

**COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT**

No. 2025-P-1464

Suffolk, ss.

MASSACHUSETTS GAMING COMMISSION,

Plaintiff/Appellee

v.

LANDMARK AMERICAN INSURANCE COMPANY,

Defendant/Appellant

On Appeal From a Judgment of Suffolk Superior Court

Appellant's Brief

Date: April 2, 2026

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CORPORATE DISCLOSURE STATEMENT

Appellant Landmark American Insurance Company is a wholly owned subsidiary of RSUI Indemnity Company, Inc. RSUI Indemnity Company, Inc. is a wholly owned subsidiary of RSUI Group, Inc. RSUI Group, Inc. is a wholly owned subsidiary of Alleghany Insurance Holdings, LLC. Alleghany Insurance Holdings, LLC, is a wholly owned subsidiary of Alleghany Corporation, which is a wholly owned subsidiary of Berkshire Hathaway, Inc., which is a publicly held entity.

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STATEMENT OF THE ISSUES

- I. Whether the Superior Court erred in holding that Landmark had a continuing duty to defend the Appellee in an underlying action after the Court dismissed all potentially covered claims with prejudice.
- II. Whether the Superior Court correctly held that the Regulatory Taking claim that survived the Court's dismissal of the potentially covered claims in the underlying action was unambiguously excluded from coverage by the terms of the Landmark Policy.

STATEMENT OF THE CASE

Appellant Landmark American Insurance Company (“Landmark”) appeals from the judgment of the Suffolk Superior Court entered on September 8, 2025, in favor of Appellee Massachusetts Gaming Commission (the “Commission”) on Counts I and II of the Commission’s First Amended Complaint. R.A. III at 164. Landmark also appeals from all subsidiary rulings, including the Superior Court’s February 25, 2025, Decision partially denying Landmark’s Motion to Dismiss, R.A. II at 306, and its June 2, 2025, Order granting the Commission’s Motion for Judgment on the Pleadings, R.A. III at 153. Inclusive of prejudgment interest, the Court awarded the Commission a total of \$1,622,750.19 in the September 8, 2025, Judgment. R.A. III at 164.

STATEMENT OF THE FACTS

This appeal concerns the scope of the duty to defend under a policy of insurance that was issued by Landmark to the Commission. When an underlying action was filed against the Commission, Landmark acknowledged a duty to defend, but reserved all rights as to coverage. R.A. I at 166. Subject to its reservation of rights, Landmark paid 100% of the Commission's defense expenses after exhaustion of the Retention. R.A. I at 15. Landmark properly ceased payment of the Commission's defense expenses only after the Court dismissed with prejudice all potentially covered claims against the Commission in the underlying action. R.A. I at 110, 170. When the plaintiff in the underlying action appealed from the dismissal of a potentially covered claim, Landmark resumed its defense and paid 100% of the Commission's fees and expenses relating to the appeal. R.A. II at 71; R.A. III at 9.

In its February 25, 2025, decision denying in part Landmark's motion to dismiss, the Court held that Landmark had a duty to continue its defense of the Commission in the underlying action after dismissal of all potentially covered claims, even though the operative Complaint at that point no longer contained any Counts that were even potentially subject to coverage under the Landmark policy. R.A. II at 306. The Court then

granted the Commission's motion for judgment on the pleadings on the same basis. R.A. III at 153 ("Allowed as to Count I.").

THE LANDMARK POLICY

Landmark issued Directors and Officers Liability Policy No. LHP664428 (the "Policy") to the Commission with an initial Policy Period of September 11, 2015, to September 11, 2016, subsequently extended through December 11, 2016. R.A. I at 176. Coverage under the Policy is subject to a \$1 million aggregate Limit of Liability and a self-insured Retention of \$250,000. *Id.*, at 177. Subject to its terms, conditions, and exclusions, the Policy provides coverage for Loss on account of Claims for Wrongful Acts that are first made against an Insured during the Policy Period and reported to Landmark in accordance with the requirements of the Policy. R.A. I at 205.

The Policy defines a "Wrongful Act" as "any actual or alleged act, error, omission, misstatement, misleading statement, neglect or breach of duty by or on behalf of the Insured Organization." R.A. I at 186. "Loss" is defined to include Defense Expenses. *Id.*, at 181. "Defense Expenses" is defined as "reasonable and necessary legal fees and expenses incurred, with the Insurer's consent, by any Insured in the defense of a Claim, including any appeal therefrom." *Id.*, at 206.

Exclusion 12 of the Policy provides that Landmark shall not be liable to make any payment for Loss in connection with any Claim made against any insured “[a]lleging, arising out of, based upon or attributable to inverse condemnation, temporary or permanent taking, adverse possession or dedication by adverse use.” R.A. I at 186.

THE FBT ACTION

The Commission brought this action to recover legal fees and expenses incurred in the defense of an underlying action in Suffolk Superior Court captioned, *FBT Everett Realty, LLC v. Massachusetts Gaming Commission*, Case No. 1684-CV-03481 (the “FBT Action”).¹ R.A. I at 11, 60. The Complaint in the FBT Action was filed in November 2016, during the Policy Period of the Landmark Policy. R.A. I at 60.

The plaintiff in the FBT Action, FBT Everett Realty (“FBT”), purchased a parcel of land in Everett, Massachusetts, for \$8 million in 2009. R.A. I at 90; *see FBT Everett Realty, LLC v. Massachusetts Gaming Commission*, 489 Mass. 702, 704 (2022). In 2012, after legalization of casino gambling in Massachusetts, FBT and Wynn MA, LLC (“Wynn”) entered into an agreement under which Wynn was granted an option to purchase the land for \$75 million if Wynn could secure a license from the

¹ The Court transferred the case to Middlesex Superior Court on February 1, 2018, under Case No. 1881-CV-00304. *See* R.A. II at 182.

Commission to develop and operate a casino on the land. R.A. I. at 90; *see FBT Everett*, 489 Mass. at 704.

During the license suitability review process, the Commission uncovered evidence that led it to suspect that FBT had hidden criminal ownership interests. R.A. II at 308; *see FBT Everett*, 489 Mass. at 705. Without resolving the issue, the Commission allegedly determined that FBT should not be allowed to receive a “casino-use premium” on the sale of the land to Wynn. R.A. II at 308; *see FBT Everett*, 489 Mass. at 703. “Fearing that the commission would otherwise find Wynn unsuitable, dooming Wynn’s license application and FBT’s sale of the Everett parcel to Wynn, FBT agreed in November 2013 to amend the option agreement to reduce the price from \$75 million to \$35 million ...” *FBT Everett*, 489 Mass. at 706; *see* R.A. I at 87. Wynn ultimately purchased the land for \$35 million rather than the original option amount. R.A. I at 92; *see FBT Everett*, 489 Mass. at 707. In November 2016, FBT sued the Commission to recover the lost \$40 million premium. R.A. I at 60.

FBT’s initial complaint alleged a single cause of action against the Commission for intentional interference with contract. R.A. I at 68. The Commission moved to dismiss the complaint on the grounds that it was immune from liability for intentional torts as a public employer under the Massachusetts Tort Claims Act, M.G.L. c. 258. *Id.*, at 140.

By letter dated February 7, 2017, Landmark agreed to defend the Commission in the FBT Action, subject to a full reservation of rights. R.A. I at 162. Landmark's reservation of rights letter noted that the intentional interference with contract claim alleged a "Wrongful Act," defined by the Policy to include "any actual or alleged act, error, omission, misstatement, misleading statement, neglect or breach of duty by or on behalf of the" Commission. *Id.*, at 164.

While the Commission's motion to dismiss was pending, FBT filed an amended complaint. R.A. I at 72; *see* R.A. I at 14. In addition to the intentional interference with contract claim (Count I), it added three additional causes of action. R.A. I at 81-83. Count II alleged a *per se* taking of FBT's property, Count III alleged a regulatory taking of FBT's property, and Count IV alleged impairment of a contract right in violation of the Contract Clause of the United States Constitution. *Id.*

On June 8, 2017, the Superior Court in the FBT Action (the "FBT Court") granted the Commission's motion to dismiss the initial FBT Complaint. R.A. I at 14, 88. It agreed that the Commission had absolute immunity from liability for intentional torts, including intentional interference claims, as a public employer under the Massachusetts Tort Claims Act. *FBT Everett Realty, LLC v. Massachusetts Gaming Commission*, 34 Mass.L.Rptr. 340 at *7 (Mass. Super. Ct., June 8, 2017).

On May 14, 2018, the FBT Court entered an Order dismissing Counts I, II, and IV of the Amended FBT Complaint. *FBT Everett Realty, LLC v. Massachusetts Gaming Commission*, 35 Mass.L.Rptr. 191 (Mass. Super. Ct., May 14, 2018). The Court reaffirmed its earlier dismissal of Count I for intentional interference with contract and held that FBT failed to state a claim as to Counts II (*per se* taking) and IV (impairment of contract right). *Id.* at *1, *5, *9. As to Count III, however, the FBT Court held that FBT adequately alleged a regulatory taking of a property right inherent in its ownership of real property. *Id.* at *5-7. Only the regulatory taking claim remained in the FBT Action after the May 14, 2018, Order. *Id.*; *see* R.A. I at 110.

By correspondence dated May 25, 2018, Landmark informed the Commission that no further coverage for Defense Expenses would be provided because the regulatory takings claim was the only one that survived, and the Policy specifically excluded coverage for all takings claims. R.A. I at 170. The Policy's Exclusion 12 bars coverage for all Loss (including Defense Expenses) on Claims "[a]lleging, arising out of, based upon or attributable to inverse condemnation, temporary or permanent taking, adverse possession or dedication by adverse use." *Id.*, at 186.

The FBT Court subsequently granted the Commission's motion for summary judgment dismissing the remaining regulatory taking claim. *FBT*

Everett Realty, LLC v. Massachusetts Gaming Commission, 2021 WL 2584131, at *1 (Mass. Super. June 16, 2021), *reversed and remanded*, 489 Mass. 702 (2022); *Addendum* at 45; *see FBT Everett*, 489 Mass. at 707; *see also* R.A. II at 119. FBT appealed this decision and the earlier dismissal of the intentional interference with contract claim. *FBT Everett*, 489 Mass. at 707. As the latter claim was potentially covered by the Policy, Landmark paid 100% of the Commission's legal fees in connection with the appeal. R.A. II at 71; R.A. III at 9.

In a May 23, 2022, decision, the Supreme Judicial Court affirmed the FBT Court's dismissal of the intentional interference of contract claim. *FBT Everett*, 489 Mass. at 722. However, it reversed the grant of summary judgment as to the regulatory taking claim and remanded the case for further discovery and analysis. *Id.*, at 717. The regulatory taking claim was the sole claim against the Commission remaining after remand. *Id.* On remand, the Superior Court again granted summary judgment for the Commission, dismissing the regulatory takings claim. *FBT Everett Realty, LLC v. Massachusetts Gaming Commission*, 2024 WL 5183396, at *17 (Mass. Super. Dec. 12, 2024); *Addendum* at 52.

THE PROCEEDINGS BELOW

The Commission's initial complaint in this action alleged that Landmark breached the policy when it withdrew its defense after the FBT Court dismissed all claims other than the regulatory takings claim on May 14, 2018. R.A. I at 11. On March 23, 2021, Landmark moved to dismiss the complaint for failure to state a claim upon which relief could be granted. R.A. I at 111. Landmark argued that it was warranted under the plain language of the Policy in terminating its defense of the FBT Action after the May 14, 2018 ruling, because the sole remaining claim for an alleged regulatory taking fell squarely within Exclusion 12 of the Policy. *Id.*, at 123. On January 22, 2022, Landmark and the Commission moved to stay this action pending resolution of the FBT appeal. R.A. I at 7. The Superior Court granted the motion to stay on February 17, 2022. *Id.*

On December 9, 2022, after the SJC's decision on the FBT appeal, the Superior Court allowed the parties' motion to lift the stay and to schedule a hearing on Landmark's motion to dismiss. R.A. I at 7. Following a January 14, 2025, hearing, *id.*, at 263, the Superior Court issued its decision on February 25, 2025 (the "Decision"). *Id.*, at 306. In the Decision, the Superior Court held that Landmark had a continuing duty to defend the Commission even after the FBT Court dismissed all claims other than the regulatory taking claim, and that this duty continued

until the SJC affirmed the dismissal of the intentional interference with contract. R.A. II at 314. The Court also held that the Commission had a viable claim “to recover the reasonably attorneys’ fees and litigation expenses incurred in bringing this action.” *Id.* at 319.

On March 24, 2025, the Commission filed a First Amended Complaint for Breach of Contract (Count I) and Attorneys’ Fees for Litigating Landmark’s Duty to Defend (Count II). R.A. III at 4. On May 27, 2025, it moved for judgment on the pleadings as to Count I, *id.*, at 139, which the Superior Court granted on June 2, 2025, *id.*, at 153. The Commission moved for attorneys’ fees on August 14, 2025. *Id.*, at 157. On September 8, 2025, the Superior Court entered judgment in favor of the Commission on Counts I and II of the First Amended Complaint. *Id.*, at 164.

On September 23, 2025, Landmark timely filed a notice of appeal from the September 8, 2025, judgment and all prior rulings, including the February 25, 2025, Decision denying its motion to dismiss, and the allowance of the Commission’s motions for judgment on the pleadings and for attorneys’ fees. R.A. II at 165.

This appeal followed.

SUMMARY OF THE ARGUMENT

The Superior Court erred when it denied in part Landmark's motion to dismiss and then granted the Commission's motion for judgment on the pleadings. It is undisputed that the sole claim remaining in the FBT Action after May 14, 2018, was a regulatory takings claim. It is clear from the plain language of the Landmark Policy that it specifically and unambiguously excludes coverage for all takings claims. The Superior Court therefore erred when it determined that Landmark had a duty to continue its defense of the Commission in the FBT Action after May 14, 2018. This Court should reverse that part of the Superior Court's decision denying Landmark's motion to dismiss and reverse the Court's grant of the Commission's motion for judgment on the pleadings. The Superior Court correctly rejected all of the Commission's other arguments.

STANDARD OF REVIEW

Because the decision below was decided as a question of law, it is subject to de novo review in this Court, without any deference to the Trial Court's determinations. *Reagan v. Commissioner of Revenue*, 491 Mass. 446, 451 (2023). An order on a motion to dismiss is reviewed de novo. *A.L. Prime Energy Consultant, Inc. v. Massachusetts Bay Transportation Auth.*, 479 Mass. 419, 424 (2018). An order on a motion for judgment on the

pleadings also is reviewed de novo. *Mullins v. Corcoran*, 488 Mass. 275, 281 (2021). The interpretation of an insurance policy is a conclusion of law which is reviewed de novo. *Fuller v. First Fin. Ins. Co.*, 448 Mass. 1, 5 (2006); see *James B. Nutter & Co. v. Estate of Murphy*, 478 Mass. 664, 667 (2018).

ARGUMENT

I. The Trial Court Erred in Holding that Landmark's Duty to Defend in the Underlying Action Continued After All Potentially Covered Claims were Dismissed with Prejudice.

This is not a case in which an insurer simply abandoned its insured. Landmark paid 100% of the Commission's Defense Expenses in the FBT Action, subject to a reservation of rights, until May 14, 2018. R.A. I at 110, 170. At that point, when the FBT Court left only a single regulatory taking claim pending against the Commission, Landmark withdrew its defense. *Id.* at 170. As the Superior Court noted, Exclusion 12 of the Policy "unambiguously bars coverage for FBT's 'regulatory taking' claim." R.A. II at 319. As of May 14, 2018, therefore, there was no live claim pending against the Commission that was even potentially within the coverage of the Policy.

When FBT filed an appeal that included the potentially covered interference with contract claim, Landmark paid all of the Commission's

Defense Expenses for the appeal. R.A. II at 71; R.A. III at 9. Although the Superior Court characterized this as an “assertion,” R.A. II at 310 n.5, Landmark’s motion to dismiss papers included a copy of its August 10, 2021, letter in which it agreed to cover the appeal defense costs, *id.*, at 71.

The Superior Court could have considered this letter, without converting the motion into a motion for summary judgment, because Landmark’s coverage position was central to the Commission’s Complaint and because the Commission did not object either to consideration of the letter or to letter’s authenticity. *See* R.A. I at 15; R.A. II at 115-34. “When deciding a motion to dismiss under Rule 12(b)(6), a court may consider ‘documents the authenticity of which is not disputed by the parties’ without converting the motion into one for summary judgment.” *Bay Colony Property Dev. Co. v. Headlands Realty Corp.*, 34 Mass.L.Rptr. 338 at *1 (Mass. Super. June 7, 2017) (allowing consideration of undisputed letter attached to motion to dismiss) (citing *Town of Barnstable v. O'Connor*, 786 F.3d 130, 141 n.12 (1st Cir. 2015)).

Regardless, by the time the Superior Court ruled on the Commission’s motion for judgment on the pleadings, the Commission had filed a First Amended Complaint, which expressly alleged that, “[b]ecause the dismissal of the tortious interference claim was subject to FBT’s appeal, Landmark did resume paying the Commission’s defense

costs when FBT filed its Notice of Appeal ...” R.A. III at 9. Therefore, it was undisputed at that point that Landmark paid the cost of the appeal.

Although Landmark paid for the Commission’s Defense Expenses in the FBT Action until dismissal of all potentially covered claims, and its Defense Expenses for FBT’s appeal of the dismissal of those claims, the Superior Court held that Landmark had a continuing duty to defend the Commission in the FBT Action even after dismissal of all potentially covered claims. The Court ruled that, after the potentially covered claims were dismissed, “[t]he Commission was . . . entitled to have Landmark continue to pay for its defense in the FBT Action so long as there was a chance that the SJC might . . . reinstate FBT’s claim for intentional interference.” R.A. II at 317.

No prior court has ever held that, under Massachusetts law, an insurer has a continuing duty to defend its insured after dismissal with prejudice of all claims potentially covered by the insurer’s policy. On the contrary, every prior case addressing this issue under Massachusetts law has come to the opposite conclusion. The leading case is the frequently cited decision of the First Circuit Court of Appeals in *Conway Chevrolet-Buick, Inc. v. Travelers Indem. Co.*, 136 F.3d 210 (1st. Cir. 1998). The *Conway* Court interpreted this Court’s decision in *Sterilite Corp. v. Cont’l Cas. Co.* which held that, although the initial scope of the duty to defend is broad,

an insurer can “get clear of the duty from and after the time when it demonstrates with conclusive effect on the third party that as matter of fact—as distinguished from the appearances of the complaint and policy—the third party cannot establish a claim within the insurance.” 17 Mass.App.Ct. 316, 323 (1983).

The *Conway* Court held that a summary judgment decision dismissing all potentially covered counts in the underlying action was a circumstance which allowed the insurer to “get clear” of the duty to defend under the rule announced in *Sterilite*. The *Conway* Court explained:

[The insurer] stepped in to defend Conway when the litigation included counts for negligent infliction of emotional distress and invasion of privacy—claims that would not inevitably fall within the exclusions for intentional conduct or for claims arising out of termination of employment, harassment, or discrimination. Once those claims were dismissed by the court's grant of summary judgment, however, only counts falling directly within the policy exclusions remained. The case thus became one in which “the allegations of the third-party complaint [do not] find apparent lodgment in the effective coverage of the policy,” *Sterilite*, 17 Mass.App. at 323, 458 N.E.2d 338.

* * *

Indeed, Conway does not challenge the district court's ruling that “the terms of the Policy explicitly exclude the three remaining claims of the Young suit.” As the complaint asserted no live counts outside the exclusion, [the insurer] did not breach its contractual duty to defend when it withdrew.

136 F.3d at 214-215. The decision is on point here. *See also Premier Homes, Inc. v. Laws. Title Ins. Corp.*, 76 F.Supp.2d 110, 118 (D. Mass. 1999) (“In a

situation in which counts in a complaint have been dismissed, an insurer may withdraw from defense of an insured's case once ‘the complaint unambiguously excludes coverage’”). The Supreme Judicial Court said essentially the same thing, albeit in *dicta*, in *Vappi & Co. v. Aetna Cas. & Sur. Co.*: “until [the insurer], during its defence of [the insured], narrowed the claims to those seeking ‘a recovery that the policy did not cover,’ [the insurer] was not relieved from its obligation to defend.” 348 Mass. 427, 430 n.3 (1965) (alterations added).

The scheme outlined in *Sterilite*, under which a broad initial duty to defend is combined with an opportunity for the insurer to “get clear” of the duty when the nature of the case is confined by future events, was explained further in *Nat’l Union Fire Ins. Co. of Pittsburgh, P.A. v. Town of Norwood*:

“In order for the duty of defense to arise, the underlying complaint need only show, through general allegations, a possibility that the liability claim falls within the insurance coverage. There is no requirement that the facts alleged in the complaint specifically and unequivocally make out a claim within the coverage.” *Sterilite Corp. v. Continental Cas. Co.*, 17 Mass.App.Ct. 316, 319, 458 N.E.2d 338 (1983). Moreover, where an insurer is obligated to defend the insured on one of the counts alleged against it, the common law “in for one, in for all” doctrine requires the insurer to mount a defense on all counts, including those that are not covered. . . . By contrast, where the allegations in the underlying complaint “lie expressly outside the policy coverage and its purpose, the insurer is relieved of the duty” to defend. . . .

The apparent tension between these two bedrock propositions of insurance law raises the question of whether the general duty to defend under the “in for one, in for all” doctrine requires an insurer to continue the defense at the point the only remaining claim against the insured falls within an exclusion from the policy. The answer is found in the venerable *Sterilite* decision: “When, as in the present case, the allegations of the third-party complaint find apparent lodgment in the effective coverage of the policy, the insurer is obligated to defend. But it can, by certain steps, get clear of the duty from and after the time when it demonstrates with conclusive effect on the third party that as matter of fact—as distinguished from the appearances of the complaint and policy—the third party cannot establish a claim within the insurance.” *Sterilite Corp.*, 17 Mass.App.Ct. at 323, 458 N.E.2d 338. In other words, under *Sterilite*, the insurer is permitted to withdraw the defense when only “counts falling directly within the policy exclusions remain[].” *Conway Chevrolet Buick, Inc. v. Travelers Indem. Co.*, 136 F.3d 210, 214 (1st Cir. 1998).

267 F.Supp.3d 320, 323-24 (D. Mass. 2017) (emphasis added)

Landmark acknowledges that the case law on this issue from around the country is not uniform. However, the *Conway* decision is not an outlier. On the contrary, numerous cases from multiple jurisdictions are to the same effect. “If the covered claims have been dismissed in the underlying action, an insurer’s duty to defend is generally terminated.” *Couch on Insurance* § 200:49 (3d ed. 2015); see, e.g., *Westminster American Insurance Company v. Spruce 1530, LLC*, 2020 WL 3288193 at *5 (E.D. Pa. Jun. 17, 2020) *aff’d* 853 F.App’x 793 (3d Cir. 2021) (“in interpreting Pennsylvania’s rule that the duty to defend continues until the insurer can ‘confine’ the claim ‘to a recovery that the policy does not cover,’ courts in

this district have consistently treated the dismissal of covered claims as a sufficient basis for terminating an insurer's duty to defend”); *Med. Mut. Ins. Co. of Maine, Inc. v. Burka*, 2017 WL 1743505 at *6 (D. Me. May 3, 2017) (citing *Conway* and holding that because there was no “live” claim for damages remaining after dismissal of the potentially covered Counts, the insurer had no ongoing duty to defend); *Am. Econ. Ins. Co. v. Aspen Way Enters., Inc.*, 2015 WL 12748304 at *7 (D. Mont. Sep. 25, 2015) (after dismissal of all potentially covered Counts, insurer did not owe a duty to defend remaining Count) *aff’d sub nom. Am. Econ. Ins. Co. v. Hartford Fire Ins. Co.*, 695 F.App’x 194 (9th Cir. 2017); *QBE Ins. Corp. v. Jinx-Proof Inc.*, 102 A.D.3d 508, 510 (2013) (insurer’s duty to defend ended once the potentially covered claims were dismissed and the remaining claims fell within an exclusion) *aff’d* 22 N.Y.3d 1105 (2014)²; *Gustafson v. Am. Fam. Mut. Ins. Co.*, 2012 WL 5949572 at *8 (Bankr. D. Colo. Nov. 27, 2012) (citing *Conway* and holding that insured’s recovery of attorneys’ fees and costs was limited to those incurred before the date on which the potentially covered claim was dismissed from the underlying action).

² One of the decisions cited by the Superior Court on this issue, *Harrington Haley, LLP v. Nutmeg Ins. Co.*, 39 F.Supp.2d 403 (S.D.N.Y. 1999), is no longer good law in light of the subsequent decision by the Court of Appeals of New York, in *Jinx-Proof* affirming that the insurer’s duty to defend ended when the potentially covered claims were dismissed. See R.A. II at 317.

The Superior Court correctly rejected the Commission's attempts to distinguish *Conway* and its progeny. *Compare* R.A. II at 124-25 *with* R.A. II at 315. However, the Court held that *Conway* was wrongly decided: "the First Circuit erred in *Conway* . . . by holding that, under Massachusetts law, a trial court order dismissing all potentially covered claims will always terminate an insurer's duty to defend . . ." R.A. II at 315.

While the aforementioned federal court decisions like *Conway* are not controlling here, their reasoning is sound and they are strong persuasive authority in support of Landmark's position. An affirmance of the Superior Court's ruling in this case would substantially undermine *Sterilite's* holding by making it all but impossible for an insurer to ever "get clear" of the broad initial duty to defend. Other courts have rejected the rule articulated by the Superior Court for this reason:

Wackenhut's remaining argument is that National Union was obligated to continue its defense following the trial judge's dismissal of the only claim that could plausibly have been interpreted as being covered, because the dismissal was "non final." . . . Under the reasoning employed by Wackenhut, an insurer's duty to defend can never come to an end during the course of federal litigation, because all orders are nonfinal if entered before a final judgment adjudicating the rights of all parties. The Court declines to adopt Wackenhut's reasoning on this point.

Wackenhut Servs., Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pennsylvania, 15 F.Supp.2d 1314, 1324 (S.D. Fla. 1998) (holding that under Florida law

nonfinal dismissal of the only potentially covered claim terminated liability insurer's obligation to defend).

Sterilite simply does not impose the hoops that the Superior Court required Landmark to jump through to “get clear” of its initial duty to defend. While the duty to defend is broad, an insurer “can, by certain steps, get clear of the duty from and after the time when it demonstrates with conclusive effect on the third party that as a matter of fact . . . the third party cannot establish a claim within the insurance.” *Sterilite*, 17 Mass.App.Ct. at 323. “Conclusive effect” may be demonstrated “by discovery or other tactics within the third-party action.” *Id.* (citing *Lee v. Aetna Cas. & Sur. Co.*, 178 F.2d 750, 752 (2d Cir. 1949)). The *Sterilite* court's reference to “other tactics within the third-party action” plainly includes motions to dismiss or for summary judgment. “A declaratory action . . . may serve for the demonstration” but it is not required. *Id.* at 323.³

The *Conway* Court correctly applied *Sterilite* in holding that an insurer does not breach its duty to defend when it withdraws its defense of its insured after dismissal of all potentially covered claims against the insured in the third party action. *See Conway*, 136 F.3d at 214. Requiring

³ In its opposition to Landmark's motion to dismiss, the Commission clarified that it was “alleging that Landmark improperly withdrew its defense, not that it needed prior judicial approval to do so.” R.A. II at 124.

Landmark to defend a case that, after May 14, 2018, was exclusively a regulatory takings claim would require Landmark to provide coverage that it never agreed to provide and for which the Commission never paid. *See* R.A. I at 186. When all potentially covered claims are dismissed from an action, it necessarily means that the complaint's allegations are not "reasonably susceptible" to an "interpretation that they state or adumbrate a claim covered by the policy terms." *Sterilite*, 17 Mass.App.Ct. at 318. The Superior Court's holding that Landmark had a continuing duty to defend after dismissal with prejudice of all claims potentially covered by the Policy was erroneous as a matter of law.

Even assuming, *arguendo*, that the Superior Court was right in declaring *Conway* to be wrongly decided, it nevertheless erred in denying Landmark's Motion. In its Decision, the Superior Court recognized that there could an exception in cases where dismissal of the covered claim was "obviously correct" and "not subject to any real possibility of reversal on appeal." R.A. II at 317. However, it found that such an exception was not implicated in this case because whether the Commission qualified as a "public employer," with absolute immunity against liability for intentional torts, was a matter of first impression. *Id.*, at 318.

The Court overlooked that the interference with contract claim was subject to an additional defect which made its dismissal "obviously

correct.” R.A. II at 317. To make out a case of intentional interference with a contract, a plaintiff must prove, among other things, that the defendant knowingly induced a third party to break a contract with the plaintiff. *Williams v. B & K Medical Systems, Inc.*, 49 Mass.App.Ct. 563, 572 (2000). As noted by the FBT Court’s May 14, 2018, decision, the underlying contract between FBT and Wynn was an *option* agreement. Wynn had the right to buy, but “FBT did not have a contract based right to sell the Everett Parcel to Wynn for \$75 million ...” 35 Mass.L.Rptr. 191 at *5. FBT and Wynn *agreed* to modify the option price. *Id.* Because Wynn had no obligation to buy the property at any price, there was never a plausible claim that Wynn breached the option agreement with FBT.

