

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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WESTPORT INSURANCE CORPORATION,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	No. 00-4367
	:	
KENNETH L. MIRSKY, ESQUIRE; MICHAEL	:	
HEPPS, ESQUIRE; THE LAW OFFICES OF	:	
MICHAEL B.L. HEPPS; RENEE ROSETTI	:	
KASTON and DWIGHT THOMAS PETERSON,	:	
	:	
Defendants.	:	

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**MEMORANDUM**

ROBERT F. KELLY, Sr. J.

SEPTEMBER 10, 2002

Presently, before this Court, is a declaratory action brought by an insurer, Westport Insurance Corporation (“Westport”) against its insured, Kenneth L. Mirsky, Esq. (“Mirsky”), Michael Hepps, Esq. (“Hepps”) and the Law Offices of Michael B.L. Hepps (“Hepps Law Offices”).<sup>1</sup> This matter is a result of a controversy regarding the provisions of professional liability policies issued by Westport to Mirsky, Hepps and Hepps Law Offices. Westport seeks declaratory judgment that it does not owe any coverage to its insured in relation to a legal malpractice action brought against them based upon Exclusion B, the prior knowledge exclusion, applicable to the relevant policies. Specifically, Westport’s Declaratory Complaint contains three counts: Count I - seeking a declaration from the Court that there is no coverage for Mirsky

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<sup>1</sup> This action includes two additional Defendants, Renee Rosetti Kaston (“Kaston”) and Dwight Thomas Peterson, Esq. (“Peterson”). Kaston commenced a legal malpractice suit involving the Defendants for which this declaratory judgment is undertaken. As for Peterson, he has played a minimal role in this declaratory action and default was entered against him on May 25, 2001.

under a professional liability insurance policy issued by Westport solely to Mirsky (“the Mirsky Policy”); Count II - seeking a declaration that there is no coverage for either Mirsky or Hepps pursuant to a professional liability policy issued by Westport to Hepps Law Offices (“the Hepps Policy”) and Count III - seeking a declaration, in the alternative, that there is no coverage for Hepps under the Hepps’ Policy, if, as a matter of fact, Mirsky is not an “Insured” under the policy.

Westport relies on Exclusion B to operate as a bar of coverage for Mirsky and Hepps. Both of the professional liability policies issued by Westport to Mirsky and Hepps contain Exclusion B. Exclusion B excludes coverage for any claim which arises out of any act or omission which occurred prior to the inception of the policy if any insured under the policy knew or could have reasonably foreseen that any such prior act, error, omission or circumstance might give rise to a claim.<sup>2</sup>

First, relying upon Exclusion B, Westport has denied coverage for Mirsky under the Mirsky Policy based upon his alleged personal prior knowledge of legal malpractice with respect to his representation of Kaston in her underlying medical malpractice suit. Second,

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<sup>2</sup> Exclusion B of the Mirsky Policy and the Hepps Policy contains the following language:

This POLICY shall not apply to any CLAIM based upon, arising out of, attributable to, or directly or indirectly resulting from

- B. any act, error, omission, circumstance or PERSONAL INJURY occurring prior to the effective date of this POLICY if any INSURED at the effective date knew or could have reasonably foreseen that such act, error, omission, circumstance or PERSONAL INJURY might be the basis of a CLAIM.

Pl.’s Exs. 68 and 75.

Westport claims that Exclusion B also operates to bar coverage for both Mirsky and Hepps under the Hepps' Policy, if Mirsky qualifies as an "Insured" under that policy.<sup>3</sup> If the Court finds that Mirsky qualifies as an "Insured" under the Hepps Policy, pursuant to the policy's "Independent Contractor" clause, Westport claims that there is no coverage for either Mirsky or Hepps because coverage is excluded if any insured (e.g. Mirsky) under the policy "knew or could have reasonably foreseen that such act, error, omission, circumstance or PERSONAL INJURY might be the basis of a CLAIM." Exclusion B. Third, if the Court finds that Mirsky is not an "Insured" under the Hepps Policy, Westport, alternatively, asserts that Exclusion B precludes coverage for Hepps solely based upon Hepps' own personal prior knowledge of the alleged mishandling of Kaston's medical malpractice suit.

In accordance with Federal Rule of Civil Procedure 52, after conducting a three day bench trial, the Court makes the following findings of fact and conclusions of law based upon consideration of the testimony by the witnesses, the admitted exhibits, arguments of counsel and the parties' post-trial submissions.

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<sup>3</sup> The Hepps Policy contains an "Independent Contractor(s)" endorsement which amends the definition of "INSURED" in the Hepps Policy to include:

the individual lawyer(s) named below who act(s) as Independent Contractor(s) to the NAMED INSURED, but only as respects legal services rendered on behalf of the NAMED INSURED:

Kenneth Mirskey [sic]

Pl.'s Ex. 75.

## FINDINGS OF FACT

### **I. The Parties**

1. Plaintiff Westport is, and at all times relevant hereto was, an insurance corporation incorporated under the laws of the state of Missouri, with its principal place of business in Overland Park, Kansas.

Compl., ¶ 4; Defs.' Ans., ¶ 4.

2. Defendant Mirsky is, and at all times relevant hereto was, an individual licensed to practice law in the Commonwealth of Pennsylvania with an office located on the second floor of 2033 Walnut Street, Philadelphia, Pennsylvania.

Compl., ¶ 5; Defs.' Ans., ¶ 5.

3. Defendant Hepps is, and at all times relevant hereto was, an individual licensed to practice law in the Commonwealth of Pennsylvania with an office located on the second floor of 2033 Walnut Street, Philadelphia, Pennsylvania.

Compl., ¶ 6; Defs.' Ans., ¶ 6.

4. Defendant Hepps Law Offices is, and at all times relevant hereto was, a corporation incorporated under the laws of the Commonwealth of Pennsylvania.

Hepps' Ans., ¶ 7.

5. Defendant Peterson is, and at all times relevant hereto was, an individual licensed to practice law in the Commonwealth of Pennsylvania with an office located on the fourth floor of 2033 Walnut Street, Philadelphia, Pennsylvania.

Compl., ¶ 8; Defs.' Ans., ¶ 8.

6. Defendant Kaston is, and at all times relevant hereto was, an individual citizen and resident of the Commonwealth of Pennsylvania.

Compl., ¶ 9; Defs.' Ans., ¶ 9.

