IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

GAGE COUNTY, NEBRASKA Plaintiff, v. EMPLOYERS MUTUAL CASUALTY COMPANY, Defendant.	)	Case No. CI 17-1822 **ORDER ON MOTIONS FOR SUMMARY JUDGMENT**

This case is before the Court on the Defendant Employers Mutual Casualty Company's Motion for Summary Judgment (Filing No. 2) and Plaintiff Gage County, Nebraska's Motion for Partial Summary Judgment (Filing No. 3). On July 27, 2017, the Court heard argument and received evidence on the motions. Attorneys Joel Nelson and Joel Bacon appeared for the Plaintiff Gage County, Nebraska (Gage County). Attorney Karen Bailey appeared for the Defendant Employers Mutual Casualty Company (EMC). Being fully advised on the premises, the Court rules as follows.

I. BACKGROUND

A. Criminal proceedings.

In 1985, Helen Wilson was killed in Beatrice, Nebraska. Ex. 7 at ¶ 19. The Gage County Sheriff Jerry DeWitt and his deputies Burdette Searcey, Gerald Lamkin, Kent Harlan, and Mark Meints investigated the crime. *Id.* at ¶ 25. Wayne Price also participated in the investigation. He

was a psychologist who worked part-time as a deputy sheriff. Ex. 1, Ex. NNN at 736; Ex. 7 at ¶ 45. Searcey, DeWitt, and Price were the most active investigators and conducted multiple interviews with witnesses and suspects. Ex. 7 at ¶ 45.

Gage County's then-county attorney, Richard Smith, eventually charged six persons with crimes related to Wilson's death: Joseph White, James Dean, Kathleen Gonzalez, Thomas Winslow, Ada Joann Taylor, and Debra Shelden. Those persons became known as the "Beatrice Six." In November 1989, a jury convicted Joseph White of murder. Ex. 7 at ¶ 26. The other members of the Beatrice Six were sentenced under pleas admitting or not contesting their guilt. *Id.* at ¶¶ 26–27.

Many years later, the Beatrice Six were exonerated. Ex. 7 at ¶¶ 30–31. In 2009, they received pardons from Nebraska's Board of Pardons. *Id.* at ¶ 32.

B. Civil rights litigation.

In July 2009, five members of the Beatrice Six filed civil rights lawsuits in the U.S. District Court for the District of Nebraska. Ex. 2, Exs. G, H, I, J, K. The sixth member, Debra Shelden, filed suit in 2011. Ex. 6, Attach. B. In 2013, the district court consolidated her lawsuit with the others. Ex. 7 at ¶ 39.

The complaints are substantively similar. They each name Smith, Searcey, Lamkin, Harlan, Meints, DeWitt, and Price as defendants in both their individual and official capacities. E.g., Ex. 2, Ex. G. The Beatrice Six alleged that Price acted in the scope of his employment as both a deputy sheriff and a consulting psychologist. E.g., *id.* at 71. The complaints also name Gage County as a defendant, along with the offices of its sheriff and county attorney. E.g., *id.*

Generally, the complaints allege that the defendants prosecuted and punished the Beatrice Six for a crime they did not commit. E.g., Ex. 2, Ex. G. The complaints allege that the defendants solicited and manufactured false or misleading evidence and recklessly ignored inconsistencies in the evidence. E.g., *id.*

The summary of the defendants' wrongful conduct in White's complaint is representative:

> Defendants did not attempt to determine the actual truth in their investigation of the rape and murder of Helen Wilson. Instead, defendants were motivated by a desire to gain any conviction, at any cost, and considered WHITE to be essentially a disposable person. Defendants adopted a false narrative of the Wilson homicide and then used their collective interrogation skills to force their false narrative on individuals they knew to be mentally and intellectually challenged, very compliant to suggestion, and likely to be overborne by intimidation and threats of life imprisonment or execution in the electric chair.
>
> Defendants, individually or acting in concert, deliberately and with reckless disregard of the truth, solicited, fabricated, manufactured and coerced evidence they knew was false, fraudulent and profoundly lacking in reliability. In the course of these actions, defendants filed false affidavits with the courts, prepared false investigative reports, repeatedly lied about the evidence during the course of all interrogations, and threatened everyone with life imprisonment or execution in the electric chair if they did not cooperate and recite defendants' false narrative of the Wilson homicide.
> Ex. 2, Ex. G at 90–91.