When FBT amended its complaint in the FBT Action to assert direct claims against Wynn, the only claims asserted against Wynn were for fraud and violation of M.G.L c. 93A, and not for breach of contract. R.A. II at 190 (File Ref. Nbr. 64); *see Bogertman v. Attorney General*, 474 Mass. 607, 616 (2016) (holding that the Court may take judicial notice of facts not subject to reasonable dispute) (citing *Provencal v. Commonwealth Health Ins. Connector Auth.*, 456 Mass. 506, 516 (2010); Mass. G. Evid. § 201(b) (2016)). Because there was never a breach of contract claim against Wynn, there could never have been a meritorious claim against the Commission for interference with contract. To the extent the new rule of law

articulated by the Superior Court has an exception for “obviously correct” dismissals, therefore, this case squarely fits in that exception, and the Court erred in finding otherwise.

Accordingly, the Superior Court erred as a matter of law when it held that Landmark had to wait until a final appellate decision before withdrawing its defense. R.A. II at 315-17. Reversal of the Superior Court’s decision denying Landmark’s motion to dismiss and reversal of its grant of the Commission’s motion for judgment on the pleadings is therefore warranted.

II. The Superior Court Correctly Held that Coverage for the Regulatory Takings Claim in the Underlying Action Was Unambiguously Excluded by the Terms of the Landmark Policy.

The issue relied upon by the Superior Court in its decision was not the Commission’s primary argument in opposition to Landmark’s motion to dismiss. *Compare* R.A. II at 116 *with* R.A. II at 306. In fact, the argument that Landmark’s duty to defend continued until an appeal affirmed the FBT Court’s dismissal of the potentially covered claims received minimal attention in the Commission’s briefing. *See* R.A. II. at 125-26. Most of the Commission’s briefing was devoted to arguments (1) that the facts alleged in the FBT Amended Complaint implicated a duty to defend even after all covered claims were dismissed, (2) that Exclusion 12 did not apply

to regulatory takings, and (3) that the Commission was entitled to a continuing defense based on its reasonable expectations. *Id.*, at 116. Although the Superior Court rejected all of these arguments, Landmark addresses them briefly here because it anticipates the Commission may raise them on appeal as alternative grounds for affirmance.

“The interpretation of an insurance contract is no different from the interpretation of any other contract, and we must construe the words of the policy in their usual and ordinary sense.” *Hakim v. Massachusetts Insurers’ Insolvency Fund*, 424 Mass. 275, 280 (1997). “Where the language of an insurance policy is clear and unambiguous, we rely on that plain meaning, and do not consider policy arguments in interpreting the plain language.” *Mount Vernon Fire Ins. Co. v. Visionaid, Inc.*, 477 Mass. 343, 349 (2017). This rule of construction applies to the interpretation of an exclusion. *Bagley v. Monticello Ins. Co.*, 430 Mass. 454, 457 (1999).

Under this standard, the Superior Court’s conclusion that the regulatory taking claim fell “squarely within an unambiguous policy coverage exclusion” clearly was correct and is not subject to any legitimate dispute. R.A. II at 319. Exclusion 12 provides that Landmark shall not be liable to make any payment for Loss (including Defense Expenses) in connection with any claim made against any Insured “[a]lleging, arising out of, based upon or attributable to inverse condemnation, temporary or

permanent taking, adverse possession or dedication by adverse use.” R.A. I. at 186. Exclusion 12 therefore unambiguously bars coverage for FBT’s regulatory taking claim against the Commission. The Court correctly held that “[a]lthough FBT’s regulatory taking claim remained in this case, Landmark has met its burden of showing that this remaining claim falls squarely within an unambiguous policy exclusion,” Exclusion 12. R.A. II at 319.

The cases relied upon by the Commission in arguing that the facts alleged in the FBT Action created a continuing duty to defend after May 14, 2018, involved the insurer’s initial duty to defend. R.A. II at 121 (citing *Boston Symphony Orchestra v Commercial Union Ins. Co.*, 406 Mass 7 (1989)). The existence of an initial duty to defend in this case is not at issue, as Landmark properly assumed the defense at the outset. R.A. I at 162.

Once the FBT Court ruled that the Commission had absolute immunity against intentional torts and dismissed all claims other than the regulatory taking claim, however, there was no longer any possibility of a covered judgment. *Id.*, at 110. The FBT Amended Complaint could not plausibly be construed to assert a potentially covered claim after the FBT Court had already dismissed all potentially covered claims. After the FBT Court’s May 14, 2018, decision, the FBT Amended Complaint simply was not “reasonably susceptible of an interpretation that states or roughly

sketches a claim covered by the policy.” *Billings v. Commercial Union Ins. Co.*, 458 Mass. 194, 200 (2010). It is settled that there can be no duty to defend when there is no possibility of a covered loss. *Transamerica Co. v. KMS Patriots, L.P.*, 52 Mass. App. Ct. 189, 192-193 (2001).

The Superior Court also rejected the Commission’s argument that Exclusion 12 applies only to physical takings of real property by eminent domain and not to regulatory takings. R.A. II at 320. As the Court correctly noted, “the language of the exclusion unambiguously encompasses any taking of property, and in no way suggests that the exclusion might be limited to the taking of real property.” *Id.* The exclusion expressly refers to “inverse condemnation,” and “‘inverse condemnation’ and ‘regulatory takings’ mean the same thing.” *Id.*, at 319 (citing *Giovanella v. Conservation Comm’n of Ashland*, 447 Mass. 720, 724 (2006); *Smyth v. Conservation Comm’n of Falmouth*, 94 Mass.App.Ct. 790, 794 (2019)); see also R.A. II at 288 (noting the Commission’s concession that inverse condemnation “means a regulatory taking.”).

The Court further found that the Commission’s “argument is beside the point because FBT’s regulatory taking claim” does “allege[] the taking of real property.” R.A. II at 320. The Court correctly stated that “FBT’s regulatory taking claim alleged that the Commission had deprived FBT of the right to sell its real property for the highest possible price.”

Id.; see R.A. I at 82. The FBT Action is about the sale of land, and the regulatory taking claim sought compensation for the “forced reduction of the contract price” for the land sale. R.A. I at 82.

Lastly, the Superior Court also correctly rejected the Commission’s argument that it had a reasonable expectation of coverage for the regulatory taking claim notwithstanding the unambiguous language of the exclusion. R.A. II at 319. As the Court explained, it “need not consider the Commission’s reasonable expectations . . . because ‘the plain language of the . . . exclusion unambiguously precludes coverage.’” *Id.* (citing *Finn v. Nat’l Union Fire Ins. Co. of Pittsburgh, Pennsylvania*, 452 Mass. 690, 697-98 (2008)).

Indeed, the reasonable expectations doctrine is “typically limited to cases in which the policy is ambiguous and the mutual intent of the parties cannot be determined.” *Finn*, 452 Mass at 697-98 (quoting 1 B.R. Ostrager & T.R. Newman, *Insurance Coverage Disputes* § 1.03[b], at 34 (14th ed. 2008)). As Exclusion 12 unambiguously barred coverage for the regulatory taking claim, the Commission’s allegedly reasonable expectations as to policy coverage are irrelevant. R.A. I at 319-20.

Accordingly, the Court should affirm that part of the Superior Court’s decision which held that coverage for the regulatory takings claim was unambiguously precluded by Exclusion 12 of the Landmark Policy.

CONCLUSION

Landmark paid for the Commission's Defense Expenses in the FBT Action for as long as the action included a claim against the Commission for intentional interference with contract that was potentially covered by the Policy. When the FBT Court dismissed that claim, and left only a regulatory taking claim pending, Landmark correctly withdrew its defense because its policy unambiguously excluded coverage for regulatory takings. The Superior Court misinterpreted the law when it held that Landmark had to continue its defense of the clearly uncovered takings claim until the Supreme Judicial Court affirmed the dismissal of the intentional interference claim. This Court should reverse that part of the Superior Court's decision denying Landmark's motion to dismiss the Commission's complaint.

Respectfully submitted,

LANDMARK AMERICAN
INSURANCE COMPANY

By its attorneys,

A handwritten signature in blue ink, appearing to be "MDuffy", written over a horizontal line.

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ADDENDUM

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2015 WL 12748304

Only the Westlaw citation is currently available.
United States District Court, D. Montana,
Billings Division.

AMERICAN ECONOMY INSURANCE
COMPANY, an Indiana corporation;
American States Insurance Company,
an Indiana corporation; and General
Insurance Company of America, a
New Hampshire corporation, Plaintiffs,
v.

ASPEN WAY ENTERPRISES,
INC., d/b/a Aaron's Sales and
Leasing, a Montana corporation; and
Hartford Fire Insurance Company, a
Connecticut corporation, Defendants.
Hartford Fire Insurance Company,
Counterclaimant and Crossclaim Plaintiff,
v.

American Economy Insurance Company;
American States Insurance Company;
General Insurance Company of American;
and Aspen Way Enterprises, Inc.,
Counterclaim and Crossclaim Defendants.
Aspen Way Enterprises, Inc., d/b/a Aaron's
Sales and Leasing, Cross-Claimant,
v.

Hartford Fire Insurance
Company, Cross-Defendant.
Hartford Casualty Insurance
Company, Intervenor-Plaintiff,
v.

American Economy Insurance Company;
American States Insurance Company;
General Insurance Company of American;
and Aspen Way Enterprises, Inc.,
Defendants to Intervenor Complaint.

CV 14-09-BLG-SPW

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Signed 09/24/2015
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Filed 09/25/2015

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OPINION and ORDER

SUSAN P. WATTERS, United States District Judge

*1 Before the Court is the Motion for Summary Judgment filed by Hartford Fire Insurance Company and Hartford Casualty Insurance Company (referred to individually or collectively as “Hartford”). Hartford seeks a declaration that it does not owe Aspen Way Enterprises (“Aspen Way”) a duty to defend in two underlying actions. For reasons discussed below, the Court finds that according to the relevant insurance policies, Hartford is not required to defend Aspen Way in the underlying actions and grants the Motion for Summary Judgment.

I. Background

Aspen Way is a franchisee of Aaron's Inc. and operates rent-to-own stores in at least Montana, Washington, and Wyoming. Relevant here, Aspen Way is defending two separate underlying actions related to its installation of software called PC Rental Agent onto computers sold or rented to customers. (Doc. 33 at 3–4).

A. The Byrd Action

In May 2011, Crystal and Brian Byrd, individually and on behalf of a class consisting of Aaron's and its franchisees' customers, sued Aspen Way, Aaron's, and other Aaron's franchisees in the United States District Court for the Western District of Pennsylvania (the “Byrd Action”). (*Id.* at 3). The Byrds allege that on July 30, 2010, they entered into a lease agreement for a laptop computer from Aspen Way. (Doc. 58–1 at 24). On December 22, 2010, an Aspen Way store manager erroneously believed that the Byrds were delinquent in their lease payments and appeared at the Byrds' residence to repossess the computer. (*Id.* at 26). The store manager showed Brian Byrd a picture taken with the computer's webcam that showed him using the computer. (*Id.*). The Byrds asked the

store manager to leave the residence and reported the incident to law enforcement. (*Id.*).

The Byrds later found out that Aspen Way took the picture using PC Rental Agent. (*Id.*). PC Rental Agent is a software product designed by a company named DesignerWare. (*Id.* at 16). Once installed on a computer, PC Rental Agent is generally undetectable by consumers. (*Id.* at 17). The installer can remotely install “Detective Mode” on the computer over the internet while it is in the consumer's possession. (*Id.*).

Once Detective Mode has been installed, the installer can secretly take photographs with the computer's webcam, capture keystrokes, and take screen shots. (*Id.*). Detective Mode transmits the gathered data to DesignerWare. (*Id.* at 18). DesignerWare then emails the data to the installer that activated Detective Mode. (*Id.*).

The Byrds allege that Aaron's franchisees have used PC Rental Agent since at least June 2009. (*Id.* at 16). The Byrds claim that the franchisees received private and confidential data after activating Detective Mode on their customers' computers. (*Id.* at 16–17). Such private data included private emails, keystroke logs for usernames and passwords, bank and credit card statements, Social Security numbers, and webcam photos of individuals in various states of undress. (*Id.*). Aaron's franchisees could remotely install and activate Detective Mode through Aaron's corporate server. (*Id.* at 20). Aaron's franchisees would also access the acquired data from Aaron's corporate server. (*Id.*).

*2 The Byrds claim that Aspen Way accessed their computer via Detective Mode on about 347 occasions. (*Id.* at 25). While Detective Mode is no longer operational on the Byrds' computer, the Byrds allege that information obtained by Aspen Way “has been repeatedly transmitted via unencrypted email and forwarded to unknown persons and locations.” (*Id.* at 28). In all, the Byrds claim that more than 800 customers had private information transmitted to Aaron's franchisees. (*Id.* at 29). The Byrds allege these customers “continue to suffer harm or potential harm,” as their information “may have been possibly transmitted to other third parties thereby placing them at an increased risk of fraud and identity theft[.]” (*Id.* at 23). Aaron's franchisees stopped using PC Rental Agent in January 2012. (*Id.* at 29). Even after ceasing to use PC Rental Agent, the Byrds claim that “franchisee employees and other unknown individuals continue to possess and potentially spread” private information obtained by the software. (*Id.* at 32).

In their Corrected Third Amended Class Action Complaint, the Byrds brought four causes of action against Aaron's and numerous franchisees, including Aspen Way. Count I alleges a violation of the Electronic Communications Privacy Act, 18 U.S.C. § 2511 ("ECPA"). The Byrds claim that the defendants violated the ECPA by "intentionally collecting, transmitting, storing and disclosing, or endeavoring to disclose, to any other person," the contents of the private data collected by PC Rental Agent. (*Id.* at 33). Count II alleged a tort named Invasion of Privacy, Count III alleged a conspiracy to violate the ECPA, and Count IV alleged that Aaron's aided and abetted the invasion of privacy. (*Id.* at 34–39).

On March 31, 2014, the District Court granted in part and denied in part Aaron's Motion to Dismiss for Failure to State a Claim. *Byrd v. Aaron's, Inc.*, 14 F. Supp. 3d 667, 674 (W.D. Pa. 2014). The Court held that the Byrds sufficiently pled a claim for liability under the ECPA as to Count I. *Id.* at 675. The Court dismissed Counts II, III, and IV. *Id.* at 674. As to Count II, the Court adopted a Magistrate Judge's Report and Recommendation that concluded that Wyoming law does not have a tort cause of action for invasion of privacy. *Id.* at 692–93. As to Count III, the Court held that the ECPA does not allow for secondary liability. *Id.* at 674–75. The Byrds apparently conceded that they could not maintain a cause of action for Count IV. *Id.* at 694. Accordingly, the ECPA claim in Count I is "the only remaining claim." *Id.* at 675.

The Court also denied Aspen Way's Motion to Dismiss for Lack of Personal Jurisdiction. *Id.* at 675–76. In a separate order on March 31, 2014, the Court denied the Byrds' motion for class certification. *Byrd v. Aaron's, Inc.*, 2014 WL 1316055, at *1 (W.D. Pa. Mar. 31, 2014). On April 16, 2015, the Third Circuit reversed the denial of class certification. *Byrd v. Aaron's Inc.*, 784 F.3d 154, 160 (3d Cir. 2015). Since the District Court received the Third Circuit's mandate, there apparently has been a discovery dispute but there is no scheduling order in place. *See* Minute Entries (Docs. 371, 374, 377, 381), *Byrd v. Aaron's Inc.*, Civil Action No. 1:11–101–CB–SPB (W.D. Pa. May 26, June 24, July 29, and August 25, 2015).

In May 2011, Aspen Way demanded coverage from Hartford for the Byrd Action. (Doc. 58–2). Hartford agreed to defend Aspen Way, but did so under a complete reservation of rights. (Doc. 58–3 at 5–6). In particular, Hartford reserved the right to institute a declaratory judgment action and withdraw its defense at any point. (*Id.* at 8–9).

B. The Washington Action

On October 18, 2013, the State of Washington sued Aspen Way in Spokane County Superior Court, Washington ("Washington Action"). (Doc. 33 at 4). In the Complaint for Injunctive and Other Relief, the State claimed that Aspen Way violated Washington's Consumer Protection Act and Computer Spyware Act by installing PC Rental Agent and Detective Mode. (Doc. 58–4). That State alleged that Aspen Way began violating Washington law in November 2010. (*Id.* at 3). Aspen Way tendered the Washington Action to Hartford for coverage. (Doc. 58–3 at 1). Hartford denied coverage and did not provide a defense to the Washington Action. (*Id.* at 5).

*3 On February 4, 2015, the State and Aspen Way entered into a Consent Decree. (Doc. 58–5). Aspen Way did not admit to the alleged violations of Washington law, but Aspen Way agreed to an injunction against installing software similar PC Rental Agent and Detective Mode. (*Id.* at 4–6). Aspen Way also agreed to pay \$150,000 to the State to cover the costs of instituting the Washington Action and for monitoring and enforcing the Consent Decree. (*Id.* at 6).

C. Hartford's Policies

Hartford issued a series of primary and umbrella insurance policies to Aspen Way from October 11, 2006 through January 1, 2010. (Doc. 58–6 and 58–7). The policy provisions relevant to this action are the same in each policy. Aspen Way's coverage is triggered when allegations of "personal and advertising injury are made. (Docs. 58–6 at 10; 58–7 at 21). The definitions section provides:

17. "Personal and advertising injury" means injury, including consequential "bodily injury", arising out of one or more of the following offenses:

...e. Oral or written publication, in any manner, of material that violates a person's right of privacy [.]

(Doc. 58–6 at 22).¹

Relevant here, Hartford's policies contain an endorsement entitled "EXCLUSION—VIOLATION OF STATUTES THAT GOVERN EMAILS, FAX, PHONE CALLS OR OTHER METHODS OF SENDING MATERIAL OR INFORMATION" ("Recording and Distribution Exclusion"). (Docs. 58–6 at 5; 58–7 at 35). The Recording and Distribution Exclusion provides:

2. Exclusions

This insurance does not apply to:

DISTRIBUTION OF MATERIALS IN VIOLATION OF STATUTES

“Personal and advertising injury” arising directly or indirectly out of any action or omission that violates or is alleged to violate:

...(c) Any statute, ordinance or regulation, other than the TCPA or CAN-SPAM Act of 2003, that prohibits or limits the sending, transmitting, communicating or distribution of material or information.

(*Id.*). The Recording and Distribution Exclusion also applies to “bodily injury.” (*Id.*).

D. The Instant Action

Three insurers (collectively “Liberty Mutual”) initiated this action against Aspen Way and Hartford Fire Insurance Company seeking a declaratory judgment that they do not owe Aspen Way a duty to defend in the Byrd Action and did not owe a duty to defend in the Washington Action. (Doc. 1 at 31–33). Liberty Mutual did not state a cause of action against Hartford Fire. Hartford Fire filed a crossclaim against Aspen Way for a declaratory judgment that it also does not owe a duty to defend the Byrd Action and did not owe a duty in the Washington Action, (Doc. 18 at 26–27).

Aspen Way filed a crossclaim against Hartford Fire. (Doc. 19 at 20–22). Aspen Way's crossclaim asserts two causes of action against Hartford Fire: (1) Violation of the Unfair Trade Practices Act (“UTPA”); and (2) Breach of contract. (*Id.*).

The Court allowed Hartford Casualty Insurance Company to intervene and realigned the parties for jurisdictional purposes. (See Doc. 49). Hartford Casualty seeks the same declaratory judgments sought by Hartford Fire. (Doc. 51). Aspen Way also asserts a UTPA claim against Hartford Casualty. (Doc. 53 at 17–19).

Hartford now moves for summary judgment against Aspen Way and asserts that the facts alleged in the Byrd and Washington Actions do not entitle Aspen Way to coverage. First, Hartford argues that coverage is not triggered, as neither action alleges “personal or advertising injury.” Second, Hartford argues that even if there were allegations of “personal or advertising injury,” coverage is precluded by

the Recording and Distribution Exclusion. Finally, Hartford argues that Aspen Way's crossclaim and counterclaim fail as a matter of law.

*4 Aspen Way opposes the motion and advances several arguments. First, Aspen Way argues that coverage is triggered by allegations of “bodily injury” and “personal and advertising injury.” Aspen Way also argues the Recording and Distribution Exclusions do not apply for reasons that will be discussed later. Finally, Aspen Way argues that its UTPA claim is a jury question.

II. Standards

A. Summary Judgment Standard

Summary judgment is proper when “the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” *Fed.R.Civ.P. 56(c)*. An issue is “genuine” only if there is a sufficient evidentiary basis on which a reasonable fact finder could find for the nonmoving party and a dispute is “material” only if it could affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The party moving for summary judgment has the initial burden of showing the absence of a genuine issue of material fact. *Anderson*, 477 U.S. at 256–57. Once the moving party has done so, the burden shifts to the opposing party to set forth specific facts showing there is a genuine issue for trial. *In re Barboza*, 545 F.3d 702, 707 (9th Cir.2008). The nonmoving party “may not rely on denials in the pleadings but must produce specific evidence, through affidavits or admissible discovery material, to show that the dispute exists.” *Id.*

On summary judgment, the evidence must be viewed in the light most favorable to the non-moving party. *Id.* The court should not weigh the evidence and determine the truth of the matter, but determine whether there is a genuine issue for trial. *Anderson*, 477 U.S. at 249.

B. Duty to Defend Standard

Under Montana law, an insurer's “duty to defend is independent from and broader than the duty to indemnify created by the same insurance contract.” *Farmers Union Mut. Ins. Co. v. Staples*, 90 P.3d 381, 385 (Mont. 2004). The duty to defend “arises when a complaint alleges facts which represent

a risk covered by the terms of an insurance policy.” *Blair v. Mid-Continent Cas. Co.*, 167 P.3d 888, 891 (Mont. 2007). An insurer must also defend its insured if it knows facts not contained in the complaint which may give rise to coverage. *Revelation Indus., Inc. v. St. Paul Fire & Marine Ins. Co.*, 206 P.3d 919, 928 (Mont. 2009).

“Unless there exists an unequivocal demonstration that the claim against an insured does not fall within the insurance policy's coverage, an insurer has a duty to defend.” *Staples*, 90 P.3d at 385. In other words, the duty to defend arises when a complaint alleges or avers facts, which if proven, would result in coverage. *Id.* This Court “must liberally construe allegations in a complaint so that all doubts about the meaning of the allegations are resolved in favor of finding that the obligation to defend was activated.” *Id.*

III. The Byrd Action

The question of whether Hartford had a duty to defend Aspen Way in the Byrd Action and the Washington Action requires separate analyses. The Court will start with the Byrd Action.

A. Whether the Byrd Action alleges “personal and advertising injury”

Hartford argues that coverage is not triggered in the Byrd Action. At issue is whether the Byrd Action alleges facts that could have caused “personal and advertising injury.” As discussed above, “personal and advertising injury” includes “[o]ral or written publication, in any manner, of material that violates a person's right of privacy.” (Doc. 58–6 at 22). “Publication” is not defined in the policy. The Court must first define “publication,” and then apply that definition to the allegations in the Byrd Action.

*5 An insurance policy's terms are given their usual and common sense meaning from the viewpoint of an ordinary consumer. *Newbury v. State Farm Fire & Cas. Ins. Co. of Bloomington, Ill.*, 184 P.3d 1021, 1025 (Mont. 2008). To determine a word's usual and commonsense meaning, the Montana Supreme Court sometimes looks to the word's dictionary definition. See *Modroo v. Nationwide Mut. Fire Ins. Co.*, 191 P.3d 389, 396–97 (Mont. 2008); *Fisher ex rel. McCartney v. State Farm Mut. Auto. Ins. Co.*, 305 P.3d 861, 866 (Mont. 2013); and *Portal Pipe Line Co. v. Stonewall Ins. Co.*, 845 P.2d 746, 751 (Mont. 1993). Dictionaries commonly define “publication” as including disclosure to the public. See *Webster's Third New International Dictionary* 1836 (Philip Babcock Gove ed. 1981) (defining “publication,” in part, as

“communication (as of news or information) to the public”); *New Oxford American Dictionary* 1411 (Angus Stevenson & Christine Lindberg eds., 3rd ed. 2010) (“the action of making something generally known”); and *The American Heritage Dictionary* 1424 (Joseph Pickett ed., 5th ed. 2011) (“Communication of information to the public”).

Some courts hold that the “public” does not necessarily mean the public-at-large, but can include a third party. For example, the Eastern District of Pennsylvania's “dictionary of choice” made “clear that promulgation to the public, even to a limited number of people, is the essence of *publication*.” *OneBeacon Am. Ins. Co. v. Urban Outfitters, Inc.*, 21 F. Supp. 3d 426, 437 (E.D. Pa. 2014) (emphasis in original) (citing XII *The Oxford English Dictionary* 782 (2nd ed. 1989)). The Supreme Court of Connecticut reasoned that “[c]ommon sense dictates that a lay person would understand the term ‘publication’ to mean the communication of words to a third person.” *Springdale Donuts, Inc. v. Aetna Cas. & Sur. Co. of Illinois*, 724 A.2d 1117, 1122 (Conn. 1999). The Eastern District of Louisiana held that there is personal and advertising injury when there is “publication to a third party” and the material is “generally known, announced publicly, disseminated to the public, or *released for distribution*.” *Ticknor v. Rouse's Enterprises, LLC*, 2 F. Supp. 3d 882, 896 (E.D. La. 2014) (emphasis added).

This Court adopts a definition of “publication” that includes the dissemination of information to at least a third party, if not the public-at-large. This liberal definition of “publication” conforms with Montana's strong policy of construing insurance policy terms in the insured's favor. *Pablo v. Moore*, 995 P.2d 460, 463 (Mont. 2000). Viewing the term “publication” from the perspective of a consumer of average intelligence, this Court concludes that “publication,” as used in Hartford's definition of “personal and advertising injury,” occurs when information is transmitted to a third party.

The Court further finds that the Byrd Action alleges sufficient facts to trigger the duty to defend under Hartford's coverage for “personal and advertising injury.” By liberally construing the Corrected Third Amended Class Action Complaint, the plaintiffs allege facts that, if proven, would result in coverage. The Byrds allege that their private information was collected by PC Rental Agent and “has been repeatedly transmitted via unencrypted email and forwarded to unknown persons and locations.” (Doc. 58–1 at 24). Both the Byrds and the members of the putative class action allege they suffered injury after their information “may have been possibly

transmitted to other third parties thereby placing them at an increased risk of fraud and identity theft.” (*Id.* at 23). The Byrds claim that despite Aspen Way's cessation of their use of Detective Mode, “unknown individuals continue to possess and potentially spread” their private information. (*Id.* at 32).

*6 Assuming those allegations as true, Aspen Way may have violated the ECPA. The ECPA prohibits the intentional disclosure or use of any intercepted electronic communication. 18 U.S.C. § 2511(1)(c), (d). If the plaintiffs in the Byrd Action prove all their allegations against Aspen Way, the plaintiffs will have suffered “personal and advertising injury” as defined in Hartford's policies. Accordingly, there has not been an “unequivocal demonstration” that the Byrd Action does not fall within the policies’ coverage. *Staples*, 90 P.3d at 386.

B. Applying the Recording and Distribution Exclusion

The next step is determining whether the Byrd Action is excluded from coverage. “Exclusions from coverage are to be narrowly and strictly construed because they are contrary to the fundamental protective purpose of an insurance policy.” *Steadale v. Colony Ins. Co.*, 260 P.3d 145, 149 (Mont. 2011). An exclusion is ambiguous if it is reasonably subject to two interpretations. *Id.* Any ambiguity “is to be interpreted most strongly in favor of the insured and any doubts as to coverage are to be resolved in favor of extending coverage for the insured.” *Id.* However, courts should not “seize upon certain and definite covenants expressed in plain English with violent hands, and distort them so as to include a risk clearly excluded by the insurance contract.” *Travelers Cas. & Sur. Co. v. Ribi Immunochem Research, Inc.*, 108 P.3d 469, 474 (Mont. 2005) (internal quotation omitted). “Ambiguity does not exist just because a claimant says so or just because the parties disagree as to the meaning of the contract provision.” *Giacomelli v. Scottsdale Ins. Co.*, 221 P.3d 666, 672 (Mont. 2009).

Here, the Court finds that coverage for the Byrd Action is excluded by the Recording and Distribution Exclusion. As mentioned numerous times above, the Recording and Distribution Exclusion precludes coverage from any suit that alleges a violation of a federal statute that prohibits the transmitting or distribution of material or information. The only remaining count in the Byrd Action is the allegation that Aspen Way violated the ECPA by using Detective Mode. The ECPA is a federal statute that prohibits the disclosure or use of intercepted electronic communications. 18 U.S.C. § 2511(1)(c), (d). Since the ECPA is a federal statute as described by the Recording and Distribution Exclusion, the

Byrds’ allegation that Aspen Way violated the ECPA by transmitting and collecting personal information is excluded from coverage.

The Court is not persuaded by Aspen Way's efforts to avoid a straightforward application of the Recording and Distribution Exclusion. First, Aspen Way argues that the exclusion is ambiguous due to its use of the phrase “arising directly or indirectly out of any action or omission.” Aspen Way correctly states that under Montana law, the phrase “arising out of” is inherently ambiguous in the insurance context. *Troutt v. Colorado W. Ins. Co.*, 246 F.3d 1150, 1160 (9th Cir. 2001). However, Aspen Way does not propose an alternate interpretation of the phrase “arising directly or indirectly out of any action or omission.” (Doc. 62–13 at 31). A policy's term is not automatically invalidated because it is found to be ambiguous. Instead, the ambiguous provision is given the construction that favors the insured. *Pablo*, 995 P.2d at 463.

