J. A09035/10

2010 PA Super 130

PENN-AMERICA INSURANCE COMPANY,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellant	:	
v.	:	
PECCADILLOS, INC.; DAVID M. FREEMAN; LORETTA J. SWARTWOOD, ADMINISTRATRIX OF THE ESTATE OF HEIDI MARIE BRITTON SPICER; MICHAEL J. WRIGHT, PARENT AND NATURAL GUARDIAN OF HALEY MORGAN WRIGHT, A MINOR; TERRY I. SOLIWODA, GRANDPARENT AND NATURAL GUARDIAN OF MADISON PAIGE WANDER, A MINOR; JAMES R. WATSON, ADMINISTRATOR OF THE ESTATE OF MEGAN ANN WATSON; PHILLIP L. CLARK, JR., ADMINISTRATOR OF THE ESTATE OF JACOB CHARLES LATTA,	:	
Appellees	:	No. 914 WDA 2009

Appeal from the Order of May 8, 2009,
in the Court of Common Pleas of Erie County,
Civil Division at No. 12571-08

BEFORE: BENDER, BOWES and COLVILLE*, JJ.

*****Petition for Reargument Filed August 6, 2010*****

OPINION BY COLVILLE, J.: Filed: July 22, 2010

¶ 1 This is an appeal from an order which declared the rights of the parties. We affirm.

¶ 2 The background underlying this matter can be summarized in the following manner. In September of 2007, a complaint was filed by Loretta J. Swartwood, Administratrix of the Estate of Heidi Marie Britton Spicer,

*Retired Senior Judge assigned to the Superior Court.

deceased; Michael J. Wright, parent and natural guardian of Hayley Morgan Wright, a minor; Terry I. Soliwoda, grandparent and guardian of Madison Paige Wander, a minor; and James R. Watson, Administrator of the Estate of Megan Ann Watson, aka Megan A. Watson, deceased (collectively referred to as "Plaintiffs"). The complaint named as defendants Peccadillos, Inc. ("Peccadillos") and Phillip L. Clark, Jr., Administrator of the Estate of Jacob Charles Latta, deceased ("Latta Estate"). The complaint contained the following "factual background."

> 7. On March 17, 2006, [Jacob] Latta [("Latta")], then aged twenty-two, accompanied by his friend, Matthew James Maisner ("Maisner"), then aged twenty-two, were in the City of Erie on St. Patrick's Day.
>
> 8. Latta and Maisner determined to "celebrate" St. Patrick's Day by visiting a series of bars where both of them drank excessive amounts of alcohol, causing them to be significantly and visibly intoxicated.
>
> 9. In the late afternoon and/or early evening of that day, Latta and Maisner were patrons of Peccadillos, where they continued to purchase and consume additional alcohol, although both were visibly intoxicated, and Peccadillos' agents served the alcohol to Latta and Maisner in that condition.
>
> 10. Latta and Maisner continued to become even more intoxicated and rowdy, including a physical altercation with another Peccadillos patron.
>
> 11. Latta and Maisner were then required to leave Peccadillos' premises by Peccadillos' agents, when it was apparent that neither of them was in a safe condition to operate a motor vehicle.

12. Upon leaving Peccadillos, at approximately 9:00 p.m., Latta drove his 2004 Dodge Stratus, with Maisner as his passenger, on State Route 97 ([“]Perry Highway[”]) southbound in Summit Township, Erie County, Pennsylvania, while extremely intoxicated.

13. At that location, Perry Highway is a two lane black asphalt highway with asphalt berms, with one lane of travel in each direction.

14. At that time, the weather was clear and cold and the pavement was dry.

15. At that same time, date and place, . . . Heidi Marie Britton Spicer[ ] was operating her 1990 Buick Skylark in a safe and normal fashion northbound on Perry Highway.

16. [ ] Heidi Marie Britton Spicer was accompanied by . . . Megan Ann Watson, in the right front passenger seat, and Heidi’s two minor daughters, [ ] Hayley Morgan Wright and [ ] Madison Paige Wander, with [ ] Hayley being seated in the left rear passenger seat, and [ ] Madison seated in the right rear passenger seat.

