DA 20-0238

IN THE SUPREME COURT OF THE STATE OF MONTANA

2021 MT 46

ALPS PROPERTY & CASUALTY INSURANCE COMPANY,
d/b/a Attorneys Liability Protection Society,
a Risk Retention Group,

Plaintiffs and Appellees,

v.

KELLER, REYNOLDS, DRAKE, JOHNSON & GILLESPIE, P.C.;
RICHARD GILLESPIE; BRYAN SANDROCK; GG&ME, LLC,
a Montana limited liability company; and DRAES, INC.,
a Montana close corporation; CHARLES JOSEPH SEIFERT;
and THOMAS Q. JOHNSON,

Defendants and Appellants.

APPEAL FROM: District Court of the First Judicial District,
In and For the County of Lewis and Clark, Cause No. ADV-2016-463
Honorable Michael Menahan, Presiding Judge

COUNSEL OF RECORD:

For Appellants Keller, Reynolds, Drake, Johnson & Gillespie, P.C., Charles J. Seifert, and Thomas Q. Johnson:

Patrick M. Sullivan, Poore, Roth & Robinson, P.C., Butte, Montana

For Appellants Bryan Sandrock, GG&ME, LLC, and Draes, Inc.:

John C. Doubek, Doubek, Pyfer & Storrar, PC, Helena, Montana

For Appellees:

Martha Sheehy, Sheehy Law Firm, Billings, Montana

Scott G. Gratton, Brown Law Firm, P.C., Missoula, Montana

For Amicus American Property Casualty Insurance Association:

Bradley J. Luck, Emma L. Mediak, Garlington, Lohn & Robinson, PLLP, Missoula, Montana

Submitted on Briefs: January 6, 2021

Decided: February 23, 2021

Filed:

Clerk

Justice Laurie McKinnon delivered the Opinion of the Court.

¶1 ALPS Property & Casualty Insurance Company (ALPS) filed this action seeking a declaration that ALPS owes no duty to defend or indemnify Keller, Reynolds, Drake, Johnson & Gillespie, P.C. (Firm), or any of its members, for claims Bryan Sandrock, GG&ME, LLC and DRAES, Inc. (collectively "Sandrock") asserted in a malpractice suit against the Firm and three of its attorneys. On March 9, 2020, the District Court granted ALPS's motion for summary judgment, holding the Firm's ALPS policy (the Policy) did not provide coverage for Sandrock's claim because a member of the Firm knew of the basis for Sandrock's claim prior to the Firm's procurement of the Policy. Sandrock, the Firm, and two of the Firm's members, appeal from that ruling. We restate the issue as follows:

> *Whether the District Court correctly granted summary judgment to ALPS, concluding there was no coverage under the Policy, a claims-made-and-reported policy, because a member of the Firm knew the basis of the legal malpractice claim before the effective date of the Policy.*

¶2 We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Representation of Sandrock

¶3 Sandrock's malpractice claim against the Firm and three of its members, Richard Gillespie, Charles Seifert, and Thomas Johnson, arose from Gillespie's representation of Sandrock in two related lawsuits: a 2008 action filed in the Fifteenth Judicial District, Sheridan County (the Estate Action), and a 2009 lawsuit filed in the First Judicial District, Lewis & Clark County (the DeTienne Lawsuit). In July 2014, the district court in the Estate Action awarded sanctions against Sandrock for discovery

abuses in the amount of $9,157.50. Gillespie, employed by the Firm, represented Sandrock in the Estate Action and the DeTienne Lawsuit. Attorneys Seifert and Johnson were not involved and did not represent Sandrock in these matters. They did not supervise Gillespie's work and did not review any documents Gillespie filed in these actions.

¶4 On August 11, 2015, the plaintiffs in the DeTienne Lawsuit filed and served a Second Amended Complaint. Gillespie did not file an answer on behalf of Sandrock, and on September 11, 2015, the Deputy Clerk of the District Court entered default against Sandrock pursuant to M. R. Civ. P. 55(a), on grounds that Sandrock failed to answer the Second Amended Complaint "within the time period allotted by the Court . . . ." The Deputy Clerk provided Gillespie with a notice of the entry of default. The District Court scheduled a hearing for October 21, 2015 to consider the default. Gillespie requested a continuance, and the hearing was re-scheduled for November 30, 2015. On the date of the hearing, Gillespie filed a motion to set aside the Clerk's default, which the District Court denied on March 1, 2016. When the District Court asked why he would file such a motion ten minutes prior to the hearing, Gillespie stated he "had not paid the necessary attention to the matter." The District Court reset the hearing on damages for April 13, 2016 and entered a default judgment against Sandrock on September 28, 2016, for $2.2 million.

