

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

**ALLSTATE INSURANCE COMPANY** : **CIVIL ACTION**  
  :   
  :   
  : **No. 05-5353**  
  :   
**v.** :   
  :   
**JOSEPH THOMPSON, ET AL.** :   
  :

**MEMORANDUM AND ORDER**

**Savage, J.**

**July 19, 2006**

Allstate Insurance Company (“Allstate”) brought this action seeking a declaration that it has no duty to defend or indemnify its policyholder, his son and a third person, pursuant to a homeowner’s policy, in a pending lawsuit in which the plaintiff alleges that he was assaulted by them.<sup>1</sup> Allstate contends that the policy excludes coverage for intentional and criminal acts. The policyholder and his son argue that they are entitled to coverage because discovery in the underlying state action shows that the third defendant in the state court action is the only culpable party.

After reviewing the policy, the plaintiff’s complaint and his deposition in the underlying action, I conclude that Allstate has met its burden of demonstrating that the insurance policy excuses it from defending and indemnifying its insureds because they have been sued for intentional acts, which are excluded from coverage under the policy. Accordingly, Allstate’s motion for summary judgment will be granted and the Thompsons’ cross-motion will be denied.<sup>2</sup>

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<sup>1</sup> Jurisdiction in this declaratory judgment action is predicated on the Federal Declaratory Judgment Act, 28 U.S.C. § 2201 et seq.

<sup>2</sup> The Thompsons filed a cross motion for summary judgment on June 7, 2006, raising the same arguments they make in their response to Allstate’s motion.

## The Underlying Action/Procedural History

The complaint in the underlying state action (“Rossi complaint”) names as defendants Joseph Thompson (“Thompson”), the policyholder; Joseph Thompson, Jr. (“Thompson Jr.”), the policyholder’s son with whom he resided; and, Thomas Hayes (“Hayes”), who did not reside with the policyholder. The plaintiff in that action, Michael A. Rossi (“Rossi”), alleges that the three defendants assaulted him in a road rage incident.<sup>3</sup> According to his complaint, Rossi was involved in a non-contact automobile incident with a car driven by Thompson and occupied by Thompson Jr. and Hayes.<sup>4</sup> Shortly after the incident, Rossi pulled his car into a gas station.<sup>5</sup> When he got out of his car, he was confronted by the three defendants, who demanded an apology.<sup>6</sup> Rossi alleges that the three defendants pursued him across the parking lot, Thompson struck him in the face and knocked him to the ground, and then all three defendants repeatedly struck him.<sup>7</sup>

As a result of his participation in the incident, Thompson was charged with simple assault. He was later accepted into a pretrial diversion program and placed on 12 months probation.<sup>8</sup>

The Thompsons requested Allstate to defend them under the homeowner’s policy issued to Joseph Thompson. Allstate responded by filing this declaratory judgment action

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<sup>3</sup> *Michael A. Rossi v. Joseph Thompson, et al.* No. 05-2548, Court of Common Pleas of Montgomery County, Pennsylvania (filed Feb. 4, 2005).

<sup>4</sup> *Rossi Compl.* ¶ 6 (Ex. A, Allstate Compl.).

<sup>5</sup> *Rossi Compl.* ¶ 7 (Ex. A, Allstate Compl.).

<sup>6</sup> *Rossi Compl.* ¶ 8 (Ex. A, Allstate Compl.).

<sup>7</sup> *Rossi Compl.* ¶¶ 9-12 (Ex. A, Allstate Compl.).

<sup>8</sup> *Compl.* ¶¶ 24-25.

seeking a declaration that it has no duty to defend and indemnify the Thompsons under the homeowner's policy because the damages sought in the Rossi complaint stem exclusively from intentional conduct which is excluded from coverage.<sup>9</sup> In the meantime, it has been defending the Thompsons in the state case subject to a reservation of rights. Now that discovery has been completed in both the underlying case and this one, Allstate asks to be relieved of any duty to defend and to indemnify them.

### **Legal Standard**

The interpretation of an insurance contract is a question of law for the court to decide. *Reliance Ins. Co. v. Moessner*, 121 F.3d 895, 900 (3d Cir. 1997) (citing *Standard Venetian Blind Co. v. Am. Empire Ins. Co.*, 469 A.2d 563, 566 (Pa. 1983)). "Whether a particular loss is within the coverage of an insurance policy is such a question of law and may be decided on a motion for summary judgment in a declaratory judgment action." *State Farm Mut. Auto. Ins. Co. v. Universal Underwriters Ins. Co.*, 657 A.2d 1252, 1255 (Pa. Super. 1995).

