STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1153

Loyal H. "Bud" Chapman, d/b/a Chapman Studios,
Appellant,

vs.

Minnesota Lawyers Mutual Insurance Company,
Respondent.

Filed June 30, 2009
Affirmed
Shumaker, Judge

Hennepin County District Court
File No. 27-CV-07-1255

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Considered and decided by Shumaker, Presiding Judge; Halbrooks, Judge; and Crippen, Judge.[*]

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

SHUMAKER, Judge

We are asked in this appeal to decide whether the district court erred in granting summary judgment to respondent insurer after ruling that the insured attorney had made a material misrepresentation on his application for renewal of his malpractice insurance, which thereby voided insurance coverage. We hold that the district court did not err in its ruling, and we affirm.

FACTS

This legal-malpractice insurance coverage case began when a client sued his lawyer, claiming that the lawyer negligently failed to start a lawsuit on the client's behalf before the statute of limitations barred the suit. The lawyer tendered the defense to the client's action to his malpractice insurer. The insurer denied that the claim was covered under the lawyer's policy and refused the tender.

The lawyer then settled the claim under a *Miller-Shugart* arrangement by paying some money, stipulating to the entry of a money judgment against him for an additional sum, and assigning to the client any claim the lawyer had against his malpractice insurer. Upon the assignment, the client sued the insurer.

Both parties moved for summary judgment. The district court ruled, among other things, that the lawyer's knowledge of and failure to disclose the client's claim against him when he renewed his insurance policy voided coverage. The court then granted summary judgment to the insurer and dismissed the client's action. The correctness of the district court's ruling as to coverage is the dispositive issue on appeal.

Certain material facts are not in dispute. Those facts show that appellant Loyal H. "Bud" Chapman is an artist who created a series of paintings with a golf theme titled "Infamous Golf Holes" that depicted fantasy golf holes in various striking locales, such as the Grand Canyon.

On July 19, 1993, Chapman's son sent to the Cadillac automobile company a proposal for the use of the paintings in the company's advertising. Cadillac replied that it was not interested. In 1994, Chapman saw a television commercial by Cadillac showing a famous golfer playing two fantasy golf holes similar to those in Chapman's copyrighted paintings.

Believing that Cadillac had infringed his copyright, Chapman contacted his longtime friend, attorney Reed Mackenzie. On June 26, 1994, Mackenzie wrote to Cadillac on Chapman's behalf and accused the company of infringing Chapman's copyright. Cadillac did not respond.

Having heard nothing further about his claim, Chapman contacted Mackenzie again in May 1995. Mackenzie stated that he had heard nothing from Cadillac but that he would write another letter. He did so on May 26, 1995. Cadillac did not reply. Later in 1995, Chapman contacted Mackenzie to inquire about the matter, only to be told that Mackenzie had heard nothing.

Periodically during 1996 and 1997, Chapman claims that he talked to Mackenzie about the Cadillac claim and Mackenzie stated that he would start a lawsuit against Cadillac. Mackenzie did not start the lawsuit.

In February 1998, Chapman received a letter from a California lawyer who represented a client in a similar copyright-infringement action against Cadillac. The lawyer stated a concern that Chapman's claim was barred by the three-year statute of limitations. Chapman sent a copy of the letter to Mackenzie, who told Chapman that there was plenty of time to bring a lawsuit against Cadillac. Chapman continued to inquire of Mackenzie and contacted him again on November 3, 1998, and August 2, 1999, about the matter. On August 27, 1999, Mackenzie acknowledged to Chapman that he had never brought a lawsuit against Cadillac and told him that "if you think you have a claim, it's against me." Chapman remembered saying to Mackenzie, "Well, you know, you've got an insurance company obviously, so maybe we can get something there." According to Chapman, Mackenzie said he would contact his malpractice insurer.

Mackenzie left a message for Chapman on October 12, 1999, that he would be meeting with the insurance company. Three days later, Mackenzie told Chapman that the insurer wanted sales information about the golf paintings. In a letter dated November 1, 1999, Chapman wrote to Mackenzie about sales figures:

> This information is being forwarded to you per your request from your insurance company regarding our claim. Since the inception of the "Infamous Golf Holes" in 1975, Chapman Studios has had gross sales of approximately $3,000,000 related to these images.
>
> This figure relates only to the "Infamous Golf Holes" . . . . I am not sure how this relates to our claim . . . .