This Court cannot imagine a reasonable construction of the phrase “arising directly or indirectly out of any action or omission” that would render the Recording and Distribution Exclusion inapplicable to the Byrd Action. In *Wendell v. State Farm Mut. Auto. Ins. Co.*, the Montana Supreme Court determined that the phrase “arising out of the use” in uninsured motorist coverage was ambiguous as it was reasonably subject to more than one interpretation. 974 P.2d 623, 638–39 (Mont. 1999). The phrase could be constructed narrowly to mean that the uninsured vehicle was the instrument that caused injury. *Id.* at 639. The phrase “arising out of the use” could also be construed broadly to mean “originate from, or grow out of, or flow from the use.” *Id.* The Montana Supreme Court applied the broad interpretation as it favored the insured. *Id.* at 639–40. Similarly, in *Pablo*, the Montana Supreme Court held that “arising out of” was ambiguous. 995 P.2d at 462–63. The term could be construed broadly as in *Wendell*. However, since a narrower construction benefitted the insured, the Court interpreted “arising out of” to be limited to torts specifically related to the use of a vehicle. *Pablo*, 995 P.2d at 400.

*7 Here, the Court cannot find a reasonable construction of “arising directly or indirectly out of any action or omission” that results in coverage for Aspen Way. Whether the Court applies a broad definition as in *Wendell* or a narrow definition as in *Pablo*, the Byrd Action arises out of Aspen Way's alleged violation of the ECPA.

Aspen Way claims that “other courts have also deemed this exclusion ambiguous.” (Doc. 74 at 24). However, Aspen Way does not cite any such cases. The case Aspen Way immediately cites after that statement actually applied the Recording and Distribution Exclusion to preclude coverage. *Big 5 Sporting Goods Corp. v. Zurich Am. Ins. Co.*, 957 F. Supp. 2d 1135, 1151 (C.D. Cal. 2013).

Aspen Way also argues that the common law invasion of privacy allegations contained in Count II were dismissed only as to Aaron's but remain intact against Aspen Way. As discussed in the beginning, Count I in the Byrd Action alleges the violation of the ECPA and Count II alleged the tort of invasion of privacy. (Doc. 62–3 at 34–40). Aspen Way assumes that Count II would not be excluded by the Recording and Distribution Exclusion as it does not allege a violation of a statute, regulation, or ordinance. If true, Hartford would be required to defend against all counts under the “mixed-action rule.” See *State Farm Fire & Cas. Co. v. Schwan*, 308 P.3d 48, 51 (Mont. 2013).

Aspen Way misreads the District Court's Order that dismissed Counts II, III, and IV. The District Court clearly dismissed every count in its entirety except Count I by describing it as the “only remaining claim.” *Byrd*, 14 F. Supp. 3d at 675. Count II was dismissed as the tort of invasion of privacy is not recognized in Wyoming law. *Id.* at 692. Since Count II is not a viable claim, the Byrds could not pursue it against any defendant. Count III was dismissed because the ECPA does not allow for secondary liability. *Id.* at 674–75. The Byrds apparently abandoned Count IV. *Id.* at 693–94. The District Court concluded that Counts II, III, and IV were not legally viable. Accordingly, they were dismissed in their entirety.

Aspen Way presents the alternative argument that even if Count II was dismissed in its entirety, under the “mixed-action rule” the duty to defend continues even after the covered claim's dismissal until the opportunity to appeal has expired. However, the Montana Supreme Court rejected that argument in *City of Bozeman v. AIU Ins. Co.*, 865 P.2d 268 (Mont. 1993). In *City of Bozeman*, the Court held that an insurer can withdraw its defense of an insured upon the dismissal of the potentially-covered claim if there is not an immediate appeal of the dismissal. *Id.* at 273. The insurer must resume the defense if an appellate court later remands the case and revives the dismissed claim. *Id.*; see also 14 Steven Plitt et al., *Couch on Insurance* § 200:48 (3d ed. 2015) (“If the covered claims have been dismissed in the underlying action, an insurer's duty to defend is generally terminated”). The

Court finds that success on appeal of the dismissal of Count II is unlikely, as Wyoming law clearly does not recognize the tort of invasion of privacy. See *Byrd*, 14 F. Supp. 3d at 692.

In conclusion, a narrow reading of the Recording and Distribution Exclusion shows that the Byrd Action is precluded from coverage under Hartford's policies. Since there is no coverage, Hartford does not owe a duty to defend Aspen Way in the Byrd Action.

D. Bodily Injury

*8 Aspen Way argues that even if there is no coverage for the alleged “personal or advertising injury,” there is coverage for “bodily injury.” The Court does not reach the question of whether the Byrd Action alleges “bodily injury,” as bodily injury is also excluded from coverage by the Recording and Distribution Exclusion. (Docs. 58–6 at 5; 58–7 at 35).

IV. The Washington Action

Hartford argues that it did not owe a duty to defend the Washington Action as its last policy with Aspen Way expired on January 1, 2010. In the Washington Action, the State alleges that Aspen Way's alleged misconduct began in November 2010. In response, Aspen Way concedes that the Hartford policies had expired prior to the alleged conduct. Accordingly, Hartford did not have a duty to defend the Washington Action.

V. Aspen Way's crossclaim

Hartford is also entitled to summary judgment on Aspen Way's counterclaims. As discussed above, Hartford has not breached their contracts with Aspen Way. Further, since there is no coverage, Hartford had “a reasonable basis in law or in fact for contesting the claim” and Aspen Way's counterclaim under the UTPA also fails. *Mont. Code Ann.* § 33–18–242.

VI. Conclusion

For reasons discussed above, IT IS HEREBY ORDERED:

1. Hartford's Motion for Summary Judgment (Doc. 56) is GRANTED.
2. Hartford did not owe Aspen Way a duty to defend or indemnify in the Washington Action.

American Economy Insurance Company v. Aspen Way..., Not Reported in Fed....

3. Hartford does not owe Aspen Way a duty to defend or indemnify in the Byrd Action.

All Citations

Not Reported in Fed. Supp., 2015 WL 12748304

Footnotes

- 1 "Personal and advertising injury" is not explicitly defined in the umbrella policies, but the umbrella policies incorporate the definitions provided in the primary policies. (Doc. 58–7 at 33).

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Reversed and Remanded by [FBT Everett Realty, LLC v. Massachusetts Gaming Commission](#), Mass., May 23, 2022

2021 WL 2584131

Only the Westlaw citation is currently available.

Superior Court of Massachusetts,
Department of the Trial Court, Suffolk County.

FBT EVERETT REALTY, LLC

v.

MASSACHUSETTS
GAMING COMMISSION

v.

[Wynn MA, LLC](#)

1881CV00304-B

|

June 16, 2021

Memorandum and Order Allowing Defendants' Motions for Summary Judgment

[Kenneth W. Salinger](#), Justice of the Superior Court

*1 Wynn MA, LLC built the Encore Boston Harbor resort casino on land it bought from FBT Everett Realty, LLC. At first, FBT sold Wynn an option to buy the property for \$75 million if Wynn received a casino license. But Massachusetts Gaming Commission staff believed that a convicted felon had an ownership interest in FBT, and allegedly told Wynn that it's license application would be denied if Wynn agreed to pay more than the land's value for non-casino purposes. So Wynn hired an appraiser that estimated the property was worth \$35 million if no casino could be built there. FBT reluctantly agreed to sell to Wynn at that price, and the Commission awarded the license to Wynn.

FBT sued the Commission, seeking to recover the \$40 million it gave up to Wynn. The court (Kaplan, J.) dismissed FBT's claims that the Commission's actions constituted tortious interference with a contract, violated the Contract Clause of the United States Constitution, or were a *per se* taking of property. FBT's remaining claim is that it suffered a "regulatory taking" of its property rights when the Commission forced it to accept the price cut.

The Commission then sued Wynn, asserting that if the Commission is liable to FBT then it is entitled to be fully compensated by Wynn. The court (Kaplan, J.) dismissed the Commission's claims for contribution and indemnification. The claim against Wynn under an unjust enrichment theory is still pending.

The Commission and Wynn have moved for summary judgment on the two open claims. The Court will **allow** the Commission's motion because FBT cannot prove that the Commission made a regulatory taking of a property right by interfering with reasonable investment-backed expectations. It will also **allow** Wynn's motion, as the Commission has agreed that it has no claim against Wynn if it defeats all of FBT's claims.

1. **Factual Background.** The following facts are undisputed for the purpose of deciding the Commission's motion for partial summary judgment.

This lawsuit concerns particular real estate in Everett, Massachusetts. FBT bought the property for \$8 million in late 2009. At that time casino gaming was illegal in Massachusetts.¹ The property was heavily contaminated and needed extensive environmental remediation. FBT explored developing the property for uses ranging from a storage facility to a recycling and sustainable energy plant to a big box retail store.

Two years after FBT acquired the property, the Governor signed legislation that established a new Massachusetts Gaming Commission and authorized it to license several casinos.² This new law divided Massachusetts into three regions and authorized a single "category 1" license for a destination resort casino in each region. Everett is in Region A, which consists of Suffolk, Middlesex, Essex, Norfolk, and Worcester counties.³

*2 Wynn became interested in this property as a possible site for a resort casino. It entered into an option contract with FBT in late 2012. Wynn agreed to pay FBT \$100,000 each month in exchange for acquiring and maintaining the right, but not any obligation, to buy the property for \$75 million if the Massachusetts Gaming Commission chose to award the Region A Category 1 casino license to Wynn. The agreement also provided that FBT would have to seek an easement for a perimeter roadway (and spend up to \$2.5 million to do so) and perform certain initial environmental cleanup (at an estimated cost of \$2.5 million); Wynn and FBT agreed that each would

pay half of any remaining, additional cost to clean up the property. Wynn did not seriously pursue and did not acquire an option on any other potential casino sites.

A month later Wynn and one other company started the process of applying for the Region A Category 1 gaming license.

Commission staff began a suitability investigation of Wynn and its affiliates. At some point they learned that a convicted felon with alleged ties to organized crime might have an ownership interest in FBT. The current owners of FBT explained that, although this had once been true, this person no longer had any interest in FBT. The Commission's investigators did not believe this sworn testimony, however, and suspected that this person still had a hidden ownership interest in FBT.

Commission staff worked with Wynn to moot this concern, by having Wynn eliminate any “casino-related premium” from the price it would pay to FBT for the property. Wynn sought an appraisal of the property based on assumptions that the land had been made free of environmental contamination and could not be used for a casino resort. The appraiser determined that the highest and best non-casino use for the property was probably “large box retail,” and that under these assumptions the property was worth \$35 million. FBT did not dispute this conclusion.

In late 2013, FBT and Wynn agreed to amend their option agreement to reduce the purchase price from \$75 million to \$35 million, and to cap FBT's total liability for environmental cleanup at \$10 million. Ten months later, the Commission awarded the Region A Category 1 license to Wynn, which then exercised its option to acquire the property from FBT at the reduced price.

2. Regulatory Takings in General. FBT claims that the “Commission's forced reduction of the contract price by \$40 million constitutes a regulatory taking” under the Fifth and Fourteenth Amendments to the United States Constitution⁴ and under article 10 of the Massachusetts Declaration of Rights.⁵

Like the parties, the Court will evaluate this claim by applying the standards that have developed under Federal law. The Supreme Judicial Court has followed Federal precedent when examining regulatory and other takings claims brought under article 10. See *Fitchburg Gas & Elec. Light Co. v.*

Department of Pub. Utils., 467 Mass. 768, 775 n.8 (2014). Article 10 and the Fifth Amendment provide “parallel” protections that require the government to pay reasonable or just compensation if it takes property for a public use. *Verrochi v. Commonwealth*, 394 Mass. 633, 637 n.7 (1985), quoting *Bromfield v. Treasurer & Receiver Gen.*, 390 Mass. 665, 668 (1983). Since FBT does not argue that its regulatory takings claim might succeed under article 10 even if it fails under the United States Constitution, there is no need to explore whether in some circumstances different standards may apply under Massachusetts law. See *Steinbergh v. City of Cambridge*, 413 Mass. 736, 738 (1992).

*3 The Constitution treats “physical takings” and “regulatory takings” differently. See *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 321–324 (2002). “When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner[.]” *Id.* at 322. In contrast, “[a] regulatory taking ... arises not from the acquisition of an interest in property by the government, but rather from a [government] regulation ... that severely limits the property's use.” *Blair v. Department of Conservation and Recreation*, 457 Mass. 634, 641 (2010). “While most restrictions on the use of private property do not constitute a taking, when a regulation substantially restricts the owner's use of the property, so that the regulation ‘goes too far,’ it may be deemed a regulatory taking of that property for a public use.” *Id.*, quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

Two kinds of government action will almost always constitute a regulatory taking of property. “Government regulatory actions may be deemed per se takings if a regulation causes a permanent physical invasion, or if the regulation deprives a property owner of any viable economic use of the property.” *Fitchburg Gas*, 467 Mass. at 776 (internal citation omitted); accord *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015–1016 (1992).⁶ This case does not fall into either of these categories, which is why Judge Kaplan dismissed FBT's claim of a *per se* regulatory taking.

With those two exceptions, there is generally no “set formula” for deciding whether a regulatory taking has occurred; the Supreme Court continues to “resist the temptation to adopt *per se* rules in ... cases involving partial regulatory takings.” *Tahoe-Sierra*, 535 U.S. at 326. Instead, “the determination rests on ‘the particular circumstances’ in each case after

‘essentially ad hoc, factual inquir[y].’ ” *Giovanella v. Conservation Comm’n of Ashland*, 447 Mass. 720, 725 (2006), quoting *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978); accord *Tahoe-Sierra, supra*, at 322.

Nonetheless, “[w]hen a regulatory taking involves neither a physical invasion nor a complete deprivation of use, as in the case here, Federal law has established several interrelated factors which are to be considered in determining whether a compensable taking has occurred: (1) ‘the economic impact of the regulation on the claimant;’ (2) ‘the extent to which the regulation has interfered with distinct investment-backed expectations;’ and (3) ‘the character of the governmental action.’ ” *Leonard v. Town of Brimfield*, 423 Mass. 152, 154 (1996), quoting *Penn Central, supra*.

3. FBT’s Regulatory Takings Claim. FBT contends that the Commission took away its alleged property right “to sell the Everett Parcel for its highest and best use as a casino site.”

This claim fails because FBT did not have a reasonable, investment-backed expectation that its property could be used for casino gaming. When FBT bought the property, casinos were illegal in Massachusetts, so FBT could not reasonably have expected that its property would or even might be developed as a resort casino. FBT’s later hopes of realizing a casino-related premium by selling the property to Wynn are not relevant, as they arose several years after FBT acquired the site. Even if relevant as a matter of timing, however, those hopes would still not amount to a reasonable investment-backed expectation, given that Wynn had no right to obtain a casino license.

*4 Since FBT cannot prove this aspect of its claim, the Commission is entitled to summary judgment in its favor. See generally *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 715 (1991) (summary judgment appropriate against party with “no reasonable expectation of proving an essential element” of its claim).

3.1. Investment-Backed Expectations as an Essential Element. To make out a regulatory taking claim in a case like this, where a property owner claims that the government has barred the most lucrative use of their property, the owner must show that the government action interfered with their reasonable, investment-backed expectations. The Commission is entitled to summary judgment because, as discussed in sections 3.2 and 3.3 below, FBT cannot meet this part of its burden of proof. See *Monsanto Co.*, 467 U.S.

at 1005 (lack of reasonable investment-backed expectations was “so overwhelming ... that it disposes of the taking question”); *Anaheim Gardens, LP v. United States*, 953 F.3d 1344, 1351 (Fed. Cir. 2020) (affirming summary judgment due to “complete absence of reasonable distinct investment-backed expectations”); *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1120 (9th Cir. 2010) (en banc) (affirming summary judgment because lack of interference with investment-backed expectations was “fatal”); *Cablevision Systems Corp. v. Federal Communications Comm’n*, 570 F.3d 83, 98–99 (2d Cir. 2009) (claim failed as matter of law without evidence that regulation interfered with investment-backed expectations); *State ex rel. Gilmour Realty, Inc. v. Mayfield Hts.*, 910 N.E.2d 455, 459–460 (Ohio 2009) (affirming summary judgment because rezoning “did not substantially interfere with Gilmour’s distinct investment-backed expectations”); *Good v. United States*, 189 F.3d 1355, 1363 (Fed. Cir. 1999) (affirming summary judgment because a lack of any reasonable, investment-backed expectation “defeats [a] takings claim as a matter of law”); *767 Third Ave. Assocs. v. United States*, 48 F.3d 1575, 1580 (Fed. Cir. 1995) (affirming summary judgment because plaintiff “had no reasonable investment-backed expectation to be free from government interference with its leases” to foreign government for consulate).

Hodel v. Irving, 481 U.S. 704 (1987), is not to the contrary. It concerned a Federal statute that barred Native American tribal members from passing small, fractional shares of jointly-owned land to their heirs, and instead transferred ownership to the tribe upon the member’s death. *Id.* at 708–709. The Court held that this was a taking of property for which compensation was required. *Id.* at 710, 718. It explained that the right to leave property to one’s heirs is such a central aspect of our conception of property that taking it away is akin to destroying the right to exclude others, which similarly is “one of the most essential sticks in the bundle of rights that are commonly characterized as property.” *Id.* at 716, quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). For that reason a complete abrogation of the right to pass on property when the property owner dies constitutes a taking without regard to whether the regulation interfered with any investment-backed expectations, just as under the *per se* rule that regulations causing a permanent physical invasion of property always constitute a regulatory taking. *Id.*

*5 Nothing comparable happened here. The Commission did not deprive FBT of its right to exclude others or an equally vital right that is inherent in the nature property.

FBT's assertion that it has an absolute right to sell its property for the highest price and most lucrative use, and that government action preventing it from doing so is a regulatory taking, is wrong. See, e.g., *Penn Central*, 438 U.S. at 131 (decisions that barred construction of 53-story office building in airspace above Grand Central Terminal in New York City were not a taking of property, even though they “significantly diminished the value of the Terminal site”); *Bridge Aina Le'a, LLC v. State of Hawaii Land Use Comm'n*, 950 F.3d 610, 630 (9th Cir. 2020) (en banc) (“the inability to pursue a particular development and to obtain its value” is not a regulatory taking). “A government entity is not required to permit a landowner to develop property to [the] full extent he might desire or be charged with an unconstitutional taking of the property.” *Daddario v. Cape Cod Comm'n*, 425 Mass. 411, 417 (1997) (denial of development permit to remove sand and gravel not a regulatory taking as a matter of law), quoting *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 347 (1986); accord *Zanghi v. Board of Appeals of Bedford*, 61 Mass. App. Ct. 82, 89 (2004).

FBT's reliance on *Tahoe-Sierra* is also misplaced. *Tahoe-Sierra* neither holds nor suggests in dicta that courts must always consider all three *Penn Central* factors, even if there is no evidence that a challenged regulation interfered with any reasonable investment-backed expectations. *Tahoe-Sierra* holds only that temporary moratoria on development are not a categorical or *per se* taking of property that require compensation in all cases, but instead must be evaluated using the *Penn Central* test. See 535 U.S. at 320–321. It did **not** reverse or question the holding in *Monsanto* that a lack of investment-backed expectations can be dispositive. See 467 U.S. at 1005. Indeed, *Tahoe-Sierra* does not even mention *Monsanto*.⁷

The Court may not ignore *Monsanto* on the theory that it was implicitly overruled by *Tahoe-Sierra*. As the Supreme Court has repeatedly explained:

If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [other courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.

Tenet v. Doe, 544 U.S. 1, 10–11 (2005), quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). So *Monsanto* lives and remains “the law of the land until the Supreme Court decides otherwise.” Cf. *Commonwealth v. Runyan*, 456 Mass. 230, 234 (2010).

3.2. FBT's Reasonable Expectations when it Acquired the Property. Whether FBT lost investment-backed expectations must be determined based on what it reasonably expected when it acquired the property; new expectations that arose later, up to the time that the Commission took the actions challenged in this case, are irrelevant. See *Bridge Aina Le'a*, 950 F.3d at 634 (“[W]hat is ‘relevant and important in judging reasonable expectations’ is ‘the regulatory environment at the time of the acquisition of the property.’”) (quoting *Love Terminal Partners, L.P. v. United States*, 889 F.3d 1331, 1345 (Fed. Cir. 2018)); *Meriden Tr. & Safe Deposit Co. v. F.D.I.C.*, 62 F.3d 449, 454 (2d Cir. 1995) (“[T]he critical time for considering investment-backed expectations is the time a property is acquired, not the time the challenged regulation is enacted.”).

It follows that FBT cannot prove its regulatory taking claim. When FBT bought the property in October 2009, it could not reasonably have expected to flip the site to a casino developer. At that time casinos were illegal in Massachusetts. The statute authorizing casinos was not approved until November 2011. See St. 2011, c. 194. FBT could not have reasonably expected to be able to use the site, or sell to a buyer that would use the site, for activities that were illegal when FBT bought the property. See *Anaheim Gardens*, 953 F.3d at 1348–1351; *Guggenheim*, 638 F.3d at 1120.

***6** FBT may have hoped that the Legislature would someday authorize casinos, as Governor Patrick had proposed two years before FBT acquired the site.⁸ But that would not count as an investment-backed expectation. “In order to rise to the level of an unconstitutional regulatory taking, the investment-backed expectations frustrated by governmental regulation must be ‘reasonable and predicated on existing conditions,’ not merely a ‘unilateral expectation or an abstract need.’” *FIC Homes of Blackstone, Inc. v. Conservation Comm'n of Blackstone*, 41 Mass. App. Ct. 681, 693 (1996), quoting *Leonard*, 423 Mass. at 155; accord *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005–1006 (1984).

The dashing of unfounded hopes cannot support a regulatory taking claim. The requirement that investment-backed expectations be “reasonable” makes it an objective test. See, e.g., *Cienega Gardens v. United States*, 331 F.3d 1319, 1346 (Fed. Cir. 2003). In other words, “‘[d]istinct investment-backed expectations’ implies reasonable probability, ... not starry eyed hope of winning the jackpot[.]” *Bridge Aina Le'a, LLC*, 950 F.3d at 634, quoting *Guggenheim*, 638 F.3d at 1120.

The Commission is entitled to judgment in its favor as a matter of law not because the Court is creating some new *per se* rule, but instead because FBRT cannot “meet its difficult burden to establish reasonable investment-backed expectations” of being able to sell the site to a casino developer. Cf. *Anaheim Gardens*, 953 F.3d at 1349–1350. In this case “the complete lack of investment-backed expectations overwhelmingly outweighs the other *Penn Central* factors.” *Id.* at 1351.

3.3. FBT's Expectations after the Gaming Act Took Effect.

FBT argues that its investment-backed expectations must be determined based on expenses it incurred and commitments it made after licensed casino gambling became legal in Massachusetts. But it fails to identify any legal precedent that supports this assertion.

The one decision that FBT cites in this regard is not on point. *Kaiser Aetna* does **not** hold that a regulatory taking may occur if government interferes with expectations that arise long after someone has acquired property, as FBT contends. Instead, the Supreme Court held that once *Kaiser Aetna* had developed a private marina by dredging a salt-water lagoon, the imposition of public right of navigational access would constitute a taking that requires just compensation because it would “result in an actual physical invasion of the privately owned marina.” 444 U.S. at 180. *Kaiser Aetna* is governed by the rule that any government regulation compelling a private property owner to suffer a permanent physical invasion of their property is a *per se* taking, without regard to whether any investment-backed expectations have been dashed. See *Lucas*, 505 U.S. at 1015 (characterizing *Kaiser Aetna* in this way). Though *Kaiser Aetna* mentions the three *Penn Central* factors, 444 U.S. at 175, it does not analyze or otherwise discuss investment-backed expectations at all.

But even if FBT's expectations after the Commission was created and casino gaming became legal in Massachusetts were relevant, FBT would still be unable to prove that FBT had an objectively reasonable, investment-backed expectation that it could reap a premium by selling the site to Wynn for use as a destination resort casino. Case law about other kinds of government approval needed for particular uses of real estate is relevant here.

*7 For example, a zoning amendment that bars what would have been the most lucrative use of a particular site is not a regulatory taking as a matter of law, because a property owner

cannot have a reasonable investment-backed expectation that zoning will never change or become more restrictive. See *Zanghi v. Board of Appeals of Bedford*, 61 Mass. App. Ct. at 88; *W.R. Grace & Co.-Conn. v. Cambridge City Council*, 56 Mass. App. Ct. 559, 574 (2002) (affirming summary judgment against land owner).

Similarly, a landowner could not have a reasonable investment-backed expectation that she would be given a special permit allowing her to subdivide and build on land in a flood plain. *Leonard*, 423 Mass. at 155. And the lack of any reasonable, investment-backed expectation of receiving such regulatory approval to develop a property will defeat the owner's regulatory takings claim as a matter of law. *Good v. United States*, 189 F.3d 1355, 1363 (Fed. Cir. 1999).

The same is true here.

The Commission has “full discretion as to whether to issue a license” and applicants “have no legal right or privilege to a gaming license.” G.L. c. 23K, § 17(g). By enacting this provision, the Legislature “sharply curtailed the availability of judicial review of commission licensing decisions, and thereby vested a tremendous amount of discretion in the commission.” *City of Revere v. Massachusetts Gaming Comm'n*, 476 Mass. 591, 606 (2017). Indeed, if the Commission was not convinced that there is an applicant that met the eligibility criteria and also provided convincing evidence that it would provide value to the region, the Commission could have declined to issue the category 1 license for Region A to any applicant at all. See *id.*, §§ 19(a) & 20(a).

As a result, Wynn and other applications for gaming licenses could not have any reasonable “expectation of value” that could constitute property subject to constitutional protection. See *Caesars Massachusetts Management Co. v. Crosby*, 778 F.3d 327, 335 (1st Cir. 2015); accord *Abdow v. Attorney General*, 468 Mass. 478, 496 (2014) (proposed initiative to repeal Gaming Act would not, by prohibiting approval of license application, constitute a taking of property). To the contrary, “participating in an application for a casino license is accorded no status more substantial than hope alone.” *Caesars*, *supra*.

Since Wynn could have no reasonable expectation that it would be awarded a gaming license, it necessarily follows that FBT could not have a reasonable investment-backed

expectation that Wynn would be awarded the license and then choose to exercise its option to buy the property.

3.4. **Rule 56(f) Request.** At the end of its written memorandum, after fully addressing the merits of the Commission's motion for summary judgment, FBT urges the Court not to reach the merits until discovery has been completed. FBT has submitted an affidavit from counsel in support of this request under [Mass. R. Civ. P. 56\(f\)](#).

FBT has not met its burden of showing that such a continuance is appropriate, because it has not identified any additional discovery that would be relevant “to the issue being adjudicated in summary judgment.” Cf. [Commonwealth v. Fall River Motor Sales, Inc.](#), 409 Mass. 302, 308 (1991).

FBT says that it should be allowed to depose current or former Massachusetts Gaming Commissioners, Commission staff, and Wynn representatives about “the character of the governmental action here.” For the reasons discussed above, however, more information about what the Commission did and why it took those actions is immaterial because FBT cannot show that the Commission interfered with any reasonable, investment-backed expectations.

*8 In addition, FBT says it should be allowed to conduct further discovery to establish the full extent and value of expenses it incurred in an effort to sell the property at a premium for a casino use. This part of the [Rule 56\(f\)](#) request fails because FBT has not identified any “specific facts” that could be established through additional discovery, cannot be fleshed out using FBT's own books and records, and would be material as to issues raised in the Commission's

summary judgment motion. See [E.A. Miller, Inc. v. South Shore Bank](#), 405 Mass. 95, 100, (1989). As discussed above, FBT's hopes and expectations after licensed casino gaming was legalized in Massachusetts are irrelevant and, in any case, not objectively reasonable. That is so regardless of the nature and amount of the alleged investment.

4. **The Commission's Unjust Enrichment Claim.** Wynn argues that, if the Commission obtains summary judgment on FBT's remaining claim, then the Commission would have no basis for pressing its unjust enrichment claim against Wynn. And the Commission agrees. The Court will therefore allow Wynn's motion for summary judgment.

Orders

The Massachusetts Gaming Commission's motion for summary judgment is **allowed**. Wynn MA, LLC's motion for summary judgment is also **allowed**.

Pursuant to the prior decisions in this case partially allowing motions to dismiss and the Court's current decision granting summary judgment as to all remaining claims and third-party claims, **final judgment shall enter** dismissing the claims by FBT Everett Realty, LLC, against the Massachusetts Gaming Commission with prejudice, and also dismissing the third-party claims by the Commission against Wynn MA, LLC, with prejudice.

All Citations

Not Reported in N.E. Rptr., 2021 WL 2584131

Footnotes

1 See [G.L. c. 271, §§ 3, 5, 7, 8](#).

2 See St. 2011, c. 194, § 16, which enacted G.L. c. 23K. This statute was approved by the Governor on November 22, 2011. It exempted casinos licensed under c. 23K from the statutes that otherwise make it a crime to operating a gaming establishment in Massachusetts. See [G.L. c. 271, §§ 3, 5, 7, 8](#), as amended by St. 2011, c. 194, §§ 53, 54, 57, 58.

3 See [G.L. c. 23K, § 19\(a\)\(1\)](#).

4 “The Fifth Amendment prohibition against the taking of private property for public use without just compensation applies against the States through the Fourteenth Amendment.” [Texaco, Inc. v. Short](#), 454 U.S. 516, 523 n.11 (1982); accord [Chicago, B. & Q. R. Co. v. Chicago](#), 166 U.S. 226, 239 (1897).

