida law governs this diversity action.

Under Florida law, the interpretation of an insurance contract is a question of law. *See James River Ins. Co. v. Ground Down Eng'g, Inc.*, 540 F. 3d 1270, 1274 (11th Cir. 2008) (citations omitted). "In interpreting insurance contracts, the Florida Supreme Court has made clear that 'the language of the policy is the most important factor.'" *Id.* (quoting *Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co.*, 913 So. 2d 528, 537 (Fla. 2005)). "Under Florida law, insurance contracts are construed under their plain meaning." *Id.* (quoting *Taurus*, 913 So. 2d at 532). "Ambiguities in policy language 'are construed against the insurer' in favor of coverage." *Id.* (quoting *Deni Assocs. of Fla. v. State Farm Fire & Cas. Ins. Co.*, 711 So. 2d 1135, 1149 (Fla. 1990)). "A contract provision is considered ambiguous if the 'relevant policy language is susceptible to more than one reasonable interpretation, one providing coverage and the other limiting coverage.'" *Id.* (quoting *Taurus*, 913 So. 2d at 532). "However, 'to allow for such a construction the provision must actually be ambiguous ... [and] courts may not rewrite contracts, add meaning that is not present, or otherwise reach results contrary to the intentions of the parties.'" *Id.* (quoting *Taurus*, 913 So. 2d at 532). "A provision is not ambiguous simply because it is complex and requires analysis." *Penzer v. Transp. Ins.*

Co., 29 So. 3d 1000, 1006 (Fla. 2010) (citations omitted).

Liability policies typically impose on an insurer both the duty to defend the insured against a claim of liability and the duty to indemnify the insured for a liability. An insurer's duty to defend is broader than its duty to indemnify. *See Jones v. Fla. Ins. Guar. Assoc. Inc.*, 908 So. 2d 435, 443 (Fla. 2005) (citations omitted). The duty to indemnify is determined by the facts adduced at trial or during discovery, but the duty to indemnify is generally determined solely by the allegations of the underlying complaint. *See id; Farrer v. U.S. Fid. & Guar. Co.*, 809 So. 2d 85, 88 (Fla. 4th DCA 2002). "Indeed, when the actual facts are inconsistent with the allegations in the complaint, the allegations in the complaint control in determining the insurer's duty to defend." *See Jones*, 908 So. 2d at 443 (citations omitted). "[H]owever, ... there are some natural exceptions to this where an insurer's claim that there is no duty to defend is based on factual issues that would not normally be alleged in the underlying complaint." *Higgins v. State Farm Fire & Cas. Co.*, 894 So. 2d 5, 10 n.2 (2004). "In such circumstances, ... the courts may entertain a declaratory action seeking a determination of a factual issue upon which the insurer's duty to defend depends." *Id.*

The Court discusses below the duties to defend and indemnify with respect to both the professional liability and commercial general liability coverages, beginning with professional liability.

A. Professional Liability Coverage

Diamond State moves for a summary judgment declaring that its policy does not extend professional liability coverage to the Crawfords' suit against His House. Diamond State offers several arguments in support of its position. The majority relate to whether the Crawfords' claim was *first* made during the coverage period, as appears to be required by the plain language of the policy. But the most compelling argument is that His House foresaw the Crawfords' claim by the time it applied for insurance from Diamond State and, therefore, that the claim is excluded from coverage, regardless of whether it falls within the temporal scope of coverage.⁵

The Court agrees that the Crawfords' claim against His House is excluded under the policy's foreseeable claim exclusion. The policy excludes from its professional liability coverage "any 'claim' ... of which any insured had knowledge or could have reasonably foreseen, at the signing date of the application for this insurance." The provision is unambiguous. *See Coregis Ins. Co. v. McCollum*, 961 F. Supp. 1572, 1579 (M.D. Fla. 1997) (holding that a similar exclusion was unambiguous). Further, the undisputed evidence demonstrates that His House could reasonably have foreseen—and,