The Firm's Procurement of the Policy

¶5 From December 12, 2014 to December 12, 2015, Carolina Casualty insured the Firm under a claims-made professional liability policy. In November 2015, the Firm sought professional liability coverage from ALPS. As part of the application process, each of the Firm's attorneys were required to complete and sign an Individual Attorney Supplement

(Supplement). Every attorney in the Firm, including Gillespie, submitted a separate Supplement representing that he or she was not aware of and had no knowledge of any fact, circumstance, act, error, or omission that could reasonably be expected to be the basis of a claim against him or her. By signing, the attorneys attested to understanding that the Supplement "bec[ame] a part of [the] [F]irm's Professional Liability Application and [was] subject to the same terms and conditions." The Firm's application alerted the attorneys and the Firm to the importance of reporting known claims, stating that a "failure to reveal timely facts or circumstances which may give rise to a claim against current or prior insureds, may result in the absence of coverage for any matter which should have been reported or may result in the failure of coverage altogether."

¶6 Gillespie completed and signed his Supplement on December 1, 2015, months after receiving notice of default in the DeTienne Lawsuit and just a day after the default hearing where he admitted he had "not paid the necessary attention to the matter." Gillespie answered "No" to the following question in his Supplement: "Are you aware of or do you have knowledge of any fact, circumstance, act, error, or omission that could reasonably be expected to be the basis of a claim against you, regardless of the merit of such claim?" As a result of Gillespie's and the other attorneys' Supplements, the Firm, in its application, answered a question denying that the Firm or any of its members were aware of or had knowledge of any fact, circumstance, act, error, or omission that could reasonably be expected to be the basis of a claim against the Firm or its attorneys. ALPS accepted the Firm's application and issued the Policy with an effective date of December 12, 2015. The Policy was a claims-made-and-reported policy and the Firm was the "Named Insured"

under the Policy. The Declarations listed each of the Firm's attorneys, including Gillespie, Johnson, and Seifert as an "Insured Attorney."

Notice to ALPS and Sandrock's Malpractice Claim

¶7 In April 2016, Gillespie informed Johnson that default had been entered against Sandrock in the DeTienne Lawsuit and that he was preparing for the April 13, 2016 damages hearing. Seifert learned of the default on the day of the hearing. Prior to April 2016, no one at the Firm, including Johnson and Seifert, were aware of the entry of default, the proceedings conducted by the District Court in connection with the entry of default, or the sanctions order. Gillespie had not informed Sandrock about the sanctions order or the entry of default prior to April 2016. On April 21, 2016, Seifert, on behalf of the Firm, provided written notice to ALPS of a potential claim.

¶8 In September 2016, Sandrock filed a malpractice suit against Gillespie alleging Gillespie committed malpractice by subjecting Sandrock to sanctions in the amount of $9,157.50 in the Estate Action and by allowing a default, resulting in a $2.2 million judgment, in the DeTienne Lawsuit. In October 2018, Sandrock filed a Second Amended Complaint naming the Firm, Seifert, and Johnson as additional defendants. Sandrock asserted that Seifert and Johnson were negligent in failing to monitor and supervise Gillespie's work.

ALPS Declaratory Judgment Complaint and the District Court's Order Granting Summary Judgment

¶9 ALPS filed a complaint seeking a declaratory judgment that it did not owe a duty to defend or indemnify. In Count I, ALPS asserted the malpractice claims fell outside the

scope of the Policy's coverage because members of the Firm and Gillespie knew or should have known, prior to the effective date of the Policy, that the discovery sanctions order and default had been entered against Sandrock and that either of these might be the basis of a claim. In Count II, ALPS alleged that Sandrock's malpractice claims against the Firm and its members were excluded from coverage under 3.1.5(c) because neither the Firm nor any of its members gave notice of the claim or potential claim prior to the effective date of the policy. Count II also cited exclusion 3.1.5(b), which excluded coverage for claims if "[t]here [was] an earlier-incepting policy of professional liability insurance that provide[d] coverage for the [c]laim or would have provided coverage if the [i]nsured's obligations under that policy had been complied with . . . ." ALPS contended that the Firm should have notified Carolina Casualty at the time of entry of default in September 2015, or any time thereafter, during the prior insurance policy's period. In Count III, ALPS alleged that the Firm and its members failed to give timely notice of an act, error, or omission that could reasonably have been expected to be the basis of a claim. Disclosing such knowledge was required under Section 4.6.1 of the Policy and was a condition precedent to coverage. ALPS alleged that the Firm falsely represented to ALPS in its application that neither the Firm nor any of its attorneys had knowledge of any fact, circumstance, act, error or omission that could reasonably have been expected to be the basis of a claim against the Firm or its attorneys.

¶10 The District Court found there was no coverage available for the Firm. The court ruled that the Firm and its attorneys were not entitled to coverage because Gillespie's alleged acts or omissions occurred before the effective date of the Policy, and Gillespie

reasonably should have known that his errors might be the basis of a malpractice claim and that he did not give notice to ALPS of the potential claim. The District Court concluded that *ALPS Prop. & Cas. Ins. Co. v. McLean & McLean, PLLP*, 2018 MT 190, 392 Mont. 236, 425 P.3d 651, had no precedential value because the case involved a recission issue and "[d]enial of coverage under exclusionary policy provisions was not an issue" in the case. The District Court ruled that the Policy's "Innocent Insured" exception had no application. The court's order did not address the specific coverage issues relating to Johnson and Seifert, individually, nor did it address whether coverage applied under either the reasonable expectations doctrine or the common law innocent insured doctrine.

STANDARD OF REVIEW

¶11 We review a district court's summary judgment ruling de novo. *Wendell v. State Farm Mut. Auto. Ins. Co.*, 1999 MT 17, ¶ 9, 293 Mont. 140, 974 P.2d 623. Summary judgment is appropriate only when no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. M. R. Civ. P. 56(c); *Modroo v. Nationwide Mut. Fire Ins. Co.*, 2008 MT 275, ¶ 19, 345 Mont. 262, 191 P.3d 389. "Once the moving party has met its burden, the opposing party must present material and substantial evidence to raise a genuine issue of material fact." *Bird v. Cascade County*, 2016 MT 345, ¶ 9, 386 Mont. 69, 386 P.3d 602 (citation omitted). The court "will draw all reasonable inferences from the evidence in favor of the party opposing summary judgment; but conclusory statements, speculative assertions, and mere denials are insufficient to defeat a motion for summary judgment." *Bird*, ¶ 9 (citation omitted). This Court reviews a district court's conclusions of law to determine whether they are correct and its findings of fact to

determine whether they are clearly erroneous. *Pilgeram v. GreenPoint Mortg. Funding, Inc.*, 2013 MT 354, ¶ 9, 373 Mont. 1, 313 P.3d 839.

DISCUSSION

Whether the District Court correctly granted summary judgment to ALPS, concluding there was no coverage under the Policy, a claims-made-and-reported policy, because a member of the Firm knew the basis of the legal malpractice claim before the effective date of the Policy.

¶12 On appeal, Appellants argue that the Firm and attorneys Johnson and Seifert are covered under the Policy for the claims asserted in Sandrock's malpractice suit. They maintain that Seifert and Johnson were not aware of the facts and circumstances relating to Gillespie's professional negligence at any time before the Policy's effective date and that neither Johnson nor Seifert had any involvement in Sandrock's representation. They assert that neither Johnson nor Seifert supervised Gillespie's work. Appellants argue that although Gillespie's failure to disclose facts and circumstances relating to his negligence in his Supplement may serve as a basis to deny him coverage, it may not be imputed to Seifert or Johnson.[1] Appellants assert that Johnson and Seifert are entitled to coverage

[1] Appellants argue the Firm is entitled to coverage under the Policy as a matter of law pursuant to our holding in *McLean*. They contend that in *McLean*, David McLean's misrepresentations were imputed to the firm—which provided a basis for ALPS to deny coverage to the firm—because David was a partner in the firm, and as a partner, he made the representations on behalf of the firm. *McLean*, ¶¶ 13, 31. Appellants argue that, in contrast, Gillespie was not a partner, officer, director, or shareholder of the Firm, but rather, a contract employee. Here, the terms of the Policy are instructive and controlling. Gillespie, in his capacity as a lawyer, had a contract of employment with the Firm, which provided legal services. By signing the Supplement, the Policy provided that Gillespie was an "Insured Attorney" of the Firm and "bec[ame] a part of [the] [F]irm's Professional Liability Application and [was] subject to the same terms and conditions." Every member of the firm—regardless of whether they were associated by employment contract or as a partner, shareholder, officer, or director—were required as a condition of the contract of insurance to submit a separate Supplement which, in turn, was considered by ALPS when it issued the Policy to the Firm. Our holding in *McLean* cannot be read so narrowly as Appellants suggest.

under the reasonable expectations doctrine, the common law innocent insured doctrine, and the Policy's "Innocent Insured" provision. We address the threshold question of coverage, first, and then consider Appellants' arguments pertaining to particular provisions of the Policy.

