

ORDER

¶ 1 *Held:* The lower court properly granted summary judgment in favor of the insurance company based on an affidavit from the insured which was entered in a prior lawsuit prior to the affiant's death. The failure of the insurer to attach exhibits to the affidavit in the declaratory judgment action was harmless since all of the parties had earlier received the affidavit with all attached exhibits. The affidavit left no material facts to be determined as to whether the deceased insured (and his firm) should have notified their carrier of the potential claim occasioned by the insured's failure to timely file an objection to a ballot measure. Affirmed.

¶ 2 Defendants-Appellants Resurrection Health Care and Saint Francis Hospital (hereinafter, collectively referred to as "Resurrection") filed a legal malpractice lawsuit against the law firm Lavelle & Motta, Ltd., and its sole shareholder, Michael E. Lavelle (hereinafter, collectively referred to as "Lavelle"). Lavelle, in turn, notified their professional liability insurance carrier, Liberty Insurance Underwriters, Incorporated (Liberty), which denied coverage of the claim. Months later, Liberty brought a declaratory judgment complaint against Lavelle, adding Resurrection as a necessary party. In its complaint, Liberty alleged that Lavelle's claim was not covered under the professional liability insurance policy (policy), citing the policy's "known claims or circumstances" exclusion, while also alleging that Lavelle's claim constituted a known loss. Liberty and Resurrection filed dueling motions for summary judgment. The lower court granted Liberty's motion for summary judgment, while denying Resurrection's motion, finding that there was no coverage under the plain and unambiguous language of the policy and, further, that the claim was precluded under the "known loss" doctrine. Resurrection then filed a motion for reconsideration, which the court denied. This timely appeal followed.

¶ 3

BACKGROUND

1-11-2096

¶ 4 The two actions that led to this appeal stem from a proposed ballot measure filed in Evanston on January 18, 2005, in which the voters were asked to consider determining the appropriateness of the tax-exempt status of Resurrection. In an attempt to strike the measure from the ballot, Resurrection hired Michael Lavelle, a well-known specialist in election law matters, who recommended filing an objection to the measure. On January 20, 2005, Lavelle told the hospital that time was of the essence because any such objection essentially had to be filed by January 25, 2005, in order to be considered. Lavelle blew the filing deadline and didn't actually file the objection until February 1. Shortly thereafter, the Evanston election board briskly dismissed Resurrection's objection citing its lack of jurisdiction because the period for filing objections had expired by the time Lavelle filed theirs.

¶ 5 With the ballot measure still technically on the books, Resurrection promptly engaged additional legal counsel who filed a claim in the Circuit Court of Cook County challenging the board's decision on multiple grounds, but the circuit court affirmed the board's decision because of the late filing. Resurrection then hired a public relations company to run an advertising campaign in order to foster a negative voter response to the advisory question. Ultimately, the voters considered the measure in April and Resurrection's position prevailed as the voters rejected the advisory question in the election.

¶ 6 Soon thereafter, Resurrection filed a two-count complaint against Lavelle, alleging professional negligence and breach of contract. In its complaint, Resurrection alleged that Lavelle was negligent in failing to file the objection on time, causing Resurrection to hire additional counsel and to spend substantial sums to undertake "significant efforts to obtain a

1-11-2096

negative voter response to the advisory question." Both Resurrection and Lavelle filed cross-motions for summary judgment on the issue of liability. In support of their motion, Lavelle attached Michael Lavelle's personal affidavit, in which Lavelle asserted they should be absolved from any wrongdoing. The trial court granted Resurrection's motion, finding that Lavelle's failure to timely file the objection resulted in Resurrection's objection to the advisory question being waived. On the subsequent cross-motions for summary judgment on the issue of damages, the court granted Resurrection's motion and found that it had incurred \$65,697.98 in damages for additional legal services. In a later trial, the court found Lavelle liable for further damages in the amount of \$146,186.13, which consisted of the fees Resurrection incurred from the hiring of a public relations company.

¶ 7 While the underlying action was being litigated, specifically on March 1, 2007, Lavelle tendered a defense to their insurance carrier, Liberty, contending that the policy they obtained from Liberty on May 1, 2006, more than a year after the allegedly negligent conduct, still provided coverage on the claim which was actually filed during the effective date of the obtained coverage. On April 11, 2007, Liberty responded in writing, denying coverage of the claim, stating that it would not indemnify or defend Lavelle in the underlying action, claiming it wasn't obligated because of the "known claims or circumstances" disclaimer in the policy. Liberty further argued that the claim was a "known loss" as established in *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90 (1992).

¶ 8 On May 28, 2008, Liberty filed its declaratory action against Lavelle, naming Resurrection as a necessary party. Liberty sought a declaration that the policy provided no

1-11-2096

coverage for Lavelle's claim. Both Lavelle and Liberty filed their answers to the complaint and neither party included affirmative defenses.

