

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

ALLSTATE INSURANCE COMPANY,)	
)	Civil Action
Plaintiff)	No. 02-CV-02387
)	
vs.)	
)	
MAURA J. KENNEY;)	
ZACHARY KENNEY, a Minor, by)	
his Parent and Natural Guardian,)	
MAURA J. KENNEY; and)	
CHRISTOPHER DOGGENDORF, a Minor,)	
by and through his Parents and)	
Natural Guardians,)	
SUZANNE and DAVID DOGGENDORF,)	
and in their own right,)	
)	
Defendants)	

* * *

APPEARANCES:

KATHRYN A. DUX, ESQUIRE
On behalf of plaintiff
Allstate Insurance Company,

BEBE H. KIVITZ, ESQUIRE and
DOLORES M. TROIANI, ESQUIRE
On behalf of defendants
Zachary Kenney, a Minor, by
his Parent and Natural Guardian,
Maura J. Kenney

JOHN F. McKENNA, ESQUIRE
On behalf of defendants
Christopher Doggendorf, a Minor,
by and through his Parents and
Natural Guardians, Suzanne and
David Doggendorf, and in their
own right

* * *

O P I N I O N

JAMES KNOLL GARDNER,
United States District Judge

This matter is before the court on the Motion for Summary Judgment of Plaintiff Allstate Insurance Company filed December 11, 2002.¹ For the reasons expressed below, we conclude that the allegations that Christopher, Suzanne, and David Doggendorf ("Doggendorfs") make against Zachary and Maura Kenney ("Kenneys") in the complaint in the underlying state court action fall outside the range of coverage that Allstate Insurance Company ("Allstate") provided the Kenneys in their insurance contract. Accordingly, we grant summary judgment for plaintiff and declare that Allstate need neither defend nor indemnify the Kenneys in the underlying state court action.

Procedural History

The within civil action is a request for a declaratory judgment pursuant to 28 U.S.C. § 2201. It is before the court on diversity jurisdiction.² See 28 U.S.C. § 1332. Venue is

¹ On January 10, 2003, Defendants Christopher, Suzanne and David Doggendorf's Response to Motion for Summary Judgment of Plaintiff Allstate Insurance Company and Defendants Christopher, Suzanne and David Doggendorf's Memorandum of Law contra Allstate Insurance Company's Motion for Summary Judgment were filed. Defendants Maura and Zachary Kenney's Response to Motion for Summary Judgment of Plaintiff Allstate Insurance Company was filed August 18, 2003.

² Allstate avers that it is incorporated in Illinois and has its principle place of business in Illinois and that all defendants are citizens of Pennsylvania. The amount in controversy exceeds \$75,000.00. The subject
(Footnote 2 continued)

appropriate because both the defendants and the underlying state action may be found in Chester County. See 28 U.S.C. §§ 118, 1391.

Allstate Insurance Company's Complaint for Declaratory Judgment was filed on April 23, 2003. In the complaint, plaintiff seeks a declaration from the court that the losses alleged in the underlying state action between the Daggendorfs and the Kenneys are the result of an intentional act by Zachary Kenney. Therefore, plaintiff contends that those losses are not covered by or are excluded from the terms, conditions, and exclusion of the insurance contract between Allstate and the Kenneys.

On October 21, 2002, an entry of default was entered by the Clerk of Court in the United States District Court for the Eastern District of Pennsylvania against the Kenney defendants. However, on June 16, 2003, the Kenney defendants appeared. By agreement of counsel, the entry of default was lifted on August 5, 2003.

(Footnote 2 continued:)

matter of this action is an insurance contract with a policy limit of \$100,000.00. "Where a liability policy is involved in proceedings for a declaratory judgment, the amount in controversy for jurisdictional purposes is the maximum amount for which the insurer could be held liable under the policy" Britamco Underwriters, Inc. v. Stone, No. CIV.A. 91-4691, 1992 U.S. Dist. LEXIS 11476, *4, 1992 WL 195378, *2 (E.D. Pa. Aug. 3, 1992).

