IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

DAVID T. TURBYFILL and
DAVID T. TURBYFILL, D.M.D., P.A.,

Plaintiffs,

v. Case No. 3:14cv283-RV/EMT

SCOTTSDALE INDEMNITY COMPANY,

Defendant.
_____/

ORDER

At the time relevant to this case, the plaintiff, David T. Turbyfill, was a sedation dentist and employee, officer, and shareholder of plaintiff David T. Turbyfill, D.M.D., P.A. (together, "Turbyfill"). He was also a partner, officer, and director in Greskovich and Balcom ("G&B"), a Florida company that provided management services to those engaged in the practice of oral surgery. The defendant, Scottsdale Indemnity Company ("Scottsdale"), issued a business indemnity policy to G&B ("Policy"), and Turbyfill was an insured thereunder.

In April 2013, the Department of Health ("DOH") brought an Administrative Complaint against Turbyfill, accusing him of sexual misconduct with minor female patients under sedation. He settled the case, after which he brought this action against Scottsdale to recover all of the expenses that he incurred in defending himself. He also sought to recover, as assignee, expenses that G&B incurred in defending itself against various business torts. Scottsdale filed a counterclaim, and discovery is now complete. Scottsdale has filed a motion for summary judgment (doc. 30), and Turbyfill has filed a motion to strike portions of a declaration filed in support of that motion (doc. 36).

I. Turbyfill's Motion to Strike (doc. 36)

In support of its motion for summary judgment, Scottsdale filed a declaration under penalty of perjury by one of its attorneys, Charles C. Lemley. The declaration makes statements of fact and seeks to introduce documentary evidence. The portions relevant to Turbyfill's motion to strike are as follows:

> Paragraph 4, in which Lemley testified that Scottsdale had issued a second indemnity policy (with different effective dates) for after the expiration of the Policy at issue here;
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> Paragraph 9, in which Lemley testified that "Scottsdale obtained its copy of the Administrative Complaint from the State of Florida, not Greskovich & Balcom or Plaintiffs;"
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> Paragraph 10, in which Lemley testified that "Plaintiffs did not seek or obtain Scottsdale's consent to settle the Administrative Complaint;"
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> Exhibit 1, a document purporting to be a true and correct copy of the Policy;
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> Exhibit 4, a document purporting to be a true and correct copy of an Order of Emergency Restriction of License of Dr. David T. Turbyfill, filed by the DOH;
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> Exhibit 5, a document purporting to be a true and correct copy of the Administrative Complaint;
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> Exhibit 7, a document purporting to be a true and correct copy of Scottsdale's adjuster file/log notes;
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> Exhibit 9, a document purporting to be a true and correct copy of an email from G&B to Scottsdale, dated July 29, 2013;

> Exhibit 10, a document purporting to be a true and correct copy of a letter from G&B, dated September 3, 2013;
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> Exhibit 11, a document purporting to be a true and correct copy of a draft complaint from Turbyfill's counsel;
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> Exhibit 12, a document purporting to be a true and correct copy of an Assignment with Reservation that G&B gave to Turbyfill; and
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> Exhibit 15, a document purporting to be a true and correct copy of the transcript of Turbyfill's deposition testimony in the DOH administrative proceedings.

Certain of the foregoing testimony and documents are not necessary to resolve the issues that have been raised on summary judgment, and they need not be discussed or relied on in this order. Specifically: Paragraph 4, Paragraph 9, Exhibit 4, Exhibit 9, Exhibit 10, and Exhibit 12. Consequently, the motion to strike is denied as moot for those six portions of the declaration.[1] As for the other portions to which Turbyfill has objected, I will discuss them in turn.

First, Turbyfill moves to strike the factual statement in Lemley's declaration (Paragraph 10) that "Plaintiffs did not seek or obtain Scottsdale's consent to settle the Administrative Complaint." Turbyfill maintains that this fact is "in dispute," and he

[1] To highlight just one example, Exhibit 12 purports to be a true copy of the Assignment with Reservation that G&B gave to Turbyfill. The document states that, for $10 consideration, G&B was assigning to Turbyfill "any and all claims of any nature whatsoever . . . that assignor may have for itself or on behalf of any insured against Scottsdale." Turbyfill moves to strike the document for lack of foundation/authentication and hearsay. However, it is unchallenged that G&B did, in fact, make that assignment. To be sure, Turbyfill not only alleged that fact in the complaint, but he attached the document itself (doc. 15 at ¶ 8 and Ex. C). Thus, even though the assignment's "authenticity" cannot be seriously denied, the allegations in the complaint alone make it unnecessary for me to rule on the admissibility of actual document itself. So, the motion to strike Exhibit 12 is moot.

challenges Lemley's statement on the grounds that it is "conclusory," "self-serving," and falls outside "personal knowledge." Even if it is agreed that Lemley did not have sufficient personal knowledge to make that statement himself, there is other evidence in the record to support that fact, including, inter alia, the testimony of Megan Ellis, Scottsdale's Rule 30(b)(6) witness, and there is no record evidence to the contrary. In fact, as Scottsdale points out, Turbyfill has acknowledged elsewhere in his pleadings that Scottsdale did not give its consent before he settled with the DOH (doc. 35 at 12). Because the record is unchallenged that Scottsdale first learned of the Administrative Complaint only after Turbyfill settled the matter with the agency, the motion to strike Lemley's statement to that effect is denied.

Turbyfill next moves to strike the declaration to the extent that it seeks to make the Policy part of the summary judgment record (Exhibit 1). The Policy is an essential part of Turbyfill's claims. Nevertheless, he argues that it "has not been authenticated by anyone with personal knowledge of what it is." Actually, the Policy was attached to his complaint (and Scottsdale admitted its authenticity in its answer), and it was then attached to Scottsdale's counterclaim (and Turbyfill admitted its authenticity in his answer). It has been incorporated into the pleadings, and it is already part of the case record. There are no conceivable grounds to challenge the "authenticity" of the Policy, and Turbyfill's attempt to strike it on such a basis is patently disingenuous.

Turbyfill also moves to strike the Administrative Complaint (Exhibit 5) on the grounds that (1) it has not been authenticated, and (2) it constitutes hearsay. As for the first ground, Scottsdale responds that Turbyfill authenticated the document during his deposition in this case and in other related litigation. Also, because the Administrative Complaint is available to the public via the DOH official website, I can (and do) take

judicial notice of it. See, e.g., Gent v. CUNA Mutual Ins. Society, 611 F.3d 79, 84 n.5 (1st Cir. 2010) (courts may take judicial notice of information available on "'official government website'") (citing, inter alia, Denius v. Dunlap, 330 F.3d 919, 927 (7th Cir. 2003) ("The defendants have simply caused additional judicial work by contesting a factual issue that, according to information readily available in the public domain, cannot be reasonably disputed.")). While that resolves the authentication challenge, it does not necessarily resolve the hearsay challenge. See, e.g., Galvan v. City of La Habra, 2014 WL 1370747, at *2 (C.D. Cal. 2014) ("'Judicial notice, while it may cure authentication, does not cure any customary objections involved in the admissibility of evidence, such as . . . hearsay.'"). However, the Administrative Complaint is not hearsay since it is not being offered for the truth of its allegations, but, rather, to show what allegations were made in the administrative proceeding for which Turbyfill seeks coverage. See Hartford Acc. & Indem. Co. v. Beaver, 466 F.3d 1289, 1292 (11th Cir. 2006) (stating that insurer's duty to defend turns on the allegations in the underlying case, not their truth). The motion to strike the Administrative Complaint is denied.

Turbyfill challenges the introduction of Scottsdale's adjuster claim (log) notes (Exhibit 7) as unauthenticated hearsay. However, those log notes were identified and authenticated during the deposition of Ms. Ellis, Scottsdale's Rule 30(b) witness, and Turbyfill has offered no evidence or argument indicating a lack of trustworthiness. As the notes were authenticated as "business records" of Scottsdale, they fall within an exception to the rule against hearsay. See Fed. R. Evid. 803(6).