17. At that same time, date and place, [ ] Latta, traveling at an extraordinarily high rate of speed greatly in excess of the speed limit, attempted to pass another southbound vehicle that had stopped to make a signaled left hand turn, by making an illegal pass off of the traveled surface of the roadway on the right, lost control of his vehicle, and crossed over the southbound lane and into the northbound lane, causing his vehicle to violently collide with the Spicer vehicle.

18. As a result of the collision, Latta, Maisner, Heidi Spicer and Megan Ann Watson, all suffered fatal injuries, resulting in their death on said date.

19. Both minor[s] . . . witnessed the collision and fatal injuries of their Mother and the injuries of each other.

Action for Complaint in Declaratory Judgment, 05/28/08, Exhibit 1, at ¶¶7-19. Plaintiffs' complaint contained various counts against Peccadillos and the Latta Estate.

¶ 3 Peccadillos is insured by Penn-America Insurance Company ("Penn-America"). On May 28, 2008, Penn-America filed a complaint in declaratory judgment. The complaint named the following parties as defendants: Peccadillos, Plaintiffs, the Latta Estate, and David Freeman ("Freeman"), the owner of Peccadillos (collectively referred to as "Defendants"). Penn-America's complaint explained Plaintiffs' complaint and further stated that Plaintiffs filed a writ of summons against Freeman. According to Penn-America's complaint, Peccadillos tendered Plaintiffs' suit to Penn-America for defense and indemnity. Penn-America asserted that it denied liability coverage based upon the liquor liability exclusion in Peccadillos' Penn-America insurance policy ("the Policy"). Penn-America sought an order from the trial court declaring that Penn-America is not required to defend or indemnify Peccadillos or Freeman.

¶ 4 Penn-America eventually filed a motion for summary judgment. Peccadillos and Freeman responded by filing what they styled as a motion for partial summary judgment. On May 8, 2009, the trial court entered an order denying Penn-America's motion for summary judgment and granting Peccadillos and Freeman's motion for summary judgment. Penn-America

timely filed a notice of appeal.[1] The trial court directed Penn-America to comply with Pa.R.A.P. 1925(b), which it did. The trial court later issued a memorandum stating that the court already had placed its reasoning for its decision on the record in its May 8, 2009, order; yet, this order contains no explanation for the trial court's decision.

¶ 5 In its brief to this Court, Penn-America asks us to consider the following questions.

> 1. Whether the court below erred to the extent it relied upon anything other than the underlying Complaint and Penn-America Policy in determining whether a duty to defend exists.
>
> 2. Whether the court below erred by denying summary judgment to Penn-America.
>
> 3. Whether the court below erred by granting summary judgment to [ ] Peccadillos and Freeman, finding that Penn-America had a duty to defend the [Plaintiffs' suit] against Peccadillos and Freeman where the claims in that suit are excluded from coverage by the Liquor Liability exclusion in the policy.
>
> 4. Whether the court below erred to the extent it found, as requested by the underlying plaintiffs, that Penn-America had a duty to indemnify Peccadillos or Freeman for their claims in the underlying suit, because the duty to indemnify was not before the court below on the motion and was premature.

---

[1] The trial court's order declared the rights of the parties and disposed of all of the claims made by Penn-America in its complaint for declaratory judgment. Consequently, the order was immediately appealable. ***See Cresswell v. Pennsylvania Nat'l Mut. Cas. Ins. Co.***, 820 A.2d 172, 181 (Pa. Super. 2003) ("In ***Nationwide Mutual Ins. Co. v. Wickett***, 563 Pa. 595, 763 A.2d 813 (2000), our Supreme Court held that an order in declaratory judgment action that declares the rights and duties of a party constitutes a final order that is final and immediately appealable.").