Facts

Based upon the pleadings, exhibits, and record papers the following are the pertinent facts. On February 4, 2002, Christopher Doggendorf, a minor, by and through Suzanne and David Doggendorf, brought suit against Zachary and Maura Kenney in the Court of Common Pleas, Chester County, Pennsylvania.

The allegations in the state court action stem from an incident in which Zachary Kenney allegedly struck Christopher Doggendorf. In the factual allegations, the state court complaint avers that Zachary Kenney "viciously struck Christopher Doggendorf in the face and head, threw him to the floor of the bus and caused him to bleed out of his nose and mouth."³ Count 1 of that complaint contends that Mr. Kenney "[i]ntentionally and knowingly [struck] the minor plaintiff so as to bring about bodily harm".⁴ Count 1 also claims that Zachary Kenney "[r]ecklessly and wantonly [struck] the minor plaintiff with such force as to cause bodily harm."⁵

The state complaint further contends that Maura J. Kenney was negligent in the supervision of her son, Zachary Kenney. The Doggendorfs aver that it was Maura Kenney's

³ Motion for Summary Judgment of Plaintiff Allstate Insurance Company, Exhibit 1.

⁴ Motion for Summary Judgment of Plaintiff Allstate Insurance Company, Exhibit 1.

⁵ Motion for Summary Judgment of Plaintiff Allstate Insurance Company, Exhibit 1.

negligent supervision of Zachary Kenney that was a proximate cause of Christopher Daggendorf's injuries.

Maura Kenney informed Allstate of the state court complaint. On March 4, 2003, Allstate informed Ms. Kenney that it was providing her a defense to the suit subject to a reservation of rights. Counsel who Allstate provided to the Kenney's in the state court action agreed to stay the state court action while Allstate sought the within declaratory judgment on October 17, 2002.

Standard for Summary Judgment

Summary judgment is proper when no genuine issue of material fact is in dispute and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); Federal Home Loan Mortgage Corp. v. Scottsdale Insurance Company, 316 F.3d 431, 443 (3d Cir. 2003). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211 (1986); see Federal Home Loan Mortgage Corp., 316 F.3d at 443. Thus, a "material" fact is one that is necessary to establish an element under the substantive law governing a claim. A fact is "genuine" if it is such that a

reasonable jury could return a verdict for the non-moving party.
Anderson, 477 U.S. at 248, 106 S.Ct. at 2510, 91 L.Ed.2d 211.

When considering summary judgment, the court must take the facts in the light most favorable to the non-moving party. While the non-moving party is not burdened to prove his case as he might at trial, "a party opposing a properly supported motion for summary judgment 'may not rest upon the mere allegations or denials of his pleadings, but ... must set forth specific facts showing that there is a genuine issue for trial.'" Anderson, 477 U.S. at 248, 106 S.Ct. at 2510, 91 L.Ed.2d at 212 (quoting Fed.R.Civ.P. 56(e)). As a result, plaintiff, as the moving party, must set forth such facts as would permit a reasonable jury to conclude that the plaintiff can establish every element of its case.

Discussion

An insurer's duty to defend and to indemnify its insured under Pennsylvania law is summarized as follows:⁶

The duty to defend is a distinct obligation separate and apart from the duty to indemnify. Erie Ins. Exchange v. Transamerica Ins. Co., 516 Pa. 574, 582, 533 A.2d 1363, 1368 (1987). The duty to defend arises whenever claims asserted by the injured party potentially come within the coverage of the policy, Gedeon v. State Farm Mutual Automobile Ins. Co., 410 Pa. 55, 56, 188 A.2d 320, 321 (1963), while the duty to

⁶ The parties agree that Pennsylvania law governs the substantive issues in this case.