The Beatrice Six alleged that Price had previously evaluated Debra Shelden on a referral from the county probation office. E.g., Ex. 2, Ex. G at 85. Based on Price's prior work with Shelden, he knew that Shelden was impulsive and poorly understood the consequences of her actions. E.g., *id.* at 85. Price told Shelden that she had repressed memories of Wilson's death and that she could recover the memories when she relaxed or dreamed. E.g., *id.* at 86. Shelden started to recall details of the crime after meeting with Price. E.g., *id.*

Similarly, the Beatrice Six alleged that Price interviewed Dean and told him that he was repressing memories. E.g., Ex. 2, Ex. G at 87. Price told Dean to relax and try to picture Wilson's apartment. E.g., *id.* After meeting with Price, Dean started to recover memories of the crime. E.g., *id.*. Price also "interrogated" Gonzalez, but with less success. E.g., *id.* at 88.

The Beatrice Six pleaded three counts against the defendants. First, a count under 42 U.S.C. § 1983 titled "Malicious Prosecution, False Imprisonment, Use of Unreliable and Fraudulent Investigatory Techniques, Procurement of Unreliable and Fabricated Evidence. "E.g., Ex. 2, Ex. G at 92. Dean's complaint titled this count "Malicious Prosecution Leading to Wrongful Conviction." Ex. 2, Ex. H at 112. The Beatrice Six alleged that the defendants solicited, fabricated, manufactured, and coerced evidence that was false or misleading for the purpose of arresting, prosecuting, convicting, and imprisoning them for Wilson's death. They alleged that the defendants unreasonably seized them under the Fourth Amendment, deprived them of liberty without due process under the Fifth and Fourteenth Amendments, denied them a speedy trial by an impartial jury under the Sixth Amendment, and cruelly and unusually punished them under the Eighth Amendment. E.g., Ex. 2, Ex. G at 93–94.

The second count alleged that the defendants had conspired to deprive the Beatrice Six of their civil rights. E.g., Ex. 2, Ex. G at 94–95. The third count alleged that Gage County had policies, practices, and customs that deprived the Beatrice Six of their civil rights. E.g., *id.* at 95–97.

C. Gage County's insurance policies with EMC.

In 1989, Gage County bought three insurance policies from EMC: (1) a Commercial General Liability Policy (CGL Policy); (2) a Linebacker Policy, and (3) a Commercial Umbrella

Policy (Umbrella Policy). Ex. 7 at ¶ 1. Each policy has the same date of issue. Ex. 2, Ex. A at 1; Ex. 2, Ex. B at 27; Ex. 2, Ex. C at 49. The effective period for each policy was February 2, 1989 to February 2, 1990. Ex. 2, Exs. A, B, C.

Coverage B of the CGL Policy insures Gage County against "damages" because of "personal injury." Ex. 2, Ex. A at 6. "Personal injury" includes injury arising out of certain offenses, including "False arrest, detention or imprisonment" and "Malicious prosecution." *Id.* at 12.

But an endorsement to the CGL Policy excludes "**ANY AND ALL PROFESSIONAL SERVICES.**" Ex. 2, Ex. A at 13. The endorsement does not define "professional services." The CGL Policy also requires Gage County to "promptly" notify EMC of an occurrence that might result in a claim. *Id.* at 9.

The Umbrella Policy covers losses because of "Personal injury," which it defines like the CGL Policy. Ex. 2, Ex. B at 30. But the Umbrella Policy excludes liability arising from both "**professional liability**" and "**excluded occupations liability.**" *Id.* at 35. It defines "Professional Liability" as

> liability arising out of the rendering of a service relating to a profession in a manner which is reasonable and in keeping with the standards of that profession and formal accreditation or failure to render a service.
>
> This includes but is not necessarily limited to professions such as:
>
> A. The practice of medicine, i.e., . . . psychiatrist, psychologist . . .
>
> B. The practice of law
>
> . . .

