

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

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| Penn Patriot Insurance Company, | : | July Term 2017 |
| <i>Plaintiff,</i> | : | No. 4002 |
| v. | : | |
| Dowlings Palace, Inc. | : | Commerce Program |
| D/B/A Dowlings Palace, Stacey Dowling, | : | |
| Dominique Burton, and Thomasina Morris | : | |
| <i>Defendants.</i> | : | |

J. DJERASSI

FEBRUARY 5, 2020

OPINION

Plaintiff Penn Patriot Insurance Company appeals an Order denying its motion for summary declaratory judgment Penn Patriot has neither a duty to defend nor duty to indemnify. Defendants were sued for negligence in an underlying lawsuit brought by patrons of Dowlings Palace, a social hall and bar in Philadelphia. Their alleged injuries occurred during a fight between unknown other persons at Dowlings Palace.¹ On review, we declared Penn Patriot’s has a duty to defend defendants because policy exclusions do not apply to a duty to defend when negligence was the sole cause of action against defendants in the underlying case. Regrettably, our Order was overbroad and suggested we intended to include indemnity in our declaration. This was not correct.

As a result, Penn Patriot appealed the declaratory judgment as stated. On initial review, we requested remand by letter on belief that our declaratory judgment was incorrect in its entirety. The Court declined remand and requested this Rule 1925(a) opinion.

¹ Defendants Dominique Burton and Thomasina Morris are nominal defendants here and are named only in their capacity as plaintiffs in the underlying lawsuit. “Defendants” going forward refers to Dowlings Palace, Inc. and Stacey Dowling.

Now following extensive review, we conclude we were correct as to duty to defend but again request remand for more evidence on the question of indemnity. We explain our reasoning here.²

I. STATEMENT OF FACTS

This case follows an insurance coverage dispute between defendants Dowlings Palace, Inc. and Stacey Dowlings (“Dowlings Palace”) and plaintiff Patriot Insurance Company (“Penn Patriot”). Penn Patriot sought a declaration that it had no duty to defend and indemnify Dowlings Palace in an underlying negligence case captioned *Thomasina Morris and Dominiques Burton v. Dowlings Palace, Inc. d/b/a Dowlings Palace and Stacy Dowling C.P.* Phila. No. 150503180 (the “Underlying Case”). Dowlings Palace had purchased Penn Patriot’s general commercial liability policy (the “Policy”) for the period between July 28, 2012 and July 28, 2013.

In the Underlying Case, Thomasina Morris (“Ms. Morris”) and Dominique E. Burton (“Mr. Burton”) were injured on June 1, 2013 at Dowlings Palace, apparently occurring during a fight between unknowns. They had been Dowlings Palace patrons attending an adult prom there. Their underlying complaint accused Dowlings Palace with negligence and averred personal injury was caused by failure to protect them from harm caused by others.³

In support of its position to deny coverage for Dowlings Palace, Penn Patriot cites two Policy exclusions: (1) assault or battery; and (2) firearms and other weapons, though only the first is addressed here.

² Our December 26, 2018 Order denying Penn Patriot’s Motion for Summary Judgment only addressed duty to defend in its explanatory footnote 1. We had concluded there, “Penn Patriot has a duty to defend defendants--- and must do so forthwith”. We did not issue a similar declaration on indemnity.

³ See Paragraph 16 of the Underlying Complaint

II. RELEVANT PROCEDURAL HISTORY

On July 5, 2015 Ms. Morris and Mr. Burton filed the underlying negligence case against Dowlings Palace. The present declaratory judgment action case was filed by Penn Patriot on August 4, 2017, and its summary judgment motion was filed on August 6, 2018. Court proceedings in the underlying case were stayed through July 18, 2019 but the case has now settled.

This court denied Penn Patriot's summary declaratory judgment motion on December 26, 2018. Declaratory judgment was immediately appealable and notice of appeal was filed on January 4, 2019. No Rule 1925 Statement was requested. Our letter dated September 25, 2019 requesting remand was returned by the Court with instruction to file this Rule 1925(a) opinion.

III. ISSUES ON APPEAL

A. What are the Policy Exclusions that Apply?

In the Underlying Case's complaint, Ms. Morris and Mr. Burton contended that Dowlings Palace failed them through negligence in the performance of duties as a business proprietor. Specifically mentioned were failures relating to its alcohol servers, bouncers, managers and security personnel and procedures.⁴ Broad allegations included failure to employ security measures such as screening/patting down/searching patrons for weapons and failing to remove dangerous persons. The Underlying Complaint does not suggest how Dowlings Palace might have identified beforehand the unknown persons who fought on June 1, 2013, or what Dowlings

⁴ See Paragraph 13 and Paragraph 14 of the Underlying Complaint.

