

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

ALLSTATE INSURANCE CO. : CIVIL ACTION  
v. :  
RAYMOND R. FISCHER, et al. : No. 97-4806

**MEMORANDUM AND ORDER**

BECHTLE, J.

APRIL 28, 1998

Presently before the court in this declaratory judgment action are Allstate Insurance Company's ("Allstate") motion for summary judgment, defendants Marie and John Luckiewicz (the "Luckiewiczs") cross-motion for summary judgment and the responses thereto. For the reasons set forth below, Allstate's motion will be granted and the Luckiewiczs' motion will be denied.

**I. BACKGROUND**

This declaratory judgment action is based upon the following undisputed facts. On February 10, 1996, the Luckiewiczs drove to Raymond R. Fischer's residence in Philadelphia to attempt to collect a delinquent newspaper bill for the Philadelphia Inquirer. Marie Luckiewicz waited in the car and John Luckiewicz approached the house to discuss the delinquent bill. While John Luckiewicz was talking to Raymond R.

Fischer and his father, Raymond B. Fischer,<sup>1</sup> Raymond R. Fischer grabbed John Luckiewicz in a headlock and struck his face. John Luckiewicz then fell off the porch. Raymond R. Fischer followed John Luckiewicz to the yard and struck his face again. Both Raymond B. Fischer and Marie Luckiewicz witnessed the incident. John Luckiewicz suffered physical injuries requiring surgery and both Luckiewiczs suffered emotional damages as a result of the incident. (Compl. ¶¶ 10-13.) At the time of the incident, Raymond R. Fischer was insured pursuant to the terms of an Allstate homeowner's policy (the "policy").

The Luckiewiczs filed suit against Raymond R. Fischer in state court for assault, battery, negligent and intentional infliction of emotional distress. (Compl. Ex. A.) Allstate assumed Raymond R. Fischer's defense in the underlying action, but maintained a full reservation of rights because it believes that it has no duty to defend or indemnify him under the terms of the policy. (Compl. ¶¶ 15-16.)

The action proceeded to arbitration, and the arbitrators found against Raymond R. Fischer and in favor of the Luckiewiczs. On July 25, 1997, Allstate filed a declaratory judgment action in this court seeking a declaration that it has no duty to defend or indemnify Raymond R. Fischer with respect to the described events. On September 15, 1997, the Luckiewiczs

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1. Raymond B. Fischer was originally named as a defendant. All claims against him were dismissed by stipulation and order dated December 17, 1997.

filed a motion to dismiss this action for lack of subject matter jurisdiction, and on September 30, 1997, Raymond R. Fischer filed a similar motion to dismiss. On December 2, 1997, Allstate filed a motion for summary judgment, and on December 23, 1997, the Luckiewicz filed a response and cross-motion. On March 4, 1998, the court denied both motions to dismiss.

## II. LEGAL STANDARD

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." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) (quoting Fed. R. Civ. P. 56(c)). A fact is material if it might affect the outcome of the suit under the governing substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). The court must draw all justifiable inferences in the light most favorable to the non-moving party. Id. If the record thus construed could not lead a trier of fact to find for the non-moving party, there is no genuine issue for trial. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

In response to a motion for summary judgment, the non-moving party may not rest upon the mere allegations or denials of the moving party's pleadings, but must "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ.

P. 56(e); Celotex, 477 U.S. at 322. If the non-moving party does not so respond, summary judgment shall be entered in the moving party's favor because "a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." Fed. R. Civ. P. 56(e); Celotex, 477 U.S. at 322-23.

### **III. DISCUSSION**

#### **A. Allstate's Motion for Summary Judgment**

Allstate argues that because the policy only covers accidents, it has no duty to defend or indemnify Raymond R. Fischer in the underlying action arising from an intentional assault and battery, and it is therefore entitled to judgment as a matter of law.

