

ARKANSAS COURT OF APPEALS

DIVISIONS I, III & IV

No. CV-18-892

E B MANAGEMENT COMPANY, LLC
AND ERNIE OF LITTLE ROCK, INC.
d/b/a ERNIE BIGGS, AND BRANDON
GRIFFIN

APPELLANTS

V.

HOUSTON SPECIALTY INSURANCE
COMPANY AND MICHAEL SCOTT
TICE

APPELLEES

Opinion Delivered: May 22, 2019

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT,
FIFTH DIVISION
[NO. 60CV-17-4424]

HONORABLE WENDELL GRIFFEN,
JUDGE

AFFIRMED

WAYMOND M. BROWN, Judge

Appellants E B Management Company, LLC (E B Management), and Ernie of Little Rock, Inc., d/b/a Ernie Biggs (Ernie Biggs), and Brandon Griffin¹ appeal from the circuit court's order denying their motion for summary judgment, dismissing their complaint for declaratory judgment, and granting the cross-motion for summary judgment of appellees Houston Specialty Insurance Company (Houston Specialty), and Michael Scott Tice. On appeal, Ernie Biggs argues that the (1) circuit court erred in finding that the insurance policy was unambiguous and (2) allegations of the underlying complaint give rise to the possibility of coverage and trigger the appellee's duty to defend. We affirm.

¹Griffin originally filed a complaint against Ernie Biggs but subsequently joined appellants' position on appeal.

On August 29, 2015, Houston Specialty issued a commercial general liability (CGL)

policy to E B Management. The policy stated the following:

SECTION I - COVERAGES

COVERAGE A - BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages.

However, a limited-assault-or-battery-coverage section stated that it modified the CGL policy:

I. LIMITED ASSAULT AND BATTERY INSURING AGREEMENT

- A. We will pay all sums the Named Insured is legally obligated to pay as damages because of "injury", "bodily injury", "property damage" or "personal and advertising injury" arising out of an "assault or battery incident" by any insured.

In the "EXCLUSIONS" section, the policy stated:

The following exclusion is added to the COMMERCIAL GENERAL LIABILITY COVERAGE FORM:

Injury, damage or loss, however caused, arising, directly or indirectly, out of:

1. Assault;
2. Battery;
3. Any "assault or battery incident".

In the immediately following "DEFINITIONS" section, "assault and battery incident" is defined:

"Assault and battery incident" means harmful or offensive contact between or among two or more persons including, but not limited to, apprehension or harmful or offensive contact or threats or harmful or offensive contact. An "assault or battery incident" may be:

- a. provoked or unprovoked by any person, and
- b. arise out of or result form any act or omission in connection with:
 - (1) Prevention or suppression of an "assault or battery incident";
 - (2) Protection of persons or property;

- (3) Negligent hiring, supervision, retention or training or any “employee” of the Insured; or
- (4) Implementation of adequate security measures, through security personnel, surveillance or other security devices.

On December 29, 2015, Griffin paid an entry fee into Ernie Biggs as well as twenty dollars to a piano player to GO on stage and play the drums during a song being played by that piano player. Stating that Griffin was not keeping the beat, the piano player stopped playing the song. Griffin asked for the return of his twenty dollars; the piano player declined. At some point near this time, Tice removed Griffin from the stage and threw Griffin out the door of the establishment. After being released by Tice, Griffin hit his head on the concrete sidewalk, causing injury.