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- 5 Though FBT also refers to the eminent domain statute ([G.L. c. 79, § 10](#)) in its amended complaint, that adds nothing to its regulatory takings claim. If the Commission's actions do not constitute a taking of property, then the eminent domain statute is not implicated.
- 6 There is a "caveat" to this second category: "[t]he complete deprivation of use will not require compensation if the challenged limitations 'inhere ... in the restrictions that background principles of the State's law of property and nuisance already placed upon land ownership.' " *Murr v. Wisconsin*, 137 S. Ct. 1933, 1943 (2017), quoting *Lucas*, 505 U.S. at 1029.
- 7 The same is true of Justice O'Connor's concurring opinion in *Palazzolo v. Rhode Island*, 533 U.S. 606, 632–636 (2001), two paragraphs of which are quoted with approval in *Tahoe-Sierra*, 535 U.S. at 336. Indeed, no opinion in *Palazzolo* mentions *Monsanto*.
- 8 See "Governor Patrick Unveils Plan for Casino Gambling in Massachusetts," Press Release issued September 17, 2007, available at <https://archives.lib.state.ma.us/bitstream/handle/2452/124898/ocn7951832452007-09-17.PDF?sequence=1&isAllowed=y>.

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2024 WL 5183396 (Mass.Super.) (Trial Order)

Superior Court of Massachusetts.

Middlesex County

FBT EVERETT REALTY, LLC,

v.

MASSACHUSETTS GAMING COMMISSION,

v.

Wynn MA, LLC.

No. 1881CV00304.

December 12, 2024.

Decision and Order on Further Motions for Summary Judgment[Kenneth W. Salinger](#), Judge.

***1** Wynn MA, LLC built the Encore Boston Harbor resort casino in Everett, Massachusetts, on land that it bought from FBT Everett Realty, LLC. At first, FBT contracted to sell the property to Wynn for \$75 million if Wynn received a casino license. But staff in the Investigations and Enforcement Bureau (“IEB”) of the Massachusetts Gaming Commission learned that a convicted felon may have had an indirect ownership interest in FBT, which prompted the IEB to conduct an extensive investigation. Wynn was concerned that this could lead to a finding that it was not suitable to receive a casino license. Wynn told FBT that, in an effort to cure this problem, Wynn would pay no more than the land's value for non-casino purposes. Wynn hired an appraiser that estimated the property was worth only \$35 million if no casino could be built. FBT reluctantly agreed to sell to Wynn at that price. The Commission approved this solution and eventually gave Wynn a license.

FBT claims that the Commission made a regulatory taking of FBT's property rights. In pressing this claim, FBT contends the evidence shows that IEB staff coerced Wynn into pressuring FBT to accept a \$40 million price reduction by telling Wynn it would not be found suitable unless Wynn convinced FBT to cut the sales price to eliminate any casino-related premium.

FBT also claims, in the alternative, that Wynn engaged in fraud and committed unfair or deceptive trade practices in violation of G.L. c. 93A. When it argues in favor of these claims against Wynn, FBT takes the exact opposition position and contends the evidence supports a finding that the IEB never told Wynn it would be found unsuitable if it paid a casino premium for the Everett property, and that Wynn falsely claimed the IEB said the agreed-upon purchase price would not be approved to coerce FBT into accepting a much lower price.

The Commission and Wynn have moved for summary judgment in their favor on these claims.

The Court will **allow** the Commission's motion for summary judgment on the regulatory taking claim. Only final action by the Commission itself can give rise to liability on a regulatory taking theory. Even assuming that IEB staff made clear to Wynn that it would probably not be found suitable to receive a gaming license unless the price paid to FBT did not include a casino-related premium, it is undisputed that the Commission played no role in that alleged pressure and was not involved in considering the Option Agreement until after FBT had already agreed to the price reduction sought by Wynn.

The evidence obtained during discovery establishes that the Commission had nothing to do with pressuring or convincing FBT to sell the property at a lower price, therefore no action by the Commission had any adverse economic impact on FBT, and (as previously established) the price reduction did not interfere with any reasonable investment-backed expectations by FBT. All three of these factors weigh heavily against finding that the Commission did anything that constitutes a regulatory taking of FBT's property interests. FBT's remaining claim against the Commission therefore fails as a matter of law. It follows that Wynn is entitled to summary judgment on the Commission's related claim against Wynn on a theory of unjust enrichment.¹

***2** The Court will **deny** Wynn's motion for summary judgment with respect to FBT's fraud and c. 93A claims. With respect to these claims, there is a material dispute as to whether the IEB told Wynn that its license application would be imperiled if Wynn paid a casino-related premium to FBT. The evidence would support findings that the IEB staff never said any such thing, that Wynn committed fraud and engaged in unfair and deceptive trade practices by falsely telling FBT that IEB staff were insisting that FBT accept a price cut to eliminate that premium, and that FBT reasonably relied on Wynn's misrepresentations and suffered economic damage as a result.

1. Procedural Background. FBT originally sued only the Commission, seeking to recover the \$40 million that FBT gave up to Wynn. The court (Kaplan, J.) dismissed FBT's claims that the Commission's actions constituted tortious interference with a contract, violated the Contract Clause of the United States Constitution, or were a *per se* taking of property. FBT's remaining claim against the Commission is that it suffered a “regulatory taking” of its property rights because of pressure by IEB staff members.

The Commission then sued Wynn, asserting that if the Commission is liable to FBT then it is entitled to be fully compensated by Wynn. The court (Kaplan, J.) dismissed the Commission's claims for contribution and indemnification. The unjust enrichment claim against Wynn is still pending. In this claim, the Commission contends that Wynn would be unjustly enriched if the Commission were found liable to FBT for the price reduction but Wynn were allowed to keep the benefit of that reduction.

In June 2021, this Court (Salinger, J.) granted summary judgment in the Commission's favor on the regulatory taking claim because it concluded that FBT cannot prove that the Commission made a regulatory taking of a property right by interfering with reasonable investment-backed expectations.

The Supreme Judicial Court agreed that the Commission's alleged role in pressuring FBT to accept a \$40 million price cut did not interfere with any reasonable investment-backed expectations, but held that the Court erred in granting summary judgment without also considering the character of the Commission's actions (if any) and the economic impact of those actions on FBT. See *FBT Everett Realty, LLC v Massachusetts Gaming Commission*, 489 Mass. 702, 703 & 709-713 (2022). The SJC remanded the case for completion of discovery on these other factors, explaining that “[o]nly when the disputed facts surrounding the commission's actions are fully developed and resolved will it be possible to properly decide FBT's regulatory taking claim.” *Id.* at 717. In addition, the SJC affirmed Judge Kaplan's prior dismissal of FBT's tortious interference claim, on the ground that the Commission is a public employer and is therefore immune from liability for intentional tort claims under the Massachusetts Tort Claims Act. *Id.* at 717-723.

After remand, the parties completed the further discovery contemplated in the SJC's decision.

Based on that discovery, FBT sued Wynn for fraud and for violating [G.L. c. 93A, § 11](#). FBT asserts that, if IEB staff testified accurately that they did not tell Wynn that its planned purchase of the property would be unacceptable if carried out pursuant to the terms originally agreed to by Wynn and FBT, then Wynn engaged in fraud by misrepresenting the IEB's position as a ploy to pressure FBT into accepting a \$40 million price cut.

2. FBT's Regulatory Taking Claim. With that as background, the Court will now address the Commission's motion for summary judgment as to FBT's regulatory taking claim. This claim asserts that the “Commission's forced reduction of the contract price by \$40 million constitutes a regulatory taking” under the Fifth and Fourteenth Amendments to the United States

Constitution² and under article 10 of the Massachusetts Declaration of Rights.³ The summary judgment record shows that the Commission is entitled to judgment in its favor on this claim as a matter of law.

***3 2.1. Legal Standards.** The Court must apply the following legal rules or principles in deciding the Commission's summary judgment motion.

2.1.1. Evaluating Alleged Regulatory Takings. Like the parties, the Court will evaluate FBT's regulatory taking claim by applying the standards that have developed under Federal law.⁴

The United States Constitution treats “physical takings” and “regulatory takings” of property differently. See *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 321-324 (2002). “When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner[.]” *Id.* at 322. In contrast, a regulatory taking “arises not from the acquisition of an interest in property by the government, but rather from a regulation” or other government action “that severely limits the property's use.” *Blair v. Department of Conservation and Recreation*, 457 Mass. 634, 641 (2010). “While most restrictions on the use of private property do not constitute a taking, when a regulation substantially restricts the owner's use of the property, so that the regulation ‘goes too far,’ it may be deemed a regulatory taking of that property for a public use,” in which case the property owner is entitled to fair compensation for the rights taken from it. *Id.*, quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

Two kinds of government action will almost always constitute a regulatory taking of property. “Government regulatory actions may be deemed per se takings if a regulation causes a permanent physical invasion” of private property, “or if the regulation deprives a property owner of any viable economic use of the property.” *Fitchburg Gas & Elec. Light Co. v. Department of Pub. Utils.*, 467 Mass. 768, 776 (2014) (internal citation omitted); accord *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015-1016 (1992).

This case does not fall into either of these categories, which is why Judge Kaplan dismissed FBT's claim of a *per se* regulatory taking.

“To determine whether a government restriction on an owner's use of property has effected a compensable taking” in a case like this, “where the restriction involves neither a physical invasion nor a complete deprivation of economically viable use,” courts must consider and balance three factors: “the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action.” *FBT Everett*, 489 Mass. at 708, quoting *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021). These are often referred to as the “Penn Central factors,” because they were first identified by the Supreme Court in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). See *FBT Everett*, *supra*, at 708 & 711.

***4** A determination of whether there has been a regulatory taking “rests on ‘the particular circumstances’ in each case after ‘an essentially ad hoc, factual inquiry’” focusing on these three factors. *Giovanella v. Conservation Comm'n of Ashland*, 447 Mass. 720, 725 (2006) (cleaned up), quoting *Penn Central*, *supra*; accord *Tahoe-Sierra Preservation Council*, 535 U.S. at 322; *FBT Everett*, *supra*.

2.1.2. Granting Summary Judgment. The entry of summary judgment is appropriate if, and only if, “viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law.” *Nelson v. Salem State College*, 446 Mass. 525, 530 (2006), quoting *Augat, Inc. v. Liberty Mut. Ins. Co.*, 410 Mass. 117, 120 (1991).

“The purpose of summary judgment is to decide cases where there are no issues of material fact without the needless expense and delay of a trial followed by a directed verdict.” *Correllas v. Viveiros*, 410 Mass. 314, 316 (1991).

On a motion for summary judgment the Court “must ... draw all reasonable inferences” from the evidence “in favor of the nonmoving party,” as a fact finder would be free to do at trial. *Godfrey v. Globe Newspaper Co., Inc.*, 457 Mass. 113, 119 (2010); see also *O'Connor v. Redstone*, 452 Mass. 537, 540 (2008) (in deciding motion for summary judgment, “[t]he judge views the evidence indulgently in favor of the nonmoving party and without considering witness credibility, weighing the evidence, or making findings of fact”).

A factual dispute will preclude summary judgment only where it is material to the outcome; “the dispute is not ‘material’ if one can assume the facts as contended by the nonmoving party, and on those assumed facts the moving party still must prevail as a matter of law.” *Jenkins v. Bakst*, 95 Mass. App. Ct. 654, 660 (2019). Thus, “to the extent the record includes disputed evidence,” the Court may “consider that evidence in the light most favorable” to FBT, as the nonmoving party, and determine whether the Commission is entitled to judgment as a matter of law if the evidence is construed in that manner. See *O’Keeffe v. Dwyer & Duddy, P.C.*, 100 Mass. App. Ct. 671, 671 (2022) (affirming summary judgment), quoting *Cesso v. Todd*, 92 Mass. App. Ct. 131, 132 (2017); accord *Nelson*, 446 Mass. at 535 (affirming summary judgment).

2.2. Factual Background with Inferences Drawn against the Commission. When construed in the light most favorable to and if one draws all reasonable inferences in favor of FBT, the summary judgment record shows that the following facts are undisputed or that the Court must treat them as being undisputed for the purpose of deciding the Commission’s motion.

2.2.1. FBT Acquires the Property. This lawsuit concerns certain real estate in Everett, Massachusetts. FBT bought the property for \$8 million in late 2009. The property was heavily contaminated and needed extensive environmental remediation. When FBT bought the property, casino gaming was illegal in Massachusetts. See G.L. c. 271, §§ 3, 5, 7, 8; *FBT Everett*, 489 Mass. at 704.

2.2.2. The Original Option Agreement. Two years after FBT acquired the property, the Governor signed legislation that established a new Massachusetts Gaming Commission and authorized it to license several casinos. *FBT Everett*, *supra*.⁵ This new law divided Massachusetts into three regions and authorized a single “category 1” license for a destination resort casino in each region. See G.L. c. 23K, § 19(a)(1); *FBT Everett*, *supra*. Everett is in Region A, which consists of Suffolk, Middlesex, Essex, Norfolk, and Worcester counties. *Id.*

***5** After this statute took effect, Wynn became interested in FBT’s Everett property as a possible site for a resort casino. Wynn entered into an Option Agreement with FBT in late 2012. Wynn agreed to pay FBT \$100,000 each month in exchange for acquiring and maintaining the right, but not any obligation, to buy the property for \$75 million if the Commission awarded the Region A Category 1 casino license to Wynn. This purchase price reflected a substantial premium over what the property would have been worth for a non-casino use.

The Option Agreement addressed how to allocate future environmental remediation costs, as follows.

- FBT agreed (in § 5.7.1) that it would be solely responsible for obtaining and paying for environmental cleanup work sufficient to achieve a “Permanent Solution” that met the requirements of the Massachusetts Contingency Plan, “consistent with [Wynn’s] proposed use and development of the Property and acceptable to [Wynn] in its reasonable discretion.”⁶ FBT was obligated to have that work completed before closing on the sale to Wynn. The Option Agreement placed no cap on FBT’s liability for achieving a Permanent Solution.
- Wynn and FBT agreed (in § 5.7.6) to pay 50 percent each of any “Incremental Environmental Costs” incurred due to Wynn’s development and use of the property, such as increased costs incurred to dispose of contaminated soil, groundwater or sediments. The parties agreed that FBT’s share of such incremental costs would be subject to an unspecified, “to-be-determined” cap or upper limit.
- Wynn and FBT agreed (again in § 5.7.6) to enter into a mutually agreeable “Environmental Cost-Sharing Agreement” that would specify the cap on FBT’s share of Incremental Environmental Costs, and to do so no later than a defined “Environmental

Condition Date.” The parties also agreed to maximize any environmental cost recovery under a judgment against a former owner of the property, Pharmacia Corporation, and that the full recovery under that judgment would be assigned to Wynn unless the parties agreed otherwise in their Environmental Cost-Sharing Agreement.⁷

*6 The Option Agreement provided (in §§ 5.7.6 and 8.7) that if Wynn and FBT did not agree on how to allocate the Incremental Environment Costs by the Environmental Condition Date then either party could terminate the Option Agreement. Wynn and FBT kept extending that deadline, but never agreed on any cap on FBT's share of the Incremental Environmental Costs.

However, neither side exercised any right to terminate the Option Agreement. Instead, as discussed below, in late November 2013 Wynn and FBT entered into a Ninth Amendment to the Option Agreement that reduced the purchase price and imposed a different cap on FBT's environmental cleanup obligations.

2.2.3. The Investigation and Enforcement Bureau's Role. In January 2013, after signing the original Option Agreement, Wynn filed its application for the Region A Category 1 gaming license. The IEB then began to investigate whether Wynn was suitable to receive such a license.

In early July 2013, IEB staff obtained recorded prison phone calls suggesting that a convicted felon with an extensive criminal record, who was friendly with a state prison inmate with ties to organized crime, might have a concealed ownership interest in FBT. These recordings triggered an extensive investigation by the IEB into the ownership of FBT. Several people who once had an interest in FBT asserted their Fifth Amendment right against self-incrimination when subpoenaed to testify before the IEB.

In response to the IEB's inquiries, FBT provided a document purporting to show that the convicted felon had transferred his ownership interest in FBT to another person in August 2012, four months before Wynn and FBT entered into their Option Agreement. FBT's owners all assured the IEB that the felon had in fact transferred his interest well before Wynn executed the Option Agreement.

But in October FBT's manager conceded under oath, during testimony before IEB investigators, that this was not true. He admitted that this transfer of ownership interests did not actually take place until July 2013, that it occurred after FBT became aware of the IEB's investigation into the ownership of FBT, and that FBT's manager had falsely backdated the document to make it look like the former owner had signed it almost a year earlier.

During this investigation, IEB staff considered, but never discussed with any of the Commissioners, whether the IEB could condition Wynn's receipt of a casino license on the elimination of any casino-related premium from the purchase price to be paid to FBT for the Everett property. The IEB also considered, but again did not discuss with the Commission, whether the Commission could require that the casino premium be paid to the Commission on behalf of the Commonwealth, rather than to FBT.

IEB staff met or spoke with Wynn representatives at least ten different times about the FBT land transaction and the threat it posed to Wynn being found suitable to receive a casino license. In October 2013, the IEB played the prison phone call recordings for Wynn, which understood that the IEB did so because a hidden criminal interest in FBT could be inconsistent with Wynn being found to be suitable as an application for a gaming license. At around the same time the IEB played the same recordings for members of FBT.

During the IEB's communications with Wynn about whether someone with a criminal record may still hold an indirect ownership interest in FBT, IEB staff conveyed to Wynn their belief that FBT's principals should not profit from the legalization of casino gaming in Massachusetts by earning a casino-related premium on the sale of FBT's property to Wynn. IEB staff made clear to Wynn during the Fall of 2013 that, given the evidence suggesting that someone with a significant criminal history had held an indirect ownership interest in FBT, and that FBT had tried to conceal that fact, the IEB's evaluation of Wynn's suitability would be adversely affected if FBT was to earn a casino-related premium for selling the property to Wynn.⁸

*7 The IEB also made clear to Wynn that the Commission had not yet deliberated about the issue, which meant that the IEB did not know whether the Commission shared the IEB's views.

The IEB ultimately concluded in its December 2013 report to the Commission that FBT had withheld material information, FBT's manager had provided false and deceptive documents and information about who held ownership interests in FBT and when they did so, and one person with an ownership interest in FBT had tried to conceal his role because he had a significant criminal history. The IEB also concluded that Wynn did not participate in or have any knowledge of FBT's wrongdoing. This report was issued after FBT had agreed to reduce the purchase price for the Everett property.

2.2.4. Wynn's Renegotiation. Wynn first discussed the IEB's concerns with FBT during a meeting on September 27, 2013. Wynn told FBT that if it did not cooperate in fixing the problem then Wynn could be found unsuitable to receive a license. In making this point, Wynn's general counsel said that FBT needed to do whatever Wynn said was necessary to fix the problem, or whatever the IEB or the Commission required, and that if FBT refused then Wynn was "going to sue you back to the stone ages."

Several weeks later, during a conference call on October 22, 2013, Wynn told FBT that IEB staff was insisting that the Option Agreement be renegotiated to eliminate any casino-related premium from the purchase price for the property. Wynn also told FBT that it would be seeking an appraisal of the property based on assumptions that the land was made free of environmental contamination and could not be used for a casino resort. In addition, Wynn told FBT during this call that if FBT did not agree to reduce the property's sale price to eliminate any casino-related premium, then the IEB was going to deem Wynn unsuitable for a casino license, Wynn would not close on the purchase of the property, and Wynn would sue FBT and its principals for all resulting economic damage.

Wynn reiterated some of these points in writing. On November 6, 2013, Wynn wrote to FBT stating that the IEB had informed Wynn that purchase of the Property pursuant to the terms of the then-current Option Agreement would not be acceptable. Wynn also confirmed in this letter that it had commissioned an appraisal of FBT's property to determine its fair market value on the assumption that it could not be used for a casino.

The appraiser hired by Wynn determined in late October 2013 that the highest and best non-casino use for the property was probably "large box retail." It also concluded that, if the property was not used for gaming and the environmental contamination were adequately remediated, then fair market value of the property would be \$35 million. FBT did not dispute this conclusion.

On November 18, 2013, FBT's attorney met with the IEB's director to discuss the possible reduction of the property's purchase price to fair market value without a casino-related premium. FBT floated whether there were alternate remedies, like a blind trust arrangement, that would suffice to address concerns about who held beneficial interests in FBT. The IEB's director made clear that in her view no other remedies would solve the problem, and that she was not sure whether the Commission would even accept Wynn paying FBT fair market value without a casino premium.⁹ However, the IEB's director did not say or suggest that the IEB had come up with the idea of reducing the purchase price to eliminate the casino premium, or that it had pressed or encouraged Wynn to pressure FBT to do so.

***8 2.2.5. The Amended Option Agreement.** FBT capitulated to Wynn's demand and accepted the \$40 million price reduction, in order to eliminate the so-called casino premium, because Wynn told FBT that the IEB was pressing for that to happen. FBT told Wynn in a later dated November 11, 2013, that it was accepting Wynn's reports about its communications with the IEB without seeking independent verification.

On November 26, 2013, FBT and Wynn agreed to amend their Option Agreement to reduce the purchase price from \$75 million to \$35 million, and to cap FBT's total liability for environmental cleanup at \$10 million. This Ninth Amendment to Option Agreement provided in part that if the Commission were to approve the Option Agreement, as amended, then mutual releases by Wynn and FBT of all past or present claims of any kind would take effect.

The following week, on December 5, 2013, Wynn submitted a petition to the Commission asking it to accept the amended Option Agreement. The next day, the IEB submitted its final report regarding its suitability investigation of Wynn to the Commission. The report addressed the FBT ownership issues.

Only the Commission had the authority to approve Wynn's proposal to reduce the purchase price. The IEB informed Wynn that the IEB did not have the authority to approve Wynn's proposal. And the IEB did not know and never offered any opinion to Wynn or FBT as to whether the Commission would approval the proposal.

2.2.6. The Commission's Role. The Commissioners of the Massachusetts Gaming Commission played no role whatsoever in the price reduction that Wynn extracted from FBT.

The Commission first learned from IEB staff that someone with a criminal record may have an ownership interest in FBT during an executive session in early August 2013. The Commission received confidential updates on this issue from IEB staff on August 22 and September 19, 2013.

On December 13, 2013, several weeks after FBT's and Wynn's November 26 agreement to amend their Option Agreement to reduce the purchase price, the Commission held its first public meeting to discuss the IEB's investigation into who held direct or indirect ownership interests in FBT.

During this public meeting, the IEB's director gave an oral report summarizing the IEB's investigation and conclusions regarding these issues. She confirmed that the IEB had briefed Wynn on what the IEB had uncovered, and had made clear to Wynn that she was concerned by the evidence that someone with a criminal record held an indirect ownership interest in FBT, and also that the Commission had not yet deliberated on the matter. The director also made clear she believed that Wynn's "position regarding the sellers receiving a financial windfall as a result of the gaming facility was something the IEB would report on regarding [Wynn's] suitability" for a gaming license; however, the director did not say that the IEB ever told Wynn it would be taking this into account.

Later during this meeting, the Commission discussed and voted to accept the amendment to the Option Agreement as a resolution of the land ownership issues identified by the IEB. It also voted to require certificates from FBT members regarding whether anyone else held ownership interests in FBT, and directed the IEB to forward its investigatory materials to State and Federal law enforcement officials.

At no time before this December 13 meeting and vote did the Commission ever discuss, consider, or make any decision as to any potential remedies, solutions, or any other restrictions regarding the sale of the Property from FBT to Wynn. Nor did the Commission or any Commissioner ever communicate to the IEB, to Wynn, or to anyone else before the December 13 meeting that Wynn would have to convince FBT to reduce the purchase price for the Property in order for Wynn to be found suitable to receive a casino license.

***9** Ten months later, in September 2014, the Commission awarded the Region A Category 1 license to Wynn, which then exercised its option to acquire the property from FBT at the reduced price.

2.3. Analysis of the Regulatory Taking Claim. The summary judgment record establishes that FBT cannot prove its regulatory taking claim against the Massachusetts Gaming Commission, because all three Penn Central factors weigh heavily against finding that the Commission took any action that could constitute a taking of property from FBT.

FBT's assertion that "[t]he SJC's earlier decision in this case forecloses the Commission's present motion for summary judgment" is without merit. The SJC made clear that its conclusions were "based on the limited discovery that has occurred so far" and specifically "remand[ed] FBT's regulatory taking claim to the Superior Court to allow the completion of discovery and further

proceedings consistent with this opinion.” *FBT Everett Realty*, 489 Mass. at 705 & 717. It emphasized that “[o]nly when the disputed facts surrounding the commission's actions are fully developed and resolved will it be possible to properly decide FBT's regulatory taking claim.” *Id.* at 717.

Since the more robust evidentiary record presented by the parties now is very different from the one previously reviewed on appeal, the SJC's determination that summary judgment was inappropriate on the prior record does not control whether it is appropriate on the current record. Cf. *Kitras v. Town of Aquinnah*, 474 Mass. 132, 146 (2016) (issue decided on appeal may be reopened after remand if evidence after subsequent proceedings is substantially different).

2.3.1. **No Governmental Action by the Commission.** The factor concerning the character of the governmental action weighs heavily against finding a regulatory taking here, because it is undisputed that the Gaming Commission never took any final action -- or even any preliminary action -- to compel Wynn not to pay a casino-related premium to FBT. Though there is evidence suggesting that IEB staff made clear to Wynn that its application would fail unless it could convince FBT to agree to reduce the property's purchase price to eliminate any casino premium, the Commission was not aware of and had no involvement in those efforts by IEB staff.

FBT improperly conflates the IEB staff with the Gaming Commission itself. No urging by IEB staff to eliminate any casino-related premium from the price to be paid to FBT could constitute a regulatory taking because it did not constitute final action by the Commission.

In evaluating whether there has been a regulatory taking, a court must consider only the character and impact of a final action by the relevant governmental decisionmaker. “A regulatory takings case becomes ripe for adjudication only after ... the responsible government entity has reached ‘a final decision regarding the application of the regulation to the property at issue’” (cleaned up). *Giovanella v. Conservation Comm'n of Ashland*, 447 Mass. 720, 723 (2006), quoting *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985). In other words, there must have been a final decision by “the government entity charged with implementing the regulations” or statute at issue. *Commonwealth v. Blair*, 60 Mass. App. Ct. 741, 746, rev. denied, 442 Mass. 1101 (2004), quoting *Daddario v. Cape Cod Comm'n*, 425 Mass. 411, 414 (1997), quoting in turn *Williams County*, *supra*. Agency action that falls short of “a final and authoritative determination” as to the nature and scope of legally permitted use of property cannot constitute a regulatory taking of the property. *Daddario*, quoting *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986).¹⁰

*10 Here, the Massachusetts Gaming Commission is the responsible government entity and had sole and exclusive power to implement the governing statute. The Commission consists of five commissioners and can act only by a vote of at least three commissioners. G.L. c. 23K, §§ 3(a), 3(d). Although the IEB is charged with investigating the suitability of each applicant for a gaming license (see G.L. c. 23K, § 12(a), and 205 Code Mass. Regs. 105.01(1)), it may only make a recommendation as to suitability; the Commission must decide for itself whether an applicant is suitable and, if so, to review the applicant's entire application. See G.L. c. 23K, § 12(c); 205 Code Mass. Regs. § 115.05. It was up to the Commission, and not to IEB staff, to decide whether to approve Wynn's option agreement to purchase the Everett property from FBT. See G.L. c. 23K, § 21(b); 205 Code Mass. Regs. §§ 116.08(1), 116.09(1), & 116.10(1). And it was similarly up to the Commission, and not to the IEB or any other staff, to decide whether to issue a gaming license to Wynn or to any other applicant. See G.L. c. 23K, § 17(e)-(g), § 19(a); 205 Code Mass. Regs. §§ 116.01 & 119.03.

The IEB therefore had no independent power to determine whether Wynn was suitable to obtain a casino license, or to approve or disapprove any contract between Wynn and FBT. Only the Commission, acting by majority vote of the Commissioners, could do so. As a result, the IEB had no ability to force Wynn to reduce the price it would pay for the Everett property to eliminate any casino premium. As the Commission aptly notes in its reply memorandum, “[t]he IEB did not, and could not, impose any such requirement on Wynn.

The Commission never made a final and authoritative decision that it would not approve Wynn's contract with FBT unless the negotiated purchase price were reduced by \$40 million. That is not in dispute. Indeed, it is undisputed that the Commission took no action at all with respect to Wynn's Option Agreement until several weeks after FBT had executed the contract amendment containing the price reduction.

Since “[a] final decision is an essential element of a regulatory taking claim,” and it is undisputed that the Commission did not make any final decision before FBT accepted the price reduction sought by Wynn, the Commission is entitled to summary judgment in its favor on this ground alone. See *Blair*, 60 Mass. App. Ct. 745-749 (affirming summary judgment on ground that regulatory taking claim was not ripe under *Penn Central* test because property owner did not seek variance from application of Watershed Protect Act regulations and thus did not obtain a final agency decision).

In any case, since the evidence viewed in the light most favorable to FBT establishes that the Commission “merely accepted” a reduction in the price that Wynn was to pay FBT “as a cure to its concerns about undisclosed criminal ownership interests at FBT,” and that **the Commission** never took any action to direct or compel such a result, the character of the Commission's actions weighs heavily against finding that a regulatory taking occurred. Cf. *FBT Everett*, 489 Mass. at 715.

The parties dispute whether IEB staff told Wynn that the IEB would likely not find it to be suitable to receive a gaming license unless Wynn could convince FBT to accept a lower price that did not include any casino-related premium (as FBT contends when pressing its claim against the Commission), or whether the IEB merely informed Wynn about the concerns as to whether a felon had an indirect ownership interest in FBT and Wynn decided on its own that it could cure the problem only if FBT agreed to forego a casino premium (as the Commission contends).

