STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC **SUPERIOR COURT**

(FILED: March 14, 2013)

QUEST DIAGNOSTICS, LLC	:	
	:	
v.	:	**C.A. No. PC-2011-6410**
	:	
PINNACLE CONSORTIUM OF HIGHER EDUCATION, a Vermont Reciprocal Risk Retention Group, and GENESIS INSURANCE COMPANY	:	

DECISION

GIBNEY, P.J. Before this Court for decision is an insurance dispute between Plaintiff Quest Diagnostics, LLC ("Quest") and Defendants Pinnacle Consortium of Higher Education ("Pinnacle") and Genesis Insurance Company ("Genesis"). Quest brought the instant declaratory judgment action to determine its rights to defense and indemnification under insurance policies issued by Pinnacle and Quest to Brown University ("Brown"). Quest and Brown are co-defendants in an underlying tort suit in which Brown filed a cross-complaint against Quest. Quest moved for summary judgment on its request for declaratory relief, and Pinnacle and Genesis filed objections and cross-motions for summary judgment. Jurisdiction is pursuant to G.L. 1956 § 9-30-1, the Uniform Declaratory Judgment Act. For the reasons set forth below, this Court declares that Quest is not entitled to defense and indemnification pursuant to the relevant policies and provisions.

I

Facts and Travel

Brown and Quest entered into a professional services agreement pursuant to which Brown retained Quest as "a licensed independent contractor to perform certain clinical laboratory testing for students and employees" at Brown University Health Services ("Health Center"). The agreement set forth, inter alia, policies and procedures for testing to be performed by Quest on behalf of Brown. The agreement also contained an insurance procurement obligation which, in part, required Brown and Quest separately to obtain general liability insurance and professional liability insurance policies. Each party was to name the other as an additional insured on its general liability policy. Brown secured such insurance through Pinnacle, as well as excess insurance through Genesis. The instant dispute among Quest and Pinnacle and Genesis arose out of a tort suit in which Brown and Quest are co-defendants.

On May 10, 2006, Pauline Hall, who then was a Brown graduate student, presented to the Health Center with complaints of a sore throat, ear pain, and nausea. Ms. Hall was seen by Rita Shiff, a physician's assistant employed by Brown at the Health Center, who ordered a Rapid Strep Test to be performed by Quest. The parties dispute what happened next. Brown and its insurers claim that in violation of the professional services agreement, Quest failed to send the sample to the proper facility and consequently failed to perform the test. Quest argues that the error actually was caused by a Brown employee who covered the Quest desk during lunch. In any event, it is undisputed that the test was not performed. Ms. Hall returned to the Health Center on May 12, 2006, at which point she was diagnosed with toxic shock syndrome. This resulted in a prolonged illness from which she suffered permanent injury. On June 26, 2006, Brown's Director of the Office of Insurance and Risk notified the insurers in writing of a

potential claim. In March 2008, Ms. Hall filed suit ("Underlying Complaint" or "Underlying Action") against Ms. Shiff, Brown, and Quest. Ms. Hall alleged negligent treatment and diagnosis by Ms. Shiff and Brown, as well as negligent laboratory testing by Quest.

On December 10, 2010, Brown filed a cross-complaint ("Cross-Complaint") against co-defendant Quest in which Brown alleged that Quest caused Ms. Hall's injuries and that Quest negligently failed to properly process the Rapid Strep Test, failed to obtain the results of the test, and failed to communicate the test results to the Health Center. Brown specifically alleged that, in violation of the professional services agreement, Quest was negligent in its failure to perform the test at a local facility instead of sending it to Cambridge; failure to perform the test on May 10, 2006; failure to notify the Health Center that the test was pending as of 5:00 P.M.; failure to report the test results to the Health Center by 5:30 P.M.; and failure to fax the results of the test to the Health Center. Brown also claimed that Quest breached the professional services agreement and that the agreement entitled Brown to indemnification and contribution from Quest in relation to Ms. Hall's claims.

On May 4, 2011, Ms. Hall settled with Brown and Ms. Shiff; Pinnacle and Genesis participated in the settlement, although Quest did not, and Brown's Cross-Complaint against Quest was not resolved. On July 15, 2011 and July 27, 2011, Quest's counsel faxed and mailed to Brown's counsel a demand for complete defense and indemnification from Pinnacle regarding the pending litigation. The letters requested contact information for the pertinent Pinnacle claims representative so that Quest could make its request directly. Both letters also requested information for applicable excess insurance policies, though neither mentioned Genesis.