Id. at 31.

The Umbrella Policy defines "Excluded Occupations Liability" as

> liability arising out of the rendering of a service relating to an occupation listed below or the failure to render a service:

. . .

C. Law Enforcement

. . .

Id. at 31.

The Linebacker Policy is a claims-made policy covering damages from acts or omissions in the discharge of organizational duties. Ex. 2, Ex. C at 52. It too excludes liability arising from "professional services," which it defines similarly to, but not the same as, the Umbrella Policy. *Id.* at 52.

D. Gage County's tender to EMC.

In July 2009, Gage County tendered its defense of the first five Beatrice Six lawsuits to EMC. Ex. 2, Ex. D. Gage County did not send EMC another notice after Shelden filed her complaint in 2011. Ex. 7 at ¶ 38. Gage County apparently referred EMC to Shelden's claims for the first time after the jury's verdict. Ex. 1, Ex. LLL; Ex. 2, Ex. T; Ex. 2, Ex. W; Ex. 3 at 22.

In October 2009, EMC denied coverage under all three policies. Ex. 7 at ¶ 35. Among other reasons, EMC cited the professional services exclusion in the CGL Policy and the exclusion for professional liability and excluded occupations liability in the Umbrella Policy. E.g., Ex. 2, Ex. S. EMC denied coverage under the Linebacker Policy because no claim was made during the relevant period. E.g., *id.*

EMC stated that it denied coverage based only on the documents that Gage County provided. Ex. 2, Ex. S at 322. Gage County had sent EMC the complaints from the first five Beatrice Six lawsuits. Ex. 2, Ex. E. EMC's claims manager was not aware of the insurer investigating the claims beyond reviewing the complaints. Ex. 3 at 11–12.

In October 2016, EMC rejected Gage County's request to reconsider its coverage decision. Ex. 1, Ex. MMM. EMC stated that it had "never wavered or changed its position on coverage since the determination was made in October of 2009." *Id.*

E. Outcome of the civil rights litigation.

The federal district court instructed the jury to decide whether DeWitt, Searcey, and Price manufactured evidence or recklessly investigated. Ex. 7 at ¶ 40. The jury also decided whether DeWitt, Searcey, and Price had conspired to violate the Beatrice Six's civil rights and whether Gage County (through its policymaker DeWitt) had a custom or policy of violating civil rights. *Id.*

The federal jury concluded that Searcey and Price had manufactured false evidence or recklessly investigated during the Beatrice Six investigation. Ex. 7 at ¶ 41. The jury found that DeWitt had not violated the Beatrice Six's civil rights, but he had established a custom or policy of civil rights violations for Gage County. *Id.* Collectively, the jury awarded the Beatrice Six more than $28 million of damages. *Id.* at ¶ 42.

F. Qualifications and training of law enforcement defendants.

Because EMC denied coverage in part under "professional services" and "professional liability" exclusions, the parties have submitted evidence of the training and qualifications of sheriffs and their deputies. During the relevant period, the parties have stipulated that new law enforcement officers attended the Nebraska Law Enforcement Training Center and received certificates of completion. Ex. 7 at ¶ 44. To be eligible to attend the training center, officers needed a high school degree or an equivalent and to be able to read and write at an eleventh-grade level. *Id.* Searcey's training at the Center lasted 12 weeks. *Id.*

Gage County also produced evidence of training and continuing education classes that Sheriff DeWitt and deputies Searcey, Lamkin, Harlan, and Meints attended. It is not clear if these documents represent all the formal training and education that these individuals received during the relevant period.

In addition to training certificates from the Nebraska Law Enforcement Training Center, DeWitt completed 20 hours of continuing education in both 1988 and 1989. Ex. 1, Ex. PPP at 748, 751.