indemnify arises only when the insured is determined to be liable for damages within the coverage of the policy. See, e.g., Employers Reinsurance Corp. v. Sarris, 746 F. Supp. 560, 566-68 (E.D. Pa. 1990). It follows then, that when the claims in the underlying action have not been adjudicated, the court entertaining the declaratory judgment action must focus on whether the underlying claims could potentially come within the coverage of the policy. Air Products and Chemicals, Inc. v. Hartford Accident and Indemnity Co., 25 F.3d 177, 179 (3d Cir. 1994). If there is a possibility that any of the underlying claims could be covered by the policy at issue, the insurer is obliged to provide a defense at least until such time as those facts are determined, and the claim is narrowed to one patently outside of coverage. C. Raymond Davis & Sons, Inc. v. Liberty Mut. Ins. Co., 467 F. Supp. 17, 19 (E.D. Pa. 1979). On the other hand, if there is no possibility that any of the underlying claims could be covered by the policy at issue, judgment in the insurer's favor with regard to the duty to defend and indemnification is appropriate. See, e.g., Germantown Ins. Co. v. Martin, 407 Pa. Super. 326, 595 A.2d 1172 (1992), alloc. denied, 531 Pa. 646, 612 A.2d 985 (1992).

Britamco Underwriters, Inc. v. Stokes, 881 F. Supp. 196, 198 (E.D. Pa. 1995).

An insurer's duty to defend is determined solely from the allegations in the underlying complaint giving rise to the claim against the insured. See General Accident Insurance Company of America v. Allen, 708 A.2d 828, 830 (Pa. Super. 1998); Lebanon Coach Co. v. Carolina Casualty Insurance Co., 450 Pa. Super. 1, 15, 675 A.2d 279, 286 (1996); Stidham v. Millvale Sportsman's Club, 421 Pa. Super. 548, 564, 618 A.2d 945, 953-54 (1992). "[T]he particular cause of action that a

complainant pleads is not determinative of whether coverage has been triggered. Instead it is necessary to look at the factual allegations contained in the complaint." Mutual Benefit Insurance Co. v. Haver, 555 Pa. 534, 538-539, 725 A.2d 743, 745 (Pa. 1999); see Agora Syndicate, Inc. v. Levin, 977 F.Supp. 713, 715 (E.D. Pa. 1997).

Our determination of the duty to defend under an insurance policy is a question of law requiring only an examination of the language of the policy at issue and the allegations in the underlying complaint. Gene's Restaurant, Inc. v. Nationwide Insurance Co., 519 Pa. 306, 308, 548 A.2d 246, 246-247 (Pa. 1988).

An insurance policy must be read as a whole and be construed according to the plain meaning of its terms. C.H. Heist Caribe Corp. v. American Home Assurance Co., 640 F.2d 479, 481 (3d Cir. 1981); Atlantic Mutual Insurance Co. v. Brotech Corp., 857 F. Supp. 423, 427 (E.D. Pa. 1994), aff'd, 60 F.3d 813 (3d Cir. 1995). "Where the language of the contract is clear, a court is required to give the words their ordinary meaning." Brotech, 857 F.Supp. at 427; see also Gene & Harvey Builders, Inc. v. Pennsylvania Manufactures Association Insurance Co., 512 Pa. 420, 426, 517 A.2d 910, 913 (Pa. 1986).

The burden is on the insured to establish coverage under an insurance policy. Erie Insurance Exchange v.

Transamerica Insurance Co., 516 Pa. 574, 580, 533 A.2d 1363, 1366-1367 (Pa. 1987); Benjamin v. Allstate Ins. Co., 354 Pa. Super. 269, 272, 511 A.2d 866, 868 (1986). The burden of establishing the applicability of an exclusion is on the insurer. Allstate Insurance Co. v. Brown, 834 F. Supp. 854, 857 (E.D. Pa. 1993); Erie Insurance Exchange, 516 Pa. at 580, 533 A.2d at 1366.

The insurance policy at issue provides in pertinent part:

COVERAGE X - FAMILY LIABILITY PROTECTION

LOSSES WE COVER UNDER COVERAGE X:

Subject to the terms, conditions, and limitations of this policy, Allstate will pay damages which an insured person becomes legally obligated to pay because of bodily injury or property damage arising from an occurrence to which this policy applies, and is covered by this part of the policy.