Penn-America's Brief at 3 (suggested answers omitted).[2]

¶ 6 Under its first issue, Penn-America correctly asserts that "[a]n insurer's duty to defend arises only when the allegations in the underlying complaint state a claim potentially covered by the policy." Penn-America's Brief at 12 (citing ***Mutual Benefit Ins. Co. v. Haver***, 725 A.2d 743, 745 (Pa. 1999)). Penn-America then argues,

> Contrary to the established standard for determining a duty to defend, the trial court stated: "Well, that's the issue and I'm going to take a look at deposition testimony and see what the facts are to see if that can survive separately." Penn-America reminded the [c]ourt that the depositions submitted by Loretta Swartwood in opposition to Penn-America's Motion for Summary

---

[2] Because Penn-America appeals from an order denying and granting summary judgment, the following general principles apply to our review:

> The standards which govern summary judgment are well settled. When a party seeks summary judgment, a court shall enter judgment whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense that could be established by additional discovery. A motion for summary judgment is based on an evidentiary record that entitles the moving party to a judgment as a matter of law. In considering the merits of a motion for summary judgment, a court views the record in the light most favorable to the nonmoving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Finally, the court may grant summary judgment only when the right to such a judgment is clear and free from doubt. An appellate court may reverse the granting of a motion for summary judgment if there has been an error of law or an abuse of discretion. . . .

Swords v. Harleysville Insurance Companies, 883 A.2d 562, 566-67 (Pa. 2005) (citations omitted).

> Judgment were not properly before the [c]ourt. Counsel for minor plaintiffs, arguing in opposition to Penn-America's Motion for Summary Judgment, concurred: "I remind the [c]ourt it's the allegation of the complaint that controls at this point."
>
> The court below erred in considering anything beyond the underlying complaint and Penn-America's policy to determine whether a duty to defend [Plaintiffs'] suit existed.

Penn-America's Brief at 13 (citations omitted).

¶ 7 As an initial matter, the comments Penn-America attributes to the trial court and counsel appear to have been made at a hearing on the motions for summary judgment. The certified record is devoid of a transcript of such a hearing. In fact, in the "Request for Transcript" Penn-America filed in the trial court, Penn-America stated, "A Notice of Appeal having been filed, in accordance with Pa.R.App.P. 1911, [Penn-America] states that there is no transcript for any proceeding or testimony applicable or required." Request for Transcript, 06/02/09.

¶ 8 Moreover, there is nothing of record which indicates that the trial court, in fact, considered deposition testimony in reaching its decision regarding the motions for summary judgment. Indeed, as we noted above, the trial court failed to identify the rationale it employed in reaching its decision. Penn-America's arguments under this issue warrant no relief.

¶ 9 We will address Penn-America's next two issues together. Under these issues, Penn-America contends that the trial court erred by denying its motion for summary judgment and granting summary judgment in favor of

Peccadillos and Freeman. According to Penn-America, the allegations leveled against Peccadillos in Plaintiffs' complaint fall squarely within the Policy's liquor liability exclusion. As such, Penn-America takes the position that it should not be required to defend Peccadillos or Freeman with regard to Plaintiffs' action.

¶ 10 Defendants essentially have conceded that several of the claims Plaintiffs brought against Peccadillos fall under the Policy's liquor liability exclusion. Defendants, however, have maintained that Plaintiffs brought allegations against Peccadillos which fall outside of the exclusion. Thus, in Defendants' view, Penn-America is required to defend Peccadillos against Plaintiffs' suit.

¶ 11 Our review of these issues is guided, in part, by the following principles:

> Preliminarily, we note that "[t]he interpretation of an insurance contract regarding the existence or non-existence of coverage is 'generally performed by the court.'" ***Minnesota Fire and Cas. Co. v. Greenfield***, 579 Pa. 333, 344, 855 A.2d 854, 861 (2004). "The interpretation of an insurance contract is a question of law, our standard of review is *de novo,* thus, we need not defer to the findings of the lower tribunals. Our scope of review, to the extent necessary to resolve the legal question before us, is plenary." ***Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.***, 589 Pa. 317, 331, 908 A.2d 888, 893 (2006). Our purpose in interpreting insurance contracts is to ascertain the intent of the parties as manifested by the terms used in the written insurance policy. ***401 Fourth Street, Inc. v. Investors Ins. Group***, 583 Pa. 445, 454, 879 A.2d 166, 171 (2005). "When the language of the policy is clear and unambiguous, we must give effect to that

language." ***Kvaerner***, 589 Pa. at 331, 908 A.2d at 897. However, "when a provision in the policy is ambiguous, the policy is to be construed in favor of the insured to further the contracts prime purpose of indemnification and against the insurer, as the insurer drafts the policy and controls coverage." ***Id.***

In determining whether an insurance company is responsible to defend its insured, we observed in ***Gene's Restaurant Inc. v. Nationwide Ins. Co.***, 519 Pa. 306, 308, 548 A.2d 246, 247 (1988) that:

> [a]n insurer's duty to defend an action against the insured is measured, in the first instance, by the allegations in the plaintiff's pleadings. . . . In determining the duty to defend, the complaint claiming damages must be compared to the policy and a determination made as to whether, if the allegations are sustained, the insurer would be required to pay resulting judgment. . . . [T]he language of the policy and the allegations of the complaint must be construed together to determine the insurers' obligation.

