

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

MONICA SMITH, AS ASSIGNEE	:	
OF TALENA JOHNSON,	:	
Plaintiff,	:	CIVIL ACTION
	:	NO. 97-CV-4243
v.	:	
	:	
THE HARTFORD INSURANCE CO.,	:	
Defendant.	:	

McGlynn, J.

March 12, 1998

MEMORANDUM OF DECISION

I. Background

On April 9, 1992, Talena Johnson ("Johnson") was the operator a vehicle which struck Monica Smith ("Smith"), causing Smith serious injury resulting in the amputation of her left leg. Johnson was arrested and charged with aggravated assault, simple assault and recklessly endangering another person. On April 8, 1993, following a bench trial in the Court of Common Pleas of Philadelphia, Johnson was convicted of all charges.¹

The vehicle driven by Johnson, a 1984 Chevrolet Blazer, was owned by Johnson's sister, Sue Carolyn Mack ("Mack"). At the time of the accident, The Hartford Insurance Company ("Hartford") had in force a policy of automobile liability insurance issued to Gertrude and Godfrey Nichols, Johnson's great-aunt and great-uncle with whom Johnson resided. Hartford does not contest that

¹ The court sentenced Johnson to two to five years only on the aggravated assault charge since the simple assault and reckless endangerment charges merged for purposes of sentencing.

Johnson was insured under this policy by virtue of her status as a resident relative.²

On March 3, 1993, Smith commenced a civil action against Johnson and Mack alleging negligence. No defense was tendered by Johnson nor did Hartford provide her with one. On June 3, 1993, a default judgment was entered in favor of Smith. The court assessed damages in the amount of \$950,000 on July 28, 1994. On September 7, 1994, the court molded the verdict to include \$22,166.66 in delay damages, bringing Smith's total award to \$972,166.66. To recover the award, Smith attempted to garnish the Nichols' policy. During the garnishment proceedings, however, Hartford's motion for summary judgment was granted and Smith appealed. On January 16, 1997, the superior court vacated the judgment in favor of Hartford and remanded the garnishment action to the court of common pleas.³

On May 28, 1997, after receiving an assignment of rights from Johnson, Smith commenced the instant bad faith action under 42 Pa. Cons. Stat. Ann. § 8371 in the Court of Common Pleas of

² The Nichols' policy provided coverage for family members: "[f]amily member means a person related to you by blood, marriage or adoption who is a resident of your household. This includes a ward or foster child." Nichols' Policy, Definitions, F.

³ The superior court reasoned that the trial court prematurely granted summary judgment before receiving Smith's response to the motion. Smith v. Johnson, No. 04127 PHL 95, slip op. at 4-5 (Pa. Super. Ct. Jan 16, 1997), appeal denied, 701 A.2d 578 (1997). Notably, the court expressed reservation concerning Smith's standing to pursue the garnishment action without an assignment of rights from Johnson. Id. at 5 n.9. At present, Smith and Hartford have filed cross-motions for summary judgment which are currently awaiting disposition.

Philadelphia. Smith premised the action on Hartford's alleged breach of its duty under the Nichols' policy to defend Johnson. Smith seeks punitive damages, court costs and attorney's fees. Hartford removed the action to this court based on diversity of citizenship and amount in controversy. Presently before the court is Hartford's Motion for Summary Judgment. For the following reasons, Hartford's motion will be denied.

II. Standard of Review

Summary judgment is appropriate if, after consideration of the evidence in the light most favorable to the non-moving party, "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); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue of fact is "genuine" only if the evidence is such that a reasonable jury could return a verdict for the non-moving party in light of burdens of proof imposed by the substantive law. Id. Moreover, the party moving for summary judgment bears the initial burden of demonstrating, by a preponderance of evidence, the absence of a genuine issue of material fact. Celotex v. Catrett, 477 U.S. 317, 322 (1986). Once this burden is discharged, Rule 56(e) requires a non-moving party to "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

III. Discussion

Hartford claims that its duty to defend Johnson was discharged upon Johnson's conviction for aggravated assault.

A. Duty to Defend

In Pennsylvania, an insurer has a duty to defend whenever the allegations in a complaint against the insured, taken as true, set forth a claim which potentially falls within the coverage of the policy. Visiting Nurse Ass'n of Greater Philadelphia v. St. Paul Fire & Marine Ins. Co., 65 F.3d 1097, 1100 (3d Cir. 1995); Kiewit Eastern Co. Inc. v. L & R Constr. Co., Inc., 44 F.3d 1194, 1205 (3d Cir. 1995); see Gedeon v. State Farm, 188 A.2d 320, 321 (Pa. Super. Ct. 1963)(finding "insurer agrees to defend the insured against any suits arising under the policy even if such suit is groundless, false or fraudulent")(internal quotations omitted). In United Services Automobile Ass'n v. Elitzky, the court stated that "[t]he obligation of an insurer to defend an action against the insured is fixed solely by the allegations in the underlying action." 517 A.2d 982, 987 (Pa. Super. Ct. 1985), appeal denied, 528 A.2d 957 (1987). "After discerning the facts alleged in the complaint, we then must decide whether, if those facts were found to be true, the policy would provide coverage. If it would, then there is a duty to defend." D'Auria v. Zurich Insurance Co., 507 A.2d 857, 859 (Pa. Super. Ct. 1986).

In the instant matter, Smith's underlying complaint alleged that Johnson was negligent. It did not allege that Johnson intentionally struck Smith. "[A]n insurance company must defend

the action if the factual allegations of the underlying complaint on their face state a claim against the insured to which the policy potentially applies." Pacific Indem. Co. v. Lim, 590 F. Supp. 643, 646 (E.D. Pa. 1984), aff'd, 766 F.2d 754 (3d Cir. 1985). Here, the Nichols' policy provided coverage for the negligent acts of its insured. It did not provide coverage for the insured's intentional conduct. However, the complaint in the underlying action cannot be read as alleging intentional acts by Johnson and, therefore, Hartford was not relieved of its obligation to provide a defense. Compare Agora Syndicate, Inc. v. Levin, 977 F. Supp. 713, 715 (E.D. Pa. 1997)("[I]f the factual allegations of the complaint sound in intentional tort, arbitrary use of the word 'negligence' will not trigger an insurer's duty to defend.").

Smith filed her civil action in March of 1993. Johnson was convicted on April 8, 1993. At a minimum, Hartford had a duty to provide a defense for Johnson until the question of Johnson's intent was resolved.⁴

⁴ Smith maintains that Hartford waived its right to challenge its duty to defend because Hartford had notice of Smith's personal injury proceeding but failed to take any action on behalf of Johnson, including reserving its rights or filing a declaratory judgment action. See Butterfield v. Giuntoli, 670 A.2d 646, 651 n.6 (Pa. Super. Ct. 1996)(citing, inter alia, Renschler v. Pizano, 198 A. 33 (1938)); Stidham v. Millvale Sportsmen's Club, 618 A.2d 945, 955 (1992), allocatur denied, 637 A.2d 290 (1993).

On April 23, 1993, however, Hartford sent a reservation of rights letter to Godfrey Nichols, the policy holder. The letter stated: "[t]his letter is being sent to give you written notice as required by the Pennsylvania Law that Hartford contends or may later contend that [it] has the right to assert a certain defense

According to Hartford, however, even if it initially had an obligation to defend Johnson, that duty was subsequently discharged upon Johnson's criminal conviction for aggravated assault. Hartford claims the conviction violated the intentional acts exclusion in the Nichols' policy as well as Pennsylvania public policy prohibiting insurance coverage for willful, criminal acts. Moreover, Hartford maintains that it is sheltered from liability under the exclusion in the Nichols' policy for use of vehicles not covered in the policy but regularly used by the insured.⁵

1. Intended Harm Exclusion

The Nichols' policy states:

We will pay damages for bodily injury . . . for which any insured 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. In addition to our limit of liability, we will pay all defense costs we incur . . . We have no duty to defend any suit or settle any claim for bodily injury . . . not covered under this policy.

or defenses to your claim coverage under the policy of coverage referred to above."

Smith claims Hartford, at a minimum, should have either sought a declaratory judgment after Johnson's conviction or defended Johnson subject to a reservation of rights letter.

While filing a declaratory judgment action was an available option for Hartford pending the disposition of Johnson's criminal trial, it was not mandatory. See 42 Pa. Cons. Stat. Ann. § 7532.

⁵ It is well-settled in Pennsylvania that the burden of demonstrating the applicability of insurance policy exclusions rests with the insurer. See Allstate Ins. Co. v. Brown, 834 F. Supp. 854, 857 (E.D. Pa. 1993); Erie Ins. Exchange v. Transamerica Ins. Co., 533 A.2d 1363, 1366 (Pa. 1987).

Nichols' Policy, Part A -- Liability Coverage, Insuring Agreement, section A. Hartford contends that Johnson's conviction for aggravated assault, by definition, was not an accident and falls under the exclusion for intentional acts. This exclusion states: "[w]e do not provide liability coverage for any person: 1. [w]ho intentionally causes bodily injury or property damage." Nichols' Policy, Part A -- Liability Coverage, Exclusions, section A. Because aggravated assault requires a "more culpable state of mind" than mere negligence, Hartford claims its duty to defend Johnson is discharged since Johnson's "state of mind contained sufficient intentionality [sic] to bring it within the scope of the public policy prohibition" and the intentional acts exclusion. Smith counters that Johnson's conviction of aggravated assault was to punish her reckless conduct which is distinguishable from intentional conduct and is therefore covered under the policy.

The policy does not define the phrase "intentional acts." See, e.g., Elitzky, 517 A.2d at 987 (finding insurer had duty to defend for insured's reckless conduct where policy did not define "intended" act). In Elitzky, the court stated: [w]e hold that such a clause excludes only injury and damage of the same general type which the insured intended to cause. An insured intends an injury if he desired to cause the consequences of his act or if he acted knowing that such consequences were substantially certain to result." Id. at 989; Wiley v. State Farm Fire & Cas. Co., 995 F.2d 457, 460 (3d Cir. 1993)("In Pennsylvania, then, it

is not sufficient that the insured intended his actions; rather, for the resulting injury to be excluded from coverage, the insured must have specifically intended to cause harm."). But even if the language is susceptible to more than one interpretation, the court must construe the clause in favor of the insured. Curcio v. John Hancock Mutual Life Ins. Co., 33 F.3d 226, 231 (3d Cir. 1994); Standard Venetian Blind Co. v. American Empire Ins., Co., 469 A.2d 563, 566 (1983)(same).

The question then becomes whether the insured's conviction for aggravated assault based on reckless conduct triggers an exclusion for intentional acts in the insured's policy. The language in the Nichols' policy excludes coverage for intentional acts, not reckless behavior. As a result, the burden shifts to Hartford to prove Johnson acted intentionally. However, both Smith and Hartford concede that the parties are precluded from litigating the issue of Johnson's intent. "[T]he victim of a criminal act is precluded from litigating the issue of the insured actor's intent where that intent has been established by independent evidence in the prior criminal proceeding." See Stidham v. Millvale Sportsmen's Club, 618 A.2d 945, 952 (1992), allocatur denied, 637 A.2d 290 (1993). Moreover, "criminal convictions are admissible in civil actions" and "are conclusive evidence of criminal acts." Id. at 954.

In the present matter, Smith's state of mind was

conclusively determined at the criminal trial.⁶ Aggravated assault, under 18 Pa. Cons. Stat. Ann. § 2702(a), is defined as: "attempts to cause serious bodily injury to another, or caus[ing] such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life." Id. (emphasis added). To convict Johnson, the court determined that she acted recklessly. This, coupled with the fact that Hartford declined to litigate the issue of Johnson's intent at Smith's civil trial, binds Hartford to the finding of the criminal court that Johnson's actions were reckless, but not intentional. Accordingly, the intentional acts exclusion in the Nichols' policy did not absolve Hartford of its duty to defend Johnson.

2. Public Policy

Hartford alternatively argues that Johnson's conviction for aggravated assault violates Pennsylvania public policy which prohibits insurance coverage for the consequences of willful criminal acts or intentional torts regardless of policy language. State Farm Mut. Auto. Ins. Co. v. Martin, 660 A.2d 66, 68 (Pa. Super. Ct. 1995)(holding no coverage when insured, an intoxicated husband, intentionally drove car into wife); Germantown Ins. Co. v. Martin, 595 A.2d 1172, 1175 (Pa. Super. Ct. 1991) (holding no

⁶ On August 1993, Judge C. Darnell Jones of the Court of Common Pleas of Philadelphia stated: "[t]he conduct exhibited by the defendant in this case at the time of the incident and prior to the incident was such that this Court certainly believed that it was reckless yet not intentional." Johnson Sentencing Transcript, at 28 (August 24, 1993)(emphasis added).

coverage under homeowner's policy when insured shot and killed individuals at home of ex-girlfriend), appeal denied, 612 A.2d 985 (1992); Nationwide Mutual Ins. Co. v. Hassinger, 473 A.2d 171, 173 (Pa. Super. Ct. 1984)(holding no coverage when insured drove vehicle across sidewalk killing pedestrian); Esmond v. Liscio, 224 A.2d 793, 799 (Pa. Super. Ct. 1966)(holding no coverage for insured who intentionally hit pedestrian with car door amounting to willful, intentional and criminal assault); see Agora, 977 F. Supp. at 715, 716; Federal Ins. Co. v. Potamkin, 961 F. Supp. 109, 113 (E.D. Pa. 1997). Smith argues that Johnson's conviction was premised on her reckless conduct as contrasted to a willful act. At issue here is whether aggravated assault based on reckless conduct is tantamount to a willful criminal act.

Pennsylvania public policy is premised on the theory that an insured "should not be able to avoid financial responsibility by shifting the penalty for his criminal act to an insurance carrier." Kraus v. Allstate Ins., Co., 258 F. Supp. 407, 412, aff'd, 379 F.2d 443 (3d Cir. 1967). A policy of liability insurance is designed "to protect and benefit the insured from liability resulting from unintentional conduct." Martin, 660 A.2d at 67. In determining whether bodily injury is caused accidentally or intentionally for the purpose of construing an insurance policy, the act is examined from the perspective of the insured. Id. Hartford, however, claims Smith's testimony at Johnson's criminal trial illustrates the requisite intent

necessary to characterize Johnson's conduct as "willful". At Johnson's criminal trial, Smith testified that she believed that Johnson was in control of the Blazar at the time of the incident and that Johnson had a "smirk" on her face. Johnson Criminal Trial, at 109b, 125b, 144b (Monica Smith testimony) (March 30, 1993).

In Pennsylvania, "reckless" is defined as:

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and intent of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation.

18 Pa. Cons. Stat. Ann. § 302(b)(3). "Willfulness", however, is defined as: "[r]equirement of willfulness satisfied by acting knowingly. -- A requirement that an offense be committed willfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements appears." 18 Pa. Cons. Stat. Ann. § 302(g) (emphasis added).

Here, the trial court specifically convicted Johnson of aggravated assault based on her reckless conduct, not on her intentional or knowing conduct. Hartford attempts to disavow coverage by looking to the perspective of Smith, the injured party. Under Pennsylvania law, however, willful conduct is

analyzed from the actor's perspective. Therefore, Hartford has not carried its burden on a motion for summary judgment of demonstrating that Johnson's conduct was "willful".

3. Regular Use Exclusion

Finally, Hartford contends that the Nichols' policy excludes liability coverage for the Blazar which was "furnished or available for the regular use of any family member." The Nichols' policy states:

- B. We do not provide Liability Coverage for the ownership, maintenance or use of:
 - 3. Any vehicles, other than your covered auto, which is:
 - a. owned by any family member; or
 - b. furnished or available for the regular use of any family member.However this exclusion (B.3.) does not apply to your maintenance or use of any vehicle which is:
 - a. owned by a family member; or
 - b. furnished or available for the regular use if a family member.