But this factual dispute is not material because the Commission is entitled to judgment as a matter of law even construing this evidence in the manner suggested by FBT.

Although there is evidence suggesting that IEB staff advised Wynn the IEB's evaluation of Wynn's suitability would be adversely affected if FBT was to earn a casino-related premium for selling the property to Wynn, that advice had no legal effect because it was not a final decision or other action by the Commission. It is therefore “not a form of coercive government action at all, but at most a form of ‘persuasion,’” a distinction that “weighs strongly against finding a regulatory taking.” *Taylor v. United States*, 959 F.3d 1081, 1089 (Fed. Cir. 2020) (advice by Air Force officials that Federal Aviation Administration would likely not issue “no hazard” determination, which was required to erect wind turbines on plaintiff's land, “falls into no category of governmental action we have recognized as supported a regulatory-taking claim”).

***11 2.3.2. No Economic Impact of any Commission Action.** The factor concerning the economic impact of the Commission's actions also weighs heavily against finding that there was a regulatory taking, because it is undisputed that **the Commission** did nothing that caused FBT to suffer any economic loss.

Economic impact is relevant to a regulatory taking claim only if it was “caused by” the challenged governmental action; a “‘diminution in property value, standing alone’ does not establish a taking.” *FBT Everett*, 489 Mass. at 713, quoting *Penn Central*, 438 U.S. at 124. In other words, under the *Penn Central* factors there is no regulatory taking unless some economic injury was “caused by the government action at issue, not by some other factor.” *Love Terminal Partners, L.P. v. United States*, 889 F.3d 1331, 1345 (Fed. Cir. 2018).

Thus, to succeed on its regulatory taking claim, FBT must be able to show that it was an “action of the *commission*, rather than Wynn, that caused economic loss to FBT” (emphasis in original). *FBT Everett*, 489 Mass. at 713. In a case like this, where a taking claim is based on allegations that the government “pressure[d] a third party to take action that diminishes the value of the plaintiff's property, the government is responsible ... for the economic impact of the third party's action if the economic harm to the plaintiff ‘was direct and intended’ and ‘the government's influence over the third party was coercive rather than

merely persuasive.” *FBT Everett*, 489 Mass. at 713-714, quoting *A & D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1154 (Fed. Cir. 2014).

As discussed above, it is undisputed that FBT contractually agreed to a \$40 million price cut before the Commission ever considered or voted on whether to approve the Option Agreement. Since the Commission did nothing to coerce Wynn and did nothing that caused FBT to suffer economic loss, this factor weighs heavily against finding that there was a regulatory taking.

2.3.3. No **Reasonable Investment-Backed Expectations**. Finally, it is the law of the case that “the reasonable investment-backed expectations factor weighs heavily against the finding of a regulatory taking” of FBT’s property interests. *FBT Everett*, 489 Mass. at 713.

Since casino gaming was illegal in Massachusetts when FBT bought the Everett property, FBT “could not reasonably have expected to sell the property as a site for the development of a casino.” *Id.* at 712. That would be true even if FBT believed at the time that casino gambling would be legalized, because a “‘starry eyed hope of winning the jackpot if the law changes’ does not give rise to reasonable investment-backed expectations.” *Id.*, quoting *Bridge Aina Le’a, LLC v. State of Hawaii Land Use Comm’n*, 950 F.3d 610, 633 (9th Cir. 2020) (en banc), cert. denied, 141 S.Ct. 731 (2021).

Nor could FBT’s further investments in the property after casino gaming was legalized in Massachusetts “give rise to reasonable investment-backed expectations because they remained subject to the long-shot gamble that a gaming license would be awarded to develop a casino on the Everett parcel.” *FBT Everett*, 489 Mass. at 712-713. The Massachusetts gaming act provides that the Commission “shall have full discretion as to whether to issue a license” and that applicants “have no legal right or privilege to a gaming license.” *G.L. c. 23K, § 17(g)*. “Given the commission’s very broad discretion, FBT could not reasonably have expected that Wynn would be awarded a region A casino gaming license.” *FBT Everett, supra*, at 713.

***12 2.3.4. Balancing the Penn Central Factors.** In sum, the revised summary judgment records establishes that all three Penn Central factors point in the same direction and weigh heavily against finding that there was a regulatory taking. When the Court considers and balances the Penn Central factors, based on undisputed facts and construing any disputed facts in the light most favorable to FBT, it is apparent that the Commission is entitled to judgment in its favor as a matter of law, as no reasonable fact finder could conclude that the Commission took any action that constitutes a regulatory taking of property from FBT.

2.3.5. **The Commission’s Unjust Enrichment Claim against Wynn.** Wynn argues that, if the Commission obtains summary judgment on FBT’s remaining claim, then the Commission would have no basis for pressing its unjust enrichment claim against Wynn. And the Commission seems to agree, as it has not opposed Wynn’s conditional motion for summary judgment on the unjust enrichment claim. The Court will therefore allow this part of Wynn’s motion.

3. FBT’s Claims against Wynn. Let’s turn now to FBT’s separate claims against Wynn for intentional fraud and under *G.L. c. 93A, § 11*. The Court concludes that Wynn is not entitled to summary judgment in its favor on these claims.

3.1. Factual Background with Inferences Drawn against Wynn. For the purpose of deciding Wynn’s motion for summary judgment, the record establishes the same facts or supports drawing the same inferences that are set out in §§ 2.2.1 through 2.2.6 above—with one significant exception.

As discussed in § 2.2.3 of this decision, the Commission and FBT dispute whether IEB staff ever told Wynn that it would not be found suitable to obtain a gaming license if it paid FBT a casino-related premium as part of the purchase price for the Everett property. When considering the Commission’s summary judgment motion, the inference favorable to FBT was that IEB staff did in fact convey that message.

In contrast, when considering Wynn's motion, the inference favorable to FBT is the exact opposite, that the IEB staff never told or suggested to Wynn that it could not obtain a license unless it convinced FBT to agree to a substantial price reduction that eliminated the casino premium.

Wynn implicitly concedes this point. This makes sense because, as noted above, Wynn's General Counsel, as well as the Chief Financial Officer and General Counsel of Wynn's parent company, all testified under oath at their depositions that the idea to renegotiate the Option Agreement price to eliminate any casino-related premium originated solely within Wynn, and not with the IEB.

Though Wynn asserts there is no evidence that it made any false statements or representations to FBT, it bases that argument on the assertion that there is no competent evidence that **Wynn** ever told **FBT** that the IEB staff had made clear that Wynn's application would fail if the Option Agreement continued to include a casino-related premium in the purchase price. But Wynn does **not** contend that if Wynn made such statements to FBT they would have been true.

In sum, for the purpose of deciding Wynn's motion, the Court must construe the summary judgment record as showing that: (1) IEB staff did **not** convey to Wynn their belief that FBT's principals should not profit from the legalization of casino gaming in Massachusetts by earning a casino-related premium on the sale of FBT's property to Wynn; and (2) IEB staff did **not** make clear to Wynn during the Fall of 2013 that the IEB's evaluation of Wynn's suitability would be adversely affected if FBT was to earn a casino-related premium for selling the property to Wynn.

***13 3.2. Fraud Claim.** To recover on its claim for intentional misrepresentation or fraud, FBT will have to prove that Wynn “made a false representation of material fact, with knowledge of its falsity, for the purpose of inducing” FBT “to act on this representation,” that FBT “reasonably relied on the representation as true,” and that FBT “acted upon it to [its] damage.” *Cumis Ins. Society, Inc.*, 455 Mass. 458, 471 (2009).

Wynn argues that FBT cannot prove key elements of this claim because the evidence establishes that Wynn's representations about its communications were all true, FBT did not rely (or at least did not reasonably rely) on Wynn's representations, and FBT cannot prove that it suffered any compensable injury. The Court concludes that these arguments are without merit.

If a factfinder were presented at trial with the evidence in the summary judgment record it could reasonably conclude that FBT has proved each of these elements. Wynn is therefore not entitled to summary judgment on its fraud claim. See generally *Flesner v. Technical Communications Corp.*, 410 Mass. 805, 811-812 (1991) (“Where a jury can draw opposite inferences from the evidence, summary judgment is improper.”); *Dennis v. Kaskel*, 79 Mass. App. Ct. 736, 741 (2011) (summary judgment may not be granted where “a reasonable jury could return a verdict for the nonmoving party” (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986))).

Although the November 2013 contract amendment reducing the purchase price includes a general release of all possible claims by FBT against Wynn, whether that release is enforceable cannot be resolved at this time. If FBT can prove that it was induced to enter into the contract amendment and release due to fraud by Wynn, the general release would be voidable. See *Shaw's Supermarkets, Inc. v. Delgiacco*, 410 Mass. 840, 842 (1991); *Green v. Harvard Vanguard Medical Assoc., Inc.*, 79 Mass. App. Ct. 1, 11 (2011).

3.2.1. False Statements. The summary judgment record contains sufficient evidence that Wynn represented to FBT that the IEB was insisting that the casino premium had to be eliminated or Wynn would not be found to be suitable for a gaming license, and that this representation was false.

Dustin DeNunzio testified under oath at his deposition that in October 2013, when DeNunzio was manager and one of the three remaining owners of FBT, Wynn's general counsel met with DeNunzio and told him that the IEB was insisting the sale price be reduced to eliminate the casino premium or Wynn would not be found suitable, and that Wynn would sue FBT if it did not

agree to the price cut. Wynn's assertion that "there is no evidence in the record" indicating that Wynn told FBT in October 2013 that the IEB was requiring a reduction in purchase price as a condition of suitability is simply wrong. Wynn's general counsel sent DeNunzio a letter on November 6, 2013, that arguably corroborates DeNunzio's testimony about the prior meeting. In this letter, Wynn's general counsel wrote:

As previously communicated, we have been informed by the Division of Investigation/Enforcement of the Massachusetts Gaming Commission (the "MGC") that the members of FBT have failed to cooperate and/or have provided unsatisfactory testimony to the MGC. As a direct result of this failure to cooperate, the MGC has informed us that our purchase of the Property pursuant to the terms of the current Option Agreement will not be acceptable. Moreover, if we are unable to resolve this matter prior to the deadline to submit our response to the MGC's RFA-2 Application due on December 31, 2013, we will not be eligible to receive a Casino License.

***14** The MGC has informed us that we are unable to proceed with the purchase of the Property as set forth in the Option Agreement. In addition, our internal compliance committee has serious concerns regarding the proposed transaction as it currently exists. As a result, with your approval, we have engaged Colliers International Valuation & Advisory Services to prepare an appraisal of the Property with the assumption that it will not be used for gaming purposes. We have been informed that we should be receiving the appraisal this week and we will share it with you upon receipt.

Since the letter defines "MGC" to mean the IEB, each reference in this letter to the MGC is actually a reference to the IEB.

Wynn contends that this letter proves nothing, because it "does not state anywhere that the Commission (or the IEB) was requiring a reduction in purchase price as a condition of suitability."

But at trial a factfinder could reasonably infer that this letter, when read as a whole and considered in light of DeNunzio's testimony about his prior meeting with Wynn's general counsel, was intended to and did imply that the IEB told Wynn it needed to get FBT to reduce the purchase price to eliminate any casino premium. That is a fair inference since the letter came on the heels of the late October meeting in which Wynn (allegedly) told FBT that the IEB was insisting on elimination of the casino premium, and the letter discusses the process for achieving that goal (through an appraisal that would assume the property would not be used for gaming purposes). "Fraud or deceit 'may be perpetrated by an implied as well as by an express representation.'" *Briggs v. Carol Cars, Inc.*, 407 Mass. 391, 396 (1990), quoting *Robichaud v. Owens-Illinois Glass Co.*, 313 Mass. 583, 585 (1943). And an inference

"need only be reasonable and possible;" it does not have to be "necessary or inescapable." *Parker v. EnerNOC, Inc.*, 484 Mass. 128, 132 (2020), quoting *Commonwealth v. Kelly*, 470 Mass. 682, 693 (2015).

There is also evidence that Wynn's representations that the IEB told Wynn that it would not be found suitable if it paid FBT a casino-related premium were false. The IEB's director testified under oath that the IEB never told Wynn that purchasing the property under the terms of the then-current Option Agreement would not be acceptable, but instead merely alerted Wynn to the concerning information that the IEB had uncovered while being "very specific" that it was up to Wynn to decide how to solve the problem. And Wynn's Rule 30(b)(6) witness confirmed that this was correct, testifying on behalf of Wynn that the IEB "firmly put the burden on us to come with a solution," and that the IEB's director told Wynn "many times" that "we can't tell you what to do" and that "this is your problem to solve."

3.2.2. Reasonable Reliance. Wynn's argument that FBT could not have been relying on FBT's alleged misrepresentations because it knew full well that the IEB was concerned about whether a convicted felon had an ownership interest in FBT is also without merit.

FBT does not dispute that by the Fall of 2013 it was well aware of the IEB's investigation into who actually owned FBT. But that is not the same thing as being aware, as Wynn allegedly represented, that the IEB was demanding the property purchase price be reduced to eliminate any casino-related premium.

Similarly, when FBT's counsel met with the IEB's director in mid-November 2013, the director indicated that they did not know whether the Commission would accept an amended Option Agreement that eliminated any casino premium as a solution to concerns about who owned or had owned FBT. As noted above, there is no evidence that the director revealed or suggested that the IEB had come up with the idea of reducing the purchase price to eliminate the casino premium, or that it had pressed or encouraged Wynn to pressure FBT to do so.

***15** Wynn cannot defeat the fraud claim by trying to show that FBT did not make sufficiently efforts to learn whether IEB staff had pressured Wynn to seek a price reduction. “The recipient in a business transaction of a fraudulent misrepresentation of fact is justified in relying on its truth,” even if they could have figured out that the representation was false had they “made an investigation.” *Yorke v. Taylor*, 332 Mass. 368, 374 (1955), quoting *Restatement of Torts* § 540 (1938); accord *Zimmerman v. Kent*, 31 Mass. App. Ct. 72, 81 (1991). As a result, FBT “cannot be faulted for having failed to investigate the truth or falsity” of Wynn's alleged representations before signing the Ninth Amendment to Option Agreement. See *Waste Management of Mass., Inc. v. Carver*, 37 Mass. App. Ct. 694, 699 n.5 (1994).

FBT's manager testified at his deposition that FBT agreed to the price reduction “with a gun held to our head,” and did so only “because Wynn told us that the IEB required this of us.” At trial the factfinder could credit such testimony, Wynn has therefore not shown that it is entitled to summary judgment as to the element of reliance.

Under the circumstances of this case, whether FBT's alleged reliance on Wynn's alleged misstatements was reasonable is also a question that a jury or judicial factfinder must decide at trial, not something that the Court may resolve on summary judgment as a matter of law. Cf. *Nova Assignments, Inc. v. Kunian*, 77 Mass. App. Ct. 34, 39 (2010) (summary judgment should not have been entered where reasonableness of reliance was question for jury to decide based on all facts and circumstances).

3.2.3. Damage. Wynn argues that FBT's fraud claim fails for the further reason that FBT's alleged damages “are purely speculative” because there is no way to tell what amount of money FBT would have been required to pay toward environmental remediation costs under the prior Option Agreement, and therefore no way to tell whether FBT would have made more or less profit under the prior contract than it did under the challenged contract amendment. Wynn argues that it never reached agreement with FBT as to the scope of work required either to achieve a Permanent Solution or to complete necessary Incremental Environmental Costs, regarding the “to-be-determined cap” on FBT's share of the Incremental Environmental Costs, or on how to allocate the Pharmacia judgment.

The Court concludes that these arguments are also without merit.

Both the scope of work needed to achieve a Permanent Solution in cleaning up the property that would meet the standards established by the Massachusetts Contingency Plan, and the reasonable cost of that work, are proper subjects of expert testimony. FBT has presented such testimony. It will be up to the factfinder to determine at trial whether the cost estimate by FBT's expert or some other amount is an appropriate estimate of the Permanent Solution cost. Although the original Option Agreement provided that Wynn had to approve of the Permanent Solution, it had to exercise “reasonable discretion” in doing so. It would not have been reasonable for Wynn not to accept a Permanent Solution that met the requirements of the MCP.

Much the same is true for the scope and cost of any Incremental Environmental Costs. Wynn and FBT have presented conflicting evidence as to what share of the actual costs incurred by Wynn count as “Incremental Environmental Costs” within the meaning of the prior Option Agreement. That is a genuine dispute of material fact that will have to be resolved at trial.

Though Wynn and FBT never reached agreement as to an appropriate cap on FBT's share of the Incremental Environmental Costs, that does not prevent FBT from establishing its damages due to Wynn's alleged fraud either. The Option Agreement required that there be a cap on FBT's liability for Incremental Environmental Costs, but left the details to be worked out later.

Since the parties never agreed as to the specifics of this contract term, the trial judge will have to determine and supply a reasonable term based on evidence of all relevant circumstances presented at trial.

***16** “When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court.” *President and Fellows of Harvard College v. PECO Energy Co.*, 57 Mass. App. Ct. 888, 896 (2003), quoting *Restatement (Second) of Contracts § 204* (1979)). Doing so in this case will not involve any speculation as to what agreement Wynn and FBT might have reached if they had not executed the contract amendment that FBT contends was procured by fraud. Instead, where contracting parties did not agree upon an essential but missing contract provision, “the court should supply a term which comports with community standards of fairness and policy rather than analyze a hypothetical model of the bargaining process.” *Id.*, quoting *Restatement § 204*, comment d. The Appeals Court has described this as the “equitable insertion” of a “curative term.” *Browning-Ferris Industries, Inc. v. Casella Waste Mgmt. of Massachusetts, Inc.*, 79 Mass. App. Ct. 300, 312 (2011).

Thus, if FBT were to prove the other elements of its fraud claim at trial, the trial judge will have to determine, based on all the circumstances, what reasonable cap on FBT's liability for Incremental Environmental Costs should be inserted into the prior version of the Option Agreement. Since reformation of a contract is an equitable remedy, the parties have no right to have the issue decided by a jury. See *Ross v. New England Mut. Ins. Co.*, 120 Mass. 113, 117 (1876); see generally *Rosati v. Boston Pipe Covering, Inc.*, 434 Mass. 349, 350 (2001) (if plaintiff's claim “‘is analogous, in either subject matter or remedy sought, to cases within the court's equity jurisdiction, as it existed at the time of the adoption of the Constitution,’ there is no right to trial by jury”) (quoting *Dalis v. Buyer Advertising, Inc.*, 418 Mass. 220, 223 (1994)).

One of the circumstances that the trial judge will have to consider in making this decision is the amount that was recovered under the Pharmacia judgment. Wynn's argument that the lack of a subsequent agreement with FBT on how to allocate the Pharmacia recovery precludes summary judgment on the fraud claim is without merit. The Option Agreement resolved the issue by providing (in § 5.7.6) that the full amount of the Pharmacia judgment would be assigned to Wynn, “unless otherwise agreed by the Parties in the Environmental Cost-Sharing Agreement.” This means that if the amended Option Agreement is voidable on account of fraud, then the full amount recovered under the Pharmacia judgment is to be credited to Wynn,¹¹ but the trial judge may consider that as a relevant circumstance in determining a reasonable cap on FBT's liability for Incremental Environmental Costs.

Finally, to the extent that Wynn is arguing that the prior Option Agreement was automatically terminated and cannot be revived because the parties never agreed upon a mutually acceptable Environmental Cost-Sharing Agreement, that is incorrect. Wynn may have had the right to terminate the contract, but the summary judgment record establishes that Wynn never exercised that right. The Court concludes that the Option Agreement is unambiguous when considered as a whole, so its meaning is a question of law that the Court may decide on a summary judgment motion.¹² Sections 5.7.6 and 8.7, when read together, make clear that failure to agree on a final allocation of environmental costs would not trigger the automatic termination of the contract, but instead would merely give either party to the right to terminate the arrangement if it wished. Wynn concedes in its memorandum that “the Option Agreement provided that either party could walk away from the deal, with no termination fee, if they failed to reach an environmental cost-sharing agreement.”

***17** Wynn did not have the option of accepting parts of the Option Agreement and selectively terminating others. “[U]nless rescinded ‘a voidable contract imposes on the parties the same obligations as if it was not voidable.’” *Berenson v. French*, 262 Mass. 247, 260-261 (1928), quoting Williston, *Contracts*, § 15 (1920). The same is true here.

Rather than exercise any right to terminate the Option Agreement, Wynn convinced FBT to revise the terms of the deal, bought the property, and built a resort casino there. Therefore, if FBT can prove at trial that the amended contract was procured by fraud, Wynn would be bound by the terms of the prior contract, as modified by the trial judge to supply the missing term as to a reasonable cap on FBT's liability for Incremental Environmental Costs.

3.3. **Chapter 93A Claim.** Since FBT's claim for intentional fraud survives summary judgment, so does its claim under c. 93A. See, e.g., *Stolzoff v. Waste Sys. Int'l, Inc.*, 58 Mass. App. Ct. 747, 765 (2003).

As discussed above, if FBT succeeds in proving that Wynn procured the last Option Agreement amendment by fraud then Wynn will not be able to enforce the general release of all claims, including the c. 93A claim, contained in the amended contract. See *Shaw's Supermarkets*, 410 Mass. at 842 (1991); *Green*, 79 Mass. App. Ct. at 11.

Orders

The motion by the Massachusetts Gaming Commission for summary judgment on the regulatory taking claim by FBT Everett Realty, LLC (docket no. 78) is **allowed**. The motion by Wynn MA, LLC's motion for summary judgment (docket no. 79) is **denied in part** with respect to FBT's claims against Wynn for fraud and under G.L. c. 93A, § 11, and **allowed in part** with respect to the Commission's claim against Wynn for unjust enrichment.

The Court will hold a final pre-trial conference concerning FBT's claims against Wynn on February 27, 2025, at 2:30 p.m., in Suffolk Superior Courtroom 1017. FBT and Wynn shall file the required joint pre-trial memorandum, and provide a courtesy copy to the Court at Suffolk Superior Courtroom 1017, no later than February 14, 2025.

/s/

Kenneth W. Salinger

Justice of the Superior Court

12 December 2024

Footnotes

- 1 The Court will not enter separate and final judgment on the claims by or against the Commission. See *Long v. Wichett*, 50 Mass. App. Ct. 380, 388-404 (2000) (vacating entry of partial judgment that was inconsistent with “bedrock policy against premature and piecemeal appeals”).
- 2 “The Fifth Amendment prohibition against the taking of private property for public use without just compensation applies against the States through the Fourteenth Amendment.” *Texaco, Inc. v. Short*, 454 U.S. 516, 523 n.11 (1982); accord *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 239 (1897).
- 3 Though FBT also refers to the eminent domain statute (G.L. c. 79, § 10) in its amended complaint, that adds nothing to its regulatory takings claim. If the Commission's actions do not constitute a taking of property, then the eminent domain statute is not implicated.
- 4 The Supreme Judicial Court has followed Federal precedent when examining regulatory and other takings claims brought under article 10. See *Fitchburg Gas & Elec. Light Co. v. Department of Pub. Utils.*, 467 Mass. 768, 775 n.8 (2014); *Blair v. Department of Conservation and Recreation*, 457 Mass. 634, 642-644 (2010). Since FBT does not argue that its regulatory takings claim might succeed under article 10 even if it fails under the United States Constitution, there is no need to explore whether in some circumstances different standards may apply under Massachusetts law. See *Steinbergh v. City of Cambridge*, 413 Mass. 736, 738 (1992); accord *FBT Everett*, 489 Mass. at 709 n.4.
- 5 See also St. 2011, c. 194, § 16, which enacted G.L. c. 23K. This statute was approved by the Governor on November 22, 2011. It exempted casinos licensed under c. 23K from the statutes that otherwise make it a crime to operating a gaming establishment in Massachusetts. See G.L. c. 271, §§ 3, 5, 7, 8, as amended by St. 2011, c. 194, §§ 53, 54, 57, 58.

- 6 The Massachusetts Contingency Plan is a set of regulations promulgated by the Massachusetts Department of Environmental Protection (“MassDEP”) to implement the environmental cleanup process required under G.L. c. 21E, § 3(b). See *Peterborough Oil Co., LLC v. Department of Environmental Protection*, 474 Mass. 443, 446 (2016). “The MCP creates a multiphased assessment and cleanup process whereby a contaminated site can reach either a ‘temporary’ or a ‘permanent’ solution. A temporary solution means that the site has achieved a substantial elimination of hazardous material, but monitoring and mitigation efforts may remain ongoing indefinitely. A permanent solution means that, having been remediated, the site creates a condition of no significant risk to health, safety, public welfare, and the environment.” *Id.* at 446-447 (citations omitted).
- 7 In June 2006, a federal judge held that Pharmacia was liable under G.L. c. 21E for 90 percent of the environmental remediation costs that had been incurred as of April 2006, and must share responsibility for future costs under a specified sliding scale providing that Pharmacia's share would increase as additional funds were expended. See *Mystic Landing, LLC v. Pharmacia Corp.*, 443 F.Supp.2d 97, 108 (D.Mass. 2006) (Gorton, J.), reproduced as Ex. 72. In December 2014, Pharmacia, FBT, and Wynn entered into an agreement implementing this judgment as follows. Pharmacia agreed to pay \$8 million to FBT, which in turn agreed to pay Wynn \$10 million, subject to the condition that \$8 million of that amount would be held in escrow. The escrowed amount would be released to Wynn in stages; \$6 million would be released when Wynn filed a permanent solution statement with MassDEP for the upland area of the property, and the other \$2 million would be released when Wynn filed a similar statement for the entire property. See Ex. 87, ¶ 3.
- 8 The Commission disputes FBT's assertion that IEB staff told Wynn it needed to reduce the purchase price of the Everett property to eliminate any casino-relate premium. It points in part to testimony by Wynn's General Counsel, and by the Chief Financial Officer and General Counsel of Wynn's parent company, that the idea to renegotiate the Option Agreement price to eliminate any casino-related premium originated solely within Wynn, and not with the IEB. But FBT has presented evidence that would support a contrary inference that IEB staff made clear to Wynn that the IEB was unlikely to recommend that the Commission find Wynn to be suitable for a casino license if the casino premium was not taken out of the purchase price to be paid to FBT. For the purpose of deciding the Commission's summary judgment motion, the Court will resolve this factual dispute by construing the relevant evidence in the light most favorable to FBT, because it is the nonmoving party. See *Nelson*, 446 Mass. at 535; *O'Keeffe*, 100 Mass. App. Ct. at 671.
- 9 See Wynn's Statement of Material Facts, ¶¶ 24-25, and exhibits cited therein.
- 10 “[W]hile there is a narrow futility exception to the requirement for a final decision before a takings claim is ripe, ‘to come within that exception, a sort of inevitability is required: the prospect of refusal must be certain (or nearly so).’” *Daddario v. Cape Cod Comm'n*, 56 Mass. App. Ct. 764, 770 (2002), quoting *Gilbert v. Cambridge*, 932 F.2d 61 (1st Cir. 1991).
- 11 That is what in fact happened in 2014; FBT agreed to assign the full \$8 million final recovery from Pharmacia to Wynn.
- 12 See *Seaco Ins. Co. v. Barbosa*, 435 Mass. 772, 779 (2002); *Trustees of Beechwood Village Condominium Trust v. USAlliance Federal Credit Union*, 95 Mass. App. Ct. 278, 284-285 (2019). “Whether a contract is ambiguous is also a question of law.” *Eigerman v. Putnam Investments, Inc.*, 450 Mass. 281, 287 (2007).

§ 2. Liability; exclusiveness of remedy; cooperation of public..., MA ST 258 § 2



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Proposed Legislation

Massachusetts General Laws Annotated

Part III. Courts, Judicial Officers and Proceedings in Civil Cases (Ch. 211-262)

Title IV. Certain Writs and Proceedings in Special Cases (Ch. 246-258e)

Chapter 258. Claims and Indemnity Procedure for the Commonwealth, Its Municipalities, Counties and Districts and the Officers and Employees Thereof (Refs & Annos)

M.G.L.A. 258 § 2

§ 2. Liability; exclusiveness of remedy; cooperation of public employee; subsequent actions; representation by public attorney

Effective: June 30, 2009

[Currentness](#)

Public employers shall be liable for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any public employee while acting within the scope of his office or employment, in the same manner and to the same extent as a private individual under like circumstances, except that public employers shall not be liable to levy of execution on any real and personal property to satisfy judgment, and shall not be liable for interest prior to judgment or for punitive damages or for any amount in excess of \$100,000; provided, however, that all claims for serious bodily injury against the Massachusetts Bay Transportation Authority shall not be subject to a \$100,000 limitation on compensatory damages. The remedies provided by this chapter shall be exclusive of any other civil action or proceeding by reason of the same subject matter against the public employer or, the public employee or his estate whose negligent or wrongful act or omission gave rise to such claim, and no such public employee or the estate of such public employee shall be liable for any injury or loss of property or personal injury or death caused by his negligent or wrongful act or omission while acting within the scope of his office or employment; provided, however, that a public employee shall provide reasonable cooperation to the public employer in the defense of any action brought under this chapter. Failure to provide such reasonable cooperation on the part of a public employee shall cause the public employee to be jointly liable with the public employer, to the extent that the failure to provide reasonable cooperation prejudiced the defense of the action. Information obtained from the public employee in providing such reasonable cooperation may not be used as evidence in any disciplinary action against the employee. Final judgment in an action brought against a public employer under this chapter shall constitute a complete bar to any action by a party to such judgment against such public employer or public employee by reason of the same subject matter.

