

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

GE AQUARIUM, INC. d/b/a ZOOS	:	June Term 2003
PET CENTER and GEORGE	:	
STRICKLAND,	:	No. 000038
Plaintiffs,	:	
v.	:	Commerce Program
HARLEYSVILLE MUTUAL INSURANCE:	:	
COMPANY, MARYLAND CASUALTY	:	
COMPANY, MERCHANTS &	:	
BUSINESSMEN'S INSURANCE	:	
COMPANY and THOMAS and RUTH	:	
COELHO, H/W,	:	
Defendants.	:	

OHIO CASUALTY INSURANCE	:	October Term, 2003
COMPANY on its own behalf and as	:	
Successor-in-Interest to certain AMERICAN:	:	
NATIONAL FIRE INSURANCE	:	
COMPANY policies; AMERICAN FIRE &	:	
CASUALTY COMPANY,	:	
Plaintiffs,	:	No. 3375
v.	:	
GUROTZIAN ENTERPRISES t/a ZOOZ	:	
PET CENTER, GE AQUARIUM, INC.	:	
d/b/a ZOOZ PET CENTER and	:	Commerce Program
THOMAS AND RUTH COELHO,	:	
Defendants.	:	Control Number 074314

ORDER

AND NOW, this 27th day of December 2004, upon consideration of Plaintiffs Ohio Casualty Insurance Company, on its own behalf and as Successor-in-Interest to certain American National Fire Insurance Company policies and American Fire & Casualty Company's Motion for Summary Judgment, Defendants' response in opposition, memorandum, all matters of record and in accord with the contemporaneous

Memorandum Opinion to be filed of record, it hereby is **ORDERED** and **DECREED** that Plaintiffs' Motion for Summary Judgment is **Granted** and plaintiffs have no further duty to defend or indemnify defendants in the action filed in the Court of Common Pleas for Philadelphia County at docket number 2551 April Term, 2003.

BY THE COURT,

C. DARNELL JONES, II, J.

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COMPANY and THOMAS and RUTH	:	
COELHO, H/W,	:	
	:	
Defendants.	:	

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GUROTZIAN ENTERPRISES t/a ZOOZ	:	
PET CENTER, GE AQUARIUM, INC.	:	
d/b/a ZOOZ PET CENTER and	:	Commerce Program
THOMAS AND RUTH COELHO,	:	
	:	
Defendants.	:	Control Number 074314

MEMORANDUM OPINION

JONES, II, J.

In this action, plaintiffs Ohio Casualty Insurance Company, on its own behalf and as Successor-in-Interest to certain American National Fire Insurance Company policies and American Fire & Casualty Company (“Plaintiff Insurance Companies”) have moved for summary judgment on its claim for a declaratory judgment that it need not defend and indemnify defendants in Thomas and Ruth Coelho v. GE Aquarium, Inc. d/b/a Zoos Pet

Center, April Term 2003 No. 2551. The Coelho's filed a lawsuit against GE Aquarium, Inc. d/b/a Zoos Pet Center, George Strickland and Gerzozian Enterprises, Inc. d/b/a Zoo's Pet Center alleging that the defendants in the underlying action (defendants herein) sold dogs in their Philadelphia and New Jersey pet stores in poor health and with numerous health problems between 1996 to the present. The Coehlo's allege causes of action for violation of the Unfair Trade Practices and Consumer Protection Act ("UTPCPL") 75 Pa. C.S.A. § 201-2, 201-3, 201-9.2 (a), violation of the New Jersey Consumer Fraud Act, N.J. S.A. § 58: 8-2, breaches of express and implied warranties, intentional misrepresentation, negligent misrepresentation, negligence and gross negligence. On February 13, 2004, the negligence counts against all defendants were dismissed as well as all claims for punitive damages in the underlying action.

On May 4, 2004, GE Aquarium, Inc., et. al. v. Harleystown Insurance Company, June Term 2003 No. 0038 was consolidated with Ohio Casualty Insurance Company v. Gurotzian Enterprise, October Term 2004 No. 3375.¹ Thereafter, Plaintiff Insurance Companies filed the instant motion for summary judgment.

DISCUSSION

To discern an insurer's duty to defend under the terms of an insurance contract, a reviewing court must ascertain the scope of coverage stated in the contract and analyze the allegations of the insured's complaint. Mistick, Inc. v. Northwestern Nat'l Cas. Co., 806 A.2d 39, 41 (Pa. Super. 2002). "The obligation to defend arises whenever the complaint filed by the injured party may potentially come within the coverage of the policy." Id (quoting Britamco Underwriters, Inc. v. Weiner, 431 Pa. Super. 276, 636 A.2d

¹ In a separate order and opinion, the court considered preliminary objections and a motion for summary judgment filed in GE Aquarium, Inc. v. Harleystown insurance company, June Term 2003 No. 0038.

649, 651 (Pa. Super. 1994). “Where an insurer relies on a policy exclusion as the basis for its denial of coverage and refusal to defend, the insurer has asserted an affirmative defense and, accordingly, bears the burden of proving such defense.” Id. (quoting Madison Constr. Co. v. Harleysville Mut. Inc. Co., 557 Pa. 595, 735 A.2d 100, 106 (Pa. 1999)).

Summary judgment should be granted “if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, to show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” Pa. R. Civ. P. 1035 (b). Whether a particular loss falls within the coverage of an insurance policy is a question of law to be decided by a court on a motion for summary judgment in a declaratory judgment action. Erie Ins. Exchange v. Transamerica Ins. Co., 516 Pa. 574, 533 A.2d 1363 (1987).

Plaintiff Insurance Companies provided liability coverage to defendants at the time of the alleged injuries which form the basis of the underlying action. Ohio Casualty is the successor in interest to American National Fire Insurance Company. Defendants are seeking coverage under Ohio Casualty’s Business Liability section of the policy. The Ohio Casualty policy states in part the following:

A. Coverages

1. Business Liability

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury”, “property damage”, “personal injury” or “advertising injury” to which this insurance applies...
(Businessowners’ Liability Coverage Form pg. 1 of 14, Praeipce to Substitute (Exhibit “I”).

Under the policy “bodily injury” is defined as “bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.” (Id. p.11 of 14). A review of the underlying action demonstrates that the only allegation of injury alleged is emotional distress. (Exhibit “B” Dfts. Mt. for SJ, Amended Complaint ¶ 10 (e)). Pennsylvania courts have soundly rejected the contention that policy definitions of injury or bodily injury encompass mental or emotional harm. Jackson v. Travelers Ins. Co., 414 Pa. Super. 336, 606 A.2d 1384 (1992); *see also* Kline v. Kemper Group, 826 F.Supp. 123, *aff’d*, 22 F.3d 301 (3d Cir. 1994); ARC Water Treatment Company of Pa., Inc. v. Hartford Cas. Ins. Co., 2002 U.S. Dist. Lexis 11523 (E. D. Pa. 2002), Legion Indem. Co. v. CareStat Ambulance, Inc., 152 F. Supp. 2d 707 (E.D. Pa. 2001). The Pennsylvania Superior Court has also determined that physical symptoms that result from mental and emotional harm do not constitute “bodily injury” for purposes of insurance law. Zerr v. Erie Ins. Exch., 446 Pa. Super. 451, 667 A.2d 237 (Super. 1995).

In the case at bar, absent from the complaint are any allegations that defendants suffered any physical or bodily harm. Consequently, defendants’ injuries clearly fall outside the policy definition of “bodily injury.”

Moreover, the underlying complaint also fails to allege any allegations of “property damage” as defined by the policy. The Ohio Casualty policy defines “property damage” as follows:

“Property damage” means:

- a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
- b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the “occurrence” that caused it.