¶ 9 In December 2009, as the declaratory action was being litigated, Michael Lavelle died and ten months later, Liberty filed its motion for summary judgment. Liberty alleged that it was not obligated to provide coverage of Lavelle's underlying claim because Lavelle failed to mention that he might have a potential claim as a result of blowing the filing deadline. This, according to Liberty, amounted to a material misrepresentation in the "known loss" section of the insurance application and in the "known claims or circumstances" exclusion section of the policy. Liberty attached Michael Lavelle's affidavit from the underlying case in support of its motion for summary judgment. Resurrection then filed its own cross-motion for summary judgment and filed a response to Liberty's summary judgment motion. In its response, Resurrection argued that Liberty should be estopped from raising policy defenses based on its delay in filing its declaratory judgment complaint. Resurrection also moved to have Michael Lavelle's affidavit stricken, claiming that it was barred by the Dead-Man's Act (735 ILCS 5/8–201 (West 2008)). Lavelle adopted Resurrection's motion for summary judgment and its response to Liberty's motion for summary judgment.

¶ 10 On April 18, 2011, the trial court granted Liberty's motion for summary judgment, while denying Resurrection's motion for summary judgment and its motion to strike Michael Lavelle's affidavit. The trial court held that Liberty was not estopped from denying coverage of the underlying claim since neither Resurrection nor Lavelle had raised the issue of estoppel in any pleading, and further found that Liberty had filed its complaint within a reasonable period. The

1-11-2096

court's order also denied Resurrection's motion to strike Michael Lavelle's affidavit because it failed to identify what portions of the affidavit it sought to be struck or otherwise explain why those statements constituted hearsay. In its order, the lower court specifically found that Michael Lavelle's affidavit established that the matters at issue were precluded from coverage under the "known claims or circumstances" exclusion and the "known loss" doctrine.

¶ 11 Resurrection moved to reconsider the summary judgment order arguing that the trial court misapplied existing law. Especially pertinent to this appeal, Liberty's motion for reconsideration contended that Michael Lavelle's affidavit failed to comply with Illinois Supreme Court Rule 191(a) (eff. July 1, 2002) because it failed to attach documents that formed part of the basis of the statements in the affidavit. The trial court denied this motion, and this timely appeal followed.

¶ 12

ANALYSIS

¶ 13 On appeal, Resurrection argues that the lower court erred in finding that Liberty was not estopped from bringing its declaratory judgment action and raising policy defenses. Resurrection contends that Liberty's declaratory judgment action, which was filed seventeen months after Liberty was initially put on notice of the underlying claim, was not filed promptly. Resurrection cites *Coltec Industries Inc. v. Zurich Insurance Co.*, No. 99-C-1087, 2004 WL 413304 (N.D. Ill. 2004), where the Northern District of Illinois, interpreting Illinois law, found that an insurer who fails to file a prompt declaratory judgment action is estopped from raising policy defenses.

¶ 14 In its order, the lower court ruled that Resurrection could not be granted any relief on this basis, since it had not filed any pleadings regarding estoppel. The court, however, went on to

1-11-2096

state that even if the matter were properly before the court, Liberty would not be estopped because it filed its declaratory judgment complaint within a reasonable period of time after being put on notice of the underlying action. The court stressed that the declaratory action was filed before any final judgment was rendered on the underlying case. This court has held that the filing of a declaratory judgment complaint prior to the resolution of the underlying action is timely. See *Pekin Insurance Co. v. Allstate Insurance Co.*, 329 Ill. App. 3d 46 (2002).

Therefore, the trial court's denial of Resurrection's affirmative defense is affirmed.

¶ 15 Next, Resurrection contends that the trial court erred in denying its motion to strike Michael Lavelle's affidavit and therefore erred in granting Liberty's motion for summary judgment. As the trial court's order makes perfectly clear, Michael Lavelle's affidavit was the only piece of admissible evidence presented by Liberty to support its contention that Lavelle had breached a professional duty. On appeal, Resurrection contends that Michael Lavelle's affidavit should have been stricken because it was hearsay and also for the technicality of failing to attach exhibits that all of the parties to this litigation already had possessed for years.

¶ 16 As a threshold matter, there is a dispute between the parties as to the appropriate standard of review as it specifically relates to the attached exhibits at issue. Resurrection argues that the denial of a motion to strike an affidavit that is made in conjunction with a trial court's ruling on a motion for summary judgment is reviewed *de novo*. See *Jackson v. Graham*, 323 Ill. App. 3d 766, 773 (2001). Liberty, however, argues that the appropriate standard of review is abuse of discretion, contending that Resurrection's argument relating specifically to Michael Lavelle's affidavit was not raised until Resurrection's motion to reconsider. See *Rahill v. Urbanski*, 123

1-11-2096

Ill. App. 3d 769, 776 (1984) ("When an argument is first brought to the trial court's attention by way of a post-judgment motion, the issue on appeal is whether the trial court abused its discretion in denying the motion.")