Palace could have done in seconds available to stop a panic that allegedly caused personal injury to Ms. Morris and Mr. Burton.⁵

The Penn Patriot's Policy provides coverage to the insured for bodily injury and property damage liability during the insurance term. The Policy states in pertinent part:

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply
- b. This insurance applies to "bodily injury" and "property damage" only if:
 - (1) The "bodily injury" or "property damage" occurs during the policy period ...
The policy defines "bodily injury" and "occurrence" as follows...
 - 3) "Bodily Injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

Further, the Assault or Battery exclusion states the following:

"...this insurance does not apply to liability for damages because of "bodily injury"... arising out of an "assault", "battery", or "physical altercation" that occurs in, on, near or away from an insured's premises:

- 1) Whether or not caused by, at the instigation of, or with the direct or indirect involvement of an insured, an insured's employees, patrons or other persons in, on, near or away from an insured's premises, or
- 2) Whether or not caused by or arising out of an insured's failure to properly supervise or keep an insured's premises in a safe condition, or
- 3) Whether or not caused by or arising out of any insured's act or omission in connection with the prevention, suppression, failure to warn of the "assault", "battery" or "physical altercation", including but not limited to, negligent hiring, training and/or supervision.
- 4) Whether or not caused by or arising out of negligent, reckless, or wanton conduct by an insured, an insured's employee, patrons or other persons.

For purposes of this endorsement:

"Assault" means any attempts or threat to inflict injury to another including any conduct that would reasonably place another in apprehension of such injury.

"Battery" means the intentional or reckless physical contact with anyone or any use of force against a person without his or her consent that entails some injury or

⁵ See Paragraph 16 of the Underlying Complaint.

offensive touching whether or not the actual injury inflicted is intended or expected. The use of force includes but is not limited to the use of weapon.

“Physical Altercation” means a dispute between individuals in which one or more persons sustains bodily injury arising out of the dispute.”⁶

B. How Do These Exclusions Apply to this Case?

Whether a duty to defend or a duty to indemnify is within coverage of a particular insurance policy is a question of law which may be decided by summary judgment motion if there are sufficient undisputed facts. *Equibank v. State Farm Mutual Automobile Insurance Company*, 626 A.2d 1243, 1244 (Pa. Super. 1993). Where the insurer relies on a policy exclusion as the basis for denying coverage, it bears the burden of proving such a defense. *Madison Construction Company v. Harleysville Mutual Insurance Company*, 735 A.2d 100, 106 (Pa. 1999). To decide whether an insurance company has met its burden of proof, courts look to the intent of the parties when signing the written instrument. *Id.* In determining whether an insurance policy provides coverage for a suit brought in an underlying case, courts compare the terms of the insurance policy to the allegations of the underlying complaint. *Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.*, 908 A.2d 888, 896 (Pa. 2006). Additionally, the factual allegations in the underlying complaint are taken as true and liberally construed in favor of the insured. *Indalex Inc. v. National Union Fire Ins. Co. of Pittsburgh*, 83 A.3d 418, 421 (Pa. Super. 2013). When policy terms are clear, courts must give effect to the policy’s language; but

⁶ See Penn Patriot’s CGL Coverage Form.

ambiguous policy terms must be construed in favor of the insured. *Donegal Mut. Ins. Co. v. Baumhammers*, 938 A.2d 286, 290 (Pa. 2007).

We find that the language in Penn Patriot's Policy's assault or battery exclusion is ambiguous because a relevant term is open to more than one reasonable interpretation. Specifically, the material provision states that coverage is precluded for bodily injury arising out of "assault", "property damage", or "physical altercation" whether or not caused by or arising out of neglect, reckless, or wanton conduct by an insured, an insured's employees, patrons or *other persons*.⁷ This "other persons" phrase is ambiguous when applied to the facts in the underlying case as it could mean that Dowlings Palace is not covered at all when **any** person acts irresponsibly on its premises regardless whether such person is connected to the insured or not. The phrase "other persons" is overbroad and may apply to random non-business invitees such as a drug addict or mentally ill individual who eludes protective actions by a bar or social hall's employees---and then caused bodily injury to others through no fault of the premise owner. It is one thing to exclude coverage of bodily injury caused by negligent actions of *an insured, an insured's employees, or patrons*; it's quite another to exclude insurance protection against negligent conduct caused by all *other persons*---in other words anyone.

In the context of this case's duty to defend, the inclusion of "other persons" means the exclusion is too vague in a situation where Dowlings Palace liability has potential to be included within the scope of the Underlying Complaint. Who were the unknown persons who caused the June 1, 2013 problems at Dowlings Palace. Were they business invitees, employees, patrons?

⁷ See Penn Patriot's General Liability Insurance Policy "Assault or Battery Exclusions" provision # (4).

Were they drug addicts or mentally ill? Were they persons whom Dowling Palace could have guarded? We simply don't know through the Underlying Complaint.

This ambiguity means that the allegations in the Underlying Complaint are taken as true, and liberally construed in favor of the insured. *Indalex Inc. v. National Union Fire Ins. Co. of Pittsburgh*, 83 A.3d 418, 421 (Pa. Super. 2013), *app. den.* 99 A.3d 926 (Pa. 2014). See also *QBE Ins. Corp. v. Walters*, 148 A.3d 785, 788 (Pa. Super. 2016) (Policy exclusions are strictly construed against the insurer and in favor of the insured).