(Substituted Exhibit “T” Policy p. 14 of 14)

Excluded from such coverage is “Property damage” to “Your Product” arising out of it or any part. “Your Product” is defined under the policy as

- a. Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:
 - (1) You;
 - (2) Others trading under your name; or
 - (3) A person or organization whose business or assets you have acquired; and
- b. Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.

“Your product” does include”:

- a. Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of “your product”, and
- b. The providing of or failure to provide warnings or instructions.

“Your product” does not include vending machines or other property rented to or located for the use of others but not sold. (Id. p. 14 of 14).

In the case at bar, the underlying action alleges damage to defendants’ property (pets). Since the underlying action alleges that the pets themselves constitute the property damage, no coverage exists since the property damage arises from the product itself.²

Additionally, the damages alleged in the underlying action, reimbursement of veterinary expenses, are economic and intangible in nature and not subject to coverage under the policy. There is no duty to defend a claim asserting solely intangible economic losses because such losses do not constitute damage to injury to tangible property.

² Defendants argue that coverage exists under the subcontractor exception to “Your Work” provision. After reviewing the allegations of the underlying action as well as the pertinent policy provisions, the court finds that the underlying complaint alleges damage to goods (pets) not work performed by subcontractors.

International Ins. Co. v. St. Paul Fire & Marine Ins. Co., 1988 U.S. Dist. Lexis 12215 at *18 (E.D. Pa. 1988). Since the claimed harm in the underlying action is not encompassed by the policy definitions of “bodily injury” or “property damage”, Ohio Casualty does not have a duty to defend plaintiffs in the underlying action.³

Furthermore, the general liability policy requires that the bodily injury or property damage must be caused by an “occurrence”. The policy defines “occurrence” as an accident, including continuous or repeated exposure to substantially the same general harmful conditions. (Substituted Exhibit “I” p. 13 of 14). On February 13, 2004, the court dismissed the negligence claims from the underlying complaint. The remaining claims are those for fraud, breach of warranty and violations of the Pennsylvania and New Jersey consumer protection statutes. It is clear from the overall reading of the allegations within the amended complaint that the conduct alleged therein is not accidental but can be construed as deceptive and intentional misrepresentations regarding the pets’ health. Such conduct does not fall with the terms of the business liability policy provided by Ohio Casualty. See Sclabassi v. Nationwide Mut. Fire Ins. Co., 789 A.2d 699, 703 (Pa. Super. 2001) (intentional acts are not “occurrences”); Freestone v. New Eng. Log Homes, Inc., 819 A.2d 550, 553 (Pa. Super. 2003) (Pennsylvania law does not recognize the applicability of a general liability policy to a breach of warranty claim); Feeney v. Disston Manor Pers. Care Home, Inc., 849 A.2d 590, 597 (Pa. Super. 2004) (The purpose of the UTPCPL is to protect the public from fraud and unfair or deceptive business practices. One of the elements necessary to prove fraud is intent or misleading another into relying upon the misrepresentation.).

³ The policy at issue also covers injuries for advertising injuries and personal injuries. The underlying action fails to allege any injuries which satisfy the definition of either.

Consequently, there is no duty to defend these claims since the claims do not fall within the definition of “Occurrence” as defined under the policy.

CONCLUSION

For foregoing reasons, Plaintiffs Ohio Casualty Insurance Company, on its own behalf as Successor-in-Interest to certain American National Fire Insurance Company policies and American Fire & Casualty Company’s Motion for Summary Judgment is Granted and Plaintiffs have no obligation to defend or indemnify Gurotzian Enterprises, t/a Zooz Pet Center, GE Aquarium, Inc., d/b/a Zooz Pet Center and George Strickland in the underlying action pending in Philadelphia County, Pennsylvania at April Term 2003 No. 2551.

An order consistent with this opinion will follow.

BY THE COURT,

C. DARNELL JONES, II