On April 5, 2016, Griffin filed a complaint against Ernie Biggs and Tice, asserting a cause of action for negligence under the doctrine of respondeat superior, because Tice “negligently decided to come on stage and jerk Plaintiff Brandon Griffin off the stage, negligently led him to the door with too much force, and negligently threw Plaintiff Brandon Griffin out the door causing Plaintiff Brandon Griffin to hit his head on the concrete sidewalk outside the front door.” Griffin further alleged that he was “knocked unconscious, sustained a brain bleed causing a traumatic brain injury, and has permanent brain damage.” Houston Specialty provided a defense to Ernie Biggs under the policy’s assault-and-battery coverage and not its CGL coverage.²

²The CGL coverage had a policy limit of \$1,000,000 while the assault-and-battery coverage had a policy limit of \$100,000. In his April 3, 2017 response to a March 8, 2017 letter from Griffin’s counsel proposing a settlement amount, Houston Specialty’s counsel declined Griffin’s offer as it “[could not] satisfy the portion of the demand in excess of the

In an amended complaint filed on July 31, 2017, Griffin added E B Management as a defendant in the case. He also modified his statement of the case to assert that he paid the piano player forty dollars and that the piano player offered return of only twenty dollars when he requested a refund.

On August 20, 2017, E B Management and Ernie Biggs filed a complaint for declaratory judgment. Griffin answered in agreement on October 10, 2017. Houston Specialty answered in opposition on November 30, 2017, and sought dismissal of the complaint with prejudice.

Griffin voluntarily nonsuited his negligence complaint at some point. He refiled his complaint of December 28, 2017, adding Little Rock Ambulance Authority d/b/a Metropolitan Emergency Medical Services (MEMS), Arch Insurance Company, and five John Doe insurance companies as additional defendants. A negligence claim was asserted against these entities due to MEMS's employees allegedly being "negligent in causing further injury to Plaintiff Brandon Griffin, with that negligence being imputed to" MEMS.

On March 9, 2018, Houston Specialty filed a motion for summary judgment and a separately filed memorandum in support. It asserted that it had "already accepted coverage under the Policy's only applicable coverage afforded for "assault and battery incidents" subject to a \$100,000 limit of liability, and owes no further obligation to [E B Management and Ernie Biggs] in connection with this lawsuit."

available Policy Limits[.]” It did, however, offer “the applicable liability limits that remain available on its Policy[.]”

Also on March 9, 2018, E B Management and Ernie Biggs filed a cross-motion for summary judgment and a separately filed brief in support. Therein, it stated:

5. The [Houston Specialty] Policy provides coverage under its Commercial General Liability Coverage Form (the “CGL Coverage Form”), which also has certain exclusions as more fully set forth in the Complaint accompanying brief in support of this motion. One such exclusion is for an “assault and battery incident,” which is defined under the Policy and gives rise to limited Assault and Battery Coverage [(A&B Coverage)].
6. The limits of insurance under the CGL Coverage Form are \$1 million. The limits of insurance under the A&B Coverage are \$100,000. Both limits of insurance are inclusive of the costs of defense or “eroding” limits.
7. The complaint filed in the Underlying Action alleges theories of recovery grounded exclusively in negligence and does not allege (nor purport to allege) any claim, injury, damage, or loss arising out of an “assault,” “battery,” or “assault or battery incident.”
8. [Houston Specialty] has denied coverage under the Policy’s CGL Coverage Form for the Underlying Action and refuses to provide them with either a defense or indemnification under that coverage part. [Houston Specialty] is instead providing a defense to the Underlying Action under the lower limits of the A&B Coverage[.]

E B Management and Ernie Biggs sought entry of a declaratory judgment that Houston Specialty “has a duty to indemnify E B Management and Ernie Biggs in the Underlying Action under the provisions of the Policy’s CGL Coverage Form.”

Following a hearing on July 20, 2018, the circuit court entered an order denying the appellants’ motion for summary judgment, dismissing their complaint for declaratory judgment, and granting the appellee’s cross-motion for summary judgment. Therein, they stated:

[Appellants] contend that resolution of the coverage dispute should be driven by the allegations of the Amended Complaint, which contains numerous assertions that the injuries suffered by Brandon Griffin resulted from negligence on

the part of Separate Defendant Tice and Separate Defendant Ernie Biggs Piano Bar, his employer. And, plaintiffs contend that the insurance contract is ambiguous so that the Court should construe the meaning of “assault and battery incident” and be guided by the intent requirement found in the torts of assault and battery. However, as previously stated, the Limited Assault and Battery Coverage Endorsement defines “assault and battery” for purposes of the insurance contract. The definition is clear and unambiguous. There is no need to employ rules of construction to discern the meaning of “assault and battery” for purposes of resolving the coverage dispute.

Hence, the Court must focus on the incident or injury that gave rise to the claim, rather than the theory of liability asserted in the Amended Complaint. The action of Michael Tice (the Ernie Biggs bouncer who ejected Brandon Griffin from that establishment resulting in Griffin sustaining a closed head injury from the fall) was “harmful or offensive contact between . . . two . . . persons . . .” regardless whether Michael Tice intended to commit the torts of assault or battery as defined by the Arkansas Model Jury Instructions (Civil). To arrive at a different conclusion would involve the Court imposing a meaning that is different from the plain and unambiguous definition of “assault and battery” stated in the policy. In effect, the Court would be re-writing the contract on terms contrary to the explicit and unambiguous definition the insurance carrier declared when the coverage was offered and which its insured accepted.

This timely appeal followed.

A circuit court may grant summary judgment only when it is clear that there are no genuine issues of material fact to be litigated and that the party is entitled to judgment as a matter of law.³ Once the moving party has established a prima facie case showing entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact.⁴ On appellate review, we determine if summary judgment was appropriate based on whether the evidentiary items presented by

³*Lopez v. United Auto. Ins. Co.*, 2013 Ark. App. 246, at 5, 427 S.W.3d 154, 157 (citing *Mitchell v. Lincoln*, 366 Ark. 592, 596, 237 S.W.3d 455, 458 (2006)).

⁴*Id.* (citing *Mitchell*, 366 Ark. at 597, 237 S.W.3d at 458).

the moving party in support of its motion leave a material fact unanswered.⁵ Ordinarily, we view the evidence in the light most favorable to the party resisting the motion, and any doubts and inferences are resolved against the moving party.⁶ Where there are no facts in dispute, our review focuses on the circuit court’s application of the law to the facts.⁷ We give the circuit court’s conclusions of law no deference on appeal.⁸

The appellants essentially argue first that “assault and battery incident[,]” as defined by the policy, is “inherently unreasonable and, at a minimum, ambiguous” because it does not include an element of intent as is found in the legal definitions for assault and battery. They go on to argue second that because Griffin’s complaint is for negligence—which lacks an intent element as legally defined—Houston Specialty should be required to defend Griffin’s complaint under the CGL policy—with the higher policy limit—and not the A&B Coverage—with the lower policy limit. In making these arguments, appellants necessarily admit that “assault and battery incident” is defined by the policy. So the question is whether the given definition is ambiguous.

⁵*Id.*

⁶*Id.* (citing *Aloha Pools & Spas, Inc. v. Employer’s Ins. of Wausau*, 342 Ark. 398, 403, 39 S.W.3d 440, 443 (2000)).

⁷*George v. Great Lakes Reinsurance (UK) PLC*, 2015 Ark. App. 36, at 4, 454 S.W.3d 243, 245 (citing *Harasyn v. St. Paul Guardian Ins. Co.*, 349 Ark. 9, 75 S.W.3d 696 (2002); *Chamberlin v. State Farm Mut. Auto. Ins. Co.*, 343 Ark. 392, 36 S.W.3d 281 (2001)).

⁸*Id.* (citing *Morningstar v. Bush*, 2011 Ark. 350, 383 S.W.3d 840).

