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

NAUTILUS INSURANCE COMPANY	:	CIVIL ACTION
	:	
v.	:	
	:	
WILLIAM A. GARDNER, individually and d/b/a DOC FRIGHT, HAUNTED PHILADELPHIA and FESTIVAL OF FEARS; HARRIS BROOKS and SUSAN BROOKS, individually and as parents and natural guardians of SAMANTHA BROOKS, a minor; and SAMANTHA BROOKS	:	NO. 04-1858

O'NEILL, J. MARCH 21, 2005

MEMORANDUM

Plaintiff, Nautilus Insurance Company, filed a complaint on April 29, 2004 seeking a declaratory judgment establishing that it has no duty to defend defendant, William Gardner, individually and doing business as Doc Fright, Haunted Philadelphia and Festival of Fears (collectively "Gardner"), in connection with an action brought against Gardner by co-defendants, Samantha Brooks, a minor, and Harris Brooks and Susan Brooks, individually and as parents and natural guardians of Samantha Brooks (collectively "the Brooks"). Jurisdiction is based on diversity of citizenship. Before me now is plaintiff's motion for summary judgment and defendants' opposition thereto.

BACKGROUND

I. The Insurance Policy

Nautilus issued a commercial general liability insurance policy to Gardner providing coverage during the Halloween season, from September 25, 2001 to October 31, 2001. The policy provides for a general aggregate coverage limit of $2,000,000, a personal and advertising injury limit of $1,000,000, an occurrence limit of $1,000,000, a fire damage limit of $50,000 for any one fire, and a medical expense limit of $1,000 for any one person. The policy requires Nautilus to "pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' . . . to which this insurance applies" and "to defend the insured against any 'suit' seeking those damages." However, Nautilus is not required "to defend the insured against any 'suit' seeking damages for 'bodily injury' . . . to which this insurance does not apply."

The insurance policy excludes certain work-related injuries from bodily injury coverage. Specifically, the contract excludes: (1) workers' compensation, defined as "[a]ny obligation of the insured under a workers' compensation, disability benefits or unemployment compensation law or any similar law"; and (2) employer's liability, defined as:

> "Bodily injury" to
> (1) An 'employee' of the insured arising out of and in the course of:
> (a) Employment by the insured; or
> (b) Performing duties related to the conduct of the insured's business.

This exclusion applies: "(1) Whether the insured may be liable as an employer or in any other capacity; and (2) To any obligation to share damages with or repay someone else who must pay damages because of the injury." However, "[t]his exclusion does not apply to liability assumed by the insured under an "insured contract".

The insurance policy defines the term "employee" to include "leased worker" but to exclude "temporary worker." The policy further defines the term "leased worker" to mean "a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm, to perform duties related to the conduct of your business" and "temporary worker" to mean "a person who is furnished to you to substitute for a permanent 'employee' on leave or to meet seasonal or short term workload conditions."

II. The Tort Claims

The Brooks filed a complaint against Gardner on February 20, 2004 alleging that three years earlier, at some unspecified time, between October 19, 2001 and October 28, 2001, David Phillips, an employee of Gardner, sexually assaulted fourteen-year-old Samantha during her employment as an "actor" at Gardner's haunted house display and while she was under the supervision of Phillips. The Brooks first assert claims against Gardner for negligence and vicarious liability.

The Brooks allege that Gardner had a duty to protect Samantha from harms inflicted by other employees and had a duty to hire, retain, and supervise employees and supervisors who would not harm minor employees. The Brooks generally allege that Gardner breached these duties by failing to exercise reasonable care in determining Phillips' violent propensities. Specifically, the Brooks allege that Gardner was negligent and, therefore, vicariously liable for Phillips' assault because Gardner: (a) "hired and retained David Phillips without adequately investigating David Phillips' general lack of fitness for supervision of minors"; (b) "failed to make sufficient inquiry of [sic] [Phillips'] moral character of David Phillips"; (c) "failed to inquire into [Phillips'] qualifications and previous employment experience"; (d) placed [Phillips]

in a position which attested to his fitness and suitability to deal with minor employees"; (e) failed to monitor [Phillips] on an on-going basis"; (f) "failed to warn [Samantha] or her parents of [Phillips'] lack of qualifications, fitness, suitability and dangerous propensity for violence"; and (g) "failed to protect [Samantha] from the conduct of [Phillips], which [Gardner] should have recognized as involving an unreasonable risk of violence, and physical and emotional harm."

