



("Battersby" or Defendant). On February 9, 1996, Mitchell Williams entered the apartment of Helecia Whittle. Williams assaulted, battered, and stabbed Helecia Whittle. See Pl.'s Ex. A. at ¶ 13(b) ("Thereafter, Williams gained access to the apartment through the said window and began assaulting, battering and stabbing decedent with a knife or other sharp instrument."). Helecia Whittle died when Williams threw her off the balcony of her fourth floor apartment.

At his criminal trial, Williams was convicted of second degree murder, burglary, and possession of an instrument of crime. During the trial, Williams testified that he was Helecia Whittle's former boyfriend. He also testified that he lived with her from November 1995 until early February 1996. Finally, Williams testified that he possessed a key to the front door of the apartment building.

Ira, Stelma, and Anessia Whittle ("Whittles" or Defendants) filed a complaint against Battersby in the Court of Common Pleas of Philadelphia County. The complaint alleges that Williams breached Battersby's security in three ways. First, the complaint alleges that Williams entered the first floor of the complex. Second, the complaint alleges that he gained access to the fourth floor of the complex. Third, the complaint alleges that he entered Helecia Whittle's apartment through a window.

Given these alleged security breaches, the complaint

states that Battersby failed to protect Helecia Whittle from criminal intrusion. As a result of this failure, the complaint alleges five counts. The counts are: (1) a wrongful death action - Count I; (2) a survival action - Count II; (3) a negligence action - Count III; (4) a contract action - Count IV; and a negligent infliction of emotional distress action - Count V.

Pursuant to policy No. CL294390, effective from January 6, 1996 to January 6, 1997, Acceptance provided Commercial General Liability coverage to Battersby. The policy requires Acceptance to pay those sums that the insured becomes legally obligated to pay as damages because of bodily injury that is caused by an "occurrence." "Occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Pl.'s Ex. D. The policy, however, provided the following exclusion for assault and battery:

It is agreed that the insurance does not apply to Bodily Injury, including death, and/or Property Damage arising out of assault and/or battery or out of any act or omission in connection with the prevention or suppression of such acts, whether caused by or at the instigation or direction of you, your employees, patrons or any other person.

Id.

Acceptance then brought this action seeking a declaratory judgment that it has no duty to defend or indemnify Battersby in the underlying action due to the terms of the insurance contract. On May 8, 1998, Acceptance filed a Motion for Summary Judgment. On

June 12, 1998, Battersby filed a response to this motion. On June 30, 1998, the Whittles also responded to Acceptance's Motion for Summary Judgment. This response was thirty-nine (39) days after the service of the summary judgment motion. Subsequently, Acceptance filed a Motion to Strike the Whittles' response because it was untimely. The Court considers these motions together.

## II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "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). The party moving for summary judgment has the initial burden of showing the basis for its motion. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the movant adequately supports its motion pursuant to Rule 56(c), the burden shifts to the nonmoving party to go beyond the mere pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. See id. at 324. A genuine issue is one in which the evidence is such that a reasonable jury could return a verdict for the nonmoving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

When deciding a motion for summary judgment, a court must draw all reasonable inferences in the light most favorable to the

nonmovant. See Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992). Moreover, a court may not consider the credibility or weight of the evidence in deciding a motion for summary judgment, even if the quantity of the moving party's evidence far outweighs that of its opponent. See id. Nonetheless, a party opposing summary judgment must do more than rest upon mere allegations, general denials, or vague statements. See Trap Rock Indus., Inc. v. Local 825, 982 F.2d 884, 890 (3d Cir. 1992).

### **III. DISCUSSION**

#### **A. Motion to Strike**

Plaintiff asks this Court to strike the Whittles' response to their summary judgment motion because the Whittles filed the response thirty-nine (39) days late. Plaintiff does not allege that it suffered any prejudice by the Whittles' failure to file their response on time. Therefore, the Court denies Plaintiff's Motion to Strike and will consider the response in evaluating the merits of the summary judgment motion.

#### **B. Motion for Summary Judgment**

Plaintiff next moves for summary judgment and asks this Court to enter a declaratory judgment that it owes no duty to defend or indemnify Battersby in the actions stemming from Williams' murder of Helecia Whittle. The Defendants respond with two arguments. First, Defendants argue that the Plaintiff owes a

duty to defend and indemnify Battersby because the underlying action of the Whittles falls within the scope of the coverage and is not excluded by the assault and battery provision. Second, Defendants argue that, even if the assault and battery exclusion applies to the underlying action, the doctrine of reasonable expectations prevents Plaintiff from denying coverage.

### **1. Coverage of the Claims Presented in the Underlying Action**

An insurer owes a duty to defend an insured whenever the allegations in a complaint, taken as true, set forth a claim which potentially falls within the coverage of the policy. See Visiting Nurse Ass'n of Greater Phila. v. St. Paul Fire & Marine Ins. Co., 65 F.3d 1097, 1100 (3d Cir. 1995); Cadwallader v. New Amsterdam Cas. Co., 152 A.2d 484, 487 (Pa. 1959); Germantown Ins. Co. v. Martin, 595 A.2d 1172, 1174 (Pa. Super. Ct. 1991). The insurer has the burden of establishing the applicability of an exclusion. See Allstate Ins. Co. v. Brown, 834 F. Supp. 854, 857 (E.D. Pa. 1993). An insurer owes a duty to indemnify an insured only if liability is established for conduct which actually falls within the scope of the policy coverage. See Caplan v. Fellheimer Eichen Braverman & Kaskey, 68 F.3d 828, 831 n. 1 (3d Cir. 1995). The insured has the burden to establish coverage under an insurance policy. See Erie Ins. Exch. v. Transamerica Ins. Co., 533 A.2d 1363, 1366-67 (Pa. 1987); Benjamin v. Allstate Ins. Co., 511 A.2d 866, 868 (Pa. Super. Ct. 1986).

The principles governing the interpretation of an insurance contract under Pennsylvania law are well settled. See Altipenta, Inc. v. Acceptance Ins. Co., No. CIV.A.96-5752, 1997 WL 260321, at \*2 (E.D. Pa. May 14, 1997), aff'd, 141 F.3d 1153 (3d Cir. 1998) (unpublished table decision). The court generally performs task of interpreting an insurance contract. See Allstate, 834 F. Supp. at 856. The court must read the policy as a whole and construe it according to the plain meaning of its terms. See Bateman v. Motorists Mut. Ins. Co., 590 A.2d 281, 283 (Pa. 1991). In determining whether a claim falls within the scope of coverage, the court compares the language of the policy and the allegations in the underlying complaint. See Gene's Restaurant, Inc. v. Nationwide Ins. Co., 548 A.2d 246, 246-47 (Pa. 1988); Biborosch v. Transamerica Ins. Co., 603 A.2d 1050, 1052 (Pa. Super. 1996).

Whether the provisions of a contract are clear and unambiguous is a matter of law to be determined by the court. See Allegheny Int'l Inc. v. Allegheny Ludlum Steel Corp., 40 F.3d 1416, 1424 (3d Cir. 1994). "A term is ambiguous if reasonable people, considering it in the context of the entire policy, could fairly ascribe different meanings to it." See Altipenta, Inc., 1997 WL 260321, at \*2; see also Northbrook Ins. Co. v. Kuljian Corp., 690 F.2d 368, 372 (3d Cir. 1982); United Servs. Auto. Ass'n v. Elitzky, 517 A.2d 982, 986 (Pa. Super. Ct. 1986). If a provision is ambiguous, it is construed against the insurer as the drafter of

the agreement. See Lazovick v. Sun Life Ins. Co. of Am., 586 F. Supp. 918, 922 (E.D. Pa. 1984). Nevertheless, a court should not torture the language of a policy to create ambiguities. See Eastern Assoc. Coal Corp. v. Aetna Cas. & Surety Co., 632 F.2d 1068, 1075 (3d Cir. 1980).

In the instant case, the policy specifically excludes coverage for bodily injury arising from any act or omission in connection with the prevention or suppression of an assault and battery by any person. Defendants contend that the assault and battery exclusion only applies to the commission of an assault or battery by the insured. This is simply not the case. The exclusion states that the insurance does not apply to bodily injury caused by an "assault and/or battery or out of any act or omission in connection with the prevention or suppression of such acts . . . [by] any person." Therefore, the Court concludes that the insurance contract clearly excludes any negligent act or omission causing an assault or battery by any person. See First Oak Brook Corp. Syndicate v. Comly Holding Corp., 93 F.3d 92, 96 (3d Cir. 1996) (enforcing an assault and battery provision excluding coverage for injury stemming from "harmful or offensive conduct between or among two or more persons" which included negligent as well as intentional conduct); Essex Ins. Co. v. V.A.C.V. Inc., No. CIV.A.98-1046, 1998 WL 316080, at \*2 (E.D. Pa. June 9, 1998) (finding that an assault and battery exclusion nearly identical to

the one in this case excluded negligent acts "related to preventing or suppressing an assault or battery").

Because the Court concludes that the insurance contract clearly excludes any negligent act or omission causing an assault or battery by any person, it must conclude that the Whittles' lawsuit does not fall within the scope of the coverage. The Whittles allege that Williams assaulted an battered Helecia Whittle. See Pl.'s Ex. A. at ¶ 13(b). All five counts of the Whittles' complaint stem from the failure of Battersby to prevent this assault and battery upon Helecia Whittle. Thus, the Court finds that the Whittles' action does not fall within the scope of Acceptance's insurance coverage to Battersby because the insurance contract provides that there is no coverage for omissions of the insured in preventing or suppressing an assault and battery by any person.

