DOCKET NO: LLI-CV-24-6038604-S : SUPERIOR COURT

MARK J. CAPECELATRO, LLC et al. : JUDICIAL DISTRICT OF LITCHFIELD

V. : AT TORRINGTON

THE HANOVER INSURANCE COMPANY et al. : MARCH 9, 2026

MEMORANDUM OF DECISION ON PLAINTIFFS' AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

I

PROCEDURAL HISTORY AND FACTS

The plaintiffs, Mark J. Capecelatro and Mark J. Capecelatro, LLC (the insureds), bring this single count action seeking a declaratory judgment that The Hanover Insurance Company (Hanover) has the duty to defend an underlying professional liability lawsuit and pay all costs that attend that defense including any settlement, verdict, judgment or other final resolution.

Hanover filed a four-count counterclaim seeking a declaratory judgment that the insureds: (1) had no coverage because they had knowledge of a wrongful act or other facts and circumstances that may reasonably give rise to a claim prior to the inception date of the policy, and (2) had no coverage because they failed to accurately disclose information about the wrongful act or facts and circumstances. In counts three and four, Hanover seeks a declaratory judgment that claims for legal fees and emotional distress damages in the underlying lawsuit are not covered damages.

Both the plaintiffs and defendant have moved for summary judgment in this matter on the plaintiffs' complaint and the defendant's counterclaim. At issue is whether the underlying professional liability lawsuit discussed below is covered under the Lawyers E&O Policy issued by Hanover for the policy period of January 1, 2024, to January 1, 2025 (the policy).

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A

Underlying Lawsuit

On the morning of Sunday, May 2, 2021, Attorney Capecelatro received a telephone call from his client, Mr. Stewart (Stewart), stating that he wanted to change his last will and testament and wanted to name Peter Frey (Frey) as his residuary beneficiary. Stewart was in the hospital at the time. On the morning of Monday, May 3, 2021, Attorney Capecelatro called Hartford Hospital explaining that he was Stewart's attorney and his health care agent and that he needed to see Stewart that day. Attorney Capecelatro was told that he could see him but that patients were not allowed to have more than one visitor at a time because of the COVID-19 protocols in place at the time.

Attorney Capecelatro went to Hartford Hospital, to Stewart's room, and had Stewart sign the will, with Attorney Capecelatro as the sole witness. Under this will, Stewart's estate was left to Frey. On May 11, 2021, Stewart died. On July 29, 2021, the Probate Court issued a decree denying the admission of the May 3, 2021, last will and testament (2021 will), as it only had one witness, not two, as required by General Statutes § 45a-251. After the Probate Court rejected the 2021 will, the insureds submitted a 2017 will for the Stewart estate (2017 will) to the Probate Court. Unlike the 2021 will, the 2017 will left Stewart's estate to three charitable organizations, not Frey. Stewart's estate totaled $838,515.27.

Hanover issued the policy with effective dates of January 1, 2024, to January 1, 2025, to the insureds under which they have full prior acts coverage.

On April 27, 2024, Frey filed a legal malpractice lawsuit against the insureds for their failure to have two witnesses attest the signing of the 2021 will on May 3, 2021, and citing to the July 29, 2021, Probate Court decree that the second will "was not executed in accordance with C.G.S. Sec. 45a-251" (the underlying lawsuit). The underlying lawsuit contains two causes of

action by Frey against the insureds for legal malpractice and breach of understanding and agreement/third-party beneficiary. Frey alleged in the underlying lawsuit that "the [insured] was negligent and deviated from the standard of care expected of Connecticut lawyers who represent clients with regard to the preparation and execution of wills in one or more of the following ways: [1] he failed to have two witnesses attest the signing of the 2021-Will on [May 3, 2021]; and/or [2] he failed to make adequate arrangements to make sure there could or would be two witnesses available to attest the signing of the 2021-Will on [May 3, 2021] and/or [3] when he left with the will that Len signed on [May 3, 2021], the [insured] knew or should have known it was invalid because it had not been attested by two witnesses; and/or [4] after leaving with the will that Len signed on [May 3, 2021], the [insured] failed to make adequate timely arrangements to have Len's 2021-Will properly executed before Len died." Docket Entry No. 117.00, Exhibit A.

