UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

TIG INSURANCE COMPANY,	)	
	)	
Plaintiff,	)	Case No. 1:01CV00143
	)	
v.	)	**OPINION**
	)	
ROBERTSON, CECIL, KING & PRUITT, ETC., ET AL.	)	By: James P. Jones
	)	United States District Judge
	)	
Defendants.	)	

Carol L. Johnson, Bollinger, Ruberry & Garvey, Chicago, Illinois, and Deborah W. Dobbins, Gilmer, Sadler, Ingram, Sutherland & Hutton, Pulaski, Virginia, for Plaintiff; Mary Beth Nash, Gentry Locke Rakes & Moore, Roanoke, Virginia, for Defendants Robertson, Cecil, King & Pruitt, a Partnership, Robertson, Cecil & Pruitt, LLP, David E. Cecil, and Thomas L. Pruitt; Robert M. Galumbeck, Dudley, Galumbeck, Necessary & Dennis, Tazewell, Virginia, for Defendant F.D. Robertson; James E. Arrington, Jr., Arrington, Schelin & Herrell, P.C., Bristol, Virginia, for Defendants Patricia B. Rowe and James C. Branham, Administrators of the Estate of Ronald L. King, Deceased; Terrence Shea Cook, T. Shea Cook, P.C., Richlands, Virginia, for Defendant Intrepid Coal Corporation, Inc.; and Tommy Joe Williams, Roanoke, Virginia, for Defendants Janet M. McClanahan and Donald Keith McClanahan, Co-Executors of the Will of Bea Y. McClanahan.

A professional liability insurance carrier seeks to rescind its policy issued to a law partnership on the ground that the partnership falsely represented that there were no known wrongful acts that could result in a claim against any attorney in the firm.

Based on the record, I find no genuine issue of material fact and grant summary judgment in favor of the insurance company.

I

At issue in this case is a policy of lawyers professional liability insurance with a policy period of April 1, 1999, to April 1, 2000 (the "Policy"), issued by the plaintiff, TIG Insurance Company (the "Insurance Company"), to the defendant, Robertson, Cecil, King & Pruitt, a law partnership located in Grundy, Virginia (the "Law Firm").[1] The Policy was the last in a series of similar annual policies issued by the Insurance Company to the Law Firm. These were all "claims made" policies, providing coverage for claims first made and reported during the policy period.

On April 5, 1999, one of the partners in the Law Firm, Ronald L. King, completed a Renewal Application for the Policy. The Renewal Application contained a question (Question 3C) as follows:

[1] Other defendants in this action include Robertson, Cecil & Pruitt, LLP, the successor law firm to Robertson, Cecil, King & Pruitt and David E. Cecil and Thomas L. Pruitt, individual partners in the firm. These defendants are jointly represented in this case and will be referred to collectively with the Law Firm as the Law Firm Defendants. Also named as defendants are the administrators of Ronald L. King's estate, as well as F.D. Robertson, a lawyer who was of counsel to the Law Firm. The Law Firm Defendants, King, and Robertson were all insureds under the Policy.

> Is any attorney in your firm aware of any claims made (whether reported or unreported), wrongful acts, errors or omissions that could result in a professional liability claim against any past or present attorney of the firm or to its predecessors or is there a reasonable basis to foresee that a claim would be made against any past or present attorney or the firm or its predecessors?

(Renewal Application ¶ 3C, Pl.'s Ex. 7.)[2] King answered the question by checking a box marked "No Change" in lieu of a box marked "Yes" and signed the application on behalf of the Law Firm.[3] The Policy was thereafter issued on April 15, 1999.

On June 21, 1999, King died of a self-inflicted gunshot wound. It was thereafter discovered that King had been misappropriating client funds and various claims were made against the Law Firm Defendants because of King's conduct. The Insurance Company has been called upon to defend or satisfy these claims pursuant to the Policy.

As a result of these events, the present action was filed by the Insurance Company seeking rescission of the Policy or a declaration of lack of coverage under the Policy, both on the ground of material misrepresentation arising from the negative answer to the question described above. As a further alternative, the Insurance

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[2] The exhibits referred to in this Opinion were filed in support of the Plaintiff's Motion for Summary Judgment.

[3] The applications for the earlier annual policies each contained a similar question. Another partner completed those applications and answered "No" to the questions. Had King checked the "Yes" box, he was instructed by the application to complete an additional form.