Defendants cite two cases for their position that the exclusion policy in this case should not apply to the Whittles' claim. The first case the Defendants cite is Britamco Underwriters, Inc. v. Weiner, 636 A.2d 649 (Pa Super. Ct. 1994). In Weiner, the Pennsylvania Superior Court held that an insurance company had a duty to defend its insured against a negligence action, despite the presence of an assault and battery exclusion. See id. at 652. However, in that case, a patron filed suit against a bar alleging that a co-owner of the bar struck the patron in the

neck. See id. at 650. The patron's complaint, however, alleged alternate counts that the owner either intentionally or negligently struck him. See id. Thus, the underlying tortious conduct in Weiner was either intentional or negligent. In this case, the underlying tortious action, striking and throwing a tenant off a balcony, was purely intentional.

The second case cited by the Defendants is Nationwide Mut. Fire Ins. Co. v. Pipher, 140 F.3d 222 (3d Cir. 1997). In Pipher, the Third Circuit held that a tenant's death was an "occurrence" within the meaning of the insurance policy when it was caused by the intentional act of a third party, but also attributable to the negligence of the insured, an apartment owner. See id. at 225. In that case, however, the Court was deciding whether the insurance company owed a duty to defend and indemnify based on the coverage of the policy. See id. There was no mention of an assault and battery exclusion similar to the one in this case.

Therefore, this Court finds that these cases are distinguishable from the situation presented in the case at bar. The Court also concludes that the assault and battery exclusion applies to the underlying litigation by the Whittles. See Sphere Drake Ins. Co. v. Levinson, No. CIV.A.90-3349, at \*2 (E.D. Pa. Nov. 9, 1990) (entering declaratory judgment that insurer did not owe duty to defend or indemnify insured from claim that insured failed

to maintain apartment building which made attack on tenant possible). The Court will now address the Defendants' argument that, even if the policy excludes the Whittles' action, the reasonable expectations doctrine prevents Acceptance from denying coverage to Battersby.

## **2. Reasonable Expectation Doctrine**

Defendants argue that it had a reasonable expectation that the insurance policy issued by Acceptance would cover "any suits brought against him for his or his employee's negligence." See Def. Battersby's Mem. in Law in Opposition to Pl.'s Mot. For Summ. Judg. at 2. However, "an insured may not complain that his or her reasonable expectations were frustrated by policy limitations which are clear and unambiguous." Frain v. Keystone Ins. Co., 640 A.2d 1352, 1354 (Pa. Super. Ct. 1994). "The only exceptions are where an insurer engages in wrongdoing by misinforming the insured that despite the language of the policy, the claim at issue would be covered or surreptitiously changes the terms of coverage after the insured agrees to purchase or renew the policy." Altipenta, Inc., 1997 WL 260321, at \*3; see also Bensalem Township. v. International Surplus Lines Ins. Co., 38 F.3d 1303, 1312 (3d Cir. 1994).

Defendants failed to demonstrate to this Court that the doctrine of reasonable expectations should apply. Rather, Defendants make vague references to their intent in obtaining

insurance. See Security Ins. Co. of Hartford v. Altipenta, Inc., 1997 WL 197987, at \*5 (E.D. Pa. Apr. 21, 1997) (rejecting same insured's reasonable expectation argument in absence of misinformation or surreptitious changes in coverage). The Court finds no wrongdoing on the part of Acceptance to warrant application of this doctrine. To extend the limited reasonable expectation doctrine to an insured who "merely assumes that coverage is contrary to the clear and unambiguous language in the policy . . . would allow the insured to invent coverage that is contrary to that expressly provided." River Thames Ins. Co. v. 5329 West. Inc., 1996 WL 18812, at \*2 (E.D. Pa. Jan. 18, 1996) (applying assault and battery exclusion as matter of law in absence of wrongdoing by insurer).

### **3. Conclusion**

The state court claims in the instant case are clearly within the scope of the assault and battery exclusion of the policy in question. Moreover, the reasonable expectations doctrine does not change this result. Accordingly, Plaintiff's summary judgment motion is granted.

This Court's Final Judgment follows.

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

ACCEPTANCE INSURANCE COMPANY                   :     CIVIL ACTION  
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BATTERSBY ASSOCIATES,                           :  
IRA WHITTLE, STELMA                             :  
WHITTLE, and ANESSIA WHITTLE                 :     NO. 97-5098

**FINAL JUDGMENT**

AND NOW, this 9th day of November, 1998, upon consideration of Plaintiff's Motion to Strike, Plaintiff's Motion for Summary Judgment, and Defendants' responses thereto, IT IS HEREBY ORDERED that the Plaintiff's Motion to Strike is **DENIED** and the Plaintiff's Motion for Summary Judgment is **GRANTED**.

IT IS FURTHER ORDERED that:

(1) Declaratory Judgment is **ENTERED** in favor of Acceptance and against Defendants Battersby and Ira, Stelma, and Anessia Whittle; and

(2) Acceptance owes no obligation to defend or indemnify its insured in the pending state court action, Whittle v. Battersby Associates, No. 9741 (Phila. Ct. Com. Pl. Jan. Term 1997).

BY THE COURT:

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HERBERT J. HUTTON, J.