A court must give effect to the plain language of the insurance contract read in its entirety. *Reliance*, 121 F.3d at 901. When the language of an insurance policy is ambiguous, the provision must be construed in favor of the insured. *Reliance*, 121 F.3d at 900-01 (citing *Standard Venetian Blind*, 469 A.2d at 566). Contract language is ambiguous if it is reasonably susceptible to more than one construction and meaning. *Bowersox v. Progressive Cas. Ins. Co.*, 781 A.2d 1236, 1239 (Pa. Super. 2001) (citing

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<sup>9</sup> Hayes and Rossi were both named as defendants in this action. Allstate seeks declarations that Hayes, who is neither related to nor a dependent of Thompson, is not an "insured person" under Thompson's policy, and that Rossi is not entitled to Guest Medical Protection under the policy. Neither have participated in this litigation. On January 19, 2006, default was entered against both. In any event, the underlying facts demonstrate that neither Rossi nor Hayes are covered by the Allstate policy.

*Hutchison v. Sunbeam Coal Corp.*, 519 A.2d 385, 390 (Pa. 1985)). However, the language of an insurance policy may not be stretched beyond its plain meaning to create an ambiguity. *Madison Constr. Co. v. Harleysville Mut. Ins. Co.*, 735 A.2d 100, 106 (Pa. 1999).

The insured has the initial burden of establishing coverage under the policy. *Butterfield v. Giuntoli*, 670 A.2d 646, 651-52 (Pa. Super. 1995). On the other hand, when the insurer relies on a policy exclusion as the basis for denying coverage, it bears the burden of proving that the exclusion applies. *Mistick, Inc. v. Northwestern Nat. Cas. Co.*, 806 A.2d 39, 42 (Pa. Super. 2002). The insurer can sustain its burden only by establishing the exclusion's applicability by uncontradicted facts in the record. *Butterfield*, 670 A.2d at 651-52. Policy exclusions are strictly construed against the insurer. *Selko v. Home Ins. Co.*, 139 F.3d 146, 152 n.3 (3d Cir. 1998) (citing *Standard Venetian Blind*, 469 A.2d at 566).

### **Duty to Defend**

An insurance carrier's duty to defend is distinct from its duty to provide coverage. It is interpreted more broadly than the duty to indemnify. *Britamco Underwriters, Inc. v. Weiner*, 636 A.2d 649, 651 (Pa. Super. 1994). An insurer may have a duty to defend even though it may have no duty to indemnify. *Frog, Switch & Mfg. Co. v. Travelers Ins. Co.*, 193 F.3d 742, 746 (3d Cir. 1999). A duty to indemnify does not arise until the insured is found liable for a covered claim. *Id.*

An insurer is obligated to defend the insured against any suit arising under the policy "even if the suit is groundless, false, or fraudulent." *Britamco*, 636 A.2d at 651 (quoting

*Gedeon v. State Farm Mut. Auto. Ins. Co.*, 188 A.2d 320, 321 (Pa. 1963)). Consequently, whenever a complaint filed against the insured could potentially come within the policy's coverage, the insurer's duty to defend is triggered. *Belser v. Rockwood Cas. Ins. Co.*, 791 A.2d 1216, 1219, 1222 (Pa. Super. 2002); *Phico Ins. Co. v. Presbyterian Med. Servs. Corp.*, 663 A.2d 753, 755 (Pa. Super. 1995). If a single claim in a multiple claim complaint is potentially covered, the duty to defend attaches until the underlying plaintiff can no longer recover on a covered claim. *Frog, Switch & Mfg. Co.*, 193 F.3d at 746. Because the duty to defend is broader than the duty to indemnify, the complaint must be construed liberally, the factual allegations must be accepted as true, and all doubts as to coverage resolved in favor of the insured. *Roman Mosaic & Tile Co. v. Aetna Cas. & Sur. Co.*, 704 A.2d 665, 669 (Pa. Super. 1997). To prevent artful pleading designed to avoid policy exclusions, it is necessary to look at the factual allegations in the complaint, and not how the underlying plaintiff frames the request for relief. *Mut. Benefit Ins. Co. v. Haver*, 725 A.2d 743, 745 (Pa. 1999). In other words, it is the substance, not the form, of the allegations that is the focus of the coverage inquiry.

Applying these principles to this case, I shall examine the insurance policy, the allegations of the complaint and the facts developed in the underlying action. The material facts as to what the plaintiff in the state action alleges the Thompsons did and the Allstate policy language are not in dispute. Thus, the task is to decide whether the insurer has a duty to defend under the policy as a matter of law.

