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

PATRICIA M. EGGER, Administratrix of the Estate of CHARLES EGGER, Deceased	: MAY TERM, 2001
Plaintiff	: No. 1908
v.	: Commerce Program
GULF INSURANCE COMPANY, BROWNYARD GROUP, INC., W.H. BROWNYARD CORPORATION and/or BROWNYARD BROTHERS, INC.	:
Defendants,	:
v.	:
AON RISK SERVICES, INC. OF PENNSYLVANIA, and BROKERAGE PROFESSIONALS, INC.	:
Additional Defendants.	: Control Nos. 051324, 051341

O R D E R

AND NOW, this 11th day of September 2002, upon consideration of the cross Motions for Summary Judgment of plaintiff, Patricia M. Egger, Administratrix of the Estate of Charles Egger ("Egger"), and defendant, Gulf Insurance Company ("Gulf"), the pertinent responses, the respective memoranda, all other matters of record, and in accord with the Opinion being filed contemporaneously with this Order, it is hereby **ORDERED** that:

1) Egger's Motion for Summary Judgment is **Denied** because there exist genuine issues of material facts; and

2) Gulf's Motion for Summary Judgment is **Denied** because there exist genuine issue of material facts.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

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O P I N I O N

Albert W. Sheppard, Jr., J. ..... September 11, 2002

Plaintiff, Patricia M. Egger, Administratrix of the Estate of Charles Egger ("Egger"), and defendant, Gulf Insurance Company ("Gulf") have filed these cross Motions for Summary Judgment. For the reasons discussed, the motions are denied.

BACKGROUND

Egger commenced this action against Gulf to recover amounts Egger claims she is entitled to receive pursuant to the verdict in an underlying lawsuit[1] in which a jury found that one of Gulf's insured, Foulke Associates, Inc ("Foulke"), negligently caused the death of her husband, Charles Egger ("Mr. Egger"). Egger contends that under a $10 million umbrella insurance policy Gulf issued to Foulke ("umbrella policy"), she is entitled to receive $3,012,965.75, the amount unsatisfied from the $3,837,965.75 verdict.[2]

On September 5, 1997, Mr. Egger was granted access by Foulke's employees to clean a confined space on the roof of a scrubber unit at Philadelphia Electric Company's Eddystone power plant ("PECO"). While in this confined space, Mr. Egger was using a high pressure water jet to clean sulfur dioxide residue from this scrubber unit. After a sudden loss of water pressure to the jet, Mr. Egger lost his balance and the water jet came to rest near the back of his knee. When the water pressure unexpectedly came back on, the water pierced his leg and severed several arteries. Mr. Egger placed an emergency call for help to Foulke's personnel, however it took approximately twenty minutes for them to arrive to assist him. After arriving on the scene without rescue or first aid equipment, Foulke's personnel returned to Mr. Egger and determined that instead of administering first aid, they should first retrieve Mr. Egger from the confined space. In the meantime, Mr. Egger bled to death.

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1 Egger v. Foulke, et al., Nov. Term, 1998, No. 03980 (C.P. Phila. 1998)

2 Pursuant to a settlement agreement, Egger has received $825,000 from Foulke and Security Insurance Company of Hartford, Foulke's primary insurer.

Egger brought suit against Foulke for the death of Mr. Egger alleging, inter alia, failure to adequately train personnel, failure to adequately maintain rescue equipment at the confined space, failure to timely respond to Mr. Egger's emergency situation, and failure to administer timely first aid, such as placing a tourniquet on Mr. Egger's knee.[3]

On February 7, 2001, and before the jury verdict, Gulf denied umbrella coverage for Foulke. Soon thereafter, Egger and Foulke entered into a settlement agreement whereby in exchange for Egger's agreement not to enforce any excess judgment beyond the $1 million provided under Foulke's general liability insurance,[4] Egger agreed to accept $825,000 as well as an assignment of Foulke's rights under the Gulf umbrella policy. On February, 9, 2001, the jury returned its verdict in the amount of $3.5 million against Foulke. After Egger's motion for delay of damages was granted, the final judgement against Foulke totaled $3,837,965.75. Under the settlement agreement, Egger has received $825,000 from Foulke, but has yet to receive the remaining $3,012,965.75.

On May 18, 2001, Egger brought this action alleging breach of contract and bad faith claims against Gulf. On May 20, 2002, the parties filed these cross motions for summary judgment.[5]

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[3] Egger also brought claims against PECO and National Liquid Blasting, Inc, the manufacturer's of the water jet. Both claims were ultimately settled.

