

Before the court are: (1) Federal's motion for summary judgment (Docket No. 5); Aetna's answer (Docket No. 8); Federal's reply (Docket No. 9) and Aetna's sur-reply thereto (Docket No. 12); and (2) Aetna's motion for leave to file an amended complaint (Docket No.7); Federal's answer (Docket No. 10) and Aetna's reply thereto (Docket No. 11). As an initial matter I find that Federal will not be prejudiced and therefore grant Aetna's motion to amend its complaint. See Fed. R. Civ. P. 15(a). Accordingly, Phillips and PHS are added as defendants to the instant action.

I. BACKGROUND

On June 26, 1992, while on PHS premises Torres, an employee of McFarland Landscape Services Inc., was injured when, while pulling a hand truck loaded with trees, he fell from wooden planks leading from the ground to the back of a pick-up truck owned by Phillips, a PHS employee. (Torres' Amended Complaint) Generally, Torres claims he was loading the trees at the express direction of PHS through its employee Phillips and that his injuries were caused by the negligence and carelessness of PHS through its employee Phillips.

At all relevant times Federal provided insurance for PHS under a commercial general liability policy (the "CGL policy") and a business automobile policy (the "BAP policy") and Aetna provided insurance for Phillips and her husband, John

Phillips, under a personal automobile policy (the "Aetna policy").

Aetna, in its amended complaint, asks this court for the following declaratory judgment:

"1. A declaration that Federal Insurance Company, under the terms and conditions of its Commercial General Liability policy issued to the Pennsylvania Horticultural Society has the duty to assume the defense and/or indemnity from Aetna Life and Casualty of Susan Phillips, an employee of the Pennsylvania Horticultural Society, with regard to the claims set forth in the under lying [sic] action;

2. A declaration that Aetna, under the terms and conditions of its automobile policy issued to John Phillips and Susan Phillips, has no duty to defend and/or indemnify Susan Phillips with regard to the claims set forth in the underlying action."
(Aetna's Amended Complaint)

Federal, in its counterclaim, seeks the following contrary declaration;

"1. The Pennsylvania Horticultural Society is a "covered person" as defined in the Aetna policy because the Pennsylvania Horticultural Society is alleged to be legally responsible for the acts and/or omissions of Susan Phillips in the underlying Torres litigation;

2. Aetna Life and Casualty Company is obligated to defend and indemnify its insureds, Susan Phillips and the Pennsylvania Horticultural Society, against the claims asserted in the underlying litigation filed by Mr. Torres.

3. The Aetna policy issued to Susan Phillips is primary to the Federal Business Auto Policy issued to the Pennsylvania Horticultural Society and the Federal Business Auto Policy is excess over the Aetna policy issued to Susan Phillips; and

4. Aetna is obligated to reimburse Federal Insurance Company an amount according to proof as attorneys' fees and expenses incurred in connection with the defense of the Pennsylvania Horticultural Society in the underlying Torres litigation." (Federal's Answer and Counterclaim and Federal's Motion for Summary Judgment)

II. DISCUSSION

Under Pennsylvania law an insurer's duty to defend is a distinct obligation, different from and broader than its duty to provide coverage. Phico Insurance Company v. Presbyterian Medical Services Corporation, 663 A.2d 753 (Pa. Super. 1995); Aetna Casualty and Surety Company v. Roe, 650 A.2d 94, 98 (Pa. Super. 1994); D'Auria v. Zurich Insurance Company, 507 A.2d 857, 859 (Pa. Super. 1986). This obligation is fixed solely by the allegations in the underlying complaint. Aetna Casualty and Surety Company v. Roe, 650 A.2d at 98.

It is the nature of the claim and not the actual details of the injury that determines whether an insurer is required to defend. Id. If factual allegations in the complaint comprehend an injury which is potentially within the policy's scope, the insurer has a duty to defend. Phico Insurance Company v. Presbyterian Medical Services Corporation, 663 A.2d 753; Aetna Casualty and Surety Company v. Roe, 650 A.2d at 98. "The insurer owes a duty to defend if the complaint against the insured alleges facts which would bring the claim within the policy's coverage if they were true." D'Auria v. Zurich

Insurance Company, 507 A.2d at 859. See also, Phico Insurance Company v. Presbyterian Medical Services Corporation, 663 A.2d 753; State Automobile Insurance Association v. Kuhfahl, 527 A.2d 1039, 1041 (Pa. Super. 1987) Thus, resolution of coverage issues raised in Aetna's amended complaint and in Federal's counterclaim necessitate review of the applicable policies in light of Torres' Amended Complaint.

A. Does Aetna's Policy Provide Coverage for Either Phillips or PHS?

Aetna's policy provides in relevant part:

"PART A

LIABILITY COVERAGE

We will pay damages for bodily injury or property damage for which any **covered person** becomes legally responsible because of an auto accident. We will settle or defend, as we consider appropriate, any claim or suit asking for these damages. Our duty to settle or defend ends when our limit of liability for this coverage has been exhausted.

"Covered person" as used in this Part means:

1. You or any family member for the ownership, maintenance or use of any auto or trailer.
2. Any person using **your covered auto**.
3. For **your covered auto**, any person or organization, but only with respect to legal responsibility for acts or omissions of a person for whom coverage is afforded under this Part. . . ." (Emphasis in original)

Torres' Amended Complaint states in relevant part:

"7. On or about June 26, 1992 Plaintiff, ANGEL TORRES, was assigned by the Defendant through its agents and/or employees to load trees upon a truck that was owned

and/or controlled by the Defendants, THE PENNSYLVANIA HORTICULTURAL SOCIETY and/or SUSAN PHILLIPS.

8. In order to load the trees onto the truck it was necessary for Plaintiff, ANGEL TORRES, to stand on wooden planks leading from the ground to the truck and to pull a hand truck loaded with trees up the said planks to access the truck.

9. Plaintiff, ANGEL TORRES, went on the planks and used the aforementioned equipment, which was owned and/or controlled by the Defendants, at the express insistence and request of Defendants and with the express permission of Defendants, through its employees, who were acting in furtherance of Defendants' business and within the scope of their employment.

10. On or about June 26, 1992, Plaintiff ANGEL TORRES, while in the process of loading the aforesaid trees, was caused to fall from the wooden planks and was severely and permanently injured as described more fully hereinafter."

Pursuant to section one (1) of Aetna's definition of "covered person" it is clear that Phillips is a "covered person." Additionally, because Torres' Amended Complaint contains respondeat superior allegations, I find that PHS is a "covered person" pursuant to section three (3) of the definition. Aetna's policy states that it will pay damages for bodily injury or property damage for which any covered person becomes legally responsible because of an "auto accident", therefore, the determinative question is whether Torres' injuries resulted from an "auto accident."

In interpreting language in an insurance policy it is well settled that where ambiguous the language is to be construed

in favor of the insured, but where clear and unambiguous a court is required to give effect to that language. Gene & Harvey Builders v. Pa. Mfrs. Ass'n Ins. Co., 517 A.2d 910, 913 (Pa. 1986); Standard Venetian Blind Co. v. American Empire Ins. Co., 469 A.2d 563 (Pa. 1983). A court may not "rewrite" an insurance contract or construe clear unambiguous language to mean other than what it says. Guardian Life Insurance Co. v. Zerance, 479 A.2d 949, 953 (Pa. 1984).

Aetna's policy does not define "auto accident." Although each party offers its own interpretation of the term, I conclude that it is unambiguous and thus its plain and ordinary meaning must be applied. See Herr v. Grier, 671 A.2d 224, 226 (Pa. Super. 1995)("Giving the term "auto accident" its plain and ordinary meaning, we conclude that the term cannot possibly be interpreted as providing coverage for an accident involving a golf cart not designed for or operated on public highways."). In this vein, several courts have concluded that in ordinary usage the term "auto accident" refers to situations where one or more vehicles are involved in some type of collision or near collision with another vehicle, object or person. See State Farm Mutual Insurance Company v. Peck, 900 S.W.2d 910, 913 (Tx. Ct. App. 1995); Farmers Insurance Company of Washington v. Grellis, 718 P.2d 812, 813 (Wash. App. 1986); Jordan v. United Equitable Life Insurance Company, 486 S.W.2d 664, 667 (Mo. App. 1972); But see,

National Merchandise Co., Inc. v. United Service Automobile Association, 400 So.2d 526 (Fla. Dist. Ct. App. 1981)(The court found that although the words "auto" and "accident" have definite or generally accepted meanings, as used together in an auto insurance policy they are ambiguous). I agree with this definition.

According to his complaint Torres fell off of planks that were simply balanced on the back of Phillip's stationary pick-up truck. The truck however, was not an active participant in the accident -- it did not collide into Torres or move to cause the planks to fall. Thus, I find that Torres' injuries were not the result of an "auto accident." To read Torres complaint otherwise would strain the term beyond its reasonable meaning. Therefore, Aetna, under the terms of its policy, does not have a duty to defend its insured Phillips or her employer PHS.

B. Does Federal's CGL or BAP Policy Provide Coverage for Either Phillips or PHS?

Federal's CGL policy, provides in relevant part:

"COVERAGE

We will pay damages the insured becomes legally obligated to pay because of **bodily injury** or **property damage**, which occurs during the policy period caused by an **accident** and arising out of the maintenance and use in your business of any **covered auto**. We will defend any suit against the insured seeking damages. We may investigate and settle at our discretion any claim or **suit**. . . .

WHO IS INSURED

Each of the following is an insured under this insurance to the extent set forth below:

1. You for any covered auto.
2. Anyone else while using, with your permission, a covered auto
except: . . .

B. your employee if the covered auto is owned by that employee of a member of his or her household."²

(Federal's CGL Policy, Non-Owned and Hired Auto Liability Insurance Endorsement)(Emphasis in original)

It is clear that provision 2(B) of the section entitled "Who is an Insured", excludes Phillips from coverage because she is an employee of PHS and the owner of a covered auto.

Therefore, any coverage the policy might provide is available to PHS only.

Federal's duty to defend is broader than Aetna's.

Because, Federal has not used the modifier "auto" in front of the word "accident" Federal's coverage extends to suits involving any accident which arises out of the maintenance or use of any covered auto. Having decided that Torres' fall while loading trees onto the back of Phillip's pick-up did not constitute an "auto accident", I must now determine whether or not it was an accident arising out of use or maintenance of Phillips' pick-up.

2. Under Federal's policy "covered auto" means "an auto you do not own" and the term accident "includes continuous or repeated exposure to the same conditions resulting in bodily injury or property damage." (Federal's CGL Policy, Non-Owned and Hired Auto Liability Insurance Endorsement)

In determining first party coverage, Pennsylvania courts require that a causal connection exist between an injury occurring during a loading/unloading operation and use or maintenance of a vehicle. See Alvarino v. Allstate Insurance Co., 537 A.2d 18 (Pa. Super. 1988); Huber v. Erie Ins. Exchange, 587 A.2d 333 (Pa. Super. 1991). While the causal connection need not rise to the level of proximate causation, for purposes of coverage there must be some connection, more than mere chance or happenstance between the injuries sustained and the insured vehicle. Dorohovich v. West American Ins. Co., 589 A.2d 252, 257 (Pa. Super 1991) (citations omitted).

I find Torres' allegations establish the causal connection necessary to invoke coverage. When he fell from planks which rested on the back of Phillips' pick-up truck Torres was actually midway between the truck and the ground. Thus, although at rest the pick-up was an essential part of the loading process, it supported Torres' pathway, and therefore was "in use." Compare, Allstate Insurance Company v. Sentry Insurance, 563 F. Supp. 629 (E.D.Pa. 1983)(The court concluded that an accident caused by a desk falling from a hand truck, when the hand truck was almost ten feet away from the truck onto which it was to be loaded, was not an accident arising out of the use or maintenance of a motor vehicle). Therefore, I conclude that under the terms of its CGL policy Federal has a duty to defend

and indemnify PHS in the underlying Torres action. Additionally, I note that because it contains substantially the same provisions as the CGL policy, Federal also has a duty to defend and indemnify PHS pursuant to its BAP policy.

Based on my review of the policies it is clear that Aetna does not have a duty to defend Phillips and Federal does have a duty to defend PHS. Furthermore, as there are no factual or legal disputes left to resolve, Federal's motion for summary judgment is dismissed as moot and an appropriate declaratory order follows.³

3. Alternatively, this court's final disposition may be construed as a grant of summary judgment in favor of Aetna. Generally, a district court may not grant summary judgment sua sponte unless the court gives notice and an opportunity to oppose. American Flint Glass Workers Union v. Beaumont Glass Co., 62 F.3d 574 n.5 (3d Cir. 1995); Otis Elevator Co. v. George Washington Hotel Corp., 27 F.3d 903 (3d Cir. 1994). However, on the last page of its brief in opposition, Aetna requests summary judgment in its favor, therefore, I find that Federal had sufficient notice that such action might be taken.

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

AETNA LIFE AND CASUALTY,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	NO. 96-5995
	:	
FEDERAL INSURANCE COMPANY	:	
Defendant.	:	

O R D E R

AND NOW, this 26th day of November 1997, upon consideration of Plaintiff's motion for leave to file an amended complaint (Docket No. 7); Defendant's answer (Docket No. 10) and Plaintiff's reply thereto (Docket No. 11), it is hereby ORDERED that Plaintiff's motion is **GRANTED**, accordingly Susan Phillips and the Pennsylvania Horticultural Society are added as defendants in the instant action. Upon consideration of Defendant's motion for summary judgment (Docket No. 5); Plaintiff's answer (Docket No.8); Defendant's reply (Docket No. 9) and Plaintiff's sur-reply thereto (Docket No.12), it is hereby ORDERED that Defendant's motion is **DISMISSED** as moot in light of the following declaratory order.

Based on the foregoing review of the applicable policies the following is declared:

(1) Plaintiff, Aetna Casualty and Life, has no duty to defend or indemnify its insured, Susan Phillips in the underlying action, Angel Torres v. The Pennsylvania Horticultural Society and Susan Phillips, No. 4097 (Phila. C.C.P. March Term 1994).

(2) Defendant, Federal Insurance Company, under the terms of its Commercial General Liability policy, has a duty to defend and indemnify its insured, the Pennsylvania Horticultural Society in the underlying action, Angel Torres v. The Pennsylvania Horticultural Society and Susan Phillips, No. 4097 (Phila. C.C.P. March Term 1994).

This case shall be marked CLOSED.

BY THE COURT:

RONALD L. BUCKWALTER, J.