The Brooks also assert claims of intentional or negligent infliction of emotional distress against Gardner for causing Samantha to suffer the physical and sexual assault at the hands of Phillips. They allege that Gardner either acted intentionally or recklessly because Gardner "knew or should have known that the physical and sexual violations perpetuated [sic] by David Phillips upon [Samantha] would result in serious emotional distress . . . beyond what a normal person could be expected to endure." As a result, they claim physical injuries, severe emotional distress, and other psychological harms to Samantha.

STANDARD OF REVIEW

Rule 56(c) of the Federal Rules of Civil Procedure provides, in relevant part, that summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c) (2004). The moving party "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions . . . which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). After the moving party has filed a properly supported motion, the burden shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial." Fed.

R. Civ. P. 56(e) (2004).

I must determine whether any genuine issue of material fact exists. An issue is genuine if the fact finder could reasonably return a verdict in favor of the non-moving party with respect to that issue. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue is material only if the dispute over the facts "might affect the outcome of the suit under the governing law." Id. In making this determination, I must view the facts in the light most favorable to the non-moving party, and the non-moving party is entitled to all reasonable inferences drawn from those facts. Id. However, the nonmoving party may not rest upon the mere allegations or denials of the party's pleading. See Celotex, 477 U.S. at 324. The non-moving party must raise "more than a mere scintilla of evidence in its favor" in order to overcome a summary judgment motion and cannot survive by relying on unsupported assertions, conclusory allegations, mere suspicions. Williams v. Borough of W. Chester, 891 F.2d 458, 460 (3d Cir. 1989). If the evidence for the nonmoving party is merely colorable, or is not significantly probative, summary judgment may be granted. Anderson, 477 U.S. at 249-50 (citations omitted).

DISCUSSION

I. Choice of Law

The coverage issues raised in this action are governed by Pennsylvania law. Where, as here, jurisdiction is based on diversity of citizenship I must apply the choice of law rules of the forum state. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941). Under Pennsylvania law, "an insurance contract is governed by the law of the state in which the contract was made, and the contract is made at the place of delivery." Carosella & Ferry, P.C. v. TIG Ins. Co., 189 F. Supp. 2d 249, 252 (E.D. Pa. 2001). "[I]n the absence of proof of place of delivery,

the residence of the insured is presumed to be the place of delivery." Id. Because the insurance policy lists Gardner's address in Pennsylvania, I assume that Pennsylvania was the place of delivery. Therefore, Pennsylvania law governs, and the parties do not suggest otherwise.

II. Duty to Defend

Nautilus asserts in its complaint that it has no obligation under its insurance policy to defend Gardner, or indemnify him, in connection with the Brooks complaint because: (1) "the emotional distress allegedly sustained by Samantha Brooks does not constitute a bodily injury" under the insurance policy; (2) "the underlying complaint fails to allege any occurrence" of an assault; and (3) defense is not required because of "the expected or intended injury exclusion," "the worker's compensation exclusion," "the employer's liability exclusion," and "the punitive damage exclusion." However, in its motion for summary judgment, Nautilus focuses its arguments solely on the workers' compensation exclusion and the employer's liability exclusion.[1] "Exclusions from coverage contained in an insurance policy will be effective against an insured if they are clearly worded and conspicuously displayed, irrespective of whether the insured read the limitations or understood their import." Pacific Indem. Co. v. Linn, 766 F.2d 754, 760 (3d Cir. 1985) citing Standard Venetian Blind Co. v. Am. Empire Ins. Co., 469 A.2d 563, 567 (Pa. 1983). "An insurer who disclaims its duty to defend based on a policy exclusion bears the burden of proving the applicability of the exclusion." Erie Ins. Co. v. Muff, 851 A.2d 919, 926 (Pa. Super. Ct. 2004). Nautilus, therefore, bears the burden of proving that the Brooks' claims in the underlying complaint are excluded from coverage by the employer's liability and

[1]Because Nautilus does not assert the other arguments from his complaint in its motion for summary judgment, I do not consider them here.

worker's compensation exclusions.