Notwithstanding that a public employee shall not be liable for negligent or wrongful acts as described in the preceding paragraph, if a cause of action is improperly commenced against a public employee of the commonwealth alleging injury or loss of property or personal injury or death as the result of the negligent or wrongful act or omission of such employee, said employee may request representation by the public attorney of the commonwealth. The public attorney shall defend the public employee with respect to the cause of action at no cost to the public employee; provided, however, that the public attorney determines that the public employee was acting within the scope of his office or employment at the time of the alleged loss, injury, or death, and, further, that said public employee provides reasonable cooperation to the public employer and public attorney in the defense of any action arising out of the same subject matter. If, in the opinion of the public attorney, representation of the public employee, under this paragraph would result in a conflict of interest, the public attorney shall not be required to represent the public employee. Under said circumstances, the commonwealth shall reimburse the public employee for reasonable attorney fees incurred by the public employee in his defense of the cause of action; provided, however, that the same conditions exist which are required for representation of said employee by the public attorney under this paragraph.

§ 2. Liability; exclusiveness of remedy; cooperation of public..., MA ST 258 § 2

Credits

Added by St.1978, c. 512, § 15. Amended by St.1984, c. 279, § 1; [St.2009, c. 120, § 23](#), eff. June 30, 2009.

[Notes of Decisions \(281\)](#)

M.G.L.A. 258 § 2, MA ST 258 § 2

Current through Chapter 11 of the 2026 2nd Annual Session. Some sections may be more current; see credits for details.

End of Document

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Distinguished by [State Regulatory Registry, LLC v. Bartholomew](#), D.Colo.,
September 27, 2019

2012 WL 5949572

Only the Westlaw citation is currently available.
United States Bankruptcy Court, D. Colorado.

Barry G. GUSTAFSON, a
resident of Colorado, Plaintiff,
v.

AMERICAN FAMILY MUTUAL
INSURANCE CO., a Wisconsin
corporation, Defendant.

Civil Action No. 11-cv-01303-PAB-MEH.

|
Nov. 27, 2012.

ORDER

[PHILIP A. BRIMMER](#), District Judge.

*1 This matter is before the Court on the Motion in Limine [Docket No. 105] filed by defendant American Family Mutual Insurance Company (“American Family”). The motion is fully briefed and ripe for resolution.

I. BACKGROUND¹

This case involves an insurance coverage dispute between plaintiff Barry G. Gustafson and American Family. On May 17, 2011, Mr. Gustafson initiated this action seeking, among other things, a declaratory judgment that American Family breached its duty to defend Mr. Gustafson in a case in this District, *American Family Mut. Ins. Co. v. Gustafson*, No. 08-cv-02772-MSK (the “Underlying Action”). On January 20, 2012, both parties filed motions for summary judgment. *See* Docket No. 34; Docket No. 36. The Court ruled on their motions on October 5, 2012, finding that American Family had a duty to defend Mr. Gustafson in the Underlying Action and had breached that duty. Docket No. 91 at 20. The order also dismissed Mr. Gustafson's other claims for relief. *Id.* at 27–28. Thus, the only issue remaining in this case is the amount of damages suffered by Mr. Gustafson as a result of American Family's breach.

American Family filed the present motion in limine seeking to exclude Mr. Gustafson and his wife, Lynn Gustafson, from testifying about: (1) the attorneys' fees they incurred in defending the Underlying Action; (2) the scope and nature of the work performed by their attorneys in the Underlying Action; (3) the attorneys' fees incurred by American Family in the Underlying Action; (4) all attorneys' fees on the grounds that their initial disclosures did not comply with [Rule 26\(a\) \(1\) of the Federal Rules of Civil Procedure](#); (5) their claimed special or consequential damages; and (6) the costs and attorneys' fees they incurred in the Underlying Action after January 14, 2010.

II. STANDARD OF REVIEW

The purpose of a motion in limine is to aid the trial process by enabling the Court “to rule in advance of trial on the relevance of certain forecasted evidence, as to issues that are definitely set for trial, without lengthy argument at, or interruption of, the trial.” *United States v. Cline*, 188 F.Supp.2d 1287, 1291 (D.Kan.2002) (quoting *Palmieri v. Defaria*, 88 F.3d 136, 141 (2nd Cir.1996)) (further citations omitted). Pretrial rulings often may save time at trial, as well as save the parties time, effort, and cost in preparing their cases. *Cline*, 188 F.Supp.2d at 1291. The Court recognizes that in many cases, evidentiary rulings should be deferred until trial so that questions of foundation, relevancy, and potential prejudice may be resolved in the proper context. *See Sperberg v. Goodyear Tire & Rubber Co.*, 519 F.2d 708, 712 (6th Cir.1975) (though in limine rulings can save time, cost, effort and preparation, court is usually better situated during trial to assess evidence). However, the “[d]enial of a motion in limine does not necessarily mean that all evidence contemplated by the motion will be admitted at trial.” *Koch v. Koch Indus., Inc.*, 2 F.Supp.2d 1385, 1388 (D.Kan.1998) (citation omitted). Moreover, a ruling in limine does not “relieve a party from the responsibility of making objections, raising motions to strike or making formal offers of proof during the course of trial.” *Thweatt v. Ontko*, 814 F.2d 1466, 1470 (10th Cir.1987) (internal quotation omitted).

III. ANALYSIS**A. *Fed.R.Evid. 701***

*2 American Family seeks to preclude Mr. Gustafson and Lynn Gustafson² from testifying about the damages they suffered as a result of American Family's breach of its duty to defend. Docket No. 105 at 5. American Family argues that the Gustafsons have the burden of showing the reasonableness of

their damages and, because they were not disclosed as expert witnesses, they cannot testify about the reasonableness of the attorneys' fees they incurred in the Underlying Action. *Id.* at 6. American Family claims that any testimony provided by the Gustafsons about the “reasonableness” of their attorneys' fees in the Underlying Action requires specialized knowledge and therefore falls outside the purview of [Rule 701 of the Federal Rules of Evidence](#). *Id.* at 7. American Family also requests that the Court preclude the Gustafsons from using the terms “reasonable” or “necessary” when describing their damages. *Id.* at 7.³

Under [Rule 701](#), lay witnesses may give opinion testimony only if the opinion is “(a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of [expert testimony] Rule 702.” [Fed.R.Evid. 701](#). [Rule 701](#) “does not permit a lay witness to express an opinion as to matters which are beyond the realm of common experience and which require the special skill and knowledge of an expert witness.” *James River Ins. Co. v. Rapid Funding, LLC*, 658 F.3d 1207, 1214 (10th Cir.2011) (citation omitted). “[T]he type of evidence contemplated by ... [Rule 701](#) relates to the appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, and ... items that cannot be described factually in words apart from inferences.” *Id.*

As discussed in the Court's Order on the Motion for Summary Judgment [Docket No. 124], in order to prove damages, the Gustafsons must prove the costs and attorneys' fees they incurred in the Underlying Action. Docket No. 124 at 12. Once the Gustafsons establish their damages, American Family bears the burden of proving that the Gustafsons' claimed attorneys' fees in defending the Underlying Action are unreasonable or were unnecessary. *Id.* Given this burden shifting framework, testimony about the costs and attorneys' fees the Gustafsons incurred in defending the Underlying Action qualifies as lay witness testimony pursuant to [Rule 701](#) because it is based on their personal knowledge and does not rely on scientific, technical, and otherwise specialized knowledge. See *LifeWise Master Funding v. Telebank*, 374 F.3d 917, 929 (10th Cir.2004) (lay opinions are those that “do not require any specialized knowledge and could be reached by any ordinary person”). However, although the Gustafsons may testify about the costs and attorneys' fees they incurred in the Underlying Action, they will be precluded from testifying that those fees were “reasonable” or “necessary” because such

testimony falls within the purview of [Rule 702 of the Federal Rules of Evidence](#) since it requires specialized knowledge and is beyond the realm of common experience.

B. Work Performed by Mr. Gustafson's Attorneys in the Underlying Action

*3 American Family seeks to preclude the Gustafsons from testifying about the work performed by their attorneys in prosecuting the Underlying Action. Docket No. 105 at 7. Specifically, American Family seeks to preclude the Gustafsons from testifying about the specific tasks performed by their attorneys, the date on which these tasks were performed, and the hours their attorneys expended on such tasks. *Id.* at 7–8. American Family contends that the Gustafsons cannot testify as to these issues because they are not within the Gustafsons' personal knowledge. *Id.* Moreover, Mr. Gustafson's amended exhibit list, Docket No. 95–1, does not disclose the billing invoices detailing the work performed by attorneys in the Underlying Action. American Family claims that the proffered testimony from the Gustafsons is inadmissible hearsay pursuant to [Fed.R.Evid. 802](#) and does not satisfy [Rule 1002 of the Federal Rules of Evidence](#). Docket No. 105 at 8.

The Gustafsons claim that testimony about the tasks performed by their attorneys, such as preparing motions, conducting discovery, and preparing for trial, is not hearsay. Docket No. 110 at 5. They argue that they may testify about these issues based on their own personal knowledge garnered from a review of the invoices provided by their attorneys. *Id.* at 6.

Under [Rule 801 of the Federal Rules of Evidence](#), an out-of-court utterance must have two characteristics before it is rendered inadmissible as hearsay: it must be a “statement”—that is, verbal, written, or nonverbal conduct intended as an assertion—and it must be offered to prove the truth of the matter asserted. [Fed.R.Evid. 801\(a\), \(c\)](#); *Boren v. Sable*, 887 F.2d 1032, 1035 (10th Cir.1989). Here, the Court finds that the Gustafsons' testimony about the tasks performed by their attorneys in the Underlying Action qualifies as hearsay. Because the Gustafsons did not personally witness their attorneys' work in the Underlying Action, their proffered testimony about the tasks performed by their attorneys relies on written assertions prepared by someone else. The Gustafsons do not claim to have knowledge of the work performed by their attorneys independent of the representations written on the invoices and, as such, the Gustafsons' proffered testimony reciting information

contained in the invoices represents out-of-court statements offered for the truth of the matter, namely, that their attorneys actually performed these tasks in the Underlying Action. Accordingly, because the proffered testimony is hearsay, the Gustafsons will be precluded from testifying about the tasks performed by their attorneys in the Underlying Action.⁴ See [Fed.R.Evid. 802](#).

C. American Family's Attorneys' Fees and Costs in the Underlying Action

American Family requests that the Court preclude the Gustafsons from testifying about the attorneys' fees and costs incurred by American Family in the Underlying Action. Docket No. 105 at 9. American Family argues that this testimony is inadmissible hearsay pursuant to [Fed.R.Evid. 802](#) and violates [Rule 1002 of the Federal Rules of Evidence](#). *Id.* In addition, American Family claims that the attorneys' fees and costs American Family incurred in the Underlying Action are irrelevant to the Gustafsons' claim for damages. *Id.*

***4** The Gustafsons contend that American Family's costs from the Underlying Action are relevant because a jury, upon learning that American Family spent approximately the same amount in defending the Underlying Action, could determine that the Gustafsons' claimed damages were reasonable. Docket No. 110 at 6–7. Moreover, the Gustafsons claim that testimony of the attorneys' fees and costs American Family incurred in the Underlying Action is not hearsay, but rather an admission by a party opponent. *Id.*

The Court finds that evidence of the attorneys' fees incurred by American Family would be inadmissible as irrelevant. Pursuant to [Rule 401 of the Federal Rules of Evidence](#), evidence is relevant if “it has any tendency to make a fact more or less probable than it would be without the evidence.” [Fed.R.Evid. 401](#). In addition, “[r]elevant evidence is admissible unless ... the United States Constitution; a federal statute; [Rules of Evidence]; or other rules prescribed by the Supreme Court” provides otherwise. [Fed.R.Evid. 402](#).

In general, to determine whether an attorneys' fee request is reasonable, Colorado courts look at “the amount in controversy, the duration of representation, the complexity of the case, the value of the legal services to the client, and the usage in the legal community concerning fees in similar cases.” *Melssen v. Auto-Owners Ins. Co.*, 285 P.3d 328, 339 (Colo.App.2012) (citing *Hartman v. Freedman*, 591 P.2d 1318, 1321–22 (Colo.1979)). Based on the aforementioned

factors, a determination of the reasonableness of the fees expended by the Gustafsons' attorneys requires an analysis of whether the actions taken by their attorneys were reasonable in the Underlying Action. As such, the costs incurred by American Family in defending the Underlying Action are irrelevant. American Family was not defending Mr. Gustafson; it was bringing a case against him. As a result, the number of hours expended, the discovery approach, and the strategy are not comparable. Accordingly, the Court finds that, because the attorneys' fees and costs incurred by American Family are irrelevant to a determination of the reasonableness of the Gustafsons' claimed damages, they will be precluded from providing this testimony at trial. [Fed.R.Evid. 402](#).

D. Fed.R.Civ.P. 26

American Family requests that the Court preclude the Gustafsons from testifying about the attorneys' fees they incurred in defending the Underlying Action on the grounds that their initial disclosures were inadequate under [Rule 26\(a\)\(1\)\(A\)\(i\) of the Federal Rules of Civil Procedure](#). Docket No. 105 at 10. Specifically, American Family argues that disclosing Mr. Gustafson as having knowledge of “all aspects of his claim,” Docket No. 105–3 at 2, does not satisfy [Rule 26\(a\)\(1\)\(A\)\(I\)](#). Docket No. 105 at 10. In addition, American Family claims that disclosing Lynn Gustafson as having knowledge about “the damages that have occurred as a result of the denial of coverage,” Docket No. 105–3 at 2, was insufficient notice that Lynn Gustafson could testify about the attorneys' fees incurred in the Underlying Action. Docket No. 105 at 10.

***5** [Rule 26 of the Federal Rules of Civil Procedure](#) provides, in pertinent part, that a party must disclose to the other party in advance of formal discovery:

the name and, if known, the address and telephone number of each individual likely to have discoverable information—*along with the subjects of that information*—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment.

[Fed.R.Civ.P. 26\(a\)\(1\)\(A\)\(I\)](#) (emphasis added). While a party is not required to provide a complete recitation of an individual's knowledge, [Rule 26\(a\)\(1\)\(A\)](#) disclosures should indicate “briefly the general topics on which such persons have information.” See [Fed.R.Civ.P. 26\(a\)\(1\)\(A\)](#) Adv. Comm. Notes (1993); accord *Lobato v. Ford*, No. 05–cv01437–LTB–CBS, 2007 WL 2593485, at *5 (D.Colo. Sept. 5, 2007). The mandatory disclosure requirements under [Rule 26\(a\)\(1\)](#) are

designed to accelerate the exchange of basic information, to “help focus the discovery that is needed, and facilitate preparation for trial or settlement.” See [Fed.R.Civ.P. 26\(a\) Adv. Comm. Notes \(1993\)](#). Because the purpose of [Rule 26\(a\)\(1\)](#) is to accelerate the exchange of basic information and prevent a party from being unfairly surprised, “disclosure requirements should, in short, be applied with common sense” to help focus discovery and prevent the risk that litigants will “indulge in gamesmanship with respect to the[ir] disclosure obligations.” [Robinson v. Champaign Unit 4 Sch. Dist.](#), 412 F. App’x 873, 877 (7th Cir.2011) (citing [Fed.R.Civ.P. 26\(a\) Adv. Comm. Notes \(1993\)](#)); see [Sender v. Mann](#), 225 F.R.D. 645, 650 (D.Colo.2004).

1. Mr. Gustafson's [Rule 26\(a\)\(1\)](#) Disclosures

The Court finds that Mr. Gustafson's initial disclosures did not comply with the requirements of [Rule 26\(a\)\(1\)\(A\)\(i\)](#). Mr. Gustafson's disclosure that he had knowledge about “all aspects of his claim” did not notify American Family of the specific subjects about which he had discoverable information. See [Lobato](#), 2007 WL 2593485, at *5 (the “Advisory Committee's reference to ‘topics’ suggests that the disclosing party must provide more than a perfunctory statement that the identified person has information ‘about the case’ ”).

A party's failure to comply with [Rule 26\(a\)](#) subjects him to the sanctions identified in [Fed.R.Civ.P. 37\(c\)\(1\)](#). Pursuant to [Rule 37\(c\)\(1\)](#), “[i]f a party fails to provide information or identify a witness as required by [Rule 26\(a\)](#) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.” [Fed.R.Civ.P. 37\(c\)\(1\)](#) (emphasis added). The Tenth Circuit considers four factors in determining whether the failure to disclose is substantially justified or harmless: (1) the prejudice or surprise to the impacted party; (2) the ability to cure the prejudice; (3) the potential for trial disruption; and (4) the erring party's bad faith or willfulness. [Woodworker's Supply, Inc. v. Principal Mut. Ins. Life Ins. Co.](#), 170 F.3d 985, 993 (10th Cir.1999). The determination of whether a [Rule 26\(a\)](#) violation is justified or harmless is entrusted to the broad discretion of the district court. *Id.* The nonmoving party has the burden of showing that they were substantially justified in failing to comply with [Rule 26\(a\)\(1\)](#). [Nguyen v. IBP, Inc.](#), 162 F.R.D. 675, 680 (D.Kan.1995).

*6 Applying these factors to the case, the Court finds that Mr. Gustafson's failure to comply with [Rule 26\(a\)\(1\)\(A\)](#)

(i) was harmless because American Family had sufficient information about Mr. Gustafson's damages to eliminate any surprise or prejudice. Because Mr. Gustafson's initial disclosures itemized his claimed damages, see Docket No. 105–3 at 9–10, any testimony presented by Mr. Gustafson at trial will not be a surprise to American Family. In addition, because Mr. Gustafson's testimony will be limited to actual attorneys' fees incurred—and not the reasonableness of those fees—American Family has failed to identify how it will be prejudiced. Accordingly, the Court will deny American Family's request to exclude Mr. Gustafson's testimony for failure to satisfy [Rule 26\(a\)\(1\)](#).

2. Lynn Gustafson's [Rule 26\(a\)\(1\)](#) Disclosures

The Court finds that Lynn Gustafson's disclosures were sufficient to satisfy [Rule 26\(a\)\(1\)](#)'s disclosure requirements. As noted above, [Rule 26](#) requires only that a plaintiff provide the general topics on which potential witnesses may have information. See [Fed.R.Civ.P. 26\(a\)\(1\)\(A\)](#) Adv. Comm. Notes (1993). Disclosing Lynn Gustafson as having knowledge of damages was sufficient to notify American Family that she would have information about the attorneys' fees incurred to defend the Underlying Action. Accordingly, the Court will deny American Family's motion to exclude Ms. Gustafson's proffered testimony for failure to satisfy [Rule 26\(a\)\(1\)](#).

E. Special or Consequential Damages

American Family seeks to preclude Mr. Gustafson from providing testimony about the alleged costs of a loan used to finance the Underlying Action. Docket No. 105 at 12. American Family argues that evidence of this loan should be excluded because Mr. Gustafson: (1) did not plead willful and wanton breach of contract; (2) did not plead special damages as required by [Rule 9\(g\) of the Federal Rules of Civil Procedure](#); and (3) has not disclosed a witness who will testify about the foreseeability of the loan at the time American Family issued the insurance policy. *Id.* at 13.

In [Bainbridge, Inc. v. Travelers Cas. Co. of Conn.](#), 159 P.3d 748 (Colo.App.2006), the Colorado Court of Appeals held that “[g]eneral damages for a breach of the duty to defend include those flowing naturally from the breach: the costs and reasonable attorney fees incurred by the insured in defending itself against the claims asserted.” *Id.* at 756 (citing [Giampapa v. Am. Fam. Mut. Ins. Co.](#), 64 P.3d 230, 237 n. 3 (Colo.2003)). The court added that, if the breach of the duty to defend is based on contract principles, the insured may recover consequential damages, separate from costs and reasonable

attorneys' fees, that "were reasonably foreseeable at the time of [the] contract." *Id.* (citations omitted).

Mr. Gustafson seeks to recover the finance costs of loans he took out to pay for the Underlying Action arguing that it was foreseeable to American Family—when the parties entered into the insurance contract—that he would have to secure a loan if American Family breached its duty to defend. Docket No. 110 at 10–11. Mr. Gustafson claims that he will present evidence showing that his finance costs were the natural and probable consequence of American Family's breach of its duty to defend. *Id.* at 11. Given this explanation, the Court finds that Mr. Gustafson seeks consequential damages and not special damages. *Bainbridge*, 159 P.3d at 756. Because Mr. Gustafson does not seek special damages, he is not subject to the heightened pleadings standards set forth in [Rule 9\(g\) of the Federal Rules of Civil Procedure](#). See [Fed.R.Civ.P. 9\(g\)](#) ("[i]f an item of special damage is claimed, it must be specifically stated"); *Weyerhaeuser Co. v. Brantley*, 510 F.3d 1256, 1266–67 (10th Cir.2007) (finding that special damages depend on particular circumstances of the case and are typically damages that are unrelated to the circumstances of the breach).

*7 In order to prove his consequential damages, Mr. Gustafson is not necessarily dependent on testimony from an American Family representative as to foreseeability. For instance, Mr. Gustafson may have provided American Family with information regarding his finances that put American Family on notice that he would not be able to pay the costs and fees of defending himself in the Underlying Action. Accordingly, the Court will deny American Family's motion to preclude Mr. Gustafson from testifying about the financing costs he incurred to pay for his defense in the Underlying Action.

F. Termination of Duty to Defend

On January 14, 2010, American Family sought to amend its complaint in the Underlying Action to withdraw its claim against Mr. Gustafson under the Colorado Consumer Protection Act ("CCPA"), [Colo.Rev.Stat. § 6–1–101 et seq.](#) Mr. Gustafson opposed American Family's motion to withdraw the CCPA claim, arguing that American Family could not voluntarily dismiss the basis of Mr. Gustafson's duty to defend. The court in the Underlying Action ruled in favor of American Family and the CCPA claim was subsequently dismissed.

American Family requests that the Court preclude Mr. Gustafson from providing any testimony with regard to attorneys' fees and costs incurred after January 14, 2010. American Family argues that its duty to defend ended when it moved to withdraw its CCPA claim against Mr. Gustafson. Docket No. 105 at 14. American Family claims that any delay in the removal of the CCPA claim in the Underlying Action stems from Mr. Gustafson's unreasonable opposition to the withdrawal of the CCPA claim. *Id.* American Family contends that, because Mr. Gustafson's opposition to its motion to withdraw was unreasonable, he is not entitled to recover costs and attorneys' fees expended after January 14, 2010. *Id.* In response, Mr. Gustafson claims that American Family's duty to defend did not cease on the day it moved to withdraw its CCPA claim, but rather on the day the CCPA claim was actually dismissed by the court. Docket No. 110–11.

Relying on several out-of-circuit cases, the parties agree that an insurer's duty to defend ends when the claims giving rise to the duty to defend are dismissed, settled, or otherwise eliminated.⁵ See, e.g., *Conway Chevrolet–Buick, Inc. v. Travelers Indemnity Co.*, 136 F.3d 210, 214 (1st Cir.1998) (finding that an insurer did not breach its duty to defend when it withdrew its representation of the insured once a summary judgment motion dismissed all claims giving rise to coverage); *Harborside Refrigerated Servs. v. IARW Ins. Co., Ltd.*, 759 F.2d 829, 830 (11th Cir.1985) (finding that an insurer has a duty to defend until such time as the covered portion of the claim is eliminated from the suit); *accord North Bank v. Cincinnati Ins. Co.*, 125 F.3d 983, 986 (6th Cir.1997) (finding that, under Michigan law, duty to defend ends when all possible theories of recovery which could be covered by the policy are eliminated). Because the parties agree about the applicable law, the Court will rely on the holding from these cases though it is not settled that this is the state of the law in Colorado.

*8 Despite the agreement on the applicable law, the parties disagree about whether Mr. Gustafson's damages should be limited to reasonable attorneys' fees incurred before January 14, 2010. In applying the rationale from *Conway*, *Harborside*, and *North Bank*, the Court finds that Mr. Gustafson is not precluded from presenting testimony about the costs and attorneys' fees he incurred after January 14, 2010. The aforementioned cases stand for the proposition that an insurer's duty to defend does not cease until a claim leading to that duty is eliminated or otherwise terminated from the underlying action. See *Conway*, 136 F.3d at 214; *Harborside*, 759 F.2d at 830; *North Bank*, 125 F.3d at 986.

Gustafson v. American Family Mut. Ins. Co., Not Reported in B.R. (2012)

It is undisputed that American Family's CCPA claim was not dismissed from the Underlying Action on January 14, 2010. Thus, the Court will deny American Family's motion to preclude Mr. Gustafson from testifying about attorneys' fees and costs incurred after January 14, 2010. However, Mr. Gustafson's recovery of attorneys' fees and costs will be limited to those incurred before July 23, 2010, the date on which the CCPA claim was dismissed from the Underlying Action. *See* Docket No. 105–2.

IV. CONCLUSION

For the foregoing reasons, it is

ORDERED that the Motion in Limine Re: Plaintiff's Damages [Docket No. 105] is **GRANTED** in part and **DENIED** in part as indicated in this Order.

All Citations

Not Reported in B.R., 2012 WL 5949572

Footnotes

- 1** The facts relevant to this motion were outlined in the Court's October 5, 2012 Order [Docket No. 91] and are incorporated by reference.
- 2** For ease of reference, the Court will refer to Mr. Gustafson and Lynn Gustafson as the "Gustafsons."
- 3** American Family also argues that, pursuant to the Businessowners Policy, Docket No. 105–5, Mr. Gustafson is only entitled to an award of reasonable expenses incurred in defending the Underlying Action. Docket No. 105 at 6. However, as noted in the Court's November 26, 2012 Order [Docket No. 124], this policy does not expressly limit Mr. Gustafson's damages to "reasonable" attorneys' fees incurred for his defense in the Underlying Action. Docket No. 124 at 6.
- 4** Because the Court finds that Mr. Gustafson's proposed testimony constitutes inadmissible hearsay, the Court will not discuss admissibility pursuant to the Best Evidence Rule.
- 5** The parties also do not dispute that the CCPA claim is the only claim in the Underlying Action that gave rise to American Family's duty to defend.

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United States District Court, D. Maine.

MEDICAL MUTUAL INSURANCE
COMPANY OF MAINE, INC., Plaintiff,

v.

[Douglas BURKA](#), Defendant.

Docket no. 2:16-cv-462-GZS

|
Signed 05/03/2017

Attorneys and Law Firms

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**ORDER ON PLAINTIFF'S MOTION TO DEFER
CONSIDERATION OF DEFENDANT'S MOTION
FOR PARTIAL SUMMARY JUDGMENT AND
DEFENDANT'S MOTION FOR PARTIAL SUMMARY
JUDGMENT**

[George Z. Singal](#), United States District Judge

*1 Before the Court are Defendant's Motion for Partial Summary Judgment (ECF No. 18) and Plaintiff's Motion to Defer Consideration of Motion for Partial Summary Judgment (ECF No. 32). For the reasons explained below, the Court DENIES both Plaintiff's Motion to Defer and Defendant's Motion for Partial Summary Judgment. However, the Court GRANTS partial summary judgment in Plaintiff's favor on the issue of whether Plaintiff currently has a duty to defend the relevant suits in Maryland and Maine.

I. LEGAL STANDARD

Generally, a party is entitled to summary judgment if, on the record before the Court, it appears "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion

for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." [Anderson v. Liberty Lobby, Inc.](#), 477 U.S. 242, 247-48 (1986). An issue is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248. A "material fact" is one that has "the potential to affect the outcome of the suit under the applicable law." [Nereida-Gonzalez v. Tirado-Delgado](#), 990 F.2d 701, 703 (1st Cir. 1993).

The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. [Celotex Corp. v. Catrett](#), 477 U.S. 317, 325 (1986). In determining whether this burden is met, the Court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. [Santoni v. Potter](#), 369 F.3d 594, 598 (1st Cir. 2004). Once the moving party has made this preliminary showing, the nonmoving party must "produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue." [Triangle Trading Co., Inc. v. Robroy Indus., Inc.](#), 200 F.3d 1, 2 (1st Cir. 1999) (quotation marks and punctuation omitted); see also *Fed. R. Civ. P. 56(e)*. "Mere allegations, or conjecture unsupported in the record, are insufficient." [Barros-Villahermosa v. United States](#), 642 F.3d 56, 58 (1st Cir. 2011) (quoting [Rivera-Marciano v. Normeat Royal Dane Quality A/S](#), 998 F.2d 34, 37 (1st Cir. 1993)); see also [Wilson v. Moulison N. Corp.](#), 639 F.3d 1, 6 (1st Cir. 2011) ("A properly supported summary judgment motion cannot be defeated by conclusory allegations, improbable inferences, periphrastic circumlocutions, or rank speculation."). "As to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to generate a trialworthy issue warrants summary judgment for the moving party." [In re Ralar Distribs., Inc.](#), 4 F.3d 62, 67 (1st Cir. 1993).

Federal Rule of Civil Procedure 56(d) provides, "If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition [to a motion for summary judgment], the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order." However, "*Rule 56(d)* relief is not to be granted as a matter of course, and a court is entitled to refuse a *Rule 56(d)* motion if it concludes that the [movant] is unlikely to garner useful evidence from supplemental discovery." [United States ex rel. Booker v. Pfizer, Inc.](#), 847 F.3d 52, 61 (1st Cir. 2017) (alteration in original) (quotation marks omitted).