Hartford claims the Blazar is excluded from coverage because: (1) it is not identified in the Nichols' policy as the covered auto, and (2) Johnson's testimony at her criminal trial demonstrates that the Blazar was available for her regular use.

Two vehicles are covered under the Nichols' policy, a 1988 Subaru and a 1984 Buick Skyhawk. The Blazar was not a covered vehicle. According to Smith, this exclusion is not applicable because Johnson "normally resided at a different location with her boyfriend," and therefore, the Blazar was not available for

Johnson's regular use.⁷ In addition, Smith disputes that Johnson "regularly" used the Blazar because Johnson testified that, "most of the time, when I first got it [the Blazar], I didn't drive it" and even when she did drive the Blazar, it was "maybe once or twice a week." Johnson Criminal Trial Transcript, at 101a.

Based on the foregoing, there is a genuine issue of material fact whether Johnson "regularly" used the Blazar and therefore whether the Nichols' policy excludes it from coverage. As a result, Hartford's motion for summary judgment is denied as to this issue.

C. Bad Faith Refusal to Defend

Next, the court must discern whether Hartford's refusal to defend was in bad faith. The Pennsylvania statute addressing bad faith actions, 42 Pa. Cons. Stat. Ann. § 8371, reads:

In an action arising under an insurance policy, if the Court finds that the insurer has acted in bad faith toward the insured, the court may take all the following actions:

- (1) Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest plus 3%.
- (2) Award punitive damages against the insurer.
- (3) Assess court costs and attorney fees against the insurer.

42 Pa. Cons. Stat. Ann. § 8371. Because the statute does not define "bad faith," a court must look elsewhere for guidance.

⁷ This assertion appears to undercut Smith's argument that Johnson was a resident of the Nichols' household -- a necessary predicate to triggering Johnson's insurance coverage under the Nichols' policy.

The Third Circuit has applied a two-part test for bad faith, stating that both elements must be supported with clear and convincing evidence: "(1) the insurer lacked a reasonable basis for denying benefits; and (2) the insurer knew or recklessly disregarded its lack of reasonable basis." Klinger v. State Farm Mut. Auto. Ins. Co., 115 F.3d 230, 233 (3d Cir. 1997) (citing Terletsky v. Prudential Property & Cas. Ins. Co., 649 A.2d 680, 688 (Pa. Super. Ct. 1994), appeal denied, 659 A.2d 560 (1995)); see also PolSELLI v. Nationwide Mut. Fire Ins. Co., 23 F.3d 747, 752 (3d Cir. 1994).

Smith argues that Hartford's conduct was in bad faith and unreasonable because: (1) Hartford had ample notice of Smith's personal injury action; (2) Hartford did not advise Johnson to retain independent counsel or notify Johnson that Hartford would not defend her; (3) Hartford breached its duty to defend; (4) Hartford did not take statements of Johnson or Mack regarding Johnson's use of the Blazar; (5) Hartford failed to utilize procedural options such as reserving its right to contest coverage, filing a declaratory judgment action on the question of its duty or indemnifying Johnson; and (6) Hartford failed to advise Johnson that her liability in the civil action may exceed the \$100,000 maximum policy coverage, violating the duty to advise insureds of the possibility of excess exposure under Nichols v. American Cas. Co. of Reading, Pa., 225 A.2d 80, 82 (Pa. 1966).

In its defense, Hartford characterizes Johnson's conduct as

violative of the policy exclusions in the Nichols' policy which discharged its duty to defend.

Taking the allegations in the complaint as true and construing all possible inferences in the light most favorable to plaintiff, the court concludes that the facts raise a genuine issue as to the existence of bad faith on the part of the insurer. Hartford's Motion for Summary Judgment will be denied.

III. Conclusion

An appropriate order follows.