

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

CLARENDON NATIONAL
INSURANCE CO.,

PLAINTIFF

v.

JAMES RICHARD PADGETT,
WILLIAM STRADLEY, BRIAN
LOGUE, AND BOROUGH OF
MARCUS HOOK,

DEFENDANTS.

CIVIL ACTION

No. 06-642

OPINION

Pollak, J.

February ____, 2007

In this action brought pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201-2202, Plaintiff Clarendon National Insurance Company (“Clarendon”) seeks a declaratory judgment that it has no duty to defend and indemnify defendants James Richard Padgett, William Stradley, Brian Logue, and the Borough of Marcus Hook (“Borough”) in *Gaspari v. Padgett*, No. 05-9104, a tort action pending in the Delaware Court of Common

Pleas.¹ Presently before the court are cross-motions for summary judgment filed by Clarendon and the Borough. For the reasons set forth below, I conclude that Clarendon's insurance agreement with the Borough places Clarendon under an obligation to defend the Borough, but imposes no corresponding duty with respect to the defense and indemnification of Padgett, Stradley, and Logue. A decision by this court on the remainder of the complaint, as it relates to Clarendon's duty to indemnify the Borough, will be stayed pending a final judgment in the Court of Common Pleas.

I. Factual and Procedural Background

The plaintiffs in the underlying action allege that, between July and August of 2004, a series of lewd text messages were anonymously sent to their cellular telephones. They further allege that subsequent police investigations revealed that these messages had been sent by Padgett, Stradley, and Logue. Finally, they claim that, at the time that the messages were sent, Padgett, Stradley, and Logue were "discharging . . . duties of a 'special assignment' for the Borough of Marcus Hook Police Department," *Gaspari* Compl. ¶¶ 14-16; and that the governing body of the Borough "had notice of and appreciated the criminal acts being perpetrated by the individual defendants against the plaintiffs," *Id.* ¶ 17. On December 22, 2005, they filed a tort action against Padgett, Stradley, Logue, and the Borough, seeking to recover for libel, slander, loss of

¹ The plaintiffs in the underlying action are Rocco Gaspari Jr., Sue Turnier, Thomas Gaspari, Annmarie Gaspari, Lawrence Moore, and Shelly Moore.

consortium, invasion of privacy, negligence per se, intentional infliction of emotional distress, and conspiracy to commit the aforesaid.

On January 27, 2006, Clarendon informed the Borough that it would provide the Borough with a defense but was reserving its right to deny defense or indemnity coverage should it determine either that the Borough had acted in violation of the policy or that the injuries claimed fell beyond the scope of the policy. Also on that day, Clarendon sent letters denying coverage to Padgett, Stradley, and Logue. On February 10, 2006, Clarendon filed the instant declaratory judgment action in this court, seeking a determination regarding its obligation to defend and indemnify Padgett, Stradley, Logue, and the Borough. On July 25-26, 2006, Clarendon and the Borough filed cross-motions for summary judgment.

In the meanwhile, the state court suit has continued to move forward. On June 1, 2006, the Borough filed a motion for summary judgment asserting absolute immunity pursuant to 42 Pa. C.S.A. §§ 8541-42² and, in the alternative, denying all liability for

² 42 Pa. C.S.A. § 8541 states that “Except as otherwise provided in this subchapter, no local agency shall be liable for any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person.”

42 Pa. C.S.A § 8542 sets out exceptions to local government immunity. Subsection (a) provides that:

A local agency shall be liable for damages on account of an injury to a person or property within the limits set forth in this subchapter if . . . (1) The damages would be recoverable under common law or a statute creating a cause of action if the injury were caused by a person not having available [an immunity] defense . . . (2) The injury was caused by the *negligent* acts of the local agency or an employee thereof acting within the scope of his office or duties with respect to one of the categories listed in subsection (b). As used in this paragraph, "negligent acts" shall not include acts or conduct which constitutes a crime, actual fraud, actual malice or willful misconduct.

Id. (emphasis added).

plaintiffs' injuries. This motion for summary judgment was denied without prejudice because the parties had not yet engaged in discovery. On January 26, 2007, some discovery having taken place, the Borough filed a second motion for summary judgment. That motion is currently under consideration by the Court of Common Pleas.

II. Discussion

This court has jurisdiction under 28 U.S.C. § 1332 based on the diversity of the parties and the amount in controversy, which exceeds \$75,000.³ Because the court is hearing this case pursuant to 28 U.S.C. § 1332, the parties' motions for summary judgment must be analyzed under Pennsylvania insurance law.

A. Clarendon's Duty to Defend

As the Third Circuit has noted,

[u]nder Pennsylvania law, an insurance company is obligated to defend an insured whenever the complaint filed by the injured party may *potentially* come within the

Subsection (b) sets out an exclusive list of employee activities that can create liability for a local agency. These activities are: (1) “[t]he operation of any motor vehicle in the possession or control of the local agency”; (2) “[t]he care, custody or control of personal property of others in the possession or control of the local agency”; (3) “[t]he care, custody or control of real property in the possession of the local agency”; (4) “[a] dangerous condition of trees, traffic signs, lights or other traffic controls, street lights or street lighting systems under the care, custody or control of the local agency”; (5) “[a] dangerous condition of the facilities of steam, sewer, water, gas or electric systems owned by the local agency and located within rights-of-way”; (6) “[a] dangerous condition of streets owned by the local agency”; (7) “[a] dangerous condition of sidewalks within the rights-of-way of streets owned by the local agency”; (8) “[t]he care, custody or control of animals in the possession or control of a local agency.”

³ Clarendon is organized under the laws of New Jersey, and its principal place of business is New York. Defendants Padgett, Stradley, and Logue are domiciled in Pennsylvania. The Borough is organized under the laws of Pennsylvania. Compl. ¶¶ 4-8.

The *Gaspari* plaintiffs request “an amount in excess of \$50,000, together with punitive damages and costs, interest and attorneys fees” for each count of their twenty-count complaint. *See, e.g. Gaspari* Compl. ¶¶ 50, 58, 66, 74.

policy's coverage. The obligation to defend is determined solely by the allegations of the complaint in the action. The duty to defend remains with the insurer until the insurer can confine the claim to a recovery that is not within the scope of the policy. Moreover, if an insurer seeks to avoid its duty to defend under the policy on the basis of an exclusion to that policy, the insurer bears the burden to prove the applicability of that exclusion.

Pacific Indem. Co. v. Linn, 766 F.2d 754, 760 (3d Cir. 1985) (internal citations omitted).

Therefore, if a claim appearing in *Gaspari* complaint could potentially come within the coverage of the Borough's insurance policy, Clarendon has a duty to provide a defense in the state court proceeding. To determine whether this is so, the court must review the scope of the Borough's insurance coverage and then examine the allegations in the *Gaspari* complaint to ascertain if coverage is potentially triggered.

(1) The Borough's Insurance Policy

The Borough's insurance policy with Clarendon provides it with general liability coverage, law enforcement liability coverage, and public officials liability coverage. The policy also provides employment practices liability coverage, the scope of which is not at issue in this case.

The Borough's general liability coverage extends to the Borough as well as to employees of the Borough acting "within the scope of their employment as authorized by [the Borough]." It covers costs associated with "bodily injury . . . caused by an occurrence" and "personal injury . . . arising out of [the insured's] business." The definitions section of the general liability coverage form defines an "occurrence" as an "accident" and "personal injury" as, in relevant part, an "injury arising out of [the insured's] business, other than 'bodily injury.'" The common liability section of the

policy defines “bodily injury” to include bodily injury, mental anguish, and emotional distress. The policy specifically excludes bodily injury that is “expected or intended from the standpoint of the insured” or “aris[es] out of any act or omission of [the insured’s] Police Department . . . [or] its agents”; and personal injury that arises out of “oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity” or “the willful violation of a penal statute or ordinance committed by or with the consent of the insured.”

The Borough’s law enforcement liability coverage extends to the Borough as well as to “all . . . full or part-time employees . . . with respect to liability arising out of ‘law enforcement activities.’” It applies to losses associated with “‘law enforcement wrongful act(s)’ which arise out of and are committed during the course and scope of ‘law enforcement activities.’” The definitions section of the law enforcement liability coverage form defines “law enforcement wrongful acts” to include “any actual or alleged act . . . by the insured while conducting ‘law enforcement activities’ which results in (a) ‘personal injury;’ or (b) ‘bodily injury’ . . . caused by an ‘occurrence.’” “Personal injury” is defined to include “[h]umiliation or mental distress” as well as “the publication or utterance of a libel or slander or of other defamatory or disparaging material, or a publication or utterance in violation of an individual’s right to privacy.” The policy specifically excludes claims “[a]rising out of the deliberate violation of any federal, state, or local statute, ordinance, rule or regulation committed by or with the knowledge and consent of the insured.”

Finally, the Borough's public officials liability coverage extends to the Borough as well as to all "lawfully . . . employed officials." It applies to losses associated with "public officials['] wrongful act(s)" which arise out of "the discharge of duties for [the insured]." The definitions section of the public officials liability coverage form defines "public officials' wrongful acts" to include "[a]ny actual or alleged (a) error or omission, neglect or breach of duty by the insured; (b) violation of civil rights protected under 42 USC 1981[et seq.]; (c) violation of any state civil rights law." The policy specifically excludes claims "[f]or any damage arising from 'bodily injury'" or "[a]rising out of the deliberate violation of any federal, state, or local statute, ordinance, rule or regulation committed by or with the knowledge and consent of the insured."

(2) Allegations Made by *Gaspari* Plaintiffs

The *Gaspari* complaint seeks to recover for libel, slander, loss of consortium, invasion of privacy, negligence per se, intentional infliction of emotional distress, and conspiracy to commit the aforesaid. In support of their claims, the *Gaspari* plaintiffs make the following general allegations. First, that, between July and August of 2004, Padgett, Stradley, and Logue,

intending to injure plaintiffs and to deprive them of their good name, and further intending to cause plaintiffs to be removed from office and/or employment, and further intended to interfere with plaintiffs [sic] marital relations, maliciously, wickedly, illegally, and at some times in the course of their employment, made and published numerous writings containing . . . scandalous, defamatory, and libelious statements concerning the plaintiffs . . .

Gaspari Compl. at ¶¶ 19-24. Second, that at the time that the offensive messages were sent, Padgett, Stradley, and Logue "were discharging . . . duties of a 'special assignment'

for the Borough of Marcus Hook Police Department,” *id.* at ¶¶ 32-34; *see also id.* at ¶¶ 14-16 (stating that Padgett, Stradley, and Logue were “under the employ of the Borough of Marcus Hook . . . and acted in and during the course of [this] employment”). Third, that “the governing body of defendant Borough of Marcus Hook, including its Mayor and some members of the borough’s Council, had notice of and appreciated the criminal acts being perpetrated by the individual defendants against the plaintiffs . . .” *Id.* at ¶ 17.

With respect to their claims for libel and slander, the *Gaspari* plaintiffs allege that “[a]t the time of the publication” of the offensive messages, “defendants knew or should have known that [these] statements were untrue.” *See, e.g. id.* at ¶ 45, 55, 62, 117, 126. Regarding their invasion of privacy claim, they assert that “[d]efendants had knowledge and/or acted in reckless disregard as to the falsity of the publicized matters and the false light in which plaintiffs have been placed.” *Id.* at ¶ 111.

Regarding their claims for loss of consortium and intentional infliction of emotional distress, the *Gaspari* plaintiffs assert that defendants’ conduct was “intentional.” *Id.* at ¶ 92, 93, 97. With respect to their conspiracy claim, they allege that “defendants knew of the illegality of their intentional actions and the defamatory statements . . .” *Id.* at ¶ 158. In support of their negligence per se claim, the *Gaspari* plaintiffs state that defendants “violated the duties bound upon them by Pennsylvania law,” *id.* at ¶ 99, as indicated by the fact that Padgett and Logue have since been criminally charged with multiple counts of harassment in violation of 18 Pa. C.S.A. § 2709(a), and conspiracy to commit harassment in violation of 18 Pa. C.S.A. § 903(a).

(3) Analysis

Clarendon and the Borough agree that the Borough's policy does not cover losses arising from (1) intentional conduct of the Borough or its employees or (2) actions of the Borough or its employees that fall outside the scope of the Borough's business or the employee's employment. However, they dispute how the *Gaspari* complaint is to be construed.

Clarendon argues that the *Gaspari* complaint alleges only intentional conduct by all defendants. Mem. Supp. Clarendon Mot., Docket # 16 at 16-18. Clarendon also asserts that coverage was not triggered because the sending of lewd text messages was neither "within the scope of a police officer's employment," *id.* at 20, 22, 27, nor "arose out of the discharge of defendants' duties" as public officials, *id.* at 29-30. Finally, Clarendon states that Stradley's conduct "could not have arisen within the scope of his employment" since "Stradley was on disability at the time of the alleged incident." *Id.* at 22.

The Borough, in turn, contends that "[t]he basis of the claims against the Borough are *not* any intentional acts by the Borough but rather a negligent failure to discover the Officers' acts and/or a negligent failure to supervise so as to discover and prevent the Officers' acts." Mem. Supp. Borough Mot., Docket #17 at 4. In support of this assertion, the Borough states that "[n]either Plaintiff insurer nor the Plaintiffs Gasparis have set forth any facts which suggest that the Defendant Borough of Marcus Hook intended to have its employees send lewd text messages to the Gaspari plaintiffs." *Id.* The Borough

further argues that “[t]he *sole act* giving rise to the Defendant Borough of Marcus Hook’s inclusion in the Gaspari Complaint is its employment of the Defendant Officers. Thus, the claim is clearly one that arises out of the business of the Borough.” *Id.* at 5. The Borough does, however, agree with Clarendon that the *Gaspari* plaintiffs allege only intentional conduct by Padgett, Stradley, and Logue. Logue—the only one of the individual defendants to file an answer to Clarendon’s motion for summary judgment—also agrees with this interpretation of the *Gaspari* complaint. Docket # 19 at ¶ 4.

In sum, the *Gaspari* plaintiffs have alleged only intentional conduct on the part of Padgett, Stradley, and Logue. Thus, because the allegations against these defendants fall outside the scope of the Borough’s insurance coverage, Clarendon has no duty to defend or indemnify them in the underlying action.

The *Gaspari* plaintiffs’ only statement concerning the Borough is that the governing body of the Borough “had notice of and appreciated the criminal acts being perpetrated by the individual defendants against the plaintiffs.” *Gaspari* Compl. ¶ 17. Because the *Gaspari* complaint does not allege that the Borough engaged in any acts outside of employing the individual defendants, I conclude that the *Gaspari* complaint raises allegations of negligence, rather than intentional conduct, on the part of the Borough.⁴ Accordingly, I find that Clarendon has a duty to defend the Borough in the

⁴ The *Gaspari* plaintiffs’ answer to the Borough’s June 1 motion for summary judgment supports this interpretation. Responding to the Borough’s assertion of immunity pursuant to 42

underlying action.

B. Clarendon's Duty to Indemnify the Borough

In *State Farm Fire & Casualty Co. v. Corry*, 324 F.Supp. 2d 666 (E.D.Pa. 2004),

this court noted that:

Unlike the duty to defend, which arises whenever the claims asserted by the injured party *potentially* come within the coverage of the policy, the duty to indemnify is triggered only when the insured is determined to be liable for damages within the policy's coverage. *Home Ins. Co. v. Law Offices of Jonathan DeYoung, P.C.*, 107 F. Supp. 2d 647, 650 (E.D. Pa. 2000). This distinction is an important one. Whereas the duty to defend must typically be decided before the underlying case proceeds, there is no equivalent need to resolve the question of an insurer's duty to indemnify prior to the development of facts in the underlying case. In certain cases, it may in fact be preferable to permit the state court to evaluate the facts before the federal court rules on the issue of indemnification. *Nationwide Mut. Fire Co. v. Shank*, 951 F. Supp. 68, 71-72 (E.D. Pa. 1997).

Id. at 673. The court further observed that:

[B]ecause the Court of Common Pleas has not yet evaluated the facts, for this court to rule on factual issues that are also central to the state court proceeding

Pa. C.S.A. §§ 8541-42, *see supra* note 3, the *Gaspari* plaintiffs allege that the Borough is not entitled to immunity because

Defendant Borough of Marcus Hook's officers/employees/agents have violated the Plaintiffs' state constitutional rights and these rights cannot be abrogated by a legislative majority. . . . [see] *Montanye v. Vangelo*, 2004 U.S. Dist. LEXIS 2452 (E.D.Pa. Feb. 12, 2004) (where "[c]laims arising from violations of the Pennsylvania Constitution may still be raised against local governments consistent with the Political Subdivision Tort Claims Act, 42 Pa. Cons. Stat. §§ 8541, et seq.).