Allstate's duty to defend its insured is measured by the Luckiewicz's state court pleadings. Therefore, the court must compare the facts alleged in the complaint to the coverage contained in the policy to determine whether, if the allegations are sustained, Allstate would be required to pay the resulting judgment. Gene's Restaurant, Inc. v. Nationwide Ins. Co., 548 A.2d 246, 246-47 (Pa. 1988).<sup>2</sup> If there is any possibility that the allegations, if true, would be covered under the policy, then Allstate owes a duty to defend its insured. Conversely, if there

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2. Because this federal court is sitting in diversity, it must apply substantive state law. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

is no possibility that the alleged facts could fall under the policy's scope of coverage, then Allstate has no duty to defend its insured. Terra Nova Ins. Co. v. 900 Bar, Inc., 887 F.2d 1213, 1216 (3d Cir. 1989); Britamco Underwriters, Inc. v. Stokes, 881 F. Supp. 196, 198 (E.D. Pa. 1995). If the court finds that there is no duty to defend, it may also rule that there is no duty to indemnify, and grant summary judgment in Allstate's favor. Id.

### **1. The Complaint**

The underlying complaint contains three counts by John Luckiewicz against Raymond R. Fisher: assault and battery (Count I), intentional and negligent infliction of emotional distress (Counts II and III). It contains three counts by Marie Luckiewicz against Raymond R. Fischer: intentional and negligent infliction of emotional distress (Counts V and VI) and loss of consortium (Count VII).

The complaint alleges that Raymond R. Fischer "without warning or provocation . . . grabbed Mr. Luckiewicz in a headlock with his left arm, and punched him with a closed fist in the face below Mr. Luckiewicz's left eye." (Compl. ¶6.) It further alleges that Mr. Luckiewicz fell off the porch to a grassy area below, and Raymond R. Fischer followed him, and punched him "a second time with a closed fist above the bridge of Mr. Luckiewicz's nose." Id. ¶7.

The negligent infliction of emotional distress and loss of consortium claims are based upon the assault. There is no

independent negligence claim against Raymond R. Fischer contained in the complaint.

## 2. The Policy

The policy provides that Allstate will cover:

damages which an insured person becomes legally obligated to pay because of bodily injury . . . arising from an **occurrence** to which this policy applies, and covered by this part of the policy.

(Policy at 22.) The policy defines **occurrence** as:

an accident,<sup>3</sup> including continuous or repeated exposure to substantially the same general harmful conditions, during the policy period, resulting in bodily injury or property damage.

(Policy at 4.) The policy excludes:

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 . . . 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.

(Policy at 22.)<sup>4</sup> The policy also provides that Allstate will pay:

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3. Pennsylvania courts have defined "accident" as a "fortuitous, untoward or unexpected happening." See, e.g., McGaw v. Town of Bloomsburg, 257 A.2d 622, 624 (Pa. Super. 1969).

4. A similar exclusion is contained in the Guest Medical Protection section of the policy. See policy at 25.

- a) all costs we incur in the settlement of any claim or the defense of any suit against an insured person;
- b) interest accruing on any damages awarded until such time as we have paid . . . .

(Policy at 28.)

The acts of which the Luckiewiczzs complain are clearly excluded from the coverage of the policy. A person cannot negligently grab another person and repeatedly strike his face. See e.g., Gene's Restaurant, 548 A.2d at 246-47; State Farm Fire & Cas. Co. v. Griffin, 903 F. Supp. 876, 878 (E.D. Pa. 1995).

The fact that the Luckiewiczzs crafted their state court complaint in such a manner as to include claims sounding in negligence does not transform Raymond R. Fischer's intentional acts that could reasonably be foreseen to cause the resulting bodily injury into fortuitous, untoward or unexpected happenings. See Potamkin, 961 F. Supp. at 109 (despite plaintiff's negligence claim, "intentional acts exclusion" precluded claims based upon intentional conduct); see also Nationwide Ins. Co. v. Yaeger, Civ. No. 93-3024, 1994 WL 447405 at \*4 (E.D. Pa. Aug. 19, 1994)(plaintiff cannot dress up a complaint to avoid the policy's exclusions), aff'd, 60 F.3d 816 (3d Cir. 1995).