In the underlying complaint, Ms. Morris and Mr. Burton specifically deny that either assault or battery were the proximate cause of their injuries, and their underlying complaint asserts that their injuries was caused by Dowlings Palace's negligence.⁸ Explaining how they were injured, their complaint states only that: "At approximately 1:00 a.m.-2:30 a.m. of June 01, 2013, while on the premises of Dowlings, Plaintiffs were physically assaulted by an unknown persons (*sic*) in the presence of the defendants, including alcohol servers, bouncers, managers and security personnel."⁹ Unknown is whether these unknown persons were employees or patrons or more importantly whether they were random people whose presence inside Dowlings Palace was unforeseen or unpreventable. Accordingly, the assault or battery exclusion is construed in favor of the insured.

C. Legal Analysis---Duty to Defend

In denying Penn Patriot's Motion for Summary Judgment in the context of duty to defend, and in differentiating legal analysis from those in indemnity cases, we found two very instructive

⁸ See Paragraph 11 and Paragraph 12 of the Underlying Complaint

⁹ See Paragraph 9 of the Underlying Complaint

precedents: *QBE Insurance Corp., v. M&S Landis Corporation*, and *Regis Insurance Company v. All American Rathskeller*.¹⁰

The insurance policy in *QBE* contains exclusion terms similar to the relevant ones in this case.¹¹ As in *Dowlings Palace*, the *QBE* policy excludes coverage for bodily injury claims arising out of assault and battery. Both policies purport to exclude coverage for bodily injuries arising out of assault or battery that are caused by negligent failure to supervise and similar “acts or omissions” affecting safety.

In the duty to defend context, *QBE* held that an assault or battery exclusion does not cancel an insurance company’s duty to defend when the underlying complaint avers numerous allegations of negligence.¹²

The *QBE* Court concluded:

“Similarly, in this case, we agree with the Appellants, that, in light of the allegations of negligence, the assault and battery exclusion does not apply.

Accordingly, we find that *QBE* has an obligation to defend Appellants in the underlying action, with its obligation to indemnify Appellants depending on the facts developed at trial in that action” *Id.* at 1225.

We also compared *QBE* to *Regis Insurance Company v. All American Rathskeller*, supra. a case that emphasizes the distinction between legal analysis between duty to defend and duty to

¹⁰ *QBE Insurance Corp., v. M&S Landis Corporation*, 915 A.2d 1222 (Pa. Super. 2007); *Regis Insurance Company v. All American Rathskeller*, 915 a.2d 1222 (976 A2d 1157 (Pa. Super. 2009).

¹¹ The complaint in *QBE*’s underlying action averred negligent conduct by the insured’s bouncers causing a wrongful death.

¹² Compare *Acceptance ins. Co. v. Seybert*, 757 A.2d 380, 383 (Pa. Super. 2000). In finding that an assault or battery exclusion applied, the Court applied the exclusion because the underlying complaint asserted only that assault or battery was responsible for a patron’s injuries.

indemnify for identical exclusions. As stated by Justice Donahue when sitting on the Superior Court in *Regis*: “The issue in *QBE* was the insurer’s duty to *defend*. The dispositive issue in this case in significant contrast is *Regis*’ duty to *indemnify*...for the amount of a settlement in the underlying civil action.” *Regis* at 1161. (*Italics in original*).

In words that are directly applicable to this case, Justice Donahue continues in *Regis*:

“Unlike the duty to defend, the duty to indemnify cannot be determined merely on the basis of whether the factual allegations of the complaint potentially state a claim against the insured. *American States Ins. Co. v. State Auto Ins. Co.* 721 A.2d 56, 63 (Pa. Super. 1998); see also *Britamco Underwriters, Inc. v. Stokes*, 881 F. Supp. 196, 198 (E.D. Pa. 1995) (“The duty to defend arises whenever claims asserted by the injured party potentially come within the coverage of the policy, while the duty to indemnify arises only when the insured is determined to be liable for damages within the coverage of the policy.”) *Accord State Farm Fire and Cas.Co. v. DeCoster*, 67 A.3d 40, 46 (Pa. Super. 2013) (Unlike the duty to defend, a determination of the duty to indemnify is not necessarily limited to the factual allegations of the underlying complaint; rather there must be a determination that the insurer’s policy actually covers a claimed incident).

We conclude under *QBE* and *Regis* that Penn Patriot owes a duty to defend Dowlings Palace to protect them from potential liability stemming from plaintiffs’ negligence claims. However, as there has now been a settlement, we are unable to determine on the present record whether Dowlings Palace should be indemnified for damages under terms its Penn Patriot Policy. We simply do not know enough about the facts of the incident and whether the exclusion of “other persons” is enforceable in the context of what happened in the underlying incident on June 1, 2013. Accordingly, remand is requested for trial on the question of indemnity.

CONCLUSION

For these reasons, we respectfully request the Court to affirm declaratory judgment against plaintiff Penn Patriot as to duty to defend and to remand for trial on the question of indemnity.

BY THE COURT

RAMY I. DJERASSI, J.