We may investigate or settle any claim or suit for covered damages against an insured person. If an insured person is sued for these damages, we will provide a defense with counsel of our choice, even if the allegations are groundless, false or fraudulent. We are not obligated to pay any claim or judgment after we have exhausted our limits of liability.

LOSSES WE DO NOT COVER UNDER COVERAGE X:

1. 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. This exclusion applies even if:

a) such insured person lacks the mental capacity to govern his or her own conduct;

b) such bodily injury or property damage is of a different kind or degree than intended or reasonably expected; or

c) such bodily injury or property damage is sustained by a different person than intended or reasonably expected.

The policy defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions, during the policy period, resulting in bodily injury or property damage."

Allstate argues that it has no duty to defend or indemnify Zachary Kenney or Maura J. Kenney against the Doggendorfs' claims because the injuries to Christopher Doggendorf were the result of an intentional act. Specifically, regarding the state count against Mr. Kinney, Allstate asserts that the pleading of recklessness in Count 1 cannot be divorced from the factual averment of an intentional battery. In regard to the state count against Ms. Kenney, Allstate claims that the contractual language "expected or intended by any insured" prohibits Ms. Kenney from seeking Allstate to defend or indemnify her for the intentional acts of her insured son, Mr. Kenney.

Intentional Assault and Battery Claim

The Supreme Court of Pennsylvania has construed an equivalently worded definition of "occurrence" to mean "accident." See Gene's Restaurant, 548 A.2d at 247. When it is

alleged that the conduct of the insured causing harm was intentional, there has been no accident or "occurrence." See Nationwide Mutual Fire Insurance Co. v. Pipher, 140 F.3d 222, 226 (3d Cir. 1998). The "expected or intended" clause excludes from coverage liability for harm of the type which the insured intends to cause. Id. at 227. An insured intends to cause harm if he desired by his act to do so or if he acted knowing that such harm was substantially certain to result. United Servives Automobile Association v. Elitzky, 517 A.2d 982, 989 (Pa. Super. 1986).

The complaint in the underlying state action alleges that the insured "viciously struck Christopher Doggendorf in the face and head," and that the insured "threw [Christopher Doggendorf] to the floor of the bus" and that the insured "caused [Christopher Doggendorf] to bleed out of his nose and mouth." The Doggendorfs have alleged acts that were intentional and of a type substantially certain to cause injury.

In their answer to the underlying complaint, the Kenneys assert that Zachary Kenney was acting in self-defense when he pushed Christopher Doggendorf. While the Pennsylvania Supreme Court has not squarely ruled on the question of whether a claim of self-defense triggers a duty of the insurer to defend and indemnify, the Superior Court has held that an assertion of self-defense does not bring such an action within the coverage of a policy with an "expected or intended" exclusion. See Donegal

Mutual Insurance Co. v. Ferrara, 380 Pa. Super. 588, 552 A.2d 699 (1989). Moreover, this ruling appears to be consistent with the rule that the duty to defend and indemnify is determined by the factual allegations in the underlying complaint.

The factual allegations in the underlying complaint that the injuries inflicted on Christopher Doggendorf resulted from intentional conduct by the insured and, if not intended, were of a type substantially certain to result from the conduct described. Accordingly, there can be no coverage under the Allstate policy.

Negligent Supervision Claim

The Doggendorfs also allege that Maura Kenney was negligent because she knew of her son's "vicious, malignant disposition" and she "failed and neglected to exercise reasonable care so as to control her son, Zachary, and to prevent him from intentionally harming others...." Whether the policy covers the Doggendorfs' negligent supervision claim against Maura Kenney depends upon whether the Kenneys' obligations under the policy are joint or several.

