IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

DORIS BAER, Individually and as the Executrix of the Estate of WILLIAM R. BAER, deceased, Plaintiff	:	NO. 04-00,573
vs.	:	CIVIL ACTION - LAW
JAMES W. REDKA, M.D. and CORNERSTONE FAMILY HEALTH, P.C., Defendants	:	Motion to Compel Discovery

OPINION AND ORDER

Before the Court is Plaintiff's Motion to Compel Discovery, filed October 12, 2004. Argument on the motion was heard December 3, 2004.

At issue are two requests for production of documents. The first seeks "a copy of any and all insurance policies for the treatment period in question, including but not limited to, declaration sheet, endorsements and indications of CAT Fund surcharge payment."[1] Plaintiff seeks this discovery pursuant to Rule of Civil Procedure 4003.2 which provides, in pertinent part:

> **Rule 4003.2. Scope of Discovery. Insurance.**
>
> A party may obtain discovery of the existence and terms of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. ….

Pa.R.C.P. 4003.2. While Defendants agree Plaintiff is entitled to discover whether they have insurance, the name of the carrier and the limits of liability, they claim production of the policy itself is not required, citing Transue v. O'Brien, 37 Pa. D. & C.3d 567 (Lehigh County 1984), in which a similar request was denied. Plaintiff argues, on the other hand, that discovery of the "terms" of the policy allows for production of the policy, citing Weiner v. Charny, 23 Pa. D. & C.3d 367 (Allegheny County 1982), in which the Court granted a request for production of the

[1] The instant action is a medical malpractice claim.

defendant's insurance policy. After consideration of both of these cases, as well as the cases of Underwater Technics, Inc. v. Seaboard Tank Lines, Inc., 2 Pa. D. & C.3d 340 (Bucks County 1977)(discovery of insurance policy allowed) and Mancini v. Yavorek et al., CV-02-1414 (Northumberland County, July 22, 2003)(discovery of insurance policy not allowed), the Court believes the rule should be interpreted to allow for discovery of the policy, as the reasoning of those cases which do so appears to be more in keeping with the purpose of the rule.

In Weiner v. Charny, supra, Judge Wettick noted the literal language of the rule "a party may obtain discovery of the existence and terms of any insurance agreement" should allow for production of the policy itself, and went on to opine that such interpretation furthers the purpose of the rule as outlined in Szarmack v. Welch, 318 A.2d 707 (Pa. 1974).[2] There the Court required the defendant to answer interrogatories posed by the plaintiff inquiring about the existence of automobile liability insurance, the name of the carrier, and the limits of liability. The Court reasoned that a plaintiff must have some assurance that there can be a recovery in the event of a favorable verdict to justify the time, effort and expense in the preparation of the case for trial, and also considered such information valuable in evaluating offers of settlement. The Court saw such discovery as furthering the general purpose of the procedural rules, of securing the just, speedy and inexpensive determination of every action.

While Szarmack was limited by the facts of that case to interrogatories, Judge Wettick allowed discovery of the insurance policy itself for the same reasons given by the Szarmack Court, rejecting the defendant's three arguments that the rule permits discovery of only the name of the carrier and the limits of liability. First, the argument that the Szarmack case itself required disclosure of only the name of the carrier and limits of liability was rejected on the basis that such was the only information asked for in that case, but the language and rationale of the case required a broader reading of the rule. Second, the argument that a review of the policy itself would not enable a plaintiff to know whether there would ultimately actually be insurance coverage was rejected on the grounds that knowledge of the provisions of the policy would assist a plaintiff in evaluating the merits of the carrier's assertion, if such were made, that there was no coverage, and in so doing, further the purposes described in Szarmack.

Finally, Judge Wettick rejected the defendant's attempt to distinguish the federal rule,[3] which has been construed to permit discovery of the entire insurance agreement,[4] on the basis that the federal rule uses the word "contents" while the state rule uses the word "terms", concluding the language appears to be interchangeable, and noting Rule 4003.2 is described in the Explanatory Note as being taken almost verbatim from the federal rule.

In Underwater Technics, Inc. v. Seaboard Tank Lines, Inc., supra, decided prior to enactment of Rule 4003.2, Judge Bodley granted a request for production of the insurance policy on the basis that the request appeared to satisfy the requirements of the rules in effect at the time, finding an insurance policy (1) not a privileged matter, (2) relevant to the subject matter, and (3) aiding in the preparation of the case. The Court noted the directive of Rule 126 that the rules be liberally construed to secure the just, speedy and inexpensive determination of every action, and Judge Follmer's observation in Slomberg v. Pennabaker, 42 F.R.D. 8 (M.D. Pa. 1967), that: "The whole purpose of litigation is to produce results fair to both sides, not to play a game of hide and seek."

On the other hand, in Transue v. O'Brien, supra, the Court rejected the plaintiff's request for production of the insurance policy on the basis that there was no appellate authority which required production of the policy, and further, that if a controversy later developed wherein coverage was denied, that controversy could be litigated in a separate lawsuit and the policy could at that point be produced. With all due respect to Judge Gardner, such reasoning does not facilitate the "just, speedy and inexpensive determination of every action." And, in Mancini v. Yavorek, supra, the Court found the word "contents" to be broader than the word "terms", and reasoned that if the Pennsylvania rule were to be interpreted as broadly as the federal rule, the state rule would have been amended when the federal rule was. Again, with all due respect to Judge Saylor, the Explanatory Comment (1978) to the rule indicates it is taken almost verbatim from the federal rule, but does not indicate any distinction is to be made in interpretation. The Court is hesitant to put such meaning into the lack of amendment,

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[2] In the Explanatory Note to the rule it is indicated the rule codifies the decision of the Pennsylvania Supreme Court in Szarmack v. Welch, 318 A.2d 707 (Pa. 1974).
[3] Found at Fed.R.Civ.P. 26(b)(2) at the time of the Weiner decision.
[4] In fact, subsequent to Judge Wettick's decision in Weiner, in 1993 the federal rule was amended to provide for "inspection and copying" of any insurance agreement. Fed.R.Civ.P. 26(a)(1)(D).

especially when such can also be interpreted as indicating a belief that the rule was already as broad as the federal rule and needed no amendment.

Accordingly, following the reasoning articulated by Judges Wettick and Bodley, the request for production of the insurance policy in the instant matter will be granted.

Plaintiff also seeks "any and all investigation, whether in the nature of surveillance or otherwise, concerning any party or witness in this case, including but not limited to accompanying instruction to the person conducting the surveillance." As indicated to counsel at argument, it appears this request has been sufficiently addressed in Defendants' answers to interrogatories, and in any event, defense counsel represented at the time of argument that no investigation has been made. Accordingly, this request will be denied as moot.

ORDER

AND NOW, this 10th day of December 2004, for the foregoing reasons, Plaintiff's Motion to Compel is GRANTED with respect to Request Number 13, but DENIED with respect to Request Number 14. Defendants shall produce the requested insurance policy(ies) within fifteen (15) days of this date.

BY THE COURT,

Dudley N. Anderson, Judge

cc: Clifford A. Rieders, Esquire
C. Edward S. Mitchell, Esquire
Gary Weber, Esquire
Hon. Dudley Anderson