## **II. Westport's Insurance Policies Concerning Mirsky and Hepps**

7. Since 1995, Mirsky had one-year professional liability insurance policies with Westport and its predecessors.

Mirsky's Proposed Findings of Fact, ¶ 30.

8. On March 30, 1995, Hepps submitted a Lawyers Professional Liability Insurance Renewal Application to Westport's predecessor, Coregis Insurance Company, wherein Hepps indicated that Mirsky worked as an "Independent Contractor/Per Diem attorney" for the Law Offices of Michael B.L. Hepps.

Pl.'s Ex. 1.

9. Throughout the policy years 1995-1996 to 1999-2000, Hepps continued to accept premium quotations from Westport and/or Coregis which indicated that "Independent Contractor" endorsements would apply for Mirsky.

Pl.'s Exs. 2 and 3.

10. On February 13, 1999, Westport Policy No. PLL-333021-6 (the Mirsky Policy) inceptioned. The Mirsky Policy is a "Claims Made and Reported" Policy, with Mirsky as the Named Insured, containing a policy period of February 13, 1999 to February 13, 2000. The policy has limits of liability of \$500,000 for each claim and \$1 million in the aggregate, and a \$1,000 deductible for each claim.

Pl.'s Ex. 68.

11. On July 14, 1999, Westport Policy No. PLL-333740-7 (the Hepps Policy) inceptioned. The Hepps Policy is a "Claims Made and Reported" Policy, with the Law Offices of Michael B.L. Hepps as the Named Insured, with a policy period of July 14, 1999 to July 14, 2000. The policy has limits of \$1 million for each claim and \$2 million in the aggregate, and a \$5000 deductible for each claim and aggregate for the policy period.

Pl.'s Ex. 75.

12. A “claims made” policy provides coverage for claims made against the insured provided that the negligent or omitted act that forms the basis for a claim is discovered and brought to the attention of the insurer within the policy term. A “claims made” policy differs from an “occurrence” policy, the other major type of insurance policy, because an “occurrence” policy insures against the occurrence itself during the policy period, regardless of when the resulting claim is asserted.

See Pizzini v. Am. Int’l Specialty Lines Ins. Co., 210 F. Supp.2d 658 (E.D. Pa. 2002).

13. Both the Mirsky and Hepps policies contain the following exclusion in the GENERAL TERMS & CONDITIONS section:

XIV. EXCLUSIONS

This POLICY shall not apply to any CLAIM based upon, arising out of, attributable to, or directly or indirectly resulting from:

- B. any act, error, omission, circumstance or PERSONAL INJURY occurring prior to the effective date of this POLICY if any INSURED at the effective date knew or could have reasonably foreseen that such act, error, omission, circumstance or PERSONAL INJURY might be the basis of a CLAIM.

Pl.’s Exs. 68 and 75.

14. The Hepps Policy also contains an “Independent Contractor(s)” endorsement which amends the definition of “INSURED” in the Hepps Policy to include:

the individual lawyer(s) named below who act(s) as Independent Contractor(s) to the NAMED INSURED, but only as respects legal services rendered on behalf of the NAMED INSURED:

Kenneth Mirskey [sic]

Pl.’s Ex. 75.

**III. The Underlying Kaston Medical Malpractice Action**

15. In or about the summer of 1994, Kaston consulted with and retained Peterson to represent her in connection with a claim for medical malpractice against Valentino Ciullo, D.P.M.

N.T. 4/24/02, p. 31, lines 14-16; p. 91, lines 18-22.

16. On or about July 14, 1995, Peterson, on behalf of Kaston, filed a Civil Action complaint in the Court of Common Pleas of Philadelphia County, Pennsylvania, claiming medical malpractice. The resulting action, captioned Kaston v. Ciullo was assigned number 780 of the June Term, 1995 (hereinafter the “Kaston Medical Malpractice Action”).

N.T. 4/24/02, p. 31, lines 24-32; Pl.’s Ex. 5.

17. In or about the latter part of 1995, Peterson contacted Hepps and requested that Hepps assist Peterson with the handling of the Kaston Medical Malpractice Action.

N.T. 4/24/02, p. 92, lines 1-5.

18. On February 14, 1996, Kaston executed a retainer agreement wherein she agreed to pay to Hepps a certain percentage of any recovery in exchange for Hepps’ representation.<sup>4</sup>

N.T. 4/24/02, p. 32, lines 19-24; Pl.’s Ex. 10.

19. The retainer agreement was signed in Hepps’ presence in Hepps’ office.

N.T. 4/24/02, p. 72, lines 16-19; p. 84, lines 8-13.

20. Shortly after becoming involved in the Kaston Medical Malpractice Action, Hepps requested that Mirsky assist him in researching certain issues raised in the Kaston Medical Malpractice Action, including an issue regarding the applicable statute of limitations.

Mirsky’s Proposed Findings of Fact, ¶ 8 (Stipulation of Undisputed Facts).

21. Prior to April 29, 1996, Hepps forwarded to Kaston Interrogatories propounded by the Defendants in the Kaston Medical Malpractice Action. Hepps signed Kaston’s interrogatory answers as Kaston’s attorney.

N.T. 4/24/02, p. 34, line 17; p. 35, line 4; Pl.’s Ex. 11.

22. On June 11, 1996, Hepps filed his Entry of Appearance on behalf of Kaston in the Kaston Medical Malpractice Action.

N.T. 4/24/02, p. 229, lines 21-23; Pl.’s Ex. 12.

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<sup>4</sup> There is a dispute whether the agreed-upon percentage was 40% or 45%, however, the exact percentage is inconsequential because it has no bearing upon the result of this coverage dispute.