Coverage Under the Policy

¶13 An insurance policy is a contract between the insurer and the insured. We turn first to interpreting the language of the policy when resolving disputes over insurance coverage. The interpretation of an insurance contract is a question of law. *Meadow Brook, LLP v. First Am. Title Ins. Co.*, 2014 MT 190, ¶ 14, 375 Mont. 509, 329 P.3d 608 (internal citation omitted). We use the following approach to interpret insurance contracts:

> General rules of contract law apply to insurance policies and we construe them strictly against the insurer and in favor of the insured. Courts give the terms and words used in an insurance contract their usual meaning and construe them using common sense. Any ambiguity in an insurance policy must be construed in favor of the insured and in favor of extending coverage. An ambiguity exists where the contract, when taken as a whole, reasonably is subject to two different interpretations. Courts should not, however, seize upon certain and definite covenants expressed in plain English with violent hands, and distort them so as to include a risk clearly excluded by the insurance contract.

Mecca v. Farmers Ins. Exch., 2005 MT 260, ¶ 9, 329 Mont. 73, 122 P.3d 1190 (quoting *Travelers Cas. and Sur. Co. v. Ribi Immunochem Research, Inc.*, 2005 MT 50, ¶ 17, 326 Mont. 174, 108 P.3d 469 (internal citations omitted)). We read insurance policies as a whole and, to the extent possible, reconcile a policy's various parts to give each part meaning and effect. Section 33-15-316, MCA; *Newbury v. State Farm Fire & Cas. Ins. Co. of Bloomington, Ill.*, 2008 MT 156, ¶ 19, 343 Mont. 279, 184 P.3d 1021. "While the

language of an insurance policy governs if it is clear and explicit, exclusions from coverage will be narrowly and strictly construed because they run contrary to the fundamental protective purpose of an insurance policy." *McLean*, ¶ 32 (citing *Truck Ins. Exch. v. Waller*, 252 Mont. 328, 331, 828 P.2d 1384, 1386 (1992); *Farmers Union Mut. Ins. Co. v. Oakland*, 251 Mont. 352, 356, 825 P.2d 554, 554 (1992) (internal quotation marks omitted).

¶14 In disputes over insurance coverage, this Court "allocate[s] the respective burdens of proof to the insured and the insurer consistent with the basic distinction between coverage clauses and exclusionary clauses." *Ribi*, ¶ 29. The initial burden is placed on the insured to establish that the claim falls within the basic scope of coverage. *See Ribi*, ¶ 29. If coverage is proven, the burden then shifts to the insurer to establish that the claim is specifically excluded. *See Ribi*, ¶ 29. Here, the Appellants bear the burden of proving that Sandrock's claims fell within the general coverage provision of the Policy. If proven, ALPS then bears the burden to show the claims were specifically excluded.

¶15 Claims-made policies are classified as either claims-made or claims-made-and-reported policies. Claims-made-and-reported polices are generally a more restrictive form of coverage as "notice is the event that actually triggers coverage" and is generally required within the policy period or extended reporting period. *Schleusner v. Cont'l Cas. Co.*, 102 F.Supp.3d 1148, 1152 (D. Mont. 2015) (quoting *Pension Trust Fund v. Fed. Ins. Co.*, 307 F.3d 944, 955 (9th Cir. 2002)). Both claims-made and claims-made-and-reported policies, however, were specifically developed to limit the insurer's risk by placing a temporal limitation on coverage.

Schleusner, 102 F.Supp.3d at 1152 (citation omitted). Both are typically written to exclude coverage for claims the insured knew of prior to the policy. Known loss exclusions "embody the concept that one may not obtain insurance for a loss already in progress, or for a loss that the insured either knows of, planned, intended, or is aware is substantially certain to occur." 43 Am.Jur.2d, Insurance § 469. "[T]his temporal limitation serves to enforce one of the primary axioms of insurance, namely, that insurance is intended to cover only the risk of unknown loss." Mark Wade & Patricia Essoff, *Lawyers Professional Liability: A Primer on Prior Knowledge*, 30 The Brief 29, 35 (Fall 2000). Indeed, it is well-accepted that insurance does not cover known losses. *Interstate Fire & Cas. Co. v. Abernathy*, 93 So. 3d 352, 359 (Fla. Dist. Ct. App. 2012) ("An agreement to assume a known loss is not insurance."); *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 607 N.E.2d 1204, 1210 (Fla. 1992) ("By its very nature, insurance is fundamentally based on contingent risks which may or may not occur."); *Bartholomew v. Appalachian Ins. Co.*, 655 F.2d 27, 29 (1st Cir. 1981) (insurer insures against a risk, not a certainty); *Keene Corp. v. Ins. Co. of N. Am.*, 667 F.2d 1034, 1041(D.C. Cir. 1981) (insurance contract is based on uncertain loss or the possibility of incurring legal liability). Insurance covers the *risk* of loss.