The initial determination of the existence of an ambiguity rests with the circuit court.⁹ Language is ambiguous if there is doubt or uncertainty as to its meaning and it is fairly susceptible to more than one equally reasonable interpretation.¹⁰ The primary contract-interpretation rule is to give the parties' words the meaning that they intended them to have.¹¹ And we must give the words their plain and ordinary meaning.¹² Another settled rule is that the parties' intention must be gathered, not from particular words and phrases, but from the entire agreement.¹³

Prior to using contract-interpretation devices, the contract must be ambiguous.¹⁴ A court cannot make a contract for the parties but can only construe and enforce the contract that they have made.¹⁵ Moreover, we will not read into the contract words that are

⁹*Lee v. Bolan*, 2010 Ark. App. 209, at 7, 374 S.W.3d 718, 723 (citing *Fryer v. Boyett*, 64 Ark. App. 7, 978 S.W.2d 304 (1998); *Wedin v. Wedin*, 57 Ark. App. 203, 944 S.W.2d 847 (1997)).

¹⁰*Rausch Coleman Homes, LLC v. Brech*, 2009 Ark. App. 225, at 5, 303 S.W.3d 456, 459 (citing *Magic Touch Corp. v. Hicks*, 99 Ark. App. 334, 260 S.W.3d 322 (2007)).

¹¹*Prochazka v. Bee-Three Dev., LLC*, 2015 Ark. App. 384, at 4, 466 S.W.3d 448, 452 (citing *Singletary v. Singletary*, 2013 Ark. 506, at 10, 431 S.W.3d 234, 240-41).

¹²*Id.*

¹³*Id.*

¹⁴*Crittenden Cty. v. Davis*, 2013 Ark. App. 655, at 8, 430 S.W.3d 172, 178 (citing *Found. Telecomm., Inc. v. Moe Studio, Inc.*, 341 Ark. 231, 16 S.W.3d 531 (2000)).

¹⁵*Id.* at 9, 430 S.W.3d at 178 (citing *Found. Telecomm. Inc., supra*).

not there.¹⁶ And we will not rewrite a contract or approve additional terms that would, in effect, enforce a contract that the parties might have made but did not make.¹⁷

A plain reading of the contract shows that an “assault and battery incident” is a “harmful or offensive contact between or among two or more persons” without regard to the listed act or omission from which it arose. We hold that the circuit court did not err in finding that the definition provided for “assault and battery incident” is not ambiguous as there is not more than one equally reasonable interpretation of the definition.

Griffin was physically removed from the stage by an employee of Ernie Biggs, removed from the establishment, and released onto the sidewalk where he landed and hit his head. These actions fit squarely within the policy’s definition of “assault and battery incident” since being thrown out of an establishment cannot be reasonably found to be anything other than “harmful or offensive,” and it occurred between two persons—Tice and Griffin. This court cannot find error in the circuit court’s finding that such actions constituted an “assault and battery incident” as defined. As such is the case, Houston Specialty is required to defend under the A&B Coverage and not the CGL Coverage. No one argues that it failed to do so. It offered to settle the matter for the balance of the A&B Coverage.¹⁸

¹⁶*Id.* (citing *Seidenstricker Farms v. Doss*, 372 Ark. 72, 270 S.W.3d 842 (2008)).

¹⁷*Id.* (citing *Rector-Phillips-Morse, Inc. v. Vroman*, 253 Ark. 750, 489 S.W.2d 1 (1973)).

¹⁸The A&B Coverage had “eroding limits” in which the costs of defending the claim were subtracted from the total amount permitted under the coverage.

Appellants would have this court read an intent element into the contract that simply is not there in order to “give rise to the possibility of coverage” under the CGL coverage. The lack of inclusion of such an element, which Houston Specialty could have included in its definition but declined to do, does not make the term “inherently unreasonable” or ambiguous. And when the term is clearly defined, this court need not interpret it. Furthermore, to the extent that appellants argue that their asserted cause of action governs the substance of the case to be litigated over the defined terms of the contract, it is well settled that the language of the contract governs.¹⁹

Affirmed.

GLADWIN, HARRISON, SWITZER, and VAUGHT, JJ., agree.

ABRAMSON, VIRDEN. WHITEAKER, and HIXSON, JJ., dissent.