23. On July 24, 1996, Hepps attended Kaston's deposition along with Peterson.  
N.T. 5/2/02, p. 62, lines 12-15.
24. After Kaston's deposition in the Kaston Malpractice Action, Hepps informed Kaston that Mirsky "was going to help him" on the medical aspect of the case and that she could call either of them thereafter to inquire about the status of the case.  
N.T. 4/24/02, p. 78, lines 6-17.
25. Upon learning that Mirsky was going to "help" Hepps with certain aspects of her case, Kaston questioned Hepps as to whether she would have to "give [Mirsky] 40 percent as well." Hepps responded that Mirsky's fee would "be taken care of" between the attorneys.  
N.T. 4/24/02, p. 39, lines 8-21; p. 77, line 25; p. 78, lines 1-5.
26. Kaston never entered into a separate retainer agreement with Mirsky.  
N.T. 4/24/02, p. 39, lines 14-16.
27. Kaston verbally agreed to Mirsky's participation and understood that such participation was done "[t]hrough Mr. Hepps' office."  
N.T. 4/24/02, p. 47, lines 2-7.
28. Kaston understood that Mirsky was a "part of Hepps' office."  
N.T. 4/24/02, p. 39, lines 2-4.
29. Kaston also had the understanding that Hepps and Mirsky were "working together" on her medical malpractice claim.  
N.T. 4/24/02, p. 77, lines 3-6.
30. After Hepps entered his appearance on behalf of Kaston, Hepps was sent several letters from judges of the Court of Common Pleas informing him of discovery deadlines, settlement conferences and hearings on Defendant Ciullo's Motion for Summary Judgment in the Kaston Medical Malpractice Action.  
Pl.'s Exs. 29, 32, 57 and 59.

31. On September 25, 1996, Hepps and Mirsky served a Request for Production of Documents upon Defendant Ciullo's counsel in the Kaston Medical Malpractice Action. On the Request for Production, Hepps' and Mirsky's names appear together under the heading of "Law Offices of Michael B.L. Hepps" and over the telephone number of Hepps' office.

N.T. 4/24/02, p. 188, line 16; p. 189, line 3; Pl.'s Ex. 14.

32. On October 14, 1996, Hepps and Mirsky served a Notice of Deposition for Defendant Fox in the Kaston Medical Malpractice Action utilizing the same letterhead wherein the names of Hepps and Mirsky appear under the heading of Hepps' firm.

N.T. 4/24/02, p. 189, lines 7-11; Pl.'s Ex. 15.

33. The aforementioned letterhead was used jointly by Hepps and Mirsky in cases wherein both attorneys were involved so that if one or the other was out of the office, the other could sign pleadings for the other.

N.T. 4/24/02, p. 188, line 16; p. 189, line 3.

34. On January 27, 1997, Mirsky prepared a memorandum to Hepps reminding Hepps to contact a Dr. Teplick regarding Dr. Teplick's report concerning the Kaston Medical Malpractice Action.

Pl.'s Ex. 22.

35. In or about February of 1997, Hepps received a Notice of Record Reproduction Request from the Court of Common Pleas regarding the Kaston Medical Malpractice Action.

N.T. 4/24/02, p. 206, lines 17-19; Pl.'s Ex. 27.

36. In or about February of 1997, Hepps received a request from vocational expert Dr. Robert Wolf requesting information regarding the Kaston Medical Malpractice Action.

N.T. 4/24/02, p. 207, lines 4-7; Pl.'s Ex. 28.

37. On or about February 24, 1997, Hepps drafted and sent a letter to Dr. Wolf enclosing certain information regarding Kaston in connection with the Kaston Medical Malpractice Action.

N.T. 4/24/02, p. 207, line 23; p. 208, line 8; Pl.'s Ex. 30.

38. On March 17, 1997, Hepps had a telephone conference with Peterson and they discussed, *inter alia*, that Dr. Wolf's testimony had been barred by the Court of Common Pleas.
- N.T. 4/24/02, p. 117, lines 5-8; Pl.'s Ex. 79.
39. On April 4, 1997, Hepps signed and caused to be filed Kaston's Settlement Memorandum in the Kaston Medical Malpractice Action. Mirsky's name appears along with Hepps' name over the mutual address and telephone number of Hepps' office.
- N.T. 4/24/02, p. 212, lines 3-8; Pl.'s Ex. 37.
40. On May 23, 1997, Mirsky signed and filed Kaston's Pre-Trial Memorandum in the Kaston Medical Malpractice Action. Mirsky's signature appears over Hepps' and Mirsky's name.
- N.T. 4/24/02, p. 207, lines 4-7; Pl.'s Ex. 38.
41. On August 25, 1997, Mirsky wrote to Judge Flora Barth Wolf of the Court of Common Pleas regarding an allegation made against Mirsky of "obstructive activities" in the Kaston Medical Malpractice Action. The letter indicates a copy to Hepps.
- Pl.'s Ex. 42.
42. On September 12, 1997, Mirsky wrote to Judge Papalini of the Court of Common Pleas requesting a hearing regarding Defendant Ciullo's request for discovery sanctions in the Kaston Medical Malpractice Action. The letter indicates a copy to Hepps.
- Pl.'s Ex. 45.
43. On September 15, 1997, Hepps, Mirsky and Peterson met in Hepps' office. During the meeting, Hepps and Mirsky indicated to Peterson that they had not received certain discovery orders. Consequently, they informed Peterson that they wanted him to withdraw his appearance on Kaston's behalf. During this meeting, Peterson provided both Hepps and Mirsky copies of all orders relating to deadlines for compliance with discovery and notes associated therewith.
- N.T. 4/24/02, p. 123, line 15; p. 124, line 4; p. 126, lines 6-7; Pl.'s Ex. 79.
44. On September 17, 1997, Mirsky entered an appearance and Peterson withdrew his appearance on behalf of Kaston in the Kaston Medical Malpractice Action.
- Pl.'s Ex. 48.

45. From June 11, 1996 to September 17, 1997, Peterson and Hepps were the only attorneys of record representing Kaston in her medical malpractice action.

N.T. 4/24/02, p. 98, lines 21-23.

46. Prior to Mirsky's filing of his appearance on September 17, 1997, Peterson had the understanding that Mirsky was assisting Hepps in the Kaston Medical Malpractice Action.

N.T. 4/24/02, p. 98, lines 18-20.

47. On September 24, 1997, seven days after Mirsky entered his appearance, Judge Papalini of the Court of Common Pleas entered nineteen orders which included an order requiring Kaston to immediately pay to defendant a sanction in the amount of \$300. The series of orders also set a hearing in twenty days to identify additional possible sanctions, including possible preclusion of experts.

Pl.'s Ex. 49.

48. On October 8, 1997 and on October 14, 1997, Mirsky sent letters to Judge Papalini regarding the September 24, 1997 orders and requesting reconsideration. Both letters indicate copies to Hepps.

N.T. 4/25/02, p.54, lines 7-10; Pl.'s Exs. 50 and 51.

49. On October 15, 1997, Hepps drafted a letter to Dr. Barolat requesting that he review Kaston's deposition in the Kaston Medical Malpractice Action and requesting Dr. Barolat's opinion regarding Kaston's condition.

N.T. 4/24/02, p. 234, lines 10-16; Pl.'s Ex. 52.

50. On October 20, 1997, Judge Papalini barred the testimony of Kaston's expert liability witnesses: Dr. Bennett, Dr. Teplick and Dr. Joyce. Also, Judge Papalini ordered Mirsky to personally pay the original \$300 sanction as well as an additional \$500 sanction.

Pl.'s Ex. 54.

51. On October 21, 1997, Mirsky sent a letter to Defendant's counsel in the Kaston Medical Malpractice Action enclosing a check in the amount of \$800. The letter indicates a copy to Hepps.

N.T. 4/24/02, p. 236, lines 2-11; Pl.'s Ex. 55.

52. The \$800 sanction check was drawn upon Hepps' account and Hepps signed the check.  
N.T. 4/24/02, p. 236, lines 16-19; p. 243, line 13; N.T. 4/25/02, p. 139, lines 3-9.
53. After the entry of the four preclusionary orders of the Court of Common Pleas dated October 20, 1997 and in the 1997 time frame, it was Hepps who communicated to Kaston the fact that her experts had been barred.  
N.T. 4/24/02, p. 54, lines 2-5.
54. As a result of the October 20, 1997 preclusionary orders, Defendant Ciullo in the underlying medical malpractice action filed and served a motion for summary judgment based upon the orders on October 24, 1997.  
N.T. 4/24/02, p. 54, lines 2-5.
55. On September 18, 1998 summary judgment was granted in favor of the Defendant in the Kaston Medical Malpractice Action.  
Pl.'s Ex. 60.
56. In granting Dr. Ciullo's motion for summary judgment, the Court noted that, prior to the filing of the motion, an order was entered by another judge in the Kaston Medical Malpractice Suit precluding Kaston from presenting three experts to testify at trial "due to the continual failure of plaintiff's counsel to comply with discovery court orders." The Court observed that the motion for summary judgment was premised on Kaston's "inability to establish a *prima facie* case of medical malpractice due to the lack of an expert witness."  
Comp., ¶ 14; Pl.'s Ex. 67.
57. The September 18, 1998 order of the Court of Common Pleas indicates that a copy was sent to all counsel of record.  
Pl.'s Ex. 60.
58. Mirsky received a copy of the order granting summary judgment by mail from the Court of Common Pleas.  
N.T. 4/25/02, p. 141, lines 3-8.

59. Hepps advised Kaston's father, Peter Rosetti, over the telephone that the Kaston Medical Malpractice Action was being appealed to the Pennsylvania Superior Court and further advised Mr. Rosetti that he was "going to pay for everything out of [his] pocket."
- N.T. 4/24/02, p. 86, lines 9-24.
60. Kaston first learned that an appeal had been filed on her behalf in the medical malpractice action after Hepps told her father, Mr. Rosetti, that "we had lost the case" and Hepps said that he would pay the costs of appeal.
- N.T. 4/24/02, p. 26, line 16; p. 27, line 12; Pl.'s Ex. 82.
61. Peter Rosetti had numerous conversations with Hepps concerning the status of the Kaston Medical Malpractice Action.
- N.T. 4/24/02, p. 85, lines 2-14.
62. On September 23, 1998, a check was drawn on Hepps' account for \$55. The check stub indicates "Appeal-Kaston v. Ciullo."
- N.T. 4/25/02, p. 10, lines 1-9; p. 142, lines 2-4; Pl.'s Ex. 61.
63. At the time that Mirsky filed the Notice of Appeal on Kaston's behalf, Mirsky knew that unless the Superior Court of the Commonwealth of Pennsylvania overturned the summary judgment order of September 18, 1998, Kaston would have no recourse but to bring an action for legal malpractice.
- N.T. 4/25/02, p. 148, lines 14-19; p. 149, line 20; p. 150, line 1.
64. In November of 1998, the Court of Common Pleas issued its opinion with regard to the granting of summary judgment in the Kaston Medical Malpractice Action. Mirsky was aware of and reviewed the opinion of the court prior to February 13, 1999, the inception date of the Mirsky Policy.
- N.T. 4/25/02, p. 144, lines 5-14.
65. On June 16, 1999, prior to the inception of the Hepps Policy on July 14, 1999, the Superior Court of the Commonwealth of Pennsylvania affirmed the summary judgment order of the Court of Common Pleas.
- Pl.'s Ex. 71.

66. In its opinion the Superior Court found that Kaston’s counsel acted willfully “and in bad faith.”
- Pl.’s Ex. 71, p. 11.
67. On June 23, 1999, Mirsky wrote to Kaston advising that the Superior Court had denied the appeal and stated that “we” would be seeking review by the Pennsylvania Supreme Court. The letter indicates a copy to Hepps.
- N.T. 4/25/02, p. 144, lines 22-25.
68. On January 6, 2000, the Pennsylvania Supreme Court denied the petition for allocatur.
- Mirsky’s Proposed Findings of Fact, ¶ 37 (Stipulation of Undisputed Facts).
69. During the pendency of the Kaston Medical Malpractice Action, Hepps never wrote to Kaston informing her that he no longer represented her.
- N.T. 4/25/02, p. 27, line 25; p. 28, line 1.
70. During the pendency of the Kaston Medical Malpractice Action, Hepps never wrote to any opposing counsel advising that he was “off” the case.
- N.T. 4/25/02, p. 28, lines 5-10.
71. During the pendency of the Kaston Medical Malpractice Action and as late as March of 1999, Hepps and his secretary and quasi paralegal, Gregory Northam, sent letters under Hepps’ letterhead to various medical providers and potential experts in connection with the Kaston Medical Malpractice Action.
- Pl.’s Exs. 13, 19, 21, 30, 31, 41, 52, 56 and 63-66.
72. During the pendency of the Kaston Medical Malpractice Action, Mirsky was authorized to request that Mr. Northam send letters on behalf of Mirsky.
- N.T. 4/24/02, p. 199, lines 5-11.
73. During the pendency of the Kaston Medical Malpractice Action, Hepps “encouraged” Mirsky to “use” Mr. Northam for tasks such as typing and sending out letters and instructed Mr. Northam to be as accommodating as he could.
- N.T. 4/24/02, p. 202, lines 11-17; 4/25/02, p. 12, lines 20-25.

74. One reason that Hepps encouraged Mirsky to use Mr. Northam was to ensure that tasks on matters of mutual interest to Hepps and Mirsky would be completed.
- N.T. 4/25/02, p. 27. lines 7-11.
75. At no time during the pendency of the Kaston Medical Malpractice Action did Mirsky employ a secretary.
- N.T. 4/25/02, p. 26, lines 10-13.
76. During the pendency of the Kaston Medical Malpractice Action, Mirsky used Hepps' copy machine.
- N.T. 4/25/02, p. 26, lines 17-20.
77. During the pendency of the Kaston Medical Malpractice Action, Hepps' office maintained a bin wherein papers regarding Hepps' cases were placed. It was Mirsky's practice to drop letters copied to Hepps for the Kaston Medical Malpractice case in that bin.
- N.T. 4/25/02, p. 127, lines 15-18; p. 128, line 5.
78. Mirsky has no reason to believe that any of the letters regarding the Kaston Medical Malpractice Action which indicated a copy to Hepps were not delivered to the Hepps bin.
- N.T. 4/25/02, p. 130, lines 7-15.
79. Hepps provided Mirsky up to 25%-50% of Mirsky's income.
- N.T. 4/25/02, p. 30, lines 9-17.
80. In approximately fifty cases in which Mirsky provided legal services to Hepps, Hepps and Mirsky would meet periodically and determine if there was money to be distributed with regard to any rent owed by Mirsky to Hepps and any fees owed by Hepps to Mirsky.
- N.T. 4/24/02, p. 200, line 10; p. 201, line 23.

#### **IV. Kaston's Legal Malpractice Claim Against Hepps and Mirsky**

81. Kaston first believed that Hepps did not properly handle her representation prior to November 3, 1999, when Hepps advised her that he “did not have some documents and that the case was going to be thrown out unless (Kaston) got them the same day or prior to the trial.”

N.T. 4/24/02, p. 28, lines 19-25; p. 50, lines 10-15.

82. In November of 1999, Edwin Smith, Esquire wrote to Hepps and Mirsky informing them that he had been retained to represent Kaston in connection with a potential claim for legal malpractice against Hepps and Mirsky.

Mirsky's Proposed Findings of Fact, ¶ 33 (Stipulation of Undisputed Facts); Pl.'s Ex. 76.

83. On December 14, 1999, Smith filed the “Kaston Legal Malpractice Action” in the Court of Common Pleas of Philadelphia County assigned Number 1445 of the December Term, 1999 against Hepps and Mirsky. Peterson was later joined as a defendant in the action.

Pl.'s Ex. 77.

84. In her legal malpractice claim, Kaston alleged, *inter alia*, that: “At all times material hereto, Defendant Hepps remained as primary counsel for (Kaston) in said cause and Defendant Mirsky was acting as the agent, co-venturer, servant or employee of Defendant Hepps and Defendant Hepps never sought nor was granted release as attorney for (Kaston) throughout said proceedings.”

N.T. 4/24/02, p. 171, lines 10-15.

#### **V. Kaston's Legal Malpractice Claim and Westport**

85. After receiving Smith's November 15, 1999 letter, Mirsky notified Westport of the potential claim against him on November 30, 1999.

Mirsky's Proposed Findings of Fact, ¶ 34.

86. Within three weeks after Smith's letter, Hepps reported Kaston's potential claim to his insurance carrier.

Pl.'s Ex. 76.

87. After notice of the claim was received, Westport assigned Janice Neems, a lawyer, to handle the claims against Mirsky and Hepps.

N.T. 4/25/02, p. 89, line 19; p. 90, line 6.

88. On December 8, 1999, during her initial investigation of the claims against Mirsky and Hepps, Ms. Neems contacted Hepps by telephone. During this conversation, Hepps advised Ms. Neems that he had been notified that there were “problems” with discovery in the Kaston Medical Malpractice Action, specifically, regarding producing certain medical records.

N.T. 4/25/02, p. 91, lines 5-20.

89. Hepps also indicated to Ms. Neems that he had advised Mirsky to give opposing counsel the medical authorizations for Kaston so that counsel could go out and obtain the records themselves.

N.T. 4/25/02, p. 95, lines 12-18.

90. Contemporaneously with her conversation with Hepps on December 8, 1999, Ms. Neems recorded her conversation in a memorandum which was made part of Westport’s claims file with regard to Hepps.

N.T. 4/25/02, p. 93, lines 16-22; Pl.’s Ex. 76.

91. On December 30, 1999, Ms. Neems wrote to Hepps advising that Westport was reserving its rights to deny coverage for Kaston’s legal malpractice suit under the Hepps Policy, but agreed to provide Hepps a full defense subject to Westport’s full reservation of rights.

N.T. 4/25/02, p. 96, line 20; p. 97, line 11; Compl., ¶ 37.

92. Additionally, Ms. Neems advised that Mirsky qualified as an additional insured under the Hepps Policy pursuant to the Independent Contractor Endorsement of the policy.

N.T. 4/25/02, p. 96, line 20; p. 97, line 11.

93. Hepps did not object to Ms. Neems contention that Mirsky qualified as an additional insured under the Hepps Policy.

N./T. 4/25/02, p. 97, lines 12-14.

94. On or about December 30, 1999 and January 28, 2000, Westport advised Mirsky that Westport was reserving its rights to deny coverage for Kaston's malpractice claim under the Mirsky and Hepps Policies, but agreed to provide Mirsky a full defense subject to Westport's full reservation of rights.

Compl., ¶ 35.

95. On or about August 23, 2000, Westport disclaimed coverage to Mirsky and terminated the funding of Mirsky's defense in Kaston's Medical Malpractice Suit.

Compl., ¶ 36.

96. On August 25, 2000, Westport initiated the instant action for Declaratory Judgment in this Court.

See Compl.

97. Regarding the issue of whether Mirsky was acting as an independent contractor under the Hepps Policy, Paragraph 49 of Westport's Complaint for Declaratory Judgment alleges that "Alternatively, Mirsky did not act as an independent contractor to Hepps for Kaston's Medical Malpractice Suit. Because Mirsky did not act as an independent contractor to Hepps for Kaston's Medical Malpractice Suit, the Independent Contractor endorsement does not apply here and Mirsky is not an insured under the Hepps Policy." In his answer to paragraph 49 of Westport's Complaint for Declaratory Judgment, Mirsky admitted "[a]t all times relevant to the allegations in plaintiff's Complaint, defendant Mirsky acted as an independent contractor."

Compl., ¶ 49; Mirsky's Ans., ¶ 49.

## **CONCLUSIONS OF LAW**

### **I. PENNSYLVANIA LAW REGARDING INTERPRETATION OF INSURANCE CONTRACTS<sup>5</sup>**

1. According to Pennsylvania law, it is the duty of the court to interpret the terms of an insurance contract. Standard Venetian Blind Co. v. Am. Empire Ins. Co., 469 A.2d 563, 566 (Pa. 1983)(citations omitted). Ascertaining the intent of the parties as manifested by the language of the written instrument is the goal of interpreting the contract. Id. (citation omitted). "Where a provision of a policy is ambiguous, the policy provision is to be construed in favor of the insured and against the insurer, the drafter of the agreement." Id. (citation omitted). However, where the language of the contract is clear and

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<sup>5</sup> It is undisputed that Pennsylvania law applies to this case.

unambiguous, a court must give effect to that language. Id. (citation omitted).

2. A provision of an insurance contract is considered ambiguous “if reasonable persons considering the relevant language in the context of the entire policy could honestly differ as to its meaning.” Lucker Mfg. v. Home Ins. Co., 23 F.3d 808, 814 (3d Cir. 1994)(citations omitted). That is, a term is ambiguous, “if, and only if, it is reasonably or fairly susceptible of different constructions and is capable of being understood in more senses than one and is obscure in meaning through indefiniteness of expression or has a double meaning . . . a contract is not rendered ambiguous by the mere fact that the parties do not agree on the proper construction.” Bohler-Uddeholm Am., Inc. v. Ellwood Group, Inc., 247 F.3d 79, 93 (3d Cir. 2001)(citing Duquesne Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604, 614 (3d Cir. 1995)).
3. Under Pennsylvania law, the insured has the burden of proving that its claim falls within the policy’s affirmative grant of coverage. See Koppers Co., Inc. v. Aetna Cas. and Sur. Co., 98 F.3d 1440, 1446 (3d Cir. 1996)(citation omitted). However, the insurer carries the burden of proving the applicability of any exclusions or limitations on coverage, since they are affirmative defenses. Id. (citations omitted). Moreover the court is required to construe policy exclusions strictly against the insurer. See First Pennsylvania Bank v. Nat’l Union Fire Ins., Co., 580 A.2d 799, 802 (Pa. Super. 1990).

## **II. “Claims Made” Insurance Policies**

4. “Claims made” policies “protect[] against claims made during the life of a policy irrespective of when the act giving rise to the claim occurred.” Pizzini v. Am. Int’l Specialty Lines Ins. Co., 210 F. Supp.2d 658, 668 (E.D. Pa. 2002). “Claims made” policies are different than “occurrence” policies, which protect an insured against occurrences during a policy period, regardless of when the resulting claims are made. Id. (citing Township of Center, Butler County, PA v. First Mercury Syndicate, Inc., 117 F.3d 115, 118 (3d Cir. 1997)).
5. “A ‘claims made’ insurance policy represents a distinct bargained-for exchange between insurer and insured.” Id. An insurer receives the benefit of a clear and certain cut-off date for coverage, whereas, the insured typically pays a lower premium. Id. (citation omitted). In a “claims made” policy, “[t]he reporting requirement . . . is an element of coverage because it helps define the scope of coverage under the policy.” Nat’l Union Fire Ins. Co. of Pittsburgh, PA v. Bauman, No 90-0340, 1992 WL 1738, at \*9 (N.D. Ill. Jan. 2, 1992). Since “the reporting requirement in a claims made policy helps define the scope of coverage under the policy, such reporting requirements are strictly construed.” Id. at \*6 (citation omitted); see also City of Harrisburg v. Int’l Surplus Lines, Ins. Co., 596 F. Supp. 954, 960-62 (M.D. Pa. 1984), aff’d, 770 F.2d 1067 (3d Cir. 1985)(stating that the notice provision in a “claims made” policy serves a materially different purpose than that of an “occurrence” policy and, under Pennsylvania law, “claims made” coverage

exists only when claims are timely reported). “Failure to comply with the reporting provision of a ‘claims made’ policy precludes coverage.” Pizzini, 210 F. Supp.2d at 668. Although preclusion of coverage is “a harsh consequence, ‘claims made’ policies, and their reporting provisions, are enforceable.” Id. (citation omitted).

6. Under Pennsylvania law, the “notice-prejudice” rule does not apply to “claims made” policies. See Pizzini, 210 F. Supp.2d at 669-70; Cohen & Co., Inc. v. N. River Ins. Co., No. 93-1860, 1994 WL 105561, at \* 2 (E.D. Pa. Mar. 29, 1994); Employers Reinsurance Corp. v. Sarris, 746 F. Supp. 560, 565 (E.D. Pa. 1990); City of Harrisburg, 596 F. Supp. at 962. Therefore, “an insurer providing liability coverage under a ‘claims made’ policy need not show it was prejudiced by an insured’s failure to provide timely notice of a claim in order to deny coverage on that ground.” Id. at 670.
7. Renewal of “claims made” policies does not create a single policy period for purposes of reporting. Nat’l Union Fire Ins. Co. of Pittsburgh, PA, 1992 WL 1738, at \*10; see also Ehrgood, 59 F. Supp.2d at 445 (denying Plaintiffs’ argument that renewal policies operate to create one continuous “claims made” policy because the policies have clear policy periods, different policy numbers, varied premiums and evidence an intent to create separate policies as opposed to one continuous policy). “[T]he case law and the well established rationale behind claims made coverage demonstrates that renewal of the policy did not create a single policy period for reporting purposes.” Id. A conclusion that the renewal of “claims made” policies creates one continuous policy period for reporting “would frustrate the purpose of claims made coverage by creating a long ‘tail’ of liability exposure, the avoidance of which forms the conceptual framework for claims made coverage in the first instance.”<sup>6</sup> Id.

### **III. WESTPORT DOES NOT OWE COVERAGE TO MIRSKY UNDER THE MIRSKY POLICY BECAUSE OF EXCLUSION B**

8. Pennsylvania case law has determined Exclusion B to be clear and unambiguous. See Murphy v. Coregis Ins. Co., No. 98-5065, 1999 WL 627910 (E.D. Pa. Aug. 17, 1999); Coregis Ins. Co. v. Wheeler, 24 F. Supp.2d 475 (E.D. Pa. 1998); Ehrgood v. Coregis Ins. Co., 59 F. Supp.2d 438 (M.D. Pa. 1998).
9. Exclusion B of the Mirsky Policy consists of two clauses. The exclusion applies in cases where: (1) the claim at issue arose out of “any act, error, omission, circumstance or

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<sup>6</sup> An insured has the option to purchase “tail coverage” which extends the time within which a claim can be reported after the cancellation or expiration of a “claims made” policy. Home Ins. Co. v. Law Offices of Jonathan DeYoung, P.C., 32 F. Supp.2d 219, 224 (E.D. Pa. 1998). Tail coverage insures the policy holder for claims that are asserted during the life of the tail policy for acts or omissions that took place during the life of the original “claims made” policy. Id.

PERSONAL INJURY occurring prior to the effective date of [the] POLICY” and (2) the insurer shows that “any INSURED at the effective date knew or could have reasonably foreseen that such act, error, omission, circumstance or PERSONAL INJURY might be the basis of a CLAIM.” Murphy, 1999 WL 627910, at \*4 (citing Wheeler, 24 F. Supp.2d at 478).

10. Regarding the first clause of Exclusion B, Kaston’s legal malpractice claim arose out of acts and errors resulting during the course of Mirsky’s representation of Kaston in her underlying medical malpractice claim. Specifically, by an Order dated October 21, 1997, the Court of Common Pleas precluded three of Kaston’s experts from testifying and ordered Mirsky to pay a total of \$800.00 in sanctions to the defendants “due to the continual failure of plaintiff’s counsel to comply with discovery court orders.” Comp., ¶ 14; Pl.’s Ex. 67. On September 18, 1998, the Court granted defendant’s motion for summary judgment because of Kaston’s inability to establish a *prima facie* case of medical malpractice under Pennsylvania law due to the lack of an expert witness.<sup>7</sup> Id. Thus, the record shows that Mirsky did not comply with discovery rules in order to properly litigate Kaston’s case. The Court not only strongly criticized Mirsky’s actions, but dismissed Kaston’s case as a result of such actions. Thus, the Court finds that the act, error or omission forming the basis of the alleged legal malpractice took place prior to February 13, 1999, the date of inception of the relevant Mirsky Policy.
11. Regarding the second clause of Exclusion B, courts “should apply a ‘reasonable person’ standard to determine whether a lawyer ‘knew or could have reasonably foreseen’ that his conduct might be expected to be the basis of a claim.” Murphy, 1999 WL 627910, at \*5 (citing Wheeler, 24 F. Supp.2d at 478). Therefore, “[t]he insured may not successfully defend on the ground that ‘he did not understand the implications of conduct and events that any reasonable attorney would have grasped.’” Id. (quoting Selko v. Home Ins. Co., 139 F.3d 146, 152 (3d Cir. 1998)). “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.” Coregis Ins. Co. v. Baratta & Fenerty, Ltd., 264 F.3d 302, 307 (3d Cir. 2001). An attorney “cannot assume that the claim will not be brought because he *subjectively* believes it . . . lacks merit.” Id.
12. Based on the record, the Court concludes that a reasonable attorney in Mirsky’s position would have realized that he committed an act, error or omission that might be the basis of a claim on September 18, 1998, the date the court granted summary judgment. By September 18, 1998, Mirsky was cognizant of the numerous discovery issues, the sanctions levied against himself and the court’s criticisms of Mirsky’s handling of the case. Likewise, as of the date of the grant of summary judgment, and after the filing of an appeal on October 23, 1998, Mirsky was well aware that Kaston would have no other

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<sup>7</sup> On June 16, 1999, the Superior Court of Pennsylvania affirmed the Court of Common Pleas grant of summary judgment.

recourse but to file a legal malpractice suit, if she lost the appeal. In light of these facts, the Court finds that a reasonable attorney “would have realized that he had a dissatisfied client who would undoubtedly take further legal action absent a miraculous and unlikely turnaround” in events. Selko, 139 F.3d at 154. As a result, the Court concludes that a reasonable attorney in possession of the aforementioned facts would have realized that there might be some act, error or omission that could be the basis of a potential legal malpractice claim when the entry of summary judgment against Kaston was entered on September 18, 1998. Therefore, in accordance with Exclusion B, Mirsky knew or could have reasonably foreseen that a prior act, error, omission or circumstance surrounding the Kaston action might be the basis of a claim prior to February 13, 1999, when he applied for the relevant professional liability insurance.

13. Exclusion B of the Mirsky Policy excludes coverage for Mirsky in connection with Kaston’s legal malpractice action.

**IV. WESTPORT DOES NOT OWE COVERAGE TO MIRSKY AND HEPPS UNDER THE HEPPS POLICY DUE TO EXCLUSION B OF THE HEPPS POLICY BASED ON MIRSKY’S KNOWLEDGE**

14. Mirsky’s admission in paragraph 49 of his answer constitutes a judicial admission that he was acting as an independent contractor on behalf of Hepps in connection with the Kaston Medical Malpractice Action.
15. Based upon Mirsky’s judicial admission and the findings of fact contained herein, the Court finds that Mirsky was an Independent Contractor working on behalf of the Law Offices of Michael B.L. Hepps and, thus, Mirsky is an “Insured” under Hepps’ 1999-2000 policy in connection with the Kaston Medical Malpractice Action.
16. Exclusion B, the prior knowledge exclusion, bars coverage if “any insured” knew or could have reasonably foreseen that a prior act, error, omission or circumstance might be the basis of a claim. Ehrgood, 59 F. Supp.2d at 445. The use of the phrase “any insured,” coupled with the absence of the limiting language found in another exclusion, “clearly indicates an intent to preclude coverage if any insured has prior knowledge of a potential malpractice.” Id. (citing Spezialetti v. Pac. Employers Ins. Co., 759 F.2d 1139, 1142 (3d Cir. 1985))(stating that exclusion based on acts of “any insured” unambiguously precluded coverage for innocent co-insureds.).
17. Previously, the Court concluded that Exclusion B of the Mirsky Policy bars coverage for Mirsky in connection with Kaston’s legal malpractice action.
18. Since Mirsky is an “Insured” under the Hepps Policy in connection with the Kaston Medical Malpractice Action, Exclusion B of the Hepps Policy bars coverage for both Mirsky and Hepps in connection with the Kaston legal malpractice action.