On November 11, 2011, Quest, having received no reply from Pinnacle and Genesis, filed the instant complaint ("Quest Complaint" or "Instant Complaint") for declaratory judgment

against the insurers. Quest requests two declarations: "(1) Quest is entitled to a defense and indemnification in this action[1] from Pinnacle, at Pinnacle's expense from the date of original tender; (2) Quest is entitled to indemnification in this action pursuant to the aforementioned Pinnacle and Genesis Policies of Insurance[.]" In its motion for summary judgment, Quest argues that 1) it is covered by Pinnacle professional and commercial general liability provisions from the 2005/06 policy year; 2) it is covered by Pinnacle professional liability provisions from the 2010/11 policy year; 3) it is covered by the 2010/11 Genesis Excess Policy; and 4) the insurers breached their duty to defend and waived their right to deny coverage because they failed to timely respond to Quest's demand.

Pinnacle and Genesis filed oppositions and cross-motions for summary judgment in which they argue that Quest is covered only by commercial general liability policies that are inapplicable to the Underlying Action and Brown Cross-Complaint. Specifically, the insurers argue that the Underlying Action was settled as a medical malpractice case under Brown's professional liability policy provisions, and Brown and Quest never in any professional services agreement agreed to extend coverage to one another in their respective professional liability polices. The insurers further contend that Quest failed to provide proper notice to trigger defense and indemnification under the policies.

[1] In Quest's complaint for declaratory judgment and in the parties' briefs, there is variation regarding from which complaint and claims Quest seeks defense and indemnification. In "this action," Quest is the plaintiff, and the insurers are the defendants, whereas in the Underlying Action, Quest is a defendant (Plaintiff Ms. Hall), as well as a cross-defendant (co-defendant and Plaintiff Brown). The parties, however, at various instances in their filings discuss defense and indemnification with regard to the Underlying Complaint, the Brown Cross-Complaint, or without specifically referring to either. Quest and the insurers also debate which complaint triggered insurance coverage. This question is immaterial because, as discussed below, the nature of the allegations in both the Underlying Complaint and Brown's Cross-Complaint fall within the purview of professional liability insurance provisions pursuant to which Quest was not an additional insured.

II

Standards of Review

Under the Uniform Declaratory Judgment Act (UDJA), the Superior Court possesses "the power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." Section 9-30-1; see also P.J.C. Realty v. Barry, 811 A.2d 1202, 1207 (R.I. 2002) (quoting § 9-30-1). Thus, "the Superior Court has jurisdiction to construe the rights and responsibilities of any party arising from a statute pursuant to the powers conferred upon [it] by G.L. chapter 30 of title 9, the Uniform Declaratory Judgments Act." Canario v. Culhane, 752 A.2d 476, 478-79 (R.I. 2000). Specifically, § 9-30-2 of the Act provides as follows:

> "Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or legal relations thereunder." Section 9-30-2 (emphasis added).

A trial court's "decision to grant or to deny declaratory relief under the [UDJA] is purely discretionary." Sullivan v. Chafee, 703 A.2d 748, 751 (R.I. 1997). Further, the purpose of the UDJA is "to allow the trial justice to 'facilitate the termination of controversies.'" Bradford Assocs. v. R.I. Div. of Purchases, 772 A.2d 485, 489 (R.I. 2001) (citations omitted). It is axiomatic that "[a] declaratory-judgment action may not be used for the determination of abstract questions or the rendering of advisory opinions, nor does it license litigants to fish in judicial ponds for legal advice." Sullivan, 703 A.2d at 751 (internal citations and quotations omitted). However, "the mere fact that a court is being asked to render an advisory opinion does not automatically preclude a declaratory judgment in all situations." Id. at 752. Questions of insurance coverage, including an insurer's duty to defend, may be addressed in a declaratory

judgment action. Emhart Indus., Inc. v. Century Indem. Co., 559 F.3d 57, 74 (1st Cir. 2009) (citing Conanicut Marine Servs., Inc. v. Ins. Co. of N. Am., 511 A.2d 967, 971 n.10 (R.I. 1986)); Couch on Insurance, § 202:3.

Summary judgment is proper when "no genuine issue of material fact is evident from the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, and the motion justice finds that the moving party is entitled to prevail as a matter of law." Smiler v. Napolitano, 911 A.2d 1035, 1038 (R.I. 2006) (quoting Rule 56(c)). When considering a motion for summary judgment, "the court may not pass on the weight or credibility of the evidence but must consider the affidavits and other pleadings in a light most favorable to the party opposing the motion." Lennon v. MacGregor, 423 A.2d 820, 822 (R.I. 1980). The reviewing Court is tasked with identifying, not resolving, issues. Indus. Nat. Bank v. Peloso, 121 R.I. 305, 307-08, 397 A.2d 1312, 1313 (1979). "Therefore, summary judgment should enter 'against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case.'" Lavoie v. North East Knitting, Inc., 918 A.2d 225, 228 (R.I. 2007) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) (construing the substantially similar federal rule)).