The policy provides that "we do not cover any bodily injury or property damage intended by ... any insured person." Pennsylvania courts have held that where an insurance policy specifically excludes coverage for loss resulting from the

intentional actions of "any" or "an" insured, as opposed to "the insured," the insureds' obligations under the policy are joint, and the prohibited acts of one insured bar all others from coverage. See McAllister v. Millville Mutual Insurance Co., 433 Pa. Super. 330, 640 A.2d 1283, 1288 (1994). See also Spezialetti v. Pacific Employees Insurance Co., 759 F.3d 1139, 1141-42 (3d Cir. 1985); General Accident Insurance Company of America v. Allen, 708 A.2d at 832.

The policy issued to Maura Kenney also contains a "joint obligations" clause, which provides that "[t]he terms of this policy impose joint obligations on persons defined as an insured person. This means that the responsibilities, acts and failures to act of a person defined as an insured person will be binding upon another person defined as an insured person." We are unaware of any Pennsylvania cases dealing with this precise issue, and counsel have cited none. However, other courts interpreting the same joint obligations clause have held that, in light of the clause, one insured's intentional acts bar negligent supervision claims against other insureds. See Allstate Insurance Co. v. The Pond Bar, No. Civ.A. 3-94-1310, 1995 U.S. Dist. LEXIS 12447, *28, 1995 WL 568399, *11 (D. Minn. May 19, 1995); Castro v. Allstate Insurance Co., 855 F. Supp. 1152, 1154 (S.D. Cal. 1994).

We conclude that the language of the intentional acts

exclusion, particularly when coupled with the joint obligations provision, indicates that the Allstate policy imposes a joint obligation on the Kenneys and that there can be no coverage for any insured arising out of damage caused by the intentional or criminal acts of another insured. Accordingly, Allstate has no duty to defend or indemnify Maura Kenney against the Deggendorfs' claim of negligent supervision.

Conclusion

For all the foregoing reasons, we grant plaintiff's motion for summary judgment and issue declaratory judgment in favor of plaintiff. We conclude that, because the complaint in the underlying state action avers intentional conduct on the part of Mr. Kenney, Allstate need not defend nor indemnify him in the underlying state action. Moreover, because the insurance policy governing the relationship between Allstate and the Kenneys imposes a joint obligation on the Kenneys not to engage in intentionally tortious conduct, we conclude that Allstate need not defend nor indemnify Ms. Kenney in the underlying state court action.

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

ALLSTATE INSURANCE COMPANY,)	
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Plaintiff)	No. 02-CV-02387
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vs.)	
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MAURA J. KENNEY;)	
ZACHARY KENNEY, a Minor, by)	
his Parent and Natural Guardian,)	
MAURA J. KENNEY; and)	
CHRISTOPHER DOGGENDORF, a Minor,)	
by and through his Parents and)	
Natural Guardians,)	
SUZANNE and DAVID DOGGENDORF,)	
and in their own right,)	
)	
Defendants)	

ORDER

NOW, this 8th day of October, 2003, upon consideration
of the Motion for Summary Judgment of Plaintiff Allstate

Insurance Company filed December 11, 2002; upon consideration of Defendants Christopher, Suzanne and David Doggendorf's Response to Motion for Summary Judgment of Plaintiff Allstate Insurance Company and Defendants Christopher, Suzanne filed January 10, 2003; upon consideration of David Doggendorf's Memorandum of Law contra Allstate Insurance Company's Motion for Summary Judgment filed January 10, 2003; upon consideration of Defendants Maura and Zachary Kenney's Response to Motion for Summary Judgment of Plaintiff Allstate Insurance Company filed August 18, 2003; upon consideration of the briefs of the parties; and for the reasons expressed in the accompanying Opinion,

IT IS ORDERED that plaintiff's motion is granted.

IT IS FURTHER ORDERED that declaratory judgment is entered in favor of plaintiff.

IT IS FURTHER ORDERED that Allstate Insurance Company must neither defend nor indemnify Zachary Kenney or Maura J. Kenney in the matter of Doggendorf v. Zachary Kenney and Maura J. Kenney, Civil Action Number 02-1109, which may be found in the Court of Common Pleas, Chester County, Pennsylvania.

BY THE COURT:

James Knoll Gardner

United States District Judge