[Cite as *Shaut v. Natl. Cas. Co.*, 2021-Ohio-2522.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

MICHAEL SHAUT, :

Plaintiff-Appellant, :

No. 110010

v. :

NATIONAL CASUALTY COMPANY, :

Defendant-Appellee. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: July 22, 2021

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-19-921664

Appearances:

Michael Shaut Law Office, L.P.A., Michael Shaut, and Thomas I. Monah, *for appellant*.

Bailey Cavalieri, L.L.C., Sabrina Haurin, and Jolene S. Griffith, *for appellee*.

LARRY A. JONES, SR., J.:

{¶ 1} Plaintiff-appellant, Michael Shaut ("Shaut"), pro se, appeals the trial court's decision to grant summary judgment in favor of defendant-appellee, National Casualty Company ("NCC"). Finding no merit to the appeal, we affirm.

{¶ 2} This case arose after Shaut sought, and was denied, coverage from NCC under a Directors and Officers Liability ("D&O") insurance policy for various matters arising from an alleged employment Ponzi scheme.[1] Beginning in 2015, some current and former employees of two companies, Downing Partners ("Downing") and a wholly owned subsidiary, 3si (also known as Surgical Safety Solutions, L.L.C.), alleged that they had been fraudulently induced into entering employment agreements with and investing in 3si and Downing. The current and former employees alleged that Shaut, an attorney licensed to practice law in the state of Ohio, and others promised employment opportunities in exchange for significant personal investments in the companies. According to the allegations, Shaut and the others had no intention of paying the current and prospective employees for their employment and used their investments to pay the salaries and benefits of other employees.

{¶ 3} With regard to the NCC insurance policies, NCC issued a "Business and Management Indemnity Policy" to 3si effective from February 10, 2015, to February 10, 2016 (the "2015-2016 Policy Period"). The 2015-2016 Policy's declaration page stated, in pertinent part:

> THE EMPLOYMENT PRACTICES, DIRECTORS AND OFFICERS AND COMPANY, AND FIDUCIARY COVERAGE SECTIONS OF THIS POLICY, WHICHEVER ARE APPLICABLE, COVER ONLY CLAIMS FIRST MADE AGAINST THE INSURED DURING THE

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[1]In 2017, an arbitration award in the amount of $2,423,190.94 consisting of compensatory and punitive damages was issued against Shaut, jointly and severally with others, in connection with the employment scheme. *See Hart v. Downing*, 2019 NY Slip Op 30302(U), ¶ 1 (N.Y. Sup.Ct., Feb. 7, 2019), and *Shaut v. Hatch*, N.D.Ohio No. 1:18 CV 420, 2018 U.S. Dist. LEXIS 123838, 1 (July 23, 2018).

> POLICY PERIOD OR, IF ELECTED, THE EXTENDED PERIOD AND REPORTED TO THE INSURER PURSUANT TO THE TERMS OF THE RELEVANT COVERAGE SECTION.

{¶ 4} On February 1, 2016, 3si filed two insurance applications with NCC in connection with its renewal of its D&O insurance. NCC then issued a Business and Management Indemnity Policy to 3si, the "2016-2017 Policy," effective February 10, 2016 to February 10, 2017.

Employees' Lawsuits

{¶ 5} For ease of discussion, the various lawsuits and other matters are broken down into two categories: lawsuits and demands that were reported to NCC ("Reported Matters") and those that were not ("Unreported Matters").

Unreported Matters

Hassman Lawsuit

{¶ 6} In March 2015, Eric Hassman ("Hassman") filed suit against Downing in Massachusetts alleging he was recruited by Downing to become its Chief Financial Officer and was fraudulently induced to invest $250,000 in exchange for a 1 1/4 percent ownership interest and then unlawfully terminated from his position with the company.

Hawes Lawsuit

{¶ 7} In August 2015, Shane Hawes ("Hawes") emailed Downing and Shaut alleging he was fraudulently induced into investing $250,000 with the company, was owed back wages, and had not received health benefits. In January 2016, Hawes filed suit against Downing, Shaut, and others in Cuyahoga County

Common Pleas Court, alleging that he was obligated to invest $250,000 with the company in connection with his employment but, despite being promised a $225,000 annual salary plus benefits, he did not receive several paychecks or the promised benefits. Hawes further alleged that the company and Shaut were engaged in a Ponzi scheme and that employees were only paid when a new employee or investor was brought into the company.

