

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

COPLEY ASSOCIATES, LTD.,	:	DECEMBER TERM, 2005
	:	
Plaintiff,	:	NO. 01332
	:	
v.	:	COMMERCE PROGRAM
	:	
ERIE INSURANCE EXCHANGE,	:	Control No. 081526
TAYLOR KLEIN, PATTY ANN KLEIN,	:	
And TAYLOR E. KLEIN,	:	
	:	
Defendant.	:	

ORDER

AND NOW, this 29th day of December, 2005, upon consideration of defendant Erie Insurance Exchange's ("Erie's") Motion for Judgment on the Pleadings, plaintiff Copley Associates, Ltd.'s ("Copley's") Cross Motion for Judgment on the Pleadings, the responses thereto, the briefs in support and opposition, and all other matters of record, and in accordance with the Opinion issued contemporaneously, it is hereby **ORDERED** that Erie's Motion is **GRANTED** and Copley's Motion is **DENIED**. It is further **ORDERED** as follows:

1. Erie's request for Declaratory Judgment is **GRANTED**;
2. Erie is not obligated to provide a defense and/or to indemnify Copley for the October 15, 2002 accident involving Taylor Klein, nor the litigation that resulted therefrom.
3. Copley's Complaint is **DISMISSED**.

BY THE COURT:

HOWLAND W. ABRAMSON, J.

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OPINION

Plaintiff Copley Associates, Ltd. (“Copley”) filed this action against its insurer, Erie Insurance Exchange (“Erie”), demanding coverage for defense costs and settlement amounts that Copley paid to nominal defendants, Taylor Klein, Patty Ann Klein and Taylor E. Klein (the “Kleins”), in connection with a personal injury action that the Kleins brought against Copley and others (the “Underlying Litigation”).

Erie issued a Commercial Property General Liability Insurance Policy (the “Primary Policy”) to Copley covering the period April 17, 2002 to April 17, 2003 and covering certain improved real property know as the Regency Apartments, which Copley owned. Erie also issued an excess Business Catastrophe Liability Policy to Copley for the same period (the “Umbrella Policy”). On September 30, 2002, Copley sold the Regency Apartments to SAS Regency. Effective October 1, 2002, Copley cancelled the Primary Policy and the Umbrella Policy.

On October 15, 2002, Taylor Klein, a minor, was severely injured while riding his bike at the Regency Apartments. The Kleins brought suit against SAS Regency and Copley, claiming that both the present owner and the prior owner allowed a dangerous condition to exist at the

premises which resulted in the Kleins' injuries. Erie refused to provide a defense for Copley in the Underlying Action and denied coverage to Copley under the Policies with respect to the Kleins' claims. Erie did provide a defense and indemnification for Copley's co-defendants, SAS Regency, under a separate policy of insurance issued by Erie to SAS Regency.

The Underlying Action ultimately settled with Erie paying \$500,000 on behalf of SAS Regency and Copley paying \$50,000 out of its own pocket. Copley now seeks to have Erie reimburse it for that settlement amount and for Copley's attorneys' fees. In its Motion for Judgment on the Pleadings, Erie argues that Copley is not entitled to coverage because Taylor Klein's accident and injuries occurred outside the period covered by the Primary Policy and the Umbrella Policy.

The Primary Policy is an "occurrence" policy, in that it provides coverage for "bodily injury or property damage that is caused by an 'occurrence' that takes place in the covered territory [if] the bodily injury or property damage occurs during the policy period."¹

"Occurrence" is defined in the Primary Policy as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."²

An 'occurrence' policy protects the policyholder from liability for any act done while the policy is in effect. . . . [T]he determination of when an occurrence happens must be made by reference to the time when the injurious effects of the occurrence took place. . . . '[A]n occurrence during the policy period' takes place when both the accident and the resulting injury occur in the policy period . . . Thus, an 'occurrence' happens when injury is reasonably apparent, not at the time the cause of the injury occurs. The cause and the injury may happen at very distinct periods.³

¹ Motion for Judgment on the Pleadings ("Motion"), Ex. B(A), (Commercial General Liability Coverage Form), p. 1.

² *Id.* p. 11.

³ *D'Auria v. Zurich Ins. Co.*, 352 Pa. Super. 231, 233, 507 A.2d 857, 858 (1986) (medical malpractice). *See also Keystone Automated Equipment Co., Inc. v. Reliance Ins. Co.*, 369 Pa. Super. 472, 478, 535 A.2d 648, 651 (1988) ("the determination of when the 'occurrence' had happened should be based on the time when the injurious effects first manifested themselves," not when the cause occurred).