Therefore, "a carrier's duties to defend and indemnify an insured in a suit brought by a third party depend upon a determination of whether the third party's complaint triggers coverage." ***Mutual Benefit Ins. Co. v. Haver***, 555 Pa. 534, 538, 725 A.2d 743, 745 (1999).

Donegal Mut. Ins. Co. v. Baumhammers, 938 A.2d 286, 290-91 (Pa. 2007).

¶ 12 The Policy states, in relevant part,

> 1. Insuring Agreement
>
> 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. . . .

Action for Complaint in Declaratory Judgment, 05/28/08, Exhibit 3, Commercial General Liability Coverage Form, at Page 1 of 15.

¶ 13 The liquor liability exclusion at issue in this case provides,

> This insurance does not apply to:
>
> * * * * *
>
> c. Liquor Liability
>
> "Bodily injury" or "property damage" for which any insured may be held liable by reason of:
>
> (1) Causing or contributing to the intoxication of any person;
>
> (2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or
>
> (3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.
>
> This exclusion applies only if you are in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages.

Id. at Page 2 of 15.

¶ 14 In arguing that certain of Plaintiffs' claims fall outside of the Policy's liquor liability exclusion, Defendants have highlighted paragraphs from Plaintiffs' complaint, such as the following:

> The above described collision and [Plaintiffs'] resultant injuries and damages, as aforesaid, were caused by the reckless and/or negligent, grossly negligent, willful and/or wanton actions and/or inactions of [ ] Peccadillos of continuing to serve alcoholic

> beverages to visibly intoxicated [ ] Latta in violation of 47 P.S. § 4-493(1), thereby rendering him incapable of safely operating his vehicle, and **by ejecting Latta from the premises after the physical altercation rather than by taking him in charge or summoning the police when [Peccadillos] knew or should have know that [ ] Latta would attempt to operate a motor vehicle in his unsafe, extremely intoxicated condition.**

Action for Complaint in Declaratory Judgment, 05/28/08, Exhibit 1, at ¶47 (emphasis added). Defendants have contended that the language we have highlighted levels an allegation against Peccadillos that does not invoke any of the three factors which trigger the liquor liability exclusion. We agree.

¶ 15 Peccadillos' liability under this claim does not turn on whether Peccadillos caused or contributed to Latta's intoxication. Furthermore, Peccadillos' liability as to this allegation does not require consideration of whether Peccadillos furnished alcohol to a person under the legal drinking age or under the influence of alcohol. Lastly, this claim has nothing to do with a statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages. For these reasons, this claim does not trigger the Policy's liquor liability exclusion.

¶ 16 Before we address the remainder of Penn-America's arguments, we pause to address the Dissent. The Dissent maintains that our interpretation of paragraph 47 of Plaintiffs' complaint ignores the "and" which immediately precedes the portion of the paragraph which we have highlighted above. The Dissent also contends that we treat the averments appearing before and

after this "and" as if they are in the disjunctive. The Dissent is partially incorrect and partially correct. We have not ignored this "and," but we have treated the averments appearing before and after this "and" as if they are disjunctive.

¶ 17 Again, Plaintiffs' complaint states,

> The above described collision and [Plaintiffs'] resultant injuries and damages, as aforesaid, **were caused by** the reckless and/or negligent, grossly negligent, willful and/or wanton actions and/or inactions of [ ] Peccadillos of continuing to serve alcoholic beverages to visibly intoxicated [ ] Latta in violation of 47 P.S. § 4-493(1), thereby rendering him incapable of safely operating his vehicle, **and by** ejecting Latta from the premises after the physical altercation rather than by taking him in charge or summoning the police when [Peccadillos] knew or should have know that [ ] Latta would attempt to operate a motor vehicle in his unsafe, extremely intoxicated condition.

