HANDOUT #12

Brief in Insurance Coverage Case for Negligent Rescue/ Negligent Failure to Rescue (Federal & PA)

MEMORANDUM OF LAW IN SUPPORT OF CROSS MOTION FOR SUMMARY JUDGMENT FOR HOMEOWNER'S INSURANCE COVERAGE FOR NEGLIGENT FAILURE TO RESCUE VICTIM

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NATIONWIDE INSURANCE CO.	**:**	**CIVIL ACTION**
v.	**:**	
	:	
JOHN SMITH	**:**	
and	**:**	
JOE VICTIM	**:**	**NO.**

NATIONWIDE INSURANCE CO.:	**CIVIL ACTION**	
v.	**:**	
	:	
WALLY DOE :		
and	**:**	
JOE VICTIM	**:**	**NO.**

DEFENDANT JOE VICTIM'S MEMORANDUM OF LAW
IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT OF NATIONWIDE INSURANCE CO., IN SUPPORT OF HIS CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING
DUTY TO DEFEND & IN SUPPORT OF HIS ALTERNATIVE MOTION TO
STAY OR DISMISS THESE ACTIONS

I. FACTUAL HISTORY

The present action was brought by Nationwide Insurance Company pursuant to the Federal Declaratory Judgment Act, 28 U.S.C.A. §§ 2201 & 2202, in an attempt to avoid its duty to defend and indemnify its insureds, John Smith ("Smith") and Wally Doe ("Doe"), in the negligence and recklessness action brought against him by Joe Victim for additional injuries he sustained on July 1, 2000 due to their negligence. This action arises from a July 1, 2000 incident described fully in the complaint in the underlying action, Joe Victim v. John Smith et al,

Philadelphia Court of Common Pleas, July Term, Civil Action No. ____, which is attached as Exhibit "A".

First and foremost in considering the present issues in this declaratory judgment action, Joe Victim alleges in his state court complaint in the underlying action: "**This action is being brought solely for the negligence and recklessness of defendants** [including John Smith, Wally Doe and Karen Murphy], jointly and severally and for punitive damages arising out of such reckless acts or failures to act as set forth herein." See complaint, attached as Exhibit "A", paragraph 5. Victim alleges in this complaint that on July 1, 2000, Defendants Doe and Smith were under the legal drinking age in Pennsylvania and had consumed alcoholic beverages to the point of intoxication. Exhibit "A", paras. 6-11. Further, Victim alleges that these defendants placed him in a perilous position, rendering him helpless, yet failed to rescue him (Count I), and/or negligently rescued him (Count II), causing additional injuries for which the lawsuit was brought. See Exhibit "A", paragraphs 52-76. Victim's claims, stated in Counts I & II of the underlying complaint, stem directly from the duties imposed under the Restatement (Second) of Torts, Sections 314, 321, 322, 323, and, alternatively, 324 as adopted in Pennsylvania, the violation of which constitutes *negligence*. Yania v. Bigan, 397 Pa. 316, 320, 155 A.2d 343 (1959) (finding no duty and therefore no *negligence* under Restatement (Second) of Torts, Sects. 314 & 322, because defendant had not placed the plaintiff in the position of peril); Herr v. Booten, 398 Pa.Super. 166, 580 A.2d 1115, 1121 (Pa.Super. 1990) (*en banc*) (defendants could be held liable, in *negligence*, for failing to prevent further harm to plaintiff as a result of intoxication, if they are held liable for his death to some extent); Ditullio v. Pizzo, 1991 U.S.Dist. LEXIS 9562, *11-*12 (E.D.Pa. July 11, 1991) (Newcomer, J.) (tortfeasor owes a duty of rescue, pursuant to

Restatement (Second) of Torts, Sect. 322, if he/she put plaintiff in a perilous position of helplessness); Senese v. Peoples, 626 F.Supp. 465 (M.D.Pa. 1985) (but finding no duty under Section 314 because defendant had not placed plaintiff in a "position of peril"); Filter v. McCabe, 1999 PA Super. 143, 733 A.2d 1274 (Pa.Super. 1999), appeal denied, 2000 563 Pa. 645, 758 A.2d 1200, 2000 Pa.LEXIS 1100 (2000) (finding that a homeowner's failure to provide reasonable care after a guest's fall in his home could be negligent under Restatement (Second) of Torts, Sects. 323 & 324).

In Count III, Victim seeks punitive damages for defendants' acts of recklessness. Victim concedes that the Nationwide policy does not provide coverage for the punitive damages he seeks, which is properly excluded in the policy. However, this does not absolve Nationwide of its duty to defend Doe and Smith in the underlying action because there exist covered claims stated in the complaint. Nor does it absolve Nationwide from its duty to indemnify Doe and/or Smith should either be found liable for negligence or recklessness in the underlying action for their failure to rescue and/or negligent rescue which led to additional injuries sustained by Victim.