¶ 17 The disagreement concerning the appropriate standard of review is directly attributable to Resurrection's poorly drafted motion to strike. Setting aside the numerous typographical errors, Resurrection's motion to strike can best be described as vague. While the motion does cite Illinois Supreme Court Rule 191(a) (eff. July 1, 2002), the motion never explicitly states how the affidavit fails to comply with that rule. Further complicating matters, the motion next asserts, in one sentence, that Michael Lavelle's affidavit is inadmissible hearsay but fails to provide any support of its position or even identify what portions of the affidavit are, in fact, hearsay. Finally, on its face, the motion, itself, is contradictory. The motion begins by asking the lower court to strike *portions* of the affidavit, while in its prayer for relief, it asks the lower court to strike *the* affidavit of Michael Lavelle.

¶ 18 Liberty responds that the filing of a motion which does not fully develop an argument is legally tantamount to not raising the argument at all. Based on this reasoning, Liberty contends that Resurrection first raised an argument regarding the validity of Michael Lavelle's affidavit in its motion to reconsider, and therefore, Liberty urges this court to adopt an abuse of discretion standard.

¶ 19 Our review of the record supports Liberty's position that the argument regarding the affidavit was first raised in the motion to reconsider, leaving us to review the trial court's ruling under an abuse of discretion standard. *Rahill*, 123 Ill. App. 3d at 776. We hasten to add,

1-11-2096

however, that our ruling would be the same under a *de novo* review, as the following discussion will elucidate. As stated above, Resurrection argues that Michael Lavelle's affidavit, as it was attached to Liberty's motion for summary judgment, failed to comply with Rule 191(a) because it failed to attach sworn or certified copies of all papers upon which the affiant relied. Resurrection cites *Robidoux v. Oliphant*, 201 Ill. 2d 324, 339 (2004), where the supreme court held that the failure to attach the papers upon which the affiant relied renders the affidavit insufficient. In its holding, the court stated: "The Rule 191(a) provisions barring conclusory assertions and requiring an affidavit to state facts with 'particularity' would have little meaning were we to construe the attached-papers provision as merely a technical requirement that could be disregarded so long as the affiant were competent to testify at trial." *Robidoux*, 201 Ill. 2d at 339. In the case *sub judice*, however, the attached-papers provision is surely a technical requirement because the complaining party had been in possession of those documents for years as of the time that the motion for summary judgment was heard. *Robidoux*, therefore, is meaningfully distinguishable from this case and does not mandate striking of the affidavit. Directly related to this issue, Liberty cites *Otis Elevator Co. v. American Surety Co. of New York*, 314 Ill. App. 479, 484 (1942), which held that the purpose of the supreme court rule requiring attaching exhibits to affidavits is to enable the defendant to dispute any material facts in those affidavits.

¶ 20 Liberty, therefore, maintains that because Resurrection was already in receipt of the exhibits, Liberty had satisfied the spirit, if not the specific letter, of the rule because Resurrection had ample opportunity to dispute the contents of the exhibits. We agree. Resurrection complains that the documents weren't attached, but they had been in its possession when the underlying case

1-11-2096

was litigated and for the entire time that the declaratory action was litigated. Were we to accept Resurrection's position on appeal, the case would be remanded and an amended affidavit with the necessary attachments (already in Resurrection's possession for years) would be filed in support of the motion for summary judgment which the trial court would grant for the same reasons that it initially granted the motion. We respectfully decline the opportunity to elevate form over substance.

¶ 21 Resurrection also contends that Michael Lavelle's affidavit should have been struck because it is hearsay. While the affidavit may be hearsay, this court has adopted the prior-testimony hearsay exception. See *Longstreet v. Cottrell, Inc.* 374 Ill. App. 3d 549, 553 (2007). In sum, this exception allows an unavailable witness' prior testimony to be used in a subsequent proceeding when the matters and the parties are essentially the same and the party whom the testimony is now being offered against had ample opportunity to cross-examine the witness in the prior proceeding. *Wilkerson v. Pittsburgh Corning Corp.*, 276 Ill. App. 3d 1023, 1035 (1995). Here, Michael Lavelle is unavailable due to his death. The parties and matters involved are essentially the same, as Resurrection and Lavelle were both parties in the prior proceedings and the prior matter involved Lavelle's breach of their professional duty to Resurrection. Finally, Michael Lavelle's affidavit was submitted in opposition to Resurrection's motion for summary judgment and, therefore, Resurrection had the right and opportunity to cross-examine Michael Lavelle in the prior proceeding, but obviously never opted to take his deposition before his death.

