**NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37**

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| STEADFAST INSURANCE COMPANY | : | IN THE SUPERIOR COURT OF |
| | : | PENNSYLVANIA |
| v. | : | |
| | : | |
| TONI TOMEI T/A SUNKISSED TANNING & SPA, COUNTRYSIDE SHOPPING CENTER ASSOCIATES, COLONY DEVELOPMENT COMPANY, COLONY HOLDING COMPANY PENN-AMERICA INSURANCE COMPANY AND PENN AMERICA INSURANCE COMPANY AND WESTERN HERITAGE INSURANCE COMPANY AND NATIONWIDE PROPERTY & CASUALTY INSURANCE COMPANY, NATIONWIDE MUTUAL INSURANCE COMPANY, AND NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, AND ALISHA BACKUS, ASHLEY D. BARKLEY, CAITLIN M. BEAL, ASHLEY L. BEANNER, BRITTANY N. CLAWSON, KATIE B. COOK, SARAH E. HOMULKA, CODIE L. HOWARD, KARLIE M. HUNT, JESSICA A. KAYLOR, MELISSA P. KOSKEE, JUSTINE KOWATCH, ERIKA L. LEASURE, CHRISTINA L. LEWANDOWSKI, ASHLEY N. LEWIS, KATELYN M. MARDIS, DANELL RENAY PRIMUS, LAUREN M. ROTH, LINDSAY V. ROTH, ALYSIA M. SWANK, CHRISTY WEAVER, CHELSEA A. WETTGEN, KAYLA M. WILDEY, AND KRISTIN L. ZELMORE, BRANDI EUTSEY AND BARBI STONER, AND BRANDY NEWILL AND REBECCA RICHTER, AND HEATHER A. FALCONE, MELISSA HALERZ, TARA O'NEAL AND MYLYSSA WILSON, AND CHRISTINA LAUFFER AND JONATHON LAUFFER AND MARVIN M. DEMOREST, JR. AND MICHELLE DEMOREST AND JAMIES AUMER AND DAWN MARIE MONDOCK | : | |

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| APPEAL OF: COUNTRYSIDE SHOPPING CENTER ASSOCIATES, Appellant | : | No. 477 WDA 2015 |

Appeal from the Order Entered February 19, 2015,
in the Court of Common Pleas of Westmoreland County
Civil Division at No. 12CI03917

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| STEADFAST INSURANCE COMPANY | : | IN THE SUPERIOR COURT OF PENNSYLVANIA |
| v. | : | |
| TONI TOMEI T/A SUNKISSED TANNING & SPA, AND COUNTRYSIDE SHOPPING CENTER ASSOCIATES AND COLONY DEVELOPMENT COMPANY AND COLONY HOLDING COMPANY AND PENN-AMERICA INSURANCE COMPANY AND WESTERN HERITAGE INSURANCE COMPANY AND NATIONWIDE PROPERTY & CASUALTY INSURANCE COMPANY, NATIONWIDE MUTUAL INSURANCE COMPANY AND NATIONWIDE MUTUAL FIRE INSURANCE COMPANY AND ALISHA BACKUS, ASHLEY D. BARKLEY, CAITLIN M. BEAL, ASHLEY L. BEANNER, BRITTANY N. CLAWSON, KATIE B. COOK, SARAH E. HOMULKA, CODIE L. HOWARD, KARLIE M. HUNT, JESSIKA A. KAYLOR, MELISSA P. KOSKEE, JUSTINE KOWATCH, ERIKA L. LEASURE, CHRISTINA L. LEWANDOWSKI, ASHLEY N. LEWIS, KATELYN M. MARDIS, DANELL RENAY PRIMUS, LAUREN M. ROTH, LINDSAY V. ROTH, ALYSIA M. SWANK, CHRISTY WEAVER, CHELSEA A. | : | |

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| WETTGEN, KAYLA M. WILDEY, AND KRISTIN L. ZELMORE AND BRANDI EUTSEY AND BARBI STONER AND BRANDY NEWILL AND REBECCA RICHTER AND HEATHER A. FALCONE, MELISSA HALERZ, TARA O'NEAL AND MYLYSSA WILSON AND CHRISTINA LAUFFER AND JONATHAN LAUFFER AND MARVIN M. DEMOREST, JR., AND MICHELLE DEMOREST, AND JAMIES AUMER AND DAWN MARIE MONDOCK | : | |
| APPEAL OF: COLONY DEVELOPMENT COMPANY, | : | No. 478 WDA 2015 |
| Appellant | : | |

Appeal from the Order, February 19, 2015,
in the Court of Common Pleas of Westmoreland County
Civil Division at No. 150 of 2013

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| STEADFAST INSURANCE COMPANY | : | IN THE SUPERIOR COURT OF PENNSYLVANIA |
| v. | : | |
| TONI TOMEI T/A SUNKISSED TANNING & SPA, AND COUNTRYSIDE SHOPPING CENTER ASSOCIATES AND COLONY DEVELOPMENT COMPANY AND COLONY HOLDING COMPANY AND PENN-AMERICA INSURANCE COMPANY AND WESTERN HERITAGE INSURANCE COMPANY AND NATIONWIDE PROPERTY & CASUALTY INSURANCE COMPANY, NATIONWIDE MUTUAL INSURANCE COMPANY AND NATIONWIDE MUTUAL FIRE INSURANCE COMPANY AND ALISHA BACKUS, ASHLEY D. BARKLEY, CAITLIN M. BEAL, ASHLEY L. | : | |

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| BEANNER, BRITTANY N. CLAWSON, KATIE B. COOK, SARAH E. HOMULKA, CODIE L. HOWARD, KARLIE M. HUNT, JESSIKA A. KAYLOR, MELISSA P. KOSKEE, JUSTINE KOWATCH, ERIKA L. LEASURE, CHRISTINA L. LEWANDOWSKI, ASHLEY N. LEWIS, KATELYN M. MARDIS, DANELL RENAY PRIMUS, LAUREN M. ROTH, LINDSAY V. ROTH, ALYSIA M. SWANK, CHRISTY WEAVER, CHELSEA A. WETTGEN, KAYLA M. WILDEY, AND KRISTIN L. ZELMORE AND BRANDI EUTSEY AND BARBI STONER AND BRANDY NEWILL AND REBECCA RICHTER AND HEATHER A. FALCONE, MELISSA HALERZ, TARA O'NEAL AND MYLYSSA WILSON AND CHRISTINA LAUFFER AND JONATHAN LAUFFER AND MARVIN M. DEMOREST, JR., AND MICHELLE DEMOREST, AND JAMIES AUMER AND DAWN MARIE MONDOCK | : | |
| APPEAL OF: COLONY HOLDING COMPANY, | : | No. 479 WDA 2015 |
| Appellant | : | |

Appeal from the Order Entered February 19, 2015,
in the Court of Common Pleas of Westmoreland County
Civil Division at No. 150 of 2013

BEFORE: FORD ELLIOTT, P.J.E., BENDER, P.J.E., AND SHOGAN, J.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: **FILED MAY 24, 2016**

This is a consolidated appeal from the order entered February 19, 2015, entering summary judgment for Steadfast Insurance Company ("Steadfast") and Nationwide Property & Casualty Insurance Company,

Nationwide Mutual Insurance Company, and Nationwide Mutual Fire Insurance Company (collectively, "Nationwide"), and declaring that they have no duty to defend or indemnify appellants in the underlying civil actions. After careful review, we affirm.

> The context in which this issue arises is as follows. The Defendants[1] herein are Defendants in a separate suit brought by 37 plaintiffs in an action filed at Westmoreland County Court of Common Pleas No. 6 of 2011, captioned ***Kaylor v. Toni Tomei t/a d/b/a Sunkissed Tanning & Spa, et al.***[Footnote 1] In that suit, Plaintiffs' claims arise from the surreptitious videotaping by a third party (Jesse Macklin) of Sunkissed patrons as they undressed and were unclothed during tanning sessions at the tanning salon, and the subsequent posting of these videotapes for public viewing on the internet. Generally, Plaintiffs claim to have suffered injuries constituting humiliation, embarrassment, shame, mental anguish and mental trauma as a result of discovering images of themselves nude on the internet. The Complaints allege that the Defendants were negligent in failing to ensure the safety of the underlying plaintiffs and in failing to secure the premises from the third party's misdeeds.
>
> > [Footnote 1] All 37 Plaintiffs' actions against Sunkissed, et al., have been consolidated at Westmoreland County Court of Common Pleas case number 6 of 2011.

Trial court opinion and order, 2/19/15 at 1-2.

[1] The owners of the shopping center where Sunkissed Tanning & Spa is located are related entities, Countryside Shopping Center Associates ("Countryside"), Colony Development Company, and Colony Holding Company ("Colony defendants").

Jesse Macklin ("Macklin") allegedly videotaped Sunkissed patrons while they were in varying states of undress by placing video cameras in the ceiling above the tanning booths. He recorded these videos in 2006, and posted them to the internet in the summer of 2006 and continuing into early 2007. Each of the underlying plaintiffs discovered in 2010 or 2011 that nude videos of themselves were available on the internet. The Colony defendants owned or operated the strip mall where the tanning salon was located. Countryside leased the property to Sunkissed.[2] The underlying plaintiffs alleged that Countryside and the Colony defendants, appellants herein, were negligent for failing to ensure their safety and security. Appellants sought insurance coverage from appellees, Nationwide and Steadfast.[3] By order dated February 19, 2015, the trial court granted appellees' motions for summary judgment, and this timely appeal followed.

Appellants have raised the following issues for this court's review:

> A. Whether the trial court erred by holding that no genuine issues of material fact existed, and by holding that the "bodily injury" coverage (Coverage A) in the Steadfast and Nationwide policies did not cover claims by third parties

[2] Countryside, as lessor, was endorsed as an additional insured under the policies Steadfast issued to Sunkissed. Steadfast provided commercial general liability coverage to Sunkissed from October 11, 2006 – October 11, 2010. Nationwide insured Countryside as well as the Colony defendants from December 1, 2005 – December 1, 2012.

[3] Appellants also sought coverage from Penn-America Insurance Company ("Penn-America") and Western Heritage Insurance Company ("Western Heritage"). Appellants have not appealed summary judgment for Penn-America and Western Heritage.

against the Colony Defendants even though many of the third parties alleged physical components to the injuries that they suffered, and all alleged severe emotional injuries[?]

B. Whether the trial court erred by holding that no genuine issues of material fact existed, and by holding that the "personal and advertising injury" coverage (Coverage B) in the Steadfast and Nationwide policies did not cover claims by third parties against the Colony Appellants even though the claims arose from publication of material that invaded the victims' privacy[?]

C. Whether the trial court erred by holding that no genuine issues of material fact existed, and by holding that the "personal and advertising injury" coverage (Coverage B) in the Nationwide policies did not cover claims by third parties based on a policy exclusion that was overly broad and excluded coverage for violations of any statute, ordinance or regulation prohibiting the communication of information or distribution of material, including such acts committed by a third party who was not an insured[?]

D. Whether the trial court erred by holding that no genuine issues of material fact existed, and by holding that the "personal and advertising injury" coverage (Coverage B) in the Steadfast Policies did not cover claims by third parties based on incorrect exclusionary language[?]

E. Whether the trial court erred by holding that no genuine issues of material fact existed, and by holding that the "personal and advertising injury" coverage (Coverage B) in the Steadfast and Nationwide policies did not cover claims by third parties because the posting of nude videos and photographs on the internet did not amount to "written" publication[?]

Appellants' brief at 4-5.

Initially, we note:

> Our scope of review of a trial court's order disposing of a motion for summary judgment is plenary. Accordingly, we must consider the order in the context of the entire record. Our standard of review is the same as that of the trial court; thus, we determine whether the record documents a question of material fact concerning an element of the claim or defense at issue. If no such question appears, the court must then determine whether the moving party is entitled to judgment on the basis of substantive law. Conversely, if a question of material fact is apparent, the court must defer the question for consideration of a jury and deny the motion for summary judgment. We will reverse the resulting order only where it is established that the court committed an error of law or clearly abused its discretion.
>
> ***Grimminger v. Maitra***, 887 A.2d 276, 279 (Pa.Super. 2005) (quotation omitted). "[Moreover,] we will view the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party." ***Evans v. Sodexho***, 946 A.2d 733, 739 (Pa.Super. 2008) (quotation omitted).

***Ford Motor Co. v. Buseman***, 954 A.2d 580, 582-583 (Pa.Super. 2008), ***appeal denied***, 970 A.2d 431 (Pa. 2009).

"The proper construction of a policy of insurance is resolved as a matter of law in a declaratory judgment action." ***Alexander v. CNA Ins. Co.***, 657 A.2d 1282, 1284 (Pa.Super. 1995), ***appeal denied***, 670 A.2d 139 (Pa. 1995) (citation omitted). "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." ***Gen. Accident Ins. Co. of America v. Allen***, 692 A.2d 1089, 1095 (Pa. 1997) (citations omitted). Both the duty to defend and the duty to indemnify may be resolved in a declaratory judgment action. ***Id.*** at 1096, citing ***Harleysville Mut. Ins. Co. v. Madison***, 609 A.2d 564 (Pa.Super. 1992) (insurer can seek determination of obligations to insured before conclusion of underlying action) (additional citations omitted).

> It is well established that an insurer's duties under an insurance policy are triggered by the language of the complaint against the insured. In determining whether an insurer's duties are triggered, the factual allegations in the underlying complaint are taken as true and liberally construed in favor of the insured.

***Indalex Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh***, 83 A.3d 418, 421 (Pa.Super. 2013), ***appeal denied***, 99 A.3d 926 (Pa. 2014) (citation and quotation marks omitted).

> The obligation of an insurer to defend an action against the insured is fixed solely by the allegations in the underlying complaint. As long as a complaint alleges an 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.

***Erie Ins. Exch. v. Fidler***, 808 A.2d 587, 590 (Pa.Super. 2002) (citations omitted). "[W]e focus primarily on the duty to defend because it is broader than the duty to indemnify. If an insurer does not have a duty to defend, it

does not have a duty to indemnify. However, both duties flow from a determination that the complaint triggers coverage." ***Indalex***, 83 A.3d at 421 (citations and quotation marks omitted).

In their first issue on appeal, appellants claim that the trial court erred in finding that Coverage A of the policies, providing coverage for bodily injury, did not apply where the underlying plaintiffs alleged only emotional trauma.

Both the Steadfast and Nationwide policies provide, in relevant part:

> 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. . . .
>
> . . . .
>
> b. This insurance applies to "bodily injury" and "property damage" only if:
>
> (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";

> (2) The "bodily injury" or "property damage" occurs during the policy period. . . .

The policies define "bodily injury" as "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time."

The trial court determined that the underlying plaintiffs alleged only emotional distress, embarrassment, and humiliation, with no physical injury or impact. Twelve of the underlying plaintiffs did allege "physical symptoms"; however, they did not allege any antecedent physical injury, only later manifestations of emotional distress in the form of physical symptoms.[4] Appellants argue that it is well established that "bodily injury"

[4] The trial court also found that only 9 of the 37 claimants first learned of the existence of the videos during the effective dates of Steadfast's coverage (October 11, 2006-October 11, 2010); 28 of the 37 plaintiffs first discovered the videos after the effective dates of the Steadfast policies. (Trial court opinion, 2/19/15 at 4.) Therefore, pursuant to the first manifestation of injury rule, there is no coverage available for those 28 claimants who first manifested injuries after the last day of the coverage period, October 11, 2010. ***See Pennsylvania Nat. Mut. Cas. Ins. Co. v. St. John***, 106 A.3d 1, 15-16 (Pa. 2014) (under the first manifestation rule, coverage is triggered when an injury is reasonably apparent, not at the time the cause of injury occurs) (citations omitted). Appellants do not challenge this aspect of the trial court's order granting summary judgment for Steadfast as to these 28 claimants. In addition, the 9 claimants who did allege discovery of the offending videos during the period of Steadfast's coverage did not allege any physical symptoms, only mental anguish, embarrassment, ***etc.*** With regard to the Nationwide policy, which provided coverage from December 1, 2005 to December 1, 2012, it is undisputed that all 37 underlying plaintiffs first learned of the existence of these offensive videos during the coverage period.

does not encompass emotional distress claims without an antecedent or immediate physical injury.

> The Pennsylvania courts have soundly rejected the contention that policy definitions of injury or bodily injury encompass mental or emotional harm. ***Jackson v. Travelers Insurance Company***, 414 Pa.Super. 336, 606 A.2d 1384 (1992). In the context of insurance coverage, those terms were not intended to encompass harm other than physical injury. ***Id. See also***: ***Aim Insurance Company v. Culcasi***, 229 Cal.App.3d 209, 280 Cal.Rptr. 766, 771–72 (1991) ("Bodily injury" as used in an insurance policy refers only to physical injuries and does not encompass emotional distress only with no physical harm).

***Kline v. The Kemper Group***, 826 F.Supp. 123 (M.D.Pa. 1993), ***affirmed***, 22 F.3d 301 (3rd Cir. 1994) (plaintiff's emotional distress or humiliation of having his employment terminated, allegedly on the basis of his age, did not constitute "bodily injury" within the meaning of the policy); ***see also Philadelphia Contributionship Ins. Co. v. Shapiro***, 798 A.2d 781, 787 (Pa.Super. 2002) (plaintiff's damages for mental anguish and humiliation were all emotional damages and were not covered by the policy; plaintiff made no allegation that he suffered any "bodily harm" as a result of being fired), citing ***Kline***.

Appellants cite ***Glikman v. Progressive Cas. Ins. Co.***, 917 A.2d 872 (Pa.Super. 2007), which is distinguishable. Similar to the policies in the case ***sub judice***, the policy in ***Glikman*** defined "bodily injury" as, "bodily harm, sickness, or disease, including death that results from bodily harm,

sickness, or disease." ***Id.*** at 873. The policy also provided for first-party benefits "for loss or expense sustained by an insured person because of bodily injury caused by an accident arising out of the maintenance or use of a motor vehicle." ***Id.***

In ***Glikman***, the appellant, Sura Eynisfeld Glikman, was walking across the street with her husband when he was struck and killed by a motorist whose vehicle was insured by the appellee, Progressive. ***Id.*** As a result of witnessing her husband's accident, Glikman was diagnosed with and medically treated for post-traumatic stress disorder ("PTSD"). ***Id.*** At the time of the accident, Glikman did not own a motor vehicle, nor did she reside with anyone who did. ***Id.*** Glikman sought first-party medical benefits under the tortfeasor's policy, which Progressive denied on the basis that Glikman's PTSD was not the result of a "bodily injury." ***Id.***

On appeal from summary judgment entered in favor of Progressive, this court reversed, holding that,

> under the language of [Progressive]'s policy, contraction of a "disease" caused by an accident arising out of the maintenance or use of a motor vehicle is a specifically covered bodily injury under the policy. As [Progressive] neither disputes that [PTSD] is a disease nor the cause of [Glikman]'s suffering, we find she has sustained a bodily injury within the meaning of the policy.

***Id.*** at 873. In so holding, we distinguished the Glikman policy from the policy in ***Zerr v. Erie Ins. Exch.***, 667 A.2d 237 (Pa.Super. 1995), which defined "bodily injury" or "injury" as "accidental bodily harm to a person and

that person's resulting illness, disease or death." ***Id.*** at 873-874, quoting ***Zerr***, 667 A.2d at 238. Thus, under the ***Zerr*** policy, the disease must be a result of accidental bodily harm, while under the Progressive policy under consideration in ***Glikman***, disease is defined as an injury separate from bodily harm. ***Id.*** at 874. The court in ***Zerr*** determined that the insured's policy created a distinction between physical and psychological illness, and precluded recovery for mental injuries which were not the result of accidental bodily harm. ***Id.*** at 873 n.1. This court in ***Glikman*** found that ***Zerr*** was inapposite and the trial court erred in relying upon it to assess coverage.

Instantly, as stated above, the Nationwide and Steadfast policies define bodily injury as "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time." This is akin to the definition of bodily injury in ***Glikman***. Nevertheless, we find ***Glikman*** is not controlling where in that case, Glikman suffered from a recognized psychological disease, PTSD, after watching her husband get struck and killed by a motor vehicle. Glikman was crossing the street with her husband when he was run over. Here, by contrast, some of the underlying plaintiffs alleged vague physical symptoms brought on by their emotional distress after learning that offensive videos had been posted to the internet. Even the 12 plaintiffs who at least alleged some physical symptoms associated with emotional distress did not allege any antecedent

physical injury or impact, to themselves or anyone else. Nor did they allege anything resembling a "disease" as in ***Glikman***. The trial court correctly held that the underlying plaintiffs' claims for emotional distress, humiliation and embarrassment did not qualify as claims for "bodily injury" under either the Steadfast or Nationwide policy, and therefore, they were not required to provide a defense under Coverage A.[5]

We now turn to Coverage B, which provides coverage for "personal and advertising injury" claims against the insured. Coverage B provides, in relevant part, as follows:

> SECTION 1 – COVERAGES
>
> . . . .
>
> COVERAGE B. PERSONAL AND ADVERTISING INJURY LIABILITY
>
> 1. Insuring Agreement
>
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this insurance applies. We will have the right

[5] Appellants also rely extensively on an unpublished memorandum decision of this court, ***Lipsky v. State Farm Mut. Ins. Co.***, 2011 WL 11745706 (Pa.Super. filed Sept. 1, 2011) (unpublished memorandum), ***affirmed by an equally divided court***, 84 A.3d 1056 (Pa. 2014). We caution appellants that, pursuant to this court's internal operating procedures, "An unpublished memorandum decision shall not be relied upon or cited by a Court or a party in any other action or proceeding," subject to certain limited exceptions not relevant here. Pa.Super.Ct. IOP 65.37(A). Therefore, we cannot consider ***Lipsky***. At any rate, ***Lipsky*** involved a bystander negligent infliction claim in which the plaintiffs witnessed the vehicular homicide of a family member and is factually distinguishable.

> 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 "personal and advertising injury" to which this insurance does not apply. . . .

Both the Steadfast and Nationwide policies provide identical coverage for personal and advertising injury "caused by an offense arising out of your business," which includes claims for invasion of privacy. Under SECTION V – DEFINITIONS, paragraph 14, "Personal and advertising injury" is defined as "injury, including consequential 'bodily injury,' arising out of one or more of the following offenses: … e. Oral or written publication, in any manner, of material that violates a person's right of privacy[.]" In addition, both policies exclude coverage for distribution of material in violation of the law, including any act or omission that violates or is alleged to violate any statute, ordinance, or regulation that prohibits or limits the sending, transmitting, communicating, or distribution of material or information.

As stated above, the duty to defend an action is governed by the factual allegations in the underlying pleadings.

> It is well established that an insurer's duties under an insurance policy are triggered by the language of the complaint against the insured. In ***Mutual Benefit Insurance Co. v. Haver***, 555 Pa. 534, 725 A.2d 743, 745 (1999), we stated;
>
> > A carrier's duty to defend and indemnify an insured in a suit brought by a third party depends upon a determination of

> whether the third party's complaint triggers coverage.

***Id.***, citing ***General Accident Insurance Co. v. Allen***, 547 Pa. 693, 692 A.2d 1089, 1095 (1997). This principle has been long held in this Commonwealth as well as in other jurisdictions. In ***Wilson v. Maryland Casualty Co.***, 377 Pa. 588, 105 A.2d 304, 307 (1954), we explained:

> [T]he rule everywhere is that the obligation of a casualty insurance company to defend an action brought against the insured is to be determined ***solely*** by the allegations of the complaint in the action . . .

***Id.*** (Emphasis supplied).

***Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.***, 908 A.2d 888, 896 (Pa. 2006).

Here, there is no allegation of a "personal and advertising injury" against Countryside or the Colony defendants in the underlying civil actions. Coverage B only extends coverage for specific enumerated torts, ***e.g.***, oral or written publications that violate a person's right of privacy; it affords coverage only for defined risks. The underlying plaintiffs allege that appellants were negligent in failing to secure the premises and prevent Macklin from gaining access to the ceiling above the tanning booths. However, negligent security is not one of the defined risks specified in Coverage B. No claim for invasion of privacy is advanced against Countryside or the Colony defendants. There is no allegation that appellants participated in the taking of the offending videos or posted them on the

internet. There is no allegation that appellants published oral or written material that violated the underlying plaintiffs' right of privacy, or negligently enabled the electronic publication of the videos on the internet, or are vicariously liable for Macklin's criminal conduct. The claims against appellants in the underlying civil actions sound solely in negligence and no claims for invasion of privacy are pending against them. Therefore, the trial court did not err in finding that Coverage B did not apply.[6]

Alternatively, we agree with the trial court that the violation-of-statute exclusion would apply to bar coverage under the Nationwide policy.[7]

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[6] "As an appellate court, we may affirm the lower court by reasoning different than that used by the lower court." ***Gerace v. Holmes Prot. of Phila.***, 516 A.2d 354, 357 (Pa.Super. 1986), ***appeal denied***, 527 A.2d 541 (Pa. 1987).

[7] The "Violation of Communication or Information Exclusion" in the Steadfast policies in effect during the relevant time period included language that the criminal acts must have been committed "by any insured or on behalf of any insured." The Nationwide policies did not include this qualifying language. There is no allegation that Macklin was acting on behalf of the named insured, Sunkissed, when he committed these criminal acts. Therefore, by its plain language, the Steadfast exclusion does not apply. Steadfast argues on appeal that it is incongruous for Countryside to insist that it is an insured under the policy and has coverage for the personal and advertising injury offense of "oral or written publication of material that violates a person's right of privacy" because it arose out of Sunkissed's business, and on the other hand, insist that the exclusion does not apply because Macklin was not acting on Sunkissed's behalf. (Steadfast's brief at 43.) According to Steadfast, even if the underlying plaintiffs' negligence claims fell under Coverage B, "the exclusion would apply because the offense must arise out of Sunkissed's business and Sunkissed's liability would have to be premised upon the dissemination of material in violation of statute on its behalf." (***Id.*** at 44.) This is nonsense. Steadfast is conflating the terms "arising out of" and "acting on behalf of," which mean different things in this context. The phrase "arising out of" in insurance contracts has generally been interpreted

Macklin's conduct in surreptitiously videotaping patrons of the tanning salon in the nude and then posting the videos on the internet was clearly in violation of a number of state and federal criminal statutes, including Section 7507.1 of the Pennsylvania Crimes Code.[8] As the underlying plaintiffs'

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as "causally connected with" and is construed against the insurer as the drafter of the insurance agreement. ***Mfrs. Cas. Ins. Co. v. Goodville Mut. Cas. Co.***, 170 A.2d 571, 573 (Pa. 1961). For the personal and advertising injury offense to arise out of Sunkissed's business, Macklin did not have to be acting on Sunkissed's behalf.

[8] **(a) Offense defined.--**Except as set forth in subsection (d), a person commits the offense of invasion of privacy if he, for the purpose of arousing or gratifying the sexual desire of any person, knowingly does any of the following:

(1) Views, photographs, videotapes, electronically depicts, films or otherwise records another person without that person's knowledge and consent while that person is in a state of full or partial nudity and is in a place where that person would have a reasonable expectation of privacy.

(2) Photographs, videotapes, electronically depicts, films or otherwise records or personally views the intimate parts, whether or not covered by clothing, of another person without that person's knowledge and consent and which intimate parts that person does not intend to be visible by normal public observation.

alleged injuries occurred as a result of Macklin's intentional, criminal acts, they are specifically excluded from coverage under the Nationwide policy. (Trial court opinion, 2/19/15 at 9-10.) Furthermore, as recognized by this court in ***Fidler***, as a rule, general liability policies do not cover intentional torts and/or criminal acts and must be clearly and unambiguously written to provide such coverage. ***Fidler***, 808 A.2d at 591 (citations omitted).

Appellants cite ***Bd. of Pub. Educ. of Sch. Dist. of Pittsburgh v. Nat'l Union Fire Ins. Co. of Pittsburgh***, 709 A.2d 910 (Pa.Super. 1998) (***en banc***), ***appeal denied***, 727 A.2d 126 (Pa. 1998), for the proposition that the Coverage B criminal acts exclusion was too broad. In ***Bd. of Pub. Educ.***, a complaint was filed on behalf of a minor student against the school district alleging negligent supervision after he was sexually molested by the president of the parent-teacher organization, a school volunteer. The policy excluded coverage for "any claim involving allegations of . . . criminal acts . . . ." ***Id.*** at 912. This court observed that, "This language, at face value, would eliminate coverage for any factual scenario 'involving' acts by any

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> (3) Transfers or transmits an image obtained in violation of paragraph (1) or (2) by live or recorded telephone message, electronic mail or the Internet or by any other transfer of the medium on which the image is stored.

18 Pa.C.S.A. § 7507.1 ("Invasion of privacy").

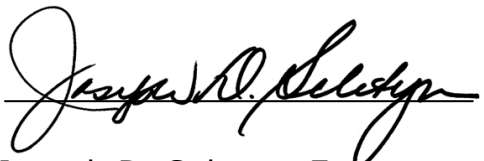
person which are arguably criminal; if the case peripherally 'involved' someone jaywalking, the insurer could claim its duty to defend was eliminated." ***Id.*** at 914-915. We determined that the parties could not have contemplated such a result: "a more realistic, less sweeping interpretation must have been intended, for otherwise there would be few if any scenarios where serious claims would be covered." ***Id.*** at 915. By contrast, in the instant case, the exclusion is specific and limited. It excludes coverage only for personal and advertising injuries alleged to have arisen from conduct that violated, or is alleged to have violated, any statute, ordinance or regulation that prohibits or limits the sending, transmitting, communicating or distribution of material or information. It does not exclude coverage for any claim involving allegations of criminal acts, as in ***Bd. of Pub. Educ.***

For these reasons, we determine that 1) Coverage A does not apply because the underlying plaintiffs do not allege a "bodily injury" as defined in the policies, but only allege emotional distress and mental anguish; and 2) Coverage B does not apply because the underlying plaintiffs do not allege any "personal and advertising injury" caused by appellants; rather, they allege appellants' negligence in failing to secure the premises. This is insufficient to bring their claims within the scope of Coverage B. Furthermore, Coverage B would not apply under the Nationwide policy

because of the exclusion for criminal activity.[9] The trial court did not err in granting summary judgment for appellees.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 5/24/2016

[9] Alternatively, appellees argue that Coverage B only applies to a personal and advertising injury caused by an offense "arising out of your business." Appellees argue that there is no allegation Macklin's posting of offensive videos occurred at the tanning salon or was part of Sunkissed's business operations. Appellees state that Macklin's independent criminal acts of posting illicit videos had no plausible connection with Sunkissed's salon business. Given our holding as set forth above, Coverage B does not apply in any event and we need not determine whether the underlying plaintiffs' alleged injuries "arose out of" the business. Similarly, we need not address the trial court's finding that Macklin's posting of the videos did not constitute "oral or written publication of material" within the scope of Coverage B. (Trial court opinion, 2/19/15 at 8-9.)