

Shuja Moore inside Club Deco during a robbery gone awry. Following this incident, Concetta Motto, as Administratrix for the Estate of Joseph Motto, filed a Complaint against JGF seeking damages for the fatal injuries sustained by Joseph Motto at the hands of Club Deco patron, Shuja Moore (the “Underlying Action”).¹

The Underlying Action spawned this case. Western has filed a Motion for Summary Judgment arguing that it has no duty to defend or indemnify JGF because of the Assault and Battery exclusion provision in its liability insurance policy. In response, defendant, Concetta Motto, has submitted a Cross Motion for Summary Judgment asserting that under Pennsylvania law, an Assault and Battery Exclusion does not apply when the underlying Complaint is based on allegations of negligence.

“A court’s first step in a declaratory judgment action concerning insurance coverage is to determine the scope of the policy’s coverage.”² Here, the policy provides

[Western] 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. [Western] will have the right and duty to defend the insured against any “suit” seeking those damages. However, [Western] 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.³

Further, the policy excludes coverage for the following:

This policy does not apply to “bodily injury”, “property damage” or “personal and advertising injury” arising out of assault or battery or out of any act or omission in connection with the prevention or suppression of such acts, including failure to warn,

¹ The Underlying Action is captioned Concetta Motto, Administratrix of the Estate of Joseph Motto v. Deco Night Club, aka the Piji Club and JGF Management Co., LLC, in the Philadelphia Court of Common Pleas, January Term 2005, No. 4545.

² General Accident Ins. Co. of Am. v. Allen, 547 Pa. 693, 706, 692 A.2d 1089, 1095 (1997).

³ Commercial General Liability Coverage Form, Section I ¶ 1(a), p. 1 of 16.

train or supervise, whether caused by or at the instigation or direction of the insured, his employees, patrons or any other person.⁴

“After determining the scope of coverage, the court must examine the Complaint in the underlying action to ascertain if it triggers coverage.”⁵

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. The duty to defend also carries with it a conditional obligation to indemnify in the event that the insured is held liable for a claim covered by the policy. Although the duty to defend is separate from and broader than the duty to indemnify, both duties flow from a determination that the complaint triggers coverage.⁶

Therefore, if the Complaint asserts facts that are not covered by the policy, then the insurer has no duty to defend or indemnify the insured. In addition, “[w]here an insurer relies on a policy exclusion as the basis for its denial of coverage and refusal to defend, the insurer has asserted an affirmative defense and, accordingly, bears the burden of proving such a defense.”⁷

In the Underlying Action, Concetta Motto, Administratrix of the Estate of Joseph Motto, alleges that Joseph Motto went to Club Deco on October 17, 2004, the same night that Shuja Moore gained entrance to the club while possessing a loaded semi-automatic weapon.⁸ Using that weapon, Shuja Moore attempted to rob another patron of Club

⁴ See Endorsement to Commercial General Liability Coverage entitled “Assault or Battery Exclusion” (hereinafter, the “Assault and Battery Exclusion”).

⁵ General Accident, 547 Pa. at 706, 692 A.2d at 1095.

⁶ Id.

⁷ Southcentral Employment Corp. v. Birmingham Fire Ins. Co., 926 A.2d 977, 980 (Pa. Super. 2007)(quoting Madison Construction Co. v. Harleysville Mutual Ins. Co., 735 A.2d 100, 106 (Pa. 1999).

⁸ Complaint in Underlying Action, ¶¶ 5, 9.

Deco.⁹ Club Deco employees intervened, and during that physical intervention, Shuja Moore fired his weapon and the bullet struck and killed Joseph Motto.¹⁰ Concetta Motto further claims that Joseph Motto was shot and killed as a direct result of JGF's negligence for failing to provide adequate security, failing to properly train security personnel and failing to properly apprehend Shuja Moore.¹¹

Instantly, the insured points to these allegations of negligence in claiming coverage under the insurance policy. However, these allegations do not satisfactorily meet the requirements necessary to trigger coverage under the policy.