Id. (emphasis added). Our interpretation of this language gives effect to the entire paragraph, including the infamous "and". Plaintiffs averred that the collision and their injuries were caused **by** Peccadillos' actions in serving alcohol to a visibly intoxicated Latta "and" **by** Peccadillos ejecting Latta from the premises.

¶ 18 In characterizing what it believes is to be the thrust of Plaintiffs' claim under paragraph 47, the Dissent extracts from the paragraph Plaintiffs' use of the second "by" and replaces it with "then". Dissenting Opinion at 3 ("The thrust of this averment is that the collision resulting in the Underlying Plaintiffs' injuries and damages was caused or contributed to by Peccadillo's

[sic] continued service of alcohol to a visibly intoxicated Latta, thus rendering him incapable of safely operating a motor vehicle, **and** *then* ejecting him from the establishment following an altercation when they knew or should have known that he would operate a motor vehicle.") (boldface type in original and italics added for emphasis). In our view, this interpretation of Plaintiffs' claim ignores the plain language Plaintiffs employed when crafting their complaint.

¶ 19 Returning to our disposition of this appeal, both Penn-America and the Dissent believe Plaintiffs' claim regarding Peccadillos' ejection of Latta from the premises is meritless. However, regardless of the merits of the claim, Penn-America is required to defend Peccadillos. As the Supreme Court has explained,

> [T]he insurer agrees to defend the insured against any suits arising under the policy 'even if such suit is groundless, false, or fraudulent.' Since the insurer thus agrees to relieve the insured of the burden of defending even those suits which have no basis in fact, our cases have held that the obligation to defend arises whenever the complaint filed by the injured party may *potentially* come within the coverage of the policy.

Gedeon v. State Farm Mut. Auto. Ins. Co., 188 A.2d 320, 321-22 (Pa. 1963) (emphasis in original). We further observe,

> [I]n order to find a duty to defend, we need not find that every claim asserted in the complaint filed against the insured is within the potential coverage of the policy. Rather we need only determine if any of the claims asserted are potentially covered. If any are, the insurer must defend until the suit is narrowed only to claims that are definitely not within that coverage.

Biborosch v. Transamerica Ins. Co., 603 A.2d 1050, 1057-58 (Pa. Super. 1992).

¶ 20 Plaintiffs' claim highlighted above is potentially covered by the Policy. As a result, Penn-America is obligated to defend Peccadillos unless and until Plaintiffs' suit is narrowed only to claims that definitely are not within the scope of the Policy's coverage. Penn-America's second and third issues thus fail.

¶ 21 Under its last issue, Penn-America notes that the trial court's order is ambiguous. With this thought in mind, Penn-America argues that, to the extent the trial court determined Penn-America has a duty to indemnify Peccadillos, this determination was premature. Penn-America explains,

> . . . Whether the liability imposed triggers a duty to indemnify is dependent entirely on what liability is ultimately found by the jury – thus, for example here, and there is no dispute by [Defendants], there is no coverage for liquor liability of punitive damages. Penn-America could have no duty to indemnify Peccadillos or Freeman for any such damages awarded or a settlement of such claims. . . .

Penn-America's Brief at 22. Penn-America misconstrues the present significance of a declaration finding that it has a duty to indemnify.

¶ 22 Penn-America properly filed a complaint seeking a declaration as to whether it is required to defend and/or indemnify Peccadillos and Freeman. ***See General Acc. Ins. Co. of America v. Allen***, 692 A.2d 1089, 1095 (Pa. 1997) ("The Declaratory Judgments Act may be invoked to interpret the

obligations of the parties under an insurance contract, including the question of whether an insurer has a duty to defend and/or a duty to indemnify a party making a claim under the policy."). We already have determined that Penn-America has a duty to defend. This determination carries with it a **conditional** obligation to indemnify in the event Penn-America is held liable for a claim covered by the policy. ***Id.*** ("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 the insured is held liable for a claim covered by the policy.**") (emphasis added).

