

VERMONT SUPERIOR COURT
Chittenden Unit
175 Main Street
Burlington VT 05401
802-863-3467
www.vermontjudiciary.org



CIVIL DIVISION
Case No. 21-CV-00323

**Nancy Kelley, et al v. Franklin County Rehab Center, LLC d/b/a Franklin County
Rehabilitation Center and d/b/a Franklin County Rehabilitation & Adult Care
Center, et al**

ENTRY REGARDING MOTION

Title: Motion to Dismiss the Crossclaim - Renewed (Motion: 32)
Filer: Curtis L. S. Carpenter
Filed Date: May 14, 2026

The motion is DENIED.

Defendant Dr. Teig Marco has filed a motion to renew his prior motion seeking dismissal of Franklin County Rehabilitative Center (FCRC) from the present litigation. Defendant makes two arguments. First, he contends there is a lack of expert testimony tying him to the alleged negligence claims that have been filed against FCRC that would support FCRC's indemnification cross-claims against him. Second, he contends that with his dismissal all liability claims against him regarding either indemnification or duty to defend claims necessarily fail. See *Monadnock Constr. Inc. v. DiFama Concrete, Inc.*, 70 A.D.3d 906, 907-908, 896 N.Y.S.2d 107 (N.Y. 2nd Dept. 2010) (holding that when the claims against the named insured are dismissed their duty to defend additional insureds are relieved).

Defendant FCRC opposes the motion to dismiss on multiple grounds. The Court agrees with Defendant FCRC and **Denies** the motion to dismiss for the following reasons.

Dr. Marco frames his motion as a reconsideration of the Court's denial of his February motion to dismiss Defendant FCRC's counterclaims. These motions appear to have been framed as motions to dismiss primarily because the window for summary judgment motions closed nearly 18 months ago. Yet, a motion to dismiss carries a substantially higher burden than a motion to dismiss. *Alger v. Dep't of Labor & Indus.*, 2006 VT 115, ¶ 23. The moving party must effectively show that that no legally cognizable claim for relief exists. *Id.*; see also 5B A. Benjamin Spencer, et al., Fed. Prac. & Proc. Civ. § 1357 (4th ed.). "The purpose of a motion to dismiss for failure to state a claim is to test the law of a claim, not the facts which support it."

Levinsky v. Diamond, 140 Vt. 595, 600 (1982) (quotations omitted), overruled on other grounds in *Muzzy v. State*, 155 Vt. 279, (1990).

In this case, Defendant FCRC seeks indemnification from Dr. Marco for both the duty to defend and the duty to indemnify. In the Court’s prior decision, it withheld a grant of judgment either for or against Dr. Marco on these issues based on a theory of judicial efficiency. FCRC claims that Dr. Marco, based on a 2017 agreement, had an obligation to purchase an Errors & Omissions Insurance policy prior to the events concerning Mr. Kelley’s care and to name FCRC as a co-insured. Dr. Marco did not purchase this policy.

When Mr. and Ms. Kelley filed the present suit, they named both Dr. Marco and FCRC as defendants and asserted that both Defendants were liable for Mr. Kelley’s injuries. At that point, any applicable insurance policy, such as the proposed E&O policy, would have triggered its duty to defend both Dr. Marco and FCRC as an additional insured. See *Kassis v. Ohio Cas. Ins. Co.*, 913 N.E.2d 933, 934 (N.Y. 2009) (noting that “additional insured” are “well-understood” to “enjoy the *same* protection as the named insured.”) (internal citations omitted).

Even if Dr. Marco was later dismissed on the issue of malpractice, he would still have the potential liability under the duty to defend portion of FCRC’s counterclaim for defense expenses that should have been covered by the missing E& O policy. *City of Burlington v. National Union Fire Ins. Co.*, 163 Vt. 124, 127 (1994) (noting that the duty to defend is broader than duty to indemnify and that it is determined by comparing the allegations in the complaint with the terms of coverage); see also *Co-operative Ins. Co. v. Woodward*, 2012 VT 22, ¶ 10 (noting that the duty to defend is triggered when the claim “might be of the type covered by the policy.”) (internal citation omitted); *Emerald Bay Cmty. Assn. v. Golden Eagle Ins. Corp.*, 130 Cal. App. 4th 1078, 1088-89, 31 Cal. Rptr. 3d 43, 52 (2005) (discussing the measure of damages for a breach of the duty to indemnify).

Given that the defense costs in this case are on-going, and given that Dr. Marco has not been fully dismissed, it is premature to address this claim at this time. Instead, the Court in its

February 20th decision elected to move forward on the Kelleys' pending claims before sorting through the duty to defend claims and costs.¹

Similarly, the duty to indemnify has not been fully resolved in this case. In the Court's August 17, 2025 Summary Judgment decision, the Court granted judgment in favor of the Defendant on the limited issue of whether FCRC, through its staff was liable for Mr. Kelley's injuries due to the alleged negligent care following Mr. Kelley's hoist chair incident. The Court determined that while there was a disputed issues of fact concerning the scope of FCRC and Dr. Marco's duty of care toward Mr. Kelley and the alleged breach in this care during this time frame, Plaintiffs had not established "but for" causation to show that this negligence contributed to Mr. Kelley's injuries, which was a critical element given that the breach in care is not alleged to have caused the injury, but worsened it by delaying the time between the alleged cause and the ultimate treatment.²

As FCRC notes, the August 18th summary judgment decision does not fully address any potential breach of the duty of care that Dr. Marco may have committed in failing to examine Mr. Kelley upon arrival at the FCRC facility. While such a breach may or may not support but for causation, it would support the claim that if Dr. Marco had examined Mr. Kelley and discovered his injuries, then it would have led to Mr. Kelley's removal from the facility before the hoist chair incident. This puts Dr. Marco in a Catch-22 situation. Either he is contractually liable to FCRC for failing to perform his duty to FCRC and removing Mr. Kelley before FCRC was potentially exposed to liability, or he is potentially liable to Plaintiff for failing to

¹ In this respect, resolution of the present cross-claims functions much like an insurance coverage declaratory judgment action. In such cases courts will often stay either the substantive claims or the coverage action to avoid inconsistent judgments or double trials. See, e.g., *Wilton v. Seven Falls Co.*, 515 U.S. 277, 289–90 (1995) (affirming the district court's decision to stay a declaratory judgment action concerning coverage while the substantive negligence claims were litigated); *Northern Sec. Ins. Co. v. Perron*, 172 Vt. 204, 207 n.2 (2001) (noting that the original substantive action was stayed to allow the declaratory judgment coverage issue to be litigated). Here, the Court has elected to go forward on the underlying substantive claims before addressing the indemnification cross-claims.

² Given the subsequent delay encountered at UVMMC and the complicated chain of causation, the Court found that Plaintiff's lacked the necessary expert opinion to link the delay at FCRC with the paralysis outcome. Specifically, Plaintiffs could not show that but for FCRC's and Dr. Marco's negligence that Mr. Kelley would have avoided the paralysis or that the delay at FCRC worsened the outcome. Plaintiffs' experts could only offer the general opinion that time was of the essence, but they could not tie the alleged breach to the specific outcome. *Kelley v. Franklin County Rehab Center, LLC*, Dckt. No. 21-CV-323, at 4 (Aug. 18, 2025).

immediately examine Mr. Kelley upon admission and returning him to the hospital based on the symptoms that he was exhibiting at admission.

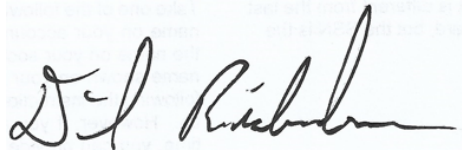
These questions, in turn, hinges, at least in part, on whether a jury finds Plaintiff's hoyer chair theory of causation to be credible. If a jury finds that the hoyer chair caused or significantly contributed to Mr. Kelley's injuries, then the question as to Dr. Marco's indemnity obligation shifts again as the admission issues may no longer be as important. As the Court indicated in its February 20th Order, resolving the Kelleys' underlying negligence and malpractice claims offers the Court and the parties the best opportunity to reduce the potential confusion here and resolve the outstanding duty questions in a reasonable and orderly manner.

Finally, Dr. Marco suggests that because FCRC has not retained or offered its own expert opinion, it cannot establish the elements of its claim. This argument ignores the testimony and opinion of Dr. Christopher Davey who has opined at length regarding Dr. Marco's duties and his theory of breach. While he is not FCRC's expert, his opinion has been timely disclosed, and counsel has had the opportunity to depose and explore Dr. Davey's opinion. The use of such expert testimony is within the trial court's discretion, and the Court finds no prejudice would attach in allowing FCRC to use and rely on this testimony. *Hutchins v. Fletcher Allen Health Care, Inc.*, 172 Vt. 580, 581 (2001) (mem.).

ORDER

For these reasons, the Court finds no basis to alter its earlier determination, and Dr. Marco's motion to reconsider is **Denied**.

Electronically signed on 8/5/2026 7:32 PM pursuant to V.R.E.F. 9(d)

A handwritten signature in black ink, appearing to read "D. Richardson", is written over a light blue rectangular background.

Daniel Richardson
Superior Court Judge