[4] Security Insurance Company of Hartford provided this $1 million general liability policy to Foulke.

[5] Defendants, Brownyard Group, Inc. W.H. Brownyard Corporation, Brownyard Brothers, Inc ("Brownyard defendants"), and additional defendant Brokerage Professionals, Inc ("BPI") filed briefs in support of Egger's Motion for Summary Judgment. The arguments raised by the Brownyard defendants and BPI mirror those of Egger.

DISCUSSION

I. Foulke's Assignment to Egger is Valid.

Initially, Gulf argues that absent an effective assignment of Foulke's rights to Egger, Egger has no standing to sue. Specifically, Gulf asserts that since the umbrella policy required Gulf's consent prior to an assignment, and Foulke did not obtain such consent, Foulke could not have assigned its rights under the policy to Egger. On the other hand, Egger argues that similar provisions in insurance policies have been interpreted not to prohibit assignments after a loss has occurred, but operate as a prohibition only prior to a loss. This court agrees and holds that the assignment was valid.

Pennsylvania law is unclear on this issue whether general stipulations prohibiting assignments absent an insurer's consent ("non-assignment clauses") should apply only to pre-loss assignments. Pennsylvania courts have, however, analyzed non-assignment clauses by considering the clear language used and the purposes for which the clauses were inserted. In National Memorial Services v. Metropolitan Life Insurance, 48 A.2d 143 (Pa. 1946), our Supreme Court was asked to determine whether life insurance benefits were assignable to pay an undertaker's bill. In holding that the clause was unenforceable, the National court explained that the event insured against by the insurance company had already occurred, namely the death of the policy holder. Thus, the amount of the claim was determined and the risk of non-payments of premiums facing the insurance company was no longer possible. Therefore, the National court concluded that there no longer existed a sound reason for the insurance company to limit or forbid assignment. In so holding, the National court relied on Couch Encyclopedia of Insurance stating:

> After a loss has occurred, the right of the insured or his successor in interest to the indemnity provided in the policy becomes a fixed and vested right; it is an obligation debt due from the insurer to the insured, subject only to such claims, demands or defenses as

> the insurer would have been entitled to make against the original insured . . . As a matter of fact, a provision in a policy, prohibiting as [sic] assignment after loss has occurred, is generally regarded as void, in that it is against public policy so to restrict the relation of debtor and creditor by restricting or rendering subject to the control of the insurer an absolute right in the nature of a chose in action.

48 A.2d 143, 144 (quoting Couch Encyclopedia of Insurance Laws, Vol. VI, §1459, p. 5275, 5277).

When considering non-assignment clauses, several federal courts, applying Pennsylvania law, have followed the approach espoused in National. In Viola v. Fireman's Fund Insurance Company, 965 F. Supp. 654 (E.D. Pa. 1997), a tort plaintiff commenced an action against an umbrella liability insurer to recover under the policy after obtaining judgment against its insured for assault. Faced with applying an assignment clause that required the consent of the insurer, the Viola court held that an assignment was valid even without consent of the insurer since the events - - there a court approved settlement - - that gave rise to the insured's indemnity claims against the insurer occurred prior to the assignment of rights to the plaintiff. Relying on National, the Viola court held that "[s]tipulations in policies forbidding assignments have no effect on the 'assignment of the policy or rights after the occurrence of the event, which creates the liability of the insurer[.]'" 965 F.Supp. at 659 (citation omitted).

Similarly, in Continental Casualty Co. v. Diversified Industries, Inc., 884 F.Supp. 937, 947 (E.D.Pa. 1995), the court held that where an injury, namely environmental damage caused by chemical pollutants, "which could potentially place liability upon the [insurers].. occurred prior to the assignment" the non-assignment provision did not preclude the insured from assigning its rights under its policies without the consent of the insurer. Relying on National, the court reasoned that "[b]ecause the assignment did not increase the amount of risk which the [insurers] will face, but merely changed the name of the party to whom any payment may be made, it passes muster under National []." Id at 948.