¶ 23 The trial court could not, and seemingly did not, conclude that Penn-America has a duty to indemnify, regardless of the outcome of Plaintiffs' action. Consequently, Penn-America's last issue warrants no relief. For these reasons, we affirm the order of May 8, 2009.

¶ 24 Order affirmed.

¶ 25 Judge Bowes files a Dissenting Opinion.

J. A09035/10

2010 PA Super 130

PENN-AMERICA INSURANCE COMPANY,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellant	:	
v.	:	
PECCADILLOS, INC.; DAVID M. FREEMAN; LORETTA J. SWARTWOOD, ADMINISTRATRIX OF THE ESTATE OF HEIDI MARIE BRITTON SPICER; MICHAEL J. WRIGHT, PARENT AND NATURAL GUARDIAN OF HALEY MORGAN WRIGHT, A MINOR; TERRY I. SOLIWODA, GRANDPARENT AND NATURAL GUARDIAN OF MADISON PAIGE WANDER, A MINOR; JAMES R. WATSON, ADMINISTRATOR OF THE ESTATE OF MEGAN ANN WATSON; PHILLIP L. CLARK, JR., ADMINISTRATOR OF THE ESTATE OF JACOB CHARLES LATTA,	:	
Appellees	:	No. 914 WDA 2009

Appeal from the Order of May 8, 2009,
in the Court of Common Pleas of Erie County,
Civil Division at No. 12571-08

BEFORE: BENDER, BOWES and COLVILLE*, JJ.

DISSENTING OPINION BY BOWES, J.:

¶ 1 As I do not believe that the underlying complaint states a claim potentially covered by the general liability insurance policy, I respectfully dissent. I agree with Penn-America that it has no duty to defend Peccadillos because the only legally tenable bases for liability herein necessarily involve

*Retired Senior Judge assigned to the Superior Court.

Peccadillos' service of alcohol and fall squarely within the policy's liquor liability exclusion.

¶ 2 The exclusion at issue provides that coverage does not apply to:

> C. Liquor Liability
> "Bodily Injury" or "property damage" for which any insured may be held liable by reason of:
> (1) Causing or contributing to the intoxication of any person;
> (2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol;
> (3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.
> This exclusion applies only if you are in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages.

Penn-America General Liability Insurance Policy at 2. The majority rests its decision on an interpretation of paragraph 47 of the underlying complaint that ignores the "and" and treats the averments as if they are in the disjunctive, focusing exclusively on the highlighted portion:

> 47. The above-described collision and Plaintiff's resultant injuries and damages, as aforesaid, were caused by the reckless and/or negligent, grossly negligent, willful and/or wanton actions and/or inactions of Defendant Peccadillos of continuing to serve alcoholic beverages to the visibly intoxicated Defendant Latta in violation of 47 P.S.§ 4-493(1), thereby rendering him incapable of safely operating his vehicle, and **by ejecting Latta from the premises after the physical altercation rather than by taking him in charge or summoning the police when Defendant Peccadillos knew or should have known that Defendant Latta would attempt to operate a motor vehicle in his unsafe, extremely intoxicated condition.**

Complaint, ***Smartwood et al. v. Peccadillos, Inc. et al.***, at paragraph 47.

¶ 3 While I agree that the highlighted language, standing alone, does not implicate the three factors which trigger the liquor liability exclusion under the policy, I believe that the averments of paragraph 47 must be read together and that they were so intended. The thrust of this averment is that the collision resulting in Underlying Plaintiffs' injuries and damages was caused or contributed to by Peccadillo's continued service of alcohol to a visibly intoxicated Latta, thus rendering him incapable of safely operating a motor vehicle, **and** then ejecting him from the establishment following an altercation when they knew or should have known that he would operate a motor vehicle. Hence, Underlying Plaintiffs' injuries, the harm herein, were at the very least "contributed to" by the service of alcohol. Appellees admit as much and concede that "The harm resulting was concurrently caused by all of these factors. . . ." Appellee's brief at 10. Where as here, Peccadillos' service of alcohol admittedly **contributed to** the intoxication of Mr. Latta, ultimately resulting in the harm to Underlying Plaintiffs, Subsection (c)(1) of the policy precludes coverage and a duty to defend. This reason alone is sufficient to reverse the order below.

¶ 4 In addition, I believe that the highlighted language upon which the majority relies in order to find a non-liquor-related basis for liability does not state a claim for negligence under Pennsylvania law. Under the common

law, Peccadillos had no duty to control Mr. Latta or to protect the Underlying Plaintiffs from harm as a result of Mr. Latta's conduct. Further, I am persuaded that our legislature, cognizant of public policy considerations, has determined what duties should be imposed upon liquor licensees in this Commonwealth, and that we should refrain from judicially expanding those duties. ***See Atcovitz v. Gulph Mills Tennis Club***, ***Inc.***, 812 A.2d 1218 (Pa. 2002).

¶ 5 The initial element in any negligence case is that the defendant owes a duty to the plaintiff. ***Althaus v. Cohen***, 756 A.2d 1166 (Pa. 2000)(plurality opinion). The existence of a duty is a question of law for the court to decide; whether there has been a neglect of such duty is generally for the jury. ***Emerich v. Philadelphia Ctr. for Human Dev.***, 720 A.2d 1032 (Pa. 1998). Under the common law, as a general rule, there is no duty to control the conduct of a third party to protect another from harm. A judicial exception to the general rule has been recognized where a defendant stands in some special relationship with either the person whose conduct needs to be controlled or in a relationship with the intended victim of the conduct, which gives to the intended victim a right to protection. The Restatement (Second) of Torts § 315 (1965), "General Principle," provides:

> There is no duty to control the conduct of a third person so as to prevent him from causing physical harm to another unless

> (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
>
> (b) a special relation exists between the actor and the other which gives to the other a right to protection.

Our courts have adopted this section of the Restatement (Second) of Torts and held that a duty may be found under the proper circumstances where there are certain relationships such as an employer/employee relationship (Restatement (Second) of Torts § 317), where a possessor of land or chattels permits a third person to use his land or possessions (Restatement (Second) of Torts § 318), or where one who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others (Restatement (Second) of Torts § 319).

¶ 6 In ***Emerich***, ***supra***, our Supreme Court recognized that the special relationship between a mental health professional and his patient may, in certain circumstances, give rise to an affirmative duty to warn for the benefit of specifically-identified intended victim. In ***Goryeb v. Comm. Dept. of Public Welfare***, 575 A.2d 545 (Pa. 1990), Section 319 of the Restatement (Second) of Torts provided the basis for liability against a state hospital for prematurely discharging a mentally disturbed man who then shot three people. Similarly, where the court found both a special relation between an adult son and his parents and that the parents had control over the son's

conduct, the parents were subject to liability for not taking possession of his gun or contacting authorities when they knew he had dangerous propensities in ***Donegal Mut. Ins. Co. v. Baumhammers***, 938 A.2d 286 (Pa. 2007).

¶ 7 My review of the pleadings fails to reveal any allegation of a special relationship between Peccadillos and Latta, or between Peccadillos and Underlying Plaintiffs, as defined in Restatement (Second) of Torts § 315 and the Supreme Court's decision in ***Donegal Mut. Ins. Co. v. Baumhammers***, ***supra***, that would give rise to a common law duty on the part of Peccadillos to control the conduct of Mr. Latta. Nor is there any allegation that Peccadillos was in charge of Mr. Latta so as to come within the ambit of Section 319. Ejecting Mr. Latta from the premises does not give rise to such a relationship.

¶ 8 Our courts have recognized that in negligence cases, the concept of duty is grounded in public policy. ***R.W. v. Manzek***, 888 A.2d 740 (Pa. 2005). The duties of liquor licensees to third persons are defined by statute and premised upon the service or sale of alcohol. ***See*** 47 P.S. § 4-493(1) (Dram Shop Act). Absent Dram Shop liability or a special relationship, such licensees have no duty to protect third persons by calling the police each time a visibly intoxicated person leaves their establishment, or otherwise taking responsibility for such patrons to ensure that they do not drive. Thus,

the licensee cannot, as a matter of law, be liable or concurrently liable on this theory so as to trigger a duty to defend.

¶ 9 As the basis for liability herein necessarily involves the sale or service of alcohol, I would hold that the liquor liability exclusion in the general liability policy precludes coverage and that, consequently, there is no duty to defend. Accordingly, I would reverse the order below.