

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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CONTINENTAL CASUALTY COMPANY,

Plaintiff,

MEMORANDUM and ORDER

v.

07-C-048-S

WILLIAM A. SCHEMBERA, SCHEMBERA  
& SMITH and EVAN ZIMMERMAN,

Defendants.

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Plaintiff Continental Casualty Company commenced this action for declaratory judgment against defendants William A. Schembera, Schembera & Smith and Evan Zimmerman requesting that the Court enter judgment declaring that it has no obligation to defend or indemnify Mr. Schembera and Schembera & Smith for malpractice claims asserted by defendant Zimmerman. Defendants William Schembera and Schembera & Smith filed a cross claim contending that plaintiff has the duty to defend and indemnify them for these claims.

On May 1, 2007 plaintiff filed a motion for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, submitting proposed findings of facts, conclusions of law, affidavits and a brief in support thereof. Plaintiff's motion for summary judgment is fully briefed and ready for decision.

On a motion for summary judgment the question is whether any genuine issue of material fact remains following the submission by

both parties of affidavits and other supporting materials and, if not, whether the moving party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. An adverse party may not rest upon the mere allegations or denials of the pleading, but the response must set forth specific facts showing there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

There is no issue for trial unless there is sufficient evidence favoring the non-moving party that a jury could return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

#### FACTS

For purposes of deciding plaintiff's motion for summary judgment the Court finds that there is no genuine dispute as to any of the following material facts.

Plaintiff Continental Casualty Company (Continental) is an insurance company organized and existing under the laws of the State of Illinois, with its principal place of business located in

Chicago, Illinois. Defendant Schembera & Smith (the Firm) is a law firm organized and existing under the laws of the State of Wisconsin. Defendant William A. Schembera is an attorney affiliated with the Firm and licensed to practice law in the State of Wisconsin. Defendant Evan Zimmerman is a resident of La Crosse, Wisconsin.

Schembera completed his application for malpractice insurance with Continental on February 24, 2004. Continental issued a policy to the Firm for the May 3, 2005 to May 3, 2006 policy period. It was a renewal of the first policy issued by Continental to the Firm for the May 3, 2004 to May 3, 2005 policy period.

The policy states at I.A. as follows:

The Company agrees to pay on behalf of the **Insured** all sums in excess of the deductible that the **Insured** shall become legally obligated to pay as damages and claim expenses because of a claim that is both first made against the **Insured** and reported in writing to the Company during the policy period by reason of an act or omission in the performance of legal services by the **Insured** or by any person for whom the **Insured** is legally liable.

At I.A. 3 the policy provides that prior to the inception date of the first policy issued no Insured had a basis to believe that any such act or omission, or related act or omission, might reasonably be expected to be the basis of a claim.

Schembera was appointed through the Wisconsin Public Defender's Office to represent Zimmerman in a criminal trial in the

Circuit Court of Eau Claire County, Wisconsin where Zimmerman was charged with homicide. (State v. Zimmerman, Case No. 01CF63). Following a trial in May 2001 Zimmerman was convicted of first degree intentional homicide. He received a mandatory life sentence.

On August 12, 2003 the Wisconsin Court of Appeals reversed Zimmerman's conviction and remanded the case. State v. Zimmerman, 266 Wis. 2d 1003, 1021, 669 N.W.2d 762 (Wis. App. 2003). The Court of Appeals stated as follows:

Based on Rene's testimony, Zimmerman's inconsistent alibis, the physical evidence and the evidence of Zimmerman's obsession with Thompson, a reasonable jury could conclude beyond a reasonable doubt that he (Zimmerman) was guilty.

The Court then addressed Zimmerman's claim that his trial counsel(Schembera) was ineffective. The Court first found that counsel was ineffective because he failed to adequately challenge Lieutenant Larson concerning DNA evidence. Id., p. 1024. The Court also found that counsel's failure to present independent medical testimony was deficient performance. Id., p. 1025. Finally the Court found that counsel's handling of Rene's hypnotically refreshed testimony was deficient. Id., p. 1026. The Court found that the cumulative effect of counsel's deficiencies was sufficient to undermine confidence in the trial's outcome. Id., p. 1029. The Court concluded that defense counsel's deficient performance

prejudiced Zimmerman's defense and reversed his conviction. Id., at p. 1031.