Lehigh Lawsuit

{¶ 8} In September 2015, Scott Lehigh ("Lehigh") filed suit against Downing and 3si in Pennsylvania, alleging that he was provided fraudulent information to induce him into entering into an employment agreement in which he agreed to become executive vice president of North American sales for 3si. He alleged that his employment was contingent upon his investing $250,000 in the company, and he relied on the company's assurance that it had a lucrative contract with a major hospital system that it did not.

Reported Matters

Hilderbrand Lawsuit

{¶ 9} In June 2016, David Hilderbrand and others filed suit against 3si, Shaut, and others in New York, alleging that the defendants perpetrated a Ponzi scheme by fraudulently inducing them into entering into employment agreements requiring a minimum investment of $250,000 in either 3si or Downing. According to the claimants, their investments were used to pay past compensation due to other employees of the defendants and, upon commencing their

employment, the claimants failed to receive their promised compensation, reimbursement for expenses, or promised benefits.

{¶ 10} In November 2016, Hilderbrand filed for arbitration against 3si, Shaut, and others, asserting causes of action related to alleged violations of various labor and employment laws and seeking damages related to unpaid wages.

Haufler Lawsuit

{¶ 11} On November 16, 2017, Glenn Haufler filed suit against Shaut, 3si, and others in Massachusetts, alleging he was fraudulently induced to make a $250,000 investment in Downing, that he was part of the same Ponzi scheme as alleged in the Hassman and Lehigh Lawsuits, and that his investment was used to resolve the claims in the Hassman Lawsuit.

Hart Arbitration

{¶ 12} On December 27, 2016, John Hart and others filed for arbitration against 3si, Shaut, and others, alleging that the defendants perpetrated a "fraud and novel Ponzi scheme" involving their inducement into entering employment agreements that conditioned their employment upon making an investment of $150,000–$250,000, in either Downing, 3si, or another related company (CliniFlow Technologies, L.L.C.). The plaintiffs asserted that their investments were used to pay other employees' back wages, that the defendants failed to pay the plaintiffs their salaries almost immediately upon the commencement of their employment, and that the defendants made numerous material misrepresentations and omissions.

Insurance Claims

{¶ 13} In July 2016, 3si requested coverage from NCC for the Hilderbrand Lawsuit. NCC alleged that, at that time, it was unaware of any pending lawsuits or arbitration matters. In September 2016, NCC informed 3si that NCC would defend 3si and its D&O's in the Hilderbrand Lawsuit subject to a reservation of rights. On March 31, 2017, Shaut emailed NCC stating he had just become aware that NCC was defending 3si in the Hilderbrand Lawsuit and requested coverage. On April 5, 2017, he emailed NCC requesting coverage under the 2016-2017 Policy for the Hawes Lawsuit, Haufler Lawsuit, and Hart Arbitration.

{¶ 14} NCC initally responded that it would defend Shaut in the Hilderbrand Lawsuit subject to a reservation of rights and requested additional information with regard to the other claims because those matters had not been reported to NCC.

{¶ 15} NCC subsequently informed Shaut that there was no coverage for the Reported Matters because the Reported Matters related to "certain" Unreported Matters and constituted a single claim that was first made prior to the 2016-2017 Policy Period, the single claim was not timely reported to NCC under the 2015-2016 Policy, and the 2016-2017 Policy's "Warranty Exclusion" precluded coverage for the Reported Matters.

The Instant Action

{¶ 16} Shaut filed this instant action alleging that NCC breached the 2016-2017 Policy when NCC determined that there was no coverage for the Reported

Matters under the policy. He further sought declarations stating that NCC was obligated to indemnify him for any judgments against him in the Reported Matters and asserted a claim for bad faith.

{¶ 17} NCC moved for summary judgment. Shaut moved to compel discovery. The trial court denied his motion. The trial court granted NCC's motion for summary judgment, finding that there was no coverage and that NCC was entitled to summary judgment on Shaut's claim for breach of contract; therefore, his bad-faith claims also failed as a matter of law. The trial court found there were no genuine issues of material fact and that reasonable minds could come to but one conclusion, which was adverse to Shaut; thus, NCC was entitled to judgment as a matter of law.