¶16 Here, the Policy contains two provisions—one coverage provision, and one exclusionary provision—that enforce this basic concept. First, in defining the scope of the Policy's coverage, provision 1.1.2 states that ALPS "agrees to pay on behalf of the Insured all sums (in excess of the Deductible amount) that the Insured becomes legally obligated to pay as Damages, arising from or in connection with a Claim first made against the

Insured and first reported to [ALPS] during the policy period, provided that at the Effective Date of [the] Policy, *no Insured knew or reasonably should have known* or foreseen that the act, error, omission or Personal Injury might be the basis of a Claim . . . ." (Emphasis added.)

¶17 Sandrock's malpractice claim falls outside the scope of coverage pursuant to provision 1.1.2, because, for coverage to apply, "no Insured" may know that acts, errors and omissions might be the basis of the claim prior to the policy's effective date. This prior knowledge provision is a condition precedent to coverage and indicates in clear and unambiguous language ALPS's "unwillingness to cover liability arising from prior acts or omissions that any insured might reasonably expect to result in a claim." *Bryan Bros., Inc. v. Cont'l Cas. Co.*, 660 F.3d 827, 830-31 (4th Cir. 2011). The Firm and its members do not contest Gillespie's knowledge of the potential claim and do not contest that his knowledge may be imputed to the Firm. Appellants argue, however, that because Johnson and Seifert had no knowledge of Gillespie's acts and omissions giving rise to Sandrock's claims, the prior knowledge provisions did not preclude them from coverage for the malpractice claims.

¶18 The Policy itself refutes this argument. Like all claims-made policies, the Policy focuses squarely on the claim itself. The unambiguous language of the Policy does not allow a claim to be divided into parts based on the knowledge of each Firm member. Consistently throughout the Policy, the prior knowledge provisions preclude coverage for the *claim*, not coverage for a specific attorney. In the scope of coverage provision, ALPS agreed to provide coverage for "a claim" first made and reported during the policy period,

provided that "at the Effective Date of the Policy, no Insured knew or reasonably should have known or foreseen that the act, error or omission . . . might be the basis of a Claim." The Policy's terms are clear and unambiguous: no attorney in the Firm can have knowledge of the potential claim.

¶19 The undisputed facts demonstrate that prior to December 12, 2015, Gillespie, an insured, "knew or reasonably should have known or foreseen" that his acts and omissions "might be the basis of a claim." In July 2014, Sandrock was sanctioned in the Estate Action while represented by Gillespie. On September 11, 2015, the Deputy Clerk entered default against Sandrock when Gillespie failed to file an answer in the DeTienne Lawsuit. This was three months prior to the Policy's effective date. Gillespie knew of the default, filed a motion to set it aside, and attended a hearing intended to assess damages and enter a judgment based on the default on November 30, 2015—two weeks prior to the Policy's effective date and a day before he signed his Supplement. While at the November 30, 2015 hearing, Gillespie admitted to the District Court that he had "not paid the necessary attention to the matter." Because Gillespie, an insured, knew or reasonably knew of Sandrock's potential claims, Sandrock's malpractice claims, in their entirety, fall outside the scope of coverage.[2] Although the results are "undeniably harsh" for Johnson and

[2] Appellants also argue that the claim against Gillespie (failure to timely file an answer and acts relating to the entry of a sanctions order) is not the same as the claims against Johnson and Seifert (negligent supervision of Gillespie's work) and, thus, covered under the Policy. Appellants argue the claims are distinct and based on different acts or omissions. Even so, the claims against Johnson and Seifert still fall outside the coverage of the Policy. Johnson and Seifert's alleged failure to supervise also would have occurred prior to the Policy's effective date, resulting in no coverage.

Seifert, the clear meaning of the Policy must govern here. *See Woodhouse v. Farmers Union Mut. Ins. Co.*, 241 Mont 69, 72, 785 P.2d 192, 194 (1990). The provision clearly and unequivocally states that coverage is provided only when, at the effective date of the Policy, *no* Insured knew or reasonably should have known that an act, error, or omission might be the basis of a claim. Gillespie was an insured, and he knew or reasonably should have known that his representation of Sandrock in the Estate Action and DeTienne Lawsuit might be the basis of a claim.

¶20 Appellants also argue the common law innocent insured doctrine provides a separate basis for coverage beyond the express terms of the Policy. Appellants' reliance on the doctrine is unpersuasive because the Policy, as explained hereinafter, directs and controls under what circumstances the innocent insured doctrine will apply. The common law doctrine cannot displace the clear provisions of the Policy, which must be interpreted as a contract, particularly when the Policy directly addresses and circumscribes the applicability of the doctrine as it pertains to ALPS and the insureds. This Court's prior rulings regarding the doctrine establish it may not be used to alter the terms of a clear and unambiguous contract or to expand coverage beyond the coverage the policy otherwise provides. In *Woodhouse*, one insured sought recovery under a fire policy when coverage was denied because of a co-insured's arson. Woodhouse invoked the innocent insured doctrine, and this Court held:

> [T]he clear meaning of the contract must govern here. We concur with Farmers that this is, plainly and simply, a contract case. The provision clearly and unequivocally states that a loss caused by an intentional act of an insured party bars coverage. Alan Woodhouse was clearly an "insured," and his act was clearly intentional. Accordingly, we find the loss was not covered.

