STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

CAROLINA CASUALTY INSURANCE COMPANY,

Plaintiff/Counter-Defendant,

vs.

CUMMINGS, McCLOREY, DAVIS & ACHO, PLC; CUMMINGS, McCLOREY, DAVIS, ACHO & ASSOCIATES, P.C.,

Defendants/Counter-Plaintiffs,

and

ALLSTATE INSURANCE COMPANY,

Defendant.
_____/

Case No. 16-02729-CBB

HON. CHRISTOPHER P. YATES

OPINION AND ORDER GRANTING SUMMARY DISPOSITION TO CAROLINA CASUALTY ON DEDUCTIBLE COUNTERCLAIM ISSUE

Although this case began as a complicated, multi-party dispute about a host of thorny issues, what remains in the wake of earlier decisions by the Court is a simple question concerning a $50,000 deductible. Specifically, Defendants Cummings, McClorey, Davis & Acho, PLC, and Cummings, McClorey, Davis, Acho & Associates (collectively, "Cummings McClorey") have one outstanding counterclaim pending against their former insurer, Plaintiff Carolina Casualty Insurance Company ("Carolina Casualty"), for reimbursement of a $50,000 self-insured deductible. Carolina Casualty has already obtained a declaratory judgment that it has no duty to defend or indemnify Cummings McClorey, and now it has moved for summary disposition under MCR 2.116(C)(10) with respect to the counterclaim for deductible reimbursement.

"A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." Corley v Detroit Bd of Educ, 470 Mich 274, 278 (2004). "In evaluating such a motion, the court considers the entire record in the light most favorable to the party opposing the motion, including affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties." Id. "Summary disposition under MCR 2.116(C)(10) is appropriately granted if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." Rose v National Auction Group, 466 Mich 453, 461 (2002). Such a "genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." See West v General Motors Corp, 469 Mich 177, 183 (2003). The Court must resolve Plaintiff Carolina Casualty's motion for summary disposition on the remaining counterclaim by applying these standards.

Defendant Cummings McClorey's remaining counterclaim asserts that Cummings McClorey is "entitled to reimbursement of its $50,000 self-insured deductible demanded and paid to Carolina Casualty since Carolina Casualty knew from the outset that there was no claim of legal malpractice since there was no attorney-client relationship existing between Forrester's counsel [in the Missouri tort litigation] and Attorney Mudd[,]" who worked for Cummings McClorey. To be sure, the Court noted in a previous opinion that any theory of legal malpractice against counsel for an opposing party appears "frivolous because a legal-malpractice claim requires proof of the existence of an attorney-client relationship." No matter how farfetched a legal-malpractice claim against Attorney Timothy Mudd might appear, however, Cummings McClorey notified its insurer, Plaintiff Carolina Casualty, that Mudd and Cummings McClorey faced some jeopardy from a threat of a legal-malpractice claim resulting from the Forrester litigation.

Soon after Plaintiff Carolina Casualty received Defendant Cummings McClorey's notice of a potential legal-malpractice claim resulting from the Forrester litigation, Carolina Casualty assigned separate defense counsel for Mudd and Cummings McClorey. Under the terms of the policy issued by Carolina Casualty to Cummings McClorey, Carolina Casualty paid the first $2,500 in fees for the assigned attorneys, Cummings McClorey paid the next $50,000 to the attorneys for Mudd and itself as a deductible, and Carolina Casualty thereafter paid approximately $30,000 more in attorney's fees for the representation of Mudd and Cummings McClorey. See Plaintiff Carolina Casualty Insurance Company's Motion for Summary Disposition Regarding Deductible Counterclaim Issue, Exhibit 6 (Affidavit of Shelagh Savino, ¶¶ 3-5). In paragraph (H) of its counterclaim, Cummings McClorey contends that Carolina Casualty must reimburse the firm to the tune of $50,000 to cover every penny of the payments that Cummings McClorey made to the assigned attorneys. The Court disagrees.

As an initial matter, the concept of deductible reimbursement seems like an oxymoron. After all, a deductible typically must be paid by the insured as a condition for receiving insurance benefits for additional expenses above the amount of the deductible. The Carolina Casualty insurance policy issued to Defendant Cummings McClorey operated in this fashion. See Plaintiff Carolina Casualty Insurance Company's Motion for Summary Disposition Regarding Deductible Counterclaim Issue, Exhibit 7. The "Limits of Liability and Deductible" language of the policy provides that "[t]he first $2,500 in Claims Expense incurred during the Policy Period shall not be applied to the Deductible," see id. (Lawyers Professional Liability Insurance Policy, § V(C)), and then "[t]he Deductible amount stated in Item 4. of the Declarations shall be borne by the Named Insured and shall apply to each and every Claim[,]" see id. (§ V(D)), so that the "Insurer shall only be liable for the amount of Damages and/or Claims Expense arising from a Claim which is in excess of the Deductible amount stated in

Item 4. of the Declarations." See id. Plugging in the deductible amount set forth in Declaration Item 4 yields a contractual obligation on Cummings McClorey's part to satisfy the deductible of $50,000. See id. (Declarations Page, "Item 4."). After Cummings McClorey met its deductible obligation of $50,000, it then had coverage up to the "Limit of Liability for the Policy Period" of $5,000,000. See id. (Declarations Page, "Item 3.").

In light of the language and structure of the policy that Plaintiff Carolina Casualty issued to Defendant Cummings McClorey, the Court cannot fathom how or why Cummings McClorey insists on reimbursement from Carolina Casualty for the $50,000 Cummings McClorey paid to its assigned counsel and the assigned attorney for Timothy Mudd. Indeed, deductible reimbursement in this case would fly in the face of well-settled principles of insurance coverage as well as the clear terms of the governing insurance policy. In a nutshell, Cummings McClorey argues that, "[a]fter receiving notice of this potential 'Claim'" arising from the Forrester litigation, Carolina Casualty "did nothing other than hire lawyers to represent Mudd and CMDA[,]" *i.e.*, Cummings McClorey. In other words, even Cummings McClorey effectively concedes that Carolina Casualty took action to fulfill its duty under the policy to assist in the defense of Cummings McClorey. In addition, Cummings McClorey faults Carolina Casualty because "instead of abiding by its promises to defend [Cummings McClorey] and investigate claims, Carolina sought to escape its promises to provide a defense and coverage for legal malpractice by filing a declaratory judgment action." These accusations have nothing to do with the contractual obligations imposed upon Carolina Casualty by the governing policy. In sum, the Court finds no support whatsoever in the record (or in law or logic) for the deductible reimbursement that Cummings McClorey seeks in paragraph (H) of the prayer for relief in its counterclaim. Therefore, the Court must grant summary disposition under MCR 2.116(C)(10) on that counterclaim.

Having resolved the last outstanding counterclaim, the Court believes that this litigation has run its course. The Court invites Carolina Casualty to submit a proposed declaratory judgment under the so-called seven-day rule, see MCR 2.602(B)(3), reflecting the Court's rulings in this opinion and order and stating that that declaratory judgment resolves the last pending claim and closes this case. Any further debate about the matters raised in this case must take place in our appellate courts.

IT IS SO ORDERED.

Dated: April 26, 2017

HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge