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ERIE INS. VS. MILLER ET AL

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NOTICE

NOTICE IS HEREBY GIVEN that W. SCOTT SANDUSKY, ESQUIRE, intends to apply in open court for admission to the Bar of the Court of Common Pleas of Adams County, Pennsylvania, on the 7th day of October 2011, and that he intends to practice law as an Assistant Public Defender in the Office of the Public Defender, County of Adams, 23 Baltimore Street, Gettysburg, Pennsylvania.

8/19, 26 & 9/2

IN THE COURT OF
COMMON PLEAS OF
ADAMS COUNTY, PENNSYLVANIA
No. 2011-S-1146

ANTONIA W. PADILLA, Plaintiff

vs.

WILMER L. CRUZ, Defendant

NOTICE

If you wish to defend, you must enter a written appearance personally or by attorney and file your defenses or objections in writing with the court. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you without further notice for the relief requested by the plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.

IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

COUNTY REFERRAL OFFICER
Adams County Courthouse
Gettysburg, PA 17325
(717) 334-6781

9/2

IN THE COURT OF
COMMON PLEAS OF
ADAMS COUNTY, PENNSYLVANIA

CIVIL DIVISION

Case Number: 11-S-501

DISCOVER BANK, Plaintiff

vs.

BECKY S. FURST, Defendant

NOTICE TO DEFEND

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.

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COURT ADMINISTRATOR
Adams County Courthouse
111 Baltimore Street
Gettysburg, PA 17325
(717) 334-6781, Ext. 213

9/2

NOTICE BY THE ADAMS COUNTY
CLERK OF COURTS

NOTICE IS HEREBY GIVEN to all heirs, legatees and other persons concerned that the following accounts with statements of proposed distribution filed therewith have been filed in the Office of the Adams County Clerk of Courts and will be presented to the Court of Common Pleas of Adams County—Orphan's Court, Gettysburg, Pennsylvania, for confirmation of accounts entering decrees of distribution on Friday, September 9, 2011 at 8:30 a.m.

HOFF—Orphan's Court Action Number OC-80-2011. The First and Final Account of Beth Watts, Ronald Hoff, and Wayne Hoff, Co-Executors of the Estate of Lovina E. Hoff, deceased, late of Borough of York Springs, Adams County, Pennsylvania.

ARAHOVAS—Orphan's Court Action Number OC-144-2010. The First and Final Account of William C. Kollas, Executor of Charalambos N. Arahovas, deceased, late of Gettysburg, Adams County, Pennsylvania.

MCCARTHY—Orphan's Court Action Number OC-83-2011. The First and Final Account of Joseph R. Zeigler, Jr. and Marilyn W. Zeigler, Executors of Gerald C. McCarthy, deceased, late of Butler Township, Adams County.

MCDOWELL—Orphan's Court Action Number OC-88-2011. The First and Final Account of John Prohovich, Sr., of Roberta McDowell, deceased, late of Oxford Township, Adams County, Pennsylvania.

Kelly A. Lawver
Clerk of Courts

8/26 & 9/2

ERIE INS. VS. MILLER ET AL

1. Specifically, in determining whether an insurer is obligated to defend an insured, the Court must decide whether the policy would provide coverage if the facts alleged in the underlying complaint are proven to be true.

2. It is well settled by our courts that the interpretation of an insurance policy is a matter of law properly resolved in a declaratory judgment action.

3. The insurer owes a duty to defend if the complaint against the insured alleges facts which would bring the claim within the policy's coverage if they were true. It does not matter if in reality the facts are completely groundless, false or fraudulent. It is the face of the complaint and not the truth of the facts alleged therein which determines whether there is a duty to defend.

4. The test of whether an injury is the result of an accident is to be determined from the viewpoint of the insured and not from the viewpoint of the one that committed the act causing the injury. Further, the fact that the event causing the injury may be traceable to an intentional act of a third party does not preclude the occurrence from being an "accident."

5. For purposes of interpreting insurance policies, the term "accident" refers to an unexpected and undesirable event occurring unintentionally, and the key term in the definition of accident is unexpected, which implies a degree of fortuity.

6. Appellate authority recognizes that it is the intentional conduct of the *insured* which precludes coverage, not the intentional acts of third parties.

7. Substantial appellate authority holds that even where an insured is convicted of "intentional" crimes, a duty to defend may still exist.

8. The least degree of concert or collusion in the commission of the offense is sufficient to sustain a finding of responsibility as an accomplice.

In the Court of Common Pleas of Adams County, Pennsylvania, Civil, No. 10-S-296, ERIE INSURANCE EXCHANGE VS. SHERI L. MILLER, JOSEPH ELLIOT ANTRIM MILLER, MICHAEL FARLEY AND LISA FARLEY.

Allan C. Molotsky, Esq., for Plaintiff

James J. Franklin, Esq., for Defendant Miller

David B. Dowling, Esq., for Defendant Farley

Campbell, J., April 19, 2011

OPINION

Before the Court is Plaintiff, Erie Insurance Exchange's (hereinafter "Erie") Motion for Judgment on the Pleadings in its Declaratory Judgment Action. Before discussing the merits of Erie's Motion it is critical to understand the factual and procedural background giving rise to Erie's action for Declaratory Judgment.

BACKGROUND

The genesis for the litigation was the tragic and senseless shooting of Michael Farley by Tyler Lee during the course of robbery Lee was

committing with Defendant, Joseph Miller. On March 25, 2006, Tyler T. Lee and Joseph E. Miller, both of whom were minors, attempted to rob the Lincoln Trading Post in Gettysburg, Pennsylvania. In preparation for the robbery, Joseph Miller “armed Lee and himself with a .22 caliber pistol and a .22 caliber rifle” **Underlying Compl. ¶ 15.** Michael Farley was an employee at the Lincoln Trading Post. During the course of the robbery, “Lee discharged his firearm striking Michael Farley at least three times,” causing Michael Farley to suffer serious life threatening injuries. **Underlying Compl. ¶ 16.** While the robbery was planned, the actual shooting by Lee was unexpected and not preplanned. *Id.* At the time of the robbery Defendant Joseph Miller was residing with his mother, Defendant Sheri Miller.

Defendant Joseph Miller was charged with numerous criminal offenses and was tried as an adult before President Judge John D. Kuhn. On November 20, 2007, President Judge John D. Kuhn found Defendant Joseph Miller guilty of robbery under 18 Pa. C.S.A. § 3701(a)(1); criminal conspiracy to commit robbery under 18 Pa. C.S.A. § 903(a)(1); aggravated assault under 18 Pa. C.S.A. § 2702(a)(1); unlawful possession or manufacture of weapons of mass destruction under 18 Pa. C.S.A. § 2716(a); possessing instruments of crime with intent to use them under 18 Pa. C.S.A. § 907(a); possession of a firearm by a minor under 18 Pa. C.S.A. § 6110.1(a); recklessly endangering another person under 18 Pa. C.S.A. § 2705; and fleeing and attempting to allude a police officer under 75 Pa. C.S.A. § 3733(a). Importantly, although his co-conspirator Tyler Lee was also convicted of attempt to commit criminal homicide under 18 Pa. C.S.A. § 901(a), Defendant Joseph E. Miller was acquitted of that offense.

Subsequently on September 2, 2008, Michael and Lisa Farley filed a civil Complaint (hereinafter “Underlying Complaint”) in the Court of Common Pleas of Adams County against Tyler T. Lee; Jana Lee Hammer, as parent and natural guardian of Tyler Lee; Joseph E. Miller; Sheri Miller as parent and natural guardian of Joseph E. Miller; and Michael Miller, as parent of Joseph E. Miller.¹ The Underlying Complaint sets forth causes of action for civil conspiracy against Joseph E. Miller, negligence against Joseph E. Miller,

¹ In the instant Declaratory Judgment Action neither Tyler T. Lee, Jana Lee Hammer or Michael Miller are parties.

negligent entrustment against Sheri Miller, negligent supervision of minors against Sheri Miller and loss of consortium.

According to the Underlying Complaint, the Farleys' personal injury action arose out of the shooting of Michael Farley during the robbery of the Lincoln Trading Post in Gettysburg, Pennsylvania on March 25, 2006. At the time of the robbery Defendant Joseph Miller was residing with his mother, Defendant Sheri Miller at 218 North Queen Street, Littlestown, Adams County, Pennsylvania. At the time of the robbery Defendant Sheri Miller held a Home Protector Policy of insurance issued by Erie, (hereinafter, "Policy") which Policy provided for home and family liability protection. Section 2 of the Policy provided liability protection for Sheri Miller and her son, Joseph E. Miller who was a resident in her home at the time. When Joseph Miller and Sheri Miller tendered the claims made against them to Erie for coverage, Erie denied coverage and declined to provide a defense or indemnification to Joseph Miller and Sheri Miller alleging first that the Underlying Complaint fails to aver an occurrence within the meaning of the Policy, and secondly that coverage is excluded under the Intentional Acts Exclusion contained within the Policy.

Eventually, on February 23, 2010, Erie commenced the instant Declaratory Judgment Action via complaint against Sheri and Joseph Miller (hereinafter "Miller Defendants" or the "Insureds") and Michael and Lisa Farley (hereinafter "Farley Defendants"). Inexplicably this Declaratory Judgment action was not filed for more than seventeen months after the Underlying Complaint was filed against the Miller Defendants. Erie's Declaratory Judgment action avers that coverage under its Home Protector policy is precluded for Joseph Miller because the Underlying Complaint filed by the Farleys fails to aver an "occurrence" as defined by the Policy, or alternatively, that even if an occurrence has been sufficiently pleaded in the underlying litigation, coverage is precluded by virtue of the Intentional Acts Exclusion. Erie also contends that because coverage is precluded to Joseph Miller, one of its insureds, on these grounds, that coverage must also be precluded for Sheri Miller.

As a result of Erie declining to provide a defense and despite the fact that Erie failed to seek relief via declaratory judgment at the outset of the underlying litigation, the Miller Defendants independently hired counsel to defend the underlying litigation. Ultimately,

the Miller Defendants in the underlying litigation stipulated to liability and the case proceeded to a trial on the issue of damages only. Following the trial held on August 17, 2010, before Judge Michael A. George in the Adams County Court of Common Pleas, judgment was entered in favor of Michael Farley and against Joseph E. Miller, Sheri Miller and Michael Miller, jointly and severally, in the amount of \$900,000.00. Judgment was also entered in favor of Lisa A. Farley and against Defendants Joseph E. Miller, Sheri Miller and Michael Miller, jointly and severally in the amount of \$150,000.00. See *Farley v. Tyler Teagon Lee, et al.*, 08-S-333 (C.P. Adams Order, October 29, 2010).²

Meanwhile, Sheri and Joseph Miller filed their Answer to the Declaratory Judgment Complaint on April 15, 2010, and the Farley Defendants filed their Answer with New Matter on June 1, 2010. On October 6, 2010, Erie filed its Answer to New Matter of the Farley Defendants and then filed the instant Motion for Judgment on the Pleadings on October 15, 2010. Erie's Motion for Judgment on the Pleadings was accompanied by its Brief in Support. The Farleys' Brief in Opposition was filed November 17, 2010, and the Miller Defendants, while not filing a brief, concurred entirely with the argument espoused by the Farley Defendants. Argument was held before the undersigned on December 21, 2010. After argument, the parties were afforded an opportunity to provide supplemental briefs in support of their respective positions. On January 14, 2011, the Farleys filed a Supplemental Brief. On January 18, 2011, Erie filed a Supplemental Brief for consideration by the Court. The matter is now before the Court and ripe for decision.

DISCUSSION

Erie's Declaratory Judgment Action contains four separate counts. Count 1 asserts that Erie has no duty to defend or indemnify Defendant Joseph Miller on the Underlying Complaint claiming there was no "occurrence" as defined by the Policy; Count 2 alleges that the Policy's Intentional Act Exclusion precludes coverage for Joseph Miller, meaning Erie has no duty to defend or indemnify him; Count 3 alleges that since the Intentional Act Exclusion precludes

² The record does not specify that judgment was entered on some counts but not others. Therefore, it must be presumed that liability was as to all counts in the Underlying Complaint, and judgment was entered on all counts.

coverage for Joseph Miller, an insured, the Policy also bars coverage for Sheri Miller; finally, Count 4 alleges that to the extent the Underlying Complaint seeks recovery of punitive damages, public policy and the Policy itself absolves Erie of any duty or obligation to defend or indemnify either Joseph Miller or Sheri Miller as to the claim for punitive damages.

Any party may file a motion for judgment on the pleadings after the relevant pleadings are closed, but within such time as to not unreasonably delay trial. **Pa. R. Civ. P. 1034.** A motion for judgment on the pleadings is treated as if it were a preliminary objection in the nature of a demurrer. *Piehl v. City of Philadelphia*, 987 A.2d 146, 154 (Pa. 2009) (citation omitted). The Court must accept as true all well pleaded averments in the complaint. *Jones v. Travelers, Ins. Co.*, 514 A.2d 576, 578 (Pa. Super. 1986) (citation omitted). In deciding the motion the Court's review is limited to consideration of the pleadings and those exhibits and documents properly attached thereto. *Kosor v. Harleysville Mut. Ins. Co.*, 595 A.2d 128, 129 (Pa. Super. 1991). Judgment on the pleadings may be entered where there are no disputed issues of fact and the moving party is entitled to judgment as a matter of law. *Id.* (citations omitted). In considering whether or not to grant judgment on the pleadings, the Court may not take into account conclusions of law or unjustified inferences asserted by either party. *Keystone Automated Equip. Co., Inc. v. Reliance Ins. Co.*, 535 A.2d 648, 650 (Pa. Super. 1988) (citation omitted). Judgment on the pleadings may be granted only where the moving party's right to succeed is certain and the case is so free from doubt that a trial would clearly be a fruitless exercise. *Jones*, 514 A.2d at 578 (citations omitted). Specifically, in determining whether an insurer is obligated to defend an insured, the Court must decide whether the policy would provide coverage if the facts alleged in the underlying complaint are proven to be true. *Keystone*, 535 A.2d at 649 (citing *State Auto Ins. Co. v. Kufahl*, 527 A.2d 1039, 1040-41 (Pa. Super. 1987)).

