

IN THE COURT OF COMMON PLEAS OF  
LYCOMING COUNTY, PA

JOSEPH M. LIVORNO and CAROLE A. LIVORNO	:	
	:	
Plaintiffs	:	
	:	DOCKET NO: 09-01768
vs.	:	
	:	
THE CINCINNATI INSURANCE COMPANIES,	:	CIVIL ACTION
	:	Scheduling Order
Defendant	:	

**OPINION AND ORDER**

On February 6, 2009, an action was filed by Margo Marie Smith, by and through her legal guardians, John and Crystal Smith, against Joseph M. Livorno, Carole A. Livorno, J.S.E. Enterprises, Inc., individually and d/b/a J.P.'S Sports Bar & Grill (hereinafter "the underlying action"). Pursuant to the allegations of the complaint, the plaintiff, Margo Smith, was injured on a dock which entered the defendants' property from the Susquehanna River. As the minor plaintiff walked across the wooden dock, she allegedly fell into a large hole and injured her leg.

On July 24, 2009, Mr. and Mrs. Livorno filed a declaratory judgment action against The Cincinnati Insurance Companies which included a claim for bad faith. On September 21, 2009, the Defendant, The Cincinnati Insurance Company,<sup>1</sup> filed a Motion for Summary Judgment. Plaintiffs subsequently filed a Cross-Motion for Partial Summary Judgment.

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<sup>1</sup> Defendant asserts that the caption incorrectly characterizes the Defendant's name as "The Cincinnati Insurance Companies."

Pa.R.C.P. 1035.2(1) provides:

After the relevant pleadings are closed, but within such time a not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law

(1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report...

Under Pennsylvania law, as a necessary prerequisite to recovery upon an insurance policy, the insured must show that the claim is within the coverage provided by the policy. See Miller v. Boston Ins. Co., 218 A.2d 275 (Pa. 1966). The interpretation of an insurance policy is a question of law for a court to decide. Kvaerner Metals Division of Kvaerner U.S., Inc. v. Commercial Union Insurance Co., 908 A.2d 888, 897 (Pa. 2006). In evaluating whether coverage is provided under a policy of insurance, Pennsylvania courts have clearly held that an insurer's duties under an insurance policy are triggered by the language of the complaint against the insured. Id. at 896.

Factual averments contained in the underlying complaint are as follows:

8. On or about June 7, 2007, Defendants' business establishment, J.P.'s Sports Bar and Grill was open for business to the general public.
9. On said date, Defendants owned, possessed, controlled and/or maintained a dock located at the rear of the Riverside Dr. property.
10. Said dock was for the public use of boating customers entering the Defendants' property from the Susquehanna River.
11. On said date, the minor Plaintiff was visiting Defendants' business establishment **for the purpose of buying goods/merchandise from Defendants.**
12. The minor Plaintiff left the business establishment and was returning to the boat via the Defendants' dock.

13. As the minor Plaintiff walked across the wood deck, she fell into a large hole in the dock causing her to sustain serious injury to her leg as described below.

(Emphasis added).

Plaintiffs' Complaint asserts that coverage for the underlying action should be provided pursuant to a Homeowner's Insurance Policy and a personal Umbrella Liability Policy issued by the Defendant. Defendant asserts that both policies provide exclusions precluding coverage for claims asserted in the underlying action. Specifically, Defendant argues that both policies contain exclusions relating to injuries arising out of business use of the property. Additionally, the Defendant asserts that the dock on which the minor plaintiff fell was not an "insured location" as defined under the Plaintiffs' homeowners' insurance policy.

The homeowners' insurance policy provides:

**SECTION II – EXCLUSIONS**

**1. Applicable to Coverage E – Personal Liability**

The following exclusions apply to Coverage E – Personal Liability:

This insurance does not apply to:

\* \* \* \* \*

**b. Business Pursuits**

"Bodily injury", "personal injury" or "property damage" arising out of or in connection with a "business" conducted from an "insured location" or engaged in by an "insured", whether or not the "business" is owned or operated by an "insured" or employs an "insured". This Exclusion **1.b.** applies to, but is not limited to, an act, error or omission, regardless of its nature or circumstance, involving a service or duty rendered, promised, owed, or implied to be provided because of the nature of the "business".

The personal Umbrella Liability Policy similarly provides:

**B. Exclusions**

This insurance does not apply to:

\* \* \* \* \*

**4. Business or Business Property Limitation**

“Bodily injury”, “property damage” or “personal injury” arising out of a “business” or “business property”, unless such liability is covered by valid and collectible “underlying insurance” as listed in Schedule A – Schedule of Underlying Insurance, and then only for such hazards for which coverage is afforded by such “underlying insurance”, unless otherwise excluded by this policy.

