IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

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| REGIS INSURANCE COMPANY, | ) | |
| | ) | C.A. No. 04C-03-050 JTV |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| JOSHUA GRAVES and CMC, INC., T/A FROGGY'S BAR & GRILLE, | ) | |
| | ) | |
| Defendants. | ) | |

*Submitted: October 8, 2004*
*Decided: January 28, 2005*

Frank E. Noyes, II, Esq., White & Williams, Wilmington, Delaware. Attorney for Plaintiff.

Jeffrey J. Clark, Esq., Schmittinger & Rodriguez, Dover, Delaware. Attorney for Defendant Graves.

Gregory A. Morris, Esq., Liguori, Morris & Yiengst, Dover, Delaware. Attorney for Defendant CMC.

Upon Consideration of Plaintiff's
Motion For Summary Judgment
**GRANTED**

**VAUGHN, President Judge**

***Regis Insurance Company v. Graves et al.***
C.A. No. 04C-03-050 JTV
January 28, 2005

## OPINION

Regis Insurance Company ("Regis") moves for Summary Judgment in this Declaratory Judgment action. It seeks an order adjudging that it has no duty to defend or indemnify its insured, CMC, Inc. t/a Froggy's Bar & Grille ("Froggy's") in an underlying tort action, *Graves v. CMC, Inc. t/a Froggy's Bar & Grill.*

## I. FACTS

At approximately 12:15 a.m. on August 31, 2002, Joshua Graves, the plaintiff in the underlying action (a defendant in this action), was in the area of a fight between two other individuals just outside of Froggy's Bar & Grill. Graves was allegedly injured when a bouncer intervened in the fight. Graves filed a personal injury action against Froggy's on February 2, 2004.

The complaint filed by Graves avers several counts based on theories of negligence and assault and battery. He contends that Froggy's was negligent through its employee, the bouncer, who allegedly attacked Graves; used unreasonable and excessive force against Graves; used force against Graves when no force was warranted; did not use reasonable care to prevent reasonably forseeable violent acts on the premises and incorrectly determined that Graves was involved in the fight. The complaint also alleges that Froggy's was negligent in the manner in which it hired, trained and supervised its bouncers, and negligent in failing to provide reasonable security for its patrons. Finally, the complaint alleges that Froggy's is vicariously liable on a theory of assault and battery for the intentional and/or reckless actions of its bouncer in that Froggy's bouncer, intentionally and without Graves'

consent, caused Graves to be in fear of immediate harmful or offensive contact and made contact with Graves in a harmful or offensive way.

Regis issued a general liability insurance policy to Froggy's effective February 18, 2002 to February 18, 2003. Froggy's has notified Regis of the action commenced by Graves and seeks coverage for the lawsuit under the policy. The policy contains an assault and battery exclusion. Its applicability is determinative in this dispute. The exclusion provides that Regis has:

> no duty to defend or to indemnify an insured in any action or proceeding alleging . . . Assault and Battery or any act or omission in connection with the prevention, suppression or results of such acts . . . harmful or offensive contact between or among two or more persons . . . apprehension of harmful or offensive contact between or among two or more persons; or . . . threats by words or deeds.
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> This exclusion applies regardless of the degree of culpability or intent and without regard to . . . the alleged failure of the insured . . . in the hiring, supervision, retention or control of any person, whether or not an officer, employee, agent or servant of the insured . . . the alleged failure of the insured or his officers, employees, agents or servants to attempt to prevent, bar or halt such conduct . . . .

Regis has accepted notice of the claim and has thus far defended Froggy's in the underlying action under a full reservation of rights. As mentioned, in this action Regis seeks a determination that it owes no duty to defend or indemnify Froggy's in the underlying action.

## II. PARTIES CONTENTIONS

Regis argues that the insurance policy clearly and unambiguously excludes coverage for assault and battery claims and all allegations in the underlying complaint arise from the alleged assault and battery. It cites *Terra Nova Ins. Co., Ltd. v. Nanticoke Pines, Ltd.*[1] and *Regis Ins. Co. v. Cosenza*[2] as controlling.

Graves argues that the insurance company is required to defend on its claims of negligence. While Graves acknowledges that this Court recently found in favor of Regis in the *Cosenza* decision, a case with an identical issue and substantially similar facts, he requests that the Court reconsider the *Cosenza* decision in light of another case, *St. Anthony's Club v. Scottsdale Ins. Co.*[3] Graves argues that a jury could find liability based entirely on negligence and that coverage exists for such liability.

Graves also contends that a duty to defend and to indemnify arises from an endorsement of the policy titled "Premises Medical Payments Coverage" which provides coverage for medical expenses incurred by a person who sustains bodily injury on the premises. He argues that the assault and battery exclusion does not specifically reference this endorsement and is not applicable to this portion of the policy. Because Graves alleges significant medical expenses in his complaint, he

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[1] 743 F. Supp. 293 (D. Del. 1990).

[2] 2001 Del. Super. LEXIS 75.

[3] 1998 Del. Super. LEXIS 415.

argues there is a duty to defend and to indemnify based on the "Premises Medical Payments Coverage" endorsement.

A stipulation was entered into between Froggy's and Regis and, as a result, Froggy's has not filed an opposition to the summary judgment motion.

## III. STANDARD OF REVIEW

Summary judgment should be rendered if the record shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[4] The facts must be viewed in the light most favorable to the non-moving party.[5] Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of the law to the circumstances.[6] However, when the facts permit a reasonable person to draw but one inference, the question becomes one for decision as a matter of law.[7]

## IV. DISCUSSION

When considering whether an insurer has a duty to defend, certain well established principles apply. The insurer's duty to defend is limited to actions

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[4] Superior Court Civil Rule 56(c).

[5] *Guy v. Judicial Nominating Comm'n.*, 659 A.2d 777, 780 (Del. Super. Ct. 1995); *Figgs v. Bellevue Holding Co.,* 652 A.2d 1084, 1087 (Del. Super. Ct. 1994).

[6] *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

[7] *Wooten v. Kiger*, 226 A.2d 238 (Del. 1967).

asserting claims for which it has assumed liability under the policy.[8] The duty to defend, however, is broader than the liability coverage as the liability coverage is based upon the allegations of the complaint.[9] Where there is some doubt as to whether the complaint alleges an insured risk, the doubt should be resolved in favor of the insured; any ambiguity in the pleadings should be resolved against the insurer; and the duty to defend arises if even one count or theory of the plaintiff's case lies within the coverage of the policy.[10] In addition, any ambiguity in the policy will be construed against the insurer.[11] "In construing an insurer's duty to indemnify and/or defend a claim asserted against its insured, a court typically looks to the allegations of the complaint to decide whether the third party's action against the insured states a claim covered by the policy, thereby triggering the duty to defend."[12]

The insurance coverage question at issue here has been addressed by the Delaware Courts in several cases. In *Terra Nova*,[13] the plaintiff sustained injuries at a tavern operated by the defendant when an employee of the defendant allegedly shot

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[8] *Continental Cas. Co. v. Alexis I. DuPont Sch. Dist.*, 317 A.2d 101, 103 (Del. Super. Ct. 1974).

[9] *First Oak Brook Corp. v. Comly Holding Corp.*, 93 F.3d 92 (3rd Cir. 1996); *St. Anthony's Club v. Scottsdale Ins. Co.*, 1998 Del. Super. LEXIS 415.

[10] *Continental Cas. Co.*, 317 A.2d at 105.

[11] *Penn Mut. Life Ins. Co. v. Oglesby*, 695 A.2d 1146, 1149-50 (Del. Super. Ct. 1997).

[12] *American Ins. Group v. Risk Enter. Mgmt., Ltd.*, 761 A.2d 826, 829 (Del. 2000).

[13] 743 F. Supp. 293 (D. Del. 1990).

him. The plaintiff alleged negligence on the part of the defendant for failing to supervise the employee and failing to provide adequate security. The District Court found that all allegations arose from the assault and battery and the insured had no duty to defend because the policy had an assault and battery exclusion.