Assignment of Error

{¶ 18} It is from this order that Shaut filed this pro se appeal, raising the following assignment of error:

> I. The Trial Court erred in granting summary judgment to National Casualty Company, Defendant/Appellee, finding no factual issues as to Appellee's duty to defend and indemnify Plaintiff/Appellant, and then dismissing Appellant's bad-faith claims.

Law and Analysis

{¶ 19} We review summary judgment rulings de novo, applying the same standard as the trial court. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). We accord no deference to the trial court's decision and

independently review the record to determine whether summary judgment is appropriate.

{¶ 20} Under Civ.R. 56, summary judgment is appropriate when (1) no genuine issue as to any material fact exists; (2) the party moving for summary judgment is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can reach only one conclusion that is adverse to the nonmoving party. "Once the moving party demonstrates entitlement to summary judgment, the burden shifts to the nonmoving party to produce evidence related to any issue on which the party bears the burden of production at trial. Civ.R. 56(E)." *Mattress Matters, Inc. v. Trunzo*, 2016-Ohio-7723, 74 N.E.3d 739, ¶ 10 (8th Dist.).

Contract Coverage — Which State Governs Claims?

{¶ 21} Shaut contends that Ohio law governs the contract; NCC argues that Massachusetts law controls. According to Shaut, Ohio law controls because Ohio has the most significant relationship to the contractual issues — Shaut is an Ohio resident and all of his assets and losses are in Ohio, and NCC's parent company is headquartered in Ohio.

{¶ 22} "Ohio choice of law rules mandate that the law of the state with the most significant relationship to the contract should govern disputes arising from it." *N. River Ins. Co. v. Emp. Reinsurance Corp.*, 197 F.Supp.2d 972, 979 (S.D. Ohio 2002), citing *Nationwide Mut. Ins. Co. v. Ferrin*, 21 Ohio St.3d 43, 487 N.E.2d 568 (1986). "To determine which state has the more significant

relationship to the contract, Ohio law has adopted the test set forth in the Restatement (Second) of Conflict of Laws, Section 188." *Babcock & Wilcox Co. v. Arkwright Boston Mfg. Mut. Ins. Co.*, 867 F.Supp. 573, 577 (N.D.Ohio 1992), citing *Macurdy v. Sikov & Love, P.A.*, 894 F.2d 818 (6th Cir.1990). Section 188 states, in pertinent part:

> In the absence of an effective choice of law by the parties, * * * the contracts to be taken into account in applying the principles of [Section] 6 to determine the law applicable to an issue include:
>
> (a) The place of contracting,
>
> (b) The place of negotiation of the contract,
>
> (c) The place of performance,
>
> (d) The location of the subject matter of the contract, and
>
> (e) The domicile, residence, nationality, place of incorporation and place of business of the parties.
>
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Restatement of the Law 2d, Conflict of Laws, Section 188 (1988).

{¶ 23} We agree with NCC that Ohio would have little interest in the contract by virtue of the fact that Shaut is located in Ohio. A Massachusetts-based insurance broker, EBS, reached out to a Massachusetts-based wholesale insurance broker, U.S. Risk, to assist 3si in procuring the insurance policies. 3si was located in Massachusetts at the time it purchased the policies. The policy applications were executed by 3si in Massachusetts. The Hassman and Haufler suits were filed in Massachusetts with Shaut as a named defendant.

{¶ 24} Although NCC's parent company is located in Ohio, NCC is not, and the location of the insurer's parent company is not a relevant factor under the Restatement. 3si was located in Massachusetts at the time the policies were issued and the named insured under the policies was 3si, not Shaut.

{¶ 25} In light of the above, we conclude that Massachusetts law governs the contract.

Discovery

{¶ 26} In April 2020, the parties filed a joint motion for the extension of time in the case-management schedule. The trial court granted the motion but later revoked the new case-management schedule. Shaut argues that the trial court erred in striking the modified schedule because Shaut had not disclosed his expert witnesses, submitted his expert report, or completed discovery and was thereby prejudiced by the court's action.