Instantly, resolution of Erie's Motion for Judgment on the Pleadings in its Declaratory Judgment Action revolves around the proper interpretation of the Policy at issue. It is well settled by our courts that the interpretation of an insurance policy is a matter of law properly resolved in a declaratory judgment action. *Erie Ins. Exch.*

v. *Muff*, 851 A.2d 919, 925 (Pa. Super. 2004) (citing *Aetna Cas. Sur. Co. v. Roe*, 650 A.2d 94, 98 (Pa. Super. 1994)).

All facts alleged by the Farleys in the Underlying Complaint must be accepted as true. If that Underlying Complaint alleges a claim or injury “which *may* be within the scope of the policy, the insurer must defend its insured until the claim is confined to a recovery the policy does not cover.” *QBE Ins. Corp. v. M & S Landis Corp.*, 915 A.2d 1222, 1225 (Pa. Super. 2007), *appeal denied*, 956 A.2d 436 (Pa. 2008) (emphasis added).

Under the Pennsylvania Rules of Civil Procedure alternative pleading of causes of action within one complaint is permitted. **Pa. R. Civ. P. 1020.** Thus, it is not necessary to determine that each and every claim asserted by the Farleys in the Underlying Complaint does in fact fall within the scope of the Policy. Rather, Erie has a duty to defend if any claim brought in the Underlying Complaint might properly fall within the scope of the Policy.

In discussing an insurer’s duty to defend, our Superior Court has said:

An insurer’s duty to defend is a distinct obligation, different from and broader than its duty to indemnify. An insured has purchased not only the insurer’s duty to indemnify successful claims which fall within the Policy’s coverage, but also protection against those groundless, false, or fraudulent claims regardless of the insurer’s ultimate liability to pay. Not all claims asserted against an insured, however, activate the insurer’s duty to defend.

The insurer’s obligation to defend is fixed solely by the allegations in the underlying complaint. It is not actual details of the injury, but the nature of the claim which determines whether the insurer is required to defend. The duty to defend is limited to only those claims covered by the Policy. The insurer is obligated to defend if the factual allegations of the complaint on its face comprehend an injury which is actually or potentially within the scope of the Policy.

Thus, the insurer owes a duty to defend if the complaint against the insured alleges facts which would bring the

claim within the policy's coverage if they were true. It does not matter if in reality the facts are completely groundless, false or fraudulent. It is the face of the complaint and not the truth of the facts alleged therein which determines whether there is a duty to defend.

Muff, 851 A.2d at 925-26 (citing *D'Auria v. Zurick Ins. Co.*, 507 A.2d 857, 859 (Pa. Super. 1986)) (emphasis in original). Accordingly, to determine whether Erie had an obligation to defend and indemnify Joseph Miller, and/or Sheri Miller, the inquiry must begin with a comparison of the terms of the underlying insurance policy with the nature of the allegations contained in the Farleys' Complaint against Joseph Miller and Sheri Miller. See *Muff*, 851 A.2d at 926.

Count 1 of Erie's Declaratory Judgment Action is premised upon Erie's assertion that there was no "occurrence" under the terms of the Policy issued to Sheri Miller, as it relates to the Farleys' claims against Joseph Miller.³ It follows, according to Erie's argument, that if there was no "occurrence," then there can be no coverage afforded to Joseph Miller in the Farleys' action against him. The Erie Policy at issue provides in material part as follows:

"We" will pay all sums up to the amount shown on the "Declarations" which "anyone we protect" becomes legally obligated to pay as damages because of "bodily injury" or "property damage" caused by an "occurrence" during the policy period. "We" will pay for only "bodily injury" or "property damage" covered by this policy.

(Plf.'s Decl. J. Compl. ¶ 35, HomeProtector Extracover Ins. Policy, Home and Family Liability Protection-Section II, p. 17).

The Policy defines "occurrence" as "an accident including continuous or repeated exposure to the same general harmful conditions." **Erie HomeProtector Extracover Ins. Policy, Definitions, p. 5.** The Policy does not define the term "accident" as used in the definition of an "occurrence." The question then is whether the facts as pleaded in the Underlying Complaint, all of which must be construed by this Court as true for purposes of deciding Erie's Motion for Judgment on the Pleadings, describe an "occurrence" so as to trigger coverage under the Policy. According to Erie's argument,

³ Erie concedes that the allegations of the Underlying Complaint against Sheri Miller do set forth an "occurrence" under the Policy.

because the shooting of Michael Farley by Tyler Lee, (which shooting was the proximate causing of Farley's bodily injury), occurred during the course of crimes being committed by Joseph Miller, the insured, the shooting cannot be considered accidental. It follows, according to Erie, that under the definition of occurrence, because the shooting was not accidental, an occurrence did not take place.

However, the test of whether an injury is the result of an accident is to be determined *from the viewpoint of the insured and not from the viewpoint of the one that committed the act causing the injury.* *Donegal Mut. Ins. Co. v. Baumhammers*, 938 A.2d 286, 292 (Pa. 2007) (citing *Mohn v. Am. Cas. Co. of Reading*, 326 A.2d 346, 348 (Pa. 1974)) (emphasis added). Further, the fact that the event causing the injury may be traceable to an intentional act of a third party does not preclude the occurrence from being an "accident." *Id.* In *Baumhammers*, the Supreme Court recognized that an insurer is not absolved of its duty to defend its insured when the complaint filed against the insured alleges that the intentional conduct of a third party was enabled by the negligence of the insured. *Baumhammers*, 938 A.2d at 291.

For purposes of interpreting insurance policies, the term "accident" refers to an unexpected and undesirable event occurring unintentionally, and the key term in the definition of accident is unexpected, which implies a degree for fortuity. *Id.* at 292 (citing *Kvaerner Medals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.*, 908 A.2d 888, 898 (Pa. 2006)).

Instantly, the specific and proximate cause of Michael Farley's injuries was the shooting by Tyler Lee. That shooting, as specifically alleged in the Underlying Complaint, was unexpected and not preplanned by Joseph Miller, the insured. According to the Underlying Complaint, the undisputed facts of this case show that Joseph Miller and Tyler Lee agreed with each other to jointly commit an illegal act, namely the attempted robbery of the Lincoln Trading Post, and in preparation for that attempted robbery, Joseph Miller provided firearms and ammunition, a vehicle and other equipment to be used in the commission of the robbery. During the commission of the robbery, Tyler Lee discharged the firearm causing Michael Farley to sustain severe and compensable injuries. While the robbery was planned, the actual shooting by Lee was unexpected by Miller and not preplanned.

After careful review it is evident that the Underlying Complaint sounds in negligence. Count 1 of the Underling Complaint sets forth a claim against Joseph Miller for civil conspiracy. In it, the Farleys allege that although Joseph Miller took affirmative steps in the planning of robbery, and in the commission of robbery, that the injury causing event (i.e. the shooting by Tyler Lee of Michael Farley), while reasonably foreseeable, was unexpected and not preplanned. The Complaint clearly states that “[t]he foreseeable tortious acts *committed by co-conspirator Lee during the attempted armed robbery* directly, proximately, and foreseeably *caused Farleys to sustain [injury]*. **Underlying Compl. ¶ 25** (emphasis added). Additionally, the civil conspiracy count alleges that “[d]uring the commission of the illegal acts and/or acts in furtherance of that conspiracy, *Lee committed tortious acts reasonably foreseeable to Miller.*” **Underlying Compl. ¶ 24** (emphasis added). The fact that acts may be reasonably foreseeable (negligence standard) does not mean those acts were expected, intended or substantially certain to result.

Erie argues that because the allegations involve a component of overt and intentional acts on the part of Joseph Miller in the planning and attempted commission of the robbery, which led up to the shooting of Michael Farley by Tyler Lee, that the injuries caused must be the result of the intentional conduct of Joseph Miller, and therefore not an accident. I disagree. The fact that Joseph Miller took action in the planning of a robbery does not necessarily lead to the conclusion that he intended bodily injury to Michael Farley anymore than a drunk driver planning to operate his motor vehicle down the highway while under the influence of alcohol plans or intends to cause injury to other motorists. The proximate cause of the Farleys’ damages was the unexpected and unplanned shooting by Lee, a third party, non-insured. Importantly, the Underlying Complaint alleges that Joseph Miller and Tyler Lee conspired to do an unlawful act (commit a robbery) and that they took overt acts in pursuit of that common purpose. The Underlying Complaint does not allege or suggest that Miller and Lee conspired to shoot, harm or cause bodily injury to Farley. The Underlying Complaint does not allege a cause of action for assault and battery.

As previously stated, whether an event is an accident is determined from the viewpoint of *the insured*. *Baumhammers*, 938 A.2d at 292 (emphasis added). The fact that Joseph Miller planned,

expected and intended to rob someone does not mean he expected or intended to cause bodily injury to anyone. Here, the Underlying Complaint expressly avers that the shooting was neither preplanned nor expected by the insured, Joseph Miller. Assuming that is true, as I must, the shooting of Michael Farley, and the injuries sustained by the Farleys, must be considered accidental.