*2 Finally, a court may enter summary judgment in favor of the *nonmoving party* pursuant to [Federal Rule of Civil Procedure 56\(f\)\(1\)](#) if that party is entitled to judgment as a matter of law and “the losing party [is] on notice that she had to come forward with all of her evidence.” [Rogers v. Mgmt. Tech., Inc.](#), 123 F.3d 34, 38 (1st Cir. 1997) (quotation marks omitted).

II. FACTUAL BACKGROUND

The Professional Liability Policy

Plaintiff Medical Mutual Insurance Company of Maine, Inc. (“MMIC”) issued a professional liability policy (“the Policy”) for which the Named Insured is SMHC Physician Services, P.A. (“SMHC”).¹ The Policy includes a “Slot Policy Endorsement,” which covers “all individual physicians listed on the SCHEDULE OF SLOTS ENDORSEMENT and working as employees or contractors of the NAMED INSURED.” (Def.’s Statement of Material Facts, Ex. A (ECF No. 22-1) (“Policy”), Page ID # 255.) The Endorsement specifies that “each such individual physician position shall be termed a ‘slot’ ” and that “[e]ach individual physician while occupying a ‘slot’ shall be an INSURED under the provisions of the Policy.” (Policy, Page ID # 255.) The Endorsement further provides the following coverage agreement:

Coverage afforded to insured physicians under this Policy is limited to CLAIMS arising from MEDICAL INCIDENTS or from NON-PATIENT INCIDENTS which result from their PROFESSIONAL SERVICES rendered within the scope of their duties as a physician employee or contractor of the NAMED INSURED

(*Id.*) Defendant Dr. Douglas Burka was listed by name on the schedule of Slot Coverage with an individual retroactive date of August 13, 2012. He was deleted from the Schedule of Covered Physicians by an endorsement dated August 25, 2015.

The general coverage agreement of the Policy provides,

We agree to pay on your behalf DAMAGES and DEFENSE COSTS which you become legally obligated to pay due to any CLAIM made against you as a result of a MEDICAL INCIDENT as defined in this Policy ... provided that:

1. the MEDICAL incident results from your PROFESSIONAL SERVICES ... and the MEDICAL

INCIDENT occurs on or after the Retroactive Date noted on the DECLARATIONS PAGE for this Policy;

[and]

We agree to pay on your behalf DAMAGES and DEFENSE COSTS which you become legally obligated to pay due to any CLAIM made against you as a result of a NON-PATIENT INCIDENT as defined in this Policy ... provided that:

1. the NON-PATIENT INCIDENT results from your PROFESSIONAL SERVICES ... and the NON-PATIENT INCIDENT occurs on or after the Retroactive Date noted on the DECLARATIONS PAGE for this Policy

(*Id.*, Page ID #s 271, 272.) The Policy provides the relevant definitions as follows:

- A. “CLAIM” means an oral or written demand against an INSURED for DAMAGES, and includes civil lawsuits
- B. “DAMAGES” means monetary sums not exceeding the Limit of Liability for which you are legally obligated to pay (including pre-judgment interest) to compensate for injury or death as a result of a MEDICAL INCIDENT [or] a NON-PATIENT INCIDENT ... DAMAGES do not include restitution, non-monetary relief or the cost of complying with non-monetary relief, uninsurable matters, fines, penalties, taxes or punitive, exemplary or multiplied damages (except when expressly required by law).

*3 [...]

- E. “INSURED” means any individual or organization listed as the NAMED INSURED or as an Additional INSURED on the DECLARATIONS PAGE or on an Endorsement to this Policy. Other individuals or organization might also be INSUREDS if they qualify as such under the Policy’s Section III. INSUREDS.²

- F. “MEDICAL INCIDENT” means any act, failure to act, or omission in the furnishing of PROFESSIONAL SERVICES to a PATIENT by any INSURED

[...]

- H. “NON-PATIENT INCIDENT” means an occurrence other than a MEDICAL INCIDENT which arises from PROFESSIONAL SERVICES provided by an

INSURED and which results in a CLAIM for DAMAGES

I. “PATIENT” means any person for whom any INSURED under this Policy directly performs PROFESSIONAL SERVICES in the form of healthcare treatment of that person

J. “PROFESSIONAL SERVICES” means an INSURED’S ...

3. obligation to maintain PATIENT confidentiality in the handling of PATIENT records in the direct course of providing PROFESSIONAL SERVICES to that PATIENT

(*Id.*, Page ID #s 279-80.)

The Maryland and Maine Lawsuits against Dr. Burka

On February 26, 2016, Allison Cayne Burka, Dr. Burka’s now ex-wife, and her parents Howard and Caroline Cayne, filed a Complaint against Dr. Burka and his father, Dr. Steven A. Burka, in Maryland state court. The Complaint alleges, in relevant part, that both during their marriage and after their separation in or about April 2015, Douglas “engaged in a campaign to access Allison’s medical records to learn about her mental and gynecological health and other confidential medical information.” (Def.’s Statement of Material Facts, Ex. B (ECF No. 22-2) (“Maryland Compl.”) ¶ 14.) Specifically, the Complaint alleges that Douglas conspired with his father in or about May 2015 to improperly obtain Allison’s medical records kept in Washington, D.C.-area medical facilities in order to harass and embarrass her and to gain advantage in the pending divorce litigation. (Maryland Compl. ¶ 15.) The Complaint recites that “on at least one occasion, after Allison left him, Douglas Burka also used his privileges at Southern Maine Medical Center to access Allison’s medical records.” (*Id.* ¶ 14.) However, the Complaint states that this incident, along with others prior to May 2015, is “the subject of a separate lawsuit in Cumberland County Superior Court in Maine,” *id.*, and the specific counts do not further reference activities in Maine or seek relief pursuant to Maine law.

*4 On May 9, 2016, Allison filed an Amended Complaint in Maine state court alleging, in relevant part, that Douglas inappropriately accessed her medical records “at Southern Maine Healthcare” around April 2015, at a time during which he is alleged to have been living in the Washington, D.C., area, but “still employed in Maine and still a member of

the medical staff at Southern Maine Healthcare.” (Def.’s Statement of Material Facts, Ex. C (ECF No. 22-3) (“Maine Compl.”) ¶¶ 15-16.) At some point, Count I of the Complaint (Invasion of Privacy) was dismissed by the state court, and Count III (Intentional Infliction of Emotional Distress) was eventually dismissed by stipulation of the parties, leaving only Count II (Unlawful Disclosure of Confidential Health Care Information), which seeks injunctive relief and costs pursuant to 22 M.R.S.A. § 1711-C, Confidentiality of Health Care Information.³

The Matter Before this Court

On November 17, 2016, MMIC filed an Amended Complaint for Declaratory Judgment against Dr. Burka in the District of Maine, seeking a declaration that MMIC does not have a duty to defend Dr. Burka in the Maryland and Maine lawsuits. On January 17, 2017, Dr. Burka moved for partial summary judgment, seeking a declaration that MMIC *does* have a duty to defend the two lawsuits.⁴ On February 7, 2017, MMIC moved for this Court to defer consideration of Dr. Burka’s motion for partial summary judgment until MMIC can conduct discovery on the issue of whether Dr. Burka was an insured within the meaning of the Policy or, in the alternative, to grant summary judgment *in MMIC’s favor*.⁵ Upon Defendant’s unopposed request, oral argument was held before the Court on April 27, 2017.

III. DISCUSSION⁶

A. Plaintiff’s Motion to Defer Consideration

MMIC contends that additional discovery is needed to determine whether Dr. Burka was an “insured” within the meaning of the Policy. Although the Court appreciates the company’s argument that discovery on this threshold issue may be necessary in some duty to defend cases, this is not such a case. The plain language of the Policy provides that “[e]ach individual physician while occupying a ‘slot’ shall be an INSURED under the provisions of the Policy.” (Policy, Page ID # 255.) MMIC does not contest that Dr. Burka was an individual physician occupying a “slot” during a portion of the period involved in the Maryland and Maine suits. The company nevertheless argues that additional discovery is necessary to determine if, notwithstanding the plain Policy language, Dr. Burka was acting outside the scope of Policy coverage when he allegedly accessed his ex-wife’s medical records. But this issue is typically addressed, as explained below, by comparing a policy with the relevant

complaint to determine whether the allegations potentially fall within policy coverage. Because additional discovery is unnecessary to determining this question and would therefore be “fruitless,” the Court DENIES Plaintiff’s Motion to Defer.⁷ See [Pfizer, Inc.](#), 847 F.3d at 62.

B. Defendant’s Motion for Partial Summary Judgment

*5 “Whether an insurer owes a duty to defend is a question of law....” [City of South Portland et al. v. Me. Mun. Ass’n Prop. & Cas. Pool](#), Cum-16-105, 2017 WL 1149607, at *2 (Me. Mar. 28, 2017) (footnote omitted). The procedure for determining whether a duty to defend exists, and the supporting rationale, is well established:

To determine whether an insurer has a duty to defend, a court considers and compares two documents: the insurance policy and the underlying complaint against the insured. An insurer has a duty to defend an insured when the complaint, read broadly in conjunction with the policy, reveals the existence of any legal or factual basis that could *potentially be developed at trial and result in an award of damages covered by the terms of the policy....* [The Maine Supreme Court has] explained the comparison test and its low threshold for triggering an insurer’s duty to defend as a test and a threshold designed to discourage mini-trials on the issue of the duty to defend.

[Harlor v. Amica Mut. Ins. Co.](#), 150 A.3d 793, 797-98 (Me. 2016) (emphasis added) (footnote, citations, and quotation marks omitted).

A court must “appl[y] a broad construction of the underlying complaint in favor of the insured and a strict construction of policy exclusions and ambiguities against the insurer.” [Barnie’s Bar & Grill, Inc. v. U.S. Liab. Ins. Co.](#), 152 A.3d 613, 615 (Me. 2016). However, a court should not “conjure the duty to defend from speculation or supposition,” *id.*, or “speculate about causes of action that were not stated,” [York Golf and Tennis Club v. Tudor Ins. Co.](#), 845 A.2d 1173, 1175 (Me. 2004). Similarly, “[t]he facts alleged in the complaint need not make out a claim that specifically and unequivocally falls within the coverage,” [Harlor](#), 150 A.3d at 797 (quotation marks omitted), but a court should not “read allegations into the complaint” to find a legal or factual basis for coverage that does not otherwise exist, [Barnie’s Bar & Grill, Inc.](#), 152 A.3d at 616. The duty to defend inquiry thus requires a court to walk a fine line between fairly discerning a potential for coverage and reading too much into a complaint. In this matter, however, the inquiry is not unduly complex.

Regarding the Maryland suit, the Court can discern no potential for coverage under the Policy. As a preliminary matter, it is clear from the face of the Complaint that the claims in the Maryland suit are not based on the accessing of medical records in Maine. (See Maryland Compl. ¶ 14 (stating that the accessing of medical records in Maine is “the subject of a separate lawsuit in Cumberland County Superior Court in Maine”).) The Court is therefore left to consider the allegations concerning the accessing of Allison’s medical records at Washington, D.C.-area medical facilities. To trigger the duty to defend under the Policy, claims for “medical incidents” or “non-patient incidents” must arise from the furnishing of “professional services” that are “rendered within the scope of [a physician occupying a slot’s] duties as a physician employee or contractor of” SMHC. ((Policy, Page ID # 255); see also Def.’s Mot. for Partial Summ. J. (ECF No. 18), Page ID # 102 (“The only articulated barrier to a defense being required for any lawsuit against an insured is whether the claim arose from the rendering of professional services.”)) The Court agrees with Defendant that there is some ambiguity in the definition of “professional services” in the Policy. However, the Court concludes there is no potential that facts will be developed at trial that would connect Dr. Burka’s provision of “professional services” under the Policy, however that term is defined, with the alleged conspiracy to access Allison’s medical records at Washington, D.C.-area medical facilities seemingly unaffiliated with SMHC at a time when Allison was no longer living in Maine. The Court’s conclusion is supported by the allegation in the pleadings that “Steven Burka used *his credentials within JHHS* [Johns Hopkins Health System] *and his access to JHHS systems* to improperly access and obtain Allison’s medical records.” (Maryland Compl. ¶ 15) (emphasis added). This allegation suggests, if anything, the potential that *Steven Burka’s* actions were related to his professional services, but, of course, Steven Burka was not an insured under the Policy. For these reasons, the claims regarding the accessing of Allison’s medical records at the Washington, D.C.-area medical facilities simply do not “reveal[] the existence of any legal or factual basis that could potentially be developed at trial and result in an award of damages covered by the terms of the policy.” [Harlor](#), 150 A.3d at 797. The Court therefore concludes that MMIC has no duty to defend the Maryland suit.⁸

*6 The Maine suit presents a different problem for Dr. Burka. The Policy creates a duty to defend a “claim,” which is defined as “an oral or written demand against an INSURED for DAMAGES.” (Policy, Page ID # 279.)

“Damages” is further defined to exclude “restitution, non-monetary relief or the cost of complying with non-monetary relief, uninsurable matters, fines, penalties, taxes or punitive, exemplary or multiplied damages (except when expressly required by law).” (*Id.*) The sole remaining claim in the Maine suit seeks injunctive relief and costs. On its face, then, the claim does not fall within Policy coverage. The Maine Supreme Court has held that, in determining whether a claim involves damages for purposes of the duty to defend, a court may consider whether a court *could award damages* on the claim, even in the absence of a request for damages. See [York Golf and Tennis Club](#), 845 A.2d at 1176 (stating that, even when a complaint does not request monetary damages, a court “must look to the allegations in the underlying complaint to determine whether they would support an award of damages even though damages were not requested”). However, the remaining claim in the Maine suit was brought under 22 M.R.S.A. § 1711-C(13)(B), which does not provide for damages.⁹

Dr. Burka contends that MMIC still has a duty to defend even if the remaining claim in the Maine suit does not appear to fall within Policy coverage because the involuntarily dismissed claim sought damages and that claim could be reinstated on appeal. The Court notes the case law in other circuits suggesting that the duty to defend “continues until all arguably covered claims ha[ve] been completely extinguished—in other words, when no further rights to appeal those arguably covered claims exist.” [Wells' Dairy, Inc. v. Travelers Indem. Co. of Ill.](#), 336 F. Supp. 2d 906, 911 (N.D. Iowa 2004) (quotation marks omitted). However, the Court is more convinced by authority in this circuit suggesting otherwise. Although the Maine Supreme Court has not squarely addressed this issue in recent years, the First Circuit has held that there is no ongoing duty to defend where a court has disposed of the claims that potentially fell within policy coverage. See [Conway Chevrolet-Buick, Inc. v. Travelers Indem. Co.](#), 136 F.3d 210, 214-15 (1st Cir. 1998) (“The court's grant of partial summary judgment, however, left no basis for coverage.... As the complaint asserted no live counts outside the exclusion, Travelers did not breach its contractual duty to defend when it withdrew.”)

[Conway](#) involved a suit in Massachusetts, but the holding regarding the basis for coverage was not at all dependent on any particulars of Massachusetts law, and Massachusetts and Maine generally take a similar approach in duty to defend cases. See [Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co.](#), 788 N.E.2d 522, 530 (Mass. 2003) (explaining that Massachusetts determines if there is a duty to defend by comparing the complaint with the policy). The Court, therefore, concludes that, because there is no “live” claim for damages in the Maine suit, MMIC has no ongoing duty to defend that suit.¹⁰

*7 The Court's comparison of the Policy with the Complaints reveals no ongoing potential for an award of damages covered by the Policy. Therefore, the Court concludes that MMIC currently has no duty to defend either suit. For this reason, the Court DENIES Defendant's Motion for Partial Summary Judgment. However, the Court concludes that, on the current record, Plaintiff is entitled to judgment as a matter of law to the extent it sought a declaration that MMIC has no duty to defend the Maryland suit and no duty to defend the Maine suit given the sole remaining claim.

IV. CONCLUSION

For the foregoing reasons, the Court DENIES Plaintiff's Motion to Defer, DENIES Defendant's Motion for Partial Summary Judgment, but GRANTS partial summary judgment in favor of Plaintiff with a declaration that MMIC does not have a duty to defend the Maryland suit and does not have a duty to defend the Maine suit to the extent it only states a claim under 22 M.R.S.A. § 1711-C(13)(B). This matter remains pending as to whether MMIC had a duty to defend the Maine suit before the dismissal of the counts seeking damages.

SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2017 WL 1743505

Footnotes

- 1 Southern Maine Health Care is the sole shareholder of SMHC and has operated under the assumed name of Southern Maine Medical Center. Southern Maine Health Care and SMHC are part of the MaineHealth network of healthcare providers.

2 Section III of the Policy, "INSURED," provides,

Each of the following is an INSURED to the extent set forth below:

A. the NAMED INSURED;

B. the medical corporation, association or partnership of which the NAMED INSURED is a physician member or physician employee, but only with respect to the acts or omissions of the NAMED INSURED in the provision of PROFESSIONAL SERVICES. A medical corporation, association or partnership which maintains in force a separate professional liability policy, either with the Company or another insurer, is not an INSURED under this Policy;

C. employees of the NAMED INSURED, but only for PROFESSIONAL SERVICES rendered within their scope of duties as such; however, with respect to the NAMED INSURED'S employed Physicians, Nurse Anesthetists, Nurse Midwives, Nurse Practitioners and Physician Assistants, they are not INSURED'S under this Policy unless their names and their specific premium charges are shown on the DECLARATIONS PAGE; and,

D. any physician or surgeon temporarily employed by the NAMED INSURED as a relief or substitute physician or surgeon, provided that the NAMED INSURED has obtained approval from the Company prior to the employment of the relief or substitute physician or surgeon.

(Def.'s Statement of Material Facts, Ex. A (ECF. No. 22-1), Page ID #s 272-73.) The Court does not rely on this provision in its analysis of whether Dr. Burka is an "insured" under the Policy.

3 In addition to the Complaints, the parties have filed with the court an order dismissing Count I and a stipulation dismissing Count III in the state court proceedings. (ECF Nos. 30-4, 30-5.) The Court notes that the filed order dismissing Count I appears to predate the Amended Complaint, which includes an invasion of privacy claim. However, the parties agree that Count II is the only remaining claim in the Maine action and, in any event, the Court takes judicial notice of the state court's dismissals.

4 Dr. Burka filed a counterclaim seeking "a declaration that he is owed a defense in the underlying actions, an award of his fees and costs incurred in defending those actions, an award of his attorneys' fees incurred in defending this action, for such consequential damages to which he may be entitled, and an award of his costs." (Answer with Countercl. (ECF No. 7), Page ID # 31.) On March 2, 2017, the parties stipulated to the dismissal without prejudice of Dr. Burka's claim for consequential damages. (ECF No. 39.)

5 Plaintiff's request for summary judgment in its Motion to Defer put Defendant on notice that summary judgment could be entered in favor of Plaintiff, the nonmoving party. See Fed. R. Civ. P. 56(f)(1).

6 The parties agree that Maine law controls the substantive legal questions before this Court.

7 Because the Court denies Plaintiff's Motion to Defer on its merits, it does not opine on Defendant's argument that Plaintiff waived the ability to file a [Rule 56\(d\)](#) motion. (See Def.'s Opp'n to Pl.'s [Rule 56\(d\)](#) Mot. (ECF No. 35), Page ID # 485.)

8 The Court does not understand Defendant to seriously contend that the allegations in the Maryland suit concerning Howard and Caroline Cayne, Allison's co-plaintiffs and parents, are sufficient to trigger a duty to defend. Among other issues, these allegations concern events occurring after Dr. Burka was removed from the Policy.

9 The statute provides,

13. Enforcement. This section may be enforced within 2 years of the date a disclosure in violation of this section was or should reasonably have been discovered.

A. When the Attorney General has reason to believe that a person has intentionally violated a provision of this section, the Attorney General may bring an action to enjoin unlawful disclosure of health care information.

B. An individual who is aggrieved by conduct in violation of this section may bring a civil action against a person who has intentionally unlawfully disclosed health care information in the Superior Court in the county in which the individual resides or the disclosure occurred. The action may seek to enjoin unlawful disclosure and may seek costs and a forfeiture or penalty under paragraph C. An applicant for injunctive relief under this paragraph may not be required to give security as a condition of the issuance of the injunction.

C. A person who intentionally violates this section is subject to a civil penalty not to exceed \$5,000, payable to the State, plus costs. If a court finds that intentional violations of this section have occurred after due notice of the violating conduct with sufficient frequency to constitute a general business practice, the person is subject to a civil penalty not to exceed \$10,000 for health care practitioners and \$50,000 for health care facilities, payable to the State. A civil penalty under this subsection is recoverable in a civil action.

D. Nothing in this section may be construed to prohibit a person aggrieved by conduct in violation of this section from pursuing all available common law remedies, including but not limited to an action based on negligence.

[22 M.R.S.A. § 1711-C\(13\)](#). The Court reads this language to suggest that injunctive relief, fines, or penalties are the only forms of relief provided by [Section 1711-C](#). This conclusion is bolstered by the fact that the statute explicitly states that it does not foreclose an aggrieved party from separately pursuing common law remedies, such as a negligence suit, that would allow the recovery of damages. See [id. § 1711-C\(13\)\(D\)](#). Defendant does not contend that a request for court costs is alone sufficient to trigger coverage, and the Court is not inclined to rest a duty to defend upon such a thin reed.

- 10 To the extent Defendant is seeking his defense costs for the period before the claims seeking damages in the Maine suit were dismissed, the Court is not prepared, on this record and without a more complete understanding of the state court proceedings, to determine whether there was a duty to defend and at what exact point the duty, if it existed, was extinguished. See supra n.3.

2020 WL 3288193

Only the Westlaw citation is currently available.
United States District Court, E.D. Pennsylvania.

**WESTMINSTER AMERICAN
INSURANCE COMPANY**, Plaintiff

v.

SPRUCE 1530, LLC, et al., Defendants

CIVIL ACTION NO. 19-539

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Filed 06/17/2020

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Spruce 1530, LLC, [Al Shapiro](#).

MEMORANDUM OPINION

[NITZA I. QUIÑONES ALEJANDRO](#), J.

INTRODUCTION

*1 This is a declaratory judgment action brought pursuant to the Declaratory Judgment Act, [28 U.S.C. §§ 2201-2202](#), by Westminster American Insurance Company (“Westminster”), as the insurer, to determine whether Westminster is obligated to defend and/or indemnify Defendants Spruce 1530, LLC and Al Shapiro (collectively, “Spruce 1530”) in an underlying state court civil action filed against Spruce 1530 by non-party Touraine, L.P. (“Touraine”). Before this Court are the following: Westminster's motion for summary judgment, [ECF 10], Spruce 1530's cross-motion for partial summary judgment [ECF 14], and the parties' respective responses [ECF 15, 17, 20]. The issues raised in these motions have been fully briefed and are ripe for disposition. For the reasons set forth herein, this Court finds that Westminster is not obligated to defend and/or indemnify Spruce 1530. Therefore, Westminster's motion for summary judgment is granted, judgment is entered in its favor, and Spruce 1530's motion for partial summary judgment is denied.

BACKGROUND

This matter has a protracted procedural history that encompasses multiple state court civil actions and a prior action before this Court. Briefly, the uncontested, relevant facts to the cross-motions for summary judgment are as follows:¹

Spruce 1530 owns a parcel of real estate property located at 1530-1532 Spruce Street, Philadelphia, Pennsylvania, on which a multistory apartment building owned by Spruce 1530 (the “Newport Building”) is located. Defendant Shapiro is the managing principal member of Defendant Spruce 1530, LLC.

Touraine owns the adjacent parcel of real estate, located at 1520-1528 Spruce Street, on which a multistory apartment building (the “Touraine Building”) is located. The Touraine Building and the Newport Building are immediately adjacent to one another, such that the buildings meet at the Newport Building's eastern wall and the Touraine Building's western wall.

In 2015, Spruce 1530 and Touraine filed separate lawsuits against each other in state court over the property line between the properties and certain improvements to the Newport Building that allegedly extended over the property line and into the Touraine Building. These cases were consolidated (collectively, the “2015 Actions”) and tried without a jury before the Honorable Gene Cohen in 2016. Judge Cohen found that Spruce 1530 improperly encroached onto Touraine's property, and awarded Touraine injunctive relief and \$111,570 in monetary damages.

After judgment in the 2015 Actions was entered against Spruce 1530, Spruce 1530 entered into a separate settlement agreement and mutual release with its insurer, Westminster, in which Westminster agreed to pay \$52,500 towards the judgment entered against Spruce 1530. Previously, Spruce 1530 had obtained commercial liability insurance from Westminster (the “Policy”) for successive annual policy periods commencing on February 15, 2015 and continuing through February 15, 2018.

In November 2017, Touraine filed another civil action against Spruce 1530 in the Philadelphia Court of Common Pleas (the “Underlying State Action”), alleging that *throughout* the 2015 Actions, Spruce 1530 pursued frivolous claims and engaged in abusive practices, seeking to drive up litigation costs “for the improper purpose

of coercing Touraine to cede ownership of its real property to [Spruce] 1530.” Based on these allegations, Touraine asserted two claims in the Underlying State Action, *to wit*: wrongful use of civil proceedings under the Dragonetti Act, 42 Pa. Cons. Stat. § 8351 *et seq.* (Count I), and common-law abuse of process (Count II). Spruce 1530 filed preliminary objections and on June 18, 2018, the Honorable Karen Shreeves-Johns issued an order sustaining the preliminary objections as to Count I, the wrongful use of civil proceedings claim, and overruling the preliminary objections as to Count II, the abuse of process claim. The court did not issue an opinion to explain its reasoning.

*2 One month *after* the wrongful use of civil proceedings claim (Count I) was dismissed, Spruce 1530 notified Westminster for the first time of the Underlying State Action. Westminster sent Spruce 1530 return correspondence disclaiming coverage. Thereafter, Westminster initiated this declaratory judgment action, seeking this Court's declaration that Westminster has no duty to defend and/or indemnify Spruce 1530 in the Underlying State Action. The parties filed the instant cross-motions for summary judgment without conducting discovery and, collectively, acknowledge that the resolution of this matter turns exclusively on questions of law.

LEGAL STANDARD

Federal Rule of Civil Procedure (“Rule”) 56 governs the practice of summary judgment motions. Fed. R. Civ. P. 56. Specifically, this rule provides that summary judgment is appropriate “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” *Id.* A fact is “material” if proof of its existence or non-existence might affect the outcome of the litigation, and a dispute is “genuine” 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, 248-49 (1986). Under Rule 56, the court must view the evidence in the light most favorable to the non-moving party. *Galena v. Leone*, 638 F.3d 186, 196 (3d Cir. 2011). At summary judgment, the inquiry is whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law. *Id.* at 251-52.

The standards to be applied in deciding cross-motions for summary judgment are the same as those applied when

only one party has filed a summary judgment motion; the court rules “on each party's motion on an individual and separate basis, determining, for each side, whether [summary] judgment may be entered in accordance with the Rule 56 standard.” *Auto-Owners Ins. Co. v. Stevens & Ricci, Inc.*, 835 F.3d 388, 402 (3d Cir. 2016) (citation and internal quotation marks omitted). “If upon review of cross-motions, the court finds ‘no genuine dispute over material facts,’ then judgment may be entered ‘in favor of the party deserving judgment in light of the law and undisputed facts.’” *Coulter v. Receivables Mgmt. Sys.*, 367 F. Supp. 3d 307, 311 (E.D. Pa. 2019) (quoting *Iberia Foods Corp. v. Romeo*, 150 F.3d 298, 302 (3d Cir. 1998)).

DISCUSSION

The issue before this Court is whether Westminster has a duty to defend and/or indemnify Spruce 1530 in the Underlying State Action. Under Pennsylvania insurance law,² an insurer's duty to defend is broader than its duty to indemnify. *Sikirica v. Nationwide Ins. Co.*, 416 F.3d 214, 225 (3d Cir. 2005). “Necessarily, therefore, the analysis must begin with an evaluation of the duty to defend.” *IDS Prop. Cas. Ins. Co. v. Schonewolf*, 111 F. Supp. 3d 618, 623 (3d Cir. 2015) (quoting *Sikirica*, 416 F.3d at 225).

*3 Whether an insurer owes a duty to defend an insured in a lawsuit brought against the insured is dependent on the allegations in the underlying complaint and on the language of the insurance policy at issue. See *Mehlman*, 589 F.3d at 110 (citing *Donegal Mut. Ins. Co. v. Baumhammers*, 938 A.2d 286, 290-92 (Pa. 2007)). That is, a “carrier's duty to defend ... an insured in a suit brought by a third party depends upon a determination of whether the third party's complaint triggers coverage.” *Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.*, 908 A.2d 888, 896 (Pa. 2006) (quoting *Mut. Benefit Ins. Co. v. Haver*, 725 A.2d 743, 745 (Pa. 1999)). Courts should “look to the language of the policies themselves ... and then examine [the underlying] complaint,” *Kvaerner*, 908 A.2d at 896-97, in order to evaluate “whether, if the allegations [in the underlying complaint] are sustained, the insurer would be required to pay [the] resulting judgment.” *Sabia Landscaping v. Merchs. Mut. Ins. Co.*, 2013 WL 6022129, at *2 (E.D. Pa. Nov. 6, 2013) (quoting *Donegal*, 938 A.2d at 290). “It does not matter if in reality the facts [alleged in the underlying complaint] are completely groundless, false or fraudulent. It is the face of the complaint and not the truth of the facts alleged therein which determines whether there is a duty to defend.”

D'Auria v. Zurich Ins. Co., 507 A.2d 857, 859 (Pa. Super. Ct. 1986). Allegations in the underlying complaint must be “liberally construed with all doubts as to whether the claims may fall within the coverage of the policy to be resolved in favor of the insured.” *Roman Mosaic & Tile Co. v. Aetna Cas. & Sur. Co.*, 704 A.2d 665, 669 (Pa. Super. Ct. 1997).