**B. The Luckiewiczzs' Cross-Motion**

In their cross-motion, the Luckiewiczzs argue that because the complaint not only includes assault and battery claims, but also contains negligence and loss of consortium claims, the court cannot grant Allstate's motion for summary judgment, and must grant their cross-motion. (Cross-Mot. at 2.)

The Luckiewiczzs also urge the court to remember and follow a number of legal maxims, including: ambiguities are to be construed against the drafter; insurance coverage is to be construed to provide the greatest possible coverage to the insured; insurance policy exclusions are to be construed in favor of the insured; and the insurer must defend the insured if some of the allegations potentially fall within the terms of coverage. (Cross-Mot. at 3.)

The Luckiewiczzs also point out that Allstate's brief does not contain the full policy definition of the term "occurrence." They remind the court that the policy definition of "occurrence" also contains a clause covering "repeated exposure to substantially the same general harmful conditions, during the policy period, resulting in bodily injury or property damage." (Cross-Mot. at 3, quoting policy at 4.) They argue that the assault is covered under this part of the definition because the continued punching was a repeated exposure.

These arguments are meritless. First, as explained, the court looks to the facts alleged in the complaint to determine whether Allstate has a duty to defend or indemnify Raymond R. Fischer in the underlying action. The complaint alleges that the insured committed an intentional assault and battery which was the direct and sole cause of the Luckiewiczzs' injuries. Because the policy clearly excludes coverage for this type of act, Allstate has no duty to defend or indemnify Raymond R. Fischer under the terms of the policy. Second, the policy is

not ambiguous. To the contrary, the policy is clear and directly addresses the situation presented to the court. The Luckiewiczzs apparently realize this fact because they do not even attempt to argue how the policy is ambiguous. Third, while policies are construed in favor of the insured, they are not construed to provide coverage that does not exist. Fourth, none of the facts alleged bring this case within the scope of coverage provided by the policy. Likewise, the fact that the insured repeatedly committed an act excluded by the policy does not bring it within the scope of coverage provided by the policy. The policy covers repeated occurrences, or accidents. Raymond R. Fischer's actions, while repeated, were no accident.

While the events that occurred on February 10, 1996 were certainly unfortunate for the Luckiewiczzs, the events were not accidental. Insurance is intended to cover accidents, not malicious acts undertaken by the insured. No insurance company could long endure were it to cover all of its insureds' intentional wrongs. The facts alleged in the Luckiewiczzs' state court complaint exemplify the type of "intentional act" that is routinely excluded from insurance policy coverage. Allstate has shown that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. Therefore, the court will grant Allstate's motion and deny the Luckiewiczzs' cross-motion.

**IV. CONCLUSION**

For the foregoing reasons, Allstate's motion for summary judgment will be granted and the Luckiewiczs' cross-motion for summary judgment will be denied.

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ORDER

AND NOW, TO WIT, this th day of April, 1998, upon consideration of plaintiff Allstate Insurance Company's motion for summary judgment, defendants Marie and John Luckiewicz's cross-motion for summary judgment and the responses thereto, IT IS ORDERED that Allstate's motion is GRANTED and the Luckiewicz's motion is DENIED.

Judgment is entered in favor of Allstate Insurance Company and against Raymond R. Fischer. Judgment is entered in favor of Allstate Insurance Company and against Marie and John Luckiewicz.

IT IS FURTHER ORDERED that Allstate Insurance Company has no duty to defend or indemnify Raymond R. Fischer with respect to the underlying state court action, John J. Luckiewicz and Marie V. Luckiewicz v. Raymond R. Fischer, No. 2500, filed in the Court of Common Pleas of Philadelphia County.

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LOUIS C. BECHTLE, J.