Following a review of the complaint allegations, this Court finds that policy exclusions preclude coverage for the claims asserted by Margo Smith against Mr. and Mrs. Livorno. The allegations against the Plaintiffs in the underlying complaint are clearly based upon the Plaintiffs’ failure to protect Margo Smith as a business invitee to the property. Plaintiffs’ liability exposure solely derives from their alleged “business” conduct. Following a review of the subject policies, it is clear that each of the policies contain an exclusion relating to injuries arising out of, or in connection with a business or business pursuit.<sup>2</sup>

Moreover Plaintiffs’ argument that inaccuracies in the underlying complaint should change this result must fail. At the time of argument, counsel for the Plaintiffs provided this Court with a factual account of the underlying claim which differed greatly from the facts as set forth in the complaint in the underlying action. Specifically, Plaintiffs’ counsel asserted that at the time of Margo Smith’s fall she was **not** engaged in any business activity, but was merely swimming in the area near the dock. After her father told her it was time to get out of the water she fell on the

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<sup>2</sup> Moreover, Plaintiffs argument that the claim set forth in the underlying policy must be covered under the policy because the Plaintiffs have been sued in their individual capacities similarly must fail. Coverage is not triggered simply because Plaintiffs are sued in their individual capacity. The analysis of coverage requires a review of the specific allegations against Plaintiffs to determine if Plaintiffs’ individual liability exposure is excluded from the policy.

dock. Plaintiffs' counsel additionally asserts that as the dock itself was moveable, and used by the Plaintiffs for personal enjoyment, it was not subject to the policy exclusions.

In Kvaerner, *supra*, in evaluating whether coverage existed under an insurance policy, the Pennsylvania Superior Court looked beyond the allegations contained in the underlying complaint to expert reports submitted by the plaintiff with its cross-motion for summary judgment. Following a review of the expert reports, the Superior Court found there was a genuine issue of material fact, and concluded that summary judgment was improperly entered by the trial court. In reversing the Superior Court, the Pennsylvania Supreme Court held:

We now conclude that the Superior Court did in fact err in looking beyond the allegations raised in Bethlehem's complaint to determine whether National Union had a duty to defend Kvaerner and in finding that the Battery's damages may have been the result of an 'occurrence.'

\* \* \* \* \*

It is well established that an insurer's duties under an insurance policy are triggered by the language of the complaint against the insured.

\* \* \* \* \*

In this case, the Superior Court looked to information not contained in the underlying complaint in its determination that coverage might exist under the National Union policies. It claimed that it could do so because the Policies do not require that a Complaint be filed in order to trigger coverage. The Superior Court premised its coverage determination on reports submitted by two experts on behalf of Kvaerner stating that torrential rains may have caused the damages complaint of by Bethlehem. The court held that these reports create uncertainty as to the cause of the damage and perhaps set forth an 'occurrence' as required by the policies to trigger coverage, thus making summary judgment improper. The Superior Court erred in looking beyond the allegations raised in Bethlehem's Complaint to determine whether National Union had a duty to defend Kvaerner and in finding that the Battery's damages may have been the result of an 'occurrence.' In doing so, it departed from the well-established precedent of the Court requiring that an insurer's duty to defend and indemnify be determined solely from the language of the complaint against the insured... We find no reason to expand on the well-

reasoned and long-standing rule that an insurer's duty to defend is triggered, if at all, by the factual averments contained in the complaint itself. Id. at 895-6.

As this Court is bound by the allegations set forth in the underlying complaint, and those allegations are clearly based upon Margo Smith's status as a business invitee, the exclusionary language of the policies at issue precludes recovery by the Plaintiffs under the policies.

### **ORDER**

AND NOW, this 11<sup>th</sup> day of December, 2009, following argument on the parties respective Motions for Summary Judgment, it is hereby ORDERED that the Plaintiff's Motion for Partial Summary Judgment is DENIED and the Defendant's Motion for Summary Judgment is hereby GRANTED. In granting Defendant's Motion for Summary Judgment this Court declares that the Defendant does not owe a duty to defend or indemnify Joseph Livorno and Carole Livorno against the allegations and claims presented by Margo Marie Smith, by and through her legal guardians, John D. Smith and Crystal J. Smith against Joseph and Carole Livorno in the civil matter filed in the Court of Common Pleas of Lycoming County, Pennsylvania, No. 08-02351. Plaintiffs' Complaint is hereby DISMISSED with prejudice.

BY THE COURT,

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Dudley N. Anderson, J.

cc: John R. Bonner, Esquire

Adam M. Barnes, Esquire  
707 Grant Street, Suite 1400  
Pittsburgh, PA 15219

Honorable Richard Gray

Deputy Court Administrator

Gary Weber, Esquire