Under Pennsylvania law, the duty to defend is determined by examination of the allegations of the underlying complaint. See, e.g., Pacific, 766 F.2d at 760 (citing Pennsylvania cases); Simon Wrecking Co., Inc. v. AIU Ins. Co., 350 F. Supp. 2d 624, 640 (E.D. Pa. 2004) (same). In determining the duty to defend, the complaint should be read generously: "[a]n insurance company is obligated to defend an insured whenever the complaint filed by the injured party may *potentially* come within the policy's coverage." See id. The duty to defend arises even if the underlying complaint has no basis in fact, is groundless, false, or fraudulent. Britamco Underwriters, Inc. v. Weiner, 636 A.2d 649, 651 (Pa. Super. Ct. 1994). The duty to defend rests with the insurer "until the insurer can confine the claim to a recovery that is not within the scope of the policy." Pacific, 766 F.2d at 760. Therefore, in order to determine whether Nautilus has a duty to defend Gardner, I must first determine the scope of coverage of the insurance policy and then ascertain whether the complaint against the insured states a claim that potentially triggers coverage under the policy. Britamco, 636 A.2d at 651.

A. The Nautilus Insurance Policy

When construing an insurance policy my duty is to ascertain the intent of the parties as manifested in the language of the insurance policy. Nationwide Mut. Ins. Co. v. Daily, No. 02-4830, 2003 WL 22246951, *3 (E.D. Pa. September 26, 2003) citing Mut. Benefit Ins. Co. v. Haver, 725 A.2d 743, 746 (Pa. 1999). Where the terms of a policy are clear and unambiguous, I must give the terms their plain and ordinary meaning. Pacific, 766 F.2d at 760-61. Where the terms of a policy are ambiguous and the intention of the parties cannot be discerned from the face of the policy, I "may look to extrinsic evidence of the purpose of the insurance, its subject matter,

the situation of the parties, and the circumstances surrounding the making of the contract" in an attempt to construe the contract in accord with the parties' intentions. Id. at 761 citing Celley v. Mut. Ben. Health & Accident Ass'n, 324 A.2d 430, 434 (Pa. Super. Ct. 1974). "Where a provision of an insurance policy is ambiguous, the provision is construed in favor of the insured and against the insurer." Erie Ins., 851 A.2d at 926. "The language of a policy may not be tortured, however, to create ambiguities where none exist." Pacific, 766 F.2d at 761. A policy term is ambiguous if it is reasonably susceptible to different constructions and capable of being understood in more than one sense. Mark I Restoration SVC v. Assurance Co. of Am., 248 F. Supp. 2d 397, 402 (E.D. Pa. 2003) citing Madison Constr. Co. v. Harleysville Mut. Ins. Co., 735 A.2d 100, 106 (Pa. 1999). Even if a term is not defined in an insurance policy, a term is not ambiguous where it possesses a clear legal or common meaning that may be supplied by a court. City of Erie v. Guar. Nat'l Co., 109 F.3d 156, 163 (3d Cir. 1997).

1. Employer's Liability Exclusion

The employer's liability exclusion excludes coverage for bodily injury to an employee of the insured arising out of and in the course of employment by the insured or performing duties related to the conduct of the insured's business. Nautilus must, therefore, prove: (a) that the alleged assault of Samantha arose out of and in the course of her employment by Gardner or that she was performing duties related to Gardner's business; and (b) that Samantha constitutes an employee under the insurance policy.

a. "Arising Out Of And In The Course Of"

The Supreme Court of Pennsylvania has interpreted similar language from an insurance policy that excluded coverage for any injury or death of an employee "arising out of and in the

course of . . . employment by the insured" to mean "causally connected with" one's employment. McCabe v. Old Republic Ins. Co., 228 A.2d 901, 903 (Pa. 1967). The Court clarified that "arising out of" does not mean "proximately caused by" but rather a cause and result relationship similar to "but for' causation. Id. Moreover, the Court found the phrase "arising out of and in the course of employment," "when read in its entirety, [to be] clear and definite," and held that "a construction may not be adopted which conflicts with the plain language." Id.