Although federal courts have relied on National in holding that non-assignment clauses did not preclude the insured from assigning its rights without the consent of the insurer, in two instances our Superior Court has chosen not to follow the Supreme Court's holding in National. The courts in both Fran and John's Doylestown Auto Center v. Allstate Insurance Co., 638 A.2d 1023 (Pa.Super.Ct. 1994) and High-Tech Enterprises, Inc. v. General Accident Insurance Co., 635 A.2d 639 (Pa.Super.Ct 1993), make no reference whatever to National. In striking down the assignments of the insureds, both courts merely looked to the plain language of the policies which required consent of the insureds prior to assignment. Fran and John's, 638 A.2d at 1025; High-Tech, 635 A.2d at 641-642. Thus, the approach used by both these courts is in direct conflict with our Supreme Court in National.

While there seems to be conflicting law in Pennsylvania regarding the assignability of rights under a policy requiring the insurer's prior consent, "the great majority of courts adhere to the rule that general stipulations in policies prohibiting assignments thereof except with the consent of the insurer apply only to assignments before loss, and do not prevent an assignment after loss." Couch on Insurance 3D 35:7 (1995). For example, courts in Delaware, Georgia, Wisconsin, Oregon, Iowa, and Texas all have held that clauses requiring the insurer's consent prior to a transfer of rights prohibit only the assignment of the rights before a loss occurs, not after. See e.g., Int'l Rediscount Corp. v. Hartford Accident and Indem. Co., 425 F.Supp. 669 (D. C. Del. 1997); Georgia Co-Operative Fire Association v. Borchardt & Co., 51 S.E. 429 (Ga. 1905); Straz v. Kansas Bankers Sur. Co., 986 F.Supp. 563, 569 (E.D. Wis. 1997); Spare v. Home Mutual Ins. Co., 17 F. 568 (D. Ore. 1883); Conrad Brothers v. John Deere Ins. Co., 640 N.W. 2d 231, 238 (Iowa 2001); McLaren v. Imperial Cas. & Indem. Co., 767 F.Supp. 1364, 1377 (N.D. Tex. 1991). In so holding, these courts have unanimously agreed that the "general rule is to prevent a liability or

indemnity insurance policy's express prohibition of an assignment without the consent of the insurer from barring an assignment of the policy or right thereunder after the event has occurred by which liability under the policy is fastened upon the insurer." Couch, 35:7 (citations omitted).

This court is persuaded that the rationale of National is the better view. Accordingly, this court concludes that Foulke's assignment to Egger was valid in that it occurred after the jury verdict in the underlying lawsuit. Following Gulf's denial of coverage, Hartford and Foulke negotiated a settlement with Egger and PECO whereby Egger agreed, inter alia, to an assignment of Foulke's rights under the Gulf policy in exchange for Egger's agreement to not enforce any excess judgment that may be returned by the jury against Foulke. Pl's Mem. of Law at 8. Gulf argues that the assignment is invalid because the agreement reached by Foulke and Egger occurred before the insured against loss of providing excess liability coverage, as it was entered into one day before the case went to the jury for a verdict. Def's Repl at 5, 6. However, although the assignment clause in the agreement between Egger and Foulke may have existed before the jury verdict, it was merely an agreement to assign and did not become an actual assignment until after the $3.5 million jury verdict. Further evidence of this is the written agreement attached to Egger's Complaint which shows that the execution date of the agreement was "March 15, 2001", over a month after the February 6, 2001, jury verdict. Complaint, Ex. C. Since Foulke assigned its rights under the Gulf policy to Egger after the loss (here the $3.5 million jury verdict), the assignment "passes muster" under our Supreme Court's holding in National and is therefore valid.

II. The Cross Motions for Summary Judgement are Both Denied as There Exist Genuine Issues of Disputed Material Facts.[6]

A proper grant of summary judgment depends upon an evidentiary record that either (1) shows the material facts are undisputed or (2) contains insufficient evidence of facts to make out a prima facie cause of action or defense. Basile v. H & R Block, Inc., 777 A.2d 95 (Pa. Super Ct. 2001). Under Pa.R.C.P. 1035.2(2), if a defendant is the moving party, he may make the showing necessary to support the entrance of summary judgment by pointing to materials which indicate that the plaintiff is unable to satisfy an element of his cause of action. Id. The non-moving party must adduce sufficient evidence on an issue essential to its case and on which it bears the burden of proof such that a jury could return a verdict favorable to the non-moving party. Id. When the plaintiff is the non-moving party, "summary judgment is improper if the evidence, viewed favorably to the plaintiff, would justify recovery under the theory [he] has pled." Id. However, "[s]ummary judgment is proper when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits demonstrate that there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Horne v. Haladay, 728 A.2d 954 (Pa.Super.Ct. 1999) (citing Pa.R.C.P. 1035.2). Summary judgment may only be granted in cases where it is "clear and free from doubt that the moving party is entitled to judgment as a matter of law." Id. (citations omitted).