Count 2 of the Underlying Complaint essentially alleges a cause of action for negligent entrustment of firearms and ammunition by Joseph Miller, an Erie insured, to Tyler Lee, the shooter. The Underlying Complaint alleges that Joseph Miller permitted a third person, Tyler Lee, to use a thing that had been under Miller's control, namely, a loaded firearm and ammunition, during the course of an attempted robbery of the Lincoln Trading Post. **Underlying Compl. ¶ 28.** The Underlying Complaint alleges that Miller knew or should have known that the loaded firearm could be discharged creating an unreasonable risk of harm to others in the store, and in this regard that Miller's conduct was *reckless*. **Underlying Compl. ¶ 29.** (emphasis added). The Underlying Complaint further alleges that "Miller's entrustment of the firearm to Lee proximately and directly and foreseeably caused harm to Plaintiff, Michael Farley when Lee shot Farley unexpectedly during the attempted robbery" **Underlying Compl. ¶ 30.** The Underlying Complaint further alleges that Miller failed to prevent Lee from discharging the firearm. **Underlying Compl. ¶ 31.** All of these averments sound in negligence.

While Erie argues that the entrustment of the firearm by Miller to Lee was intentional, the same can be said in any situation where a parent intentionally gives the keys to the family car to a child known to be irresponsible, only to have the child cause injury that was unplanned and unexpected by the parent. In the wrong hands, a motor vehicle, like a firearm, can be a dangerous and deadly weapon. I see little distinction here.⁴

While Paragraphs 13, 15, 16, 22, and 24 of the Underlying Complaint clearly describe overt acts of Joseph Miller, it is important to note that none of those acts was the proximate cause of injury to Michael Farley. Rather, Michael Farley was injured, senselessly and

⁴ The Policy at issue would seem to concede that entrustment of a motor vehicle to an irresponsible child who then causes injury would be an "occurrence" as Erie has taken other steps to cover this situation by adding an express exclusion regarding injuries arising out of the use of a motor vehicle.

severely, when he was shot by Lee. Joseph Miller did not participate in the shooting and never discharged his firearm. But for Lee discharging his firearm, Michael Farley would not have been injured in the robbery. The Underlying Complaint consistently alleges that the shooting of Michael Farley by Lee was unexpected and not pre-planned by Miller, the insured.

The Court is mindful that the caption of a specific count within a complaint does not necessarily define the cause of action set forth therein. See *Krajisa v. Key Punch, Inc.*, 622 A.2d 355, 357 (Pa. Super. 1993). However, instantly, the factual averments of the Underlying Complaint set forth viable causes of action against Joseph Miller sounding in negligence. Although there was some degree of intent in the actions of Joseph Miller leading up to the unplanned, unnecessary and fortuitous shooting of Michael Farley by Tyler Lee, it is equally apparent that the shooting was neither planned nor expected and that Joseph Miller, an insured, did not participate in any way in the firing or discharging of any weapons. Nor did he encourage Lee to shoot Farley. The injury causing event was not the planning to commit a robbery, or even Miller's participation in that robbery, but rather the shooting of Michael Farley by Tyler Lee. If the shooting by Tyler Lee was unexpected, not preplanned and not intended, when viewed from the perspective of Joseph Miller, the insured, then it was an occurrence. Based on the averments of the Underlying Complaint, which this Court must accept as true, the shooting was not pre-planned, was not expected and was not intended by Joseph Miller. Accordingly, the injury causing event, the shooting of Michael Farley by Tyler Lee, was an occurrence for purposes of the Policy at issue. The allegations of the Underlying Complaint are not only potentially within the scope of the Policy, they are actually within its scope. Accordingly, Erie has a duty to both defend and to indemnify Joseph Miller.

Erie next argues in Count 2 of its Declaratory Judgment Action that even if there was an occurrence, coverage for Joseph Miller is still precluded as a result of the Intentional Acts Exclusion contained within the Policy. The Policy contains various exclusions providing that the Policy does not cover:

1. "bodily injury," "property damage" or "personal injury" expected or intended by "anyone we protect" even if:

- a. the degree, kind or quality of the injury or damage is different than what was expected or intended; or
- b. a different person, entity, real or personal property sustained injury or damage than was expected or intended.

“We” do cover reasonable acts committed to protect persons and property.

Under the Policy “bodily injury means physical harm, sickness or disease, including mental anguish or resulting death...”

For some unknown reason, Erie’s Declaratory Judgment Complaint also indentifies the following exclusion in the Policy:

“Personal injury arising out of willful violation of the law or ordinance by anyone we protect.”

Personal Injury is defined in the Policy as:

“Injury arising out of:

1. Libel, slander, or defamation of character;
2. False arrest, wrongful detention or imprisonment, malicious prosecution, racial or religious discrimination, wrongful entry or eviction, invasion of privacy, or humiliation caused by any of these.”