In later tape-recorded conversations with Mackenzie, Chapman asked about the insurance claim and wanted to know if there was a claim number. Although Mackenzie assured Chapman that the insurance company had the letter regarding sales figures and

that the company would be contacting Chapman, as of December 28, 1999, Mackenzie had not notified his insurer about Chapman's claim and had not sent any information about it to his insurer.

During his dealings with Chapman regarding the Cadillac claim, Mackenzie was insured under a professional liability policy written by respondent Minnesota Lawyers Mutual Insurance Company (MLM). This was a single-year claims-made policy that ran from December 28, 1998, until December 28, 1999. Although the policy needed to be renewed each year, Mackenzie had previously enrolled in MLM's "Member Advantage Plan" that kept the annual premium level for three years.

On December 8, 1999, MLM sent to Mackenzie a "Request to Issue" form, which was in effect an application for the renewal of the coverage and a continuation of the Member Advantage Plan. The form contained a certification about claims: "By accepting this quotation, you are certifying that there have been no significant changes in your practice . . . [and] further certify that you are not aware of any claims or circumstances that could result in claims or disciplinary actions that have not been reported to MLM." On December 27, 1999, Mackenzie signed the form on behalf of his law firm and returned it to MLM. MLM renewed Mackenzie's coverage for the 1999-2000 policy year.

The 1999-2000 insurance policy incorporates this certification by reference and describes the coverage afforded under the policy:

> This policy affords coverage for CLAIMS first reported to US during the policy period if the act, error or omission occurred during the POLICY PERIOD. This policy also covers

> CLAIMS resulting from any act, error or omission which occurred prior to the POLICY PERIOD and on or after the PRIOR ACTS RETROACTIVE date if the INSURED had no knowledge of facts which could reasonably support a CLAIM after the effective date of this policy.

Mackenzie did not inform MLM of Chapman's claim until late February or early March, 2000. Treating as a material misrepresentation Mackenzie's certification that he was aware of neither claims against him nor circumstances that could result in claims, MLM notified Mackenzie that, since he knew of the Chapman claim by the fall of 1999, coverage for that claim had been voided.

The district court was persuaded by MLM's argument and dismissed Chapman's claim with prejudice. Asserting as error the court's ruling as to coverage, as well as other non-dispositive rulings, Chapman appealed.

D E C I S I O N

On the coverage issue, Chapman first argues that the district court erred when it ruled as a matter of law that Mackenzie knew that Chapman would make a claim against him because that determination was a factual finding, something inappropriate on summary judgment. "A moving party is entitled to summary judgment when there are no facts in the record giving rise to a genuine issue for trial as to the existence of an essential element of the nonmoving party's case" and a party is entitled to judgment as a matter of law. *Nicollet Restoration, Inc. v. City of St. Paul*, 533 N.W.2d 845, 847 (Minn. 1995) (citation omitted). On summary judgment, the district court is not permitted to resolve factual disputes but is limited to determining whether a genuine and material fact issue exists. *Albright v. Henry*, 285 Minn. 452, 464, 174 N.W.2d 106, 113 (1970). Nor is the

court permitted to weigh the evidence or judge credibility. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997) (regarding weighing evidence); *Forsblad v. Jepson*, 292 Minn. 458, 459-60, 195 N.W.2d 429, 430 (1972) (regarding credibility).

MLM's policy defined "claim" as a "demand or suit received by the INSURED for money or services. It also means any incident which could reasonably support such a demand or any communication or notice to the INSURED of a potential CLAIM." By the plain language of the policy, five types of events fall within the ambit of a "claim" against the insured:

1. A "demand" for money or services.
2. A lawsuit seeking money or services.
3. An "incident" that could reasonably support a demand.
4. A "communication" of a potential claim.
5. A "notice" of a potential claim.

Chapman argues that the district court should have concluded that "the communications from a disgruntled client, such as this, do not rise to the level of a 'claim' that needs to be reported to a legal malpractice carrier, in order to ensure continuing coverage, in case a claim is ultimately made." He notes that Mackenzie testified in a deposition that he did not think Chapman would make a claim against him, that he was not expecting a claim, and that he thought that after Chapman consulted a lawyer there would be no claim. Chapman, too, in his affidavit indicates that he was merely disappointed in Mackenzie but that he never demanded money from him and never spoke of the possibility of suing him. Although at one point in his conversation with Mackenzie Chapman mentioned the sum of $200,000, he avers that they were simply discussing sales figures and the possible value of a claim against Cadillac.

Chapman denies that he had any intention of asserting a claim against Mackenzie until his son urged him to consult another lawyer. He did so, but this was well after the date of Mackenzie's insurance-renewal certification.

Chapman argues that a subjective standard as to what Mackenzie knew should be applied and that summary judgment was inappropriate because questions of intent are usually issues for a jury to resolve.

Although the district court is not permitted to decide issues of credibility at the summary-judgment stage of litigation, the controlling rule requires the court to determine whether there is a "*genuine* issue as to any material fact." Minn. R. Civ. P. 56.03 (emphasis added). An issue is not genuine if it is speculative, theoretical, frivolous, or sham. *Dyrdal v. Golden Nuggets, Inc.*, 689 N.W.2d 779, 783 (Minn. 2004); *A & J Builders Inc. v. Harms*, 288 Minn. 124, 132-33, 179 N.W.2d 98, 103 (1970). An issue can be deemed a sham, depending on the circumstances, when a party or a critical witness gives sworn testimony as to a material fact and then, when faced with a summary-judgment motion, takes a contradictory position in an affidavit or by some other means. *Essick v. Yellow Freight Sys., Inc.*, 965 F.2d 334, 335 (7th Cir. 1992); *Camfield Tires, Inc. v. Michelin Tire Corp.*, 719 F.2d 1361, 1365-66 (8th Cir. 1983). The moving party has the burden of showing the lack of genuineness of a material fact claimed to be genuine. *Ritter v. M.A. Mortenson Co.*, 352 N.W.2d 110, 112 (Minn. App. 1984). The nonmoving party is entitled to the benefit of any doubt about the genuineness of a material fact. *Rathbun v. W. T. Grant Co.*, 300 Minn. 223, 230, 219 N.W.2d. 641, 646 (1974).

The district court ruled that Chapman made a $200,000 demand of Mackenzie and that a "demand" is a "claim" under the MLM policy. Chapman contends that the $200,000 represented a sales figure and the context of the discussion was the value of a claim against Cadillac. It is not clear and indisputable that Chapman made a $200,000 demand against Mackenzie, and thus any doubt as to the genuineness of this fact inures to Chapman's benefit. But the court also ruled that "the evidence is clear that Mackenzie subjectively knew Chapman was actively trying to get money from Mackenzie's MLM policy. Indeed, the two had specifically referred to Chapman's 'claim' in at least one discussion before Christmas 1999."

In his deposition, Mackenzie testified that in November 1998 he told Chapman: "If you think you have a claim, it's against me, because as you know, there is no lawsuit pending." Mackenzie then, or in a later conversation, told Chapman that "if he thought he had a claim, he should send me some information, and I would turn it over to my insurance carrier." Mackenzie acknowledged under oath that in November 1999 Chapman wrote to him and referenced "our claim," which, according Mackenzie, referred to Chapman's claim against him and Chapman's expectation that Mackenzie would forward information to MLM.

In his deposition, Chapman stated that he tape-recorded a telephone conversation with Mackenzie and had the recording transcribed. He admitted that the conversation focused on his claim against Mackenzie:

> Q. So at this point, when you're having this conversation, you're making a claim against Reed through his insurance company?

