

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

U.S. UNDERWRITERS INSURANCE CO.,	:	SEPTEMBER TERM, 2003
	:	
Plaintiff,	:	No. 04493
	:	
v.	:	COMMERCE PROGRAM
	:	
AGV, INC., LAUREN VAILE,	:	Control Nos. 051234, 051312
ANTHONY CRINITI and THERESA CRINITI,	:	
Individually and d/b/a A. CRINITI REALTY,	:	
	:	
Defendants.	:	

ORDER

AND NOW, this 26th day of August 2004, upon consideration of the parties' cross Motions for Summary Judgment, the responses thereto, the briefs in support and opposition, and all other matters of record, it is hereby **ORDERED** that plaintiff's Motion is **GRANTED** and defendant Lauren Vaile's Motion is **DENIED**, and that plaintiff has no duty to defend or indemnify defendants in the action filed in the Court of Common Pleas for Philadelphia County at docket number 03172, April Term 2003.

BY THE COURT:

C. DARNELL JONES, II, J.

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Defendants.	:	

MEMORANDUM OPINION

In this action, plaintiff U.S. Underwriters Insurance Company (“USUIC”) has moved for summary judgment on its claim for a declaratory judgment that it need not defend and indemnify defendants AGV, Inc. (“AGV”), Anthony Criniti, Theresa Criniti, and A. Criniti Realty (collectively the “Crinitis”) in a certain underlying negligence action brought by nominal defendant Lauren Vaile (the “Underlying Litigation”). Ms. Vaile has cross moved for summary judgment, arguing that USUIC does have a duty to defend and indemnify the other defendants.

AGV apparently is the proprietor of a bar in which Ms. Vaile was sexually assaulted and robbed by certain third parties. The Crinitis are allegedly the owners and lessors of the property where AGV’s bar is located. USUIC issued a general commercial liability policy to AGV (the “Policy”).

“A court’s first step in a declaratory judgment action concerning insurance coverage is to determine the scope of the policy’s coverage.” General Accident Insurance Co of America v. Allen, 547 Pa. 693, 706, 692 A.2d 1089, 1095 (1997). In this case, the Policy covers damages

for “bodily injury” caused by “an accident.” Stipulation, ¶¶ 3, 6. The Policy further provides that

no coverage shall apply under this policy for any claim, demand or ‘suit’ based on Assault and 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 the insured, his employees, patrons or any other person.

Id. ¶ 5.

In determining whether USUIC owes any of the defendants a duty to defend or indemnify them in the Underlying Litigation, the court must review the allegations of the complaint in the Underlying Litigation to see if the acts alleged are covered by the terms of the Policy. *See General Accident Insurance Co of America v. Allen*, 547 Pa. 693, 706, 692 A.2d 1089, 1095 (1997) (“After determining the scope of coverage, the court must examine the complaint in the underlying action to ascertain if it triggers coverage. If the complaint against the insured avers facts that would support a recovery covered by the policy, then coverage is triggered and the insurer has a duty to defend until such time that the claim is confined to a recovery that the policy does not cover.”)

In her complaint in the Underlying Litigation, Ms. Vaile alleges that the defendants are guilty of numerous negligent acts in failing to prevent her from being raped and robbed at AGV’s bar. Although Ms. Vaile claims that AGV and/or the Crinitis was merely negligent in causing her injuries, she is thereby attempting to hold them responsible for a third parties’ intentional assault upon her person.¹ Since Ms. Vaile’s injuries arose out of an intentional

¹ “The particular cause of action that a complainant pleads is not determinative of whether coverage has been triggered. Instead it is necessary to look at the factual allegations contained in the complaint. . . [T]o allow the manner in which the complainant frames the request for redress to control in a case such as this one would encourage litigation through the artful use of pleadings designed to avoid exclusions in liability insurance policies.” Mutual Benefit Ins. Co. v. Haver, 555 Pa. 534, 538-9, 725 A.2d 743, 745 (1999).

assault, they are not covered under the express exclusionary language of the Policy.² Similarly the Assault and Battery exclusion expressly precludes coverage for defendants' negligent acts or omissions by which they allegedly failed to prevent or suppress the intentional assault on Ms. Vaile. See Acceptance Ins. Co. v. Seybert, 757 A.2d 380 (Pa. Super. 2000) (insurer did not have duty to defend or indemnify insured bar for negligently serving alcohol to persons who assaulted plaintiff.); Britamco Underwriters, Inc. v. Grzeskiewicz, 433 Pa. Super. 55, 639 A.2d 1208, 1210-1 (1994) (insurer did not have duty to defend insured bar with respect its negligence in allowing a third party to assault plaintiff). Since there are no disputed issues of fact regarding the Policy's lack of coverage with respect to the claims in the Underlying Litigation, this court may grant summary judgment for USUIC as a matter of law.

CONCLUSION

For all the foregoing reasons, plaintiff's Motion for Summary Judgment is granted, defendant's Motion for Summary Judgment is denied, and the court will issue a declaratory judgment in plaintiff's favor.

BY THE COURT:

C. DARNELL JONES, II, J.

² Because the underlying wrongful assault on Ms. Vaile was clearly intentional, this case is readily distinguishable from Britamco Underwriters, Inc. v. Weiner, 636 A.2d 649 (Pa. Super. 1994), on which Ms. Vaile relies. In Weiner, the complaint in the underlying action alleged that the hitting of the plaintiff by one of the insured's employees may have been done negligently. If it was done negligently, then it was not excluded under the policy. In this case, there is no question that the assault upon Ms. Vaile was an intentional act; she does not claim that she was negligently raped and robbed.