Nautilus appears to argue that Samantha's alleged assault arose out of and in the course of her employment because the alleged assault took place during her employment at the haunted house display and would not have happened but for her employment by Gardner. Nautilus analogizes the instant case to Forum Ins. Co. v. Allied Security, Inc., 866 F.2d 80 (3d Cir. 1989). In Forum Insurance, the Court of Appeals applied McCabe to hold that an insurance company had no duty to defend against allegations of negligent hiring, retention, placement, supervision, and control where a security guard attacked and killed his fellow employee while both were on assignment for the insured because the insured's policy contained an exclusion for claims arising out of "[b]odily injury, sickness or disease, including death or disability at any time resulting therefrom to any employee . . . arising out of and in the course of his employment." 866 F.2d at 81-82. Although the jury in the underlying case found that the attack was not directed at the victim because of his status as an employee, the Court of Appeals concluded that it "does not mean that the injury did not arise out of [the victim's] employment in the sense used by Pennsylvania. [The victim's] death clearly arose out of his employment under Pennsylvania law, since he was killed by a fellow employee while both were on assignment as security guards for the employer." Id. at 83.

Here, Samantha's alleged assault was causally connected with her employment. The alleged assault took place during her employment at the haunted house display, and but for her employment with Gardner's Festival of Fears Samantha would not have met Phillips or allegedly been sexually assaulted by him. See also Miller v. Quincy Mut. Fire Ins. Co., No. 03-1328, 2003 WL 23469293, *7 (E.D. Pa. December 4, 2003) (Yohn, J.)(applying McCabe and Forum Insurance to hold that a similar employer's liability exclusion precludes coverage for liability arising from allegations of sexual assault in the workplace). McCabe and Forum Insurance clearly support Nautilus' argument that Samantha's alleged assault arose out of and in the course of her employment.

b. "Employee"

Defendants also assert that Samantha was not an employee under the insurance policy and instead was a temporary worker under the language of the policy. The policy defines the term "employee" to include "leased worker" but to exclude "temporary worker." Both parties agree that Samantha was not a "leased worker" under the policy as she was not leased to Gardner from a labor leasing firm. Where the parties disagree is whether Samantha was a "temporary worker" under the policy. The policy defines the term "temporary worker" to mean "a person who is furnished to you [the insured] to substitute for a permanent 'employee' on leave or to meet seasonal or short term workload conditions." Defendants do not contend that Samantha substituted for a permanent employee who was on leave. Therefore, the question becomes whether Samantha was furnished to Gardner to meet seasonal or short term workload conditions.

Defendants argue that Samantha was hired to meet seasonal or short term work load conditions because she was hired to work in Gardner's haunted house display as a part of his

Festival of Fears, which was operated only during the October Halloween season, lasting for approximately 14 days of each year. Samantha's brief employment at an event that takes place only during the Halloween season can reasonably be construed to constitute seasonal or short term workload conditions. However, the question remains whether Samantha was furnished to Gardner for work in his haunted house display.

i. "Furnished to You"

Nautilus argues that the phrase "furnished to you" is not ambiguous when interpreted in light of the purpose of the employer's liability exclusion. See Indiana Ins. Co. v. Brown, No. 2003-CA-000113-MR, 2003 WL 23008788 (Ky. App. Ct. December 24, 2003);[2] Nationwide Mut. Ins. Co. v. Allen, 850 A.2d 1047, 1057 (Conn. Super. Ct. 2003) (holding that under Connecticut law, "[t]he language of this section is clear and unambiguous. A temporary worker is a person who 'must be furnished' to the insured to substitute for a permanent employee on leave or to meet seasonal or short-term workload conditions. [The employer] did not go to a headhunter, employment agency manpower service provider or any similar service to employ and or to utilize [the worker's] services. [The worker] was not employed by anyone who lent or furnished him to [the employer] as an employee."); Am. Family Mut. Ins. Co. v. Tickle, 99 S.W.3d 25, 30 (Mo. App. Ct. 2003) (applying a grammatical analysis, under Missouri law, to hold that "[t]here is no ambiguity in the relationship of 'is furnished' to its modifier 'to meet