Br. Opp. Borough's Mot., Docket #17, Exhibit B. The *Gaspari* plaintiffs further assert that: The *Constitution of the Commonwealth of Pennsylvania* provides, in Article I, Section 7, provides [sic] that conviction shall be had in any prosecution for publication of papers relating to the official conduct of officers or men in public capacity, or to any other matter proper for public investigation or information, where the fact that such publication was made maliciously or **negligently**. Accordingly the Borough's contention of immunity based upon scienter being a requisite element of a defamation cause of action is foundationless, and not grounds for summary judgment.

Id. (emphasis in original).

“raises serious questions of collateral estoppel.” *Shank*, 951 F. Supp. at 72.⁵ To rule on the indemnification question would require resolution of the merits of the underlying dispute, unduly prejudicing one or more of the litigants in the state court proceeding. *See Pacific Indem. Co.*[, 766 F.2d at 766].

For these reasons, “[a]s a general rule, the declaratory judgment court should refrain from determining the insurer’s duty to indemnify until the insured is found liable for damages in the underlying action.” *Home Ins. Co.*, 107 F. Supp. at 650.

Id.

The Court of Common Pleas for Delaware County has yet to determine whether the *Gaspari* plaintiffs should even be permitted to sue the Borough, let alone whether the Borough should be liable for plaintiffs’ injuries—and, if so, on what theory. In addition, setting aside the allegations made in the parties’ pleadings, no evidence on these issues has actually been presented to this court. Accordingly, I will stay this action with respect to the question of indemnification, and permit the Court of Common Pleas to render a decision on the underlying facts of this dispute. Upon the resolution of the state proceeding, the parties are directed to inform the court of the outcome, at which time I will entertain any motion or motions for summary judgment on the issue of indemnification.

⁵ In *City of Pittsburgh v. Zoning Bd. of Adjustment*, 559 A.2d 896, 901 (1989), the Pennsylvania Supreme Court noted that, under Pennsylvania law, collateral estoppel applies if (1) the issue decided in the prior case is identical to one presented in the later case; (2) there was a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party in the prior case; (4) the party or person privy to the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding and (5) the determination in the prior proceeding was essential to the judgment.

Conclusion

I find that Clarendon is under an obligation to defend the Borough in the underlying state action, but has no duty to defend or indemnify Padgett, Stradley, and Logue. Therefore, the Borough's motion for summary judgment will be granted in part; Clarendon's motion for summary judgment will be granted in part; and Clarendon's declaratory judgment complaint will be dismissed insofar as it relates to Clarendon's duty to defend the Borough. Because it would be improvident to resolve the issue of whether Clarendon must indemnify the Borough while the underlying state action is pending, the remainder of Clarendon's declaratory judgment action will be stayed until the conclusion of the state proceeding.

An appropriate order follows.

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

CLARENDON NATIONAL
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JAMES RICHARD PADGETT,
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CIVIL ACTION

No. 06-642

ORDER

February ____, 2007

For the reasons set forth in the accompanying opinion, it is hereby **ORDERED**

that:

- (1) Clarendon National Insurance Company is bound by its insurance policy to defend the Borough of Marcus Hook in the underlying state court suit.
- (2) The Borough of Marcus Hook's Motion for Summary Judgment (Docket #17) is **GRANTED** with respect to Clarendon's duty to defend the Borough.
- (3) Clarendon National Insurance Company's Motion for Summary Judgment (Docket # 16) is **DENIED** so far as it relates to a duty to defend the Borough.
- (4) Clarendon National Insurance Company has no duty to defend or indemnify James Richard Padgett, William Stradley, Brian Logue in the underlying state court suit.
- (5) Clarendon National Insurance Company's Motion for Summary Judgment

(Docket # 16) is **GRANTED** with respect to Clarendon's duty to defend and indemnify James Richard Padgett, William Stradley, Brian Logue.

- (6) The remainder of Clarendon's Declaratory Judgment Complaint, as it relates to Clarendon's duty to indemnify the Borough, is **STAYED** until such time as a final judgment is entered in the underlying state court suit.
- (7) The clerk of this court is directed to place this case in the civil suspense docket pending the outcome of the underlying state court action.
- (6) Upon the entrance of a final judgment in the underlying state court action, the parties shall so inform the court.

Pollak, J.