Company seeks a declaratory judgment that it is not obligated under the Policy for certain specific claims made as a result of King's conduct, based on an exclusion in the Policy.[4] The Law Firm Defendants and defendant Robertson have filed counterclaims seeking a declaration that there is coverage under the Policy and requesting damages for the failure to provide coverage. After discovery, the Insurance Company, the Law Firm Defendants, and Robertson have all moved for summary judgment in their respective favors, which motions have been briefed and argued and are ripe for decision.

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[4] The third-party claims at issue are (1) the Compton claim, involving a claim by Stephen and Veda Compton that King, while serving as their attorney in 1996, misappropriated an insurance settlement payment intended for them in the amount of $78,434.45. Judgment was entered in favor of the Comptons against the Law Firm Defendants and King's estate in a suit in this court on September 4, 2001, and that judgment has been paid. Accordingly, the Comptons, who had been parties to this action, were dismissed; (2) the McClanahan claim, in which King, serving as executor of the will of Bea Y. McClanahan, misappropriated $199,310.89 of estate funds to his own use between 1993 and 1997. Suit is pending against the Law Firm Defendants and King's estate in state court, where the only remaining question is whether King was acting in his capacity as a partner in the Law Firm when the funds were taken; and (3) the Intrepid Coal Corporation claim, in which King misappropriated $55,000 paid to him in 1998 by a client in trust to settle a local tax dispute. Suit is pending against the Law Firm on this claim in state court. The present co-executors of McClanahan and Intrepid Coal Corporation are defendants in this case. Naturally, they agree with the Law Firm Defendants' position that there is insurance coverage for King's actions.

Numerous other malpractice claims were made following King's death in addition to those described above.

II

Summary judgment is appropriate when there is "no genuine issue of material fact," given the parties' burdens of proof at trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see* Fed. R. Civ. P. 56(c). In determining whether the moving party has shown that there is no genuine issue of material fact, a court must assess the factual evidence and all inferences to be drawn therefrom in the light most favorable to the non-moving party. *See Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985).

Rule 56 "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Summary judgment is not "a disfavored procedural shortcut," but an important mechanism for weeding out "claims and defenses [that] have no factual basis." *Id.* at 327.

The defendants do not dispute that King engaged in wrongful conduct prior to the completion of the Renewal Application.[5] Their arguments are directed elsewhere.

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[5] At oral argument, counsel for the Law Firm Defendants answered as follows:

THE COURT: What I'm asking you is do you, on behalf of

They first argue that rescission is not available to the Insurance Company because the Policy contains a provision allowing the Insurance Company to cancel if there was a misrepresentation in the application.[6] This cancellation provision requires the Insurance Company to give thirty days prior written notice before cancellation is effective and the defendants argue that since no such notice has been given, the Policy cannot be rescinded.

The parties agree that Virginia law applies to the issues in this case. It is established in Virginia that an insurance contract may be rescinded by the insurer if the insured made a material misrepresentation of fact in applying for the insurance. *See* Va. Code Ann. § 38.2-309 (Michie 2002); *Time Ins. Co. v. Bishop*, 425 S.E.2d 489, 491 (1993). Cancellation describes a different remedy than rescission. The Insurance

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> your client, contest that Mr. King engaged in wrongful activities which as reflected in the Compton, McClanahan, and Intrepid Coal claims, that he did those things prior to the inception of the last policy and prior to the application which was made?
>
> MS. NASH [counsel for the Law Firm Defendants]: Your Honor, we have no facts to dispute what Mr. King did.

(Tr. 25.)

[6] The cancellation provision specifically provides that the Policy may be cancelled for "(1) nonpayment of premium; or (2) failure of the Insured to comply with the terms or conditions of this Policy; or (3) misrepresentation in the Application or misrepresentation in presenting a Claim under this Policy; or (4) where the Insured's right or license to practice law has been revoked, suspended or canceled." (Policy ¶ XII(K), Pl.'s Ex. 11.)

Company does not want to cancel the Policy as of some date in the future but to rescind it *ab initio*. The Policy provision is concerned with a different subject and thus I cannot find that the Insurance Company intended to give up its equitable right of rescission by its use of the language in question.

The defendants also contend that there was no misrepresentation when King answered Question 3C, relying on *St. Paul Fire & Marine Insurance Co. v. Jacobson*, 48 F.3d 778 (4th Cir. 1995). Their reliance on that holding is misplaced, however. In *Jacobson*, a doctor tricked his patients by using his own sperm in artificial insemination procedures, rather than the sperm supplied to him by the patients. Before this fraud came to light, the physician did not disclose his wrongful conduct when he answered a malpractice insurance application question as follows: "Do you have knowledge of any pending claims or activities (including requests for medical records) that might give rise to a claim in the future?" *Id.* at 781.