[T]o determine if there is coverage, [the court] must look to the facts alleged in the underlying Complaint, not the cause of action pled. Indeed, to allow the manner in which the complainant frames the request for redress to control in a case such as this one would encourage litigation through the use of artful pleadings designed to avoid exclusions in liability insurance policies.¹²

Here, Joseph Motto's death resulted from the suppression of an attempted robbery. Under the Pennsylvania Crimes Code, a person has committed a robbery if, in the course of committing a theft, he "inflicts serious bodily injury upon another."¹³ Similarly, a person has committed aggravated assault if he "attempts to cause serious bodily injury to

⁹ Id. at ¶ 11.

¹⁰ Id. at ¶¶ 12, 13.

¹¹ Id. at ¶¶ 19, 20. ¶19 also contains numerous other grounds for negligence. They are: allowing a person to enter a club with a loaded weapon, allowing a person to remain in a club with a weapon, failing to provide working security equipment, failing to warn patrons of criminal activity inside the club, and failing to discover the amount and nature of criminal activity being committed in the club. Id.

¹² QBE Ins. Corp. v. M&S Landis Corp., 915 A.2d 1222, 1225 (Pa. Super. 2007). This Court notes that Defendant's Cross Motion for Summary Judgment is denied for the reasoning supplied in the QBE excerpt above. The facts pled in the Underlying Action are the critical component towards determining if there is coverage, not the cause of action pled. Here, the facts pled lead this court to conclude that coverage is not appropriate.

¹³ 18 Pa.C.S.A. §3701.

another, or causes such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life.”¹⁴ These two crimes are inherently linked insofar as the “gravamen of the offense of robbery is an assault on a person when combined with the taking or attempted taking of money or property.”¹⁵ As such, Concetta Motto’s claims clearly arise out of a crime consisting of an assault and/or battery, so they are excluded under the express terms of the Assault and Battery exclusion provision within the insurance policy.

JGF and Concetta Motto urge that the allegations of negligence in the Complaint render the Assault and Battery Exclusion inapplicable. In support of their position, the defendants rely upon cases which are factually distinguishable from the present matter. In QBE Ins. Corp. v. M&S Landis Corp., it was alleged that the insured nightclub’s bouncers negligently restrained the plaintiff (by laying on top of him and pinning him to the ground) which caused his death by suffocation.¹⁶ In Britamco Underwriters, Inc. v. Weiner, the Complaint alleged that the insured bar’s owner and an employee may have hit the plaintiff in the neck by “accident.”¹⁷ Both of these cases involved situations where the insured’s agents committed the harm to plaintiff negligently.

Here, unlike QBE and Britamco, the assault on Joseph Motto was committed by a third party, Shuja Moore, intentionally. The facts pled in this case are similar to those of Acceptance Ins. Co. v. Seybert.¹⁸ In Acceptance, the underlying Complaint alleged that

¹⁴ 18 Pa.C.S.A. §2702(a)(1).

¹⁵ Comm. of Pa. v. Weigle, 949 A.2d 899, 907 (Pa. Super. 2008).

¹⁶ 915 A.2d 1222, 1224 (Pa. Super. 2007).

¹⁷ 636 A.2d 649, 652 (Pa. Super. 1994).

¹⁸ 757 A.2d 380 (Pa. Super. 2000).

five of the insured hotel's patrons "violently attacked" the plaintiff in the hotel's parking lot.¹⁹ The court found that the attack was the product of intent, rather than accident, and as such, there was no coverage under the policy's assault and battery exclusion.²⁰

In this case, the Complaint speaks of a robbery attempt by a third party, an incident best characterized as intentional conduct. Moreover, unlike QBE and Britamco, this incident did not primarily involve the actions of the insured's employees, but rather the conduct of a third party. And so, the result in this case falls within the rationale of Acceptance, *supra*. The Assault and Battery Exclusion within the insurance policy applies and Western should not be obliged to provide coverage.

CONCLUSION

For these reasons, plaintiff's Motion for Summary Judgment is granted. The defendant's Cross Motion for Summary Judgment is denied.

An Order consistent with this Opinion will be issued.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

¹⁹ Id. at 381.

²⁰ Id. at 383-84.