{¶ 27} On February 30, 2020, the court issued a journal entry stating that Shaut's expert report and all paper discovery were to be completed May 8, 2020. On April 20, the parties filed a joint motion for extension of case schedule and proposed, among other deadlines, that Shaut's expert report be due August 10. The trial court did not rule on the motion until September when it denied the motion.

{¶ 28} On June 22, 2020, more than a month after the deadline to disclose experts and serve written discovery had passed, counsel for the parties participated in a case-management conference during which the trial court extended the case

schedule and imposed a new discovery deadline of October 20, 2020. But the court did not extend the expert disclosure deadline; therefore, the deadline remained May 8, 2020. On July 8, 2020, the court issued an order stating: "Journal Entry dated 06/24/20 is hereby stricken. Case to proceed with previously set schedule."

{¶ 29} Appellate courts generally review a discovery dispute under an abuse of discretion standard. *Friedenberg v. Friedenberg*, 161 Ohio St.3d 98, 2020-Ohio-3345, 161 N.E.3d 546, ¶ 22, citing *Ward v. Summa Health Sys.*, 128 Ohio St.3d 212, 2010-Ohio-6275, 943 N.E.2d 514. "A court abuses its discretion when a legal rule entrusts a decision to a judge's discretion and the judge's exercise of that discretion is outside of the legally permissible range of choices." *State v. Hackett*, Slip Opinion No. 2020-Ohio-6699, ¶ 19.

{¶ 30} The trial court's July 8, 2020 journal entry striking the modified case-management schedule was not an abuse of discretion with regard to Shaut's expert witness or expert report because the report and disclosure would have been untimely made even under the modified case schedule. Shaut's deadline to disclose experts was May 8, 2020. The July 8, 2020 order did not alter Shaut's deadline to disclose his experts; that order only extended the discovery deadline. Shaut did not disclose his expert until August 21, 2020, when he filed a motion to compel discovery. Thus, his disclosure was untimely under both the original and modified case schedule.

{¶ 31} The trial court also did not abuse its discretion in denying Shaut's motion to compel discovery that was filed August 21, 2020, well after the trial court's July 8 order rescinding the extended case schedule. Although the reasons for the trial court's decision to revert back to the original case schedule are not in the record, we note that its decision put both parties at an equal disadvantage. Because the case schedule reverted back to the original deadlines, NCC's expert witness disclosure and report deadline and the deadline to complete paper discovery for both parties had also passed.

2016-2017 Policy

{¶ 32} "As with any contract, in interpreting an insurance policy, [Massachusetts courts] begin with the plain language of the policy." *Mt. Vernon Fire Ins. Co. v. Vision Aid, Inc.*, 477 Mass. 343, 348, 76 N.E.3d 204 (2017), citing *Boston Gas Co. v. Century Indemn. Co.*, 454 Mass. 337, 910 N.E.2d 290 (2009). "An insurance policy should be 'interpreted as a whole' to give effect to the 'main manifested design of the parties' as expressed 'according to the words used' to capture 'what an objectively reasonable insured would expect to be covered.'" *United States Fid. & Guar. Co. v. Assoc. Sleep Industries*, 6 F.Supp.2d 41, 46 (D.Mass. 1998), quoting *Ayer v. Imperial Cas. & Indemn. Co.*, 418 Mass. 71, 73, 634 N.E.2d 571 (1994). "Unless the words in an insurance policy viewed as a whole are ambiguous, a court should 'not look beyond the four corners of the policy' but should read those words in their 'usual and ordinary sense.'" *Assoc. Sleep*

Industries at *id.*, quoting *Somerset Sav. Bank v. Chicago Title Ins.*, 420 Mass. 422, 429, 649 N.E.2d 1123 (1995).

{¶ 33} "Under Massachusetts law, 'the proper interpretation of an insurance policy is a matter of law to be decided by a court, not a jury.'" *United States Liab. Ins. Co. v. Benchmark Constr. Servs.*, 797 F.3d 116, 119 (1st Cir.2015), citing *Boazova v. Safety Ins. Co.*, 462 Mass. 346, 968 N.E.2d 385 (Mass.2012). "Under Massachusetts law, the insured bears the initial burden of establishing that the case involves a generally covered risk under the policy." *Fontaine Bros. v. Acadia Ins. Co.*, D.Mass. No. 3:18-cv-11636-KAR, 2019 U.S. Dist. LEXIS 148056, 3 (Aug. 29, 2019).