Turbyfill next attempts to strike a draft complaint (Exhibit 11) that his counsel purportedly drafted during the ("business tort") dispute with G&B. He contends that there is no foundation for this document, it has not been authenticated, and it contains

hearsay. However, Turbyfill testified during deposition that his attorney prepared the complaint for his business tort claims against G&B for which he is seeking insurance coverage in this case. His foundation/authentication/hearsay arguments in support of striking a complaint that his own lawyers drafted and forwarded to G&B are entirely without merit.

And lastly, Turbyfill moves to strike the transcript of a deposition that he gave in the administrative proceeding (Exhibit 15). Relying solely on Rule 32(a)(8) of the Federal Rules of Civil Procedure, he maintains that "a deposition taken in an earlier action can be used at a hearing or trail [sic] in a later action, but only if the later action is between the same parties (or their representative or successors) and involves the same subject matter." However, as will be seen in Section II.B, Turbyfill testified to things during his DOH deposition—specifically, his defense to the sexual misconduct charges—that could qualify as admissions by a party opponent under Rule 801(d)(2) of the Federal Rules of Evidence, and, thus, his prior testimony is admissible and may be used here. See, e.g., The Globe Savings Bank v. United States, 61 Fed. Cl. 91, 95-96 (2004) (citing cases for the view that Rule 801(d)(2) provides an independent basis for use of prior depositions in subsequent litigation, and Rule 32(a)(8) does not apply to depositions that constitute admissions of a party opponent).

I must say one final thing before turning to Scottsdale's motion for summary judgment. Much of Turbyfill's motion to strike is ultimately based on the notion that it was improper for Lemley—as one of Scottsdale's attorneys of record—to introduce documents and testify to the things that he did. In advancing this argument, Turbyfill relies on Rule 4-3.7 of the Florida Rules of Professional Conduct (and the committee

comments to the rule) to argue that Lemley's declaration impermissibly combines "the roles of advocate and witness," which "can prejudice the tribunal and can also involve a conflict of interest between the lawyer and his client." Rule 4-3.7(a) addresses when a lawyer may testify, and it provides that a lawyer "shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness on behalf of the client," except in limited situations. As the emphasized language clearly indicates, even if Lemley is deemed a necessary witness, Rule 4-3.7(a) only applies "at a trial." See, e.g., Columbo v. Puig, 745 So.2d 1106 (Fla. 3d DCA 1999) ("The key words here are 'at a trial.' Therefore, it follows that a lawyer may act as an advocate at pre-trial (before the start of the trial) . . . ."). In contending that it was inappropriate for Lemley to submit his declaration, "Plaintiff ignores the reality that filing documents [pre-trial] pursuant to attorney declaration is a well established practice." See Estes Express Lines v. Macy's Corp. Services, 2010 WL 398749, at *5 (D.N.J. 2010). To be sure, this practice is so established that Turbyfill's attorneys have apparently done exactly the same thing. As Scottsdale has noted in its response in opposition:

> Turbyfill's position is ironic because, within the past month, Turbyfill moved for summary judgment in [a separate] case in this Court in which he seeks insurance coverage (from a different insurance carrier) for defending himself against charges of sexual misconduct (including the same Administrative Complaint for which he seeks coverage here), OMS Nat'l Ins. Co. v. David T. Turbyfill, No. 3:14-cv-622/MCR/CJK. In support of his motion in the OMS litigation, Dr. Turbyfill submitted only two declarations, from two of the three counsel who signed the Motion to Strike, attaching documents that Turbyfill relied on in his summary judgment motion. See Declaration of Edwin A. Steinmeyer, No. 3:14-cv-622, Doc. 66 (attached

> hereto as Exhibit A) and Declaration of John L. Fiveash, id., Doc. 73 (attached hereto as Exhibit B). Even more ironically, at least two of the documents the attorneys submitted as authentic under penalties of perjury are the same documents that they seek to strike here [namely, the Administrative Complaint and Turbyfill's prior deposition].

Turbyfill's motion to strike Lemley's declaration has no merit. It must be, and is, denied in its entirety.

