

BAD FAITH BLOG

# Your Case is Pending on Appeal? If Malpractice is a Concern, Don't Forget to Disclose

AUTHOR: SANDBERG PHOENIX

## Introduction

In *Bar Plan Mutual Ins. Co. v. Likes Law Office, LLC*, 2015 WL 6023075 (Ind. App. Oct. 15, 2015) (No. 02A03-1502-CT-65), the Indiana Court of Appeals examined an attorney's duty to disclose a potential claim when completing a malpractice insurance renewal application—particularly when an attorney has a favorable judgment from a state's intermediate appellate court, but the case is still pending before the state supreme court. The case serves as an apt reminder for attorneys to be mindful of how an appellate reversal could lead to a malpractice claim.

## Factual and Procedural History

This matter originated from attorney Kevin Likes' representation of Rickey Whitaker in a lawsuit against Travis Becker for injuries resulting from a car accident. *Id.* at \*1. One month after Likes filed suit against Becker on Whitaker's behalf, Becker's counsel sent Likes a set of written discovery requests; Likes failed to respond. *Id.* Becker's counsel reminded Likes on three occasions that the discovery was overdue; eventually, Becker filed a motion to compel, which the trial court granted. *Id.* After Likes finally responded to the discovery, Becker's counsel moved for sanctions that sought dismissal of the cause, arguing that Likes "provided false and misleading answers to the interrogatories and deliberately concealed certain evidence." *Id.* Likes did not respond to the sanctions motion. *Id.* The trial court granted the motion, holding that "Likes had supplied deceptive interrogatory answers and had done so in bad faith." *Id.* On March 29, 2011, the Court of Appeals reversed. But on April 28, 2011, Becker filed a petition for transfer to the Indiana Supreme Court, which the court granted on May 17, 2011. *Id.*

While the case was pending before the Indiana Supreme Court, Likes filed a renewal application for his legal malpractice insurance on November 14, 2011. *Id.* at \*2. The malpractice insurance renewal application inquired whether Likes or any attorney in his firm had “knowledge of any incident, circumstance, act or omission which may give rise to a claim.” *Id.* Likes answered “no”; the renewed policy went into effect on December 1, 2011. *Id.* On January 18, 2012, the Indiana Supreme Court reversed the Court of Appeals and affirmed the trial court’s dismissal of Whitaker’s cause. *Id.*

Whitaker then sued Likes for legal malpractice. *Id.* Likes notified his malpractice insurer, which denied coverage. *Id.* In particular, the insurer noted that Likes had answered “no” to the question asking whether Likes or any attorney in his firm had “knowledge of any incident, circumstance, act or omission which may give rise to a claim.” *Id.* The malpractice insurer noted that when Likes filed his insurance application, there was still a possibility that the Indiana Supreme Court could reverse the Court of Appeals and affirm the trial court. *Id.*

Likes then filed a third-party complaint against his insurer—and the insurer moved for summary judgment. *Id.* The trial court ruled in favor of Likes; his insurer appealed. *Id.*

#### Analysis: Likes Should Have Disclosed

On appeal, the insurer noted that the renewal application and policy required Likes to notify the insurer if he became aware of a “specific incident act or omission while acting in a professional capacity providing Legal Services.” *Id.* The key issue on appeal was “whether, at the time of [his] application for renewal, Likes had knowledge or should have had reasonable knowledge of an act or omission on [his] part that might reasonably be expected to be the basis of a malpractice claim by Whitaker.” *Id.* at \*5. On this question, the insurer argued as follows:

[A]t the time Likes signed his renewal application of the Policy, he had knowledge or should reasonably have known that the trial court’s dismissal of the underlying cause could give rise to Whitaker’s legal malpractice claim. . . . As an Indiana attorney doing appellate work, he knew the March 2011 favorable Court of Appeals opinion was subject to a pending Petition to Transfer and thus, as a matter of law, was not a final decision upon which he could rely in November 2011 [at the time of the renewal application] to avoid revealing the situation regarding the dismissal.

*Id.* at \*3, \*5. In contrast, Likes argued that the Court of Appeals in the Whitaker-Becker action had handed down its opinion reversing the dismissal of the Whitaker cause, meaning there was no potential claim to report. *Id.* at \*4.

The Court of Appeals held in favor of the insurer. The court explained that when the Court of Appeals in the Whitaker-Becker action reversed the trial court's underlying decision, Likes at that point could reasonably state that he had no reason to believe any of his acts or omissions may have resulted in a claim for legal malpractice. *Id.* at \*6. But that belief **had to have changed** when Becker filed his petition for transfer to the Indiana Supreme Court. At that point, Likes did indeed have reason to believe that his acts or omissions may have resulted in a claim for legal malpractice. The court also noted that "because of the severity of the trial court's remedy—dismissal of the cause—any reasonable attorney in Likes' position would realize that his client might pursue a potential legal malpractice claim against him should the supreme court affirm the trial court." *Id.* at \*7. Accordingly, when Likes signed his renewal application on November 14, 2011, Likes knew or reasonably should have known that the only thing standing between him and a probable malpractice claim was the Indiana Supreme Court ruling. Therefore, he should have disclosed these facts on his application for renewal.

#### Conclusion

This case provides attorneys an excellent reminder of the dangers of failing to disclose potential malpractice claims. Although an attorney may have a favorable appellate decision, that could all change if the case is still pending before a higher court. Thus, attorneys should always carefully consider any potential malpractice claims when completing a malpractice insurance renewal application.

By Mohsen Pasha

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