NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

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

INSURANCE COMPANY; AND	:	
NATIONWIDE PROPERTY & CASUALTY	:	
INSURANCE COMPANY, NATIONWIDE	:	
MUTUAL, INSURANCE COMPANY,	:	
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, CHRISTINE 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,	:	
KRISTIN L. ZELMORE; AND	:	
BRANDI EUTSEY, BARBI STONER; AND	:	
BRANDY NEWILL, REBECCA RICHTER;	:	
AND HEATHER A. FALCONE, MELISSA	:	
HALERZ, TARA O'NEIL, MYLYSSA	:	
WILSON; AND CHRISTINA LAUFFER,	:	
JONATHAN LAUFFER; AND	:	
MARVIN DEMOREST, JR.,	:	
MICHELLE MARVIN DEMOREST, JR.,	:	
MICHELLE DEMOREST; AND JAMIE	:	
AUMER, DAWN MARIE MONDOCK	:	
	:	
APPEAL OF: TONI TOMEI	:	
T/A SUNKISSED TANNING & SPA,	:	No. 480 WDA 2015
	:	
Appellant	:	

Appeal from the Order Dated February 19, 2015,
in the Court of Common Pleas of Westmoreland County
Civil Division at No. 3917 of 2012

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

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

Toni Tomei, t/a Sunkissed Tanning & Spa ("Sunkissed"), appeals from the order of 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"), in this declaratory judgment action.[1] We affirm.

> The context in which this issue arises is as follows. The Defendants[2] 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.

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[1] Sunkissed is not appealing the grant of summary judgment for Nationwide, only Steadfast. (Sunkissed's brief at 8.)

[2] 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").

> [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.

Plaintiff Steadfast issued commercial general liability insurance coverage to Sunkissed from October 11, 2006, to October 11, 2010. Steadfast, together with Penn-America Insurance Company, who had issued a commercial general liability insurance coverage policy to Sunkissed from September 11, 2005, to September 11, 2006, are jointly defending Sunkissed in the underlying civil action. Western Heritage Insurance Company ("Western Heritage") issued commercial general liability coverage to Sunkissed from October 11, 2010, to October 11, 2011, however, Western Heritage is not providing a defense to Sunkissed in connection with the underlying civil actions. [Nationwide] issued commercial general liability insurance coverage and umbrella insurance coverage to Countryside and Colony (the shopping center and the development company, respectively, where the tanning salon business is located) from December 1, 2005, to December 1, 2012. Nationwide issued commercial general liability insurance coverage to Colony Holding from February 16, 2008, to February 16, 2012.

The various plaintiffs in the underlying suit discovered the publication of the offending videotapes on the worldwide web from 2008 through April 2011. None of the 37 claimants discovered the offending video on the web during the period of time that Penn-America provided coverage (September 11, 2005, to September 11, 2006). Nine of the 37 claimants first learned of the offending video during the period of time that Steadfast provided coverage (October 11, 2006, to October 11, 2010). The remaining twenty-eight claimants learned of the posting of the offending videos during the period of time that Western

> Heritage provided coverage (October 11, 2010, to October 11, 2011).

Trial court opinion and order, 2/19/15 at 1-3.

Sunkissed raises the following issue for this court's review:

> Did the trial court err, as a matter of law, in holding that insurance coverage is not required, where the insured tanning salon is sued for negligently failing to discover and prevent a third-party non-insured from surreptitiously filming salon clients in the nude and posting these nude videos on the internet?

Sunkissed's brief at 4.

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).

The underlying plaintiffs claimed damages against Sunkissed for the embarrassment and humiliation they allegedly suffered as a result of having their videos posted on pornographic websites. They further alleged that Sunkissed's negligence caused this harm because Sunkissed, ***inter alia***, failed to properly train and supervise its employees, failed to maintain and secure the premises, and failed to protect its clients from the type of activity

that occurred. Sunkissed sought coverage under Coverage B of the Steadfast policy[3] which provides, in relevant part, as follows:

> **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 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. . . .
>
> b. This insurance applies to "personal and advertising injury" caused by an offense arising out of your business but only if the offense was committed in the "coverage territory" during the policy period.
>
> 2. Exclusions
>
> c. Material Published Prior To Policy Period
>
> "Personal and advertising injury" arising out of oral or written publication of material whose first publication took place before the beginning of the policy period.

[3] Sunkissed did not seek coverage for bodily injury under Coverage A of the policy.

> d. Criminal Acts
>
> "Personal and advertising injury" arising out of a criminal act committed by or at the direction of the insured.
>
> SECTION V – DEFINITIONS
>
> 14. "Personal and advertising injury" means 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, the Steadfast policies contained the following exclusion:

> **Violation Of Communication Or Information Law Exclusion**
>
> . . . .
>
> The following exclusion is added to paragraph 2. Exclusions of Section I – Coverage A – Bodily Injury and Property Damage Liability and Coverage B – Personal and Advertising Injury Liability:
>
> 2. Exclusions
>
> This insurance does not apply to:
>
> **Violation of Communication or Information Law**
>
> "Bodily injury," "property damage" or "personal and advertising injury" resulting from or arising out of any actual or alleged violation of:
>
> A. the federal Telephone Consumer Protection Act (47 U.S.C. § 227), Drivers Privacy Protection Act

> (18 U.S.C. § 2721-2725) or Controlling the Assault of Non-Solicited Pornography and Marketing Act (15 U.S.C. § 7701, et seq.); or
>
> B. any other federal, state or local statute, regulation or ordinance that imposes liability for the:
>
> (1) Unlawful use of telephone, electronic mail, internet, computer, facsimile machine or other communication or transmission device; or
>
> (2) Unlawful use, collection, dissemination, disclosure or re-disclosure of personal information in any manner
>
> by any insured or on behalf of any insured.

The trial court found that the criminal communications exclusion applied to bar coverage. Since the underlying plaintiffs' alleged injuries occurred as a result of Macklin's conduct that was expressly prohibited by Section 7507.1 of the Pennsylvania Crimes Code,[4] any alleged "personal or

[4] **(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

advertising injury" arising out of a violation of the statute was specifically excluded from coverage under the Steadfast policy. (Trial court opinion, 2/19/15 at 10.) Therefore, the trial court determined that Steadfast was not required to provide a defense under Coverage B. (***Id.***)

Sunkissed argues that the trial court's ruling was in error, at least as to Steadfast, because the exclusion only applies if a crime was allegedly

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> 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.
>
> (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").

committed "by any insured or on behalf of any insured."[5] Here, Macklin was not an insured under the Steadfast policy, nor is there any allegation that he was acting "on behalf of" any insured. (Sunkissed's brief at 18-19.)

We agree. As there is no allegation that Macklin was acting on Sunkissed's behalf when he videotaped customers in the nude and posted the videos on the internet, the "Violation of Communication or Information Law" exclusion does not apply. Steadfast argues that subsequent versions of the policy do not contain the language "by any insured or on behalf of any insured." (Steadfast's brief at 39-40.) However, the policies in effect during the relevant timeframe, from October 11, 2006 – October 11, 2007, and from October 11, 2007 – October 11, 2008, did contain this limiting language. (Steadfast's supplemental reproduced record, Vol. 1 at 167b, 272b.)

Steadfast complains that Sunkissed cannot argue it is an "insured" under the Steadfast policy and has coverage for a personal and advertising injury offense "arising out of [its] business," and on the other hand, insist that the criminal acts exclusion does not apply because Macklin was not "acting on its behalf." (Steadfast's brief at 40-41.) According to Steadfast, Sunkissed's position is internally inconsistent. We disagree. Macklin did not

[5] The Nationwide policy had a similar exclusion but did not include the language "by any insured or on behalf of any insured." However, as noted ***supra***, Sunkissed is not appealing the trial court's summary judgment order as to Nationwide, only Steadfast. (Sunkissed's brief at 8.)

have to be acting on Sunkissed's behalf when he posted the videos for the offense to "arise out of" Sunkissed's tanning salon business. The concepts are not interchangeable. The phrase "arising out of" in insurance contracts has generally been interpreted as "causally connected with" and is construed against the insurer as the drafter of the insurance agreement:

> We start, however, with the Pennsylvania Supreme Court case of ***Manufacturers Casualty Insurance Co. v. Goodville Mutual Casualty Co.***, 403 Pa. 603, 170 A.2d 571 (1961), in which that court held that "[c]onstrued strictly against the insurer, 'arising out of' [in an insurance policy] means causally connected with, not proximately caused by. 'But for' causation, ***i.e.*** a cause and result relationship, is enough to satisfy this provision of the policy." ***Id.*** at 573. This formulation of "arising out of" is now well-settled in Pennsylvania, and has been applied in various insurance law settings, both when interpreting insurance policies and assessing issues arising by operation of statutes, even though some of the cases applying the formulation do not cite ***Goodville***.

Allstate Prop. and Cas. Ins. Co. v. Squires, 667 F.3d 388, 391-392 (3rd Cir. 2012) (citations omitted).

Regarding the "arising out of" requirement, Steadfast argues that there was no connection between Macklin's criminal acts of posting offensive videos to the internet and Sunkissed's salon business. (Steadfast's brief at 35.) Steadfast argues that an unrelated third party posting illicit videos to the internet from his home has nothing to do with Sunkissed's business, and therefore, the alleged injuries did not "arise out of" the business. However, clearly, there was a causal connection between the business and Macklin's

actions. These videos of nude customers were created at Sunkissed's business. The videos were of unsuspecting patrons of the business, who had to disrobe in order to use the tanning beds. The offensive videos would not have existed "but for" Sunkissed's business. Although there is no allegation that Macklin was acting on Sunkissed's behalf, there is an obvious causal relationship.

Steadfast also argues that it has no duty to defend/indemnify Sunkissed in the underlying litigation because Sunkissed failed to establish that any of the videos were posted during the policy period. Coverage B only applies to personal and advertising injuries "committed in the 'coverage territory' during the policy period." (Steadfast's brief at 37.)[6] The first Steadfast policy was issued October 10, 2006. Macklin testified that most of the offending videos were uploaded to the internet in the summer of 2006, before the Steadfast policy took effect. (***Id.***) However, according to Sunkissed, Macklin took some of the videos in November or December 2006 and posted them in 2007. (Sunkissed's brief at 6, 31.) Therefore, it appears that at least some of the underlying plaintiffs' videos were posted after the Steadfast policy took effect. At most, it presents a disputed issue of fact which precludes summary judgment.

[6] Coverage B also contains an exclusion for "'Personal and advertising injury' arising out of oral or written publication of material whose first publication took place before the beginning of the policy period." This exclusion would apply to any of the 37 claimants whose videos were first posted prior to October 10, 2006.

Although we respectfully disagree with the trial court that the criminal acts exclusion applies to bar coverage, we are compelled to agree with Steadfast that the underlying plaintiffs' allegations of negligence do not trigger coverage under Coverage B of the policy. 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).

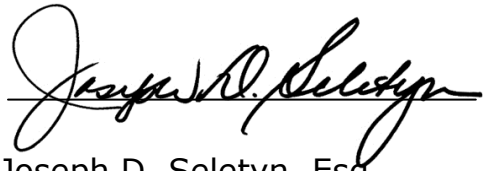
Here, there is no allegation of any "personal and advertising injury" against Sunkissed in the underlying civil actions. Coverage B only extends coverage for specific enumerated torts, ***e.g.***, "oral or written publications" that violate a person's right of privacy; it affords coverage only for defined risks. The underlying plaintiffs allege that Sunkissed was negligent in failing to secure the premises and prevent Macklin from gaining access to the ceiling above the tanning booths. The underlying plaintiffs also alleged, ***inter alia***, that Sunkissed failed to properly train/supervise its employees and failed to adequately inspect the premises. However, negligent operation of the business is not one of the defined risks specified in Coverage B. No claim for invasion of privacy is advanced against Sunkissed, only against Macklin, a non-insured third party. There is no allegation that Sunkissed participated in the taking of the offending videos or posted them on the internet. There is no allegation that Sunkissed 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 is vicariously liable for Macklin's criminal conduct. The underlying plaintiffs claim that Sunkissed negligently failed to prevent Macklin from surreptitiously videotaping salon patrons; however, this alleged negligent act or omission by Sunkissed does not implicate the "oral or written publication" of anything. The claims against Sunkissed in the underlying civil actions sound solely in negligence and no claims for invasion of privacy are pending

against Sunkissed. Therefore, the trial court did not err in finding that Coverage B did not apply.[7]

For these reasons, we need not discuss whether the videos constituted the "oral or written" publication of material violating a person's right to privacy. The trial court opined that, "The publishing of videotapes and photographs are not publications that would be generally defined as either "oral" or "written" under the plain meaning of those terms." (Trial court opinion, 2/19/15 at 8.) However, the trial court did not decide the matter on that basis. (***Id.*** at 8-9.)

Order affirmed. Steadfast's motions to quash the appeal and for sanctions are denied.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 5/24/2016

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