III

Analysis

Brown retained Quest as "a licensed independent contractor to perform certain clinical laboratory testing for students and employees" at Brown's Health Center. It is undisputed that the professional services agreement provided that Brown and Quest would secure general liability insurance on which each would name the other as an additional insured, and that both also would secure professional liability insurance, with no requirement to add the other as an

additional insured. It is further undisputed that Brown complied with these requirements by securing an insurance policy through Pinnacle—a policy which applied to Quest by reference, although not explicitly by name. The issue central to the Instant Action is the extent to which Quest is covered by a policy in relation to the allegations in the Underlying Action and Cross-Complaint. Quest relies on various policies and policy terms to support its claim that it is entitled to defense and indemnification. This Court therefore must construe the pertinent professional services agreements and Pinnacle and Genesis policies to determine 1) which policy and policy terms cover the Underlying Action and Cross-Complaint; and 2) whether Quest is entitled to defense and indemnification pursuant to such policy and terms.

A

Contract and Insurance Policy Principles

The Rhode Island Supreme Court "applies the same rules when construing insurance policies as it does when construing contracts." Employers Mut. Cas. Co. v. Pires, 723 A.2d 295, 298 (R.I. 1999) (quoting Martinelli v. Travelers Insurance Companies, 687 A.2d 443, 445 (R.I. 1996)). In the formation of a contract of insurance, as in other contracts, there must be a manifestation of mutual assent in the form of an offer or proposal by one party and an acceptance thereof by the other. John Hancock Mut. Life Ins. Co. v. Dietlin, 97 R.I. 515, 517 (R.I. 1964).

A court will not depart from its literal language of either document absent a finding that it is ambiguous. Lynch v. Spirit Rent-A-Car, Inc., 965 A.2d 417, 425 (R.I. 2009) (quoting Mallane v. Holyoke Mutual Insurance Co. in Salem, 658 A.2d 18, 20 (R.I. 1995)). To determine ambiguity, the document is viewed in its entirety and its words are given their "plain, ordinary, and usual meaning." Id. When a contract is determined to be clear and unambiguous, "the meaning of its terms constitutes a question of law for the court" and the terms must be applied as

written. Cassidy v. Springfield Life Insurance Co., 106 R.I. 615, 619, 262 A.2d 378, 380 (1970); Amica Mutual Ins. v. Streicker, 583 A.2d 550, 553 (R.I. 1990). Such an issue of law may be resolved by summary judgment. Lennon v. MacGregor, 423 A.2d 820, 822 (R.I. 1980).

Conversely, a contract is ambiguous when it is "reasonably susceptible of different constructions." Westinghouse Broadcasting Co., Inc. v. Dial Media, Inc., 122 R.I. 571, 579, 410 A.2d 986, 991 (1980); see also Dubis v. East Greenwich Fire District, 754 A.2d 98, 100 (R.I. 2000). When there is ambiguity in the contractual language, then construction of the terms becomes an issue of fact. Irene Realty Corp. v. Travelers Property Cas. Co. of America, 973 A.2d 1118, 1122 (R.I. 2009). However, the Court shall "refrain from engaging in mental gymnastics or from stretching the imagination to read ambiguity into a policy where none is present." Mallane v. Holyoke Mutual Ins. Co., 658 A.2d 18, 20 (R.I. 1995).

An insurer's duty to defend an insured is determined by applying the "pleadings test," which requires this Court to look at the allegations contained in the complaint filed against the insured, and "if the pleadings recite facts bringing the injury complained of within the coverage of the insurance policy, the insurer must defend irrespective of the insured's ultimate liability to the plaintiff." Shelby Ins. Co. v. Northeast Structures, Inc., 767 A.2d 75, 76 (R.I. 2001) (quoting Peerless Insurance Co. v. Viegas, 667 A.2d 785, 787 (R.I. 1995)). An insurer's duty to defend is broader in scope than its duty to indemnify. Travelers Cas. & Sur. Co. v. Providence Washington Ins. Co., Inc., 685 F.3d 22, 25 (1st Cir. 2012) (quoting Employers' Fire Ins. Co. v. Beals, 103 R.I. 623, 240 A.2d 397, 403 (1968), abrogated on other grounds by Peerless Ins. Co. v. Viegas, 667 A.2d 785 (R.I. 1995)). The former is the duty to defend a lawsuit based merely on the potential of liability under the policy, while the latter is the duty to indemnify the insured for liability imposed against the insured after trial. Travelers Cas. & Sur. Co., 685 F.3d at 25

(applying Rhode Island law); Couch on Insurance, §§ 200:1, 3. Therefore, a finding that the insurer has no duty to defend equates to finding that there is no duty to indemnify. Couch on Insurance, § 200:3; 43 Am. Jur. 2d Insurance § 684.

