2017 IL App (4th) 160365-U

NOS. 4-16-0365, 4-16-0546 cons.

FILED
June 27, 2017
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

ILLINOIS STATE BAR ASSOCIATION MUTUAL INSURANCE COMPANY, Plaintiff-Appellant, v. THE REX CARR LAW FIRM, LLC, an Illinois Professional Limited Liability Corporation; GLENN CARR, as Personal Representative of THE ESTATE OF REX CARR, Deceased; BRUCE A CARR; BRUCE K. SIDDLE and SANDRA K. SIDDLE, Individually and as Trustees of BRUCE K. SIDDLE and SANDRA K. SIDDLE TRUST, Dated July 16, 2003; PPCT MANAGEMENT SYSTEMS, INC.; GEORGE V. CRAWFORD III; GULLETT SANFORD ROBINSON & MARTIN, PLLC; ROY W. OAKS; LATIMORE BLACK MORGAN & CAIN, P.C.; LINDA COOPER; DOCTOR R. CRANTS, JR.; DOCTOR R. CRANTS III; CONNECTGOV, INC., a Corporation; DC INVESTMENT PARTNERS LLC; FOUR CORNERS CAPITAL LLC; LYNNVIEW PARTNERS, LP; PHAROS CAPITAL PARTNERS, LLC; PHAROS HOMELAND FINANCIAL, LLC; MICHAEL E. DEVLIN; LISA QUICK; THOMAS SIMSTAD; MARLA SIMSTAD; and LAND DEVELOPMENT SERVICES, LLC, Defendants-Appellees.	)	Appeal from Circuit Court of Sangamon County No. 12MR849 Honorable John P. Schmidt, Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Holder White and Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: (1) If, to induce the insurer to issue a policy, a proposed insured knowingly makes a material misrepresentation to the insurer, that misrepresentation will defeat or avoid the policy only if the misrepresentation is stated in the policy itself or in a written application for that policy; a renewal policy cannot be rescinded on the basis of a misrepresentation made in the application for a predecessor policy.

(2) Although it is clear from extrinsic evidence (admissible under an exception to the eight-corners rule) that the plaintiffs in the underlying malpractice action seek items of damages that the malpractice insurance policy excludes from coverage, *i.e.*, attorney fees and costs that they incurred, it is unclear, from the open-ended prayer for relief in their complaint, that they do not seek other, covered items of damage as well, and thus the insurer has a contractual duty to defend the insured in the malpractice action.

(3) Just because the clients lost, by summary judgment, in a lawsuit in which the insured attorneys represented them, it does not follow that this unfavorable development was, in itself, an incident or circumstance that the attorneys knew might result in a malpractice claim.

¶ 2 Plaintiff, Illinois State Bar Association Mutual Insurance Company, sought a declaratory judgment that it had no contractual duty to defend The Rex Carr Law Firm, LLC (Firm), Rex Carr, or Bruce A. Carr in a legal malpractice action, Siddle v. Carr, St. Clair County case No. 13-L-238. (Rex Carr died on April 27, 2015, during the pendency of this declaratory judgment case, and the personal representative of his estate, Glenn Carr, has been substituted for him.) The Firm and Rex Carr moved for a summary judgment on certain counts of the declaratory judgment, and the trial court granted their motion. The court also made a finding pursuant to Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016). Plaintiff appeals. In our *de novo* review, we see no genuine issue of material fact, and we conclude that defendants are entitled to judgment as a matter of law. See 735 ILCS 5/2-1005(c) (West 2016); *Illinois Emcasco Insurance Co. v. Tufano*, 2016 IL App (1st) 151196, ¶ 17. Therefore, we affirm the trial court's judgment.

¶ 3 I. BACKGROUND

¶ 4 A. Malpractice Insurance, Renewed Annually

¶ 5 On April 28, 2008, Rex Carr, the principal of the Firm, submitted to plaintiff an application for legal malpractice insurance. One of the questions in the application was whether he or any other member of the Firm had become aware of any circumstance, error, or omission that might give rise to a claim. He answered no to that question—omitting to mention that, in May 2007, the Martinez case, filed by another member of the Firm, Bruce A. Carr, was dismissed because of disobedience to court orders, including an order to pay $5,000 in sanctions. The case never was refiled, and the Martinezes eventually sued the Firm for malpractice, once they found out, too late, what had happened. (It appears to be undisputed that plaintiff received timely notice of the Martinezes' malpractice lawsuit. That lawsuit has been settled. Plaintiff did not receive timely notice, however, of the involuntary dismissal of the Martinezes' earlier lawsuit, in May 2007, when they were represented by Bruce A. Carr.) That malpractice lawsuit was still in the future when Rex Carr filled out the application on April 28, 2008. In response to the application, plaintiff issued policy No. 111163-6 to the Firm, with an effective period of May 23, 2008, to May 23, 2009.

¶ 6 Thereafter, Rex Carr completed applications to renew the policy—answering similar questions as to whether any claims had been made against the Firm and whether he or anyone else in the Firm had become aware any circumstances that could give rise to a claim—and, in response to these applications, plaintiff issued successive renewals: policy No. 111163-7 (May 23, 2009, to May 23, 2010), policy No. 111163-8 (May 23, 2010, to May 23, 2011), policy No. 111163-9 (May 23, 2011, to May 23, 2012), policy No. 111163-10 (May 23, 2012, to May 23, 2013), and policy No. 111163-11 (May 23, 2013, to May 23, 2014).

¶ 7 B. Germane Provisions of the Insurance Policies

¶ 8 Under the heading of "**COVERAGE AGREEMENTS**," each insurance policy provided as follows:

> "A. The **COMPANY**, agrees to pay on the **INSURED'S** behalf all **DAMAGES** and **CLAIM EXPENSES** in excess of the **DEDUCTIBLE** up to the Limit of Liability which the **INSURED** becomes legally obligated to pay as a result of a **CLAIM** first made against an **INSURED** and reported to the **COMPANY** in writing during the **POLICY TERM** or **EXTENDED REPORTING PERIOD**, if applicable, provided that:
>
> (1) The **CLAIM** arises out of a **WRONGFUL ACT** which occurred on or after the **PRIOR ACTS DATE**; and
>
> (2) As of the effective date of this Policy, the **INSURED** had no knowledge of the **CLAIM**; and
>
> (3) Notice of the **WRONGFUL ACT** was not given nor required to be given to any prior insurer.
>
> B. With respect to the Insurance afforded by this Policy, the **COMPANY** has the right and duty to defend any suit or arbitration proceeding against the **INSURED** that seeks **DAMAGES** arising out of a **WRONGFUL ACT** even if any of the allegations of the suit or arbitration proceeding are groundless, false, or fraudulent."

¶ 9 The policy defines a "**CLAIM**" as follows:

"(1) a demand received by the **INSURED** for money or services, or the service of a suit or the initiation of an arbitration proceeding against the **INSURED** that seeks **DAMAGES** arising out of a **WRONGFUL ACT**;

(2) an incident or circumstance of which the **INSURED** has knowledge that may result in a demand against the **INSURED** that seeks **DAMAGES** arising out of a **WRONGFUL ACT**."

¶ 10 The policy defines "**WRONGFUL ACT**" to include "any actual or alleged negligent, act, error, or omission in the rendering of or failure to render **PROFESSIONAL SERVICES**."

¶ 11 The policy defines "**DAMAGES**" as follows:

"D. **DAMAGES** means all sums which an **INSURED** is legally obligated to pay for any **CLAIM** to which this Policy applies, including judgments, settlements, final arbitration awards, and any taxes, fines, or penalties incurred by a third party. The **INSURED** agrees with the **COMPANY** that **DAMAGES** do not include:

(1) punitive or exemplary damages;

(2) any amounts which are a multiple of compensatory damages, including but not limited to awards of double or treble damages or damages deemed uninsurable by law;

(3) any civil or criminal fines, penalties[,] or sanctions[,] whether pursuant to statute or imposed by law;

(4) legal fees, costs[,] or expenses paid or incurred by the claimant, or retained or possessed by the **INSURED**[,] whether claimed by way of

restitution of specific funds, forfeiture, financial loss[,] or otherwise, and injuries which are, in whole or part, a consequence of those fees;

(5) legal costs, expenses[,] or fees incurred by the **INSURED**, whether claimed by way of restitution of specific funds, financial loss[,] or otherwise."