Coverage for Unreported Matters

{¶ 34} Pursuant to the 2016-2017 Policy, NCC will pay the loss of a Director and Officer for which the D&O becomes legally obligated to pay by reason of a claim first made against the D&O during the 2016-2017 Policy Period (February 10, 2016 – February 10, 2017). Hawes sent his demand letter on August 25, 2015 and filed suit on January 20, 2016. Both dates preceded the 2016-2017 Policy Period and; therefore, there was no coverage for the Hawes Lawsuit under the 2016-2017 Policy.

{¶ 35} There also was no coverage under the 2015-2016 Policy. The 2015-2016 contained a "Notice" provision, which stated that an insured must give NCC written notice of any claim "as soon as practicable, but in no event later than sixty days after the end of the 2015-2016 Policy Period." NCC did not learn about the

Hawes Lawsuit until April 5, 2017, which was more than 60 days after the end of the 2015-2016 Policy Period.

{¶ 36} Shaut argues that there are questions of material fact about whether NCC should be able to raise a defense of late notice because NCC never raised the issue of prejudice based on Shaut's "theoretical delay or shortfall in meeting the Notice standard." But this issue was not raised at trial-court level; therefore, Shaut has waived his claim that NCC's defense was improper. *See State ex rel. Givens v. Shadyside, Ohio*, 7th Dist. Belmont No. 20 BE 0001, 2020-Ohio-4826, ¶ 34, citing *Vari v. Coppola*, 7th Dist. Mahoning No. 18 MA 0114, 2019-Ohio-3475, ¶ 12 (Issues that are not raised before the trial court cannot be raised for the first time on appeal and are waived.).

{¶ 37} Even if Shaut had not waived the issue on appeal, a claim must be reported to the insurer within the policy's reporting period as a condition precedent to coverage under a claims-made policy such as the policies at issue in this case. *See, e.g., New England Environmental Technologies v. Am. Safety Risk Retention Group, Inc.*, 738 F.Supp.2d 249, 255 (D.Mass.2010), citing *Gargano v. Liberty Ins. Underwriters, Inc.*, 572 F.3d 45, 49 (1st Cir.2009).[2] Such provisions

[2]A "claims made," or "claims made and reported," policy is premised on when the claim is asserted against the insured and provides coverage for claims made and reported during the policy period or a specified period thereafter, regardless of when the covered act or omission occurred. *New England Environmental Technologies* at *id.*, citing *Chas T. Main, Inc. v. Fireman's Fund Ins. Co.*, 406 Mass. 862, 551 N.E.2d 28 (Mass. 1990).

are strictly enforced in Massachusetts. *Caitlin Specialty Ins. Co. v. Am. Superconductor Corp.*, 32 Mass.L.Rep. 93 (2014).

{¶ 38} Thus, the trial court did not err in finding that there were no issues of material fact with regard to the Unreported Matters.

Coverage for Reported Matters

{¶ 39} NCC contends that there is no coverage for the Reported Matters under the 2016-2017 Policy because they involved the same wrongful acts or interrelated wrongful acts as the Unreported Matters and, therefore, constitute a single claim that was first made prior to the 2016-2017 Policy Period.

{¶ 40} NCC contends that all claims under the policies arose out of the same wrongful act or interrelated wrongful acts. The 2016-2017 Policy defines "Wrongful Act" as "any actual or alleged error, omission, misleading statement, misstatement, neglect, breach of duty or act allegedly committed or attempted by" any of the directors and officers, while acting in their capacity as such, or any matter claimed against any director and officer solely by reason of his or her serving in such capacity and "Interrelated Wrongful Acts" as "all Wrongful Acts that have as a common nexus any fact, circumstance, situation, event, transaction, cause or series of facts, circumstances, situations, events, transactions or causes."

{¶ 41} Section D(3) of the 2016-2017 Policy provided:

> All Claims arising out of the same Wrongful Act and all Interrelated Wrongful Acts shall be deemed to constitute a single Claim and shall be deemed to have been made at the earliest of the following times, regardless of whether such date is before or during the Policy Period:

> a. the time at which the earliest Claim, involving the same Wrongful Act or Interrelated Wrongful Act is first made; * * *.