Woodhouse, 241 Mont. at 72, 785 P.2d at 194 (cited with approval in *Tyler v. Fireman's Fund Ins. Co.*, 255 Mont. 174, 176-77, 841 P.2d 538, 540 (1992)). In *Woodhouse*, no coverage was available when the policy precluded coverage if "an insured" committed arson, even when the other insured was innocent. The claim itself simply was not covered. The Court applied the same rationale in *Tyler* relying on the clear language of the policy. Similarly, in this case, the Policy only provides coverage for Sandrock's malpractice claims if "no Insured" had prior knowledge of the potential claim. The common law innocent insured doctrine cannot be used to *create* coverage for Sandrock's malpractice claim when it otherwise would not exist.[3]

¶21 We agree with the District Court that, "the malpractice claims are outside the scope of coverage under [the Policy]." Because the Firm never met its burden of establishing that the Sandrock claims fell within the scope of coverage, the burden never shifted to ALPS to establish the applicability of an exclusion. *See Ribi*, ¶ 29. Nonetheless, the District Court properly held that the Policy exclusions also precluded all possibility of coverage for the Sandrock malpractice claims. The parties argue extensively about the applicability of several Policy provisions and exclusions. We will address these arguments because of the importance in distinguishing between issues centered around whether there

[3] Appellants assert that *Woodhouse* is distinguishable because the case involved malfeasance, the intentional act of arson. The attempt to distinguish *Woodhouse* falls short because this Court relied on the policy language in *Woodhouse* and determined that when a policy excludes coverage for a claim based on the acts of "an insured," the claim is excluded as to all insureds. The Policy is even clearer on this point. For coverage to apply to Sandrock's malpractice claims, "no Insured" could know of the potential for the claim prior to December 12, 2015.

is coverage in the first instance and, if there is coverage, whether a term or provision of the policy excludes coverage or otherwise provides for coverage under certain circumstances. However, here, Sandrock's claims do not invoke coverage in the first instance because it is beyond the scope of coverage contained within provision 1.1.2 of the Policy.

Exclusionary Language Precluding Coverage

¶22 Provision 3.1.5(c) excludes from coverage any claim arising from or in connection with:

> Any act, error, omission or Personal Injury that occurred prior to the Effective Date of this Policy if [p]rior to the Effective Date of [the] Policy, *any* Insured gave or should have given, to any insurer, notice of a Claim or potential Claim arising from the act, error, omission, or Personal Injury, or from any act, error, omission, or Personal Injury in Related Professional Services.

(Emphasis added.) The clear language of the Policy excludes claims based on a single insured's prior knowledge of the potential for a claim. Further, provision 3.1.5(b) precludes coverage if "[t]here [was] an earlier-incepting policy of professional liability insurance that provide[d] coverage for the Claim, or would have provided coverage if the Insured's obligations under that policy had been complied with . . . ." Undisputed facts establish that Gillespie knew that his representation of Sandrock might result in a claim in September 2015 when the Deputy Clerk entered default. Gillespie possessed that knowledge prior to applying for new coverage with ALPS, excluding him from coverage under 3.1.5(c). Moreover, per exclusion 3.1.5(b), Gillespie should have given notice of the claim to Carolina Casualty, which provided a professional liability claims-made policy to the Firm from December 2014 to December 2015. Instead, Gillespie did not provide notice

of a claim to Carolina Casualty and did not disclose the claim in the application to ALPS. As with the scope of coverage provision, exclusion provision 3.1.5(c) was clear and unambiguous: if *any* attorney gave or should have given notice of the claim to Carolina Casualty, no coverage existed under the Policy. As a result, the claim, in its entirety, is excluded. Because Gillespie failed to disclose the potential claim to ALPS or Carolina Casualty prior to the inception of the Policy, exclusion 3.1.5 unequivocally precluded coverage.

Coverage Under the "Innocent Insured" Provision

¶23 Appellants also argue that Johnson and Seifert are entitled to coverage as "Innocent Insureds." The "Innocent Insured" coverage provision, 4.3.1 of the Policy, applies when ALPS seeks to *deny* coverage under exclusion 3.1.1 of the Policy (the "fraud" or "bad acts" exclusion). Thus, provision 4.3.1 provides coverage in specific circumstances to "Innocent Insureds." The Policy's bad acts exclusion precludes coverage for "any *Claim* arising from or in connection with [a]ny dishonest, fraudulent, criminal, malicious, or intentionally wrongful or harmful act, error, or omission . . . ." (Emphasis added.) Under those circumstances, firm members not implicated in the wrongful conduct that gave rise to the claim may be entitled to coverage as "Innocent Insureds" under 4.3.1. The District Court concluded that there were no allegations in Sandrock's malpractice lawsuit that Gillespie's actions were dishonest, fraudulent, malicious, or intentionally wrongful. Accordingly, the District Court concluded that the bad acts exclusion, and by extension, the "Innocent Insured" provision, did not apply.