The question of whether the complaint in the underlying tort action alleges facts and circumstances bringing the case within the coverage afforded by the policy is resolved by comparing the complaint in that action with the policy issued by the insurer. Flori v. Allstate Ins. Co., 120 R.I. 511, 513, 388 A.2d 25, 26 (1978). If the complaint discloses a statement of facts bringing the case potentially within the risk coverage of the policy, the insurer is bound to defend, irrespective of the ultimate outcome of the underlying tort action. Id. Here, the professional services agreements are construed in conjunction with the policies because "[i]nstruments referred to in a written contract may be regarded as incorporated by reference and thus may be considered in the construction of the contract." Haffenreffer v. Haffenreffer, 994 A.2d 1226, 1232 (R.I. 2010) (citing Rotelli v. Catanzaro, 686 A.2d 91, 94 (R.I. 1996)).

B

The Professional Services Agreements Between Brown and Quest

In January 2005, Brown and Quest first entered into a professional services agreement. The initial agreement was in effect from December 7, 2004 to December 7, 2005; Brown and Quest agreed to extend the contract for an additional one-year period, to December 7, 2006 ("2005/06 Professional Services Agreement"). This agreement, therefore, was in force when Ms. Hall sought care at the student Health Center on May 10, 2006.

The 2005/06 Professional Services Agreement provided that Rapid Strep Tests "when order[ed] as 'STAT' or 'Same Day,' shall be performed at one of [Quest's] local testing facilities located within a fifteen (15) mile radius of Brown[,]" and Quest would notify Brown of the

results via fax. Tests could be performed at Quest's regional Cambridge, Massachusetts, facility only when ordered "routine" by Brown's Health Center. The 2005/06 Professional Services Agreement outlined the manner in which Quest would report test results to the Department: STAT test results within one to three hours of Quest's specimen receipt; Same Day test results by 5:30 P.M., the same day of Quest's specimen receipt; and routine tests within twenty-four hours of Quest's specimen receipt. The terms also required Quest to notify the Department of STAT and Same Day tests pending as of 5:00 P.M. The parties agree that although Ms. Hall's test was ordered Same Day, the order was erroneously sent to Quest's Cambridge facility, the test was not performed, and Quest provided no notice to the Health Center of the pending test.

Pursuant to the 2005/06 Professional Services Agreement, Brown and Quest also were obliged to obtain insurance:

> "2.6 Contractor [Quest] and Brown shall purchase and maintain at their sole expense and with an insurance company or through self-insurance the following insurance coverage and limits:
>
> (i) Worker's Compensation (covering [Quest's] employees) to statutory limits;
>
> (ii) Comprehensive General Liability Insurance for injuries to persons and property occurring at the Site [Quest's contractually provided work area for performance of services] or as a result of this Agreement in the amount of at lease [sic] one million dollars ($1,000,000) per occurrence and two million dollars ($2,000,000) aggregate. In addition, the Certificate(s) of Insurance shall name Brown or [Quest] as an "Additional Insured";
>
> (iii) "All Risk" Property Insurance, insuring against damage to or loss of any property, to its full insurable value, of [Quest] and Brown, its officers, servants, employees, agents, licensees, or any person or entity claiming by, through or under [Quest] and Brown located on the premises, and, if available such insurance shall contain a waiver of any right of subrogation which such insurance carrier might have against Brown or [Quest], its servants, or invitees, and

> (iv) Professional Liability Insurance, insuring against medical malpractice and other liability which may arise as a result of [Quest's] or [Health Center's] profession and/or business in an amount not less than one million dollars ($1,000,000)." (emphasis added).

By it terms, therefore, the 2005/06 Professional Services Agreement required that Brown and Quest name one another as additional insureds only under their respective general liability policies.[2]

C

The Pinnacle Policies and Coverage Thereunder

At all times relevant, Brown was insured through Pinnacle and Genesis, with the latter providing excess insurance. Although the parties' extensive briefing addressed Pinnacle policies from 2005/06 and 2010/11, the parties focus on the Pinnacle policy that covered the period from July 2005, to July 2006 ("2005/06 Pinnacle Policy"). Because the Underlying Complaint and Brown Cross-Complaint allegations stem from professional services, neither Pinnacle policy entitles Quest to defense and indemnification.

