CITY OF LEWISBURG, TENNESSEE, and IMPERIAL CASUALTY and INDEMNITY COMPANY, Plaintiffs/Appellants, VS. NUTMEG INSURANCE COMPANY, a subsidiary of ITT HARTFORD INSURANCE GROUP, Defendant/Appellee.	)	Appeal No. 01-A-01-9511-CH-00499 Marshall Chancery No. 8205

COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

APPEALED FROM THE CHANCERY COURT OF MARSHALL COUNTY
AT LEWISBURG, TENNESSEE

THE HONORABLE LEE RUSSELL, JUDGE

FILED

July 24, 1996

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Appellate Court Clerk

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AFFIRMED AND REMANDED

BEN H. CANTRELL, JUDGE

CONCUR:
TODD, P.J., M.S.
LEWIS, J.

O P I N I O N

This case presents only one issue -- whether an exclusion for law enforcement activities in a policy of municipal insurance issued by the appellee relieves it from liability for the actions of a policeman who misused the authority of his office to harass his ex-wife. The trial court held that the exclusion applied to the activities in question. We affirm.

I.

Clifford Gary Harris was a police officer, employed by the City of Lewisburg. He and his wife Mary Fain Davidson Harris divorced in 1986. The divorce decree granted the wife custody of the couple's daughter. After an attempt at reconciliation, which failed in February 1988, Officer Harris allegedly began a systematic campaign of harrassment and intimidation directed against his ex-wife and her brother, Thomas A. Davidson, which led them to file a federal lawsuit for deprivation of rights in violation of 42 U.S.C. § 1983.

The suit alleged many illegal acts performed under color of law by Officer Harris and his fellow officers, including but not limited to the filing of false reports accusing Ms. Harris and her brother of theft; false arrest; false testimony before a Marshall County Grand Jury; and after Ms. Harris left the State to escape the threats against her, the swearing out of a false warrant against her for kidnapping the parties' child, which resulted in her arrest and imprisoment in the State of Alaska.

The Chief of Police and the City of Lewisburg were on notice of the illegal activities of Officer Harris and his cohorts, and were named in the suit for failing to investigate, supervise or discipline their employees. Following discovery, the

defendants offered judgment in accordance with Rule 68 of the Federal Rules of Civil Procedure. The offers were accepted by the two plaintiffs. Judgments totalling $125,000 were accordingly entered, and were paid in full.

II.

The appellant, Imperial Casualty and Indemnity Company (hereinafter "Imperial") conducted the defense in the federal action, in accordance with a Law Enforcement Professional Liability Policy that it had issued to the City of Lewisburg. During the same time frame, the City possessed a Public Entity Liability Insurance policy, issued by the appellee, Nutmeg Insurance Company (hereinafter "Nutmeg").

After the judgment was satisfied, Imperial and the City of Lewisburg filed a complaint against Nutmeg in state court, asking the court to declare Nutmeg liable under its general liability policy for contribution towards the judgment and towards the costs and expenses of the federal litigation.

Nutmeg argued that the following exclusion in its general liability policy operated to excuse it from any responsibility relating to the defense of the federal claim:

> **EXCLUSION - LAW ENFORCEMENT ACTIVITIES**
>
> The policy of which this endorsement forms a part does not apply to bodily injury, property damage, personal injury or errors or omissions injury arising out of any act or omission of your police department or any other law enforcement agency of yours including their agents or employees; but this exclusion does not apply to bodily injury, property damage, personal injury or errors or omissions injury arising out of the ownership, maintenance or use of your premises which are not customarily incident to law enforcement activities.

Imperial argued that the harrassment of private citizens could not be considered a law enforcement activity, and that the exclusion therefore did not apply.

The trial court held, however, that as the federal claim "arose out of" acts or omissions by the police department, the exclusion was effective. The court entered judgment for Nutmeg, and this appeal followed.

III.