¶ 12 C. The Siddles and the Compensatory Damages That They Claim

¶ 13 In 2008, Bruce K. Siddle, Sandra K. Siddle, and PPCT Management Systems, Inc. (collectively, the Siddles), entered into an attorney-client relationship with two members of the Firm, Rex Carr and Bruce A Carr, "for the purposes of investigating and litigating matters related to the Homeland Security Company" (to quote from the St. Clair County complaint). With respect to the Homeland Security Company, the Carrs filed two cases on behalf of the Siddles. The two cases eventually ended up in the Middle District of Tennessee, Nashville Division.

¶ 14 According to the background that the district court provided in its decision of March 26, 2013, the Siddles invested in Homeland Security Company, in which Doctor R. Crants, Jr., and Doctor R. Crants III also were investors. *Siddle v. Crants*, Nos. 3:09-cv-00175, 3:09-cv-01137, 2013 WL 1245678, at *1 (M.D. Tenn., Nashville Div., March 26, 2013). After acquiring an ownership interest in the company, the Siddles came to suspect the Crantses of "operat[ing] [the company] in a manner that cheated the Siddles in favor of certain third-party companies in which [the Crantses] had a controlling interest." *Id.* In 2005 and 2006, the Siddles hired a "major law firm," Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, to investigate their claims of wrongdoing, and "[a]fter that investigation, the Siddles executed two broad

binding releases *** that, in combination, released various entities, including [the Crantses], from any potential liability for the claimed wrongdoing." *Id.* One of these releases, the release dated April 6, 2006, contained a forum selection clause, which obligated the parties to file any litigation in Nashville, Tennessee, and, crucially, also provided as follows: " '[i]n the event any action, suit, or other proceeding is instituted concerning or arising out of this Agreement, the prevailing party shall recover all of such party's costs and attorney's fees incurred in such action, suit, or other proceeding ***.' " *Id.* at *2.

¶ 15 In September 2008, despite the forum selection clause, the Siddles, represented by Rex Carr and Bruce A. Carr, sued the Crantses in the Southern District of Illinois, raising a variety of legal theories, including fraud and racketeering, in connection with the operation of Homeland Security Company. The Southern District found the forum selection clause to be enforceable and, without addressing the merits, transferred the case to the Middle District of Tennessee, Nashville Division. *Id.*

¶ 16 In May 2009, just two weeks after this transfer to Tennessee, the Siddles, represented by Bruce A. Carr, filed suit again in the Southern District of Illinois, this time suing eight companies, which, they alleged, had conspired with " 'non-party conspirators,' " the Crantses. *Id.* at *3. In November 2009, the Southern District transferred this case as well to the Middle District of Tennessee, Nashville Division, again finding the forum selection clause to be applicable and enforceable. *Id.* at *5.

¶ 17 In the district court in Nashville, after engaging in extensive discovery, the defendants in the two cases filed a host of summary judgment motions. The district court granted the motions, finding the releases to be valid and enforceable. *Id.* at *5-7. Thus, the defendants became the prevailing parties for purposes of the release of April 6, 2006.