**V. WESTPORT DOES NOT OWE COVERAGE TO HEPPS UNDER THE HEPPS POLICY BASED ON EXCLUSION B BECAUSE OF HEPPS' PERSONAL KNOWLEDGE**

19. Since the Court has concluded that Westport does not owe Mirsky or Hepps coverage because Exclusion B of the Hepps Policy bars coverage for both Mirsky and Hepps in connection with the Kaston legal malpractice action, we do not have to address whether Exclusion B of the Hepps Policy excludes coverage to Hepps based on his own personal knowledge of a potential claim prior to July 14, 1999, the inception date of the relevant Hepps professional liability insurance policy. However, in the interest of completeness, the Court will address this issue.
20. The Hepps Policy includes the same prior knowledge exclusion, Exclusion B, as found in Mirsky's Policy. As mentioned earlier, Exclusion B consists of two clauses. The exclusion applies in cases where: (1) the claim arose out of "any act, error, omission, circumstance or personal injury occurring prior to the effective date of [the] policy" and (2) the insurer shows that "any insured at the effective date knew or could have reasonably foreseen that such act, error, omission, circumstance or personal injury might be the basis of a claim." Murphy, 1999 WL 627910, at \*4 (citing Wheeler, 24 F. Supp.2d at 478).
21. Regarding the first clause of Exclusion B, Kaston's legal malpractice claim arose out of acts and errors resulting from Hepps' representation of Kaston in her underlying medical malpractice claim. Given the facts, the Court finds that the only plausible interpretation of the record is that Hepps actively represented Kaston throughout the course of her medical malpractice action. The Court concludes that Hepps was aware of the discovery problems plaguing the action, the series of preclusionary orders dated October 20, 1997, the summary judgment order of September 18, 1998 and the filing of Kaston's appeal to the Superior Court of Pennsylvania. Thus, the record shows that Hepps did not properly litigate Kaston's case resulting in its dismissal. As a result, the Court finds that the act, error or omission forming the basis of the alleged legal malpractice took place prior to July 14, 1999, the date of inception of the relevant Hepps Policy.
22. Regarding the second clause of Exclusion B, as mentioned earlier, courts "should apply a 'reasonable person' standard to determine whether a lawyer 'knew or could have reasonably foreseen' that his conduct might be expected to be the basis of a claim." Murphy, 1999 WL 627910, at \*5 (quoting Wheeler, 24 F. Supp.2d at 478). Applying a reasonable person standard, the Court concludes that a reasonable attorney in Hepps' position would have realized that he committed an act, error or omission that might be the basis of a claim on September 18, 1998, the date the court granted summary judgment. By September 18, 1998, Hepps was cognizant of the numerous discovery issues, the sanctions and the court's criticisms of the handling of Kaston's case. As of the date of the grant of summary judgment, and after the denial of the appeal on June 16, 1999,

Hepps was aware that Kaston would have no other recourse but to file a legal malpractice suit. In light of these facts, the Court finds that a reasonable attorney “would have realized that he had a dissatisfied client who would undoubtedly take further action absent a miraculous and unlikely turnaround” in events. Selko, 139 F.3d at 154. As a result, the Court concludes that a reasonable attorney in possession of the aforementioned facts would have realized that there might be some act, error or omission that could be the basis of a potential legal malpractice claim when the entry of summary judgment against Kaston was entered on September 18, 1998. Therefore, in accordance with Exclusion B, Hepps knew or could have reasonably foreseen that a prior act, error, omission or circumstance surrounding the Kaston action might be the basis of a claim prior to the policy’s July 14, 1999 inception date.

23. Based on Hepps prior knowledge of a potential claim, Exclusion B of the Hepps Policy excludes coverage for Hepps in connection with Kaston’s legal malpractice action.

### **CONCLUSION**

The Court concludes that Westport does not owe coverage to either Mirsky or Hepps because Exclusion B of both the Mirsky Policy and the Hepps Policy bars coverage. Exclusion B of the Mirsky Policy excludes coverage for Mirsky in connection with Kaston’s legal malpractice action because Mirsky knew or could have reasonably foreseen that a prior act, error, omission or circumstance surrounding the Kaston Medical Malpractice Action might be the basis of a claim. In connection with the Kaston Medical Malpractice Action, Mirsky was acting as an Independent Contractor on behalf of the Law Offices of Michael B.L. Hepps. Consequently, Mirsky is an “Insured” under Hepps’ 1999-2000 policy in connection with the Kaston Medical Malpractice Action. Since Mirsky is an “Insured” under the Hepps Policy and the Court has concluded that Exclusion B bars coverage for Mirsky, Exclusion B of the Hepps Policy bars coverage for both Mirsky and Hepps in connection with the Kaston legal malpractice action. Lastly, although the Court is not required to address whether Exclusion B of the Hepps Policy precludes coverage to Hepps, the Court concludes that based on Hepps prior personal

knowledge of a potential claim, Exclusion B of the Hepps Policy excludes coverage for Hepps in connection with Kaston's legal malpractice action.

Therefore, the Court finds judgment in favor of Plaintiff, Westport Insurance Corporation, against all Defendants and to wit, the Court finds and declares that Westport is under no obligation to defend or indemnify Mirsky with regard to Kaston's claim of legal malpractice against Mirsky and Westport is under no obligation to defend or indemnify Hepps with regard to Kaston's legal malpractice against Hepps.

An appropriate Order follows.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

WESTPORT INSURANCE CORPORATION,	:	
	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	No. 00-4367
	:	
KENNETH L. MIRSKY, ESQUIRE; MICHAEL	:	
HEPPS, ESQUIRE; THE LAW OFFICES OF	:	
MICHAEL B.L. HEPPS; RENEE ROSETTI	:	
KASTON and DWIGHT THOMAS PETERSON,	:	
	:	
Defendants.	:	
	:	

**ORDER**

AND NOW, this 10 th day of September, 2002, upon consideration of the testimony of the witnesses, the admitted exhibits, and arguments of counsel, the Court hereby ORDERS as follows:

1. JUDGMENT is ENTERED in favor of Plaintiff, Westport Insurance Corporation, and against all Defendants.
2. It is DECLARED that Westport has no obligation to defend or indemnify Mirsky regarding Kaston's claim of legal malpractice against Mirsky.
3. It is DECLARED that Westport has no obligation to defend or indemnify Hepps regarding Kaston's claim of legal malpractice against Hepps.

BY THE COURT:

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Robert F. Kelly,

Sr. J.