¶24 We addressed the innocent insured exception in *McLean* and determined that an innocent insured provision "does not create an additional basis for Policy coverage." *McLean*, ¶ 36. In *Bryan Bros. Inc.*, 660 F.3d at 831, the Fourth Circuit interpreted a similar innocent insured provision as "an exception to the bad acts exclusion," and held that "the innocent insureds provision cannot provide coverage that is precluded by the plain language of the prior knowledge provision." Similarly, the Eleventh Circuit has held that a policy's innocent insured provision was applicable only if the bad acts exclusion barred coverage. *See Prof'l Asset Strategies, LLC v. Cont'l Cas. Co.,* 447 Fed. App'x. 97, 100 (11th Cir. 2011). Sandrock's malpractice claims did not allege a "dishonest, fraudulent, malicious or intentionally wrongful act," and ALPS has not invoked exclusion 3.1.1 as a basis for denying coverage in this case. The Firm has failed to meet its burden of establishing that the Sandrock claims fall within the scope of coverage, and coverage cannot be established based on an exception to an inapplicable exclusion. The unambiguous language of the Policy makes clear that the innocent insured provision is only applicable when ALPS is denying coverage under the bad acts exclusion.

The Reasonable Expectations Doctrine

¶25 Appellants argue that Johnson and Seifert are afforded coverage under the reasonable expectations doctrine. "We recognize the reasonable expectations doctrine and have consistently held that the objectively reasonable expectations of insurance purchasers regarding their policy terms should be honored, even if a painstaking study of the policy negates expectations." *Kilby Butte Colony, Inc. v. State Farm Mut. Auto. Ins. Co.*, 2017 MT 246, ¶ 10, 389 Mont. 48, 403 P.3d 664. The reasonable expectations doctrine applies even

if the policy language is unambiguous. *Meadow Brook, LLP*, ¶ 16. However, the "doctrine is inapplicable where the terms of the policy at issue clearly demonstrate an intent to exclude coverage, because expectations that are contrary to the clear exclusions are not objectively reasonable." *Meadow Brook, LLP*, ¶ 15 (citation and internal quotation marks omitted). Expectations that are contrary to clear provisions of the policy are not reasonable. *See Fisher v. State Farm Mut. Auto. Ins. Co.*, 2013 MT 208, ¶ 20, 371 Mont. 147, 305 P.3d 861.

¶26 Just as no homeowner would expect to obtain coverage for a house that was already on fire, no reasonable attorney would expect an insurer to cover a malpractice claim that existed prior to the inception of the policy when the malpractice was known to an attorney in the firm. The Appellants seem to argue there is a reasonable expectation of coverage for all the Firm's attorneys except the one attorney who failed to disclose knowledge of the impending Sandrock claims. This expectation directly conflicts with the application the Firm submitted for the ALPS Policy. The application provided: "NOTICE TO THE APPLICANT – PLEASE READ CAREFULLY." That notice included the consequences of failing to report claims: "[t]he . . . failure to reveal timely facts or circumstances which may give rise to a claim against current or prior insureds, may result in the absence of coverage for any matter which should have been reported or may result in the failure of coverage altogether." In addition, the Firm's stated expectation directly conflicts with the language of the Policy, which requires that "no Insured" have prior knowledge of a potential claim as a condition precedent to coverage.

¶27 Relying on *Wasik v. Allstate Ins. Co.*, 813 N.E.2d 1152, 1156 (Ill. App. Ct. 2004), Appellants argue that the prior knowledge provisions are ambiguous because ALPS did not state that coverage would be excluded as to "all" insureds based on the prior knowledge of any one insured. *Wasik* construed a policy exclusion precluding coverage if "any insured" concealed or misrepresented a material fact. *Wasik* did not address prior knowledge provisions such as the two provisions (1.1.2 and 3.1.5(c)) at issue here. More importantly, the Policy's prior knowledge provisions here unequivocally establish that a claim falls within the scope of coverage only if "no Insured" knew of the potential claim at the Policy's inception, *and* a claim is excluded if "any insured" should have reported the claim to Carolina Casualty. While this Court will continue to honor the objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts, in this case, Appellants' expectations are contrary to the scope of coverage provision and the exclusions. The members of the Firm had no reasonable expectation of coverage for the Sandrock claims given the specific warnings in the application for the Policy and the unambiguous language in the Policy.

