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

PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE COMPANY, Plaintiff,	:	November Term 2004
v.	:	Term 4380
ELMWOOD GITTMAN, JR., LISA ANNE GITTMAN, JAMES SPOTTS, ELIZABETH A. SPOTTS and PATRICIA FONASH, Defendants.	:	COMMERCE PROGRAM Control Number 021996

ORDER

AND NOW, this 25th day of May, 2005, upon consideration of the Motion for Summary Judgment of Pennsylvania National Mutual Casualty Insurance Company, no response in opposition, Memorandum, all matters of record and in accord with the contemporaneous Opinion filed of record, it hereby is **ORDERED** and **DECREED** that Plaintiff's Motion for Summary Judgment is **Granted** and Plaintiff does not have a duty to defend or indemnify Elwood Gittman, Jr. and Lisa Gittman for the claims asserted in Patricia Fonash v. Dean Keyes Towing, Inc., et. al., No. 96-005278, Court of Common Pleas of Bucks County, Pennsylvania.

BY THE COURT,

____
C. DARNELL JONES, II, J.

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

PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE COMPANY, Plaintiff,	:	November Term 2004
v.	:	Term 4380
ELMWOOD GITTMAN, JR., LISA ANNE GITTMAN, JAMES SPOTTS, ELIZABETH A. SPOTTS and PATRICIA FONASH, Defendants.	:	COMMERCE PROGRAM Control Number 021996

OPINION

JONES, II, J.

Presently before the court is the uncontested Motion for Summary Judgment of Pennsylvania National Mutual Casualty Insurance Company ("Plaintiff" or "Penn National"). For the reasons discussed below, Plaintiff's Motion is granted.

BACKGROUND

On or about July 22, 1994, Elwood Gittman, James Spotts and Patricia Fonash were operating automobiles that were involved in a single accident near Warrington, Pennsylvania. At the time of the accident, Gittman was operating a flat bed recovery truck owned by Dean Keyes Towing, Gittman's employer. The accident occurred while Gittman was in the course of his employment.

As a result of the accident, Patricia Fonash filed suit against Dean Keyes Towing, Elwood and Lisa Gittman in the Court of Common Pleas for Bucks County, captioned as <u>Patricia Fonash v. Dean Keyes Towing, Inc., et. al</u>., No. 96-005278.

At the time of the accident, Gittman carried personal auto coverage with Penn National which excluded coverage for "bodily injury" which arises out of the maintenance or use of any vehicle while any person is employed or otherwise engaged in any "business".

DISCUSSION

"A court's first step in a declaratory judgment action concerning insurance coverage is to determine the scope of coverage." General Accident Insurance Co. of America v. Allen, 547 Pa. 693, 706, 692 A.2d 1089, 1095 (1997). Under Pennsylvania law, the primary consideration in interpreting a contract, including an insurance contract, is the language of the contract itself. Bateman v. Motorists Mut. Ins. Co., 527 Pa. 241, 590 A.2d 281, 283 (1991). That language must be construed in accordance with its plain and ordinary meaning, O'Brien Energy Sys., Inc. v. American Employers' Ins. Co., 427 Pa. Super. 456, 461, 629 A.2d 957, 960 (1993), appeal denied, 537 Pa. 633, 642 A.2d 487 (1994), and the task of construing an insurance policy is generally performed by a court, rather than a jury, Standard Venetian Blind Co. v. American Empire Ins. Co., 503 Pa. 300, 304, 469 A.2d 563, 566 (1983). An insurer has a duty to indemnify its insured when it is established that the damages of the insured are within the policy coverage. Caplan v. Fellheimer Eichen Braverman & Kaskey, 68 F.3d 828, 831 n.1 (3d Cir. 1995). In addition, exclusions in insurance policies are strictly construed against the insurer. First Pennsylvania Bank, N.A. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 397 Pa. Super. 612, 618, 580 A.2d 799, 802 (1990).

The Penn National personal auto policy issued to Gittman provides for coverage for "bodily injury" for which any insured becomes legally responsible because of an automobile accident. The policy however excludes from coverage any bodily injury arising from the maintenance or use of any vehicle while any person is employed or otherwise engaged in any "business". Exhibit "A" PP00 01 12 89 p. 3 ¶ 7.

Here, the uncontested record evidence demonstrates that at the time and place of the accident Gittman was operating his employer's recovery vehicle in the course and scope of his employment with Dean Keyes Towing. Consequently, the coverage provided by the Penn National policy is not applicable to the claims asserted against Gittman by Fonash and Penn National neither has an obligation to defend nor indemnify Gittman against the claims asserted in the Fonash lawsuit.

CONCLUSION

For the foregoing reasons, the Motion for Summary Judgment of Plaintiff Penn National Mutual Casualty is Granted and Penn National has neither a duty to defend nor a duty to indemnify Gittman for the claims asserted in Fonash v. Dean Keyes Towing, Inc., et. al., No. 96-005278, Court of Common Pleas of Bucks County Pennsylvania. An order consistent with this Opinion will follow.

BY THE COURT,

____

C. DARNELL JONES, II, J.