KENNETH S. HIXSON, Judge, dissenting. An insurance company’s duty to defend an insured is broader than the duty to indemnify, and the duty to defend arises when there is a *possibility* that the injury or damage may fall within the policy coverage. In my view, the trial court erred in this case by entering summary judgment in favor of the appellee insurance company because, at a minimum, the insurance company should have been required to defend the claim against the appellants under the general-liability coverage of the insurance policy. Therefore, I dissent.

¹⁹*PC Scale, Inc. v. Roll Off Servs., Inc.*, 2010 Ark. App. 745, at 5, 379 S.W.3d 649, 652–53 (citing *Hot Spring Cty. Med. Ctr. v. Ark. Radiology Affiliates, P.A.*, 103 Ark. App. 252, 288 S.W.3d 676 (2008); Cal. Civ. Code §§ 1636, 1638, and 1639 (Deering 2005)).

It is difficult to overstate the breadth of an insured's duty to defend. 3 *New Appleman on Insurance Law Library Edition* § 17.01[1][b][i]. Many insureds purchase liability insurance for the peace of mind that comes with knowing that their insurer will defend them if they are sued in an action that comes within the scope of protection provided by their policy. *Id.* § 17.01[1][a]. Courts often refer to the duty to defend as “litigation insurance” and construe the duty to defend very broadly to provide insureds with the most expansive amount of protection available under the terms of the policy. *Id.*

The duty to defend arises whenever allegations in a suit against the insured create the *potential* for covered liability. 3 *New Appleman on Insurance Law Library Edition* § 17.01[ii]. *Neither adjudicated facts nor the ultimate basis for liability, if any, is relevant to whether a suit is “seeking” covered damages.* *Id.* Indemnity coverage, on the other hand, is contingent only on the facts adjudicated at trial, and whether the suit initially brought against the insurer was “seeking” covered damages is not necessarily dispositive of whether the insurer must pay damages on behalf of the insured. *Id.*

In *Murphy Oil U.S.A., Inc. v. Unigard Security Insurance Co.*, 347 Ark. 167, 176, 61 S.W.3d 807, 812-13 (2001), our supreme court analyzed the duty to defend and stated:

In examining the duty to defend, this court has recognized the general rule that the *allegations in the pleadings* against the insured *determine* the insurer's duty to defend. Additionally, this court has recognized that the duty to defend is broader than the duty to indemnify. However, the duty to defend arises when there is a *possibility* that the injury or damage *may* fall within the policy coverage. Conversely, where there is *no possibility* that the damage alleged in the complaint may fall within the policy coverage, there would be no duty to defend.

(Emphasis added.) Not only does *Murphy Oil* direct us to determine the duty to defend solely on the allegations in the pleadings, one must remember that this case was disposed of on a motion for summary judgment. At this summary-judgment stage of the proceedings, the only information available with regard to the incident at Ernie Biggs is in the complaint filed by Griffin against Ernie Biggs, which sounds purely in negligence. Perhaps, this is artful pleading by the appellant's attorney, but it is improper for the trial court to make findings of fact in deciding a summary-judgment motion. See *Nationwide Mut. Ins. Co. v. Matthews*, 2013 Ark. App. 175. Therefore, the trial court must look to the allegations in the complaint to determine whether there is a duty to defend. As long as a complaint alleges an injury that *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 (Pa. Super. Ct. 2002).

As stated in the majority opinion, this case involves a claim for insurance coverage by appellants EB Management Company, LLC, and Ernie Biggs of Little Rock (Ernie Biggs) against its insurer, appellee Houston Specialty Insurance Company (Houston). Ernie Biggs brought a complaint for declaratory judgment seeking an order to require Houston to *defend and indemnify* it against claims made in a complaint filed by Brandon Griffin under Houston's general liability coverage in the insurance policy. The parties filed cross-motions for summary judgment, and the trial court entered an order denying Ernie Biggs's summary-judgment motion and granting Houston's summary-judgment motion.

