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

ALLSTATE INSURANCE COMPANY	:	CIVIL ACTION
	:	
v.	:	
	:	
SAMANTHA WISMANN, et al.	:	NO. 05-6672

MEMORANDUM

Padova, J. **October 20, 2006**

Plaintiff, Allstate Insurance Company, brought this action for declaratory judgment seeking a declaration that Allstate Deluxe Homeowners Policy No. 001749296 and Allstate Personal Umbrella Policy No. 001551318 do not obligate it to defend or indemnify Defendants Samantha Wismann, William Wismann, and Sharyn Wismann against claims made against them in a lawsuit brought by Defendants Autumn Lucas, a minor by Lisa Oliveti, her mother, and by Lisa Oliveti in her own right. Presently before the Court are the parties' cross-motions for summary judgment.[1] For the reasons that follow, Plaintiff's Motion is granted and Defendants' Motion is denied.

I. BACKGROUND

In January 2005, Autumn Lucas and Lisa Oliveti (the "Lucas Plaintiffs") filed a complaint ("the Lucas Complaint") in the Court of Common Pleas for Bucks County, Pennsylvania against Samantha Wismann, William Wismann, and Sharyn Wismann alleging the following facts. (Pl's SMF ¶ 1.) On March 9, 2003, Autumn Lucas received threats of physical harm from Samantha Wismann related to a dispute. (Pl's Ex. A., Lucas Complaint ¶ 6.) On March 12, 2003, Samantha Wismann intentionally and viciously attacked Autumn Lucas, who sustained injuries to her head, body and extremities. (Id. ¶ 8.) Prior to the attack, Lisa Oliveti notified the Wismanns of the violent

[1]Autumn Lucas and Lisa Oliveti have not responded to Allstate's Motion for Summary Judgment.

threats Samantha made against Autumn. (Id. ¶ 11.) The Wismanns told Lisa Oliveti, in front of Samantha, that the children should just "duke it out." (Id. ¶¶ 18-19.) The Lucas Complaint asserts claims against Samantha Wismann for assault and battery, and negligence, and claims against William and Sharyn Wismann ("the Wismanns") for negligence, gross negligence, reckless indifference, recklessness, and willful and wanton disregard to the violent and/or aggressive behavior of Samantha Wismann and the consequences to Autumn Lucas. (Id. ¶¶ 5- 26.) The Lucas Plaintiffs seek compensatory and punitive damages against the Wismanns. (Id. ¶ 22, 26.) Allstate is defending the Wismanns in that lawsuit subject to a reservation of rights. (Pl's SMF ¶ 17.)

Allstate issued Deluxe Plus Homeowners Policy No. 001749296 (the "Homeowners Policy") to William Wismann for the policy period commencing December 29, 2002, with family liability protection limits of $300,000. (Pl's Ex. B., Homeowners Policy at 1-2.) The Homeowners Policy imposes joint obligations on the insured and that person's resident spouse, so that the responsibilities, acts and omissions of one are binding on the other. (Id. at 4.) The Homeowners Policy includes an exclusion for bodily injury and property damage resulting from intentional or criminal acts or omissions of any insured person. (Id. at 22.) The exclusion provision states, "We do not cover any bodily injury or property damage intended by, or which may reasonably be expected to result from the intentional or criminal acts or omissions of, any insured person." (Id.) (emphasis added). The Homeowners Policy defines "insured person(s)" as "you and, if a resident of your household: (a) any relative; and (b) any dependent person in your care." (Id. at 2.) Allstate also issued Personal Umbrella Policy No. 001551318 (the "Umbrella Policy") to William Wismann for the policy period commencing May 14, 2002 with basic liability limits of $1,000,000. (Pl's Ex. C., Umbrella Policy at 2.) The Umbrella Policy contains an exclusion provision which states: "This

policy will not apply: . . . (8) to any intentionally harmful act or omission of an insured." (Id. at 5.) (emphasis added). The Umbrella Policy states that "insured" means "a) you, and b) relatives residing in your household." (Id. at 1.)