{¶ 42} Thus, all claims that arise out of the same wrongful act or interrelated wrongful act constitute a single claim that is deemed to be first made at the time that the earliest claim involving the same wrongful act or interrelated wrongful act is first made.

{¶ 43} Lawsuits arising from and related to lawsuits that were filed prior to policy inception and demands that were sent prior to policy inception can constitute the same claim under a claims-made policy under Massachusetts law. *See Gateway Group Advantage, Inc. v. McCarthy*, 300 F.Supp.2d 236, 244 (D.Mass.2003) (holding that "related wrongful acts" that occurred in separate states both before and during the policy period were not covered under the policy); *BioChemics, Inc. v. AXIS Reins. Co.*, 924 F.3d 633, 635 (1st Cir.2019) (applying Massachusetts law in a case where allegations in SEC investigation and subpoena that predated the policy period were interrelated to allegations in later enforcement action sufficient to constitute a single claim).

{¶ 44} In this case, the same or related overarching Ponzi scheme was alleged in each of the prior Unreported Matters and the Reported Matters — Shaut and the other defendants allegedly induced claimants to become employees and to invest in 3si or Downing in exchange for an ownership interest in one of the companies (or a related company), and then allegedly failed to pay the claimants wages, benefits, and used their investments to pay other employees. In each of the

lawsuits, the claimants asserted that Shaut, Downing, 3si, and others participated in a continuous and related pattern and practice of defrauding their employees for a period of over two years. For example, in the Hassman Lawsuit, Hassman alleged that defendants had a

> practice and/or pattern of hiring senior management level employees at [Downing Partners], enticing them to invest money with Downing through fraudulent representations, and then wrongfully terminating them or otherwise avoiding] its obligations to them. This Company practice and policy [was] systemic and has been perpetrated on numerous other management-level employees.[3]

{¶ 45} Therefore, because Shaut's claims arose from the same wrongful act or interrelated wrongful acts, the trial court did not err in finding there was no coverage for the Reported Matters.

Warranty Exclusion

{¶ 46} The 2016-2017 Policy also contained a "Warranty Exclusion" that stated, in part:

> By acceptance of this Policy, the Insureds agree that:
>
> 1. the statements in the Application are their representations, that such representations shall be deemed material to the acceptance of the risk or the hazard assumed by Insurer under the Policy, and that this Policy and each Coverage Section are issued in reliance upon the truth of such representations; and
>
> 2. In the event the Application, * * * , contains any misrepresentation or omission made with the intent to deceive, or contains any misrepresentation or omission which materially affects either the acceptance of the risk or the hazard assumed by the Insurer under this

[3]Shaut's claim that the court should disregard the Hassman Suit because "the insured" was not a party to the suit is without merit. While 3si was not a named party in that lawsuit, Shaut was a named defendant.

> Policy, this Policy, including each and all Coverage Sections, shall not afford coverage to the following insureds for any Claim alleging, based upon, arising out of, attributable to, directly or indirectly resulting from, in consequence of, or in any way Involving, any untruthful or inaccurate statements, representations or information:
>
> a. any Insured who is a natural person and who knew the facts misrepresented or the omissions, whether or not such Individual knew of the Application, such materials, or this Policy;
>
> * * *
>
> With respect to any statement, representation or information contained in the Application, or in the materials submitted or required to be submitted therewith, and solely with respect to the above exclusion, no knowledge possessed by any Insured who is a natural person shall be imputed to any other Insured who is a natural person.

2016-2017 Policy, General Terms and Conditions, Section D, Endorsement No 9.

{¶ 47} When 3si applied for coverage with NCC for the 2016-2017 Policy, it represented that no claim had been brought against any proposed insured within the last five years. But at the time 3si executed the application, the Hassman and Hawes Lawsuits had been filed with Shaut as a named defendant in each, and 3si had been named as a defendant in the Lehigh Lawsuit.