The incident at the Ernie Biggs piano bar involved a patron, Brandon Griffin, and the bouncer, Michael Tice. The litigation began in April 2016 when Griffin filed a complaint, *sounding exclusively in negligence*, against Ernie Biggs and Tice. In the complaint, Griffin alleged that while at the bar he paid one of the piano players twenty dollars to come on stage and play the drums; that the piano player stopped playing the song stating that Griffin was not keeping the beat; and that Griffin asked for his money back but the piano player refused. Griffin further *alleged* that Tice, acting in the scope of his employment for Ernie Biggs, *negligently* caused him injury as follows:

Although Plaintiff Brandon Griffin was leaving the stage under his own free will, Defendant Michael Scott Tice, an employee of Ernie of Little Rock, Inc., d/b/a/Ernie Biggs Piano Bar, and while he was acting in the scope and performance of his employment with Ernie of Little Rock Inc., d/b/a/Ernie Biggs Piano Bar, *negligently* decided to come on stage and jerk Plaintiff Brandon Griffin off the stage, *negligently* led him to the door with too much force, and *negligently* threw Plaintiff Brandon Griffin out the door causing Plaintiff Brandon Griffin to hit his head on the concrete sidewalk outside the front door. As a result of being *negligently* thrown out of the piano bar, Plaintiff Brandon Griffin was knocked unconscious, sustained a brain bleed causing a traumatic brain injury, and has permanent brain damage. These acts by Defendant Michael Scott Tice, an employee of Ernie of Little Rock Inc., d/b/a/ Ernie Biggs Piano Bar, and while he was acting in the scope and performance of his employment with Ernie of Little Rock Inc., d/b/a Ernie Biggs Piano Bar, *constitute negligence* with that negligence being imputed to Defendant Ernie of Little Rock Inc., d/b/a/ Ernie Biggs Piano Bar pursuant to the legal doctrine of Respondent Superior.

(Emphasis added.) Griffin sought damages proximately caused by the *negligence* of Tice and imputed to Ernie Biggs.

The pertinent provisions in the insurance policy are as follows. The general-liability coverage, with a \$1 million limit, provides:

a. We will *pay* those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which this insurance applies. We will have the right and *duty to defend* the insured against any “*suit*” *seeking* those damages[.]

b. This insurance applies to “bodily injury” . . . only if . . . the “bodily injury” . . . is caused by an “occurrence”[.]

(Emphasis added.) The term “occurrence” is defined as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.”

Observe the difference in the two duties under the policy. The insurance company has the “*duty to pay*” only if the insured becomes “*legally obligated to pay,*” i.e., a judgment is actually rendered against its insured. However, the insurance company has the “*duty to defend . . . any suit seeking those damages.*” Note that the policy language “seeking damages” in the policy at issue is the exact same phrase used in *Appleman on Insurance* in determining the duty to defend where it states: *Neither adjudicated facts nor the ultimate basis for liability, if any, is relevant to whether a suit is “seeking” covered damages.* 3 *New Appleman on Insurance Law Library Edition* § 17.01[ii]. As one can readily ascertain, the duty to defend is much broader and the duty attaches if its insured is sued and the plaintiff is seeking damages allegedly caused by an occurrence or accident.

While the policy grants coverage under the above-cited general-liability provisions, the policy attempts to exclude, and then limit, coverage under an endorsement titled, “Limited Assault or Battery Coverage.” If the insured is able to establish that the claim against it falls within the initial grant of coverage in the insuring agreement, the burden then shifts to the insurer to prove that an exclusion applies to bar coverage. 3 *New*

Appleman on Insurance Law Library Edition § 18.03[1]. Generally, the insuring agreement is given broad interpretation in favor of coverage while the exclusions are interpreted narrowly. *Id.* The intent to exclude coverage in an insurance policy should be expressed in clear and unambiguous language, and an insurance policy, having been drafted by the insurer without consultation with the insured, is to be interpreted and construed liberally in favor of the insured and strictly against the insurer. *Nationwide Mut. Ins. Co. v. Worthey*, 314 Ark. 185, 861 S.W.2d 307 (1993).