⁵ This argument has at least two other benefits: it does not depend on facts currently being litigated in the underlying lawsuit and it does not require a determination of when the Crawfords' claim was first made—a determination which could affect coverage determinations under other policies which are not the subject of this litigation.

in fact, did foresee—the Crawfords’ claim.⁶ *See id.* (holding that a similar exclusion applied where insured “was aware of circumstances that might lead to a malpractice claim”); *Albareda, Rosso, Maluje & Nies, P.A. v. Westport Ins. Corp.*, 2008 WL 1766733 (S.D. Fla. Apr. 17, 2008). His House knew the infant was reportedly suffocated to death by a blanket while in its care and custody⁷; informed its previous insurers of the incident *because it anticipated litigation*; and received information from M.C.’s estate that litigation was imminent, all before executing the application for insurance from Diamond State on June 30, 2008. No party disputes these facts.

Nevertheless, Defendants offer several argument against the application of the exclusion. None is persuasive.

(1)

His House argues the exclusion is ambiguous because it incorporates the policy’s ambiguous definitions of both “claim” and “wrongful act.” However, none of the language with which His House takes issue is relevant to the exclusion as applied in this case. There are at least two ways in which the exclusion might have applied: (1) His House reasonably foresaw the Crawfords’ “claim” prior to signing the application for insurance or (2) His House knew of a “wrongful act” which might have resulted in the Crawfords’ “claim.” The former—which does not depend on the definition of “wrongful

⁶ The Court uses the term “claim” in this discussion as defined in the policy to mean the service of a suit for compensatory damages.

⁷ A claim could reasonably have been anticipated based on this fact alone.

act”—is satisfied in this case. Thus, His House’s attack on the definition of “wrongful act” is moot.

Similarly, His House’s particular attack on the policy’s definition of “claim” is moot. As His House correctly argues, the policy’s definition of “claim” consists of two parts. The first part defines “claim” as a “written demand upon the insured for ‘compensatory damages’, including ... the service of a ‘suit.’” In His House’s own words, this “first part is consistent with the plain meaning of the word.” (D.E. 85 p. 14.) His House only argues the second part, which expands the definition to include “reports of accidents, acts, errors, occurrences, offenses or omissions which may give rise to a ‘claim’ under the policy,” is ambiguous. But the exclusion applies in this case without reliance on that second part of the definition; what His House foresaw in this case was litigation against it, *i.e.*, a “claim” as defined in the first part of the definition.

(2)

His House argues that it had no knowledge of a claim against it prior to the application and that, by the time of the application, almost a year had passed since it had notified its previous insurers of the death with no claim being filed. The Court is unpersuaded. His House need not have known of an actual claim against it for the exclusion to apply; the exclusion clearly contemplates an insured *either* knowing *or* reasonably foreseeing a claim. And as explained above, there is no genuine issue of fact as to whether His House could reasonably have foreseen the Crawfords’ claim—a

wrongful death claim reasonably foreseeable at the time of death remains so a year later notwithstanding the mere passage of time. Under Florida law, an action for wrongful death may be brought within *two years* of death. Fla. Stat. § 95.11(4)(d).

(3)

Both the Crawfords and His House argue the exclusion should not apply because His House disclosed M.C.'s death to Diamond State during the application process. The exclusion, however, does not turn on the disclosure or non-disclosure of a foreseeable claim. The cases upon which His House relies do not concern a similar foreseeable risk exclusion, but denials of coverage under Florida Statutes § 627.409 based upon a material misrepresentation in an insurance application. *See Cox v. Am. Pioneer Life Ins. Co.*, 626 So. 2d 243, 244 (Fla. 5th DCA 1993).

Further, although Diamond State could have included a specific exclusion relating to the incident, His House cannot contend seriously that because Diamond State chose not to do so it somehow agreed to cover the incident. The plain and unambiguous language of the foreseeable claim exclusion controls, not hypothetical language the parties might have added. *See James River*, 540 F.3d at 1274. Similarly, the inclusion in the policy of a retroactive date does not provide automatic coverage for all claims emanating from acts subsequent to that date. The foreseeable claim exclusion, for instance, operates without reference to policy's retroactive date. *See Lawyers Prof'l Liab. Ins. Co. v. Dolan, Fertig & Curtis*, 524 So. 2d 677 (Fla. 4th DCA 1988) (holding similar foreseeable claim

exclusion in professional liability claims-made policy was unaffected by retroactive date).

(4)

The Crawfords argue Diamond State failed to name additional insureds ChildNet, Inc. and Our Kids of Miami-Dade/Monroe, Inc. as parties to this declaratory action and impermissibly employs evidence of claims against these non-parties in evaluating His House's coverage. The first point is irrelevant. That Child Net, Inc. and Our Kids of Miami-Dade/Monroe are not parties to this action does not affect the substantive question at hand. The second point is incorrect. Regardless of whether Child Net, Inc. or Our Kids of Miami-Dade/Monroe are additional insureds or non-parties, His House's knowledge of claims against them is probative of the applicability of the foreseeable claim exclusion. The policy may require that claims against each be considered separately, but it certainly does not prohibit Diamond State from relying on overlapping facts to deny coverage and support its legal position.

Finally, the Crawfords argue that "the issue of foreseeability is moot as the written claim ... was made during the policy period, the wrongful act occurred during the policy period, the death of M.C. occurred during the policy period, and His House, Inc.'s demand for a defense and indemnity occurred during the policy period." This argument, which completely disregards the relevant policy terms, has no basis in law or in fact,⁸ and the Court rejects it outright.

⁸ For one thing, M.C.'s death did not occur during the policy period.

Accordingly, the Court will grant summary judgment declaring that the professional liability foreseeable claim exclusion applies⁹ and that Diamond State owes no duty to defend¹⁰ or indemnify under the professional liability coverage provision with respect to the underlying claims.

B. Commercial General Liability Coverage

Diamond State moves for a summary judgment declaring that the commercial general liability coverage does not extend to the Crawfords' suit against His House. Diamond State argues summary judgment appropriate because it is undisputed that M.C.'s death occurred outside the coverage period. Neither His House nor the Crawfords contest this contention. And the Court agrees summary judgment is appropriate.

Unlike the professional liability coverage, the commercial general liability coverage is an occurrence-based coverage. That is to say that commercial general liability coverage is triggered where the "bodily injury" which gives rise to the insured's liability "occurs within the policy period." *See generally Dolan*, 433 So. 2d at 514. Here, both the underlying complaint and undisputed evidence indicate that M.C.'s death occurred on February 15, 2007. And the "policy period" did not begin until June 30,

⁹ The Court does not reach the issue of whether the Crawfords' claim falls within the temporal parameters of coverage, *e.g.*, whether the claim was first made in during the policy period.

¹⁰ In this instance, consideration of facts outside the four-corners of the underlying complaint regarding the applicability of the foreseeable claim exclusion is appropriate in determining Diamond State's duty to defend. Fact relating to whether His House foresaw the claim would not normally be alleged in the underlying complaint. *See Higgins*, 894 So. 2d at 10 n.2 (2004).

2008. Accordingly, the Court will grant summary judgment declaring Diamond State owes no duty to defend or indemnify under the commercial general liability coverage provision with respect to the underlying claims.

V. Conclusion

Diamond State is entitled to a summary judgement declaring that it owes no duty to defend or indemnify His House under the professional or commercial general liability coverage provisions of policy number SSB0583939 with respect to the Crawfords claims relating to the wrongful death of M.C.


Accordingly, it is

ORDERED and ADJUDGED that the Motion (D.E. 39) is GRANTED. The Court will separately enter its final summary judgment. It is further

ORDERED AND ADJUDGED that all remaining motions are DENIED AS MOOT. And it is further

ORDERED AND ADJUDGED that the Clerk of Court shall administratively close this case.

DONE AND ORDERED in Chambers at Miami, Florida, this 31ST day of January, 2011.



URSULA UNGARO
UNITED STATES DISTRICT JUDGE

Copies provided: counsel of record