On May 1, 2024, the insureds tendered the underlying lawsuit to Hanover for coverage under the policy. Thereafter, Hanover issued a letter to the insureds stating that it determined that Hanover had no duty to defend and no obligation to indemnify the insureds for claims made in the underlying lawsuit brought by Frey. Hanover relied upon two provisions: (1) the prior knowledge condition provision; and (2) the policy application exclusion. Specifically, Hanover states that the insureds had knowledge of but failed to disclose a wrongful act or other facts or circumstances which may give rise to a claim prior to the inception date of the policy, January 1, 2024.

Specifically, on November 17, 2021, the insureds completed and signed a renewal application for the policy. Question fifteen of the application asked, "Do any of you know of any incident, negligent act, error or omission, or other circumstance that could result in a claim or

suit against the firm or any predecessor firm or an of the firm's or any predecessor firm's current or former professional staff." Docket Entry No. 118, Exhibit D, p. 4. The insureds checked the box indicating "yes" but did not report anything to Hanover about the issue involving the Probate Court finding the 2021 will invalid. Id. Rather, the insureds reported another matter. In November 2022 and November 2023, the insureds again completed and signed another renewal application for the policy. As to the same question fifteen, the insureds check the box indicating "no". Docket Entry No. 118, Exhibit E, p. 4. Immediately below question fifteen, the policy application states: "IMPORTANT: Without prejudice to any of Our other rights and remedies, all of You understand and agree that if any such fact, circumstance or situation exists, which is not disclosed in response to the questions above, any claim or action arising from such fact, circumstance or situation is excluded from coverage under the proposed policy." Id.

It is undisputed that the insureds were aware of: (1) the Connecticut Probate Court, July 2021 order denying the admission to probate of the 2021 will; (2) that Frey inherited less from Stewart's estate than he would have been entitled to inherit had the 2021 will been admitted to probate; and (3) the insureds had reason to believe Frey was aware that the 2021 will was not admitted to probate prior to January 1, 2024. Further, it is undisputed that prior to January 1, 2024, the insureds did not inform Hanover of the facts and circumstances giving rise to the malpractice action in the underlying lawsuit.

Nevertheless, Hanover issued the policy to the insureds. The policy provides in relevant part: "COVERAGE 1. Professional Services Coverage. We will pay on Your behalf those sums which You become legally obligated to pay as Damages because of any Claim made against You for a Wrongful Act.

* * *

4. Additional Requirements. The following additional requirements and limitations shall apply to coverage provided under A.1., A.2., and A.3. above: a. The Wrongful Act and Professional Services must have first occurred on or after the applicable Retroactive Date(s); b. *None of You had knowledge of a Wrongful Act or any facts or other circumstances, which may reasonably give rise to a Claim or Supplemental Coverage Matter, or knowledge of any Claim or Supplemental Coverage Matter, prior to the inception date of this policy*; and c. The Claim or Supplemental Coverage Matter must first be made and reported to Us in writing during the Policy Period or an applicable Extended Reporting Period." (Emphasis added.) Docket Entry No. 118, Exhibit G.

The policy defines the following several terms. A claim is defined as "a suit". Id. A suit is defined as "a civil proceeding for monetary, non-monetary or injunctive relief, which is commenced by service of a complaint or similar pleading." Id. A wrongful act is defined as "any actual or alleged negligent act, error, omission, misstatement, or Personal Injury in the rendering of or failure to render Your Professional Services." Id. And lastly, professional services is defined as: "advice given or services performed for others for a fee, as a . . . Lawyer." Id.

After the insureds were sued in the underlying action, they notified Hanover. Hanover issued a letter to the insureds stating that the policy did not provide coverage because as of the policy inception date, the insureds had knowledge of a wrongful act or other facts and circumstances giving rise to a claim and had not disclosed such information. This action followed. Both parties have moved for summary judgment.

II
DISCUSSION OF LAW

A
Summary Judgment Standard

Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. "Summary judgment is a method of resolving litigation when pleadings, affidavits, and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . The motion for summary judgment is designed to eliminate the delay and expense of litigating an issue when there is no real issue to be tried. . . . However, since litigants ordinarily have a constitutional right to have issues of fact decided by a jury . . . the moving party for summary judgment is held to a strict standard . . . of demonstrating his entitlement to summary judgment." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Grenier* v. *Commissioner of Transportation*, 306 Conn. 523, 534–35, 51 A.3d 367 (2012).

"In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party." (Internal quotation marks omitted.) *Bozelko* v. *Papastavros*, 323 Conn. 275, 282, 147 A.3d 1023 (2016). "In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. . . . The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact." (Internal quotation marks omitted.) *Fiano* v. *Old Saybrook Fire Co. No. 1, Inc.*, 332 Conn. 93, 101, 209 A.3d 629 (2019).