[2]Although Nautilus relies on this case, I note that Ky. R. Civ. P. 76.28(4)(c) provides that "[o]pinions that are not to be published shall not be cited or used as authority in any other case in any court of this state." Ky. R. Civ. P. 76.28(4)(c) (2004). If such authority is not to be cited or used in Kentucky's own courts, I find no reason to apply it in this Court.

seasonal or short-term workload conditions.'").[3] Defendants counterargue that the phrase "furnished to you" is too ambiguous to be given a literal interpretation and should be construed against Nautilus. See Ayers v. C & D Gen. Contractors, 237 F. Supp. 2d 764, 768-69 (W.D. Ky. 2002) (holding that under Kentucky law "the term 'furnished to you' is too ambiguous to be given a literal interpretation").

Neither party has presented any Pennsylvania law on this issue. However, I predict that the Pennsylvania Supreme Court would hold that the term "furnished to you" in the instant insurance policy is not ambiguous under Pennsylvania law. The District Court for the Western District of Pennsylvania and the Pennsylvania Common Pleas Courts have looked to Black's Law Dictionary to define the term "furnish" in insurance contracts governed by Pennsylvania law. See Gradler v. Prudential Prop. & Cas. Ins. Co., 464 F. Supp. 575, 578-79 (W.D. Pa. 1979) ("The word, 'furnish,' is variously defined as follows: To supply or provide; For use in the accomplishment of a particular purpose; Implying some active effort to accomplish the designated end.") citing Black's Law Dictionary (4th ed. 1968); State Farm Mut. Auto. Ins. Co. v. City of Phila., No. 4187, 1981 WL 207425, 6 Phila. Co. Rptr. 431, 439 (Pa. Com. Pl. November 25, 1981) quoting Black's Law Dictionary (4th ed. 1968) ("To supply or provide. Talbott v.

[3]Nautilus also asserts that Samantha was an employee under the policy because the Brooks characterize Samantha as an employee of Gardner numerous times throughout the underlying complaint: "David Phillip's actions toward Minor Plaintiff and other minor female employees" (Underlying Compl. ¶10); "by virtue of hiring Minor Plaintiff as an employee at Festival of Fears" (Underlying Compl. ¶¶12 & 13); "to protect Minor Plaintiff from harm from Defendant's other employees" (Underlying Compl. ¶15); "to act as a supervisory employee for Defendant's minor employees" (Underlying Compl. ¶18). Samantha undoubtedly was an employee: she was hired and paid by Gardner. However, in my view, the Brooks' use of the word "employee" in the underlying complaint does not estop defendants from asserting that Samantha was a temporary worker as defined by the insurance policy.

Caudill, 58 S.W.2d 385, 248 Ky. 146. For use in the accomplishment of a particular purpose. William M. Graham Oil & Gas Co. v. Oil Well Supply Co., 128 Okl. 201, 264 P. 591, 599 . . . To provide for, to provide what is necessary for, to give, or afford. Juno v. Northland Elevator Co., 56 N.D. 223, 215 N.W. 562, 563. Equip synonymous. State ex rel. Davis v. Barber, 139 Fla. 706, 190 So. 809. To deliver, whether gratuitously or otherwise. Delp v. Brewing Co., 123 Pa. 42, 15 A. 871."). See also Pa. Nat'l Mut. Cas. Ins. Co. v. J.C. Penney Ins. Co., 8 D. & C.3d 265, 269-70 (1978) (addressing the meaning of the word "furnish" as used in Section 204(a)(1) of the No-Fault Act); Miller, 2003 WL 23469293 at *9 (holding that claimant was an employee, not a temporary worker, because she herself alleged that she was an employee and presented no evidence on the dispositive issue of whether she was "furnished" to the employer).