The Policy

The parties agree that to the extent the claims in the Underlying State Action are covered by the Policy, such claims would fall under the coverage provision defined at “Coverage P”—“personal and advertising injury.” Pertinently, the Policy defines “personal and advertising injury” as:

injury, including ‘bodily injury’ that is a consequence thereof, arising out of one or more of the following offenses:

a. oral or written publication ... of material that:

- 1) slanders or libels a person or organization;
- 2) disparages a person's or an organization's goods, products, or services; or
- 3) violates a person's right of privacy;

b. false arrest, detention, or imprisonment;

c. **malicious prosecution**;

d. misappropriation of advertising ideas of another in ‘your’ ‘advertisement’;

e. infringement of the copyright, slogan, or trade-dress of another in ‘your’ ‘advertisement’; or

f. wrongful entry into, wrongful eviction from, or invasion of the right of private occupancy of a room, dwelling, or premises that a person occupies. This offense must be committed by or on behalf of the owner, landlord, or lessor of the room, dwelling, or premises.

[ECF 10-24 at 52-53] (emphasis added).

In the “Exclusions” section of Coverage P, the Policy specifies that: “‘We’ do not pay for ‘personal and advertising injury’ arising out of an act committed by or directed by the insured who knew that ‘personal and advertising injury’ would occur as a result of the act.” [*Id.* at 64].

Allegations in the Underlying State Court Complaint

In the operative complaint in the Underlying State Action (the “Underlying State Court Complaint”), [ECF 10-4], Touraine alleges that in the 2015 Actions, Spruce 1530 prosecuted “frivolous claims” against Touraine “in a grossly negligent manner and/or without probable cause, and primarily for [an improper] purpose[.]” Touraine specifically alleges, *inter alia*, the following:

Despite being aware that 1530's³ arguments and claims [for quiet title] were falsely made and without merit, and otherwise possessing no evidence to support those arguments and/or claims, 1530 (via Shapiro) procured, initiated and continued to prosecute the Frivolous Claims in the [2015] Actions for the improper purpose of coercing Touraine to cede ownership of its real property to 1530, including because litigating against the Frivolous Claims would be expensive and economically harmful to Touraine's planned use of the real property that Shapiro, (acting through 1530) sought, in bad faith, to make his own. In other words, 1530's claims were nothing more than extortion by litigation.

*4 Touraine has ... suffered pecuniary losses and has incurred substantial attorneys’ and other professional fees and costs.... This harm was exacerbated by 1530's ... use of misleading tactics and the perversion of the litigation process in the [2015] Actions including via its use of motion practice and the discovery process.... Via the Frivolous Claims, 1530 ... [put forth] arguments, assertions and so-called legal “theories” [that] were either knowingly false ... or without merit, in that 1530 could not, at any time during the [2015] Actions ... produce any actual evidence to support them.... Defendants’ sole intent was to use the Frivolous Claims for the improper purpose of coercing Touraine to involuntarily convey to 1530 the ... [e]ncroachments [by Spruce 1530 onto Touraine's property] for zero consideration....

Shapiro told [a Touraine representative] that he (Shapiro) would not remove the illegal construction, but would instead file a lawsuit on behalf of 1530 against Touraine that was “going to cost Touraine so much time and so much money that Touraine was just going to give up” and cede part of its real property to 1530....

Throughout the [2015] Actions, 1530 ... obstructed the necessary fact-finding process.... By way of example, but not limitation, 1530 ... verified every one of 1530's pleadings [and sent] Touraine on several "wild goose chases" ... 1530 interposed repeated objections and delay tactics [in response to Touraine's discovery requests].... It turned out that most – if not all – of the third parties 1530 ... identified [as having knowledge of the property boundary] had absolutely no knowledge relevant to the claims and defenses in the [2015] Actions.... Making matters worse, during the depositions of the third parties whom 1530 identified, Touraine discovered ... that there were *other* third parties whom 1530 and Shapiro ... had not revealed to Touraine that possessed *more* relevant knowledge....

1530's willful misdirection, concealment of material information, and lack of truthfulness in connection with [its discovery responses] amounted to a perversion of the legal process and, thus, made the discovery process ... much more time-consuming and expensive than it otherwise should have been.

1530 (via Shapiro) made numerous other sweeping assertions in connection with the papers and pleadings it filed in support of its Frivolous Claims ... that [were eventually] revealed as false and unsupported by any evidence. Touraine was forced to incur massive expense "debunking" these assertions ... Despite making [these] assertions, 1530 never produced a single witness or document to [prove them].

[ECF 10-4 at 6-24] (emphasis in original).

As noted, based on the above allegations, Touraine asserted state law claims for wrongful use of civil proceedings under the Dragonetti Act (Count I) (which was dismissed on preliminary objections), and common-law abuse of process (Count II). Westminster concedes that a claim for wrongful use of civil proceedings *would* be covered by the Policy, but argues that its dismissal by the state court prior to Westminster's receipt of notice of the claim eliminated any corresponding obligation to defend Spruce 1530 in the Underlying State Action. The parties disagree as to whether the claim for common-law abuse of process is a covered claim. Thus, the resolution of the cross-motions for summary judgment requires addressing two questions: whether, despite the dismissal of Count I, Westminster has a corresponding ongoing duty to defend Spruce 1530, and whether Count II is a covered claim under the Policy. If the answer to either

question is "yes," Westminster must defend Spruce 1530 in the Underlying State Action.

Count I: Wrongful Use of Civil Proceedings

At Count I of the Underlying State Court Complaint, Touraine largely parrots the elements set forth by the Dragonetti Act,⁴ and alleges that "Defendants procured, initiated and continued civil proceedings against Touraine ... in a grossly negligent and/or reckless manner ... without probable cause and for an improper purpose ... in bad faith, and primarily for a purpose other than that of securing the proper discovery, joinder of parties or adjudication of the Frivolous Claims[.]" In Pennsylvania, a claim for "wrongful use of civil proceedings" under the Dragonetti Act is a malicious prosecution claim. *Regent Ins. Co. v. Strausser Enters., Inc.*, 902 F. Supp. 2d 628, 638 (E.D. Pa. 2012) ("Malicious prosecution under Pennsylvania law—also termed 'Wrongful use of civil proceedings'—is defined by the Dragonetti Act.").

*5 Westminster argues that because Count I was dismissed from the Underlying State Action when the trial court sustained Spruce 1530's preliminary objections, any obligation to defend that may have been triggered by this claim was likewise dismissed. Spruce 1530 disagrees and counters that because such a dismissal is "not a final, non-appealable order," which could be "modified or vacated ... or reversed" and "may remain a factor in settlement discussions," Westminster cannot conclusively establish that the Underlying State Action will not produce a judgment covered by the Policy.

Whether a trial court's dismissal of a claim terminates an insurer's duty to defend has not been definitively answered by the Pennsylvania courts. As such, "we must predict how [the Pennsylvania Supreme Court] would rule if faced with the issue." *Spence v. ESAB Grp., Inc.*, 623 F.3d 212, 216 (3d Cir. 2010). "In making such a prediction, 'we must look to decisions of state intermediate appellate courts, of federal courts interpreting [this] state's law, and of other state supreme courts that have addressed the issue[.]'" *Id.* (quoting *Norfolk S. Ry. Co. v. Basell USA Inc.*, 512 F.3d 86, 92 (3d Cir. 2008)).

The parties suggest their own answers to this question and, unsurprisingly, rely on different sources. Spruce 1530 points to the oft-cited *Commerce & Industry Insurance Co. v. Bank of Hawaii*, 832 P.2d 733 (Haw. 1992) and *Meadowbrook, Inc.*

v. Tower Insurance Co., 559 N.W. 2d 411 (Minn. 1997), in which the Supreme Courts of Hawaii and Minnesota squarely addressed the question and concluded that “the duty to defend extends through the appellate process,” *Meadowbrook*, 559 N.W. 2d at 416 or, at least, “until ... a final judgment had disposed of the entire case[.]” *Bank of Haw.*, 832 P.2d at 737. In the years since those opinions were published, several federal courts have relied on them in predicting their own state courts’ positions. See, e.g., *City of Sandusky, Ohio v. Coregis Ins. Co.*, 192 F. App’x 355, 361-62 (6th Cir. 2006); *Wells’ Dairy, Inc. v. Travelers Indem. Co. of Ill.*, 336 F. Supp. 2d 906, 911 (N.D. Iowa 2004); but see *Med. Mut. Ins. Co. of Me., Inc. v. Burka*, 2017 WL 1743505, at *6 (D. Me. May 3, 2017) (declining to follow *Wells’ Dairy* and holding that insurer had no ongoing duty to defend after potentially covered claim was dismissed).

Notably, however, Spruce 1530 fails to identify—and this Court could not find—a single instance in which any state or federal court in Pennsylvania reached Spruce 1530’s favored holding. Instead, in interpreting Pennsylvania’s rule that the duty to defend continues until the insurer can “confine” the claim “to a recovery that the policy does not cover,”⁵ courts in this district have consistently treated the dismissal of covered claims as a sufficient basis for terminating an insurer’s duty to defend. For example, Westminster highlights *Nationwide Mutual Insurance Co. v. Garzone*, in which the Honorable Michael Baylson rejected the argument that the duty to defend “should exist ‘until such time as the Pennsylvania appellate courts decide once and for all’ ” the fate of dismissed claims. 2009 WL 2996468, at *9 (E.D. Pa. Sept. 17, 2009). Westminster also cites to *Meridian Mutual Insurance Co. v. James Gilligan Builders*, 2009 WL 1704474, at *2 (E.D. Pa. June 18, 2009), in which the Honorable Eduardo Robreno observed that an insurer’s obligation “ceases ... if the cause of action upon which the duty to defend exists is dismissed,” and to *Palmer v. Twin City Fire Insurance Co.*, 2017 WL 5571051, at *4 (E.D. Pa. Nov. 20, 2017), in which the Honorable Wendy Beetlestone concluded that the insurer had no duty to defend an uninsured party after the insured was dismissed from the underlying suit on preliminary objections. These decisions are consistent with other decisions by other courts of this district. See, e.g., *M.P. III Holdings, Inc. v. Hartford Cas. Ins. Co.*, 2011 WL 2604736, at *19 (E.D. Pa. June 30, 2011) (“[t]he courts of this district have interpreted Pennsylvania case law to hold that the withdrawal or dismissal of a claim establishes that an insurer no longer has a duty to defend”); *Allstate Ins. Co. v. Sanchez*, 2003 WL 22100865, at *5 (E.D. Pa. July

30, 2003) (holding that insured are not entitled to defense by insurer if covered claims in underlying action are dismissed).

*6 Moreover, though technically not a “final” decision from a procedural standpoint, the dismissal of a claim on preliminary objections is meant to constitute a conclusive rejection of a plaintiff’s potential for recovery on that claim. As described in *Freundlich & Littman, LLC v. Feierstein*:

Preliminary objections in the nature of a demurrer test the legal sufficiency of the complaint.... Preliminary objections which seek the dismissal of a cause of action should be sustained only in cases in which it is *clear and free from doubt* that the pleader will be unable to prove facts legally sufficient to establish the right to relief. If any doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling the preliminary objections. 157 A.3d 526, 530 (Pa. Super. Ct. 2017) (quoting *Richmond v. McHale*, 35 A.3d 779, 783 (Pa. Super. Ct. 2012)) (emphasis added). Here, though there is no published opinion explaining why the wrongful use of civil proceedings claim was dismissed, this Court is bound to accept the state court’s ruling. As such, and in accordance with the persuasive opinions of judges in this district, this Court predicts that the Pennsylvania high court would find that an insurer’s duty to defend is extinguished by the dismissal of all covered claims, notwithstanding the possibility of future appeal. Thus, this Court finds that Westminster has no duty to defend Spruce 1530 in the Underlying State Action based on Touraine’s wrongful use of civil proceedings claim.⁶ Following this finding, the resolution of this matter will turn on whether Count II is a covered claim under the Policy.

Count II: Abuse of Process

As noted, at Count II of the Underlying State Court Complaint, Touraine asserts an abuse of process claim. Plainly, “abuse of process” is not expressly listed among the covered claims in the Policy. Nevertheless, Spruce 1530 contends that the Policy’s coverage of “malicious prosecution” claims should be read to cover Touraine’s abuse of process claim. In order to determine whether this argument has any merit, this Court will consider the Pennsylvania courts’ handling of malicious prosecution and abuse of process claims.

*7 Though abuse of process and malicious prosecution are “often confused,” they are in fact “separate and distinct”

torts. *Werner v. Plater-Zyberk*, 799 A.2d 776, 785 (Pa. Super. Ct. 2002). Abuse of process—“the use of legal process as a tactical weapon to coerce a desired result that is not the legitimate object of the process”—is a “state common law claim[.]” *Id.* (emphasis added). In contrast, “allegations of malicious prosecution invoke Pennsylvania’s statutory law ... [the] Dragonetti Act.” *Id.* (emphasis added). Pennsylvania courts have repeatedly explained the difference between malicious prosecution and abuse of process by observing that while “[t]he gist of an action for abuse of process is the improper use of process after it has been issued, that is, a perversion of it[.] [m]alicious use of civil process has to do with the wrongful initiation of such process.” *P.J.A. v. H.C.N.*, 156 A.3d 284, 291 (Pa. Super. Ct. 2017) (quoting *Rosen v. Am. Bank of Rolla*, 627 A.2d 190, 192 (Pa. Super. Ct. 1993)) (emphasis added).

Though Spruce 1530 focuses on the fact that, technically speaking, the Dragonetti Act contemplates liability not merely for the “initiation” of wrongful civil proceedings, but also for their “continuation,” 42 Pa. Cons. Stat. § 8351, Pennsylvania courts have defined liability under the Dragonetti Act to require that the underlying proceedings have been “instituted primarily for an improper cause.” *P.J.A.*, 156 A.3d at 292 (citing *Hart v. O’Malley*, 647 A.2d 542, 546 (Pa. Super. Ct. 1994)) (emphasis added); see also *Sabella v. Estate of Milides*, 992 A.2d 180, 188 (Pa. Super. Ct. 2010) (citing *Hart*). On the other hand, “[a]buse of process ... is not commencing an action or causing process to issue without justification, but misusing or misapplying process justified in itself for an end other than that which it was designed to accomplish.” *In re Finney*, 184 F. App’x 285, 289 (3d Cir. 2006) (quoting *Gen. Refractories Co. v. Fireman’s Fund Ins. Co.*, 337 F.3d 297, 305 (3d Cir. 2003)). That is, where malicious prosecution focuses on the bringing of a suit, abuse of process focuses on a party’s behavior during litigation, even where the underlying action has a legitimate basis.⁷ Moreover, the elements of abuse of process, though not entirely dissimilar from those of a Dragonetti Act claim, are distinct.⁸

Spruce 1530 insists that, despite these technical distinctions, the two torts overlap sufficiently to warrant the conclusion that the Policy’s “malicious prosecution” coverage includes coverage for abuse of process. In support of this argument, Spruce 1530 highlights a footnote from *Stone Crushed Partnership v. Kassab Archbold Jackson & O’Brien*, where the Pennsylvania Supreme Court mused that the Dragonetti Act “subsumes both the torts of malicious use of process

and abuse of process.” 908 A.2d 875, 877 n.1 (Pa. 2006). However, in *Langman v. Keystone Nazareth Bank & Trust Co.*, a panel of the United States Court of Appeals for the Third Circuit observed that the statement in *Stone Crushed* “was *obiter dicta*”—not controlling precedent—and found “a judicial chorus of support” in the years after *Stone Crushed* was published for the notion that claims of abuse of process and wrongful use of civil proceedings remain distinct torts under Pennsylvania law. 502 F. App’x 220, 225 (3d Cir. 2012). As such, the Third Circuit panel concluded that “[u]nder Pennsylvania law ... common law abuse of process remains a separate cause of action, distinct from an action under the Dragonetti Act[.]” *Id.* This Court finds persuasive the analysis in *Langman*, and adopts the Third Circuit’s reasoning herein.⁹

*8 Spruce 1530 makes two additional arguments as to why Count II is covered under the Policy, *i.e.*: (1) Count II of the Underlying State Court Complaint actually includes a claim for malicious prosecution; and (2) the Policy’s coverage of malicious prosecution should be construed against Westminster so as to cover abuse of process claims. Spruce 1530’s first argument is self-defeating. Though, under its Count II heading in the Underlying State Court Complaint, Touraine “incorporates by reference ... each of the preceding paragraphs” and echoes its Count I allegations that Spruce 1530 “procured, initiated and continued” the 2015 Actions for improper purposes, the dismissal of Touraine’s Dragonetti Act claim foreclosed the possibility of recovery on these allegations, which clearly parrot the language of the Dragonetti Act. Further, “[t]o prevent artful pleading designed to avoid policy exclusions, it is necessary to look at the factual allegations in the complaint, and not how the underlying plaintiff frames the request for relief.” *Allstate Ins. Co. v. Thompson*, 2006 WL 2387090, at *8 (E.D. Pa. July 19, 2006) (citing *Mut. Benefit Ins. Co. v. Haver*, 725 A.2d 743, 745 (Pa. 1999)). Westminster’s duty to defend is ultimately determined by “whether, if the allegations are sustained, [it] would be required to pay resulting judgment,” *Donegal*, 938 A.2d at 290, and here, the state trial court determined that Touraine would be unable to establish liability for malicious prosecution. Therefore, it is immaterial whether allegations supporting such liability appear in Touraine’s “Count II” section of the Underlying Complaint.

Spruce 1530’s second argument is more complex. Even acknowledging the distinction between abuse of process and malicious prosecution, Spruce 1530 argues that the Policy’s “malicious prosecution” provision should be construed to cover abuse of process claims. Spruce 1530 bases this

argument on its theory that the Policy's use of "malicious prosecution" is ambiguous and would, according to the "reasonable perspective of a layperson," extend coverage to abuse of process claims. Spruce 1530 is mistaken

"Our purpose in interpreting insurance contracts is to ascertain the intent of the parties as manifested by the terms used in the written insurance policy." *Donegal*, 938 A.2d at 290 (quoting *401 Fourth St., Inc. v. Inv'rs Ins. Grp.*, 879 A.2d 166, 171 (Pa. 2005)). "When the language of the policy is clear and unambiguous, we must give effect to that language." *Donegal*, 938 A.2d at 290 (quoting *Kvaerner*, 908 A.2d at 897). "However, 'when a provision in the policy is ambiguous, the policy is to be construed in favor of the insured.'" *Donegal*, 938 A.2d at 290 (quoting *Kvaerner*, 908 A.2d at 897). "An ambiguity is said to exist if there is more than one reasonable interpretation of the term or 'if reasonably intelligent people considering the term in the context of the entire policy would honestly differ as to its meaning.'" *Bhd. Mut. Ins. Co. v. Salem Baptist Church of Jenkintown*, 985 F. Supp. 2d 624, 631-32 (E.D. Pa. 2013). Spruce 1530 offers little evidence of the Policy's ambiguity beyond some historical confusion about the distinction between malicious prosecution and abuse of process (referencing, *inter alia*, *Stone Crushed*). Notably, this Court could not identify any recent or local authority that supports the proposition that a Policy provision referencing "malicious prosecution" might be ambiguous with respect to whether it extends to abuse of process claims.¹⁰ Further, since Spruce 1530 has not suggested that Westminster made any misrepresentations about the itself Policy, Spruce 1530's assertion that the "reasonable expectations of the insured" should govern this analysis is misplaced. See *West v. Lincoln Ben. Life Co.*, 509 F.3d 160, 168-69 (3d Cir. 2007) ("In the absence of an affirmative misrepresentation by the insurer or its agent about the contents of the policy, the plain and unambiguous terms of a policy ... control.... An analysis of the reasonable expectations of the insured is rightly employed when a claimant alleges that the insurer engaged in deceptive practices[.]"); *Downey v. First Indem. Ins.*, 214 F. Supp. 3d 414, 426 (E.D. Pa. 2016) ("The law within Pennsylvania and this circuit reflects that the 'reasonable expectations' doctrine is typically invoked where an insurer unilaterally alters the terms of the policy such that it runs contrary to the policy applied for and paid for.").

*9 Consistent with the case law, this Court finds that where a policy provides explicit coverage for an enumerated list of recognizable torts, the injuries alleged in the underlying

suit must raise a possibility of recovery for one of the listed torts in order to trigger an insurer's duty to defend. See *Roman Mosaic*, 704 A.2d at 669 (finding no duty to defend where injuries alleged in underlying action did not "arise out of" torts enumerated in the policy); *O'Brien Energy Sys., Inc. v. Am. Emp'rs' Ins. Co.*, 629 A.2d 957, 964 (Pa. Super. Ct. 1993) (policy provision at issue "extends liability coverage to the specific torts there enumerated. It affords coverage only for defined risks."); see also *CGU Ins. v. Tyson Assoc.*, 140 F. Supp. 2d 415, 420 (E.D. Pa. 2001) (analyzing whether underlying complaint alleged any torts specifically enumerated in the policy).

Here, the Policy provided coverage for injury "arising out of one or more" of a specifically enumerated list of torts including, *inter alia*, malicious prosecution. The Policy, however, does not include nor provide coverage for abuse of process claims. As noted, malicious prosecution and abuse of process are distinct torts. Therefore, this Court finds that the Policy's malicious prosecution coverage is triggered *only* by allegations giving rise to possible liability for malicious prosecution, and not by any allegations supporting a claim for abuse of process. The allegations of malicious prosecution contained in the Underlying State Court Complaint were dismissed. Under these circumstances, this Court concludes that Touraine's remaining claim for abuse of process is not covered by the Policy and, therefore, Westminster has no duty to defend Spruce 1530 in the Underlying State Action. Further, since Westminster has no duty to defend, it also has no duty to indemnify. *Permanent Gen. Ins. Co. of Ohio v. McDevitt*, 2020 WL 1329657, at *2 (E. D. Pa. Mar. 23, 2020) ("[I]f the Court concludes that an insurer has no duty to defend, it must necessarily hold that there is no duty to indemnify[.]") (citing *Frog, Switch & Mfg. Co. v. Travelers Ins. Co.*, 193 F.3d 742, 746 (3d Cir. 1999)).

CONCLUSION

For the reasons set forth, this Court concludes that Westminster has no duty to defend or indemnify Spruce 1530 in the Underlying State Action. Accordingly, Westminster's motion for summary judgment is granted, and Spruce 1530's motion for partial summary judgment is denied. An Order consistent with this Memorandum Opinion follows.

All Citations

Not Reported in Fed. Supp., 2020 WL 3288193

Footnotes

- 1 In reviewing a motion for summary judgment, the Court must “consider all evidence in the light most favorable to the party opposing the motion.” *A.W. v. Jersey City Pub. Sch.*, 486 F.3d 791, 974 (3d Cir. 2007). Because an insurer’s duty to defend an action against its insured is initially determined on the basis of the allegations contained in the underlying complaint against the insured, most of the facts set forth in this section are drawn from the state court complaint in the Underlying State Action. See *State Farm Fire & Cas. Co. v. Estate of Mehlman*, 589 F.3d 105, 108 n.3 (3d Cir. 2009) (citing *Donegal Mut. Ins. Co. v. Baumhammers*, 938 A.2d 286, 290-92 (Pa. 2007)). However, some facts in this section are drawn from the parties’ respective motions and responses thereto. While most of the facts material to the parties’ cross-motions are undisputed, this Court has construed any disputed facts in favor of Spruce 1530.
- 2 The parties focus their legal arguments exclusively on Pennsylvania law. Moreover, the Underlying State Action is pending in Pennsylvania state court, and the Policy makes repeated reference to the laws of the “state where the premises described are located”—in this case, Pennsylvania. Accordingly, this Court will treat the decisions of the Pennsylvania Supreme Court as binding precedent and the decisions of the Pennsylvania Superior Court as persuasive precedent. *Mehlman*, 589 F.3d at 108 n.2 (citing *Jewelcor Inc. v. Karfunkel*, 517 F.3d 672, 676 n.4 (3d Cir. 2008)).
- 3 To the extent that Touraine’s complaint includes references to “1530,” it refers to Spruce 1530, LLC.
- 4 Specifically, under the Dragonetti Act, a “person who takes part in the procurement, initiation or continuation of civil proceedings against another is subject to liability to the other for wrongful use of civil proceedings” when:
 - (1) He acts in a grossly negligent manner or without probable cause and primarily for a purpose other than that of securing proper discovery, joinder of parties or adjudication of the claim on which the proceedings are based; and
 - (2) The proceedings have terminated in favor of the party against whom they are brought.

42 Pa. Cons. Stat. § 8351.
- 5 *Unionamerica Ins. Co. v. J.B. Johnson*, 806 A.2d 431, 443-44 (Pa. Super. Ct. 2002).
- 6 The parties do not dispute that Westminster was not notified of the Underlying State Action until roughly one month after Count I was dismissed. Nevertheless, they disagree as to whether Spruce 1530 is entitled to reimbursement of litigation costs incurred prior to Count I’s dismissal. While courts applying Pennsylvania law have not unanimously embraced the argument that an insurer’s duty to defend “only arises after notice,” see, e.g., *Rite Aid Corp. v. Liberty Mut. Fire Ins. Co.*, 2006 WL 2376238, *5 (M.D. Pa. Aug. 14, 2006), this Court cannot find—and Spruce 1530 has not identified—any case in which an insurer was required to reimburse pre-notice costs despite having no ongoing duty to defend. Rather, Westminster offers several cases that generally support its position that “[o]rdinarily, the carrier’s performance is not triggered until the policyholder requests that the carrier defend.” *Gen. Refractories Co. v. First State Ins. Co.*, 94 F. Supp. 3d 649, 663 (E.D. Pa. 2015) (citing *Widener Univ. v. Fred James & Co.*, 537 A.2d 829, 832 (Pa. Super. Ct. 1988)). Notably, Spruce 1530 does not meaningfully attempt to respond to Westminster’s argument. As such, this Court finds that Westminster is not obligated to reimburse Spruce 1530 for fees incurred prior to Count I’s dismissal.
- 7 Parties may be liable for abuse of process when they “primarily intend[] to increase the burden and expense of litigation to the other side,” as Touraine has alleged, but to be found liable, their “behavior must ‘become so lacking in justification as to lose its legitimate function as a justifiable litigation procedure.’ ” *In re Finney*, 184 F. App’x at 289 (quoting *Gen. Refractories*, 337 F.3d at 308).
- 8 “To establish a claim for abuse of process it must be shown that the defendant (1) used a legal process against the plaintiff, (2) primarily to accomplish a purpose for which the process was not designed; and (3) harm has been caused to the plaintiff.” *P.J.A.*, 156 A.3d at 288 (quoting *Werner*, 799 A.2d at 785). The elements of a wrongful use of civil proceedings claim are set forth at note 4, *supra*.
- 9 This Court acknowledges that *Langman* is a non-precedential opinion and appears to contradict the Third Circuit’s conclusion ten years earlier in *U.S. Express Lines, Ltd. v. Higgins*, which held that “both torts are subsumed within the general scope of the [Dragonetti] Act.” 281 F.3d 383, 394 (3d Cir. 2002). However, the *Higgins* court appears to

have based its analysis exclusively on its own reading of the language of the statute, rather than any Pennsylvania court's interpretation, and did not have the benefit of the "judicial chorus of support," *Stone Crushed* notwithstanding, that subsequently defined (and continues to define) malicious prosecution and abuse of process as distinct torts. See, e.g., *Freundlich & Littman*, 157 A.3d at 531 n.3 ("We note that our Supreme Court has stated, in dicta, that the Dragonetti Act 'subsumes both the torts of malicious use of process and abuse of process.' Nevertheless, since *Stone Crushed Partnership*, this Court has continued to recognize common law abuse of process claims.") (collecting cases); *Brobst v. Crossett*, 2017 WL 2377729, at *6 n.8 (E.D. Pa. May 31, 2017) (rejecting *Stone Crushed* position on the basis that "[s]ubsequent decisions ... make clear that the abuse of process tort is still recognized by the Pennsylvania courts.") (citing *Freundlich*).

- 10 Spruce 1530 identifies just one case, from the Ninth Circuit, in which a court determined that an insurance policy's coverage of "malicious prosecution" was sufficiently ambiguous as to cover claims for abuse of process: *Lunsford v. American Guarantee & Liability Insurance Co.*, 18 F.3d 653, 655 (9th Cir. 1994). However, in *Lunsford*, the court applied California law, and the Ninth Circuit's reasoning is, at best, obliquely relevant here. See *id.* (observing that "California courts have not yet considered whether 'malicious prosecution' coverage includes actions for abuse of process[.]"). This Court is not bound by the Ninth Circuit's holding.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(k) of the Massachusetts Rules of Appellate Procedure

I, Joseph C. Robinson, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass. R. A. P. 16 (a)(13) (addendum);
Mass. R. A. P. 16 (e) (references to the record);
Mass. R. A. P. 18 (appendix to the briefs);
Mass. R. A. P. 20 (form and length of briefs, appendices, and other documents); and
Mass. R. A. P. 21 (redaction).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 20 because it is produced in the proportional font Garamond at size 14, and contains 6,529 total non-excluded words as counted using the word count feature of Microsoft Word.



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CERTIFICATE OF SERVICE

Pursuant to Mass.R.A.P. 13(d), I, Joseph C. Robinson, hereby certify, under the penalties of perjury, that on April 2, 2026, I have made service of this Brief and Appendix upon the attorney of record for each party, or if the party has no attorney, then I made service directly to the self-represented party, by the Electronic Filing System and by electronic mail on:

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