{¶ 48} Shaut contends that Jeffrey Rice ("Rice"), who executed the insurance policy application on 3si's behalf, was unaware of any facts contrary to what he put in the application, was inexperienced, and did not receive assistance from NCC's agent to complete the application. Thus, Shaut contends, any "discrepancies" were unintentional and NCC should have followed up these "inconsistencies" in the application before issuing the policy.

{¶ 49} Under the terms of the Warranty Exclusion, NCC did not have to demonstrate that Rice executed the application with an intent to deceive in order for the Warranty Exclusion to apply. NCC had to show *either* an "intent to deceive" or "any misrepresentation or omission that materially affects either the acceptance of the risk or the hazard" assumed by NCC under the 2016-2017 Policy.

{¶ 50} "A fact contained in an insurance application is material

> if "the knowledge or ignorance" of the fact "would naturally influence the judgment of the underwriter in making the contract at all, or in estimating the degree and character of the risk, or in fixing the rate of the premium."

(Quotations and citation omitted.) *Yerardi v. Pacific Idemn. Co.*, 436 F. Supp.2d 223, 239, n. 5 (D.Mass. 2006), quoting *Employers' Liab. Assur. Corp. v. Vella*, 366 Mass. 651, 655, 321 N.E.2d 910 (1975). Thus, the relevant inquiry is whether NCC would have issued the policy under materially different terms or at all had it known the true facts and not whether the insured knew that the facts represented were false or whether they were made with intent to deceive.

{¶ 51} Paul Tomasi ("Tomasi"), the President of E-Risk Services, L.L.C., averred that E-Risk underwrote the 2016-2017 Policy for NCC, utilizing and relying on information contained in the policy application. Tomasi averred that, had 3si checked the box marked "yes" in response to any of the questions on the application instead of the box marked "no," E-Risk would have evaluated the risk in underwriting the 2016-2017 Policy much differently, including but not limited to: (1) increasing the policy premiums to account for the increased risk of the

existence of a prior claim and/or an actual or anticipated private debt or equity offering or sale of securities; (2) adding an endorsement that addressed the increased risk of the existence of a prior claim and/or an actual or anticipated private debt or equity offering or sale of securities; and/or (3) not renewing the account and not issuing the 2016-2017 Policy.

{¶ 52} Thus, 3si's omission or misstatements were material and the trial court did not err when found that there was no issue of fact with regard to the policy's Warranty Exclusion.

Bad-Faith Claim

{¶ 53} Shaut additionally claimed that NCC acted in bad-faith by denying him coverage and by delaying in informing him that they were denying him coverage.

{¶ 54} Where a claim for bad faith rests upon the same allegations as a claim for breach of contract and there has been no breach of contract, the bad-faith claim fails as a matter of law. *See, e.g*, *Calianos v. Commerce Ins. Co.*, 29 Mass.L.Rep. 316, 16 (2011); *Claredon Natl. Ins. Co. v. Philadelphia Indemn. Ins. Co.*, 954 F.3d 397, 409 - 410 (1st Cir. 2020) (applying Massachusetts law).

{¶ 55} "[T]o establish a claim of bad faith, a plaintiff must produce factual evidence of the defendant's knowledge and intent." *Claredon Natl. Ins. Co.* at 409, citing *O'Leary-Alison v. Metro. Property & Cas. Ins. Co.*, 52 Mass. App. Ct. 214, 752 N.E.2d 795 (2001). The insured must demonstrate that the insurer's coverage position was "based on an unreasonable interpretation of policy terms." *Id.*, citing

id. Even an insurer's "plausible, although ultimately incorrect" coverage position is insufficient to establish bad faith. *Id*., citing *id*.

{¶ 56} Shaut argues that NCC had a duty to defend and indemnify him and its failure to do so constituted bad faith. But, because there is no coverage under the policies, NCC did not have a duty to defend. As such, Shaut's bad-faith claim also fails as a matter of law and the trial court did not err in granting summary judgment in favor of NCC on Shaut's bad-faith claim.

{¶ 57} No genuine issues of material fact exist and NCC was entitled to judgment as a matter of law. Therefore, the trial court did not err when it granted summary judgment to NCC.

{¶ 58} The sole assignment of error is overruled.

{¶ 59} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

LARRY A. JONES, SR., JUDGE

MARY J. BOYLE, A.J., and
MARY EILEEN KILBANE, J., CONCUR