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This opinion shall not "constitute precedent or be binding upon any court."  
Although it is posted on the internet, this opinion is binding only on the  
parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-0959-16T1

IRONSHORE INDEMNITY, INC.,

Plaintiff-Respondent,

v.

PAPPAS & WOLF, LLC, HERCULES  
PAPPAS and MATTHEW S. WOLF,

Defendants.

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MICHAEL P. POMPEO, As Assignee Of  
The Claims of PAPPAS & WOLF, LLC  
and HERCULES PAPPAS,

Appellants.

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Argued April 23, 2018 – Decided May 1, 2018

Before Judges Fasciale and Summers.

On appeal from Superior Court of New Jersey,  
Law Division, Essex County, Docket No. L-9918-  
13.

Jeffrey S. Lipkin argued the cause for  
appellants.

Matthew P. O'Malley argued the cause for  
respondent (Tompkins, McGuire, Wachenfeld &  
Barry, LLP, attorneys; Matthew P. O'Malley and

William C. Kelly, of counsel and on the brief).

PER CURIAM

This is a legal malpractice insurance coverage case. The parties disputed whether the attorney materially misrepresented important information when his firm filled out an insurance renewal application. Specifically, the question is whether – under a totality of the circumstances – the attorney misrepresented that there existed no potential legal malpractice claims, when in fact he knew otherwise. The carrier learned about this misrepresentation and denied insurance coverage.

The case reaches us after the judge entered orders concluding that the misrepresentation justified the denial. The basis of the attorney's knowledge of the potential claims came from his association with a former client. After the carrier filed this complaint, the attorney and his firm assigned their rights to a receiver who was previously appointed in an action against the attorney's former client.

Michael P. Pompeo (the Receiver) – the court appointed receiver for the former client Carr Miller Capital, LLC, (CMC) and Everett Miller (Miller),<sup>1</sup> and as assignee of the claims of Pappas

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<sup>1</sup> In February 2011, the Receiver was appointed in an action by the Attorney General of New Jersey, on behalf of the New Jersey

& Wolf, LLC, and Hercules Pappas (Pappas) (collectively Pappas Defendants) – therefore appeals from two October 21, 2016 orders. One order granted the carrier's, Ironshore Indemnity Inc. (Ironshore), motion for summary judgment; and the other order denied the Receiver's cross-motion for partial summary judgment. We affirm.

In December 2013, Ironshore filed this complaint for declaratory judgment against its insureds – Pappas Defendants and Matthew S. Wolf (Wolf)<sup>2</sup> – seeking a judicial determination there was no insurance coverage for an underlying legal malpractice claim due to the misrepresentation. The Receiver, by way of a settlement agreement and consent order that he had entered into with Pappas Defendants,<sup>3</sup> then filed an answer and counterclaim, which sought a judicial determination that the insurance policy provided coverage for the underlying legal malpractice claim.

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Bureau of Securities, against Miller and CMC, alleging violations of New Jersey securities laws. In May 2011, a judge entered an order providing for the Receiver's permanent retention as Receiver for Miller and CMC.

<sup>2</sup> All claims against Wolf were later dismissed.

<sup>3</sup> In August 2012, the Receiver commenced a civil action against Pappas Defendants alleging they committed professional legal malpractice in connection with their representation of CMC.

On appeal, the Receiver (on behalf of Pappas Defendants) contends the judge erred by determining that Pappas Defendants made the material misrepresentation in the renewal application.

When reviewing an order granting summary judgment, we apply "the same standard governing the trial court." Oyola v. Liu, 431 N.J. Super. 493, 497 (App. Div. 2013). A court should grant summary judgment when the record reveals "no genuine issue as to any material fact" and "the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). We owe no deference to the motion judge's conclusions on issues of law. Manalapan Realty, LP v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995). Both parties moved for summary judgment, but because the judge granted judgment in favor of Ironshore, we consider the facts in a light most favorable to the Receiver. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995).

The Receiver asserts that no reasonable trier of fact could conclude that Pappas was aware of a basis for a potential legal malpractice claim against him. The crux of the issue lies in Pappas & Wolf's assertion in its renewal application with Ironshore for continued professional liability insurance dated August 22, 2011. In the renewal application, Pappas & Wolf responded "no" to the following question (Prior Knowledge Question):

After inquiry, does any firm member know of any circumstance, situation, act, error or omission that could result in a professional liability claim or suit against the firm or its predecessor firm(s) or any current or former member of the firm or its predecessor firm(s)?

"[I]t is well established in this State that an attorney will not have access to insurance coverage to respond to claims from injured third parties, [or] clients, . . . if the professional liability insurance policy has been rescinded due to the attorney's misrepresentations of material fact in the policy application." DeMarco v. Stoddard, 223 N.J. 363, 378 (2015).

