

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

PRUDENTIAL PROPERTY & CASUALTY INSURANCE COMPANY, Plaintiff, v. LAURA and JAY BRYAN, STACY MILLER and BARBARA WESTERFER, Defendants.	: MAY TERM, 2004 : No. 0621 : Commerce Program : Superior Court Docket No. 492 EDA 2005
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OPINION

Albert W. Sheppard, Jr., J. March 4, 2005

This Opinion is submitted relative to defendant’s appeal of this court’s Order of January 19, 2005 granting plaintiffs’ Motion for Summary Judgment and denying defendants’ cross-Motion for Summary Judgment.

For purposes of this appeal, this court submits and relies upon its Opinion of January 19, 2005 filed contemporaneously with the appealed-from Order. This prior Opinion is attached as Appendix “A” and made a part of this submission.

For the reasons set forth in the prior Opinion (Appendix “A”), this court respectfully submits that its January 19th Order should be affirmed.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

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

PRUDENTIAL PROPERTY & CASUALTY INSURANCE COMPANY, Plaintiff,	: MAY TERM, 2004
v.	: No. 0621
LAURA and JAY BRYAN, STACY MILLER and BARBARA WESTERFER, Defendants.	: Commerce Program : Control Number 110758

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OPINION

Albert W. Sheppard, Jr., J. January 19, 2005

Presently before the court is plaintiff Prudential Property & Casualty Insurance Company's ("Prudential") Motion for Summary Judgment and the Cross Motions for Summary Judgment of defendants, Laura and Jay Bryan ("Bryan") and Barbara Westerfer ("Westerfer"). For the reasons discussed, Prudential's Motion for Summary Judgment is granted and defendants' Cross Motions for Summary Judgment are denied.

BACKGROUND

Prudential filed this declaratory judgment action seeking a determination of the parties' respective rights and responsibilities under a contract of insurance issued to

APPENDIX "A"

Laura and Jay Bryan. Prudential claims that the Bryan's are not entitled to a defense or indemnity under their homeowner's insurance policy for an action filed against the Bryans by Westerfer (Westerfer v. Bryan, February Term 2004 No. 3108 ("underlying action")).

The complaint in the underlying action alleges that two minor children of Jay and Laura Bryan, as well as the Bryans, engaged in a continual pattern of harassment, which included physical assault against plaintiff and her minor children, verbal and physical threats, BB gunshots fired through the plaintiff's house windows, BB guns pointed at plaintiff's minor children and other acts of physical and emotional harassment. The acts took place on the block in which all parties resided in Philadelphia. As a result of this conduct, Westerfer filed the underlying action alleging two causes of action. Count I alleges that because of the defendants' "negligent, careless or intentional acts" Westerfer was obliged to undergo medical treatment and has incurred medical expenses. Count II alleges a claim for negligent supervision by the Bryans of their two minor children.

DISCUSSION

The issue involves the proper construction of the insurance policy. To discern an insurer's duty to tender a defense 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 649, 651 (Pa. Super. 1994)). Thus, the allegations set forth in an underlying complaint dictate

whether an insurer is obligated to defend an action against an insured. United Services Auto. Asso v. Elitzky, 358 Pa. Super. 362, 517 A.2d 982, 985 (Pa. Super. 1986). The court decides after discerning the facts in the underlying complaint, whether the policy would provide coverage. D'Aurio v. Zurich Ins. Co., 352 Pa. Super. 231, 507 A.2d 857, 859 (Pa. Super. 1986). “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. Ins. 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, 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. Exch. v. Transamerica Ins. Co., 516 Pa. 574, 533 A.2d 1363 (1987).

In the underlying action, Ms. Westerfer seeks damages allegedly caused when the Bryans and their minor children engaged in a pattern of harassment which included physical assaults, verbal and physical threats and the firing and pointing of BB guns at Westferer and her family. Westerfer alleges that the acts were “negligently, carelessly or intentionally” performed by the Bryans and that the Bryans negligently supervised their children.

The Prudential policy provides that it does not cover bodily injury or property damage:

- a. which results from an act
 - (1) that is intended by any **insured** to cause harm. (Exhibit “A” of Exhibit “1”).

This language unambiguously excludes coverage for acts that are intended by any insured to cause harm.

Here, the Complaint alleges a pattern of harassment consisting of physical assault, verbal and physical threats, and shooting and pointing of a BB gun. The complained of conduct requires an intent on the part of the actor to carry out that conduct. Thus, this court finds that the conduct alleged constitutes intentional conduct which is excluded from coverage under Section II a (1) of the Prudential policy.