It has already been determined that Doe and Smith are responsible for placing Victim in a perilous condition as a result of their actions in an altercation with Victim in City Park. See Exhibit "A", paragraphs 15-16. As a result of placing Victim in a perilous condition, the duty to rescue is imposed upon Doe and Smith, pursuant to controlling Pennsylvania law. See, e.g., Yania v. Bigan, 397 Pa. 316, 322, 155 A.2d 343 (1959) (duty to rescue if tortfeasor is legally responsible for placing plaintiff in a perilous condition); see also, *infra*, paras. 5 & 6.

Victim was injured when struck on the head with a baseball bat by Smith, while Smith was under the influence of alcohol. Smith pled guilty to aggravated assault which is not limited to intentional assaults, but also includes reckless assaults. Thus, contrary to Nationwide's anticipated arguments, there has never been any determination that any of Smith's actions taken on July 1, 2000 were intentional, including the striking of Victim. Doe was found guilty of conspiracy to commit aggravated assault, but without any specific finding that he acted intentionally.

The crux of Victim' claims in Count I of the underlying action are that Smith and Doe owed a duty and failed to render assistance, including, failing to: administer first aid, call an ambulance; stabilize his head; stop bleeding from his head; apply ice; or transport him to City Hospital for necessary medical care, which was close by. Victim also asserts that he sustained further injury because of Smith and Doe's actions in abandoning him while they visited a nearby store, leaving him on the ground. Exhibit "A", paras. 17-51 & 53. Once Smith and Doe returned from the store, they transported another individual home from City Park. Id. at paras.27-28. Once Smith and Doe returned from transporting the other individual home, Smith and Doe affirmatively took action to rescue Victim. Id. at para. 38.

The crux of Victim' claims in Count II of the underlying action are that Smith and/or Doe: negligently failed to stabilize Victim in picking him up from the ground by his hands and feet; holding him in such a manner that his head was hanging and/or moving while being carried and while he was losing blood from his head and experiencing swelling of his brain; carrying Victim on Doe's back, without supporting Victim's head; transporting Victim in Smith's car without supporting his head; transporting Victim from the car to City Hospital without

supporting his head; allowing shifting, jolting, jarring, moving, and bouncing of Victim's body and head during their attempted rescue, all of which caused new and distinct injuries and/or an increased risk of harm to Victim. See Exhibit "A", para. 39-47 & 66. Simply stated, Victim alleges in Count II, that, rather than calling 9-1-1, the police or emergency medical personnel, as a reasonable person would be expected to do, Smith and/or Doe performed a negligent and/or reckless rescue.

The negligence complained of by Victim caused him additional injuries, for which he seeks damages. As a result of the negligence of Smith and Doe, Joe Victim has sustained devastating and permanent injuries. His ability to walk has been greatly inhibited to the extent that he must utilize a wheelchair most of the time. He can only walk very short distances with the aid of a walker. See Complaint, Exhibit "A."

Smith's and Doe's negligence/recklessness, described above and in the underlying complaint, are acts and omissions which independent, separate and distinct of their allegedly intentional or expected acts, and constitute a covered "occurrence" under the policy, should the jury find in the underlying action that Smith and Doe committed negligence or recklessness. Although Smith and Doe took actions to rescue Victim, and Victim claims negligence in their execution, Nationwide seeks to avoid any duty to defend or indemnify their insureds for these specific negligent/reckless acts, by: (1) totally ignoring the negligence complained of and committed by their insureds; and (2) citing to Nationwide's own, self-serving characterization of acts allegedly committed by Smith and Doe earlier in the day as being "intentional" or expected.

First, as a matter of law, because of the negligence and recklessness claims contained in the underlying complaint, which fall squarely within the definitions of negligence contained in

the Restatement Sections 314, 321, 322, 323 & 324, as adopted in Pennsylvania, see footnotes 2-6 and paragraph 6 above, there can be no question that Nationwide owes to its insureds, Smith and Doe, the duty to defend, which is a broader duty than the duty to indemnify. Secondly, the duty to indemnify may only be decided pending the outcome of the underlying action.

For these reasons, Victim seeks the entry of summary judgment on the duty to defend and requiring Nationwide to defend the underlying action on behalf of its insureds Smith and Doe. Victim further seeks denial of Nationwide's motion for summary judgment on the duty to indemnify because there exist material issues of fact necessary to the determination of Nationwide's liability on the negligence and recklessness claims asserted against its insureds, Smith and Doe and which are intertwined, if not identical, to issues to be decided in the underlying state court action. For the reasons outlined herein, the appropriate resolution of the present declaratory judgment action, as it relates to the duty to indemnify, is for the district court to stay such decision, or decline to exercise jurisdiction, or remand this matter to the state court in the underlying action.

II. LEGAL ARGUMENT

A. NATIONWIDE OWES A DUTY TO DEFEND AS A MATTER OF LAW BECAUSE THE UNDERLYING COMPLAINT CONTAINS ONLYCLAIMS OF NEGLIGENCE AND RECKLESSNESS

Under Pennsylvania substantive law, which controls in this action brought by Nationwide to determine its duties under a Pennsylvania insurance policy, an insurer has an obligation to defend if the complaint contains a claim or claims which are potentially within the scope of coverage. The duty continues until the claim is narrowed to ones which are not covered. See, e.g., Erie Ins. Exchange v. Transamerica Ins. Co., 516 Pa. 574, 533 A.2d 1363, 1368 (Pa. 1987). "Obligations to defend are wider than obligations to indemnify. The duty to defend carries with it the conditional obligation to indemnify until it becomes clear that there can be no recovery under the policy." Pacific Indemnity Co. v. Linn, 766 F.2d 754, 766 (3d Cir. 1985); United States Fire Ins. Co. v. Rothenberg, 1998 U.S.Dist. LEXIS 15009, *17-*18 (E.D.Pa. September 25, 1998) (Padova, J.) . In deciding whether the complaint "states a claim against the insured to which the policy potentially applies, the court takes the allegations of the complaint as controlling." Id. An insurer is not excused from the duty to defend "until it becomes apparent that there are no circumstances under which the insurer would be responsible." United States Fire Ins. Co. v. Rothenberg, 1998 U.S.Dist. LEXIS 15009, at *17-*18 (E.D.Pa. September 25, 1998) (Padova, J.), *citing*, Viola v. Fireman's Fund Ins. Co., 965 F.Supp. 654, 664 (E.D.Pa. 1997).

"In cases in which the underlying complaint alleges both conduct that potentially

comes under the policy and conduct that does not, **the insurer must defend the entire action**." Rothenberg, *citing*, Bracciale v. Nationwide Mut. Fire Ins. Co., 1993 U.S. Dist. LEXIS 11606, No. 92-7190, 1993 WL 323594, at *5 (E.D. Pa. Aug. 20, 1993); Cadwallader v. New Amsterdam Casualty Co., 396 Pa. 582, 152 A.2d 484, 489 (Pa. 1959) (emphasis added). "An insurer who disclaims its duty to defend based on a policy exclusion bears the burden of proving the applicability of the exclusion." See, e.g., Belser v. Rockwood Cas. Ins. Co., 2002 PA Super. 27, 791 A.2d 1216, 1220 (2002).

In Rothenberg, an insurance carrier filed a declaratory judgment action seeking an order that it had no duty to defend or indemnify an attorney in a lawsuit brought against him for intentional claims of fraud, conspiracy, RICO violations, intentional infliction of emotional distress and personal injury. The insurer cited to exclusions of coverage for "'bodily injury' expected or intended from the point of view of the insured" and for failing to render professional services and also argued this was not a covered "occurrence" as defined in the policy. This Honorable Court held that there was a duty to defend some of the claims, and therefore, the entire lawsuit, because the underlying complaint contained allegations of bodily injury which could be unintended result of intentional acts. Notably, as it applies to the present case, this Honorable Court found that "some of the illnesses were pre-existing, but were allegedly exacerbated by the defendants' wrongful actions." Id. at *21.

Similarly, in the present case, Victim's complaint states a claim of aggravation of pre-existing injuries due to the negligence/recklessness of defendants Smith and Doe. Of course, Victim does not contend that the holding in Rothenberg is binding upon this court, rather that it is persuasive precedent, for the reasons outlined herein. Moreover, a consideration of the facts in

Rothenberg with the underlying complaint in the present case, further argues toward Nationwide's duty to defend. In Rothenberg, it appears there were no allegations of negligence stated in the underlying complaint, yet this Honorable Court found a duty to defend existed. Conversely, in the present case, there exist no allegations of intentional acts in the complaint for which recovery is sought by Victim and all claims are for negligence. Thus, the underlying complaint in the present case presents an even clearer case where the duty to defend should apply and duty to indemnify should attach, if negligence is found.

B. THE DECISION REGARDING THE DUTY TO INDEMNIFY IS NOT RIPE FOR JUDICIAL DETERMINATION SUCH THAT NATIONWIDE'S MOTION FOR SUMMARY JUDGMENT ON THE DUTY TO INDEMNIFY MUST BE DENIED OR STAYED

It is premature for a court to rule on indemnity before it is decided whether the insured is liable under the terms of the policy and the facts of the case. Unionamerica Ins. Co. v. J.B. Johnson, 2002 PA Super. 273, 806 A.2d 431 (Pa.Super. 2002); Rothenberg, *supra*. "The duty to indemnify arises only if, **after trial on the third-party claim**, it is determined that the loss suffered is covered by the terms of the policy." Id., at 434 (emphasis added); See also, Nationwide Mut. Fire. Co. v. Shank, 951 F.Supp. 68, 71 (E.D.Pa. 1997), appeal dismissed, 127 F. 3d 1096 (3d Cir. 1997) ("The duty to indemnify need not, and sometimes should not be, determined until the state court has evaluated the facts."); Nationwide Mut. Fire. Co. v. McNulty, 1997 U.S.Dist. LEXIS 20979, at *5 (E.D.Pa. December 30, 1997) ("The indemnification issue . . . requires resolution of the merits of the underlying dispute."); Capano Mgmt. Co. v. Transcontinental Ins Co., 78 F.Supp.2d 320 (D.Del. 1999) (issue of insurer's duty

to indemnify was premature at summary judgment stage where court held that insurer had duty to defend and underlying action was not yet resolved).

"Thus, when the claims in the underlying action have not yet been decided by the state court, the inquiry of the court hearing the declaratory judgment action is limited to an analysis of an insurer's duty to defend because 'the indemnification issue, by contrast, requires resolution of the merits of the underlying dispute.'" Sphere Drake, P.L.C. v. 101 Variety, Inc., 35 F.Supp. 2d 441 (E.D.Pa. 1999) (Robreno, J.), citing, McNulty, *supra*; see also Those Certain Underwriters and Insurers Subscribing to Lloyd's Policy No. SP93/7131 v. 6901 Frankford Ave., Inc., 1997 U.S.Dist. LEXIS 20892 (E.D.Pa. December 22, 1997) (Waldman, J.) (. . . "when the claims in the underlying action have not been adjudicated, the court entertaining the declaratory judgment action must focus on whether the underlying claims could potentially come within the coverage of the policy."), *citing*, Air Products and Chemicals, Inc. v. Hartford Accident and Indemnity Co., 25 F.3d 177, 179 (3d Cir. 1994).

In Rothenberg, after holding that the insurer owed the duty to defend its insured, this Honorable Court noted that "the issue of indemnity will have to await further developments. At this point, the Court cannot enter judgment as to the [insurer's] request for a declaratory judgment that it has no duty to indemnify [the insured] in the underlying suit because we do not know whether the plaintiffs in that suit will prevail on any or all of their claims against [the insured.]" Id. at *39. This Court ordered that the declaratory judgment action be stayed and the action placed in suspense, pending the outcome of the underlying suit. Id. at *39-*40. Similarly, in the present case, should this Honorable Court find that Nationwide owes a duty to defend

Smith and/or Doe, Victim submits the appropriate action is that the matter be stayed and suspended pending the outcome of the underlying civil action in state court.

Furthermore, there exist material issues of fact which are to be decided in the underlying state court action, upon which the issue of indemnification turns. Specifically, it will be determined in the state court action, *inter alia*: (1) whether Smith and/or Doe were negligent in failing to rescue and/or in negligently rescuing Victim (2) whether Smith and/or Doe acted recklessly or intentionally in failing to rescue Victim; (3) whether Smith and/or Doe acted recklessly or intentionally in their rescue of Victim; (4) whether Smith and/or Doe acted with the specific intent to injure Victim; (5) whether Smith and/or Doe acted with the specific intent to injure Victim, given their level of intoxication due to alcohol; (6) whether Smith's guilty plea for aggravated assault was due to recklessness or intentional actions; and (7) whether Doe's guilty finding of conspiracy to commit aggravated assault was due to recklessness or intentional conduct. Unless and until these issues are decided in the underlying state court action, there can be no determination whether or not Nationwide owes a duty to indemnify.

C. NATIONWIDE'S "INTENTIONAL ACT" EXCLUSION IS INAPPLICABLE TO DENY COVERAGE TO SMITH AND DOE FOR THE CLAIMS IN THE UNDERLYING COMPLAINT

Nationwide defines "occurrence" in their policies as "bodily injury . . . resulting from an accident, including continuous or repeated exposure to the same general condition." See Nationwide's complaint, para. 28. Nationwide's policies include an "intentional act" exclusion which provides that the Personal Liability Coverage does not apply to bodily injury "by an act

intending to cause harm done by or at the direction of any insured." See Nationwide's complaint, para. 33. To the extent it is Nationwide's position that this intentional act exclusion should apply to bar negligent or reckless (even highly reckless) conduct as complained of by Victim, including Smith's and Doe's delay in his rescue and performing a negligent rescue, such policy terms are ambiguous and must be construed against Nationwide as the drafter. Nationwide v. Pipher, 140 F.3d 222 (3d Cir. 1998) (finding the definition of "occurrence" to be ambiguous which was defined, in pertinent part as "one accident"); K & Lee Corp. v. Scottsdale Ins. Co., 769 F.Supp. 870, 873 (E.D.Pa. 1991), aff'd 953 F.2d 1380 (3d Cir. 1992); Brennan v. General Accident Fire & Life Assurance Corp., 524 Pa. 542, 574 A.2d 580, 583 (Pa. 1990).

1. The Underlying Complaint Alleges Covered "Occurrences" Due to Negligence and Recklessness Only

In determining whether a covered "occurrence" is stated by a complaint which brings rise to potential coverage, courts have looked to the allegations in the underlying complaint to see if it alleges harm which "may have been committed negligently." Terra Nova Ins. Co. v. 900 Bar, Inc., 887 F.2d 1213, 1226 (3d Cir. 1989) (allegation gun fired "negligently, recklessly, and/or intentionally, willfully, wantonly, and maliciously" states an occurrence); Underwriters v. 6901 Frankford Ave, Inc., 1997 U.S.Dist. LEXIS 20892 (E.D.Pa. December 22, 1997) (Waldman, J.) (where complaint stated at one point that the actions of the insured, who struck underlying plaintiff with a beer bottle, were "wanton, reckless and negligent" the incident may come within the policy definition of "occurrence"; coverage denied on other grounds); Britamco Underwriters, Inc. v. O'Hagan, 1994 U.S. Dist. LEXIS 12338, at *10, (E.D.Pa. Sept. 2, 1994) (allegation that injuries sustained from thrown beer bottle resulted from "wanton, reckless and

negligent" actions states an occurrence), aff'd, 60 F.3d 814 (3d Cir. 1995); Britamco Underwriters, Inc. v. Weiner, 431 Pa. Super. 276, 636 A.2d 649, 652 (Pa. Super. Ct. 1994), appeal denied, 655 A.2d 508 (Pa. 1994).(complaint alleging patron's injuries resulted from "willful and malicious" actions but also stating that incident was an "accident" and asserting theories of negligence against assailant states an occurrence).

More specifically, the Third Circuit Court of Appeals ("Third Circuit") has already construed Nationwide's policy which defines an "occurrence", in pertinent part, as "bodily injury . . . resulting from: a. one accident" in the context of allegedly intentional incidents. Nationwide v. Pipher, 140 F.3d 222 (3d Cir. 1998). In Pipher, the Third Circuit differentiated it from previous holdings in which coverage was disavowed. Specifically, the court noted that the underlying complaint raised "numerous allegations of negligence" which contributed to the underlying plaintiff's death. Id. at 225.

Similarly, in the case at bar, the underlying complaint contains only allegations of negligence in Smith's and Doe's delayed and failed rescue. Perhaps most notably, Victim, in his complaint, seeks only damages which are attributable to Smith and Doe's negligence/ recklessness -- not any damages attributable to any intentional acts.

Nationwide cites to its policy exclusion for intentional or expected acts. However, the Third Circuit has held that intentional/expected acts exclusions are narrowly interpreted under Pennsylvania law. Wiley v. State Farm Fire & Cas. Co., 995 F.2d 457, 460 (3d Cir. 1993); United States Automobile Association v. Elitzky, 358 Pa.Super.362, 517 A.2d 982 (Pa.Super. 1986), *alloc. denied*, 515 Pa. 600, 528 A.2d 957 (1987). The Third Circuit Court of Appeals held:

> We hold that [an intentional act exclusionary clause] excludes only injury and damage of the same general type which the insured intended to cause. An insured intends an injury if he desired to cause the consequences of his actor if he acted knowing that such consequences were substantially certain to result.

Id. Further, the Wiley court concluded that, in Pennsylvania, "it is not sufficient that the insured intended his actions; rather, for the resulting injury to be excluded from coverage, the insured must have specifically intended to cause harm." Id., at 460. "The element of subjective intent must be present." Id.

Because the "intentional act" exclusions are construed narrowly in Pennsylvania and the actions complained of by Victim relate to the negligently performed rescue, which can only be intended to cause help -- not harm -- the intentional act exclusion here does not relieve Nationwide of its duties to defend and indemnify in this negligence action. In short, there is no "reckless act", "violation of law", "assault and battery" or "rescue following intoxicated altercation" exclusion in Nationwide's policy and the negligence complained of by Victim in his rescue is not otherwise excluded from coverage. Nationwide seeks to write such exclusions into its ambiguously worded policies.

This Honorable Court, in United States Fire Ins. Co. v. Rothenberg, 1998 U.S.Dist. LEXIS 15009 (E.D.Pa. September 25, 1998) (Padova, J.), held that if some of the harm was administered *recklessly*, rather than intentionally or expected, than a liability policy must cover the recklessly caused harm and there exists a duty to defend, irrespective of an intentional act exclusion or a definition of "occurrence" similar to that contained in Nationwide's policy. In Rothenberg the court correctly pointed out that the underlying complaint "alleges physical injury that is the result of both intentional and reckless conduct." Id. at *25. This is similar to the

allegations in the underlying complaint in the present action, with the caveat that, in the case at bar, Victim does not claim damages for any intentional injuries or resulting from any intentional conduct. As outlined above, Victim seeks damages only for the additional injuries attributable to Smith's and/or Doe's negligence and recklessness in delaying his rescue and/or negligently rescuing him. Furthermore, this Honorable Court noted that "[i]f Rothenberg intended financial injury, and the bodily injury was an unintended result, then the bodily injury would not fall under the [intentional act] exclusion because it could not be considered 'the same general type [of injury] which the insured intended to cause.'" Id., at *27, *citing*, United States Automobile Association v. Elitzky, 358 Pa.Super.362, 517 A.2d 982, alloc. denied, 515 Pa. 600, 528 A.2d 957 (1987). Once again, the present scenario presents an even clearer case of actions which are not properly excluded under an "intentional acts" exclusion. The fundamental difference is that once Smith and Doe endeavored to undertake the rescue of Victim, it defies logic and common sense for Nationwide to argue there was an intended or even "expected" injury. Rather, once rescue was undertaken, it can only be inferred that there was an intent to reduce or minimize injury (or intend *help*) to Victim -- not intend injury. One who intends or expects to cause injury does not then carry and transport the injured person to a hospital, as Smith and Doe did. Thus, the additional damages claimed by Victim are the unintended result of Smith's and Doe's negligent or reckless acts relating to their rescue, not intentional acts as were at issue in Rothenberg and as Nationwide attempts to claim.

Moreover, under Pennsylvania law, a criminal conviction is not dispositive of the issue of whether or not a claim against the insured is excluded under an "intentional act" exclusion. See, e.g., Stidham v. Millvale Sportsmen's Club, 421 Pa.Super. 548, 618 A.2d 945 (Pa.Super. 1992),

appeal denied, 536 Pa. 630, 637 A.2d 290 (1993). In Stidham, the insured, McLaughlin, was insured under a homeowner's policy with liability coverage. Id. The insured shot and killed Brett Stidham and the insured pled guilty to third degree murder, three counts of aggravated assault, recklessly endangering another person and criminal mischief. Id. The insurer asserted that the exclusion in the policy for bodily injury "expected or intended" by the insured barred coverage, citing its insured's guilty plea to third degree murder in support of their claim of an intentional or intended act and claiming it was *res judicata* in the insurance coverage action. However, the Superior Court analyzed the definition and elements of third degree murder and found that it did not require the specific intent to kill and that a third degree murder conviction could be had on reckless conduct leading to a killing. Id. The Stidham court further analyzed the criminal information detailing the charges against the insured and found that it too was "ambiguous enough to have no conclusive effect on a subsequent civil action" against the insurer. Id. at 561, 618 A.2d at 952.

Therefore, by application of the holding in Stidham to the present action, the fact that Smith pled guilty to aggravated assault (to acts committed earlier in the day) is not dispositive of the issue of whether he intended or expected the injuries to Victim, complained of by him due to the failure to rescue/negligent rescue of Victim. In particular, John Smith pled guilty to violation of 18 Pa.C.S.A. § 2702 (2002), aggravated assault, which is defined in pertinent part as follows:

> a) Offense defined.--A person is guilty of aggravated assault if he:
>
> (1) attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly or ***recklessly*** under circumstances manifesting extreme indifference to the value of human life.

(emphasis added). First, despite Nationwide's attempt to invoke the intentional act exclusion to deny coverage to its insured, John Smith, because of his conviction for aggravated assault, pursuant to Pennsylvania law, there has been no finding that his actions were intentional.

Similarly, the guilty finding against Wally Doe, for conspiracy to commit aggravated assault, similarly fails to contain any finding of an intentional act leading to the injuries complained of by Victim. Moreover, the actions for which John Smith and Wally Doe were named as defendants in the underlying action do not even include acts of striking Victim, but rather acts of negligence and recklessness, relating to their failure to rescue and/or negligent rescue, which are <u>not</u> intentional acts.

2. There Exists No Specific Intent to Cause Injury and Intent <u>Cannot be Inferred in This Case</u>

Nationwide, in its present action, will likely seek to infer intent into the actions of Smith and Doe. However, it has been held that inferred intent is applied in limited circumstances, the scope of which does not include the factual scenario presented in the case at bar, a negligent failure to rescue and/or negligent rescue.

Pennsylvania courts and federal courts interpreting Pennsylvania insurance law have strictly limited the doctrine of "inferred intent" to cases of sexual abuse of minors, <u>Wiley v. State Farm</u>, 995 F.2d 457 (3d Cir. 1993), child abuse, <u>Aetna Casualty and Surety Co. v. Roe,</u> 437 Pa.Super. 414, 650 A.2d 94 (1994) and distribution of a fatal dose of heroin, <u>Minnesota Fire and Cas. Co. v. Greenfield,</u> 805 A.2d 622 (Pa. Super. 2002). Further, the Third Circuit Court of Appeals held that "inferring intent is strong medicine" and that it has "narrow applicability." <u>Aetna Life and Cas. Co. v. Barthelemy</u>, 33 F.3d 189 (3d Cir. 1994). Furthermore, the <u>Barthelemy</u>

court noted that criminal liability is not dispositive of an insured's intent to harm. Therefore, because the underlying action does not involve a fatal heroin distribution, sexual abuse of minors, or child abuse, the subjective standard must be utilized when examining the actors' intent. As such, the actors' subjective state of mind must be examined. Congini v. Portersville, 470 A.2d 157 (Pa. 1983).

Because Smith's and Doe's states of mind remain an undetermined issue, until the underlying action is tried before the fact finder, there exist material issues of fact precluding the grant of summary judgment on Nationwide's duty to indemnify its insureds.

3. Smith and Doe Were Intoxicated Minors and Thus Legally Incapable of Handling the Effects of Alcohol Such that Specific Intent to Harm May Not be Found to Exist

"Imbibed intoxicants must be considered in determining if the actor has the ability to formulate an intent." Stidham, 421 Pa.Super. at 563, *citing*, Nationwide Mut. Ins. Co. v. Hassinger, 325 Pa.Super. 484, 493, 473 A.2d 171, 176 (1984). "If the actor does not have the ability to formulate an intent, the resulting act cannot be intentional." Id. Furthermore, pursuant to Pennsylvania law, minors are deemed incompetent to handle the effects of alcohol. Congini v. Portersville, 504 Pa. 157, 161, 470 A.2d 515 (1983). Persons under the age of twenty-one are, "at least in the eyes of the law, incompetent to handle the affects of alcohol." Id. Intoxicants must be considered in the ability to formulate intent. Wiley v. State Farm, 995 F.2d 457 (3d Cir. 1993).

In this case, given that Smith and Doe were intoxicated minors at the time of their actions and negligent rescue and because minors are legally incapable of handling the effects of alcohol, it may be ultimately be found that they could not or did not form the requisite specific intent to

injure or expectation of injury, necessary for Nationwide to rely upon the intentional/intended act exclusion. In short, this presents further evidence that the intentional act exclusion may not be applied here as a matter of law, because issues of fact exist regarding Smith's and Doe's ability to formulate an intent in the first place. Moreover, the acts complained of by Victim in the underlying complaint are not even intentional acts, they are negligent and intentional acts.

D. ALTERNATIVELY, THIS HONORABLE COURT SHOULD DECLINE TO EXERCISE JURISDICTION OVER THIS ACTION

Under the Declaratory Relief Act, 28 U.S.C.A. § 2201, a federal district Court *may* exercise its jurisdiction to hear a declaratory judgment action; however, it is not required to do so. Admiral Insurance Company v. Central Sprinkler Company, Civil Action No. 98-4563 , 1999 U.S. Dist. LEXIS 1239, at *3 (E.D.Pa. February 3, 1999) (Padova, J.), *citing*, Brillhart v. Excess Ins. Co. of America, 316 U.S. 491, 494, 62 S. Ct. 1173, 1175, 86 L. Ed. 1620 (1942); Wilton v. Seven Falls Co., 515 U.S. 277, 282, 115 S. Ct. 2137, 2140, 132 L. Ed. 2d 214 (1995); Allstate Ins. Co. v. Seelye, 198 F.Supp. 2d 629 (W.D.Pa. 2002). The Act affords district courts "unique and substantial discretion in deciding whether to declare the rights of litigants." State Auto Ins. v. Summy, 234 F.3d 131, 133 (3d Cir. 2000).

In deciding whether to exercise its discretionary jurisdiction, a trial court should determine: "whether the judgment 'will serve a useful purpose in clarifying and settling the legal relationships in issue' and whether it 'will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding.'" Brotherhood Mutual Ins. Co. v. United Apostolic Lighthouse, Inc., 200 F.Supp. 2d 689,692 (E.D.Ky. 2002), *citing*, Grand Trunk

Western Railroad Co. v. Consolidated Rail Corp., 746 F.2d 323, 326 (6th Cir.1984) (quoting E. Borchard, Declaratory Judgments 299 (2d ed. 1941)). Courts should consider the following factors:

> (1) whether the declaratory action would settle the controversy;
>
> (2) whether the declaratory action would serve a useful purpose in clarifying the legal relations in issue;
>
> (3) whether the declaratory remedy is being used merely for the purpose of 'procedural fencing' or 'to provide an arena for a race for res judicata;'
>
> (4) whether the use of a declaratory action would increase friction between our federal and state courts and improperly encroach on state jurisdiction; and
>
> (5) whether there is an alternative remedy which is better or more effective.

Id., citing, Aetna Casualty & Surety Co. v. Sunshine Corp., 74 F.3d 685, 687 (6th Cir. 1996); Mitcheson v. Harris, 955 F.2d 235 (4th Cir. 1992).

The Third Circuit Court of Appeals has held, with regard to insurance companies' actions for declaratory relief in federal court "the desire of insurance companies and their insureds to receive declarations in federal court on matters of purely state law has no special call on the federal forum." Summy, 234 F.3d at 136.

An analysis of the factors weighs in favor of this Court declining to exercise continuing jurisdiction over this action. First, a declaratory judgment regarding coverage will not end the litigation, as there exists an underlying state court action which continues to be litigated. Secondly, the present action seeks an advance opinion regarding Nationwide's duty to provide indemnity in the future and "declaratory judgment actions seeking an advance opinion on

indemnity issues are seldom helpful in resolving an ongoing action in another court." Allstate Ins. Co. v. Mercier, 913 F.2d..273, 277-78 (6th Cir. 1990). Thirdly, and most notably, the underlying action has been pending in state court since July, 2002 and, but for the stay of such action sought by Nationwide, would proceed to disposition within the year. Six months later, in December, 2002, Nationwide sought and obtained a stay of such action and by the present declaratory judgment action in this Court, is seeking to win the race to resolve factual issues directly relevant to the duty to indemnify in a court of its own choosing, rather than in the state court, in which the issues of whether Smith and/or Doe acted intentionally, recklessly or negligently will be decided in the underlying case. In summary, there is an overlap of many identical factual issues which will never be decided in the state court action if decided in this federal action, although the state court action was filed six months earlier.

Fourth, the state court forum may provide a better and more effective forum to address these state law issues because the underlying tort actions are proceeding there. There is no question of federal law presented in the present action. "Gratuitous interference with the orderly and comprehensive disposition of a state court litigation should be avoided." Brillhart v. Excess Ins. Co. of America, 316 U.S. 491, 495, 86 L. Ed. 1620, 62 S. Ct. 1173 (1942). Further, the United States Supreme Court has advised that "where the basis for declining to proceed is the pendency of a state proceeding, a stay will often be the preferable course, because it assures that the federal action can proceed without risk of a time bar if the state action, for any reason, fails to resolve the matter in controversy." Wilton v. Seven Falls Co., 515 U.S. at 288 n.2, 115 S. Ct. at 2143, n.2.

In Maryland Casualty Co. v. Green, 167 F. Supp. 226, affirmed by 266 F.2d 31 (3d Cir. 1959), the district court declined to exercise jurisdiction in a declaratory judgment action when there already existed a parallel state court action in which the issue of whether the decedent was acting within the course and scope of employment.

Similarly in the case at bar, the issue of Smith's and Doe's mental state (whether they acted intentionally, negligently or recklessly) will be decided in the underlying state court action such that the federal court's exercise of jurisdiction is unnecessary and is further a duplication of judicial resources when the declaratory judgment action may be brought in the state court action.

III. CONCLUSION

This action is simply an action for negligence and recklessness in the rescue of Defendant Victim. A quick review of the underlying complaint in the state court action reveals that damages are sought only for negligence and recklessness, and, thus, there clearly exists, as a matter of law, a duty to defend. The determination of Nationwide's duty to indemnify may only be determined upon the resolution of numerous outstanding issues of fact which are to be determined in the underlying state court action. Therefore, it is equally clear that this Honorable Court may not, at this time, rule upon the duty to indemnify as it is not ripe for judicial determination. There exist a plethora of factual issues which preclude the grant of summary judgment at this time. Only after the issues are decided in the state court action would it be proper to rule upon the duty to indemnify.

Alternatively, Plaintiff submits, for the reasons outlined in Argument "D", above, that this Honorable Court should decline to exercise jurisdiction over this action as it is nothing more than a blatant attempt by Nationwide to win the race to the courthouse of its choosing in deciding

factual issues of purely state law where defendant Victim has already brought an earlier state court action to decide the same issues and such action is currently pending.

WHEREFORE, for the foregoing reasons, Defendant Joe Victim respectfully requests that this Honorable Court: (1) GRANT his cross motion for partial summary judgment on Nationwide's duty to defend John Smith and Wally Doe; (2) DENY Nationwide's motion for summary judgment on the duty to defend and indemnify, or, in the alternative; (3) STAY the decision of Nationwide's motion for summary judgment regarding Nationwide's duty to indemnify. Alternatively, Joe Victim requests that this Honorable Court STAY this entire declaratory judgment action, pending the resolution of the underlying state court action. Alternatively, Joe Victim requests that this Honorable Court DECLINE jurisdiction and DISMISS this action, without prejudice, for refiling in the Pennsylvania Court of Common Pleas, Philadelphia County.