IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

LA SHANGRILA, INC.

Plaintiff,

v. CASE NO.: 8:07-CV-1133-T-24EAJ

HERMITAGE INSURANCE COMPANY, and
BRUCE ROSEN
and JACQUELYN ROSEN

Defendants.
_____/

MOTION FOR FINAL SUMMARY
JUDGEMENT AND MEMORANDUM OF LAW IN SUPPORT

COMES NOW the Defendant, HERMITAGE INSURANCE COMPANY, a foreign insurance company ("Hermitage"), by and through undersigned counsel, pursuant to Federal Rule of Civil Procedure Rule 56, and hereby files this Motion for Final Summary Judgement and Memorandum of Law in Support, and hereby states as follows:

I. FACTUAL BACKGROUND

1. This is an action for declaratory judgement and breach of contract brought on behalf of La Shangrila, Inc., a Florida corporation ("La Shangrila"), in which La Shangrila is seeking to have this Court issue a declaratory judgement finding that a policy of insurance issued by Hermitage to La Shangrila provides coverage for a claim brought against La Shangrila by Bruce Rosen and Jacquelyn Rosen ("Rosens") in Florida state court ("underlying action").

2. The underlying action was brought by the Rosens against La Shangrila and one of its employees, Timothy Angelini ("Angelini"). The underlying action was filed on June 10, 2005.

3. The allegations of the Rosens' lawsuit are that on or about August 21, 2004, the Rosens were lawfully on La Shangrila's premises when they were pepper sprayed, assaulted and battered by Angelini and other members of La Shangrila's staff.

4. The Rosens' lawsuit alleges two separate counts against La Shangrila for negligent hiring and retention.

5. The allegations against La Shangrila in the Rosens' lawsuit are that La Shangrila was negligent in the manner in which it hired and retained its employees.

6. After the Rosens' lawsuit was filed, La Shangrila requested that Hermitage defend La Shangrila on or about March 26, 2007, citing the Commercial General Liability ("CGL") policy of insurance that Hermitage issued to La Shangrila. Hermitage was first notified of this alleged incident and lawsuit on or about March 27, 2007.

7. Nearly three years elapsed from the time the alleged incident involving the Rosens occurred, and nearly two years elapsed from the filing of the underlying action until La Shangrila notified Hermitage of the incident and requested a defense against the Rosens' suit. This is in contravention of the policy terms. Furthermore, La Shangrila made its own unilateral decision and voluntarily incurred attorneys' fees and costs defending against the Rosens' lawsuit without first notifying Hermitage of the lawsuit and without Hermitage's approval.

8. After evaluating the Rosens' claims, Hermitage determined that the allegations of the Rosens' lawsuit did not fall within the scope of coverage provided by the Hermitage CGL policy. Therefore, Hermitage denied La Shangrila's demand that Hermitage defend and indemnify La

Shangrila for the allegations of the Rosens' lawsuit in a letter dated March 29, 2007. (A copy of the denial letter is attached hereto as Exhibit "A").

9. After Hermitage denied La Shangrila's demand that Hermitage defend and indemnify it for the Rosens' lawsuit, La Shangrila retained counsel to represent it in its efforts to obtain a declaratory judgement against Hermitage for its refusal to defend La Shangrila in the underlying action.

10. La Shangrila alleges three separate counts against Hermitage, one count for declaratory judgement, seeking a declaration from the Court that Hermitage owed a duty to defend, a second count for declaratory judgement, seeking a declaration from the Court that Hermitage owed a duty to indemnify, and a third count for breach of contract based on its failure to provide a defense in the Rosens' lawsuit.

11. In response to the Complaint, Hermitage timely removed this action to Federal Court, and answered the Complaint, contending that there are policy exclusions that preclude coverage for the Rosens' lawsuit against La Shangrila.

12. Specifically, the Hermitage policy of insurance provides in relevant part as follows:

Coverage A - Bodily Injury and Property Damage Liability

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. We may, at

> our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:
>
> 1. The amount we will pay for damages Is limited as described in Section 3 - Limits of Insurance; and
>
> 2. Our right and duty to defend e n d s when we have used up the limit of insurance in the payment of judgements or settlements under Coverages A or B or medical expenses under Coverage C.
>
> No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments - Coverages A and B.

13. The Hermitage policy of insurance contains numerous exclusions, which preclude any coverage, meaning either a defense or indemnity, for certain types of acts. In addition to the exclusions contained within the CGL Coverage Form, there are a number of endorsements which alter the coverage afforded under the Hermitage policy of insurance.

14. One of those endorsements adds an exclusion to the policy for assault and/or battery, and provides as follows:

> **EXCLUSION - ASSAULT AND/OR BATTERY HIC 308 (3/92)**
>
> Assault and/or battery **shall not be deemed an accident** under the above-referenced policy. The Company shall not be obligated to pay on behalf of or defend the insured **for any claim alleging an assault and/or battery no matter how the assault and/or battery is alleged to have incurred.**
>
> It is understood and agreed that this insurance does not apply to "bodily injury" or "property damage" **arising or alleged to arise out of**:

> A) An assault and/or battery caused by or at the instigation or direction of:
>
> 1. **the insured, his agent or employee**;
> 2. any patron of the insured; or
> 3. **any other person**; or
>
> B) **Any act or omission of the insured, his agent, or employee in connection with the prevention or suppression of an assault and/or battery or criminal** acts by third parties.
>
> (Emphasis added).

15. Based upon the allegations of the Rosens' lawsuit against La Shangrila, and the specific provisions of the Hermitage CGL, including the exclusion for any claim arising out of assault and/or battery, the intended or expected injury exclusion, and lack of timely notification of claims against La Shangrila, there is no coverage afforded to La Shangrila under the Hermitage CGL policy of insurance for the Rosens' lawsuit. Therefore, Hermitage is entitled to the entry of final summary judgement in its favor and against La Shangrila on all counts of the complaint.

WHEREFORE, for the reasons stated above, Hermitage respectfully requests that this Court enter a summary final judgement in favor of Hermitage on the three counts of the Complaint, based on the finding that there is no coverage, either in the form of a duty to defend or a duty to indemnify, and that Hermitage has not breached its contract with La Shangrila based on the allegations of the Rosens' lawsuit.

II. MEMORANDUM OF LAW

A. The standard for summary judgement.

Summary judgement is authorized if the pleadings, depositions, answers to interrogatories, admissions of fact, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgement as a matter of law. Federal Rule of Civil Procedure Rule 56(c); accord, Anderson v. Liberty Lobby Inc., 477 U.S. 242, 250, 106 S. Ct. 2505, 91 L.Ed. 2d 202 (1986). Summary judgement is appropriate only in circumstances where the evidence is such that a reasonable jury could not return a verdict for the non-moving party. Id. at 248; accord, Celotex Corporation v. Catrett, 477 U.S. 317, 322-323, 106 S. Ct. 2548, 91 L.Ed. 2d 265 (1986).

The moving party bears the initial burden of proving that no genuine issue of material fact exits. *See,* Anderson, 477 U.S. at 248-250; Celotex, 477 U.S. at 324-325. The substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgement. Factual disputes that are irrelevant or unnecessary will not be counted. Anderson, 477 U.S. at 248. In determining whether the moving party has satisfied its burden, all inferences drawn from the underlying facts are considered in the light most favorable to the party opposing the motion, and all reasonable doubts are resolved against the moving party. Id. at 255, *see also,* Matsushita Electric Industries Company v. Zenith Radio Corporation, 475 U.S. 574, 587-588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). Summary judgement is mandated, however, against a party who fails to make a sufficient showing to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Celotex**,** 477 U.S. at 322.

B. The duty to defend and indemnify.

Under Florida law, an insurance carrier's duty to defend is broader than the duty to indemnify, so an insurance carrier must defend an action even if the facts alleged are actually untrue, or if the legal theories are unsound. Adolfo House Distributing Corp. v. Travelers Property and Cas. Ins. Co., 165 F.Supp.2d 1332, 1335 (S.D. Fla. 2001). In Florida, an insurance company's duty to defend an insured is determined solely from the allegations of the complaint against the insured, not by the true facts of the cause of action against the insured, the insured's version of the facts, or the insured's defenses. State Farm Fire and Casualty Company v. Steinberg, 393 F.3d 1226, 1230 (11th Cir. 2004). Conclusory buzzwords unsupported by factual allegations are not sufficient to trigger coverage for the purposes of determining the duty to defend. Id.

The insurer must defend the lawsuit if the complaint, when fairly read, alleges facts that create potential coverage under the policy. Allstate Insurance Company v. Safer, 317 F.Supp. 2d 1345, 1349 (M.D. Fla. 2004). There is no obligation on the part of an insurance carrier to defend an action against its insured when the pleading in question shows the application of a policy exclusion. Id. A plaintiff cannot trigger a duty to defend merely by labeling an intentional act negligent; instead, where the alleged facts establish intentional conduct, but the claim alleges negligence, the negligence label should be disregarded. Hatmaker v. Liberty Mutual Fire Insurance Company, 308 F. Supp. 2d 1308, 1316 (M.D. Fla. 2004). For the duty to defend to arise under Florida law, the allegations contained within the four corners of the complaint in the underlying action must set forth a cause of action that seeks recover for the type of damages that are covered by the insurance policy in question. Auto Owners Insurance Company v. Travelers Casualty & Surety Company, 227 F.Supp. 2d 1248, 1266 (M.D. Fla. 2002). The insurer's duty to defend an insured is

broader than the duty to indemnify; therefore, if the court finds that the insurer had no duty to defend, then the insurer has no duty to indemnify. Council v. Paradigm Insurance Company, 133 F.Supp. 2d 1339, 1341 (M.D.Fla. 2001).

That is precisely the situation that presents itself in this declaratory action. Here, the allegations of the Rosens' lawsuit do not trigger any coverage whatsoever under the Hermitage CGL policy of insurance. This is because the allegations of the Rosens' lawsuit fall squarely within the exclusion for claims arising out of an assault and/or battery. Notwithstanding the attempts to label the actions of La Shangrila as negligent, it is clear from a review of the Rosens' lawsuit that the entire claim is based upon the assault and/or battery of the Rosens. Thus, the assault and/or battery exclusion of the Hermitage CGL policy (see Paragraph 14 above) applies. As such, the duty to defend has not been triggered, and therefore under Florida law there is no duty to indemnify.

C. Hermitage does not have a duty to defend or indemnify La Shangrila because the allegations arise out of an excluded act, namely and assault and battery.

Florida courts that have addressed the same issue presented to this Court have reached the conclusion that the assault and battery exclusion precludes coverage for personal injuries under a CGL policy. This Court issued an opinion in a negligence action against a bar, similar to this action, in which the Court concluded that there was no coverage under a CGL policy for a negligence claim brought on behalf of a bar patron who was injured. In Council, *supra*., this Court considered a scenario in which a bar patron lost an eye during an incident on an insured's premises. The bar presented the complaint to the insurance carrier, which denied coverage. In light of the denial, the bar filed suit against the insurance carrier in a declaratory action, alleging that the carrier had breached its insurance policy by refusing to defend and indemnify the bar, as well as a request for

declaratory relief as to whether the underlying plaintiff's claims were covered by the policy. The underlying plaintiff's complaint against the bar alleged various acts of negligence. Hermitage's policy contains substantially the same policy provisions as the policy that was the subject in Council.

Under the Hermitage policy, an assault and/or battery, or claim arising therefrom, does not fall within the definition of an "occurrence" under the Policy, as set forth in the following relevant provision of the Commercial General Liability Form:

> **SECTION V - DEFINITIONS**
>
> **(13)** "Occurrence" means an **accident**, including continuous or repeated exposure to substantially the same general harmful conditions.

(Emphasis added).

Because any assault and/or battery, or any claim arising therefrom, cannot be considered an "accident" according to the plain language of the "Assault and/or Battery" exclusion above, there can be no "occurrence" to trigger coverage under CGL Form Part "A." As noted in Paragraph 14 above, there was a policy modification that added an assault and/or battery exclusion to the policy which states: "Assault and/or battery ***shall not be deemed an accident*** under the above mentioned policy." This definition restricts coverage to accidental or inadvertent incidents, not the intentional acts alleged by the Rosens, which do not fit within that description. Therefore, under the assault and/or battery exclusion, an assault and/or battery is not deemed an accident, and thus, cannot constitute an occurrence. The alleged intentional acts in the underlying complaint which give rise to the Rosens' negligence claim against La Shangrila werre not an accident, they are plainly an assault and/or battery - an intentional act by La Shangrila's staff. Since an assault and/or battery is

not deemed an accident, the assault and/or battery alleged is not an occurrence, therefore, there is no coverage triggered in the Hermitage policy under this exclusion.

Also, there is no coverage because the underlying complaint alleges negligence on La Shangrila's part for the negligent hiring and retention of Angelini. As stated in the assault and/or battery exclusion, insurance does not apply to bodily injury arising or alleged to arise out of: "Any ***act or omission*** of the insured, his agent or employee in connection with the ***prevention or suppression*** of an assault and/or battery . . ." In their underlying action, the Rosens allege that La Shangrila was negligent in the hiring and retention of Angelini. This allegation clearly falls within this exclusion since the Rosens allege that La Shangrila's act or omission in hiring/retaining Angelini is connected with the prevention or suppression of the assault and/or battery on the Rosens. Therefore, there is no coverage under this clause in the Hermitage policy.

This exclusion applies to preclude coverage for *all* of the Rosens' claims contained in the underlying action. This is because of the unambiguous and broad scope of the language, particularly the language excluding coverage for "... ***any*** claim alleging an assault and/or battery ***no matter how the assault and/or battery is alleged to have occurred***" and excluding coverage for any claim "...***arising or alleged to arise out of...***" any assault and/or battery committed by any person. A fair reading of the underlying complaint makes it abundantly clear that the catalyst and basis for the entire lawsuit and all counts of the complaint is the assault and/or battery by an employee of La Shangrila detailed in the complaint. This exclusion is unambiguous and excludes coverage for any claim that would not exist but for the assault and/or battery.

Indeed, Florida Courts have defined and applied the phrase "arising out of" in the context of exclusions, as having a much broader meaning than "caused by," and instead meaning "originating

from," "growing out of," "flowing from," "incident to," or "having a connection with." Hagen v. Aetna Cas. & Surety Co., 675 So.2d 963, 965 (Fla. 5th DCA 1996) *citing* National Indemnity Co. v. Corbo, 248 So.2d 238 (Fla. 3d DCA 1971). This would include any negligence claims that arise out of the assault and battery as well. Britamco Underwriters, Inc. v. Zuma Corporation, 576 So.2d 965 (Fla. 5th DCA 1991), ("Our conclusion is consistent with the overwhelming weight of authority in jurisdictions that have considered this issue" [case citations omitted]); Perrine Food Retailers, Inc. v. Odyssey Ltd., 721 So.2d 402, 404 (Fla. 3d DCA 1998), ("An assault and battery exclusion in a liability policy precludes coverage for the negligence of the insured which arises as a result of the assault and battery.").

In Council, this Court found that there was no coverage under the Paradigm policy of insurance, concluding:

> As to the allegations of the complaint, Council asserts several allegations which deal with the insured's own negligence. Case law demonstrates ***that injury claims described in terms of the bar owner's negligence are, in essence, injuries that arise from "assault and battery.***" *See*, Miami Beach Entertainment, Inc. v. First Oak Brook Corporation Syndicate, 682 So.2d 161 (Fla. 3rd DCA 1996); Britamco Underwriters, Inc. v. Zuma Corp., 576 So.2d 965 (Fla. 5th DCA 1991). In Walker's policy, the specific language of the exclusion under "occurrence," details that "any incident arising out of the failure or alleged failure by " the insured is not part of the coverage of the insured's policy. Therefore, it is clear from the specific language of the exclusion, under Paragraph 12, that Council's claim of the insured's negligence is not part of the insured's coverage policy.

Id. at 1342-1343. (Emphasis added).

Florida state courts that have addressed this identical issue have reached the same conclusion. For example, in Perrine Food Retailers (holding that the policy's assault and battery exclusion precludes coverage for the negligence of the insured which arises as a result of an assault and

battery), the Third District Court of Appeal considered a claim against a supermarket that was brought on behalf of a shopper when he was injured by unknown parties during the course of a robbery. The underlying plaintiff's suit was based upon various theories of negligence, including the failure to provide adequate security, the failure to train security personnel, the failure to manage and control the premises, and the failure to provide adequate lighting. The supermarket sought defense and coverage from its insurance carrier, which denied the claim on the basis of an assault and battery exclusion very similar to Hermitage's exclusion.

Based upon this exclusion, the trial court granted the insurance carrier's Motion for Summary Judgement both on the cause of action for declaratory relief, and for breach of contract. After analyzing the language of the exclusion, the Third District Court of Appeal concluded: "An assault and battery exclusion in a liability policy precludes coverage for the negligence of the insured which arises as a result of the assault and battery." Id. at 404. This language applies with equal force to this declaratory action.

Florida's Third District Court of Appeal had previously issued the same opinion in Miami Beach Entertainment (finding no coverage under policy's assault and battery exclusion for a claim alleging negligence that arose out of an assault and battery). In Miami Beach Entertainment**,** a bar customer was injured when a brawl erupted in a club. Although the injured patron was not part of the brawl itself, he was injured when he was struck in the head with a champagne bottle that had been thrown by one of the unknown brawlers. The injured plaintiff sued the club for negligence.

The club's insurer filed an action for declaratory relief, arguing that the assault and battery exclusion precluded coverage. The trial court granted the insurance carrier's Motion for Summary Judgement, and the Third District Court of Appeal affirmed. In reaching its conclusion that there

was no coverage under policy's assault and battery exclusion for a claim alleging negligence that arose out of an assault and battery, the court in Miami Beach Entertainment held that:

> Although the complaint was couched in terms of the bar owner's negligence in failing to keep control over its patrons, for purposes of determining insurance coverage, the ***injuries arose from the assault and battery***.

Id. at 162. (Emphasis added).

Both the Perrine Food Retailers and the Miami Beach Entertainment courts cite to the opinion of the Fifth District Court of Appeal in Britamco. In Britamco, the Fifth District Court of Appeal considered a trial court order which had the effect of finding that there was coverage for the owner and operator of a bar in which a patron was injured as a result of a beating inflicted by other patrons. That patron had alleged in his complaint that the bar was negligent by failing to provide adequate security, and that the bar had negligently created a dangerous condition which resulted in injuries to the patron. Britamco issued a policy of insurance that included an assault and battery exclusion, which precluded coverage for claims arising out of: "Assault & battery, whether caused by or at the instructions of, or at the direction of, the insured, his employees, patrons or any causes whatsoever ..." Id. at 965. The Fifth District Court of Appeal reversed the trial court's ruling, and found that there was no coverage for the bar patron's claim in light of the assault and battery exclusion, concluding:

> Appellee concedes that the patron was injured by an assault and battery but contends that coverage is nevertheless available because the legal theory upon which the patron obtained a judgement was negligence in failing to provide adequate security. We agree with the appellant that the ***policy excludes coverage for this claim, which clearly arises out of an assault and battery.***

Id. (Emphasis added).

Thus, this Court and Florida state courts have reached the conclusion that there is no coverage for injuries arising out of an assault and battery even where there are allegations of negligence by the injured patron claiming that the defendant bar or other entity was negligent in some manner in preventing the assault and battery. The Britamco court noted that its conclusion was "consistent with the overwhelming weight of authority in jurisdictions that have considered this issue" in holding that the policy's assault and battery exclusion barred coverage, even where the claim alleged negligent failure to hire adequate security, because the claim clearly ***arose*** out of an assault and battery. Id. *See also,* Marr Investments, inc v. Greco, 621 So.2d 447 (Fla 4th DCA 1993) (holding that the policy's assault and battery exclusion barred coverage for claim alleging negligence against insured because the claim arose out of an assault and battery).

In Council, the insured bar was sued by a patron for injuries sustained during an incident with another patron. The insurer denied coverage under an "Assault and Battery" exclusion that excluded coverage for "assault and battery committed by you, any of your executive officers, 'employees,' 'leased workers,' or 'temporary workers,' or by any other person, whether or not committed by you or at your direction [or] the failure to suppress or prevent an assault and battery of any person." Id. at 1342. The insured argued that there was a duty to defend since several allegations involved negligence on the part of the bar. The court held, however, that there was no such duty as "injury claims described in terms of the bar owner's negligence are, in essence, injuries that arise from 'assault and battery.'" Id. Consequently, the allegations of negligence against the establishment were not covered under the terms of the insurance policy due to the assault and/or battery exclusion.

Similarly, the Rosens in the underlying action allege injury due to being battered and pepper-sprayed by La Shangrila's employees and further allege that La Shangrila was negligent in hiring and

retaining Angelini. There is overwhelming case law in state and Federal Court that when there is an assault and/or battery exclusion like the one in La Shangrila's policy, if the plaintiffs in the underlying claim an act of negligence against the establishment, e.g., negligent hiring and retention, then the exclusion bars coverage. Thus, based upon the Court's holding in Council and the other cases cited above, Hermitage policy's assault and/or battery exclusion completely bars coverage for the negligence claims alleged against La Shangrila in the Rosens' underlying action.

Therefore, the overwhelming weight of authority from Florida state courts and this Court is that under the circumstances of this claim, there is no coverage afforded under the Hermitage CGL for the claims in the Rosens' lawsuit because of the assault and/or battery exclusion contained within the insurance policy. This is true because even though the Rosens' lawsuit alleges that La Shangrila was negligent in the manner in which it hired and retained Angelini; the Rosens' injuries would not have occurred but for the assault and battery. As a result, Florida courts, including this Court, recognize that the Rosens' injuries ***arise from an assault and battery***, and there is a specific exclusion contained within the Hermitage policy for such an assault and battery claim that bars coverage.

There is nothing ambiguous about the exclusion for assault and/or battery in the Hermitage policy, and therefore there is no need to resort to rules of contract construction. The plain and unambiguous meaning of the exclusion precludes the precise negligence claim that the Rosens have made against La Shangrila. Under these circumstances there is no coverage provided to La Shangrila under the Hermitage policy of insurance. As Florida law recognizes, in cases in which there is no duty to defend an insured, because the duty to defend is broader than the duty to indemnify, there is likewise no duty to indemnify. In light of the nature of the Rosens' negligence claim against La

Shangrila, the specific assault and/or battery exclusion in the Hermitage policy of insurance, and Florida law's consistent treatment of this issue, there is no coverage available to La Shangrila under the Hermitage CGL policy of insurance. Therefore, this Court should enter a final summary judgement in favor of the Hermitage Insurance Company and against La Shangrila on all counts of La Shangrila's Complaint for duty to defend, duty to indemnify and breach of contract in this declaratory action.

D. In addition, or alternatively to the "Assault and/or Battery" Exclusion, the "Intended or Expected Injury Exclusion" excludes coverage for all claims because the allegations arise out of an excluded act, namely and assault and battery.

The relevant language of the "Intended or Expected Injury Exclusion" reads as follows:

> **SECTION 1 - COVERAGES**
> **COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY**
>
> **2. Exclusions**
>
> This insurance does not apply to:
>
> **a. Expected Or Intended Injury**
>
> "Bodily Injury" or "property damage" expected or intended from the standpoint of the insured...

. . . .

The law is well-settled that there can be no coverage under an insurance policy which insures against an "accident" where the insured's wrongful act complained of is intentionally directed toward the person injured by such act. Hartford Fire Insurance Co. v. Spreen, 343 So.2d 649, 651 (Fla. 3rd DCA 1977), *citing* Grange Mutual Casualty Co. v. Thomas, 301 So.2d 158, 159 (Fla. 2d DCA 1974). Florida Courts have held that certain acts, by their very nature, are intended to cause bodily injury. In State Auto Mutual Insurance Co. v. Scroggins, 529 So.2d 1194, 1195 (Fla. 5th DCA 1988) where

an insured intentionally pulled the chair out from under the injured party, the Court held that "...some form of bodily injury must have been expected or intended to result under those circumstances." *See also,* State Farm Fire and Casualty Co. v. Caldwell, 630 So.2d 668, 669 (Fla. 4th DCA 1994); Cabezas v. Florida Farm Bureau Casualty Ins. Co., 830 So.2d 156, 158 (Fla. 3d DCA 2002), ("A punch to the head by an insured is an act expected or intended to cause bodily injury...") *citing* Ladas v. Aetna Ins. Co., 416 So.2d 21, 22-23 (Fla. 3d DCA 1982). The same analysis is applicable to the case at bar wherein the underlying complaint's allegations detail an intentional attack on the Rosens, so this clause in the Hermitage policy excludes coverage since this was an intended or expected injury - Angelini's acts were clearly intentional and directed at the Rosens.

E. Lack of timely notification of claims by La Shangrila to Hermitage precludes coverage.

The relevant language of the policy regarding timely notification of claims against the insured to Hermitage reads as follows:

SECTION IV - COMMERCIAL GENERAL LIABILITY CONDITIONS

2. Duties of the Event of Occurrence, Offense, Claim or Suit.

a. You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim. To the extent possible, notice should include:

(1) How, when and where the "occurrence" or offense too place;

(2) The names and addresses of any injured persons and witnesses; and

(3) The nature and location of any injury or damage arising out of the "occurrence" or offense.

b. If a claim is made or "Suit" is brought against any insured, you must:

(1) Immediately record the specifics of the claim or "suit" and the

date received; and

(2) Notify us as soon as practicable.

You must see to it that we receive written notice of the claim of "suit" as soon as practicable.

c. You and any other involved insured must:

(1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim of "suit;

(2) Authorize us to obtain records and other information;

(3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit"; and

(4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.

d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expenses, other than for first aid, without our consent.

Nearly three years elapsed from the time the alleged incident involving the Rosens occurred until Hermitage was notified by La Shangrila of the claim against it. One of La Shangrila's duties was to notify Hermitage under the policy conditions noted above of the actual incident. Paragraph 2.a. of the CGL conditions noted above specifically details what notice and information La Shangrila is to provide to Hermitage regarding this alleged incident. La Shangrila failed without justification to notify Hermitage "as soon as practicable" of the Rosens' August 21, 2004 incident in contravention of the policy terms and conditions.

In addition, nearly two years elapsed from the time the underlying action was filed by the Rosens until La Shangrila notified Hermitage of the incident and requested a defense against the

Rosens' suit. Paragraphs 2.b. and 2.c. of the CGL conditions noted above specifically detail what notice and information La Shangrila is to provide to Hermitage regarding the filing of any suit against the insured. La Shangrila failed to notify and inform Hermitage "as soon as practicable" of the Rosens' lawsuit and failed to "immediately" send Hermitage copies of any "demands, notices, summonses or legal papers" related to the Rosens' lawsuit, in contravention of the policy. La Shangrila failed to provide the required notification and information without justification.

These policy terms and conditions, which La Shangrila failed to abide by without justification, are for the protection of both the insurer and insured. The purpose is for the insurer to assign appropriate counsel, if required under the policy, and be involved in the litigation from the outset. La Shangrila, instead, chose to voluntarily acquire its own defense counsel in the underlying action without giving Hermitage the first opportunity to defend La Shangrila. La Shangrila in employing its own defense counsel in the underlying action, clearly violated Paragraph 2.d. of the CGL policy conditions. La Shangrila voluntarily incurred legal expenses in retaining its own counsel without first notifying Hermitage of the Rosens' lawsuit and without Hermitage's consent. La Shangrila should be held liable for the legal costs and fees it incurred voluntarily for its own unilateral decision not to notify and inform Hermitage of the underlying action in a timely manner.

La Shangrila's violation of these material and important CGL terms and conditions at several levels is in clear contravention of the policy terms. La Shangrila has not made any allegations in this declaratory action that would excuse it from these terms and conditions, or that would act as a waiver. The facts are clear that the alleged incident involving the Rosens occurred on August 21, 2004, that the Rosens filed suit on June 10, 2005 against La Shangrila and Angelini, and that Hermitage was not notified of the underlying action until on or about March 27, 2007, by La

Shangrila's own counsel. As a result of La Shangrila's own conduct and untimely notice to Hermitage of the incident and underlying action, insurance coverage for La Shangrila in the underlying action should be excluded.

In conclusion, judgment against La Shangrila is appropriate declaring that Hermitage has no duty to defend, no duty to indemnify, has not breached its contract with La Shangrila and that there is no coverage under the policy for the underlying action based on the policy exclusions and violation of the policy terms and conditions noted above.

WHEREFORE, Hermitage Insurance Company respectfully requests that this Court enter a final summary judgement in its favor, and against La Shangrila declaring that: (1) Hermitage is under no duty to defend La Shangrila for any of the allegations made against La Shangrila in the underlying action; (2) Hermitage is under no duty to indemnify La Shangrila for any of the allegations made against La Shangrila in the underlying action; (3) there is no coverage afforded under the subject insurance policy for any claims made by the Rosens in their underlying action against La Shangrila; (4) Hermitage has not breached its contract with La Shangrila under the CGL policy; (5) award Hermitage reasonable attorney's fees and costs incurred in this declaratory action under 28 U.S.C. § 2202; and (6) grant such further relief as this Court deems just and proper.

Respectfully Submitted,

/s/ Sergio C. Muñiz, Jr., Esq.
Sergio C. Muñiz, Jr., Esq.
Florida Bar No. 858161

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 4, 2007, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

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The following attorneys, who are not authorized to receive such Notices, have been served by U.S. First Class Mail: **Chris M. Limberopoulous**, Esq., LIMBEROPOULOS & STEINGOLD, 400 N. Ashley Drive, 21st Floor, Tampa, Florida 33602, counsel for Bruce Rosen and Jacquelyn Rosen

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