"A material fact . . . [is] a fact which will make a difference in the result of the case." (Internal quotation marks omitted.) *Stuart* v. *Freiberg*, 316 Conn. 809, 821, 116 A.3d 119 (2015). "[T]he trial court does not sit as the trier of fact when ruling on a motion for summary judgment. . . . [Its] function is not to decide issues of material fact, but rather to determine whether any such issues exist." (Internal quotation marks omitted.) *Mariano* v. *Hartland Building & Restoration Co.*, 168 Conn. App. 768, 777, 148 A.3d 229, 235 (2016).

"The fundamental purpose of summary judgment is preventing unnecessary trials. . . . If a plaintiff is unable to present sufficient evidence in support of an essential element of his cause of action at trial, he cannot prevail as a matter of law. . . . To avert these types of ill-fated cases from advancing to trial, following adequate time for discovery, a plaintiff may properly be called upon at the summary judgment stage to demonstrate that he possesses sufficient counterevidence to raise a genuine issue of material fact as to any, or even all, of the essential elements of his cause of action. (Citations omitted; internal quotation marks omitted.) *Stuart* v. *Freiberg*, supra, 316 Conn. 822–23. "It is the function of the court to construe the provisions of the contract of insurance . . . The [i]nterpretation of an insurance policy . . . involves a determination of the intent of the parties as expressed by the language of the policy . . . [including] what coverage the . . . [insured] expected to receive and what the [insurer] was to provide, as disclosed by the provisions of the policy . . . [A] contract of insurance must be viewed in its entirety, and the intent of the parties for entering it derived from the four corners of the policy . . . [giving the] words . . . [of the policy] their natural and ordinary meaning . . . [and construing] any ambiguity in the terms . . . in favor of the insured." (Internal quotation marks omitted). *Davison* v. *Savarese*, Superior Court, judicial district of Litchfield, Docket No. CV-11-6005070-S (April 25, 2013, *Pickard, J.*).

"Although [i]nterpretation of an insurance policy, like the interpretation of other written contracts, involves a determination of the intent of the parties as expressed by the language of the policy . . . and, thus, ordinarily presents a question of fact, when the language of the contract is clear and unambiguous, the court's determination of what the parties intended in using such language is a conclusion of law." (Citation omitted; internal quotation marks omitted.) *Mount Vernon Fire Ins. Co.* v. *Morris*, 90 Conn. App. 525, 541, 877 A.2d 910 (2005), appeal dismissed, 281 Conn. 544, 917 A.2d 538 (2007).

"In determining whether the terms of an insurance policy are clear and unambiguous, [a] court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity . . . . Similarly, any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms. . . . As with contracts generally, a provision in an insurance policy is ambiguous when it is reasonably susceptible to more than one reading. . . . Under those circumstances, any ambiguity in the terms of an insurance policy must be construed in favor of the insured because the insurance company drafted the policy. . . . This rule of construction may not be applied, however, unless the policy terms are indeed ambiguous." (Internal quotation marks omitted.) *Liberty Mutual Ins. Co.* v. *Lone Star Industries, Inc.*, 290 Conn. 767, 808, 967 A.2d 1 (2009).

"When construing exclusion clauses, the language should be construed in favor of the insured unless it has a high degree of certainty that the policy language clearly and unambiguously excludes the claim. . . . While the insured bears the burden of proving coverage, the insurer bears the burden of proving that an exclusion to coverage applies." (Internal citation omitted.) *Gerald Metals, LLC* v. *Certain Underwriters at International Underwriting Assn. of London*, 231 Conn. App. 514, 543, 334 A.3d 485 (2025). An exclusion for a wrongful act, if an

insured "knew or should have reasonably foreseen on the inception date of such first policy that such [w]rongful [a]ct could be the basis of [c]laim." *Maher & Williams* v. *ACE American Ins. Co.*, United States District Court, Docket No. 3:08CV1191 (JBA) (D. Conn. September 3, 2010). "This exclusion, which turns on the prior knowledge of particular listed entities, is designed to ensure that only risks from unknown losses are insured." (Internal quotation marks omitted.) Id., 8.