Thus, the Policy differentiates between “bodily injury” and “personal injury.” All of the damages and injuries alleged by Farleys in the Underlying Complaint are “bodily injuries” and not “personal injuries” as defined by the Policy. Importantly, the Policy expressly excludes coverage for “personal injury” resulting from “willful violation of the law” but no such exclusion exists for “bodily injuries.” This distinction, in and of itself, supports the conclusion that a criminal conviction does not necessarily or conclusively trigger the application of the Intentional Acts Exclusion.⁵

Continued to next issue (9/9/2011)

⁵ Interestingly, the Allstate Policy at issue in *Allstate Indemnity Co. v. Batzig*, 270 Fed. Appx. 154 (3d Cir. 2008), a case cited improperly in Erie’s brief contained the following exclusion: “any bodily injury or property damage intended by, or which may reasonably be expected to result from the intentional or criminal acts or omission of, any insured person.” *Id.* at 156 (emphasis added). However, the Policy at issue does not contain an exclusion for injury resulting from “criminal acts.”

ESTATE NOTICES

NOTICE IS HEREBY GIVEN that in the estates of the decedents set forth below the Register of Wills has granted letters, testamentary or of administration, to the persons named. All persons having claims or demands against said estates are requested to make known the same, and all persons indebted to said estates are requested to make payment without delay to the executors or administrators or their attorneys named below.

FIRST PUBLICATION**ESTATE OF ESTELLA MAE GEBHART a/k/a ESTELLA M. GEBHART, DEC'D**

Late of Oxford Township, Adams County, Pennsylvania

Co-Executors: Francis R. Gebhart, Rosemarie T. Herman and Veronica D. Hawn, c/o James D. Hughes, Esq., Salzmann Hughes P.C., 354 Alexander Spring Road, Suite 1, Carlisle, PA 17015

Attorney: James D. Hughes, Esq., Salzmann Hughes P.C., 354 Alexander Spring Road, Suite 1, Carlisle, PA 17015

ESTATE OF RITCHIE A. IRELAND, III, DEC'D

Late of Freedom Township, Adams County, Pennsylvania

Administratrix: Stephanie L. Papaioannou, 1118 Annandale Drive, Elgin, IL 60123

Attorney: Gary E. Hartman, Esq., Hartman & Yannetti, 126 Baltimore Street, Gettysburg, PA 17325

ESTATE OF MARY RUTH SEIDEL, DEC'D

Late of Cumberland Township, Adams County, Pennsylvania

Executors: Robert A. Seidel, Jr., 19 Jackson Road, Gettysburg, PA 17325; Mary H. Bradford, P.O. Box 504, Dillwyn, VA 23936; Theresa E.S. Wyatt, 11662 Browningsville Road, Ijamsville, MD 21754

Attorney: Robert E. Campbell, Esq., Campbell & White, P.C., 112 Baltimore Street, Suite 1, Gettysburg, PA 17325-2311

ESTATE OF ETHYL M. ZENITTINI, DEC'D

Late of the Borough of Littlestown, Adams County, Pennsylvania

Executor: Joseph J. Zenittini, 222 Boyer Street, Littlestown, PA 17340

Attorney: John J. Mooney, III, Esq., Mooney & Associates, 230 York Street, Hanover, PA 17331

SECOND PUBLICATION**ESTATE OF NANCY ELLEN GOBRECHT, DEC'D**

Late of Reading Township, Adams County, Pennsylvania

Executrix: Marcy Hufnagle, c/o Daniel D. Worley, Esq., Worley & Worley, 101 E. Philadelphia St., York, PA 17401

Attorney: Daniel D. Worley, Esq., Worley & Worley, 101 E. Philadelphia St., York, PA 17401

ESTATE OF RAY E. GOLDEN, JR., DEC'D

Late of Cumberland Township, Adams County, Pennsylvania

Barbara K. Golden, 23 Davis Avenue, Gettysburg, PA 17325

Attorney: John A. Wolfe, Esq., Wolfe & Rice, LLC, 47 West High Street, Gettysburg, PA 17325

ESTATE OF RUTHANNA JACOBS, DEC'D

Late of Oxford Township, Adams County, Pennsylvania

Executrix: Patricia L. Mummert, c/o Matthew L. Guthrie, Esq., Guthrie, Nonemaker, Yingst & Hart, LLP, 40 York Street, Hanover, PA 17331

Attorney: Matthew L. Guthrie, Esq., Guthrie, Nonemaker, Yingst & Hart, LLP, 40 York Street, Hanover, PA 17331

ESTATE OF PHYLLIS MARY KRAUSHAR a/k/a PHYLLIS KRAUSHAR, DEC'D

Late of Maryland

Executor: Anton D. Kraushar, c/o Samuel A. Gates, Esq., Gates & Gates, P.C., 250 York Street, Hanover, PA 17331

Attorney: Samuel A. Gates, Esq., Gates & Gates, P.C., 250 York Street, Hanover, PA 17331