1. Terms of the 2005/06 Pinnacle Policy

The 2005/06 Pinnacle Policy provides that Pinnacle will cover bodily injury or property damage that occurs during the policy period, and is comprised of Common Policy Declarations, Coverage Parts, and Endorsements that modify specific Coverage Parts. The core policy—i.e.,

[2] The 2005/06 Professional Services Agreement remained in effect until December 9, 2008, at which point Brown and Quest executed a modified agreement, the terms of which required Quest to secure "[g]eneral and professional liability [insurance] against medical malpractice and other liability [. . .] for all professional services provided by [Quest]." Under the modified agreement, Quest agreed to name Brown as an additional insured on its liability policies, whereas Brown agreed to name Quest as an additional insured only on its "Broad Form Commercial General Liability." The modified agreement remained in effect until Brown terminated the contract on December 5, 2010. Quest relies on this later professional services agreement to support its interpretation of the 2005/06 Professional Services Agreement—which was in effect when the Underlying Complaint was filed—but this Court declines to address these arguments: "[i]n situations in which the language of a contractual agreement is plain and unambiguous, its meaning should be determined without reference to extrinsic facts or aids." Cathay Cathay, Inc. v. Vindalu, LLC, 962 A.2d 740, 746 (R.I. 2009) (quoting Clark-Fitzpatrick, Inc./Franki Foundation Co. v. Gill, 652 A.2d 440, 443 (R.I. 1994)).

the Coverage Parts to which the Declarations and Endorsements refer—is referred to throughout the 2005/06 Pinnacle Policy as "Commercial General Liability Coverage Form" ("CGL Form"). The CGL Form is preceded by the Common Policy Declarations and four unnumbered Endorsements; these four initial Endorsements modify multiple Coverage Parts, including the "Commercial General Liability Coverage Part" and the "Professional Liability Coverage Part." The CGL Form also is succeeded by twenty-five sequentially numbered Endorsements, three of which are pertinent here.

First, the parties agree that Endorsement No. 4 of the 2005/06 Pinnacle Policy named only one insured—Brown—and provides the

> "'Who is an Insured' provision of All Coverage Parts are [sic] amended to include:
>
> [. . .]
>
> (e) At the option of the Named Insured shown on the declarations page of this policy, any person, corporation, company, organization, estate or other entity but only to the extent the Named Insured has agreed to do so."[3]

Thus, although only Brown was a Named Insured, Brown was authorized to add an additional insured; this comports with the insurance procurement obligation of the 2005/06 Professional Services Agreement between Brown and Quest.

Two numbered Endorsements pertain to commercial general liability and professional liability. Endorsement No. 7 is captioned as follows:

> "This endorsement changes the policy. Please read it carefully. This endorsement modifies insurance provided under the following:

[3] The parties in their briefs cite to different subsections of Endorsement No. 4—(d) and (e)—but quote the same language. This discrepancy appears to be due to the fact that the parties referred to different versions of Endorsement No. 4. The difference in the two versions, however, is not material here.

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

INCIDENTAL MALPRACTICE COVERAGE/HOSPITAL PROFESSIONAL LIABILITY EXCLUSION

This endorsement modifies such insurance as is afforded by the provisions of the policy as relating to the following:

COMMERCIAL GENERAL LIABILITY"

Endorsement No. 7 initially provides in pertinent part that Pinnacle will pay on behalf of Brown "all sums which the Named Insured shall become legally obligated to pay as damages because of bodily injury to any person arising out of the rendering of or failure to render professional services." The provision further provides, however, that it does not apply to "bodily injury arising out of [. . .] 1. [t]he rendering of or failure to render: (a) medical, surgical, dental, x-ray, or nursing service or treatment [. . .] or (b) any service or treatment conducive to health or of a professional nature." The "Commercial General Liability Conditions" in Section IV of the CGL Form require that an insured—i.e., the Named Insured or an insured pursuant to Endorsement No. 4—notify Pinnacle "as soon as practicable of an 'occurrence' or an offense which may result in a claim."

Endorsement No. 17 is captioned as follows:

"This endorsement changes the policy. Please read it carefully. This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

PROFESSIONAL LIABILITY COVERAGE
(CLAIMS MADE BASIS)

[Pinnacle], in consideration of the payment of the premium and subject to all of the provisions of the policy not expressly modified herein, agrees with [Brown] as follows:"

Endorsement No. 17 provides coverage for the "performing or failure to perform professional services or activities for others." The Endorsement further provides:

"1. This coverage does not apply to:

> A. Any claim for bodily injury, sickness, disease or death of any person; but this exclusion shall not apply if such bodily injury, sickness, disease or death is a result of any act, error or omission committed in a student/employee health care facility [. . .] as a result of the following:
>
> 1. The rendering or failure to render:
> (a) medical, surgical, dental, x-ray, or nursing service or treatment [. . .]; or
> (b) any service or treatment conducive to health or of a professional nature[. . . .]" (emphasis added).

Professional Liability coverage as set forth in Endorsement 17 operates on a claims-made basis: coverage, therefore, is triggered either when the actual claim is made against the insured—without regard to when the triggering event occurred—or when the insured's "Risk or Insurance Manager shall first become aware of any circumstances which may subsequently give rise to claim against the insured" and the manager gives Pinnacle written notice of such circumstances. Brown's Director of Insurance and Risk gave such notice on June 26, 2006, thereby triggering the 2005/06 policy year (effective dates July 1, 2005 to July 1, 2006).