The court in *Jacobson* held that a reasonable reading of the question was that it was asking the doctor to provide information relating to the activities of possible claimants, and not about his own conduct. *See id.* In the present case, however, the question clearly asked the lawyer to disclose his own misconduct. King failed to do so, even though any reasonable attorney would know that stealing large amounts of money from clients would likely produce a claim. *See Westport Ins. Co. v. Lydia S.*

Ulrich Testamentary Trust, 42 Fed. Appx. 578, 580-81 (4th Cir. 2002) (unpublished) (distinguishing *Jacobson*).

The defendants next contend that the Insurance Company cannot show that the misrepresentation on the Renewal Application was material to the risk insured against. The Insurance Company has filed an affidavit from one of its underwriting employees stating that the Insurance Company would not have issued the Policy had it known of King's activities. The defendants have presented no evidence to the contrary. Indeed, it would be unimaginable that the facts of King's misconduct would not be material to the risk of insuring against future malpractice claims.[7]

The defendants also contend that the Insurance Company should be estopped from rescinding the Policy on the ground that it settled some of the claims following King's death. However, it is undisputed that the Insurance Company preserved any defenses through a reservation of rights before it undertook the handling of those claims.[8] Accordingly, there was no waiver of its present defense and the Insurance

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[7] The defendants claim that the Insurance Company cannot show materiality because its representative in a rule 30(b)(6) deposition stated he did not know whether the Insurance Company would have issued the Policy had it known of the Noah Compton claim, one of the many claims asserted because of King's activities. However, the Insurance Company's underwriting decisions were not a noticed topic for the deposition and in any event the representative's answer does not contradict the affidavit presented in support of the Insurance Company's Motion for Summary Judgment.

[8] In its several reservation of rights letters, the Insurance Company stated, among other things, that "TIG reserves the right to pursue a recission [sic] of the TIG policy if it is

Company is not estopped from seeking rescission. *See Ins. Co. of N. Amer. v. Atlanta Ins. Co.*, 329 F.2d 769, 775 (4th Cir. 1964).

Finally, the Law Firm Defendants and Robertson assert that because they did not participate in or have knowledge of King's wrongdoing, they ought to be afforded coverage under the Policy. In this respect, defendants Cecil and Pruitt testified in their depositions that the Policy had been described by the insurance agent as having "innocent partner" coverage. (Cecil Dep. 64-65; Pruitt Dep. 56-58.)

The Policy does afford coverage under some circumstances for an innocent insured. The Policy excludes claims arising out of any "dishonest, fraudulent, criminal, malicious or knowingly wrongful act . . . ." but expressly removes from the exclusion "any Insured who did not commit, participate in, or have knowledge of any such act . . . ." (Policy ¶ VIII(A)(1).) This provision of the Policy does not reference or preclude the remedy of rescission for a material misrepresentation, nor do the defendants claim that it was otherwise represented to them. There is an obvious difference between affording coverage to an innocent insured under this Policy provision and rescinding the Policy because the Law Firm, through its authorized partner, lied on the application. Had King committed an act otherwise excluded under this provision of the Policy,

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determined that the answers in the application were false at the time they were made." (*See, e.g.*, Letter of 12/14/99, Ex. 15.)

without any misrepresentation in the application, his innocent partners would have had coverage.

Based on this record it is clear that Cecil and Pruitt were innocent of King's criminal acts. They and King's innocent clients surely deserve our sympathy. Nevertheless, it is long settled in the law that an innocent person is liable for his partner's misconduct. *See Reynolds v. Waller's Heir*, 1 Va (1 Wash.) 164 (1793) ("A more palpable imposition was never practised, or better established, than in this case. Reynolds, though not a party in the fraud, was nevertheless, a partner with the person who committed it, and is therefore answerable.") The Insurance Company was also innocent in its reliance on the misrepresentation that no lawyer in the Law Firm had knowledge of blameworthy conduct. As among these innocent parties, it is not unjust that King's partners—those who had the opportunity to know him best—should bear the loss.

III

For the foregoing reasons, I find that the Insurance Company is entitled to rescind the Policy. Because of this decision, it is not necessary for me to consider the other grounds asserted by the Insurance Company as to why coverage should be denied for the Compton, McClanahan, and Intrepid Coal Corporation claims. Since the Policy

is rescinded, there is no coverage for any claims arising out of King's misconduct and thus the counterclaims by the Law Firm Defendants and Robertson must be denied. A separate final judgment consistent with this opinion is being entered forthwith.

DATED: January 31, 2003

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United States District Judge