

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

UNITED NATIONAL SPECIALTY	:	DECEMBER TERM, 2004
INSURANCE CO.,	:	
	:	NO. 03045
Plaintiff,	:	
	:	COMMERCE PROGRAM
v.	:	
	:	
GUNBOAT, INC. t/a GUNBOAT BAR	:	
AND GRILL, and EDWARD	:	
ANDERSON, JR.,	:	
	:	
Defendants.	:	

**OPINION**

Plaintiff United National Specialty Insurance Co. (“UNSIC”) brought this action to determine whether it must indemnify defendant Gunboat, Inc. (“Gunboat”) under a Liquor Liability Policy (the “Policy”) for the personal injury jury verdict obtained by defendant Edward Anderson, Jr. (“Anderson”) arising out of a physical altercation that occurred at the Gunboat Bar. In the underlying action brought by Anderson against Gunboat and Derek Keough (“Keough”), the jury found in favor of Anderson and awarded him damages in the amount of \$210,000 against Gunboat and Keough, Gunboat’s employee.<sup>1</sup>

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<sup>1</sup> Jury Verdict Sheet, Anderson’s Motion for Summary Judgment, Exhibit J.

Both UNSIC and Anderson<sup>2</sup> moved<sup>3</sup> for summary judgment on the issue of whether indemnification is required under the Liquor Liability Policy. On January 26, 2006, this court granted UNSIC's Motion for Summary Judgment as to Anderson's estoppel claim, denied the remainder of UNSIC's Motion, and denied Anderson's Motion for Summary Judgment. This court subsequently conducted a non-jury trial with respect to whether the jury's verdict in the underlying action was based on any claim covered by the Policy. On May 8, 2006, this court entered judgment in favor of UNSIC and held that UNSIC has no duty to indemnify Gunboat or Keough for the verdict rendered in the underlying action.<sup>4</sup> Anderson now appeals from this court's Orders of January 26, 2006<sup>5</sup> and May 8, 2006. For the reasons set forth below, those Orders should be affirmed.

The applicable Liquor Liability Policy states:<sup>6</sup>

The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury to which this insurance applies, sustained by any person if such liability is imposed upon the insured by reason of the selling, serving or giving of any

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<sup>2</sup> UNSIC obtained a default judgment against Gunboat in this action.

<sup>3</sup> UNSIC filed its "motion" as a response to Anderson's motion. Under the Case Management Order in this action, UNSIC's filing, while timely as a response, is untimely as a motion. However, the court may consider and rule upon an untimely motion for summary judgment, where the interests of justice are served and the opposing party is "given a full and fair opportunity to supplement the record and to oppose the motion" Pa. R. Civ. P. 1035.3(e).

<sup>4</sup> Other courts have previously determined that there is no insurance coverage applicable to the judgment under Keough's homeowner's policy or Gunboat's general liability policy. Regis Insurance Co. v. Gunboat Inc., July Term, 2004, No. 04195 (Phila. Co., Jan. 6, 2005) (Sheppard, J.); Allstate Insurance Co. v. Keough, June Term, 2004, No. 01580 (Phila. Co. Mar. 10, 2005) (Jones, J.), *aff'd*, 1155 EDA 2005 (Pa. Super. Feb. 1, 2006).

<sup>5</sup> Anderson appeals this court's partial granting of UNSIC's motion for summary judgment on Anderson's estoppel claim. Anderson also appeals this court's denial of his summary judgment motion. The denial of a motion for summary judgment is not a final or collateral order from which appeal may be taken. Melvin v. Doe, 575 Pa. 264, 268, 836 A.2d 42, 44 (2003).