The court finds defendants reliance on the language “negligent, careless or intentional” unpersuasive. The particular cause of action that a complainant pleads is not determinative of whether coverage has been triggered. Erie Ins. Exch. v. Fidler, 808 A.2d 587, 590 (Pa. Super. 2002) (allowing the language of the complaint alone to control coverage questions would “encourage litigation through the use of artful pleadings designed to avoid exclusions.”). Rather, it is the facts alleged that trigger a duty to defend. “If 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.” Agora Syndicate v. Levin, 977 F.Supp. 713, 715-16 (E.D. Pa. 1997) (applying Pennsylvania law).

The Supreme Court’s decision in Mutual Benefit Ins. Co. v. Haver, 555 Pa. 534, 725 A.2d 743 (1999), is instructive. In that case, which involved a malpractice action

instituted against a pharmacist, the factual averments in the underlying complaint established that the pharmacist acted intentionally rather than negligently. In holding that a malpractice insurance policy did not apply to the underlying lawsuit, our Supreme Court ruled that the facts contained in the underlying complaint must be examined to determine the existence of coverage and that averments of negligence which ring hollow under the recited facts cannot create coverage where none exists. The court stated that “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.” *Id.* Here the underlying complaint fails to allege any facts which constitute negligence.

The underlying action also alleges a claim for negligent supervision (count II). Whether the Prudential policy covers the negligent supervision claim against the Bryans depends upon whether Bryans’ obligations under the policy are joint or several. *See Allstate Ins. Co. v. Kenney*, 2003 U.S. Dist. Lexis 18251 *14 (E.D. Pa. 2003).

The language of the intentional act exclusion of the Prudential policy states that there is no coverage for an act that is intended by “any insured”. Pennsylvania courts have held that where an insurance policy specifically excludes coverage for loss resulting from the intentional actions of “any” or “an” insured, as opposed to “the insured”, the insureds’ obligations under the policy are joint, and the prohibited acts of one insured bar all others from coverage. *See McAllister v. Millville Mut. Ins. Co.*, 433 Pa. Super. 330, 640 A.2d 1283, 1288 (1994). *See also General Accident Ins. Co. of Am. v. Allen*, 708 A.2d 828, 832 (Pa. Super. 1998). Accordingly, this court concludes that the language of the intentional acts exclusion imposes a joint obligation on the Bryans and that there can

be no coverage for any insured arising out of damage caused by the intentional act of another insured. Thus, Prudential has no duty to defend or indemnify against the claim for negligent supervision.

Further, the policy sets forth another exclusion which precludes coverage for the negligent supervision claim. The Prudential policy provides that it does not cover bodily injury or property damage

- m. which results from the actual or attempted act by any **insured** if any:
 - (1) abuse, molestation, exploitation, assault or other mistreatment of any person; or
 - (2) rape, sexual assault or other sexual abuse of any person.

In addition, **we** will not pay for damages arising out of the failure of any **insured** to take action to insure that the acts listed in items (1) and (2) would not be committed by any other person.

(See Exhibit “A” of Exhibit “1”).

The exclusion contained in Section II paragraph “m” expressly provides that Prudential will not pay for damages which arise from a failure of an insured to take action to insure that the acts of assault or other mistreatment of any person would not be committed.

Here, notwithstanding the nomenclature chosen to identify the count, the underlying complaint alleges that the Bryans are liable to Westerfer since they failed to prevent their children from physically assaulting, physically and verbally threatening and pointing a BB gun at the Westerfer’s children and shooting the BB gun into the home. Since defendants seek insurance coverage for the Bryans failure to supervise their children when they assaulted and mistreated the Westerfers, it is clear that Prudential does not have a duty to defend or indemnify defendants.¹

¹ The court does not find persuasive defendants’ argument that paragraph “m” is ambiguous.

CONCLUSION

For these reasons, plaintiff's Motion for Summary Judgment is granted, defendants' cross motions for summary judgment are denied, and the court will issue a declaratory judgment in plaintiff's favor. An Order consistent with this Opinion will be issued

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

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

PRUDENTIAL PROPERTY	: MAY TERM, 2004
& CASUALTY INSURANCE COMPANY,	
Plaintiff,	: No. 0621
v.	
LAURA and JAY BRYAN,	: Commerce Program
STACY MILLER and BARBARA WESTERFER,	
Defendants.	: Control Number 110758

ORDER

AND NOW, this 19th day of January 2005, upon consideration of plaintiff, Prudential Property & Casualty Insurance Company's, Motion for Summary Judgment and defendant Laura and Jay Bryan and Barbara Westerfer's respective Cross Motions for Summary Judgment, the respective memoranda, all matters of record and in accord with the contemporaneous Opinion filed of record, it is **ORDERED** that plaintiff's Motion is **Granted**, and that defendants' cross motions are **Denied**. The plaintiff has no duty to defend or indemnify defendants in the action filed in the Court of Common Pleas for Philadelphia County at February Term 2004 No. 3108.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.