More recently, Black's Law Dictionary has defined "furnish" to mean, "[t]o supply, provide, or equip, for accomplishment of a particular purpose." Black's Law Dictionary (6th ed. 1990).[4] Similarly, Webster's Third New International Dictionary defines "furnish" to mean "to provide or supply with what is needed, useful, or desirable; equip." Webster's Third New Int'l Dictionary of the English Language (15th ed. 1966). Relatedly, Section 6310.6 of the Pennsylvania Crimes Code relating to the illegal sale of liquor, malt, or brewed beverages to minors defines the term "furnish" to mean: "*[t]o supply, give or provide to*, or allow a minor to possess on premises or property owned or controlled by the person charged." 18 Pa. Cons. Stat. Ann. § 6310.6 (2004) (emphasis added); Commonwealth v. Lawson, 759 A.2d 1, 4 (Pa. Super. Ct. 2000). It is clear that to be "furnished," something or someone must be supplied, provided,

[4]"Furnish" is not defined in the most recent eighth edition of Black's Law Dictionary. It does define "equip" to mean "[t]o *furnish* for service or against a need or exigency; to fit out; to supply with whatever is necessary for efficient action." Black's Law Dictionary (8th ed. 2004).

or equipped to another entity or person. Thus, the phrase, "furnished to you," when read together with the entire sentence, refers to a person supplied, provided, or equipped to the insured to substitute for a permanent employee or to engage in seasonal or short term work. Here, there is no evidence to suggest that Samantha or her employment was supplied, provided, or equipped to Gardner. Therefore, Samantha does not qualify as a temporary worker, irrespective of the brevity of Samantha's employment. Samantha is an employee subject to the employer's liability exclusion.

2. Workers' Compensation Exclusion

Because I hold that Samantha is an employee subject to the employer's liability exclusion I need not address Nautilus' arguments under the workers' compensation exclusion.

III. Duty to Indemnify

Nautilus similarly argues that it is not obligated to indemnify Gardner for any of the Brooks' successful claims. The duty to defend also carries with it a conditional obligation to indemnify in the event the insured is held liable for a claim covered by the policy. Pacific, 766 F.2d at 766. Although the duty to defend is separate from and broader than the duty to indemnify, both duties flow from a determination that the complaint triggers coverage. Duff Supply Co. v. Crum & Forster Ins. Co., No. 96-8481, 1997 WL 255483, *4 (E.D. Pa. May 8, 1997) citing J.H. France Refractories v. Allstate Ins. Co., 626 A.2d 502, 510 (Pa. 1993) and Am. Contract Bridge League v. Nationwide Mut. Fire Ins. Co., 752 F.2d 71, 75 (3d Cir. 1985) modified 25 F.3d 177 (3d Cir. 1994). However, "[a]n insurer's duty to indemnify . . . requires a higher threshold, as the duty is triggered only when the claim is actually within the policy coverage." Id. citing Air Prods. & Chems. v. Hartford Accident & Indem. Co., 707 F. Supp. 762,

766 (E.D. Pa.1989). As discussed previously, Nautilus is not obligated to defend Gardner against the Brooks' complaint. Therefore, Nautilus is not obligated to indemnify Gardner for any of the Brooks' successful claims.

An appropriate order follows.

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

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WILLIAM A. GARDNER, individually and d/b/a DOC FRIGHT, HAUNTED PHILADELPHIA and FESTIVAL OF FEARS; HARRIS BROOKS and SUSAN BROOKS, individually and as parents and natural guardians of SAMANTHA BROOKS, a minor; and SAMANTHA BROOKS	:	NO. 04-1858

ORDER

AND NOW, this 21st day of March 2005, upon consideration of plaintiff's motion for summary judgment and defendants' opposition thereto, and for the reasons set forth in the accompanying memorandum, it is ORDERED that plaintiff's motion for summary judgment is GRANTED and judgment is entered in favor of plaintiff, Nautilus Insurance Company, and against defendants, William Gardner and Harris, Susan, and Samantha Brooks.

s/ Thomas N. O'Neill, Jr.
THOMAS N. O'NEILL, JR., J.