Here, Gulf argues that given the nature of Foulke's "services provided, and the fact that these services were performed for separate monetary compensation, coverage for this incident is specifically excluded under the policy." Gulf's Mem. of Law at 25. Recently, in Wagner v. Erie Ins. Co., 2002 WL 1023106 (Pa.Super.Ct. 2002), our Superior Court clarified the proper procedure in

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[6] The Egger and Gulf motions address identical arguments, and are, therefore, discussed jointly.

interpreting insurance policies as follows:

> Interpretation of an insurance contract is a matter of law and is therefore generally performed by a court rather than by a jury. Madison Construction Co. v. The Harleysville Ins. Co., [735 A.2d 100, 106 (Pa. 1999).] "In interpreting the language of a policy, the goal is 'to ascertain the intent of the parties as manifested by the language of the written instrument.' " The Municipality of Mt. Lebanon v. Reliance Ins. Co., 778 A.2d 1228, 1231-1232 (Pa.Super.2001), quoting Madison Construction, supra at 606, 735 A.2d at 106. "Indeed, our Supreme Court has instructed that the 'polestar of our inquiry . . . is the language of the insurance policy.' " Id. at 1232, 735 A.2d 100, quoting Madison Construction, supra at 606, 735 A.2d at 106.
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> " 'Where . . . the language of the [insurance] contract is clear and unambiguous, a court is required to give effect to that language.' " Madison Construction, supra at 606, 735 A.2d at 106, [citations omitted]. When construing a policy, "[w]ords of common usage ... are to be construed in their natural, plain and ordinary sense ... and we may inform our understanding of these terms by considering their dictionary definitions."[citations omitted].
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> While a court must not "distort the meaning of the language or resort to a strained contrivance in order to find an ambiguity[,]" it must find that "contractual terms are ambiguous if they are subject to more than one reasonable interpretation when applied to a particular set of facts." Id. [citations omitted] "Where a provision of a policy is ambiguous, the policy provision is to be construed in favor of the insured and against the insurer, the drafter of the agreement." Id., (citations omitted).
>
> When an insurer… relies on a policy exclusion as the basis for its denial of coverage, it has asserted an affirmative defense and thus bears the burden of proving such a defense. [citations omitted]. To prevail, [insurer] must prove that the language of the insurance contract is clear and unambiguous; otherwise, the provision will be construed in favor of the insured. Id. Moreover, when the question is one of contract interpretation, public policy arguments are irrelevant. Madison Construction, supra at 611 n. 7, 735 A.2d at 108 n. 7.

2002 WL 1023106, at *4.

The portion of the policy which Gulf urges excludes Egger's claims is the Professional Liability Exclusion Endorsement. The exclusion states, in pertinent part:

> This policy does not apply to any error or omission, malpractice or mistake of a professional nature committed or alleged to have been committed by or on behalf of the insured in the conduct of any of the insured's business activities; however, this exclusion does not apply to the insured's operations only in connection with security guard or

investigative operations. Any coverage afforded hereunder shall apply excess of "underlying insurance" as listed in the schedule of underlying insurance attached to this policy, and then only for such liability for which coverage is afforded under said "underlying insurance."…

This policy is further extended to cover "Incidental Malpractice."

As used in this endorsement "Incidental Malpractice" means "bodily injury" resulting from the rendering of or failure to render the following services by an "insured":

A) Medical, Surgical, Dental, X-Ray or Nursing service or treatment or the furnishing of food or beverages in connection therewith; or

(B) the furnishing or dispensing of drugs or medical, dental or surgical supplies or appliances;

But only if such services are provided incidentally to other operations of the "Named Insured" and not for the purposes of generating remuneration or profit.

Such "Incidental Malpractice" coverage does not include:

(1) Expenses incurred by the Insured for first-aid to others at the time of an accident;

(2) Any Insured engaged in the business or occupation of providing and of the services described under (A) and (B) above;

(3) Injury caused by any indemnitee if such indemnitee is engaged in the business or occupation of providing any of the services described under (A) and (B) above.

ALL OTHER TERMS AND CONDITIONS REMAIN UNCHANGED.

Def's Mem. of Law, Ex. N.

Thus, to meet its burden of proving that the above exclusion applies Gulf must show that Foulke's actions were not "in connection with security guard services or investigative operations." Further, Gulf must show that Foulke's actions were committed while "engaged in the business of providing," inter alia, "medical..." services ("medical services") which were not incidental to Foulke's "other operations" and the

purposes of providing such medical services were not for generating remuneration or profit.[7]

A. There Exist Genuine Issues of Disputed Material Facts Whether Foulke's "Plant Protection Services" Were Performed "in connection with security guard services."

Gulf contends that the Professional Liability Exclusion Endorsement excludes Egger's claims. Specifically, Gulf urges that at the time of the accident Foulke was performing "Plant Protection Services" and not "Security Guard Services." Therefore, Gulf maintains that Egger is excluded from coverage as Plant Protection Services are "not in connection with the provision of security guard or investigative operations." Def's Mem. of Law at 26, 29. Egger disputes this fact and argues that Gulf has a "restrictive definition of an entire industry" as the provision of "Plant Protection Services" was "only an extension of Foulke's security operations." Pl's Resp. Mem. of Law at 24.

Based on the limited evidence submitted by both parties, this court submits that there exist genuine issues of disputed material facts as to the precise relationship between Foulke's security guard operations and plant protection services. On the one hand, Gulf argues that plant protection services are different from security guard services. In support of its contention, Gulf first directs this court to the two purchase orders

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[7] Curiously, in the motion Egger concedes that "The Gulf policy unambiguously provides coverage" and that the "contractual language of the policy is clear." Pl's Mem. of Law at 21.Yet, in her response to Gulf's motion for summary judgment, Egger argues at length that "key terms and phrases" in the umbrella policy are ambiguous, and therefore this court should construe the policy in Egger's favor. Pl' Resp Mem. of Law at 7. This court disagrees. As our Superior Court in Wagner v. Erie Ins. Co., 2002 WL 1023106 (Pa. Super Ct. 2002) recently held, "[w]hile a court must not 'distort the meaning of the language or resort to a strained contrivance in order to find an ambiguity[,]' it must find that 'contractual terms are ambiguous if they are subject to more than one reasonable interpretation when applied to a particular set of facts.'" 2002 WL at *4 (citations omitted). Here, this court submits that it is not the language of this policy which is unclear or ambiguous, but rather the particular set of facts surrounding Foulke's activities.

Foulke had with PECO - - the Security Guard Services Order and the Plant Protection Services Order. Gulf suggests that the Security Guard Order was for "traditional security guard services" - - although it fails to define what these entail. Def's Mem. of Law at 29-30. Gulf then argues that the second order, the Plant Protection Services Order included "unique" services, different from the Security Guard Services Order. The Plant Protection Services Order reads in pertinent part:

> Provide plant protection services at [PECO]. Services to include, but are not limited to, confined space rescue, hazardous material release response, first aid, and fire fighting in accordance with applicable government regulations…

Def's Mem. of Law, Ex. B. Gulf concludes that the kinds of services contracted for in the Plant Protection Services Order are different from the security guard services, and therefore excluded from coverage.

In addition to the purchase orders, Gulf offers testimony from the underlying lawsuit showing the specialized skills required of Foulke employees who were to provide Plant Protection Services at PECO to support the contention that these services were different from security guard services. Specifically, Gulf provides the testimony of Lee Fulton, a PECO manager, who stated that "Foulke personnel were expected to be trained in, inter alia, fire fighting, basic first aid, be EMT qualified, and First Responder qualified." Def's Mem. of Law at 30. Finally, Gulf asserts that "common sense would lead to" the conclusion that Plant Protection Services were different from security guard services and therefore excluded from coverage. Id. at 31.

On the other hand, Egger directly disputes Gulf's factual conclusion and asserts that it is "not unique for security guard companies to provide similar services." Pl's Resp. Mem. of Law at 24. In support of the fact that Foulke regularly provides plant protection services, Egger provides affidavits, a report and a statute. Specifically, Egger offers the Affidavit of Ken Sexton, Foulke's President, who asserted that "Plant

Protection Services was but one example of Foulke's security business, and was not unique or unusual." Pl's Resp. Mem. of Law, Ex. A. In addition, Egger submits the report of Ira Somerson, a Loss Management Consultant, which states that the services performed by Foulke at PECO "are quite typical examples of the varied type of services for which a security guard company is hired." Pl's Mem. of Law, Ex. 28. Finally, Egger directs this court to language contained in 22 P.S. §12(e) which explains that a security guard, inter alia, "patrols, guards, protects..." Id. at 23.