Whether a Factual Issue Existed Precluding Summary Judgment

¶28 On appeal, only Appellant Sandrock argues that a factual issue requires reversal of the order for summary judgment. Sandrock disputes the application of the prior knowledge provisions to Gillespie and asserts that because Gillespie believed the District Court's comment that "it does not take much to set aside a default," in the DeTienne Lawsuit, Gillespie did not have prior knowledge requiring him to submit the claim to the prior insurer, or to advise ALPS of the potential claims in the Firm's application. The District

Court analyzed the issue using the "subjective-objective" test used by some courts. *See Am. Special Risk Mgmt. Corp. v. Cahow*, 192 P.3d 614, 625 (Kan. 2008). Under this test, the court first asks the subjective question of whether the insured knew of certain facts, and then asks the objective question of whether such facts could reasonably have been expected to give rise to a claim. On appeal, the fact that Gillespie knew of the sanctions and default entered against Sandrock is not disputed. We therefore turn to the objective question of whether such facts could reasonably have been expected to give rise to a claim.

¶29 An award of sanctions against a client certainly alerts an attorney to a potential claim against the Firm. Even more certain, an attorney's failure to file an answer resulting in entry of default constitutes a basis for a malpractice suit. *Ross v. Cont'l Cas. Co.*, 420 B.R. 43, 50 (D.D.C. 2009). Allowing entry of default, like letting the statute of limitations pass, is an example of an act or omission that is "so obvious that the trier of fact can find negligence [by the attorney] as a matter of common knowledge." *Kaempe v. Myers*, 367 F.3d 958, 966 (D.C. Cir. 2004). *See also Hamilton v. Needham*, 519 A.2d 172, 174-75 (D.C. Cir. 1986) (noting that "permitting entry of default against a client" is an example of negligence as a matter of common knowledge in a legal malpractice action); *Lockhart v. Cade*, 728 A.2d 65, 68 (D.C. Cir. 1999) (stating that "entry of a default operates as an admission by the defaulting party that there are no issues of liability"). Like these courts from other jurisdictions, this Court has recognized that in some cases, an "attorney's misconduct is so obvious that no reasonable juror could not comprehend the lawyer's breach of duty," such as failure to file suit within the statute of limitations or failing to notify the client of an attorney's resignation, resulting in default

judgment. *Carlson v. Morton*, 229 Mont. 234, 240-41, 745 P.2d 1133, 1137-38 (1987). The same rule applies to an attorney who fails to answer a complaint in accordance with the deadlines set by the court, resulting in entry of default, as occurred here.

¶30 The District Court concluded in its judgment that, on December 12, 2015, Gillespie was aware of the sanctions award and the entry of default. The District Court further concluded that "[a]n attorney in Gillespie's position should have reasonably expected his representation could form the basis for a malpractice action." The District Court relied on *Coregis Ins. Co. v. Baratta & Fenerty, Ltd.*, 264 F.3d 302, 307 (3d Cir. 2001) holding:

> When an attorney has a basis to believe he has breached a professional duty, he has a reason to foresee that his conduct might be the basis of a professional liability claim against him. He cannot assume that the claim will not be brought because he subjectively believes it is time barred or lacks merit.

¶31 We agree. The District Court correctly determined that when an attorney has knowledge of a default entered because the attorney failed to file an answer, the attorney should reasonably expect that his representation could form the basis of a malpractice action. We conclude that Appellant Sandrock's argument that factual issues exist lacks merit.[4] No credible disputes exist regarding what Gillespie knew and whether he should have reasonably foreseen Sandrock's claim.

[4] We note that Gillespie answered "No" to the following question in his Supplement: "Are you aware of or do you have knowledge of any fact, circumstance, act, error, or omission that could reasonably be expected to be the basis of a claim against you, *regardless of the merit of such claim*?" (Emphasis added.) Regardless of the merit of the claim, Gillespie was required to disclose potential claims to ALPS.

CONCLUSION

¶32 There is no coverage under the Policy when the coverage provisions of the Policy exclude it from its scope of coverage. Provisions concerning an innocent insured or reasonable expectations are only applicable if a claim is within the scope of the Policy's coverage. Because it is undisputed that an insured knew of the default prior to procuring the Policy, Sandrock's malpractice claims never fell within the coverage of the Policy. No genuine issues of material fact have been raised and we conclude ALPS was entitled to judgment as a matter of law. The District Court correctly granted summary judgment in favor of ALPS.

¶33 Affirmed.

/S/ LAURIE McKINNON

We concur:

/S/ JAMES JEREMIAH SHEA
/S/ BETH BAKER
/S/ INGRID GUSTAFSON
/S/ JIM RICE