¶ 18 After winning their summary judgments, the defendants in both cases "filed motions that sought to recover all of their attorney's fees and expenses from the Siddles under [Federal] Rule [of Civil Procedure] 54 and/or the Siddles' attorneys under § 1927 [of title 28 of the United States Code (28 U.S.C. § 1927 (2006))]." *Id.* at *7. (Because of potential conflicts between the Siddles and the Carrs with respect to those motions, the Carrs withdrew their appearances for the Siddles, and the Siddles hired new counsel. *Id.*) The defendants sought to recover their attorney fees and expenses from the Siddles because the release of April 6, 2006 "entitl[ed] the movant[s] to the award." Fed. R. Civ. Proc. 54(d)(2)(B)(ii) (2009). The defendants sought to recover their attorney fees and expenses from Rex Carr and Bruce A. Carr because those attorneys had "multiplie[d] the proceedings *** unreasonably and vexatiously." 28 U.S.C. § 1927 (2006).

¶ 19 On March 26, 2013, the district court granted the defendants' Rule 54 motions and found that "the Siddles [were] jointly and severally liable for $2,159,738.04" in "reasonable fees and expenses." *Siddle*, 2013 WL 1245678, at *26. Pursuant to section 1927, the district court found Rex Carr jointly and severally liable with the Siddles for $31,500 in attorney fees and costs. *Id.* at *36. The court found Bruce A. Carr to be jointly and severally with the Siddles for $412,500 in attorney fees and costs. *Id.*

¶ 20 On June 22, 2012, in this federal litigation, the Siddles filed a third-party complaint against the Firm, Rex Carr, and Bruce A. Carr, accusing them of legal malpractice and seeking damages against them in the amount of $2,159,738.04, the amount of attorney fees and sanctions the district court had imposed on them pursuant to the release of April 6, 2006. There appears to be no dispute that this third-party complaint was promptly reported to plaintiff during the effective period of policy No. 111163-10 (May 23, 2012, to May 23, 2013).

¶ 21 The district court dismissed the third-party complaint without prejudice on the ground that the Siddles had not obtained permission to file it. See Fed. R. Civ. P. 14 (2009); *Siddle*, 2013 WL 1245678, at *1. Then, instead of attempting to refile their action in federal court, the Siddles filed a malpractice complaint against the Firm, Rex Carr, and Bruce A. Carr in St. Clair County, Illinois, on May 7, 2013. This is the underlying malpractice action that is at issue in this appeal, St. Clair County case No. 13-L-238. It appears to be undisputed that the filing of this complaint in St. Clair County was promptly reported to plaintiff. This claim likewise was made during the period of policy No. 111163-10.

¶ 22 The complaint in St. Clair County has three counts. Count I is directed against the firm, count II is directed at Rex Carr, and count III is directed against Bruce A. Carr. The complaint alleges that, in 2008, Rex Carr and Bruce A. Carr, as agents of the Firm, entered into an attorney-client relationship with the Siddles "for the purpose of investigating and litigating matters related to" Homeland Security Company, the Crantses, and others. The complaint accuses Rex Carr and Bruce A. Carr of "professional negligence" but does not specify what they negligently did or failed to do. The complaint merely alleges, in count I:

> "7. The Law Firm, by and through its agents and/or employees, Rex and Bruce [Carr], breached its duty to [the] Siddle[s] by failing to provide professional services to the same degree of knowledge, skill[,] and ability as an ordinarily careful attorney practicing in the United States District Court for the Southern District of Illinois, the Twentieth Judicial Circuit of Illinois[,] and/or the United States District Court of the Middle District of Tennessee, Nashville Division, would exercise under similar circumstances.

8. As a proximate result of the professional negligence of the Law Firm, [the] Siddle[s] sustained damages, including but not limited to the entry of a judgment against [the] Siddle[s], in the amount of Two Million One Hundred Fifty-Nine Thousand Seven Hundred Thirty-Eight Dollars Four Cents ($2,159,738.04)."

¶ 23 Likewise, count II merely alleges:

"6. Rex [Carr] breached his duty to [the] Siddle[s] by failing to provide professional services to the same degree of knowledge, skill[,] and ability as an ordinarily careful attorney practicing in the United States District Court for the Southern District of Illinois, the Twentieth Judicial Circuit of Illinois[,] and/or the United States District Court of the Middle District of Tennessee, Nashville Division, would exercise under similar circumstances.

7. As a proximate result of the professional negligence of Rex [Carr], [the] Siddle[s] sustained damages, including but not limited to the entry of a judgment against [the] Siddle[s], in the amount of Two Million One Hundred Fifty-Nine Thousand Seven Hundred Thirty-Eight Dollars Four Cents ($2,159,738.04)."

¶ 24 Paragraphs 6 and 7 of count III are identical to paragraphs 6 and 7 of count II except that they substitute "Bruce [Carr]" for "Rex [Carr]."

¶ 25 II. ANALYSIS

¶ 26 A. Is Plaintiff Entitled to a Rescission of the Policies?

¶ 27 It appears that policy No. 111163-10 was the policy in force when the Siddles made their claim against the Firm, Rex Carr, and Bruce A. Carr. (For short, let us call it "policy

No. 10.") Plaintiff, however, seeks to rescind not only that policy but *all* the policies it issued to the firm after April 28, 2008, namely, policy No. 111163-6 (issued on May 23, 2008), policy No. 111163-7 (issued on May 23, 2009), policy No. 111163-8 (issued on May 23, 2010), policy No. 111163-9 (issued on May 23, 2011), policy No. 111163-10 (issued on May 23, 2012), and policy No. 111163-11 (issued on May 23, 2013). Plaintiff reasons that, in applications for policies preceding policy No. 10, beginning with the application of April 28, 2008, which was for policy No. 8, Rex Carr made material misrepresentations—for example, he failed to disclose the involuntary dismissal of the Martinez case, in May 2007, because of the nonpayment of sanctions—and if he had been honest and forthright in those earlier applications, plaintiff would have shunned the firm as an applicant (or reapplicant) and would not be the Firm's insurer now, when the Firm has been sued by the Siddles.

¶ 28 The trouble with this reasoning is that, in the eyes of the law, each renewal of an insurance policy results in a new contract, a new policy (*Dungey v. Haines & Britton, Ltd.*, 155 Ill. 2d 329, 334 (1993); *Doe v. Illinois State Medical Inter-Insurance Exchange*, 234 Ill. App. 3d 129, 137-38 (1992); *Eipert v. State Farm Mutual Automobile Insurance Co.*, 189 Ill. App. 3d 630, 637 (1989)), and section 154 of the Illinois Insurance Code (215 ILCS 5/154 (West 2012)) provides: "No misrepresentation or false warranty made by the insured or in his behalf in the negotiation for a policy of insurance, or breach of a condition of such policy[,] shall defeat or avoid the policy or prevent its attaching unless such misrepresentation, false warranty[,] or condition shall have been stated in the policy or endorsement or rider attached thereto, or in the written application therefor." Thus, if, to induce the insurer to issue a policy, a proposed insured makes a material misrepresentation to the insurer, that misrepresentation will defeat or avoid the

policy only if the misrepresentation is stated in the policy or in a written application for *that* policy ("the written application therefor"). *Id.*

¶ 29 It follows that if policy No. 10 is to be rescinded because of a misrepresentation in an application, the misrepresentation has to be in the application for that particular policy, policy No. 10; misrepresentations in applications for other policies are irrelevant. See *id.*; *Illinois State Bar Ass'n Mutual Insurance Co. v. Brooks, Adams & Tarulis*, 2014 IL App (1st) 132608, ¶¶ 22-23. Plaintiff criticizes this requirement as unfair and against sound public policy, but section 154 says what it says, and we are powerless to rewrite it. See *Kozak v. Retirement Board of the Firemen's Annuity & Benefit Fund of Chicago*, 95 Ill. 2d 211, 220 (1983); *Brooks*, 2014 IL App (1st) 132608, ¶ 23.