The evidence indicates that between 1978 and 1981, Searcey received about 270 hours of instruction. Ex. 1, Ex. TTT at 780. Between 1987 and 1989, he attended almost 80 hours of training. *Id.* at 781–83.

Besides "Basic Training Session (300 hours)," Lamkin attended "Criminal Investigation School" and training for "Basic Criminal Investigation" in 1978 and 1980. Ex. 1, Ex. UUU at 797–803. Between 1988 and 1989, records show that Lamkin attended more than 40 hours training. *Id.* at 804, 806.

Like Searcey, Harlan spent 12 weeks at the Nebraska Law Enforcement Training Center. Ex. 1, Ex. VVV at 810–11. He also served as a reserve deputy for the Lancaster County Sherriff for about one year before joining Gage County. *Id.* at 810.

Between 1983 and 1984, Meints attended about 140 hours of training, in addition to 320 hours of "Basic Training." Ex. 1, Ex. XXX at 817–18. His classes included "Interrogation School" and "Homicide Investigation." *Id.* at 825–26. Between 1987 and 1989, the record indicates that Meints attended more than 240 hours of training. *Id.* at 821–23.

II. STANDARD

A party is entitled to summary judgment as a matter of law if the pleadings and evidence show no genuine issue of any material fact or the ultimate inferences drawn from those facts. *Waldron v. Roark*, 298 Neb. 26, 902 N.W.2d 204 (2017). A fact is material only if it would affect a case's outcome. *Id.* The court views all the evidence in the light most favorable to the nonmovant and gives the nonmovant the benefit of all reasonable inferences from the evidence. *Walters v. Colford*, 297 Neb. 302, 900 N.W.2d 183 (2017).

If the facts are undisputed or reasonable minds can draw only one conclusion, the court must decide the question as a matter of law. *Walters, supra*. The movant has the initial burden of making a prima facie case by producing enough evidence to show that it would be entitled to a judgment if the evidence were uncontroverted at trial. *Id.* Then, the burden of production shifts to the nonmovant, who must produce evidence showing that a material fact exists that prevents judgment as a matter of law. *Id.*

III. ANALYSIS

A. No coverage under the CGL Policy.

EMC argues that the professional services exclusion in the CGL Policy bars coverage as a matter of law. Gage County moves for a partial summary judgment declaring that "[f]or purposes of the Plaintiff's coverages with Defendant, law enforcement was an occupation and not a profession." These issues involve policy interpretation, which is a question of law. *Fokken v. Steichen*, 274 Neb. 743, 744 N.W.2d 34 (2008).

A court reads the language in an insurance policy according to what a reasonable person in the insured's position would think it means. *Henn v. Am. Family Mut. Ins. Co.*, 295 Neb. 859,

894 N.W.2d 179 (2017). But a court will not construe a policy against the insurer unless it is ambiguous. *Id.* EMC has the burden of proving that an exclusion applies. *Federated Serv. Ins. Co. v. Alliance Constr., LLC*, 282 Neb. 638, 805 N.W.2d 468 (2011).

Under the CGL Policy, EMC promised to both defend and indemnify Gage County against covered claims. An insurer's duty to defend is broader than its duty to indemnify. *Mortg. Express, Inc. v. Tudor Ins. Co.*, 278 Neb. 449, 771 N.W.2d 137 (2009). The allegations in the complaint against the insured are the starting point for determining whether the insurer has a duty to defend. *Federated Serv. Ins. Co. v. Alliance Constr., LLC*, 282 Neb. 638, 805 N.W.2d 468 (2011). But the insurer is also charged with whatever knowledge a reasonable investigation would have shown. See *id.* Thus, an insurer has a duty to defend if (1) the allegations in the complaint, if true, would obligate the insurer to indemnify its insured; or (2) a reasonable investigation of the facts would or does disclose facts that would obligate the insurer to indemnify. *Id.*

An insurer may refuse to defend if the facts alleged in the pleading and ascertained by the insurer show that the insurer has no potential liability to its insured. *Mortg. Express*, *supra.* While an insurer must defend its insured from even groundless, false, or fraudulent claims, it does not have to defend a suit not covered by the policy. *Id.*

The seminal case on the meaning of "professional services" in a liability policy is *Marx v. Hartford Accident & Indem. Co.*, 183 Neb. 12, 157 N.W.2d 870 (1968). In *Marx*, the insured's employee mistakenly poured a combustible chemical into a hot-water sterilizer. The fumes exploded and started a fire. The insured presented the claim to its malpractice insurer.

The policy in *Marx* covered injuries arising from mistakes "in rendering or failing to render professional services." *Id.*, 183 Neb. at 13, 157 N.W.2d at 871 (emphasis removed). The Nebraska Supreme Court defined "professional acts or services" as follows:

> Something more than an act flowing from mere employment or vocation is essential. The act or service must be such as exacts the use or application of special learning or attainments of some kind. The term "professional" in the context used in the policy provision means something more than mere proficiency in the performance of a task and implies intellectual skill as contrasted with that used in an occupation for production or sale of commodities. A "professional" act or service is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual. In determining whether a particular act is of a professional nature or a "professional service" we must look not to the title or character of the party performing the act, but to the act itself.
> *Id.* at 13–14, 157 N.W.2d at 871–72 (cleaned up).

Marx held that sterilizing equipment was not a professional service because it was an act of routine cleaning that did not require specialized knowledge or skill.

Although Nebraska's appellate courts have not yet decided the issue, two federal courts have held that law enforcement services are professional services under *Marx*. In *Western World Insurance Co. v. American & Foreign Insurance Co.*, two police officers (Phillips and O'Leary) responded to a disturbance at an apartment. 180 F. Supp. 2d 224 (D. Me. 2002). One of the occupants (Weymouth) drew a knife. The officers felt threatened and O'Leary shot and killed Weymouth. The personal representative of Weymouth's estate alleged that, among other claims, the officers had violated Weymouth's civil rights by using excessive force and that the town that employed them had violated Weymouth's civil rights by not adequately training its officers.

The town had a commercial general liability policy. The policy excluded injuries "due to the rendering or failure to render any professional service." *Id.*, 180 F. Supp. 2d at 228. Although the *Western World* court said that the line between professional and non-professional services is

not precise, the "definition first articulated by the Supreme Court of Nebraska is the most frequently quoted discussion of the issue." *Id.* at 231, citing *Marx, supra.* The plaintiff in the coverage litigation conceded that under the "*Marx* analysis there can be little doubt that [] O'Leary's decision to use deadly force is one that can be made only after the training and education in the specialized decision-making process that goes into whether to use deadly force." *Id.* at 232. None of the allegations in the complaint involved "anything other than this sort of decisionmaking (*i.e.*, decisionmaking based on an officer's training and experience)." *Id.* Thus, the professional services exclusion applied as a matter of law.

Another federal court relied on *Marx* to hold that investigating a crime is a professional service. See *Lansing Cmty. College v. Nat'l Union Fire Ins. Co.*, No. 1:09-CV-111, 2010 U.S. Dist. LEXIS 17696 (W.D. Mich. March 1, 2010). In *Lansing Community College*, the college's law enforcement officers investigated the death of a professor and eventually implicated Claude McCollum. McCollum was convicted of murder and sexual assault, but was later exonerated. He alleged that the college's officers had manufactured evidence by feeding him details about the crime and then his soliciting statements. McCollum sued, among others, the college and its law enforcement officers under 42 U.S.C. § 1983.

The college had a non-profit policy issued by National Union. But the insurer refused to defend and indemnify the college under an exclusion for claims "alleging, arising out of, based upon or attributable to or in any way relating to the rendering or failure to render any professional services." *Id.* at *26.

Quoting *Marx*'s definition of "professional services," the court held that the exclusion barred coverage as a matter of law:

> the court concludes that because police officers receive specialized training and education and often are called upon to make decisions using this specialized training, their activities may constitute "professional services" as that term is normally understood. Thus, police activities such as interviewing suspects and witnesses, investigating crimes, and assisting in the prosecution of criminal cases are the types of activities that may be considered professional services.
> *Id.* at *29.