This court finds that since a genuine issue of a material fact as to a necessary element of the cause of action exists, the cross Motions for Summary Judgment should be denied. This issue is essential in that should the plant protection services not have been performed "in connection with" Foulke's security guard operations, then Egger is excluded from coverage. However, since it is not clear and free from doubt that Gulf is entitled to judgment as a matter of law, and both parties dispute the necessary element of the relationship between the plant protection services and Foulke's security guard services, this court, pursuant to Pa.R.C.P. 1035.2, must deny these motions for summary judgment.

B. There are Genuine Issues of Disputed Material Facts as to Whether Foulke is "engaged in the business of providing" Medical Services.

Gulf has also denied coverage based on the "Incidental Malpractice" provision of the umbrella policy below:

This policy is further extended to cover "Incidental Malpractice."

As used in this endorsement "Incidental Malpractice" means "bodily injury" resulting from the rendering of or failure to render the following services by an "insured":

(A) Medical, Surgical, Dental, X-Ray or Nursing service or treatment or the furnishing of food or beverages in connection therewith; or

(B) the furnishing or dispensing of drugs or medical, dental or surgical supplies or appliances;

> But only if such services are provided incidentally to other operations of the "Named Insured" and not for the purposes of generating remuneration or profit.
>
> Such "Incidental Malpractice" coverage does not include:
>
> (1) Expenses incurred by the Insured for first-aid to others at the time of an accident;
> (2) Any Insured engaged in the business of occupation of providing and of the services described under (A) and (B) above;
> (3) Injury caused by any indemnitee if such indemnitee is engaged in the business or occupation of providing any of the services described under (A) and (B) above.

Def's Mem. of Law, Ex N. Thus, Gulf must show that Foulke is "engaged in the business of providing" medical services which are not incidental to Foulke's "other operations." However, as with the dispute surrounding the extent of Foulke's security guard services, this court submits that there exists a general issue of material fact as to whether Foulke is "engaged in the business of providing" medical services.

On the one hand, Gulf argues that "given the nature of the services provided [by Foulke], and the fact that these services were performed for separate monetary compensation, coverage for this incident is specifically excluded under the policy." Def's Mem. of Law at 25. In support of this contention, Gulf directs this court to the Plant Protection Services Order which, in exchange for approximately $300,000, Foulke provided PECO with personnel trained in first aid. Id. at 35. Gulf emphasizes that it was these employees who failed to provide the adequate first aid, namely not applying a tourniquet to the bleeding Mr. Egger. Id. Gulf contends that this action "is the provision of medical services by any standard." Id. Gulf concludes that Foulke's first aid activities are expressly excluded from coverage since "such medical services were not 'incidental' to the provision of security guard services, but rather performed for the specific purpose of generating remuneration or profit." Id.

Egger counters and provides limited evidence that Foulke is not "engaged in the business of providing" medical services. First, Egger provides the Affidavit of Kenneth Sexton, Foulke's President, who states that "Foulke was not in the business of providing general medical services at [PECO]. It is not at all unusual for a security company to provide emergency response, including rescue and first aid, to its customers." Pl's Resp. Mem. of Law, Ex. A. Further, Egger offers the report of John Bogart, an insurance expert, which states "the rendering of first aid is clearly within the meaning of incidental malpractice as reflected in the Glossary of Insurance and Risk Management Terms." Id., Ex. K. Finally, Egger argues that the fact that Foulke was paid separately under the Plant Protection Services Order is not evidence of the fact that Foulke was receiving profit as a result of providing first aid. Pl's Resp. Mem. of Law at 28. Specifically, Egger shows that the Plant Protection Services Order does not provide that Foulke be "compensated separately on a fee-per-service basis, nor on a 'per services rendered' basis." Id. (citing Ex. A.).

This court finds that since a genuine issue of a material fact as to a necessary element of the cause of action exists, the cross motions for summary judgment are denied. This issue is essential to this case since if the fact finder determines that Foulke is "engaged in the business of providing" medical services, then Egger would be excluded from coverage. However, since it is not clear and free from doubt that Gulf is entitled to judgment as a matter of law - - the evidence of record reveals a dispute as to whether Foulke is engaged in the business of providing medical services - - this court, pursuant to Pa.R.C.P. 1035.2, must deny these cross Motions for Summary Judgment.

CONCLUSION

For these reasons, the cross Motions for Summary Judgment of Egger and Gulf are denied. The court will enter a contemporaneous Order consistent with this Opinion.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.