II. Scottsdale's Motion for Summary Judgment (doc. 30)

A. Standard of Review

Summary judgment is appropriate if all the pleadings, discovery, affidavits, and disclosure materials on file show that there is no genuine disputed issue of material fact, and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a), (c). The plain language of Rule 56(c) "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548 (1986).

Summary judgment is inappropriate "[i]f a reasonable factfinder evaluating the evidence could draw more than one inference from the facts, and if that inference introduces a genuine issue of material fact[.]" Allen v. Board of Public Educ. for Bibb Cty., 495 F.3d 1306, 1315 (11th Cir. 2007). An issue of fact is "material" if it might affect the outcome of the case under the governing law. Anderson v. Liberty Lobby Inc., 477 U.S. 242, 248, 106 S. Ct. 2505 (1986). It is "genuine" if the record, viewed as a whole, could lead a reasonable fact finder to return a verdict for the non-movant.

Id. "In considering a summary judgment motion, '[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.'" Trucks Inc. v. United States, 234 F.3d 1340, 1342 (11th Cir. 2000) (quoting Anderson, supra).

B. Background

The following facts have been taken from Scottsdale's 62-paragraph statement of undisputed facts and the exhibits thereto (doc. 30-1). These facts are supported by evidence in the record—which Turbyfill has not properly denied—so they are deemed undisputed. See Fed. R. Civ. P. 56(e)(2) (providing that if a party opposing summary judgment "fails to properly address another party's assertion of fact" the district court may "consider the fact undisputed for purposes of the motion").[2]

[2] Turbyfill filed a response to Scottsdale's statement of undisputed facts in which he did not deny 17 of the 62 facts (doc. 37). For each of the remaining 45 facts, he gave the same boilerplate response: "Dr. Turbyfill disputes Scottsdale's material fact number [X]. There is no evidence of record to support the statement." Included among the dozens of facts that he disputed in this manner is a denial that the DOH filed an Administrative Complaint against him in April 2013 (doc. 30-1 at ¶ 29; doc. 37 at ¶ 23), even though he expressly alleged that fact in his complaint (doc. 15 at ¶ 10). This litigation strategy—linked to his motion to strike—was questionable, to say the least, and there appears to be no good faith basis for it. Regardless, it is well settled that, in opposing a motion for summary judgment, "[a] general denial unaccompanied by any evidentiary support will not suffice." Home Design Services, Inc. v. Eber, 2009 WL 722032, at *1 (N.D. Fla. 2009); see also Graff v. Baja Marine Corp., 310 Fed. Appx. 298, 301 (11th Cir. 2009) ("When a motion for summary judgment is properly made and supported, the nonmoving party may not rest on the mere denials or allegations in the pleadings, but must set forth specific facts sufficient to raise a genuine issue for trial."); NLRB v. Smith Indus., Inc., 403 F.2d 889, 893 (5th Cir. 1968) ("a party may not avoid a summary judgment merely by denying an opponent's allegations") (citing Erickson v. United States, 340 F.2d 512 (5th Cir. 1965) ("It seems appropriate to state that a party opposing summary judgment may not rest upon the mere allegations or denials in his pleadings to avoid the granting of such a judgment otherwise justified.")); BankAtlantic v. Coast to Coast Contractors, Inc., 22 F. Supp. 2d 1354, 1359 (S.D. Fla. 1998) ("Defendant Scott has not come forward with any evidence contradicting this proof, and his mere denials are insufficient to avoid entry of summary judgment against him at this stage."). Thus, as stated above, the facts set forth in Scottsdale's statement of facts are taken as undisputed.

Scottsdale issued the Policy to G&B for the policy period of July 21, 2012, to July 21, 2013, and Turbyfill qualified as an "insured person" under its terms. The Policy provides for a $2 million aggregate limit of liability, and it affords coverage under two separate "insuring clauses," only one of which is relevant here: the Third-Party Insuring Clause.[3]

The Third-Party Insuring Clause provides that:

> In the event Third-Party Coverage is affirmatively designated . . . the Insurer shall pay the Loss of the Insureds which the Insureds have become legally obligated to pay by reason of a Third-Party Claim first made against the Insureds during the Policy Period . . . and reported to the Insurer pursuant to Section E.1. herein, for a Third-Party Wrongful Act taking place prior to the end of the Policy Period.

The Policy defines "Loss" to mean, among other things, damages, judgments, settlements, and "Costs, Charges and Expenses" incurred by an insured in defending claims. However, it does not include "matters uninsurable under the laws pursuant to which this Policy is construed."

"Third-Party" means "any natural person who is a customer, vendor, service provider, client, or other business invitee of the Company; provided, however, Third-Party shall not include any Employee."

"Third-Party Claim" means, in pertinent part:

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[3] The other insuring clause in the Policy (namely, the Employee Insuring Clause) was argued in Scottsdale's motion for summary judgment (perhaps in an abundance of caution), but Turbyfill has impliedly acknowledged that clause does not apply here as he has not argued it in his opposition to Scottsdale's motion.

> a. any written demand for damages or other relief against an insured; [or]
>
> b. a civil judicial, administrative or arbitration proceeding against an Insured . . .
>
> brought by or on behalf of a Third-Party in their capacity as such.

And finally, "Third-Party Wrongful Act" is defined as any actual or alleged:

> a. harassment of a Third-Party, including but not limited to any type of sexual or gender harassment, as well as racial, religious, sexual orientation, pregnancy, disability, age, or natural origin-based harassment; or
>
> b. discrimination against a Third-Party, including but not limited to any such discrimination on account of race, color, religion, age, disability or national origin.

The Policy provides that an insured may be entitled to payment under the Third-Party Insuring Clause if, pursuant to Section E.1., he gives Scottsdale "written notice" of any claim "as soon as practicable." The Policy further provides that the insured may not settle—or offer to settle—any claim or incur any costs "without the prior written consent of the Insurer." Therefore, under the express terms of the Policy: "The Insurer shall not be liable for any settlement, Costs, Charges and Expenses . . . to which it has not consented."

As previously noted, Turbyfill was a partner, officer, and director of G&B at the time relevant to this case, and he was engaged in the practice of sedation dentistry. On or about April 19, 2013, the DOH—the state department charged with regulating

dentistry in Florida—filed the Administrative Complaint, seeking, inter alia, to either revoke or suspend his license. According to the allegations in that complaint, on four separate occasions between November 2012 and February 2013, staff members saw Turbyfill enter rooms where minor female patients had been sedated and left alone. He was seen moving the patients' hands from under blankets and standing near and/or touching them while he was visibly sexually aroused and thrusting his hips and pelvic region on or near them. When staff members entered the room, he moved away from the patients, covered his genital region, and left the room.

It is a crime in Florida to engage, or attempt to engage, in sexual activity with a minor. It is a separate crime to engage, or attempt to engage, in sexual activity with a person who is under sedation and, thus, cannot consent. The DOH's administrative complaint charged Turbyfill with violating Section 466.027, Florida Statutes, which prohibits "sexual misconduct" by a dentist. Section 466.028(1)(mm) further provides that any violation of the statute will be grounds "for denial of a license or disciplinary action."

Turbyfill denied any sexual misconduct. He testified during the administrative proceedings that he was not "thrusting his hips and pelvic region" at the patients in a sexual manner. Rather, he claimed that he had previously sustained a back injury and his doctor recommended that he "stretch out [his] hip and back" with "side-to-side" motions at various times throughout the work day. To the extent that he may have appeared "sexually aroused" while he was doing those exercises, he maintained that it was "pharmacologically induced" as he was taking prescription testosterone, which would sometimes give him a partial erection.

Scottsdale was not provided a copy of the Administrative Complaint when it was filed, nor was it told anything about it. It was not until May 24, 2013—more than a month after the complaint was filed—that Scottsdale received several Acord forms, which are standard forms generated with new claims. The forms were incomplete and contained only little information, but they did reflect that "a Partner is being charged with sexual misconduct." Later that day, the adjuster assigned to the file, Ruth Regan, called G&B's employee contact, Lori Brock, and left a voicemail message requesting additional information. Regan left at least two more messages over the next few days because Brock was "difficult to reach" and "slow in returning calls." The two did not speak until June 4, 2013, eleven days after the Acord forms were received. Brock told Regan during their conversation that Turbyfill had been investigated by the DOH and that the investigation revealed "inappropriate conduct" with minor patients. However, Brock said that the matter had "reached a settlement." Brock further said that none of the patients had (at that time) made any claim against Turbyfill. According to Regan's log notes, Brock had been advised to put the insurer "on notice" as "Dr. Turbyfill may be looking for coverage for his attorneys fees but he has not made any type of claim." Since no claim was being made at that time, Regan closed the file.

On June 25, 2013, Turbyfill entered into a written settlement agreement with the DOH. Pursuant to the terms of the settlement, Turbyfill paid $10,000.00 in fines and more than $4,600.00 in costs. In addition, he was issued a Letter of Concern; agreed to a temporary restriction of his license; and was required to have a monitor in the room at all times when he is engaged in sedation dentistry with a patient. He agreed to these terms and entered into the settlement, and he did so without consulting

Scottsdale. Indeed, Scottsdale had not been told that the Administrative Complaint was pending at that time.[4]

Subsequently, Turbyfill wrote to G&B and demanded that it indemnify him for the defense costs that he had incurred in the administrative proceedings. At that time, Scottsdale still did not know about the Administrative Complaint, nor did it know that Turbyfill had demanded indemnification from G&B. He also made a demand against G&B for several business torts ("Business Tort Demand"). Turbyfill alleged that G&B had, inter alia, jeopardized his professional reputation and practice by reporting the sexual misconduct claims to the DOH without "properly investigating" them first. He further alleged that G&B had failed to perform "essential duties" required under the management agreement; that it intruded into his "personal and business affairs;" and that it committed fraud in connection with his original investment in G&B. Turbyfill (through counsel) prepared and sent a draft complaint to G&B which contained causes of action for tortious interference with a business relationship, conspiracy to tortiously interfere with a business relationship, breach of contract, negligence, indemnity, civil theft, fraud, and breach of fiduciary duty. The parties eventually settled the Business Tort Demand, after which G&B assigned all of its rights and claims under the Policy to Turbyfill. This present lawsuit followed.

In the complaint, Turbyfill advances two claims against the Policy: (1) a claim for the fees and costs that he incurred in defending himself against the Administrative

[4] As I noted while discussing his motion to strike, Turbyfill does not dispute that Scottsdale lacked prior notice of the settlement. In fact, he appears to concede the point as he contends that he settled the Administrative Complaint as quickly as he did—without notice—because he "had to act promptly to minimize his potential damages by restoring his license and returning him to practice as soon as possible" (doc. 35 at 12).

Complaint (Count 1), and (2) the claim by G&B—subsequently assigned to him—for the fees and costs that G&B had expended with the Business Tort Demand (Count 2). Scottsdale moves for summary judgment on both claims.

C. Discussion

This is not a close case, and only little discussion is required.

Regarding Turbyfill's claim to the fees and costs that he incurred in defending himself against the Administrative Complaint, Scottsdale advances several persuasive arguments in support of summary judgment, each of which provides an independent basis to grant the motion. First, the Administrative Complaint was not a "Third-Party Claim" under the Policy. A "Third-Party Claim" is a written demand or administrative proceeding for damages "brought by or on behalf of a Third-Party in their capacity as such." The Policy specifically defines "Third-Party" as "any natural person who is a customer, vendor, service provider, client, or other business invitee of the Company." The Administrative Complaint was brought by the DOH, which is the state department charged with regulating the practice of dentistry. It is not a "Third-Party" as defined by the Policy.[5]

Second, to fall under the Policy, the Administrative Complaint must involve a "Third-Party Wrongful Act," which is defined as either discrimination against a third party (which clearly does not apply) or harassment. While harassment is not defined in the Policy, the plain and ordinary meaning of the term means "purposeful vexation" and "words, conduct, or action (usu. repeated or persistent) that, being directed at a

[5] As Scottsdale notes, while the patients upon whom Turbyfill purportedly committed sexual misconduct may qualify as third parties (at least one of whom has since filed suit against Turbyfill), the DOH did not purport to file the case on their behalf as parens patriae. Rather, the administrative proceeding was a licensing action.

specific person, annoys, alarms, or causes substantial emotional distress to that person and serves no legitimate purpose." See Black's Law Dictionary (10th ed. 2014). The definition that Turbyfill has proposed is very similar:

> The act of systemic and/or continued unwanted and annoying actions of one party or a group, including threats and demands. The purposes may vary, including racial prejudice, personal malice, an attempt to force someone to quit a job or grant sexual favors, apply illegal pressure to collect a bill or merely gain sadistic pleasure from making someone anxious or fearful.

Insofar as Turbyfill's alleged acts were done on unconscious and sedated patients, it cannot be seriously argued that they were designed to annoy, alarm, cause substantial emotional distress, or make them feel anxious or fearful. Indeed, had they not been witnessed by G&B staff, the patients never would have even known what happened. What Turbyfill is alleged to have done may very well have been "sexual misconduct" and/or some other crime, but it was not "harassment."

Scottsdale is also probably correct that Florida public policy would preclude insurance coverage for sexual abuse, particularly against a minor [see State Farm Fire & Cas. Co. v. Tippett, 864 So.2d 31 (Fla. 4th DCA 2003); Mason v. Florida Sheriffs' Self-Insurance Fund, 699 So.2d 268 (Fla. 5th DCA 1997); Lindheimer v. St. Paul Fire & Marine Ins. Co., 643 So.2d 636 (Fla. 3d DCA 1994)], but I do not have to reach the issue. Even if it would not violate public policy, Scottsdale was obviously not given timely written notice of the Administrative Complaint as required by the Policy. As detailed above, the record is undisputed that Scottsdale was not told of the allegations until it received the incomplete Acord forms on May 24, 2013, at the earliest—more than one month after the Administrative Complaint was filed—and the adjuster called

later that day to get more information. When G&B's employee contact finally called her back eleven days later she was told that no claim had been filed and that the matter had already been "settled." Because the Policy specifically provides that "[t]he Insurer shall not be liable for any settlement, Costs, Charges and Expenses . . . to which it has not consented," there is no issue of material fact. Scottsdale is entitled to summary judgment for the Administrative Complaint claim in Count 1.

As for the Business Tort Demand, this claim was filed by Turbyfill for business torts, several of which had nothing to do with the Administrative Complaint, including G&B's failure to perform essential duties under the management agreement, intruding into his professional and personal affairs, and committing a fraud with respect to his original investment in G&B. Scottsdale argues—and I agree—that this claim fails for certain of the reasons indicated above, i.e., this was not a "Third-Party Claim" for a "Third-Party Wrongful Act," as the terms are defined in the Policy. In fact, Turbyfill has not responded to Scottsdale's arguments on this point (actually, he says nothing about the Business Tort Demand at all), which may be viewed as abandonment of the claim:

> Where a party wholly fails to respond to a summary judgment motion, the district court must make sure that it nonetheless is appropriate to enter summary judgment against the party that did not respond; in contrast, where the non-moving party fails to address a particular claim asserted in the summary judgment motion but has responded to other claims made by the movant, the district court may properly consider the non-movant's default as intentional and therefore consider the claim abandoned.

Powell v. American Remediation & Envtl., Inc., 61 F. Supp. 3d 1244, 1252 n.9 (S.D. Ala. 2014), aff'd 618 Fed. Appx. 974 (11th Cir. 2015); accord Oliver v. TECO Energy,

Inc., 2013 WL 6836421, at *11 (M.D. Fla. 2013) ("Courts commonly grant summary judgment as to claims plaintiff failed to address in response to a summary judgment motion."). Accordingly, summary judgment is appropriate on Count 2 as well.

III. Conclusion

The plaintiff's motion to strike (doc. 36) is DENIED. The defendant's motion for summary judgment (doc. 30) is GRANTED. The clerk shall enter judgment for the defendant, together with taxable costs, and close this case.

DONE and ORDERED this 24th day of February 2016.

/s/ Roger Vinson
ROGER VINSON
Senior United States District Judge