¶ 22 Next, Liberty argues that the lower court erred in granting Resurrection's motion for summary judgment based on the "known loss" doctrine. Liberty argues that there are material

1-11-2096

issues of fact as to whether Lavelle knew or had reason to know of a "known loss" prior to applying for the insurance policy.

¶ 23 Summary judgment is proper where “the pleadings, depositions, and admissions on file, together with the affidavits, if any, 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.” 735\ ILCS 5/2–1005© (West 2000); *Robidoux*, 201 Ill. 2d at 335. Despite summary judgment's ability to dispose of a lawsuit expeditiously, it remains a drastic measure and should be allowed only “when the right of the moving party is clear and free from doubt.” *Purtill v. Hess*, 111 Ill.2d 229, 240 (1986). We review the grant of summary judgment *de novo*. *Roth v. Opiela*, 211 Ill. 2d 536, 542 (2004).

¶ 24 The "known loss" doctrine, as extrapolated in *Outboard Marine Corp.*, states that when purchasing an insurance policy, if the insured knows or has reason to know that it has suffered a loss, the risk of liability is no longer unknown, and the insurer has no duty to defend. *Outboard Marine Corp.*, 154 Ill. 2d at 104. "There is no bright-line test to determine whether and at what point in time the insured knew or had reason to know of the substantial probability of the loss at issue. The extent of the insured's knowledge of the loss must be determined on a case-by-case basis. In a motion for summary judgment, the court must determine whether any factual questions exist with respect to the insured's knowledge at the time it bought each policy." *Id.*; see also *Coughlin v. Gustafson*, 332 Ill. App. 3d 406, 415 (2002). "If the court finds that no fact questions exist in this regard, the issue is one of law for the court to decide." *Outboard Marine Corp.*, 154 Ill. 2d at 104.

¶ 25 As stated above, Liberty's motion for summary judgment included Michael Lavelle's

1-11-2096

affidavit. The affidavit states that Michael Lavelle was aware that the objection they filed had been dismissed due to their untimely filing. The affidavit further stated that Michael Lavelle had discussions with Resurrection's new counsel in an attempt to address the issues created by the late filing. All of these events took place prior to Lavelle's application for the insurance policy. Therefore, Lavelle undoubtedly knew or had reason to know that they had suffered a loss prior to filing their insurance application.

¶ 26 Liberty maintains, however, that Liberty's inclusion of the "known claims or circumstances" exclusion defined a "known loss" and therefore effectively replaced and eliminated its ability to seek relief under the common law doctrine set forth in *Outboard Marine Corp.* We disagree. Despite its assertion, Liberty fails to cite a single case in support of its position that a policy provision can supersede common law doctrine. Furthermore, as the trial court held, nothing in *Outboard Marine Corp.* states that the "known loss" doctrine does not apply where the policy at issue contains a specific exclusion addressing known claims.

¶ 27 Resurrection contends that the lower court erred in finding that Lavelle's claim was excluded under the "known claims or circumstances" exclusion. Resurrection argues that Michael Lavelle's affidavit was not probative of Lavelle's reasonable belief as of the date they applied for insurance. "A policy provision that purports to exclude or limit coverage will be read narrowly and will be applied only where its terms are clear, definite and specific." *Gillen v. State Farm Mutual Automobile Insurance Co.*, 215 Ill. 2d 381, 393 (2005). The burden rests with the insurer to affirmatively demonstrate the applicability of an exclusion. *Voss v. Bituminous Casualty Corp.*, 52 Ill. App. 3d 49 (1977). The "known claims or circumstances" exclusion

1-11-2096

states:

"This policy does not apply to any **claim** arising out of a **wrongful act** occurring prior to the **policy period** if, prior to the effective date of the first Lawyers Professional Liability Policy issued by us to the **name insured** and continuously reviewed and maintained in effect to the inception of this **policy period**:

(b) **you** had a reasonable basis to believe that **you** had breached a professional duty, committed a **wrongful act**, violated a disciplinary rule, engaged in professional misconduct or to foresee that a **claim** would be made against **you**." (Emphasis in original)

¶ 28 To reiterate, Michael Lavelle was aware of the filing deadline requirement and was aware that his filing was days after that deadline. The affidavit clearly shows that prior to the policy period, Michael Lavelle, himself, and his firm, had a reasonable basis to believe that a professional duty had been breached. Therefore, the policy's "known claims or circumstances" exclusion relieves Liberty from any duty to indemnify or defend in the underlying action, thus justifying the trial court's entry of summary judgment in the declaratory judgment action.

¶ 29 *CONCLUSION*

¶ 30 Based on the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 31 Affirmed.

1-11-2096