The Receiver asserts the judge properly acknowledged that a subjective standard applies when considering a challenge to an insured's prior knowledge representation. The parties agree that the Court adopted such a standard in Liberty Surplus Insurance Corp. v. Nowell Amoroso, PA, 189 N.J. 436 (2007). In Nowell Amoroso, our Supreme Court "upheld the entry of summary judgment in favor of the insurer in a declaratory judgment action seeking rescission ab initio of a legal malpractice liability insurance policy due to misrepresentations of material fact in the policy application." DeMarco, 223 N.J. at 377 (citing Nowell Amoroso, 189 N.J. at 450). But the Receiver maintains that the judge disregarded the subjective standard when making his material factual determination.

The subjective standard examines an individual's state of mind. "Generally, when the 'subjective elements of willfulness, intent or good faith of the moving party are material to the claim or defense of the opposing party, a conclusion from papers alone that palpably there exists no genuine issue of material fact will ordinarily be very difficult to sustain.'" Nowell Amoroso, 189 N.J. at 447 (quoting Judson v. Peoples Bank & Tr. Co., 17 N.J. 67, 76 (1954)). However, "subjective intent may not be controlling when the undisputed facts[, like here,] reveal otherwise." Ibid. This is so because "our courts have determined [a principle in which] the character of the act can be the basis of an inference that the insured intended the injury." Morton Int'l, Inc. v. Gen. Accident Ins. Co. of Am., 266 N.J. Super. 300, 329-330 (App. Div. 1991), aff'd, 134 N.J. 1 (1993).

This principle makes the actor's testimony about subjective intent less than controlling but allows a judge to conclude, from the circumstances of the act, what the actor's real intent was, despite verbal protestations to the contrary. It restrains the court from "ignor[ing] reality" and accepting "the testimony of the insured" that he "did not intend to injure plaintiff" despite the fact that a "reasonable analysis [of the circumstances] requires the conclusion that from the very nature of the act harm must have been intended."

[Id. at 330 (alterations in original) (quoting State Farm Fire & Casualty Co. v. Victor, 232 Neb. 942, 946 (1989)).]

In applying the subjective standard and this principle, the judge concluded:

It thus appears clear that at least by the time the Pappas [D]efendants completed the renewal application for coverage from Ironshore in August 2011, they were actually aware of [the] possibility of a lawsuit. And common sense really supports the [d]eposition testimony of Pappas. That he must have, when you look at that [d]eposition testimony, combined with . . . the totality of facts in this case, that he was aware of some claim . . . being brought against him in his capacity as an attorney.

Importantly, the judge relied on Pappas' deposition testimony that in December 2010, nearly nine months before Wolf filled out the renewal application, he was concerned about a claim being asserted against him as an attorney because of the New Jersey Bureau of Securities action against CMC.

The Receiver contends that the judge erroneously relied on this portion of Pappas' testimony because Pappas was purportedly concerned in general about any claim being brought against him, not specifically legal malpractice claims, and Pappas later testified that he was not concerned about legal malpractice claims. This distinction is unpersuasive. As the judge noted, Pappas held himself out as an attorney, and in effect CMC's attorney. Any claim against him as an attorney would likely result in a claim with his liability insurance – Ironshore. As Pappas testified

that he was concerned about a claim being brought against him as an attorney, any such claim should have been disclosed to Ironshore, and therefore the Prior Knowledge Question required an affirmative response.

Regardless of Pappas' testimony, the subjective standard is overcome by a reasonable analysis of the circumstances. And here, there is overwhelming credible evidence showing Pappas knew of potential relevant claims. At CMC's inception in 2006, it retained Pappas' prior law firm as outside counsel before hiring Pappas as in-house counsel in 2008. As in-house counsel, Pappas accompanied Miller on trips related to CMC projects; worked fourteen-hour days; and served on the board of a corporation that CMC loaned significant funds, in order to protect CMC's interest. When Pappas resigned as CMC's in-house counsel in September 2009, he wrote to Miller stating that, "[a]s of late, I have learned from you that [CMC] is having some solvency issues, as well as some potential legal issues pertaining to the operation of the company." After Pappas resigned, Pappas & Wolf continued to serve as CMC's outside counsel. From the start, Pappas had intimate involvement with CMC and Miller.

When the Attorney General sued CMC and Miller for securities-related fraud in December 2010, Pappas was not named as a defendant, but according to his testimony, he was concerned about



claims against him as an attorney because "things happened, lawsuits get filed and people get sued." Looking at the totality of the circumstances, the judge found it "[h]ard to believe" that Pappas felt immune to legal malpractice claims because he hired outside counsel for securities-related advice in January 2009 – nearly two and a half years after he began counseling CMC.

Pappas Defendants, from our de novo review of the record, made a material misrepresentation in the renewal application by responding "no" to the Prior Knowledge Question. Such a misrepresentation justified Ironshore's denial of coverage. Consequently, Ironshore was entitled to summary judgment as a matter of law.

Affirmed.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.



CLERK OF THE APPELLATE DIVISION