These Endorsements address the two forms of liability coverage contemplated by the 2005/06 Professional Services Agreement. Endorsement No. 7 is captioned as "Commercial General Liability," excludes professional liability, and does not apply to bodily injury arising out of the rendering of or failure to render medical service or treatment, or any service or treatment conducive to health or of a professional nature. Endorsement No. 17, however, is captioned as "Professional Liability Coverage," and provides professional liability coverage for bodily injury as a result of the rendering or failure to render medical service or treatment, or any service or treatment conducive to health or of a professional nature.

2. Coverage under the 2005/06 Pinnacle Policy

Quest argues that pursuant to the 2005/06 Professional Services Agreement and the plain language of the 2005/06 Pinnacle Policy, it is covered under either the commercial general

liability or professional liability provisions. The insurers respond that Quest only is covered under the commercial general liability provisions, which are inapplicable to the Underlying Action and Cross-Complaint. Giving the words of the 2005/06 Pinnacle Policy and 2005/06 Professional Services Agreement their plain, ordinary, and usual meaning, it cannot be said that either contract is reasonably susceptible of different constructions. There is, therefore, no ambiguity that constitutes a genuine issue of material fact. Quest's arguments are unavailing because the professional liability provisions pertain to the Underlying Action and Cross-Complaint, and Quest is not entitled to defense and indemnification pursuant to the professional liability coverage.

The parties dispute whether the 2005/06 Pinnacle Policy provides separate coverage for commercial general liability and professional liability. In particular, Quest contends that there is simply one policy, with one serial number, to which Brown added Quest as an additional insured and therefore Quest is insured under all Coverage Parts therein. Although the 2005/06 Pinnacle Policy is broadly entitled "Commercial General Liability Coverage Form," coverages within the policy are discrete. First, the unnumbered Endorsements that precede the CGL Form refer to separate commercial general liability and professional liability coverage parts. Moreover, both pertinent Endorsements—Nos. 7 and 17—likewise distinguish between coverage types: they contain the CGL Form heading with sub-headings for commercial general liability and professional liability, respectively. Next, the terms of the Endorsements are distinct, with the former excluding professional liability and the latter including it. Further, the coverages are triggered under different circumstances: commercial general liability on an occurrence basis, and professional liability on a claims-made basis. And, importantly, Brown and Quest in the 2005/06 Professional Services Agreement explicitly distinguished between general liability and

professional liability and contracted to add one another as additional insureds only as to general liability coverage. Thus, by the terms of the 2005/06 Pinnacle Policy and 2005/06 Professional Services Agreement, there is separate coverage for commercial general liability and professional liability.

The parties next dispute whether the allegations set forth in the Underlying Complaint and Cross-Complaint fall within the purview of the professional liability provisions of the 2005/06 Pinnacle Policy. Commercial general liability policies are designed to cover risks generally borne by anyone in a commercial enterprise; a loss, therefore, must arise out of the insured's business operations to be covered under the policy. Couch on Insurance § 129:2. Professional services, on the other hand, are distinguished from the insured's activities in managing the business aspects of its professional office and professional liability policies provide coverage for the special risks inherent in an insured's specific profession. Couch on Insurance §§ 1:35, 131:1. Thus, while risks that arise in the pursuit of any commercial enterprise are covered by the basic commercial general liability policy, "[t]he typical professional liability policy protects the practitioner against claims for injury arising out of either malpractice or malpractice, error or mistake due to the rendering, or failure to render professional services." Couch on Insurance §§ 131:2, 131:8 (internal quotations omitted).

In determining whether a particular act involves the rendition of professional services, a court must look not to the title or character of the party performing the act, but to the act itself. Sanzi v. Shetty, 864 A.2d 614, 619 (R.I. 2005) (citing Vigue v. John E. Fogarty Mem'l Hosp., 481 A.2d 1, 3 (R.I. 1984)). For example, the administration of medication and a request that a patient produce a urine sample are both considered professional services activities that "represent[] the rendition of services by a hospital to a patient, of sufficient medical import, that

they should be considered an essential part of her treatment." Vigue, 481 A.2d at 3 ("tortious conduct based upon professional services that were rendered or which should have been rendered by a hospital is included within the definition of malpractice") (citing § 5-37-1(8) ("'Medical malpractice' or 'malpractice' means any tort, or breach of contract based on health care or professional services rendered, or which should have been rendered" by a physician, hospital, or clinic.)).

Quest performed the clinical laboratory testing in question pursuant to a professional services agreement. Endorsement No. 17 of the 2005/06 Pinnacle Policy provides professional liability coverage for "[a]ny claim for bodily injury, sickness, disease or death" where such harm is "a result of any act, error, or omission committed in a student/employee health care facility [. . .] as a result of [. . .] rendering or fail[ing] to render" medical service or treatment or "any service or treatment conducive to health or of a professional nature." Such coverage is explicitly excluded from the scope of Endorsement No. 7's commercial general liability.

In addition, the Underlying Complaint and Brown Cross-Complaint resulted from the failure to render medical service or service conducive to health. Ms. Hall presented to the Health Center on May 10, 2006 with complaints of sore throat, ear pain, and nausea. Her condition was not diagnosed, and same-day diagnostic tests were ordered, but not performed. When she returned to the Health Center two days later, her condition had worsened, and she was diagnosed with toxic shock syndrome. She then spent weeks in intensive care and suffered permanent physical and psychological harm. In her Underlying Complaint, Ms. Hall alleged Brown disregarded its duty to exercise reasonable care in the rendition of medical treatment in its failure to provide Ms. Hall a quality standard of care, protect her safety, and protect her from negligent treatment; failure to select and retain competent medical personnel; failure to adequately monitor

and supervise the quality of care rendered to patients; failure to develop, codify, and enforce adequate patient safety policies; and failure to exercise reasonable care to protect the safety and well-being of patients. Ms. Hall alleged that Quest negligently disregarded its duty to exercise the diligence and skill of a reasonably competent provider of laboratory services in that the laboratory testing was not processed properly and the results were never timely obtained. In its Cross-Complaint, Brown alleged that Quest caused Ms. Hall's injuries and that Quest negligently failed to properly process the Rapid Strep Test, failed to obtain the results of the test, and failed to communicate the test results to the Health Center.

The complaints[4] indicate the claims against Quest are premised on allegations of medical or professional negligence or malpractice—in short, Ms. Hall suffered grievous harm as a result of negligence in treatment and diagnostic testing—that fall within the purview of professional liability coverage. See Bowen Court Associates v. Ernst & Young, LLP, 818 A.2d 721, 727 (R.I. 2003) (the malpractice statute of limitation applies when "negligence claims against professional defendants challenge the quality, effectiveness, nature, or propriety of the professional services rendered"); see also 43 Am. Jur. 2d Insurance § 703 ("[T]here must be a causal relationship between the alleged harm and the complained-of professional act or service so that it must be a medical or dental act or service that causes the harm rather than an act or service that require no professional skill.").

[4] Quest alternatively argues that Brown's Cross-Complaint, which was filed after Brown terminated the Professional Services Agreement, triggered coverage for Quest pursuant to the claims-made professional liability provisions of the 2010/11 Pinnacle Policy. Even assuming a contractual relationship remained in effect between the parties, Quest's contention fails for the same reasons as does Quest's claim under the professional liability provisions of the 2005/06 Pinnacle Policy: the Underlying Action and Cross-Complaint fall within the purview of professional services policy provisions and Quest never was an additional insured under such coverage. Moreover, Quest's argument that the Cross-Complaint allegations—but not those in the Underlying Complaint—apply to the Instant Action is misguided because both complaints depend on the same operative facts (and, indeed, Quest concedes that the Cross-Complaint incorporated the Underlying Complaint by reference).

Quest fails to articulate how it qualifies for coverage under the professional liability provisions of the 2005/06 Pinnacle Policy. The fact that the document is entitled "Commercial General Liability Coverage Form" does not suffice to extend coverage to Quest under every provision because, as discussed above, the terms of the policy differentiate among coverages. Moreover, there is no evidence to suggest that the parties contracted for such broad coverage. See Lifespan/Physicians Prof'l Services Org., Inc. v. Combined Ins. Co. of Am., 345 F. Supp. 2d 214, 223 (D.R.I. 2004) (In the formation of a contract of insurance, as in other contracts, there must be a manifestation of mutual assent in the form of offer and acceptance.) (quoting John Hancock Mutual Life Ins. Co. v. Dietlin, 97 R.I. 515, 518, 199 A.2d 311, 313 (1964)). Indeed, the terms of the 2005/06 Professional Services Agreement unambiguously provided that Brown and Quest were to secure professional liability insurance and, unlike the express terms of the general liability insurance procurement obligation, the professional liability terms did not require the parties to add one another as an additional insured. The 2005/06 Pinnacle Policy affords Quest coverage, "but only to the extent [Brown] has agreed to do so." General liability coverage, but not professional liability coverage, was contemplated by Brown and Quest in the 2005/06 Professional Services Agreement. There is simply no basis in the documents for Quest's claim for professional liability coverage. See Cathay Cathay, Inc., 962 A.2d at 746 ("The language employed by the parties to a contract is the best expression of their contractual intent[.]") (citing Singer v. Singer, 692 A.2d 691, 692 (R.I. 1997)).

D

The Genesis Policies and Coverage Thereunder

Genesis issued excess liability policies to Brown for the 2005/06 and 2010/11 policy years ("2005/06 Genesis Excess Policy" and "2010/11 Genesis Excess Policy"). Quest concedes

that the 2005/06 Genesis Excess Policy is inapplicable, but argues that it is covered under the 2010/11 Genesis Excess Policy because Brown filed its Cross-Complaint against Quest during that policy year. Genesis argues that only the 2005/06 Genesis Excess Policy is relevant here and, in any event, Pinnacle is not covered under either Genesis policy because Quest is not insured under Brown's professional liability coverage.

Quest's arguments fail as to Genesis for the same reasons its arguments fail as to Pinnacle: the 2005/06 Genesis Excess Policy applies to the Underlying Action, and Quest is not insured under any professional liability provision. Specifically, the 2005/06 Genesis Excess Policy provides:

> "The Coverage provided by this policy shall be excess of and follow form the Professional Liability coverage endorsement contained within The Primary General Liability Policy issued by Pinnacle Consortium of Higher Education [the 2005/06 Pinnacle Policy]. It is further agreed that all other coverages provided by the aforesaid Primary General Liability Policy are excluded hereunder."

By its terms, therefore, the 2005/06 Genesis Excess Policy provides excess professional liability insurance and mirrors the terms of the 2005/06 Pinnacle Policy. Moreover, as discussed above, the plain language of the 2005/06 Professional Services Agreement and 2005/06 Pinnacle Policy demonstrates that Brown extended to Quest only commercial general liability coverage. The 2005/06 Genesis Excess Policy is the operative policy and, as Quest concedes, Quest is not entitled to defense and indemnification pursuant to that policy.

E

The Insurers' Duty to Defend and Notice

Quest contends that the insurers breached their duties to defend and waived their rights to deny coverage because they did not respond to Quest's tender for defense in a reasonably timely

manner. In response, Pinnacle and Genesis argue that, even if Quest were insured, Quest breached its duty to give timely notice and is, therefore, precluded from obtaining coverage. Quest's arguments are unavailing.

As discussed above, the facts recited in the Underlying Complaint and Cross-Complaint—i.e., harm caused by negligence in treatment and diagnostic testing—bring Ms. Hall's claim within the professional liability coverage of the 2005/06 Pinnacle Policy and, by extension, the 2005/06 Genesis Excess Policy. The same holds true even if the 2010/11 Pinnacle Policy were operative by virtue of Brown's Cross-Complaint. Because Quest was not insured against the occurrence at issue, Pinnacle and Genesis did not breach their duties to defend. See Sanzi, 864 A.2d at 618 (holding the insurer had no duty to defend where "there is no claim against [the insured] within the sphere of risks insured by the policy").

It also bears noting that with respect to Quest's claims for defense and indemnification from the Underlying Action or Brown's Cross-Complaint, Quest did little to apprise its purported insurers of its claim for coverage. Ms. Hall presented to the Health Center on May 10, 2006, she filed the Underlying Action against Brown and Quest on March 24, 2008, and Brown filed its Cross-Complaint against Quest on December 10, 2010. Quest failed to notify Pinnacle and Genesis until July 2011, three months after Brown and the insurers had settled the Underlying Action. Quest sent its "demand for a complete defense and indemnification in the pending [Hall] litigation" to Brown's counsel—i.e., counsel for its opposition—and failed to mention Genesis in those letters; a Genesis affiant states that the insurer received no notice until Quest filed the Instant Complaint. Without deciding whether Quest prejudiced the insurers, it is nonetheless clear that because Quest waited seven months to provide questionable notice, and then filed the Instant Action another four months thereafter, the insurers neither breached their duties to defend

nor waived any rights. See generally, Couch on Insurance §§ 198:39, 43, 44; 200:29, 32-34 (discussing duty of insurer to disclaim coverage and duty of insured to tender demand for coverage).

IV

Conclusion

After due consideration of the complaints, professional services agreements, and insurance policies at issue, this Court grants Pinnacle's Motion for Summary Judgment, grants Genesis' Motion for Summary Judgment, and denies Quest's Motion for Summary Judgment. This Court declares Quest is not entitled to defense and indemnification under the Pinnacle and Genesis policy provisions applicable to the claims stemming from Ms. Hall's treatment at Brown's Health Center. Counsel shall submit an appropriate Order for entry.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	Quest Diagnostics, LLC v. Pinnacle Consortium of Higher Education
CASE NO:	C.A. No. PC 2011-6410
COURT:	Providence County Superior Court
DATE DECISION FILED:	March 14, 2013
JUSTICE/MAGISTRATE:	Gibney, P.J.
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