Imperial's argument on appeal relies on the well established rule that any ambiguity in an insurance policy must be construed against the insurer which drafted the policy, and in favor of coverage for the insured. *Palmer v. State Farm Mutual Auto Ins.Co.*, 614 S.W.2d 788, 789 (Tenn. 1981).

Imperial notes that there is no definition of "law enforcement activities" in the policy, and contends that the scope of the exclusion should be controlled by the usual and ordinary meaning of that term. The appellant urges this court to be guided by the reasoning of the Pennsylvania Federal District Court, which discussed the definition of the disputed phrase in the case of *Imperial Casualty & Indemnity Co. v. Home Insurance Co.*, 727 F.Supp. 917 (M.D. Pa), affd, 909 F2d. 1476 (3rd Cir. 1990).

The above-mentioned case arose from the wrongful death of an inmate in a county jail. The court held that a law enforcement exclusion in the county's general liability policy did not protect the insurer from liability, because the incarceration of prisoners fell outside the usual and ordinary meaning of law enforcement, which the court found to be limited to the preservation of the peace, the discovery of violations of criminal laws and ordinances, and the arrest of offenders.

While we do not quarrel with the logic of the U.S. District Court's opinion, it does not appear to be on point with the case before us. The Pennsylvania court based its decision on a distinction it drew between two legitimate and closely related functions of government. In the present case the appellant is urging us to order

coverage by distinguishing between legitimate and illegitimate uses of law enforcement powers.

The case cited by the appellee in rebuttal, *Murdock v. Dinsmoor*, 892 F.2d 7 (1st Cir. 1989), arose from the kidnapping and beating of John Murdock by members of the Gilsum, New Hampshire police force, acting in concert with three private citizens, in an attempt to recover stolen marijuana. The town of Gilsum sought coverage under a Public Officials Liability Policy issued by National Grange Mutual Insurance Company. The policy contained an exclusion "for hazards arising out of the operation of the insured's police department," and the insurer denied coverage. The First Circuit Court of Appeals affirmed the Federal District Court's summary judgment in favor of the insurer, citing "the widely accepted practice of interpreting the phrase 'arising out of' broadly and comprehensively." 892 F.2d at 8.

The appellant seeks to distinguish *Murdock* on two bases: Imperial argues first that while the Gilsum police officers may have exceeded their authority by beating Mr. Murdock, there is no indication in the opinion that they were acting solely for personal gain, as opposed to pursuing legitimate law enforcement ends. Second, the *Murdock* opinion does not indicate whether the exclusion being construed contained any reference to "law enforcement activities" such as is to be found in the Nutmeg exclusion.

While the appellant is correct to conclude that the *Murdock* case is also not completely on point, we agree with the appellee that the phrase "arising out of" is meant to be interpreted broadly rather than narrowly. We also agree that the scope of the exclusion Nutmeg relies upon must be determined by the plain meaning of its text, rather than by its heading, contrary to the implications of the appellant's argument. See *Wallingford v. Hartford Accident and Indemnity Co.*, 649 A.2d 530, 533 (f.n.4) (Conn. 1994).

Like the trial court, we find there to be no ambiguity in the phrase "arising out of any act or omission of your police department or other law enforcement agency of yours including their agents of employees." The question that determines exclusion from coverage therefore is whether the defendant officers were agents or employees of the insured's law enforcement agency, and the proof indicates that they were both.

The disputed exclusion makes no distinction between acts performed by employees of law enforcement agencies which fall within the scope of their employment, and those which do not. We note, however, that the defendant officers appear to have been on duty when they used the accoutrements of their authority, such as uniform, badge and police cruiser to intimidate and to harrass their alleged victims. In so doing, they were acting as at least ostensible agents of the law enforcement agencies with whose authority they were clothed.

IV.

The judgment of the trial court is affirmed. Remand this cause to the Chancery Court of Marshall County for further proceedings consistent with this opinion. Tax the costs on appeal to the appellant.

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BEN H. CANTRELL, JUDGE

CONCUR:

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HENRY F. TODD, PRESIDING JUDGE
MIDDLE SECTION

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SAMUEL L. LEWIS, JUDGE