A. Right. You know, we're going after his insurance company.

During the conversation, Chapman and Mackenzie discussed a letter Chapman sent to Mackenzie on November 1, 1999. The telephone conversation followed that letter and, according to Chapman's sworn deposition testimony, the conversation occurred fairly soon after he sent the letter and within the month of November 1999:

Q. How long after you wrote the letter did you have the telephone call? It would be fairly soon, wouldn't it?

A. I would think so.

Q. Okay. Within the month, right?

A. I would think so.

The district court concluded that "[r]easonable minds could not disagree that in 1999, Mackenzie had knowledge of facts that could reasonably support a claim that he did not disclose to MLM in renewing his policy for 1999-2000." It is evident that, in drawing this conclusion, the court was assessing the genuineness of the fact issue Chapman posited, namely, that neither he nor Mackenzie believed that Chapman was making a claim against Mackenzie. The court determined, without characterizing it as such, that this fact issue was not genuine because the clear admissions of both Chapman and Mackenzie lead inexorably to the conclusion that both knew that Chapman was asserting a claim based on Mackenzie's failure to start a lawsuit against Cadillac before the statute of limitations expired. The district court did not err in its conclusion.

Thus, when Mackenzie renewed his professional liability insurance with MLM for 1999-2000, he misrepresented his knowledge of Chapman's claim. If that

misrepresentation was material, it rendered the policy void. Minn. Stat. § 60A.08, subd. 9 (1998). A misrepresentation is material if it is made with intent to deceive or defraud the insurer, or if it increases the insurer's risk of loss. *Id.; see Farmers State Bank of Russell v. W. Nat'l Mut. Ins. Co.*, 454 N.W.2d 651, 653 (Minn. App. 1990) (construing Minn. Stat. § 60A.08, subd. 9, to allow an insurer to avoid a policy if misrepresentations made by the insured are fraudulent or increase the risk of loss).

The professional liability policy that MLM issued from year to year for Mackenzie and his law firm was a "claims-made" policy. A claims-made policy provides insurance coverage for a claim reported during the policy period. *F.D.I.C. v. St. Paul Fire & Marine Ins. Co.*, 993 F.2d 155, 158 (8th Cir. 1993). MLM's policy for 1998-1999 provided, in part, that "[t]his policy affords coverage for CLAIMS first reported to US during the POLICY PERIOD if the act, error or omission occurred during the POLICY PERIOD." The policy also contained a provision for coverage for prior acts, errors or omissions "if the INSURED has no knowledge of facts which could reasonably support a CLAIM at the effective date of the first policy written and continuously renewed by US."[1]

[1] Because the district court did not err in concluding that the language "*effective date of this policy*" found in Mackenzie's 1999-2000 policy was void for failure to give Mackenzie prior notice of this change, we apply the language from Mackenzie's 1998-1999 policy.

Chapman would have us read this "effective date" language to provide coverage even if Mackenzie did not report the claim during the policy period. Such a reading would likely negate the entire nature of claims-made insurance. Moreover, in a previous decision in which we examined the identical language in a MLM claims-made policy, we rejected the interpretation Chapman now urges in favor of holding that "the 'policy period' is from the effective date to the expiration date, and the 'effective date' is the renewal date, not the date of the first policy." *Buller v. Minn. Lawyers Mut.*, 648 N.W.2d 704, 710 (Minn. App. 2002).

The question of whether an insured's misrepresentation increased the insurer's risk of loss, and thus would be deemed material, is one to be determined by the trier of fact, unless the evidence is conclusive on the point. *Id.* at 711. The evidence here is conclusive that Mackenzie knew of Chapman's claim during the 1998-1999 policy period but failed to report that claim to MLM before his claims-made insurance coverage had expired. The evidence is conclusive that Mackenzie misrepresented his knowledge of Chapman's claim when he renewed his insurance for 1999-2000. The evidence is conclusive that he then reported Chapman's claim during the renewal period of 1999-2000, thereby apparently triggering coverage of that claim. The increase in MLM's risk of loss, and hence the materiality of Mackenzie's misrepresentation, is starkly obvious: the risk of loss traveled from zero—because there was no coverage—to possibly full liability for indemnification of the settlement payment and judgment. The district court did not err in ruling that Mackenzie's material misrepresentation voided coverage under his professional liability insurance policy.

Because the coverage issue is fully dispositive of the appeal, we need not reach any other issue raised.

Affirmed.