In this case, the alleged cause occurred during the period covered by the Primary Policy, when Copley owned the Regency Apartments and allegedly failed to remedy the dangerous condition. However, the effect happened after the Primary Policy was terminated, when Taylor Klein was hurt. Because the Kleins' injuries occurred outside the Primary Policy period, their claims against Copley based on those injuries are not covered under the Primary Policy.

Copley argues that even if there is no coverage under the Primary Policy, there is coverage for the Kleins' claims under the Umbrella Policy. The Umbrella Policy provides :

We will pay on behalf of anyone we protect for the ultimate net loss in excess of the retained limit which anyone we protect becomes legally obligated to pay as damages because of:

1. Bodily Injury Liability,
 2. Personal Injury Liability,
 3. Property Damage Liability, or
 4. Advertising Injury Liability
- which occurs or is committed during the policy period.⁴

Under the Umbrella Policy, Erie further promised to provide Copley with a defense to claims for damages where “the bodily injury, personal injury, property damage or advertising injury are not covered by your underlying insurance.”⁵

The language of the Umbrella Policy⁶ regarding occurrences is slightly different than that of the Primary Policy. The Umbrella Policy can be read to cover tortious acts “committed” during the Policy period, in addition to resulting injuries that occur within the Policy period.

⁴ Motion, Ex. B(B) (Business Catastrophe Liability Policy), p. 7.

⁵ *Id.*

⁶ “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 Insurance Co of America v. Allen, 547 Pa. 693, 706, 692 A.2d 1089, 1095 (1997).

However, in the Underlying Action,⁷ Copley is not alleged to have “committed” any wrongful acts. Instead, Copley was alleged to have failed to prevent the harm that befell the Kleins.

Specifically, the Kleins claimed that Copley and the other defendants

did . . . carelessly, recklessly and negligently fail to keep and maintain the [Regency Apartments] in a safe condition **by allowing and/or failing to stop** its tenants and/or visitors and/or other persons to ride bicycles in a dangerous manner and/or build and/or maintain and/or use certain ramps, used by minor children as ‘jumping’ ramps while operating bicycles on them, so as the create a highly dangerous and defective condition . . .⁸

“Words of common usage in an insurance policy are to be construed in their natural, plain and ordinary sense, and [the court] may inform [its] understanding of these terms by considering their dictionary definitions.”⁹ The word “commit” as used in the Umbrella Policy means “to perform as an act.”¹⁰ What Copley allegedly did is an “omission,” which means “[to] neglect to perform what the law requires.”¹¹ The terms of the Umbrella Policy require active negligence and/or injury occurring within the policy period; Copley’s alleged passive negligence is not covered. Therefore, Erie is not required to defend or indemnify Copley under the Umbrella Policy with respect to the Underlying Litigation. Since there is no coverage under either the

⁷ “After determining the scope of coverage, the court must examine the complaint in the underlying action to ascertain if it triggers coverage. 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.” *Id.*, 547 Pa. at 706, 692 A.2d at 1095.

⁸ Motion, Ex. A (Complaint in Underlying Action), ¶ 28 (emphasis added)

⁹ Madison Constr. Co. v. Harleysville Mut. Ins. Co., 557 Pa. 595, 608, 735 A.2d 100, 108 (1999).

¹⁰ Black’s Law Dictionary, p. 273 (6th ed. 1990). *See also* American Heritage Dictionary of the English Language, p. 381 (3rd ed. 1992) (“to do, perform, or perpetrate.”)

¹¹ Black’s, p. 1086. *See also* American Heritage, p. 1262 (“to pass over; neglect[;] to desist or fail in doing; forbear.”)

Primary Policy or the Umbrella Policy, Copley's claims for bad faith denial of coverage also must be dismissed.¹²

CONCLUSION

For all the foregoing reasons, Erie's Motion for Judgment on the Pleadings is granted, and Copley's Cross-Motion for Judgment on the Pleadings is denied.

BY THE COURT:

HOWLAND W. ABRAMSON, J.

¹² See T.A. v. Allen, 868 A.2d 594, 600 (Pa. Super. 2005); Cresswell v. Nat'l Mut. Cas. Ins. Co., 820 A.2d 172, 179 (Pa. Super. 2003).