Allstate contends that it is not obligated under the Homeowners Policy or the Umbrella Policy to defend or indemnify Sharyn Wismann, William Wismann, or Samantha Wismann with regard to claims arising out of this incident because the injuries or damages alleged in the Lucas Complaint fall under the intentional and criminal acts exclusions and because they do not arise from an "occurrence" as defined in the policies. Conversely, the Wismanns contend that Allstate does have a duty to defend and indemnify under the Umbrella Policy because the Umbrella Policy does not impose joint obligations on the co-insureds and the language of the exclusion provision in the Umbrella Policy does not preclude coverage. The Lucas Plaintiffs, who are also Defendants in the instant action, asserted at oral argument held on October 5, 2006, that Allstate has a duty to defend and indemnify under both insurance policies because the Lucas Complaint contains a negligence claim against Samantha Wismann, in addition to a claim for an intentional tort.

Allstate and the Wismanns have filed cross-motions for summary judgment.

II. LEGAL STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with 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." Fed. R. Civ. P. 56(c). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. Id.

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant's initial Celotex burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." Id. at 325. After the moving party has met its initial burden, "the adverse party's response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). That is, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. "Speculation, conclusory allegations, and mere denials are insufficient to raise genuine issues of material fact." Boykins v. Lucent Technologies, Inc., 78 F. Supp. 2d 402, 407 (E.D. Pa. 2000). Indeed, evidence introduced to defeat or support a motion for summary judgment must be capable of being admissible at trial. Callahan v. AEV, Inc., 182 F.3d 237, 252 n.11 (3d Cir. 1999) (citing Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1234 n. 9 (3d Cir. 1993)).

III. DISCUSSION

A. Coverage of Samantha Wismann

Under Pennsylvania law, an insurer's duty to defend an action is measured, in the first instance, by the allegations in the underlying complaint. Gene's Restaurant, Inc. v. Nationwide Ins. Co., 548 A.2d 246 (Pa. 1988). The duty to defend,

> is fixed solely by the allegations in the underlying complaint. It is not the actual details of the injury, but the nature of the claim which determines whether the insurer is required to defend. The duty to defend is limited to only those claims covered by the policy. The insurer is obligated to defend if the factual allegations of the complaint on its face comprehend an injury which is actually or potentially within the scope of the policy.

Old Guard Ins. Co. v. Sherman, 866 A2d 412, 416-417 (Pa. Super. Ct. 2004) (quoting Erie Ins. Exchange v. Muff, 851 A.2d 919, 925 (Pa. Super. Ct. 2004) (emphasis in Old Guard). The Pennsylvania Supreme Court has held that the particular cause of action that a complainant pleads is not determinative of whether an insurance company has an obligation to defend. Mut. Benefits Ins. Co. v. Haver, 725 A.2d 743, 745 (Pa. 1999). Rather, the court held that "it is necessary to look at the factual allegations contained in the complaint." Id. The Pennsylvania Superior court has held that "the facts contained in the underlying complaints must be examined to determine the existence of coverage and that averments of negligence in a complaint which ring hollow under the recited facts cannot create coverage where none exists." Donegal Mut. Ins. Co. v. Baumhammers, 893 A.2d 797, 811 (Pa. Super. Ct. 2006), petition for allowance of appeal granted, Nos 110-125 WAL, 2006 the manner in which the complainant frames the request for redress to control [] would encourage litigation through the use of artful pleadings designed to avoid exclusions in liability insurance policies." Mut. Benefits Ins., 725 A.2d at 745.

The Lucas Complaint alleges that Samantha Wismann intentionally attacked Autumn Lucas several days after she had threatened Autumn Lucas with physical harm. (Lucas Complaint ¶¶ 6-9.) The Lucas Complaint also contains a claim of negligence against Samantha Wismann. (Lucas Complaint ¶¶ 14-16.) However, an examination of the facts contained in the underlying complaint reveals that the averment of negligence against Samantha Wismann "rings hollow" and cannot,

therefore, create coverage where none exists. The Lucas Complaint alleges that Autumn Lucas received threats from Samantha Wismann, and that Samantha Wismann "viciously and violently attacked Plaintiff Autumn Lucas willfully and intentionally inflicting the physical contact and/or threat of contact referred to herein upon Plaintiff Autumn Lucas." (Lucas Complaint ¶¶ 6, 8.) The allegation against Samantha Wismann with respect to negligence state simply that Samantha Wismann "acted in a negligent manner in [her] actions toward Plaintiff Autumn Lucas." (Lucas Complaint ¶ 15.) No further details are provided in the Lucas Complaint regarding how Samantha Wismann acted negligently. In contrast, the allegations of negligence against William and Sharyn Wismann list in detail five specific ways in which they were allegedly negligent. (Lucas Complaint ¶ 21(a) - (e).) Because the allegations against Samantha Wismann pertain to an intentional act, coverage of Samantha Wismann for the incident alleged in the Lucas Complaint is excluded by the terms of both insurance policies.

B. Coverage of William and Sharyn Wismann

Allstate asserts that the language excluding coverage of intentional and criminal acts extends to bar coverage for the claims in the Lucas Complaint against William and Sharyn Wismann even though the Lucas Complaint asserts claims against them for negligence and recklessness. Allstate contends that since Samantha was an insured under both policies, the Homeowners Policy, which bars coverage for bodily injury from intentional or criminal acts or omissions of any insured person, and the Umbrella Policy, which bars coverage for any intentionally harmful act or omission of an insured person, do not obligate Allstate to defend or indemnify William and Sharyn Wismann.

The Wismanns maintain that an exclusion provision which bars recovery for intentional or criminal acts of an insured should not be extended to bar recovery by innocent co-insureds. Because

the language of the Umbrella Policy bars coverage for intentionally harmful acts or omissions of an insured person, they contend that this exclusion is not applicable to them and that Allstate has a duty under the Umbrella Policy to defend and indemnify them in the underlying lawsuit.

"Whether the intentional acts of a co-insured will defeat an 'innocent' co-insured's ability to collect or be indemnified under a policy has, for the most part, turned upon the exclusionary language used in the policy." General Accident Ins. Co. v. Allen, 708 A.2d 828, 832 (Pa. Super. Ct. 1998). Exclusion provisions have been enforced that resulted in coverage being excluded for "innocent" co-insureds despite the fact that the co-insureds did not intend the damage or the injury that resulted. Id. In General Accident, Eugene Allen was sued for battery and intentional and negligent infliction of emotional distress in connection with criminal charges of various sexual offenses committed against three children. Elizabeth Allen, his wife, was also sued in the same action for negligence for failing to prevent the sexual abuse committed by her husband. Id. at 829. General Accident Insurance sought a declaratory judgment that the exclusion provision of the insurance policy purchased by Eugene and Elizabeth Allen precluded the company's obligation to defend Elizabeth Allen in the negligence suit. Id. The relevant exclusion provision in the insurance policy purchased by the Allens stated, "Personal liability . . . does not apply to bodily injury or property damage: a. which is expected or intended by the insured." Id. at 831 (emphasis added). The court held that the insurer was correct in denying coverage to Eugene based on the exclusion provision; however, the court held that since the allegations of the complaint against Elizabeth did not necessarily involve bodily injury to the plaintiff that she expected or intended, the exclusion provision should not apply to coverage of her liability. Id. at 832. The court in General Accident further noted that extension of the exclusion provision to "innocent" co-insureds has occurred

generally when the exclusion provision contains language stating the coverage is excluded for bodily injuries which were expected or intended by "any insured" and "anyone we protect." Id.

A similar result was reached when the insurance policy excludes coverage for loss resulting from the intentional act of "an insured." McAllister v. Millville Mut. Ins. Co., 640 A.2d 1283 (Pa. Super. Ct.1994) (finding that "innocent" co-insured could not recover because the policy excluded coverage for loss resulting from the neglect of "any insured" or the intentional acts of "an insured"). The court in McAllister noted a distinction between the usage of the term "the insured," which indicate separate insurable interests, and "any insured" or "an insured," which indicate joint insurable interests. By contrast, when the insurance policy excludes coverage for loss resulting from the intentional acts of "the insured," the exclusion provision has not precluded recovery by the "innocent" co-insured. Maravich v. Aetna Life and Casualty Co., 504 A.2d 896 (Pa. Super. Ct.1985).

In Baumhammers, the court was confronted with a situation similar to the instant case. Richard Baumhammers ("Richard") went on a shooting spree killing five people. Baumhammers, 893 A.2d at 802. A civil lawsuit was filed against Richard and his parents. Id. at 804. The lawsuit against the parents claimed negligence. Id. The parents had two insurance policies: a homeowner's policy ("the Donegal Policy") and an umbrella policy ("the USAA Policy"). Id. Both insurance companies sought a declaratory judgment that they had no duty to defend or indemnify Richard or his parents. Id. The Donegal Policy contained an exclusion for bodily injury that is expected or intended by "the insured." Id. at 804.[2] The USAA policy had two exclusion provisions. Id. at 805.