¶ 30 We limit our inquiry, then, to the application for policy No. 10, the application that Rex Carr signed on April 4, 2012. See 215 ILCS 5/154 (West 2012). In its brief, plaintiff points out two answers that Rex Carr gave in that application. He answered no to the following two questions:

> "14. During the past 12 months has any claim been made against: Applicant or a predecessor firm, any current member of Applicant or a predecessor firm, or, to your knowledge, any former member of Applicant or a predecessor firm which has not been previously reported in writing to [plaintiff] as a claim? If yes, identify the number of claims.
>
> ('Predecessor Firm' in this application means any law firm or professional legal corporation of which the majority of lawyers are now affiliated with the Applicant.)

15. During the past 12 months has Applicant or any Applicant member become aware of any circumstance or incident that may result in a claim or suit? If yes, identify the number of circumstances or incidents."

¶ 31 The phrase "[d]uring the past 12 months" means the period of April 4, 2011, to April 4, 2012 (since Rex Carr signed the application on April 4, 2012). Therefore, when evaluating plaintiff's claim for rescission, we ask the following questions. During the period of April 4, 2011, to April 4, 2012, what claim was made against the Firm that was not reported to plaintiff? Alternatively, of what unreported circumstance or incident did Rex Carr "become aware," during that period, that might have resulted in a claim or suit (keeping in mind that "becom[ing] aware" means receiving new information during that period, information he did not have before)? The answers to these questions should be front and center in plaintiff's argument for rescission, but they are not. Instead, plaintiff mounts an attack on *Brooks*, characterizing its discussion of section 154 as *dicta* (actually, alternative bases for a decision are judicial *dicta*, as opposed to *obiter dicta*, and, as such, they are binding precedent (*Bernabei v. County of La Salle*, 258 Ill. App. 3d 799, 801 (1994)). Absent any evidence that Rex Carr's answer to question No. 14 or 15 in his application of April 4, 2012, was false, defendants were entitled to a judgment as a matter of law that the policy to which that application corresponded, policy No. 10, was *not* defeated or avoided on the ground of misrepresentation. See 735 ILCS 5/2-1005(c) (West 2016); 215 ILCS 5/154 (West 2012).

¶ 32 B. Is There a Claim for "Damages" Within the Meaning of the Policy?

¶ 33 In the complaint they filed in St. Clair County, the Siddles allege that Rex Carr and Bruce A. Carr, as agents of the Firm, represented the Siddles in litigation regarding

Homeland Security Company; that the Carrs, in doing so, failed to provide professional services at the level of knowledge, skill, and ability that an ordinarily careful attorney would have provided under the circumstances; and that, "[a]s a proximate result of [the Carrs'] professional negligence," the Siddles "sustained damages, including but not limited to the entry of a judgment against [them] in the amount of [$2,159,738.04]."

¶ 34 Plaintiff argues that when one looks beyond that complaint and discovers specifically what the $2,159,738.04 is for, there actually is no coverage, because there are no "damages" within the meaning of the policy. Is this reliance on external evidence permissible? Ordinarily, in a declaratory judgment action on an insurer's duty to defend the insured, courts observe the eight-corners rule, staying within the four corners of the underlying complaint and the four corners of the insurance policy. *Pekin Insurance Co. v. St. Paul Lutheran Church*, 2016 IL App (4th) 150966, ¶ 63. But there is an exception to the eight-corners rule: in deciding whether the insurer is contractually obligated to defend the insured, courts may consider extrinsic evidence (factual matters outside the underlying complaint and the insurance policy) provided that consideration of the extrinsic evidence would not hinder the underlying plaintiff from pursuing any theory of liability. *Id.* ¶ 64. In other words, "the eight-corners rule bars extrinsic evidence only if, as a result of the proposed declaratory judgment, the plaintiff in the underlying lawsuit could be hampered by collateral estoppel." *Id.* We do not see how the Siddles could be hampered, in their underlying malpractice lawsuit, by a determination of the nature of their damages. Therefore, the eight-corners rule allows plaintiff, the insurer, to present extrinsic evidence of what, specifically, the judgment against the Siddles in the amount of the $2,159,738.04 was for. See *id.*

¶ 35 That question is easily answered from the decision the Middle District of Tennessee issued on March 26, 2013. The district court noted that, on April 6, 2006, the Siddles signed a release, in which they agreed that, " '[i]n the event any action, suit, or other proceeding [was] instituted concerning or arising out of this Agreement, the prevailing party [would] recover all of such party's costs and attorney's fees incurred in such action, suit, or other proceeding.' " *Siddle*, 2013 WL 1245678, at *2. As the prevailing parties in the federal litigation, the defendants filed motions pursuant to Federal Rule of Civil Procedure 54(d) (2009), in which they requested an award of attorney fees and costs, to which they were contractually entitled under the release. *Id.* at *1. The district court granted their motions, holding that "the Siddles [were] jointly and severally liable for $2,159,738.04" in attorney fees and costs. *Id.* at *26.

¶ 36 The malpractice insurance covers only claims for "**DAMAGES**," defined to exclude legal fees, costs, or expenses incurred by the claimant. Plaintiff argues that because the action in the St. Clair County complaint does not seek "damages" as the policy defines that term, plaintiff has no duty to defend the Carr defendants against that action. The policy provides:

> "With respect to the Insurance afforded by this Policy, the **COMPANY** has the right and duty to defend any suit or arbitration proceeding against the **INSURED** that seeks **DAMAGES** arising out of a **WRONGFUL ACT** even if any of the allegations of the suit or arbitration proceeding are groundless, false or fraudulent."

The policy further provides:

> "The **INSURED** agrees with the **COMPANY** that **DAMAGES** do not include:
>
> * * *

> 4. legal fees, costs or expenses paid or incurred by the claimant, or retained or possessed by the **INSURED** whether claimed by way of restitution of specific funds, forfeiture, financial loss or otherwise, and injuries which are, in whole or in part, a consequence of those fees ***."

"Claimant" clearly means someone who makes a claim against the insured, for, elsewhere in the policy, the insured agrees to give timely written notice of the claim to the insurer, and this notice must include, among other information, "the identity of anticipated or possible *claimants*." (Emphasis added.)

¶ 37 The $2,159,738.04 that the claimants, the Siddles, seek to recover in the St. Clair County circuit court consists entirely of legal fees, costs, and expenses they incurred, and plaintiff has no duty to defend the insured against a claim for legal fees, costs, and expenses, because such a claim is not a claim for "damages" within the meaning of the policy.

¶ 38 But it is not quite so simple and clear-cut as that. The way the complaint is worded, the $2,159,738.04 is not necessarily the only damages the Siddles seek. They plead that they "sustained damages, including *but not limited* to the entry of a judgment against [them] in the amount of [$2,159,738.04]." (Emphasis added.) Unless it is clear that the complaint fails to state any facts that are within, or potentially within, the coverage of the policy, the insurer has a duty to defend the insured. *Employers Insurance of Wausau v. Ehlco Liquidating Trust*, 186 Ill. 2d 127, 153 (1999). Because the allegation of damages from the Carrs' alleged professional negligence is open-ended and not limited to the $2,159,738.04 in legal fees, costs, and expenses, we resolve the doubt in favor of the insured. See *id.* It is unclear that the complaint in St. Clair County fails to state facts that are potentially within the coverage of policy No. 10, and therefore, plaintiff has a duty to defend its insured against that complaint. See *id.*

¶ 39 C. Did the Insured Have Knowledge of the Claim Before the Effective Date of the Policy?

¶ 40 One of the conditions of coverage is that "[a]s of the effective date of [the] Policy, the **INSURED** had no knowledge of the **CLAIM**." The policy in turn defines a "**CLAIM**" to include "an incident or circumstance of which the **INSURED** has knowledge that may result in a demand against the **INSURED** that seeks **DAMAGES** arising out of a **WRONGFUL ACT**."

