

STATE OF VERMONT  
RUTLAND COUNTY, SS

KEVIN ALBERT  
Plaintiff

V.

SEA & SKI RESORT  
MANAGEMENT, INC.

V.

PENN-AMERICA  
INSURANCE COMPANY  
Defendant

) RUTLAND SUPERIOR COURT

) DOCKET NO. S0247-98RCC

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**CONFORMED COPY**  
RUTLAND SUPERIOR COURT

MAY 11 1999

*Hayd. Johnson*  
Clerk

**OPINION AND ORDER**  
**CROSS-MOTIONS FOR SUMMARY JUDGMENT**  
**OF**  
**PENN-AMERICA INSURANCE COMPANY and**  
**SEA & SKI RESORT MANAGEMENT INC.**  
**ON**  
**DUTY TO DEFEND**

The court has reviewed the Motions, Oppositions, and Reply Memoranda of the above-named parties in relation to their Cross-Motions for Summary Judgment on the duty of Penn-America Insurance Company to defend Sea & Ski Resort Management, Inc. in this action.

The court has compared the facts alleged in the complaint, which sets forth claims for both battery and negligence, with the policy terms that have been brought to the court's attention in the motion papers. "If any claims are potentially covered by the policy, the insurer has a duty to defend. . . . Conversely, where there is no possibility that the insurer might be obligated to indemnify, there is no duty to defend." City of Burlington v. National Union Fire Ins. Co., 163 Vt. 124 (1994). The insurance policy in this case contains a specific

endorsement excluding bodily injury resulting from assault and battery or physical altercations that occurred in, on, or near the insured's premises. The endorsement specifies that it is part of the contract "in consideration of the premium charged."

The endorsement is clear and specific, and states that it applies to "damages resulting from . . . battery or physical altercations that occur in, on, or near the insured's premises. . . [w]hether or not caused by, at the instigation of, or with the direct or indirect involvement of. . . the insured's employees. . . , or [w]hether or not caused by or arising out of the insured's failure to properly supervise or keep the insured's premises in a safe condition." The endorsement excludes this category of situations from coverage. Its terms override any possible application of the exemption from exclusion language relied upon by Sea & Ski. (See Exhibit B of Sea & Ski's Opposition filed February 26, 1999.)

The contract as a whole is not ambiguous. On the contrary, the structure and form of the endorsement clarify that the insured did not contract or pay for coverage of battery or physical altercations. This means that the insured does not have insurance coverage for those physical altercations in which its own employees were the instigators, nor those which may have been caused directly or indirectly by its own involvement.

The complaint alleges that Plaintiff was injured as a result of being battered by employees of Sea & Ski, including specifically Kenneth Bates, while being violently ejected from the public tavern owned and operated by Sea and Ski. The complaint sets forth causes of action for battery, and for negligence based on a claim that Sea and Ski has a duty of care to hire, train, and continue to employ individuals who pose no known threats to patrons.

The Court has reviewed the facts set forth in the complaint in the light most favorable to the insured, because if there are any claims that could possibly be covered by the policy, Penn-America would be obligated to defend. The claim for battery is specifically excluded from coverage under the policy by the terms of the endorsement. The claim for negligence in hiring, training, and employing individuals who pose a threat to physical safety is a claim that Plaintiff's injuries from a physical altercation on the premises were indirectly

caused by the involvement of the insured's employees in the manner in which they hired, supervised, and employed persons who dealt with patrons. As such, it is also specifically excluded from coverage under the policy by the terms of the endorsement. See Sphere Drake Ins. Co. v. Litchfield, 438 S.E. 2d 275 (S.C.App. 1993), in which both the facts and the policy terms setting forth the exclusion from coverage are similar to those in this case. The Court adopts the analysis set forth in Sphere Drake Ins. Co. v. Litchfield.

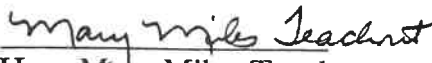
Sea & Ski claims that to permit the insurer to disclaim coverage of defense for tavern ejections contravenes public policy because it discourages insureds from enforcing legal regulations intended to promote public safety. The terms of an insurance contract are separate and distinct from an insured's obligation to enforce legal regulations. The policy endorsement clearly states that the policy does not cover liability arising out of physical altercations on the premises. It is not the court's role to add an obligation to an insurance contract for the reason that there may be a public policy reason for requiring such a provision as part of a regulatory scheme.

### **ORDER**

For the foregoing reasons, it is hereby **ORDERED**:

1. The Motion for Summary Judgment of Penn-America Insurance Company is **GRANTED**, and the Third Party Claims against Penn-America are dismissed with prejudice.
2. The court declares that Penn-America has no duty to defend or indemnify Sea & Ski Resort Management, Inc. in the underlying action.
3. The Motion for Summary Judgment of Sea & Ski Resort Management, Inc. is **DENIED**.

Dated at Rutland this 7<sup>th</sup> day of May, 1999.

  
Hon. Mary Miles Teachout  
Superior Judge