RENDERED: APRIL 29, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000592-MR

ADA BALDWIN, ADMINISTRATRIX
OF THE ESTATE OF HATTIE MAE ROSE,
DECEASED — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE IRV MAZE, JUDGE
ACTION NO. 08-CI-013274

LAWYERS MUTUAL INSURANCE
COMPANY OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; STUMBO, JUDGE; AND LAMBERT,[1] CHIEF SENIOR JUDGE.

STUMBO, JUDGE: Ada Baldwin, Administratrix of the Estate of Hattie Mae Rose, appeals from a Summary Judgment of the Jefferson Circuit Court in favor of Lawyers Mutual Insurance Company of Kentucky ("LMICK"). LMICK filed an

[1] Chief Senior Judge Joseph E. Lambert, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580

action in Jefferson Circuit Court seeking a declaration of its limit of liability arising under a professional liability insurance policy it issued to Martha M. Eastman and Eastman Law Offices (collectively referred to as "Eastman"). Baldwin, who filed a legal malpractice action against Eastman in a separate proceeding, intervened in LMICK's action. Baldwin contends that the trial court erred in determining that there was no ambiguity in the insurance contract between LMICK and Eastman, that the court must look to when the claim first began to determine which policy provisions are to be given effect, and that LMICK's potential liability under the policy is $250,000 rather than $1,000,000. We find no error, and accordingly affirm the order on appeal.

In August 2004, attorney Eastman filed a complaint in Columbus County, North Carolina, on behalf of her client Baldwin against a nursing home called Century Care Center. In that action, Baldwin alleged that the nursing home engaged in negligence proximately resulting in the death of her mother, Hattie Mae Rose. As the matter proceeded toward a trial date, the court rendered a scheduling order providing dates when expert witnesses were to be identified to opposing counsel. Eastman failed to comply with the order, resulting in the nursing home's motion to strike Baldwin's expert witnesses.

The North Carolina trial court granted the motion on September 28, 2005, and ordered Eastman to pay costs to the nursing home in the amount of $25,907.03. The order was affirmed on appeal by the Court of Appeals of North Carolina and the Supreme Court of North Carolina. On December 18, 2006,

Eastman wrote to LMICK to enquire whether the sanctions imposed were payable under the policy, the reason for imposition of the sanctions and further advised that her client might file a malpractice claim. On January 29, 2007, the North Carolina trial court rendered a Summary Judgment in favor of the nursing home because Eastman could not move forward with her case in the absence of expert witnesses.

On December 22, 2005, and during the pendency of the North Carolina appeal, LMICK issued a professional liability insurance policy to Eastman. The policy was a "claims made" policy providing coverage for certain professional "acts, errors or omissions," which set out a $250,000 coverage limit. The policy renewed for one-year terms each succeeding December.

After the Supreme Court of North Carolina denied Eastman's petition for review, Eastman notified LMICK on August 2, 2007, of the possibility that Baldwin would prosecute a claim against her for legal malpractice. By way of a separate letter that same day, Eastman requested an increase in her policy limits from $250,000 to $1,000,000 per claim. LMICK then issued an endorsement on August 9, 2007, reflecting an increase in the policy limit to $1,000,000 per claim for any new claims made on or after July 25, 2007.

On September 9, 2007, Baldwin filed an action against Eastman in North Carolina setting forth a claim of legal malpractice arising from Eastman's failure to comply with the discovery scheduling order. LMICK provided Eastman's legal defense, and notified Eastman that the policy limit was $250,000

for the underlying claim. Eastman contended that the $1,000,000 limit which went into effect on July 25, 2007, was applicable.

The instant action arose when LMICK filed a petition in Jefferson Circuit Court (Kentucky) seeking a declaratory judgment on the issue of whether the $250,000 or $1,000,000 limit was applicable to any judgment which Baldwin might obtain against Eastman. LMICK and Baldwin each filed a motion for summary judgment. After taking proof on the motions, the Jefferson Circuit Court rendered an Opinion and Order on March 1, 2010, granting Summary Judgment in favor of LMICK. It determined in relevant part that Eastman understood what constituted a "claim," and notified LMICK of a claim (her December 18, 2006 notice to LMICK of the October 13, 2005 order to pay costs) or a potential claim (Eastman's December 27, 2006 notice to LMICK of Baldwin's potential lawsuit) before the policy limit increased to $1,000,000 on June 25, 2007. It went on to conclude that the policy limit in effect at the time the claim first began is determinative. It found that Eastman's claim first arose when she gave notice to LMICK of her failure to disclose her expert witnesses in a timely manner in accordance with the scheduling order and sought payment of the sanctions imposed. The Jefferson Circuit Court granted Summary Judgment in favor of LMICK, and by way of a separate order rendered March 1, 2010, ruled that Baldwin's claim against Eastman in North Carolina is subject to the $250,000 limit of liability under LMICK's policy of insurance with Eastman. This appeal followed.