¶ 41 Before May 23, 2012, which was the effective date of policy No. 10, Rex Carr, Bruce A. Carr, or both of them surely had knowledge that the district court in Nashville had granted the defendants' motions for summary judgment. The district court granted the defendants' motions for summary judgment in January and June 2010. *Siddle*, 2013 WL 1245678, at *5, 7. So, as early as the first half of 2010, it was evident that, under the release of April 6, 2006, the Siddles faced potential liability for a substantial amount of attorney fees and costs. Plaintiff's argument is essentially this. As early as the first half of 2010, common sense would have alerted the Carrs to the prospect of having very displeased clients once these attorney fees and costs were eventually assessed against them—and surely there would be such an assessment pursuant to the release. If only because of the number of defendants, the total amount of the assessment was bound to be shockingly large. A very displeased, financially wounded client is a client who is apt to find fault, who is apt to turn on the attorney and sue for malpractice. Thus, plaintiff argues, the granting of summary judgment in the defendants' favor in *Siddle v. Crants* was a "**CLAIM**" of which the Carrs had knowledge before the effective date of policy No. 10 (May 23, 2012), and it follows that this claim is not covered.

¶ 42 Were the summary judgments indeed "incident[s] or circumstance[s] of which the **INSURED** ha[d] knowledge that [might] result in a demand against the **INSURED** that [sought]

DAMAGES arising out of a **WRONGFUL ACT**"? It depends on whether the contractual phrase "that may result in a demand" contemplates a subjective standard or an objective standard. Obviously, the phrase "the **INSURED** has knowledge" contemplates a subjective standard, but as to whether the "incident or circumstance" "may result in a demand," is the test the insured's subjective knowledge, or is the test objective: what the insured reasonably should have known? If the test were subjective all the way through, the provision would be interpreted as meaning that (1) the insured had knowledge of the incident or circumstance and (2) the insured had knowledge that the incident or circumstance might result in a claim. That would be a subjective standard for both (1) and (2). (Theoretically, almost anything an attorney does may result in a claim, but, giving the insurance contract "a practical, reasonable, and fair construction," we understand the contract as referring to a substantial risk of a claim, not a claim that would take an insured completely by surprise. *Perry v. Fidelity National Title Insurance Co.*, 2015 IL App (2d) 150168, ¶ 11. Otherwise, the "**Prior Acts Limitation**," or "Retroactive Date" of coverage, would have little meaning.) Alternatively, the provision could be interpreted as meaning that (1) the insured had knowledge of the incident or circumstance and (2) a reasonable insured would have perceived that the incident or circumstance might result in a demand. That would be a subjective test for (1) but an objective test for (2).

¶ 43 If an insurance policy can be reasonably interpreted in either of two ways, we should choose the interpretation that favors coverage. *Tufano*, 2016 IL App (1st) 151196, ¶ 20. In this context, that interpretation would be the subjective test for (2). An incident or circumstance qualifies as a claim only if the insured has knowledge of the incident or circumstance and *also* has knowledge that the incident or circumstance is apt to result in a malpractice claim.

¶ 44 We are aware of no evidence that Rex Carr, Bruce A. Carr, or anyone else at the Firm *knew*, on the effective date of policy No. 10 (May 23, 2012), that the summary judgments in the federal defendants' favor might induce the Siddles to make a malpractice claim. After all, the Siddles presumably knew of the attorney fee provision in the release, which they signed, and it was inevitable and expected that either the Siddles or the Crantses would lose in *Siddle v. Crants*. Somebody had to win, and somebody had to lose. Losing, in itself, was not indicative of malpractice. Incurring liability for the prevailing party's attorney fees was not necessarily indicative of malpractice, either, because, under the release, the losing party was liable for the prevailing party's attorney fees, regardless of the skill and diligence with which the losing party had litigated its case. For those reasons, we see no evidence supporting a reasonable inference that, as of May 23, 2012, Rex Carr, Bruce A. Carr, or anyone else at the Firm had knowledge that the summary judgments of January and June 2010 might result in a demand against them for malpractice.

¶ 45 III. CONCLUSION

¶ 46 For the foregoing reasons, we affirm the trial court's judgment.

¶ 47 Affirmed.