Gage County argues that a different meaning of "professional services" should control, based on the Nebraska Supreme Court's professional negligence case law. Initially, to decide what is "professional negligence" for purposes of issues like the statute of limitations and expert testimony, the Nebraska Supreme Court followed *Marx*. See *Taylor v. Karrer*, 196 Neb. 581, 244 N.W.2d 201 (1976). But in 1987, the Court's opinion in *Tylle v. Zoucha* "radically altered" how courts decide "whether an occupation [is] a profession." *Jorgensen v. State Nat'l Bank & Trust Co.*, 255 Neb. 241, 246, 583 N.W.2d 331, 335 (1998), citing *Tylle v. Zoucha*, 226 Neb. 476, 412 N.W.2d 438 (1987). *Tylle* stated that a "profession" usually requires "long intensive preparation," has high standards maintained by "force of organization or concerted opinion," requires continued study, and primarily renders a public service. *Tylle*, *supra*, 226 Neb. at 480, 412 N.W.2d at 440.

But post-*Tylle*, the Nebraska Supreme Court has again cited *Marx* for the meaning of "professional services" in a liability policy. See *R.W. v. Schrein*, 264 Neb. 818, 652 N.W.2d 574 (2002). Unlike the statutory and policy factors behind deciding what is "professional negligence," a professional services exclusion depends on the language of the policy. If the policy does not further define "professional services," then *Marx* continues to provide the controlling meaning.

This Court concludes that the "professional services" endorsement in the CGL Policy excludes coverage as a matter of law. The allegations in the Beatrice Six's complaints involve "decisionmaking based on an officer's training and experience." *Western World, supra*, 180 F. Supp. at 232. The Gage County sheriff and his deputies investigated the rape and murder of Helen Wilson by using law enforcement's specialized decision-making process.

Gage County concedes that the "professional services" exclusion bars coverage for the claims against the then-county attorney Smith. The Court concludes that the exclusion also applies to acts or services that Price provided as a psychologist, in addition to those he provided as a sheriff's deputy.

B. No coverage under the Umbrella or Linebacker Policies.

EMC is also entitled to judgment as a matter of law that neither the Linebacker nor the Umbrella Policies cover the Beatrice Six's claims. First, the Linebacker Policy is a claims-made policy. Gage County concedes that it did not make a claim within the relevant period. Ex. 7 at p. 3 n. 2.

Second, the Umbrella Policy excludes coverage for both "professional liability" and "excluded occupations liability." Ex. 2, Ex. B at 35. The Umbrella Policy specifically defines "professional liability" to include the practices of law and psychology. *Id.* at 31. "Law Enforcement" is one of the excluded occupations. *Id.* These exclusions preclude coverage for the Beatrice Six's claims.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Defendant Employers Mutual Casualty Company's Motion for Summary Judgment (Filing No. 2) is hereby

SUSTAINED and Plaintiff Gage County, Nebraska's Motion for Partial Summary Judgment (Filing No. 3) is **OVERRULED.**

Plaintiff's complaint is dismissed. Costs are taxed to plaintiff.

DATED this 1 day of November, 2018.

BY THE COURT:

Jodi L. Nelson
District Court Judge

cc Joel D. Nelson
jdn@keatinglaw.com
Joel A. Bacon
jbacon@keatinglaw.com
Attorneys for Plaintiff

Karen Bailey, Attorney for Defendant
kbailey@ekoklaw.com

CERTIFICATE OF SERVICE

I, the undersigned, certify that on November 2, 2018 , I served a copy of the foregoing document upon the following persons at the addresses given, by mailing by United States Mail, postage prepaid, or via E-mail:

Karen K Bailey
kbailey@ekoklaw.com

Joel D Nelson
jdn@keatinglaw.com

Date: November 2, 2018 BY THE COURT: _____
CLERK