On February 13, 2006 Zimmerman filed a civil action in this Court, Zimmerman v., City of Eau Claire, et al. for malicious prosecution, civil conspiracy, intentional infliction of emotional distress, false arrest/false imprisonment, respondeat superior and indemnification. On May 15, 2006 Zimmerman filed an amended complaint adding claims against Schembera for breach of fiduciary duty and malpractice. On July 19, 2006 this Court dismissed Schembera declining to exercise supplemental jurisdiction over the claims against him. On August 29, 2006 plaintiff's motion for reconsideration of the July 19, 2006 order was denied.

On September 12, 2006 the Court entered judgment in favor of the remaining defendants against plaintiff. Zimmerman appealed this judgment on October 11, 2006.

#### MEMORANDUM

Plaintiff contends that defendant Schembera had a basis to believe that any act or omission or related act or omission might reasonably be expected to be the basis of a claim prior to May 3, 2004 the effective date of the policy which would bar coverage of the claim. Defendants argue that they are entitled to coverage.

The language of plaintiff's policy provides coverage only if "no insured had a basis to believe that any such act or omission

might reasonably be expected to be the basis of a claim." In Estate of Logan v. Northwestern Nat'l Cas. Co., 144 Wis. 2d 318, 338, 424 N.W.2d 179, 186 (Wis. 1988) the Court stated as follows:

Whether the policy excepts coverage for a claim based on a breach of a professional duty occurring prior to the effective date of the policy must be determine by analyzing whether the insured...knew or believed prior to the effective date of the policy that he had breached a professional duty.

In Logan, the Court found that the insured knew he had breached a professional duty in failing to file the tax returns when they were due. The application for insurance coverage in Logan asked the insured whether he had breached a professional duty. Since he answered no the Wisconsin Supreme Court denied coverage for the malpractice claim stemming from the undisclosed breach of the professional duty.

In this case the insurance application did not ask whether Schembera had breached a professional duty. Rather it asked whether he had a basis to believe that any such act or omission or related act or omission might reasonably be expected to be the basis of a claim. The Court looks at what defendant Schembera, the insured, knew prior to the effective date of the policy, May 3, 2004. He knew that the Wisconsin Court of Appeals had reversed Zimmerman's conviction based on its finding that Schembera was ineffective. He also knew that the Court of Appeals had found that

based on the evidence a reasonable jury could conclude beyond a reasonable doubt that Zimmerman was guilty.

Schembera knew that for Zimmerman to prevail in an action for legal malpractice against him he had to prove four elements: 1) a lawyer client relationship existed; 2) the defendant committed acts or omissions constituting negligence; 3) the attorney's negligence caused the plaintiff injury and 4) the nature and extent of the injury. Hicks v. Nunnery, 253 Wis.2d 721, 746, 643 N.W.2d 809, 820 (Wis App. 2002). In Hicks the Court held that a criminal defendant is required to prove that he or she is innocent of the charges of which he or she was convicted in order to prevail on a claim of legal malpractice against his or her criminal defense attorney. Id., p. 753.

Prior to May 3, 2004 Schembera knew that although the Wisconsin Court of Appeals had found his representation of Zimmerman to be ineffective, Zimmerman had not been found to be innocent. In fact, the Wisconsin Court of Appeals had found that a reasonable jury could have concluded beyond a reasonable doubt that Zimmerman was guilty. Accordingly, Schembera did not have a basis to believe that his acts might reasonably be expected to be the basis of a legal malpractice claim against him because Zimmerman had not been found to be innocent.

Since Schembera did not have a basis to believe that any act of his might reasonably be expected to be the basis of a claim he

is not barred from coverage under the Continental Policy. Plaintiff's motion for summary judgment will be denied. Judgment will be entered in favor of defendants finding that plaintiff Continental Casualty Company owes a duty to defend and indemnify William A. Schembera and Schembera & Smith in actions by Evan Zimmerman for professional negligence.

ORDER

IT IS ORDERED that plaintiff's motion for summary judgment is DENIED.

IT IS FURTHER ORDERED that judgment be entered in favor of defendants on their cross claim against plaintiff finding that plaintiff owes a duty to defend and indemnify William A. Schembera and Schembera & Smith in actions by defendant Evan Zimmerman for professional negligence.

Entered this 13th day of June, 2007

BY THE COURT:

/s/

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JOHN C. SHABAZ  
District Judge