<sup>6</sup> "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 Ins. Co. of America v. Allen, 547 Pa. 693, 706, 692 A.2d 1089, 1095 (1997).

alcoholic beverage at or from the insured premises, and the company shall have the right and the duty to defend any suit against the insured seeking such damages . . .<sup>7</sup>

UNSIIC appropriately and reasonably undertook the defense of Gunboat in the underlying action because the Complaint contained at least one claim within the scope of coverage.<sup>8</sup>

When it assumed the defense, UNSIIC issued a ‘reservation of rights letter’ stating that there was no coverage under the Policy for punitive damages.<sup>9</sup> Seven months later,

UNSIIC sent Gunboat a second ‘reservation of rights letter’ which said:

now that the case is at the end of discovery, [UNSIIC] is placing [Gunboat] on notice that there is no evidence of liquor liability on the part of [Gunboat] and that coverage therefore does not apply under [the Policy].<sup>10</sup>

Anderson claims that UNSIIC must indemnify Gunboat because the jury’s verdict that Gunboat was negligent was in fact based on liquor liability. Anderson has the burden of proving that the claim upon which judgment was entered in the underlying action falls within the coverage afforded by the Policy.<sup>11</sup> Anderson has failed to meet this burden.

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<sup>7</sup> Liquor Liability Policy, Anderson’s Motion for Summary Judgment, Exhibit A.

<sup>8</sup> “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.” General Accident, 547 Pa. at 706, 692 A.2d at 1095. In his Complaint, Anderson alleged that Gunboat was negligent in serving alcohol to Keough and others, in failing to recognize that Keough and others were intoxicated, and in failing to train its staff to recognize intoxication. All these claims arguably fall within the coverage of the Liquor Liability Policy. Anderson further alleged that Gunboat was negligent in failing to provide security, failing to summon law enforcement, and failing to perform background checks on its employees. All these claims arguably do not fall within the Policy’s coverage.

<sup>9</sup> Letter dated May 14, 2004, from UNSIIC to Gunboat, Anderson’s Motion for Summary Judgment, Exhibit D.

<sup>10</sup> Letter dated December 28, 2004 from UNSIIC’s counsel to Gunboat, Anderson’s Motion for Summary Judgment, Exhibit G.

<sup>11</sup> Miller v. Boston Ins. Co., 420 Pa. 566, 570, 218 A.2d. 275, 277 (1966).

The record in the underlying action reveals that the court granted Gunboat's pretrial Motion and ordered:

that all parties are precluded from referencing that any individual allegedly involved in the incident on January 20, 2003 was intoxicated. . . .<sup>12</sup>

As a result of this ruling, all liquor liability claims based upon intoxication were effectively dismissed before trial, so no such claim could possibly have been the basis for the jury verdict. However, Anderson asserts that the jury verdict was based on the claim that Gunboat was negligent in permitting Anderson, a minor, to consume alcohol at the bar. At trial in this action, Anderson proffered the trial transcript in the underlying action in support of his argument that the jury verdict was based on Gunboat's negligent serving of a minor. This court has reviewed the transcript, particularly the jury instructions given in the underlying action, and found no evidence that this or any other liquor liability claim was ever put before the jury. Accordingly, Anderson has failed to prove that any covered claim served as the basis for the verdict in the underlying action.

Anderson next asserts that UNSIC is estopped from denying coverage because its second reservation of rights was untimely and therefore prejudicial. Anderson claims that UNSIC must pay the verdict regardless of the basis for the jury's finding of negligence because UNSIC did not specify in its first reservation of rights letter that the Policy covered only the liquor liability claims asserted in the Complaint. Defendant's claim of estoppel is simply mistaken.<sup>13</sup>

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<sup>12</sup> Order in underlying action dated March 14, 2005, UNSIC's Cross-Motion for Summary Judgment, Exhibit E.

<sup>13</sup> "To work an estoppel, there must be such conduct on the part of the insurer as would, if the insurer were not estopped, operate as a fraud on some party who has taken or neglected to take some action to his own prejudice in reliance thereon." *Wasilko v. Home Mut. Cas. Co.*, 210 Pa. Super. 322, 328, 232 A.2d 60, 63 (1967). "It is well established . . . that the burden rests on the party asserting the estoppel to

First, the court notes that UNSIC's disclaimer of coverage at the close of discovery was not untimely. In Brugnoli v. United National Insurance Company, the Superior Court succinctly described when a liability insurer may be estopped from disclaiming coverage:

It is generally recognized that a liability insurer will not be estopped to set up the defense that the insured's loss was not covered by the insurance policy, notwithstanding the insurer's participation in the defense of an action against the insured, if the insurer gives timely notice to the insured that it has not waived the benefit of its defense under the policy. However, a reservation of rights in this respect, to be effective, must be communicated to the insured. It must fairly inform the insured of the insurer's position and must be timely, although delay in giving notice will be excused where it is traceable to the insurer's lack of actual or constructive knowledge of the available defense.<sup>14</sup>

UNSIC could not determine whether coverage should have been afforded until the close of discovery in the underlying action. When UNSIC determined that there was no evidence to support Anderson's liquor liability claims, it timely declined coverage. Discovery in the underlying action closed on November 1, 2004. One month later, on December 6, 2004, at the settlement conference held in the underlying action, UNSIC informed Anderson that it was contesting coverage.<sup>15</sup> Twenty-two days later, on December 28, 2004, UNSIC sent its reservation of rights letter to Gunboat and also commenced this declaratory judgment action.<sup>16</sup> Although UNSIC was unable to serve

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establish such estoppel by clear, precise and unequivocal evidence." Novelty Knitting Mills, Inc. v. Siskind, 500 Pa. 432, 435-436, 457 A.2d 502, 503-4 (1983).

<sup>14</sup> 284 Pa. Super. 511, 518, 426 A.2d 164, 167 (1981).

<sup>15</sup> Affidavit of Anderson's counsel, Anderson's Motion for Summary Judgment, Exhibit L.

<sup>16</sup> Letter dated December 28, 2004 from UNSIC's counsel to Gunboat, Anderson's Motion for Summary Judgment, Exhibit G.

the Complaint until February 10, 2005, Anderson knew of UNSIC's position on coverage two months earlier.<sup>17</sup> UNSIC's denial of coverage was timely.<sup>18</sup>

Anderson does not claim that Gunboat was prejudiced in any way by the timing of the second reservations of rights letter. Anderson argues that he, rather than Gunboat, was prejudiced by UNSIC's second reservation of rights letter because he submitted to an Independent Medical Examination ("IME") after the discovery deadline had passed and he expended \$30,000 in prosecuting the underlying action.<sup>19</sup> Even if the court were to deem prejudice to the party who obtained a substantial verdict a factor, in this case Anderson has not demonstrated any prejudice by UNSIC's reservation of rights except for UNSIC's legitimate refusal to pay.

Anderson does not allege that the IME cost him anything, nor does he claim that the result of that medical exam negatively affected him at trial in the underlying action. Instead, he obtained a substantial verdict in his favor. He was not prejudiced by submitting to the IME even if untimely. Furthermore, Anderson alleges that "at trial, defendant Gunboat offered \$50,000 to resolve the case," but Anderson refused the offer because "it would have left him with nothing after litigation costs, welfare liens and attorney's fees were paid."<sup>20</sup> Obviously, there was no prejudice. Additionally, Anderson knew as of December 6, 2004, that UNSIC denied coverage, and therefore could not

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<sup>17</sup> Affidavit of Anderson's counsel, Anderson's Motion for Summary Judgment, Exhibit L.

<sup>18</sup> See Pfeiffer v. Grocers Mut. Ins. Co., 251 Pa. Super. 1, 379 A.2d 118 (1977) (insurer was not estopped from denying coverage, even though it did not raise grounds for denying coverage until the hearing on the claim); Wasilko, 210 Pa. Super. at 328, 232 A.2d at 63 (insurer was not estopped from denying coverage when it originally represented that it would honor plaintiff's claim, but subsequently denied coverage).

<sup>19</sup> Affidavit of Anderson's counsel, Anderson's Motion for Summary Judgment, Exhibit L.

<sup>20</sup> Anderson's Motion for Summary Judgment, ¶ 32.

possibly and certainly not reasonably have incurred any costs after that date in reliance on UNSIC providing coverage.

Since UNSIC's denial of coverage was timely and it caused no prejudice to any party, Anderson has no valid estoppel claim. Since Anderson did not proffer any evidence that a claim covered by the Policy was submitted to the jury in the underlying action, judgment was properly entered for UNSIC. For all the foregoing reasons, this court's verdict should be affirmed.

**Dated: June 28, 2006**

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**MARK I. BERNSTEIN, J.**