"Courts applying prior-knowledge exclusions to claims-made insurance policies use a two-part, subjective-objective test to determine whether the exclusion bars coverage for a particular claim, asking first, whether the insured had *actual knowledge* of a [wrongful act], a subjective inquiry; and second, whether a reasonable professional in the insured's position might expect a claim or suit to result, an objective inquiry." (Emphasis in original; internal quotation marks omitted.) Id.,11. "When applying the subjective-objective test, the court must first ask the subjective question of whether the insured had knowledge of the relevant facts." (Internal quotation marks omitted). *Wallingford Group, LLC* v. *Arch Ins. Co.*, United States District Court, Docket No. 3:18CV00946 (AVC) (May 11, 2020).

Here, the court finds that the insureds knew, prior to submitting an application with Hanover, that the 2021 will was rejected by the Probate Court. Thus, there is no genuine issue of material fact that Hanover can establish the subjective inquiry prong for the prior knowledge exclusion.

As to the objective inquiry, what a reasonable person would believe may present a question of fact, question of law or a mixed question of law and fact. See *Parnoff* v. *Aquarion Water Co. of Connecticut*, 188 Conn. App. 153, 173, 204 A.3d 717 (2019) ("In the context of intrusion upon seclusion, questions about the reasonable person standard are ordinarily questions

of fact, but they become questions of law if reasonable persons can draw only one conclusion from the evidence."); *State* v. *Walton*, 41 Conn. App. 831, 836, 678 A.2d 986 (1996) (for *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) purposes, whether a reasonable person would have believed he was not free to leave). It becomes a question of law when the mind of a fair and reasonable person can reach only one conclusion. If there is room for a reasonable disagreement, the question is one to be determined by the trier as a matter of fact. See *One Eighty-Five Stagg Associates* v. *Linwood Avenue III, LLC*, 232 Conn. App. 520, 545–46, 337 A.3d 765 (2025) (discussing the issue of proximate cause).

In *Wallingford Group, LLC* v. *Arch Ins. Co.*, supra, United States District Court, Docket No. 3:18CV00946 (AVC), the court held that the defendant failed to establish that there was no genuine issue of material fact regarding the objective prong necessary to establish that the prior knowledge exclusion applied. The Army Corp of Engineers (ACOE) sent an enforcement notice to the Juliano Associates, LLC (Juliano Associates) who designed a project advising of the potential for fines or remedial work based upon the failure to obtain a permit, stating in part: "[p]erforming any work which requires, but is not authorized by, a Corps permit, or failing to comply with the terms and conditions of a Corps permit, may subject the developer, the landowner or other responsible party, including the contractor, to criminal and/or civil liability." Id. Christopher Juliano (Juliano), an engineer and land surveyor with Juliano Associates, "testified that he did not believe the ACOE enforcement notice was a potential claim, but rather an 'informative letter.'" Id. The court held that the credibility of Juliano's testimony presented an evidentiary issue for the trier of fact to decide. Accordingly, the court denied the defendant's motion for summary judgment.

In *Maher & Williams* v. *ACE American Ins. Co.*, supra, United States District Court, Docket No. 3:08CV1191 (JBA), an insurer argued that professional liability coverage was precluded when an insured law firm had actual notice of a judgment of dismissal of one client's action and the entry of a nonsuit against another client but failed to disclose both prior to applying for insurance coverage. The insurer moved for summary judgment and the court denied its motion, stating that it agreed with the law firm's argument that it was not reasonably foreseeable, from the dismissal and nonsuit alone, that the former clients would sue for legal malpractice.

Similarly, in *Coregis Ins. Co.* v. *Goldstein*, 32 F. Supp. 2d 508 (D. Conn.1998), an insurer sought a declaratory judgment that the insured knew of a potential claim but did not disclose said claim in applying for professional liability coverage. The insurer sought a summary judgment finding that the insurer did not have to indemnify or defend a legal malpractice claim against the insured. The court denied the insurer's motion for summary judgment, holding that the foreseeability of a claim arising from an insured attorney's failure to file suit and the client's threat to take appropriate action was a question of fact which precluded summary judgment in favor of the insurer. The court held that there was a genuine issue of material fact regarding whether the insured could have reasonably foreseen that his acts, errors or omissions might be expected to be the basis of a claim. "[T]he [c]ourt notes without deciding that the complexity of the statutes of limitation involved in this case may also raise a genuine issue of material fact. . . . where attorney does not know he has made an error he can not know or expect that a malpractice claim might or could result." (Citation omitted.) *Coregis Ins. Co.* v. *Goldstein*, supra, 32 F. Supp. 2d 513.