ESTATE OF ANNE M. ROSENBERG, DEC'D

Late of Straban Township, Adams County, Pennsylvania

Executrix: Carole A. Schutz, 36103 Astoria Way, Avon, OH 44011

Attorney: Ronald J. Hagarman, Esq., 110 Baltimore Street, Gettysburg, PA 17325

ESTATE OF ARLENE G. STOUGH, DEC'D

Late of the Borough of East Berlin, Adams County, Pennsylvania

Gerald L. Stough, 345 Bermudian Creek Road, East Berlin, PA 17316

Attorney: Jan M. Wiley, Esq., The Wiley Group, P.C., 3 N. Baltimore Street, Dillsburg, PA 17019

ESTATE OF ELSIE MAY ZINN, DEC'D

Late of Oxford Township, Adams County, Pennsylvania

Dawn M. Peters, 315 Green Springs Road, Hanover, PA 17331; Dale L. Zinn, 140 Municipal Road, Hanover, PA 17331

Attorney: Thomas E. Miller, Esq., Miller & Shultis, P.C., 249 York Street, Hanover, PA 17331

THIRD PUBLICATION**ESTATE OF KIMBERLEE JOANNE LEISTER COX, DEC'D**

Late of the Borough of Carroll Valley, Adams County, Pennsylvania

Administrator: Joanne Leister, 22 Deer Trail, Fairfield, PA 17320

Attorney: John J. Murphy III, Esq., Patrono & Associates, LLC, 28 West Middle Street, Gettysburg, PA 17325

ESTATE OF SARAH R. FUSS, DEC'D

Late of the Borough of Gettysburg, Adams County, Pennsylvania

Personal Representative: John M. Fuss, 76 E. Broadway, Gettysburg, PA 17325

Attorney: G. Steven McKonley, Esq., 119 Baltimore Street, Hanover, PA 17331

ESTATE OF DONALD L. HALL a/k/a DONALD LESTER HALL, DEC'D

Late of Oxford Township, Adams County, Pennsylvania

Executor: Ralph N. Hall, c/o Douglas H. Gent, Esq., Law Offices of Douglas H. Gent, 1157 Eichelberger Street, Suite 4, Hanover, PA 17331

Attorney: Douglas H. Gent, Esq., Law Offices of Douglas H. Gent, 1157 Eichelberger Street, Suite 4, Hanover, PA 17331

ESTATE OF MEILE HORJUS, DEC'D

Late of Straban Township, Adams County, Pennsylvania

Administratrix c.t.a.: Sandra S. Kehr, 440 Kuhn Fording Rd., East Berlin, PA 17316

Attorney: Chester G. Schultz, Esq., 145 Baltimore Street, Gettysburg, PA 17325

ESTATE OF JAMES S. KRICHTEN, DEC'D

Late of the Borough of McSherrystown, Adams County, Pennsylvania

Executors: James S. Krichten, Joan M. Riley and Kay Noble, c/o James T. Yingst, Esq., Guthrie, Nonemaker, Yingst & Hart, LLP, 40 York Street, Hanover, PA 17331

Attorney: James T. Yingst, Esq., Guthrie, Nonemaker, Yingst & Hart, LLP, 40 York Street, Hanover, PA 17331

NOTICE OF ACTION IN EJECTMENT
IN THE COURT OF
COMMON PLEAS OF
ADAMS COUNTY, PENNSYLVANIA

CIVIL ACTION—LAW
COURT OF COMMON PLEAS
CIVIL DIVISION
ADAMS COUNTY
No. 11-S-700

Federal Home Loan Mortgage
Corporation
vs.

James M. Hesley or occupants

CAN GET LEGAL HELP. IF YOU CAN-
NOT AFFORD TO HIRE A LAWYER,
THIS OFFICE MAY BE ABLE TO PRO-
VIDE YOU WITH INFORMATION
ABOUT AGENCIES THAT MAY OFFER
LEGAL SERVICES TO ELIGIBLE PER-
SONS AT A REDUCED FEE OR NO
FEE.

ADAMS COUNTY
COURT ADMINISTRATOR
Adams County Courthouse
Gettysburg, PA 17325
717-337-9846

9/2

NOTICE

TO: James M. Hesley or occupants:

You are hereby notified that on April 26, 2011, Plaintiff Federal Home Loan Mortgage Corporation filed an Ejectment Complaint endorsed with Notice to Defend, against you in the Court of Common Pleas of Adams County, Pennsylvania, docketed at 11-S-700. Wherein Plaintiff seeks to Evict all occupants at the property 1620 Buchanan Valley Road, Orrtanna, PA 17353, whereupon your property was sold by the Sheriff of Adams County.

You are hereby notified to plead to the above referenced Complaint on or before (20) days from the date of this publication or Judgment will be entered against you.

**This firm is a debt collector attempting to collect a debt and any information obtained will be used for that purpose. If you have previously received a discharge in bankruptcy and this debt was not reaffirmed, this correspondence is not and should not be construed to be an attempt to collect a debt, but only enforcement of a lien against property.

NOTICE

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU