

COMMONWEALTH OF MASSACHUSETTS

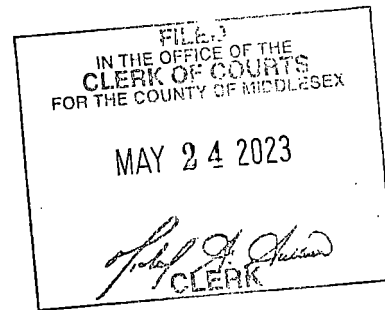
MIDDLESEX, SS.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION NO. 23-1517

FOREMOST INSURANCE COMPANY
GRAND RAPIDS, MICHIGAN,
Plaintiff,

v.

JOSEPH ZAGARELLA, DAVID STANIZZI,
NATALIAE STANIZZI, THOMAS OGDEN,
TRACEY DAVIS OGDEN, TJ OGDEN
COMPANY, INC. and PAUL COSTELLO,
PERSONAL REPRESENTATIVE OF THE
ESTATE OF ETHAN COSTELLO,
Defendants.



COMPLAINT FOR DECLARATORY RELIEF

Foremost Insurance Company Grand Rapids, Michigan (hereinafter "Foremost Insurance"), pursuant to Mass.R.Civ.P., Rule 57 and G.L. c. 231A, et. seq. hereby alleges as follows:

I. PARTIES

1. The Plaintiff, Foremost Insurance, is an insurance company authorized to do business in Massachusetts with a principal office at 5600 Beech Tree Lane, Caledonia, Michigan.
2. The Defendant, Joseph Zagarella, is an adult individual currently incarcerated at the Middlesex County House of Corrections, 269 Treble Cove Road, Billerica, Massachusetts.
3. The Defendant, David Stanizzi, is an adult individual residing at 35 Rolling Meadow Road, Tewksbury, Middlesex County, Massachusetts.
4. The Defendant, Nataliae Stanizzi, is an adult individual residing at 35 Rolling Meadow Road, Tewksbury, Middlesex County, Massachusetts.
5. The Defendant, Thomas Ogden, is an adult individual residing at 346 Boylston Street, Lowell, Middlesex County, Massachusetts. Thomas Ogden is an interested party.

6. The Defendant, Tracey Davis Ogden, is an adult individual residing at 346 Boylston Street, Lowell, Middlesex County, Massachusetts. Tracey Davis Ogden is an interested party.
7. The Defendant, TJ Ogden Company, Inc. ("TJ Ogden"), is a Massachusetts Corporation with a principal office at 17 Catherwood Road, Tewksbury, Middlesex County, Massachusetts. TJ Ogden owns and/or controls the premises at 358 Boylston Street, Lowell, Massachusetts and is an interested party.
8. The Defendant, Paul Costello, Personal Representative of the Estate of Ethan Costello's Estate, with an address of Five Sullivan Parkway, Tewksbury, Middlesex County, Massachusetts.

II. GENERAL ALLEGATIONS

9. Foremost realleges and repleads paragraphs 1 through 8 above, as if set forth fully herein.
10. As of October 28, 2016, David and Nataliaie Stanizzi, husband and wife, owned the premises located at 35 Rolling Meadow Road, Tewksbury, Middlesex County, Massachusetts.
11. As of October 28, 2016, Joseph Zagarella, the nephew of David and Nataliaie Stanizzi, resided at 35 Rolling Meadow Road, Tewksbury, Middlesex County, Massachusetts with the Stanizzi's.
12. As of October 28, 2016, 35 Rolling Meadow Road, Tewksbury, Middlesex County, Massachusetts was insured by a Foremost Classic CL Homeowners Insurance Policy, (hereinafter "the Homeowners Policy") issued by Foremost Insurance with David and Nataliaie Stanizzi listed as the named insureds.
13. Foremost Insurance is authorized to sell Homeowners insurance in Massachusetts.
14. The Homeowners Policy issued to David and Nataliaie Stanizzi by Foremost Insurance provided, among other coverages, Comprehensive Personal Liability Coverage of \$500,000.00 per accident and Medical Payments Coverage of \$5,000.00 each person.
15. On October 28, 2016, Joseph Zagarella attended a birthday party at the home of Thomas and Tracey Davis Ogden, 346 Boylston Street, Lowell, Middlesex County, Massachusetts, arranged by the Ogdens for their daughter, Samantha Ogden (16 years old at the time).
16. On October 28, 2016, Mr. Zagarella, while at the Ogdens' home at 346 Boylston Street, Lowell, Middlesex County, Massachusetts, assaulted and battered Ethan Costello, causing serious injuries, eventually resulting in Ethan's death, two days later, on October 30, 2016.

17. Mr. Zagarella was arrested and subsequently indicted on two charges: (1) Manslaughter (M.G.L. c. 265, §13); and (2) Assault & Battery with a Dangerous Weapon causing Serious Bodily Injury (M.G.L. c. 265, §15A(c)(i)).
18. The criminal proceeding against Mr. Zagarella was initially commenced in the Lowell District Court but after he was indicted, it was transferred to the Middlesex Superior Court (Docket No. 1781CR00481) in 2017.
19. The criminal case against Mr. Zagarella was delayed many years due to a number of issues, including Covid-19.
20. The criminal matter was tried, beginning on June 14, 2022, before a jury and after a seven-day trial, Mr. Zagarella was found not guilty of Manslaughter, but guilty of a lesser included offense, Assault & Battery Causing Serious Bodily Injury (M.G.L. c. 265, §13A(b)(i)).
21. M.G.L. c. 265, §13A(b)(i), Assault & Battery Causing Serious Bodily Injury, provides in pertinent part:
 - (b) Whoever commits an assault or an assault and battery:
 - (i) upon another and by such assault and battery causes serious bodily injury;
22. To be convicted of assault and battery in Massachusetts, the prosecution must prove beyond a reasonable doubt that the defendant intentionally committed, “a harmful or offensive touching of the victim, without justification or excuse.” Commonwealth v. Oberle, 476 Mass. 539 (2017).
23. Moreover, “[c]onviction of assault and battery requires finding of intentional striking of victim.” Commonwealth v. Chasson, 383 Mass. 183 (1981).
24. Mr. Zagarella was sentenced to two years and six months in the Middlesex County House of Corrections and he did not appeal the conviction.
25. On April 9, 2018, Paul Costello (as the personal representative of Ethan’s Estate), filed a wrongful death action (seeking personal injury, conscious pain and suffering and death damages as well as punitive damages) against Mr. Zagarella, the Ogdens and TJ Ogden in the Middlesex Superior Court (Docket No. 1881CV01002).
26. With respect to Mr. Zagarella, the Wrongful Death Complaint alleges that he was negligent and/or grossly negligent in causing Ethan’s death by causing him “to strike his head.”
27. The docket for the Wrongful Death Complaint indicates that Mr. Zagarella was served a Summons, Complaint, Civil Action Cover Sheet, Tracking Order, First

Set of Interrogatories and First Request for Production of Documents at his last and usual place of abode, 35 Rolling Meadow Road, Tewksbury, Massachusetts, on June 11, 2018.

28. Mr. Zagarella did not answer the Complaint or otherwise respond.
29. Accordingly, on September 12, 2018, the Middlesex Superior Court defaulted Mr. Zagarella and ordered the Plaintiff to either file a Motion for an Assessment of Default Judgment or a Request for a Default Judgment by October 12, 2018.
30. On September 28, 2018, Counsel for the Plaintiff in the Wrongful Death lawsuit, filed correspondence requesting a stay in any Assessment of Damages until a later date or at the time of trial.
31. The docket for the Wrongful Death action does not reflect a formal order regarding the Plaintiff's request for a stay of the Assessment of Damages hearing and/or an entry of Default Judgment against Mr. Zagarella.
32. Foremost Insurance did not become aware of the Wrongful Death Complaint until April 13, 2022.
33. Upon receiving notice of the Wrongful Death Complaint, Foremost Insurance retained counsel, Jeffrey A. Novins, Esq. of Howd & Ludorf, LLC, to defend Mr. Zagarella and Counsel is continuing his efforts to vacate the default, which was initially denied without prejudice on December 7, 2022.
34. Under the Definition Section of the Homeowners Policy issued by Foremost Insurance to David and Nataliaie Stanizzi, "you, your and yours means the person named on the Declarations Page and that person's family member."
35. Under the Definition Section of the Homeowners Policy, "Family member" means a person who resides in your household and is related to you by blood, marriage or adoption [and includes] a ward or a foster child."
36. Mr. Zagarella resided in David and Nataliaie Stanizzi's household as of October 28, 2016 and was related by blood.
37. The Homeowners Policy issued by Foremost Insurance to David and Nataliaie Stanizzi, in effect as of October 28, 2016, provides Comprehensive Personal Liability Coverage for bodily injury caused by an "accident."
38. The Homeowners Policy issued by Foremost Insurance to David and Nataliaie Stanizzi, in effect as of October 28, 2016, provides Medical Payments to Others Coverage for a person off the insured premises if the Bodily Injury arising out of an "accident" is "caused by your activities."

39. The word “accident” is not defined in the Homeowners Policy but Section II of the Policy, entitled, “Exclusions,” does allow Foremost Insurance to disclaim Bodily Injury and Medical Payment to Others claims, “[r]esulting from any act or omission that is intended by any of you to cause any harm or that any of you could reasonably expect to cause harm ... whether or not any of you:
- a. Intended or expected the result of his or her act or omission so long as the resulting injury or damage was natural consequence of the intended act or omission.”
40. The Homeowners Policy further excludes bodily injury “[r]esulting from an act committed by any of you in the course of or in furtherance of any crime or offense of a violent nature.”
41. The Homeowners Policy provides that Foremost Insurance be “promptly ... [sent] any demand, notice, summons or other legal papers you receive.”
42. The Homeowners Policy further provides:
- You will be required to cooperate with us in our effort to investigate the accident or loss, settle any claims against you and defend you. If you fail to cooperate, we have the right to deny you coverage in this policy.

COUNT I
REQUEST FOR DECLARATORY RELIEF v. ALL DEFENDANTS

43. Foremost Insurance realleges, repleads and incorporates by reference paragraphs 1 through 42 above, as if set forth fully herein.
44. Foremost Insurance brings this Count for declaratory relief pursuant to Mass. R. Civ. P., Rule 57 and G.L. c. 231A et. seq.
44. There exists an actual case in controversy between Foremost Insurance and Paul Costello, Personal Representative of the Estate of Ethan Costello, as to whether the Estate is entitled to recover Personal Liability Coverage benefits from a Homeowners Policy issued to David and Nataliaie Stanizzi, arising out of the assault and battery of Ethan Costello on October 28, 2016.
45. There exists an actual case in controversy between Foremost Insurance and Paul Costello, Personal Representative of the Estate of Ethan Costello, as to whether the Estate is entitled to recover Medical Payments to Others Coverage benefits from a Homeowners Policy issued to David and Nataliaie Stanizzi, arising out of the assault and battery of Ethan Costello on October 28, 2016.

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