Baldwin now argues that the circuit court erred in failing to conclude that the policy language is ambiguous and that it therefore should be construed in favor of the claim of Eastman. She directs our attention to the Multiple Claims provision of the policy, which provides in relevant part that "[t]wo or more claims arising out of a single act, error or omission . . . shall be treated as a single Claim." Baldwin contends that the policy at issue is ambiguous as a matter of law because the coverage language includes claims that are denied by an exclusion. In the present case, she maintains that the coverage language of the 2007-2008 policy specifically includes claims first made and reported to LMICK during the policy period. She takes issue with LMICK's contention that the Multiple Claims provision should be interpreted as an exclusion from this coverage.

Baldwin goes on to argue that the trial court compounded its error by treating as a "claim" Eastman's December 18, 2006 inquiry regarding LMICK's possible coverage for sanctions, thus characterizing all subsequent claims made arising from Eastman's representation of Baldwin as having first begun in 2006, when the $250,000 limit of liability was in effect. Baldwin contends that the December 18, 2006 inquiry was not a "claim" per se, and notes that it is uncontroverted that LMICK provided no legal defense to Eastman nor paid any benefits to her arising from the North Carolina court's imposition of sanctions. Baldwin maintains that it is absurd to allow LMICK to provide no benefits to Eastman on the issue of sanctions, yet rely on that event as constituting the first "claim" for purposes of fixing the limit of liability at $250,000.

Based on the foregoing, Baldwin also argues that the court erred in failing to discuss her remaining arguments. These arguments include her contention that the Multiple Claims provision is inapplicable to Eastman Law Office even if it is applicable to Eastman individually, and that it would be patently unfair to allow LMICK to accept additional premiums for increased limits of liability without informing its insureds that the increased limits of liability would not be applicable if Baldwin subsequently filed an action against Eastman.

In sum, Baldwin argues that neither contractual nor equitable principles support Summary Judgment in favor of LMICK. She seeks an order reversing Summary Judgment in favor of LMICK with directions to enter a Summary Judgment in favor of Baldwin.

In addressing the matter below, the Jefferson Circuit Court characterized Baldwin's primary argument as being whether she is subject to a $250,000 or a $1,000,000 limit of liability arising from Eastman's representation of Baldwin in North Carolina. To answer this question, the court examined whether Eastman first made a claim for benefits on December 18, 2006, when she placed LMICK on notice of a claim for fees, expenses and costs arising from the sanctions in North Carolina, or whether Eastman's first claim occurred on September 9, 2008, when she gave notice to LMICK that Baldwin filed an action against her. This question is dispositive of Baldwin's argument, because it establishes whether Eastman's first claim was made before or after the limit of liability was increased from $250,000 to $1,000,000 on June 25, 2007.

The Jefferson Circuit Court determined that Eastman's first claim arising from her representation of Baldwin occurred prior to June 25, 2007, and therefore before the limit of liability was increased from $250,000 to $1,000,000. The court found that Eastman – an attorney – knew what a "claim" was as set out in the policy language, and inquired of LMICK on at least four occasions between December 18, 2006, and May 10, 2007, if her claim for costs would be honored by LMICK. This conclusion is supported by the record. Eastman contacted LMICK on December 18, 2006, via telephone, and by letters on December 27, 2006, April 27, 2007, and May 10, 2007, to inquire if the claim arising from the sanctions would be honored by LMICK. In the April 27, 2007 letter, for example, Eastman directly asked "whether my policy will cover the Attorney Fees and Costs in the event [Century Care] tries to enforce the Order." The Jefferson Circuit Court found, and we believe properly so, that Eastman made a claim for benefits arising from her representation of Baldwin before she sought and received an increase in the limit of liability to $1,000,000. In fact, one may reasonably conclude that Eastman sought the increase *because* of the alleged malpractice in her representation of Baldwin and the North Carolina court's prior imposition of sanctions.

Article II, subsection A, of the policy states that a claim "means a demand received by the insured for money or services, including the service of suit or institution of arbitration proceedings against the Insured." Additionally, the Multiple Claims provision as set out in Article III, subsection D states,

> Multiple Insured, Claims, and Claimants: The inclusion herein of more than one Insured, or the making of Claims or the bringing of suits by more than one person or organization shall not operate to increase the Company's limit of liability. Two or more Claims arising out of a single act, error or omission, or Personal Injury, or a series of a single act, error or omissions, or Personal Injuries shall be treated as a single Claim. All such Claims, whenever made, shall be considered first made at the time the earliest Claim arising out of such act, error or omission, or Personal Injury, or related acts, errors, or omissions or Personal Injuries were first made, and all such Claims shall be subject to the same limits of liability. (Emphasis added.)

Having determined that Eastman's first claim arising from the alleged malpractice of her representation of Baldwin occurred while LMICK's limit of liability was $250,000, and based on the clear language of the contract of insurance, we find no error in the Jefferson Circuit Court conclusion that LMICK's limit of liability is $250,000. We are not persuaded by Baldwin's contention that the Multiple Claims provision is ambiguous, or that the trial court's application of that provision improperly converts the "claims made" coverage into occurrence based coverage.

Additionally, we are not persuaded by Baldwin's contention that the policy's anti-stacking provision should be construed as providing for separate limits of liability for the Eastman Law Office and Eastman in her individual capacity. LMICK issued only one policy to Eastman Law Office, which covered all claims against the office and Eastman individually. We find no basis for reversing on this issue.

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56.03. "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.,* 807 S.W.2d 476, 480 (Ky. 1991). "Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact." *Id.* Finally, "[t]he standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft,* 916 S.W.2d 779, 781 (Ky. App. 1996).

When viewing the record in a light most favorable to Baldwin and resolving all doubts in her favor, we cannot conclude that the circuit court erred in its entry of Summary Judgment in favor of LMICK. The record demonstrates that Eastman's first claim arising from her representation of Baldwin occurred while LMICK's limit of liability was $250,000, and pursuant to the Multiple Claims provision, all subsequent claims arising from the same act or occurrence are subject to this limit of liability. The circuit court properly so concluded and we find no error.

For the foregoing reasons, we affirm the Order of the Jefferson Circuit Court granting Summary Judgment in favor of LMICK.

TAYLOR, CHIEF JUDGE, CONCURS.

LAMBERT, CHIEF SENIOR JUDGE, DISSENTS, BY SEPARATE OPINION.

LAMBERT, CHIEF SENIOR JUDGE, DISSENTING: Respectfully, I dissent from the majority opinion. This appeal turns on whether the Jefferson Circuit Court properly characterized as a "claim" Baldwin's inquiry to LMICK as to whether LMICK provided coverage for the $25,000 sanction imposed on Baldwin by the North Carolina court. I conclude that it did not. Per the terms of the policy in question, a claim requires a demand for payment. Baldwin made no demand. Rather, she merely asked LMICK *if* the policy provided for such coverage, just as one would make any number of coverage inquiries to an insurer. Who among us has not inquired of an insurer after a loss has occurred whether the policy covered the loss?

I am reminded of the funeral oration for the murdered Julius Caesar, in which Marc Antony cried out "Ambition should be made of sterner stuff." *Julius Caesar, Act 3, Scene 2.* Baldwin's inquiry as well should have been made of sterner stuff if we are to properly characterize it as a claim. Under the majority view, any casual inquiry by an insured to an insurer – however benign – might inadvertently trigger policy language not remotely anticipated by the insured. I cannot conclude that Baldwin's initial inquiry to LMICK constituted a claim for purposes of dating all collateral claims. She asked a question of LMICK as to

indemnity for the $25,000 North Carolina sanction. When informed that coverage was unavailable, she accepted that conclusion and said no more.

I would reverse the Jefferson Circuit Court's Summary Judgment.

BRIEFS FOR APPELLANT:

Gary K. Shipman
Wilmington, North Carolina

Michael R. Hance
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLANT:

Gary K. Shipman
Wilmington, North Carolina

BRIEF FOR APPELLEE:

Christopher P. O'Bryan
Brent T. Asseff
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLEE:

Christopher P. O'Bryan
Louisville, Kentucky