IN THE SUPREME COURT OF THE STATE OF MONTANA
DA 20-0238

ALPS PROPERTY & CASUALTY INSURANCE COMPANY, d/b/a Attorneys Liability Protection Society, A Risk Retention Group,

Plaintiff/Appellee,

vs.

KELLER, REYNOLDS, DRAKE, JOHNSON & GILLESPIE, P.C., RICHARD GILLESPIE, BRYAN SANDROCK, GG&ME, LLC, a Montana Limited Liability Company, and DRAES, INC., a Montana Close Corporation, CHARLES JOSEPH SIEFERT and THOMAS Q. JOHNSON,

Defendants/Appellants.

On Appeal from Montana First Judicial District Court, Lewis and Clark County
Cause No. ADV-2016-463, Hon. Mike Menahan, District Court Judge

---

APPELLANTS BRYAN SANDROCK, GG&ME, LLC'S AND DRAES, INC. REPLY BRIEF

APPEARANCES:

John C. Doubek
DOUBEK, PYFER & STORRAR, PC
307 North Jackson
PO Box 236
Helena, MT 59624
(406) 442-7830
john@lawyerinmontana.com
Attorney for Appellants Sandrock, GG&ME, LLC and Draes, Inc.

Carey E. Matovich
Katherine S. Huso
2812 1st Ave. N., Suite 225
PO Box 1098
Billings, MT 59101
(406 252-5500
cmatovich@mkhattorneys.com
khuso@mkhattorneys.com
Attorney for Richard E. Gillespie

Patrick M. Sullivan
1341 Harrison Ave.
Butte, MT 59701
(406) 497-1200
pss@prrlaw.com
Attorney for Keller, Reynolds, Drake, Johnson & Gillespie, PC, Charles Siefert and Thomas Q. Johnson

Bradley J. Luck
Emma L. Mediak
Garlington, Lohn & Robinson, PLLP
350 Ryman Street • P. O. Box 7909
Missoula, MT 59807-7909
Telephone (406) 523-2500
bjluck@garlington.com
elmediak@garlington.com

Martha Sheehy
PO Box 584
Billings, MT 59103
(4066) 252-0584
msheehy@sheehylawfirm.com
Attorney for ALPS Property & Casualty Insurance Company

Scott G. Gratton, Esq.
BROWN LAW FIRM, PC
269 W. Front Street, Suite A
Missoula, MT 596802
(406) 830-3248
sgratton@brownfirm.com
Attorney for ALPS Property & Casualty Insurance Company

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Respectfully, Appellants Sandrock, GG&ME, LLC and Draes, Inc. (hereafter Sandrock) file this reply brief to ALPS brief and the amicus brief from American Property Casualty Insurance Association.

All parties have now filed lengthy briefs with dozens and dozens of legal citations. Accordingly, Sandrock will keep this brief brief.

Considering first some of ALPS statements in its brief:

1. "It is axiomatic that insurance does not cover known losses." Citing *Sapp v. Paul Revere Life Ins. Co.*, 1994 WL 259328, *3, Fed. App. 28 F.3d 108 (9th Cir. 1994)(unpublished). ALPS brief, p. 13. Here, there was no known loss when the law firm and Gillespie submitted their insurance application.
2. "Based on the three unambiguous policy provisions, the District Court correctly held that no coverage existed under the ALPS policy for the Sandrock claim." ALPS brief, p. 14.

   The three policy provisions relied on by ALPS are:

   A. Section 1. (ALPS) agrees to pay on behalf of the Insured all sums (in excess of the Deductible amount) that the Insured becomes legally obligated to pay as damages, arising from or in connection with a claim first made against the Insured and first reported to the Company during the policy period, provided that: "1.1.2 at the

Effective Date of the Policy, no Insured knew or reasonably should have known or foreseen that the act, error, omission or Personal Injury might be the basis of a Claim…" ALPs brief, p. 18.

B. Section 3.1.5 – The policy excludes from coverage "any act, error, omission or personal injury that occurred prior to the Effective Date of this Policy if . . . prior to the Effective Date of the Policy, any Insured gave or should have given, to any insurer, notice of a Claim of potential Claim . . ."

C. Innocent – Insured Coverage. 4.3.1 – Whenever a Claim otherwise covered by this Policy would be excluded based on Section 3.1.1, coverage will be afforded to any individual Insured who did not personally commit, or personally participate in committing, any such act, error or omission, or in causing such Personal Injury, and who did not remain passive after learning of the act, error, omission, or Personal Injury, provided that each such individual Insured shall have immediately notified the Company and complied with all obligations under this Policy once said Insured obtained knowledge of the act, error, omission or Personal Injury. Nothing in this section shall be interpreted to afford any coverage to a Named Insured that is an entity rather than an individual.

Here is our response to these three provisions:

First, regarding the claims-made provision (§1.1.2), there is no proof Gillespie, or the firm knew when they applied for ALPS insurance that there was some act or omission which might reasonably be the basis of a claim. ALPS is playing semantics here. Clearly, if something is unlikely to happen that means it is not reasonably expected to happen. The uncontested and unrefuted evidence showed that neither Gillespie nor the Firm nor for that matter the district judge who said in Court that defaults entered by the clerks of court are disfavored and are routinely dismissed/denied, reasonably expected a claim from what had occurred. ALPS wrote its policy. It chose the words of the policy. It chose the "reasonable" belief language. It could have chosen other language. It could have precluded pre-existing occurrences, but it did not.

Second, the prior acts provision exclusion in § 3.1.5 similarly requires knowledge of the existence of a claim. That was not present here. No one on the attorney side felt there was any need to report anything. There is undeniably a genuine issue of material fact whether Gillespie or the Firm knew of any claim. Actually, it is sheer speculation for ALPS to imply there was knowledge of a reportable claim and thus such issue should be resolved in favor of Gillespie and the Firm.

And third, regarding the Innocent Insured coverage in § 4.3.1, somehow the argument was injected by ALPS and erroneously adopted by the lower court that such coverage is only applicable if the offending attorney who would be otherwise insured under the policy has committed deliberate misconduct. There is however nothing in the policy which says an innocent insured is an attorney who must have a partner or associate culpable of "any dishonest, fraudulent, criminal, malicious, or intentionally wrongful or harmful act, error or omission . . ." An innocent attorney can be an insured attorney who simply does not know of a negligent act by another attorney in the Firm. Here, once the Firm knew that Gillespie had committed legal malpractice, the Firm gave notice to ALPS which is their duty under § 4.3.1 of the Policy.

The Firm and its members Seifert and Johnson have asserted they did not know of any malpractice by Gillespie until after the policy went into effect. This is important because under a claims-made policy, "coverage under a claims-made policy is 'determined by claims made within the policy period, regardless of when the events that caused the claim to materialize first occurred' . . . 'notice is the event that actually triggers coverage.'" As cited in the Amicus Brief at p. 6 citing to *Banjosa Hosp., LLC v. Hiscox, Inc*., No. CV 17-152-BLG-TJC, 2018 U.S. Dist. LEXIS 165537 (D. Mont. Sept. 26, 2018) (internal citation omitted)). Here, ALPS does not dispute that the claim under the policy was made within the policy period.

Rather, ALPS denies coverage under its exclusionary provisions of the policy, but at the same time acknowledges that the insurance policy is otherwise in effect and enforceable for other claims. ALPS brief p. 41 (The risk of no coverage under the Policy does not exist because "ALPS asserts that the single claim asserted by Sandrock against the Firm and its members falls outside the scope of coverage because an attorney in the Firm knew that the default entered against Sandrock in September 2015 might give rise to a claim").

In *ALPS Prop. & Cas. Ins. Co. v. McLean & McLean, PLLP,* 2018 MT 190, 392 Mont. 236, 425 P.3d 651 (Dissent), this Court recognized that justice is not served when the premiums for a policy are paid and coverage is presumably in force, only to have the rug pulled out from under the other attorneys in the firm when a claim is made, and when those other attorneys had no knowledge of the dishonest acts of their partner or employee. The same is true here, ALPS admits that the policy is otherwise, as a whole, in effect and enforceable and coverage would not otherwise be denied for other claims. ALPS brief p. 41 (arguing that unlike *McLean,* here, the Policy as a whole was not rescinded). This is critical to this case because ALPS entire argument is premised on Gillespie's failures, not the Firms and not Seifert and Johnson's. That is because the claims against the Firm and Johnson and Seifert are not the same as the claims against Gillespie, for which ALPS denies coverage for failure to disclose. Rather, these other claims are for the

failure to monitor and supervise, which through ALPS own admissions would be covered under the policy as another claim.

Indeed, when applying § 1.1.3 of the Policy, it is undisputed that neither Seifert nor Johnson knew, "at the Effective Date of this Policy" of any reasonable basis of a claim against them. ALPS totally fails to address this aspect, similarly ALPS admits that the Policy was not rescinded, like it was in *McLean*. Thus, given the fact that ALPS admits the policy is enforceable for other claims, they are covered under the Policy, regardless of Gillespie's own failures. This interpretation is in line with this Court's narrow interpretation of exclusions in coverage under the reasonable expectations doctrine as discussed at length in the opening Appellant briefs.

ALPS also argues that it is not denying coverage under § 3.1.1 and 4.3.1 the "innocent insureds" provisions, and therefore, the Firm and Seifert and Johnson cannot be innocent insureds. ALPS brief p. 35. Yet, at the same time ALPS admits that coverage exists in this case for any other claim but Sandrock's against Gillespie, *supra.* Therefore, coverage should be extended to the Firm, and Seifert and Johnson would qualify under these innocent insured provisions of the Policy. This is because they could still be found negligent in failing to monitor the actions of Gillespie, as recognized in Justice Rice's dissent in *McLean* at ¶ 62. This is exactly how an innocent insured provision should work. Moreover, if ALPS has

not denied coverage under the innocent insureds provision, they and the Firm, Johnson and Seifert otherwise should have coverage under the Policy, *supra.*

At page 16 of ALPS brief it asserts "the policies are "written to exclude coverage for claims the insured knew of prior to the policy." This is our point precisely. The Insureds, both Gillespie and the Firm, did not know of any prior claims. ALPS did not "unequivocally demonstrate" (ALPS brief, p. 16) anything to be entitled to exclude coverage.

At page 19 of ALPS brief it states that Gillespie attended the November 30, 2015 hearing which was "intended to assess damages and enter a judgment based on the default." This is flatly false. The November 30th hearing was to consider the notice of default previously entered by the Clerk of Court. That issue was not determined until March 2016 following argument and briefs and thereafter in April there was a hearing to assess damages and not until September 2016 was there a judgment entered based on the defaults.

Another misstatement by the lower court at page 8 of its decision and as argued by ALPS at page 21 of its brief, is the assertion that Gillespie (nothing about the Firm!) reasonably should have known that his errors "might be the basis of a malpractice claim." That, however, is not what the Policy says. The Policy speaks in terms of a prior claim not a malpractice action. And furthermore, the lower court never accounts for the unrebutted facts that Gillespie testified he did

not reasonably believe there was any basis for a prior claim and that District Judge Seeley told Mr. Gillespie at the November 30, 2015 hearing that "It is my understanding that it doesn't take much for me to be obligated to set aside the default. It seems like the Supreme Court has not been too pleased, that they want to have a hearing on the merits sort of thing." Transcript 11/30/2015, pp. 4 -5.

Intermittently, ALPS injects discussions about a 2014 discovery sanction levied against Sandrock for approximately $9,000. That money was paid and has nothing to do with the insurance applications with ALPS. It is nothing more than the proverbial "red herring."

At page 32 of its brief, ALPS suggests, in citing a New Jersey case, that Gillespie rushed to buy a claims-made policy recognizing his past errors. This is flatly absurd. If Gillespie had reasonably believed he had previously committed malpractice, he had coverage, albeit with a different carrier. Certainly, if he and/or the Firm reasonably knew of the malpractice they would have tendered it to that insurance carrier. All roads point to the conclusion Gillespie and the Firm were not reasonably aware of any prior malpractice.

At page 35, ALPS seems to suggest that this Court in *ALPS v. Mclean, et al.*, limited the innocent insured coverage to situations of deliberate misconduct by a fellow insured. This Court did not explicitly limit such coverage (It was simply part of the facts before the Court). And, no reasonable basis exists why an insured

should be protected when a partner commits a deliberate tort versus a negligent tort.

Lastly, ALPS admits at page 38 that "For coverage to apply to the Sandrock claim, "no Insured" could know of the potential for the claim prior to December 12, 2015" (the policy effective date). Here, Gillespie and the Firm have all testified they did not reasonably know of any prior claims.

With respect to the amicus brief, as that party states, it has no knowledge of the facts pertinent to this case or really of the specific insurance policy herein. The discussion of "occurrence based" and a "claims-made" policy is interesting. In this case, we have alleged that Gillespie did not prepare adequately for the default judgment hearing in April 2016 (five months after the insurance applications had been issued from ALPS). Gillespie had no experts, had not prepped Sandrock to testify and frankly performed woefully at the hearing. Such led to the terrible decision for millions of dollars and the entire loss of Sandrock's building. It was not Judge Seeley's fault, it was Gillespie's. All of that negligence occurred well into the policy period. That is when one could reasonably see the reportable acts and omissions.

Lastly, counsel for amicus admits at page 12 that some courts do rely on the innocent insured doctrine to prevent a carrier from rescinding coverage for innocent firm members.

CONCLUSION

The ALPS policy does provide coverage which addresses the harms suffered by Sandrock for the reasons provided herein.

DATED this 16th day of November, 2020.

DOUBEK, PYFER & STORRAR

By /s/ John Doubek
John Doubek
Attorney for Appellants Sandrock
and GG&ME, LLC and Draes, Inc.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(a) and (d), M. R. App. P., I certify that this brief:

1) is proportionately spaced Times New Roman text typeface of 14 points, except for footnotes which are size 12 font;
2) is double spaced (except that footnotes and quoted and indented material are single spaced);
3) has left, right, top and bottom margins of 1 inch:
4) has a word count calculated by Microsoft Word of **2194** words (excluding the Table of Contents, Table of Authorities, Certificate of Compliance and Certificate of Service).

Dated this 16th day of November, 2020.

DOUBEK, PYFER & STORRAR, PC

/s/ John Doubek
John C. Doubek
Attorney for Appellants

CERTIFICATE OF SERVICE

I, John C. Doubek, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 11-16-2020:

Martha Sheehy (Attorney)
P.O. Box 584
Billings MT 59103
Representing: ALPS Property & Casualty Insurance Company
Service Method: eService

Scott George Gratton (Attorney)
269 W. Front St, Ste A
Missoula MT 59802
Representing: ALPS Property & Casualty Insurance Company
Service Method: eService

Carey E. Matovich (Attorney)
2812 1st Ave N., Suite 225
P.O. Box 1098
Billings MT 59101
Representing: Richard E. Gillespie
Service Method: eService

Patrick M. Sullivan (Attorney)
1341 Harrison Ave
Butte MT 59701
Representing: Keller, Reynolds, Drake, Johnson & Gillespie, P.C., Charles Joseph Siefert, Thomas Q. Johnson
Service Method: eService

Bradley J. Luck (Attorney)
Garlington, Lohn & Robinson, PLLP
P.O. Box 7909
Missoula MT 59807
Representing: American Property Casualty Insurance Association
Service Method: eService

Electronically signed by Monica Bomgaars on behalf of John C. Doubek
Dated: 11-16-2020