In *Cosenza*, the plaintiff alleged that patrons at Froggy's savagely beat him about the head and torso. His complaint alleged several theories of liability based upon negligence. This Court examined policy language identical to the language at issue here and decided the case using *Terra Nova* as precedent. The court concluded that the various grounds of negligence asserted against Froggy's were based upon conduct that helped make the assault possible and were thus fundamentally premised on the assault itself.[14]

*Cosenza* is controlling as the issues are analogous if not identical. The insurance policy bars coverage for any claim "arising, in whole or in part, from . . . Assault and Battery [or] Harmful or Offensive contact . . . ." Graves asserts various claims against Froggy's which all arise from the allegations of assault and battery allegedly committed by Froggy's bouncer. The negligence counts allege various failures on the part of Froggy's which allowed the assault and battery to occur and are thus fundamentally premised upon the assault and battery itself. Based on the exclusions in the policy, the insurance company has no duty to defend or indemnify the insured in this action.

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[14] *Regis Ins. Co.*, 2001 Del. Super. LEXIS 293, at *9.

Graves asks the Court to re-examine its ruling in *Cosenza* in light of the decision in *St. Anthony's Club*. *St. Anthony's Club,* however, is distinguishable from *Cosenza* and this case. In *St. Anthony's Club*, a patron of the club sustained injuries when he was forcibly removed from the premises. He filed a complaint against the club and club owner alleging assault and battery. The assault and battery exclusion in the insurance policy came into question when the club sought a declaratory judgment establishing the insurer's duty to defend. The court in *St. Anthony's* distinguished the case from precedent by noting the absence of the "harmful or offensive contact" language in the policy exclusion.[15] Based on this less inclusive language, the court found that "[n]egligent conduct, short of an assault and battery – an intentional act or possibly a reckless act – is a covered risk."[16] The court then determined that this was sufficient to overcome summary judgment and send to a jury the issue on whether the assault and battery exclusion was applicable.

The decision in *St. Anthony's* is distinguishable because the language of the exclusion in this case is broader than the language in the *St. Anthony's* case. The Third Circuit, in *First Oak Brook,* interpreted a similar exclusion which included the "harmful conduct" language and found the alleged negligent conduct to be encompassed within harmful conduct.[17] Therefore, the allegations in the complaint

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[15] *St. Anthony's Club*, 1998 Del. Super. LEXIS 415, at *13.

[16] *Id*. at *5.

[17] First Oak Brook Corp., 93 F.3d at 96.

did not give rise to coverage. The language in *Terra Nova*, *First Oak Brook*, and *Cosenza* excluded coverage for assault, battery *and* harmful or offensive contact. The policy exclusion in this case parallels the language in *First Oak Brook*, *Terra Nova*, and *Cosenza* and, consequently, those cases are more persuasive than *St. Anthony's Club*. All of the allegations in the complaint, including allegations of negligence, arise from the assault or battery and are excluded from coverage by the inclusive language of the policy exclusion.

The plaintiff raises a second argument relating to a provision in the policy titled "Premises Medical Payments Coverage." This provision insures medical expenses of a person who:

> sustains bodily injury caused by accident . . . provided such bodily injury arises out of (a) a condition in the insured premises, or (b) operations with respect to which the named insured is afforded coverage for bodily injury liability under the policy.

Graves argues this endorsement gives rise to the duty to defend and to indemnify. The language in the endorsement does not support such a conclusion. The endorsement provides for the payment of medical expenses for bodily injury, resulting from an accident, when one of two conditions are met. The allegations in Graves' complaint do not arise from a condition in the insured premises and, for the reasons stated above, Froggy's is not afforded bodily injury coverage for injuries arising from an assault and battery. Neither condition is met and, consequently, there is no coverage for Graves' medical expenses under this portion of the policy.

The insurance policy clearly and unambiguously excludes coverage for Graves' personal injury action. The plaintiff's motion for summary judgment is ***granted***.

**IT IS SO ORDERED.**

/s/ James T. Vaughn, Jr.
President Judge

oc: Prothonotary
cc: Order Distribution
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