[2]Defendants misstate the facts in Donegal in their "Memorandum in Support of Wismanns' Answer to Allstate's Motion for Summary Judgment and in Support of Wismanns' Cross-Motion for Summary Judgment." Defendants contend that the court in Donegal refused to extended

The first excluded coverage for bodily injury or property damage "caused by the intentional or purposeful acts of any insured." Id. The second exclusion provided that the policy did not apply to "bodily injury, personal injury or property damage arising out of a malicious or criminal act or omission by, or with either the knowledge or consent of, any insured regardless of whether such insured is actually charged with, or convicted of, a crime." Id. With respect to the Donegal Policy, the court found that the insurer was not relieved of its duty to defend and potentially indemnify the parents. The court's discussion of the Donegal Policy focused on the meaning of the term "occurrence" as used in the policy, and did not discuss the language of the exclusion provision. Id. at 811 n.11. With respect to the USAA Policy, the court found that the exclusion provision clearly and unambiguously extended to exclude the insurance company's obligation to defend or indemnify the parents. Id. at 818. The court stated, "The fact that the [p]arents did not engage in criminal behavior is immaterial because the USAA policy exclusion applies to criminal behavior of any insured." Id. (emphasis in original).

At the time of the events alleged in the Lucas Complaint, Samantha Wismann was a resident of William and Sharyn Wismanns' household. Under the terms of both insurance policies, Samantha was an "insured." The Homeowners Policy states that "insured person(s)" means "you and, if a resident of your household: (a) any relative; and (b) any dependent person in your care." (Homeowners Policy at 2.) The Umbrella Policy states that "insured" means "a) you, and b) relatives residing in your household." (Umbrella Policy at 1.) Therefore, Samantha, William, and Sharyn Wismann were co-insureds under both the Homeowners policy and the Umbrella Policy.

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applicability of the exclusion provision of the Donegal policy to an innocent co-insured where the exclusion provision contained the "an insured" language. In fact, the exclusion provision of the Donegal policy excluded bodily injury that is expected or intended by "the insured." Id. at 804.

Under Pennsylvania law, it is clear that where language of an exclusion provision excludes coverage for intentional or criminal acts of "an" insured or "any" insured, the exclusion extends to preclude the duty on the insurer to defend or indemnify an innocent co-insured. As Samantha Wismann lived in William and Sharyn Wismanns' home, the exclusion provisions clearly exclude her intentional conduct from coverage under both policies. William and Sharyn Wismann are co-insureds under the terms of both policies. Consequently, the exclusion provision extends to them as well, and Allstate does not have a duty to defend or indemnify William and Sharyn Wismann under either policy for the incidents detailed in the Lucas Complaint.

An appropriate order follows.

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O R D E R

AND NOW, this 20th day of October 2006, upon consideration of Plaintiff's Motion for Summary Judgment (Docket No. 23), Defendants' Motion for Summary Judgment (Docket No. 27), the papers filed in connection therewith, and the Oral Argument held on October 5, 2006, **IT IS HEREBY ORDERED** as follows:

1. Plaintiff's Motion for Summary Judgment is **GRANTED**.

2. Defendants' Motion for Summary Judgment is **DENIED**.

3. **DECLARATORY JUDGMENT** is hereby **ENTERED** in favor of Plaintiff Allstate Insurance Company and against Defendants Samantha Wismann, William Wismann, Sharyn Wismann, Autumn Lucas, and Lisa Oliveti.

4. The Court **DECLARES** that Allstate Deluxe Homeowners Policy No. 001749296 and Allstate Personal Umbrella Policy No. 001551318 do not obligate Plaintiff Allstate Insurance Company to defend or indemnify Defendants Samantha Wismann, William Wismann, and/or Sharyn Wismann from claims brought by Defendants Autumn Lucas, a minor by Lisa Oliveti, her mother, and Lisa Oliveti in her own right arising from the alleged assault by Samantha Wismann on Autumn Lucas on March 12, 2003.

BY THE COURT:

s/ John R. Padova, J.
John R. Padova, J.