### **Scope of Coverage**

The homeowner's policy issued to Thompson provides that Allstate "will provide a defense with counsel of our choice even if the allegations are groundless, false or

fraudulent.”<sup>10</sup> 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.”<sup>11</sup> An “occurrence” is defined in the policy as an “accident” resulting in bodily injury, that is, unintentional conduct.<sup>12</sup> The policy specifically excludes coverage for bodily injury or property damage caused by intentional or criminal acts or omissions of any insured person regardless of whether the person has been charged with a crime.<sup>13</sup>

### **Intentional or Criminal Conduct**

Rossi’s state court complaint alleges that his injuries were caused by the Thompsons’ intentional and criminal conduct. Specifically, Rossi’s complaint alleges:

- Defendant, Joseph Thompson . . . struck [Rossi] in the face.<sup>14</sup>
- [Rossi] continued to attempt to retreat and escape from his attackers at which time he was knocked to the ground by defendant, Joseph Thompson.<sup>15</sup>
- While on the ground, [Rossi] was struck by defendant, Joseph Thompson, along with defendants, Thomas Hayes and Joseph Thompson, Jr.<sup>16</sup>

In summary, the Rossi complaint alleges that Thompson pursued Rossi, struck him and

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<sup>10</sup> *Homeowner’s Policy* at 21 (Ex. B, Allstate Compl.).

<sup>11</sup> *Homeowner’s Policy* at 21 (Ex. B, Allstate Compl.).

<sup>12</sup> *Homeowner’s Policy* at 2-3 (Ex. B, Allstate Compl.).

<sup>13</sup> *Homeowner’s Policy* at 22-23 (Ex. B, Allstate Compl.).

<sup>14</sup> *Rossi Compl.* ¶ 10 (Ex. A, Allstate Compl.).

<sup>15</sup> *Rossi Compl.* ¶ 11 (Ex. A, Allstate Compl.).

<sup>16</sup> *Rossi Compl.* ¶ 12 (Ex. A, Allstate Compl.).

continued to assault him while his two passengers joined in the attack.

Allstate argues that because the attack on Rossi was intentional and criminal, it has no duty to defend the Thompsons. The Allstate policy exclusion reads:

We do not cover any bodily injury or property damage intended by, or which may reasonably be expected to result, from the intentional, criminal acts or omissions of any insured person. This exclusion applies even if

...

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

...

This exclusion applies regardless of whether or not such insured person is actually charged with, or convicted of a crime.<sup>17</sup>

The Thompsons do not dispute that the Allstate homeowner's policy excludes intentional acts resulting in injury and that the complaint alleges intentional acts. Instead, they contend that discovery in the underlying state court action revealed that Hayes, the third person in the Thompson vehicle, was solely responsible for the attack on Rossi. Whether it was Hayes or Thompson who actually struck Rossi is immaterial. The inquiry is whether Rossi claims that the Thompsons intentionally participated in the concerted attack that injured him.

The fact that an injury is attributable to the intentional act of a third party does not necessarily preclude an insured's negligence as having been a contributing factor and, hence, a covered accident. *Nationwide Mut. Fire Ins. Co. of Columbus, Ohio v. Pipher*, 140 F.3d 222, 225-26 (3d Cir. 1998). It is the insured's acts, not those of the third party who committed the intentional injurious act, which determines whether an injury is the result of an accident or occurrence within the meaning of the policy. *Id.* at 226. Thus,

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<sup>17</sup> *Homeowner's Policy* at 22-23 (Ex. B, Allstate Compl.).

where an insured's negligence leads to or permits a third person to commit an intentional act, the preceding negligence may be an accident warranting coverage. *Donegal Mut. Ins. Co. v. Baumhammers*, 893 A.2d 797, 810 (Pa. Super. 2006).

Here, the complaint states the conclusion that as the direct result of the "negligence, careless, intentional and/or malicious acts" of the defendants, the plaintiff suffered injuries.<sup>18</sup> Yet, despite Pennsylvania's fact pleading requirement, it alleges no facts that make out a cause of action for negligence.<sup>19</sup> According to the complaint and Rossi's deposition testimony, Thompson was the driver of the vehicle that deliberately followed Rossi to a gas station where the three individuals in the Thompson vehicle confronted and assaulted him. Contrary to Thompsons' argument, neither Rossi's complaint nor his deposition testimony portrays the Thompsons as negligent. In short, Rossi alleges that the consequences of the defendants' actions were intentional and expected, rather than unintentional and unexpected.

The Thompsons cite an isolated portion of Rossi's deposition where it could be inferred that Thompson did not actually strike Rossi. Rossi's deposition testimony, while not identical to his complaint allegations, still corroborates his original allegations that Thompson and his cohorts chased and attacked him. He testified that Thompson attempted to strike him before he was knocked to the ground. Although he could not specifically identify the individuals who were striking him while he was on the ground, Rossi

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<sup>18</sup> *Rossi Compl.* ¶¶ 15, 18, 21 (Ex. A, Allstate Compl.).

<sup>19</sup> Pennsylvania is a fact pleading jurisdiction. *Miketic v. Baron*, 675 A.2d 324, 330 (Pa. Super. 1996). A plaintiff "must define the issues; every act or performance essential to that end must be set forth in the complaint." *Id.* Thus, Rossi was required to plead all facts and define all issues in support of his claims.

testified that “they [referring to all defendants] were trying to attack me, punch me.”<sup>20</sup> There is no testimony in the record nor any allegation in the complaint that the Thomspens were mere bystanders or that they failed to act to prevent the attack by Hayes or committed any negligent act. On the contrary, there is no question that Rossi, in his complaint and his testimony, claims the Thompsens intentionally assaulted him.

This case is unlike those that have held that an insured’s negligence that led to an intentional injurious act by a third party was an accident triggering coverage. In *Pipher*, the Third Circuit found coverage where the insured’s negligence enabled a third-party to commit an intentional act. 140 F.3d at 225-26. It stated:

the [underlying] plaintiff’s complaint raises numerous allegations of negligence on the part of [the insured], which allegedly contributed to Bernie McFadden’s death . . . the plaintiff alleges that . . . [the insured] *negligently* fail[ed] to re-install the apartment doors necessary for the tenant’s security, *negligently* failed to provide a reasonably safe premises for tenants . . . and *negligently hired* [the third-party attacker] to paint the second floor apartment.” Although Bernie McFadden’s death was a direct result of a third party’s intentional conduct, the complaint alleges that the insured’s own negligence also played a significant part in her death.

*Pipher*, 140 F.3d at 225 (emphasis in original).

In this case, unlike *Pipher*, there are no factual allegations that Thompson was negligent. The only factual allegations in the complaint and Rossi’s deposition testimony are that the Thompsens intended to confront, intimidate, assault and injure Rossi. It is the Thompsens, not Rossi, who attempt to characterize Rossi’s claim as one for negligence.

### **Conclusion**

Applying the above standards for insurance contract interpretation and resolving all

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<sup>20</sup> *Rossi Dep.* at 43 (*Def. Resp.* at 10) (Document No. 11).

doubts in favor of coverage, I find that the allegations in the Rossi complaint and Rossi's deposition testimony leave no doubt that he claims that his injuries were the result of the Thompsons' intentional acts and that his cause of action in the state case is for an intentional tort. There is no claim that Rossi's injuries were caused by an accident. Therefore, pursuant to the policy's exclusion of intentional acts from coverage, Allstate has no duty to defend or indemnify the Thompsons in the Rossi action.

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	<b>:</b>	
<b>v.</b>	<b>:</b>	<b>No. 05-5353</b>
	<b>:</b>	
<b>JOSEPH THOMPSON, ET AL.</b>	<b>:</b>	

**ORDER**

**AND NOW**, this 19th day of July, 2006, upon consideration of the Plaintiff Allstate Insurance Company's Motion for Summary Judgment (Document No. 10), the Cross-Motion for Summary Judgment of Defendants Joseph Thompson and Joseph Thompson, Jr. (Document No. 13), and the respective responses, it is **ORDERED** as follows:

1. The plaintiff's motion for summary judgment is **GRANTED**;
2. The Thompsons' motion for summary judgment is **DENIED**;
3. It is **DECLARED** that Allstate Insurance Company has no duty to defend Joseph Thompson, Joseph Thompson Jr. and Thomas Hayes in the underlying Pennsylvania state court action;
4. It is **DECLARED** that Allstate Insurance Company has no duty to provide Guest Medical Protection to Michael Rossi as a result of the incident described in the underlying Pennsylvania state court action; and,
5. **JUDGMENT IS ENTERED** in favor of the plaintiff Allstate Insurance Company and against the defendants Joseph Thompson, Joseph Thompson Jr., Thomas Hayes and Michael Rossi.

/s/ Timothy J. Savage  
TIMOTHY J. SAVAGE, J.