Hanover relies upon *Eisenhandler* v. *Twin City Fire Ins.Co.*, Superior Court, judicial district of New Haven, Docket No. CV-09-5031716-S (October 21, 2011, *Woods, J.*) (52 Conn. L. Rptr. 762), however, in *Eisenhandler*, the insured who failed to commence a lawsuit within the applicable statute of limitations told his former client about this mistake and advised the client to consult with an attorney to sue the insured for malpractice. Thereafter, the insured applied for professional liability insurance and answered "no" to the question of whether he was aware of any claim or circumstance that could result in a claim. In granting summary judgment in favor of the insurer, the court stated that in the *Coregis* and *Philadelphia Indemnity Ins. Co.* v. *Atlantic Risk Management, Inc.*, Superior Court, judicial district of New Haven, Docket No. CV-06-4018752-S (July 30, 2009, *Holden, J.*) matters, there was a genuine issue as to whether the insured knew that a duty was breached or an error committed. However, because Eisenhandler advised his client to consult with an attorney to sue him for malpractice, there was no doubt that he actually knew a duty was breached and an error committed.

It cannot be contested that there were "unprecedented circumstances presented by the COVID-19 pandemic." *State* v. *Henderson*, 348 Conn. 648, 667, 309 A.3d 1208 (2024). "The COVID-19 pandemic has caused significant disruption of the ability to conduct normal business practices." *Pitts* v. *Pitts*, Superior Court, judicial district of Tolland, Docket No. FA-19-6019202-S (February 19, 2021, *Armata, J.*).

Under § 45a-251, a will must be subscribed by the testator and attested by two witnesses, each of them subscribing in the testator's presence. *In re Harris*, 214 Conn. App. 596, 282 A.3d 467, cert. denied, 345 Conn. 918, 284 A.3d 299 (2022). Having Mr. Stewart's will witnessed in May 2021 was complex during an unprecedented period of time. It is undisputed that Stewart was hospitalized and allowed only one visitor at a time. Executive Order 7Q provides in relevant

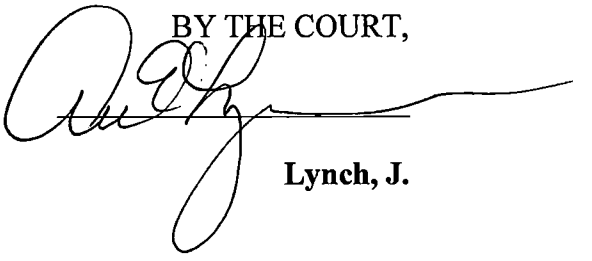
part: "Any witnessing requirement for a Last Will and Testament may be satisfied remotely through the use of Communication Technology if it is completed under the supervision of a Commissioner. The supervising Commissioner shall certify that he or she supervised the remote witnessing of the Last Will and Testament."

Although the governor issued executive orders, challenges were brought claiming that the governor's executive orders and the power granted to him to promulgate said executive orders were unconstitutional because of the separation of powers doctrine. See *CT Freedom Alliance, LLC* v. *Dep't of Education.*, 346 Conn. 1, 18, 287 A.3d 557 (2023) ("The plaintiffs' third claim is that the General Assembly unconstitutionally delegated legislative power to the governor by passing multiple special acts ratifying the governor's declarations of an emergency and allowing him to extend those declarations."); *Casey* v. *Lamont*, 338 Conn. 479, 517, 258 A.3d 647 (2021) ("Section 28-9 (b) affords the governor considerable latitude to employ the necessary means for accomplishing that policy objective. . . . But that latitude is neither standardless nor limitless. . . . in the event an aggrieved party believes the governor has taken any particular action that exceeds his lawful authority or violates the state constitution, that party may seek redress from the courts." [Citation omitted.]).

Here, the insureds were notified on May 2, 2021, that Stewart wanted to change his will. The insureds drafted the change in the will and went to the hospital the next day, May 3, 2021. Attorney Capecelatro witnessed Stewart's signature but was unable to bring another witness into the hospital because of the COVID-19 restrictions. The insureds submitted the 2021 will to probate but it was rejected in July 2021 because it lacked a second witness signature. Whether a reasonable attorney in Attorney Capecelatro's shoes would believe that the insureds would be sued for legal malpractice in preparing Stewart's will is an issue of fact for a trier to decide.

Accordingly, the court finds that there is a genuine issue of material fact as to whether the prior knowledge application exclusion and prior knowledge condition apply and the insureds' and Hanover's motions for summary judgment are denied.

BY THE COURT,



Lynch, J.