With those principles in mind, we must analyze the endorsement that excludes, and then limits, coverage. The “Limited Assault or Battery Coverage endorsement” contains the following exclusion applicable to the general-liability coverage:

Injury, damage or loss, however, caused, arising, directly or indirectly, out of:

1. Assault;
2. Battery;
3. Any “assault or battery incident.”

Under the definitions section of the policy:

“Assault or battery incident” means *harmful or offensive contact* between or among two or more persons including, but not limited to, apprehension of harmful or offensive contact or threats or harmful or offensive contact. An “assault or battery incident” may be:

- a. provoked or unprovoked by any person; and
- b. arise out of or result from any act or omission in connection with:
 - (1) Prevention or suppression of an “assault or battery incident”;
 - (2) Protection of persons or property;
 - (3) Negligent hiring, supervision, retention or training of any “employee” of the Insured; or
 - (4) Implementation of adequate security measures, through security personnel, surveillance, or other security devices.

(Emphasis added.)

In Houston’s motion for summary judgment, it contended that the conduct of Ernie Biggs’s employee fell within the policy definition of “assault or battery incident” and therefore, the occurrence was excluded from the general-liability portion of the insurance policy. In granting Houston’s summary-judgment motion, the trial court found that the “assault and battery” coverage endorsement and exclusion applied, and stated, *inter alia*:

[T]he Court must focus on the incident or injury that gave rise to the claim, rather than the theory of liability asserted in the Amended Complaint. The action of Michael Tice (the Ernie Biggs’ bouncer who ejected Brandon Griffin from that establishment resulting in Griffin sustaining a closed head injury from the fall) was “harmful or offensive contact between . . . two . . . persons . . .” regardless whether Michael Tice *intended* to commit the torts of assault or battery as defined by the Arkansas Model Jury Instructions (Civil). To arrive at a different conclusion would involve the Court imposing a meaning that is different from the plain and unambiguous definition of “assault and battery” stated in the policy. In effect, the Court would be re-writing the contract on terms contrary to the explicit and unambiguous definition the insurance carrier declared when the coverage was offered and which its insured accepted.

(Emphasis added.)

It is clear from the following sentence that the trial court erred in its reasoning: “[T]he Court must focus on the incident or injury that gave rise to the claim, rather than the theory of liability asserted in the Amended Complaint.” That is exactly opposite from what the trial court should have done. It is clear from *Appleman on Insurance, Murphy Oil, Matthews, and Erie Insurance Exchange*, that the trial court is required to accept the allegations in the pleadings to determine the duty to defend. In determining the duty to defend, especially in a motion for summary judgment, the trial court cannot adjudicate the facts to justify its decision.

That is exactly what has occurred here. The trial court reviewed the allegations and determined that the facts of the allegations constituted an “assault and battery incident.” That was error. After all the evidence is introduced and the credibility of the witnesses ascertained, it is *possible* the jury could find that the occurrence was merely negligence.

In this appeal, Ernie Biggs argues that the “assault and battery incident” exclusion in the insurance policy is ambiguous and that therefore, the underlying complaint sounding in negligence triggered Houston’s duty to defend under the limits of the general-liability coverage in the policy. Appellant asserts that because the assault-and-battery-incident exclusion is ambiguous, it should be construed against Houston, as the insurer. Appellant asserts that the ambiguity lies in whether an assault/battery under the policy involves the *intent* to cause some injury as opposed to merely being in harmful or offensive contact with no element of intent required. Appellant claims that a reasonable interpretation of the exclusion requires the *intent* to cause a harmful or offensive contact, as opposed to mere negligence, before such exclusion applies. In making this argument, appellant borrows from the Arkansas Model Jury Instructions. The term “assault” is not defined in the policy. However, under AMI Civ. 417, the tort of assault must be based on actions of a defendant that are *intended* to cause apprehension of immediate harmful or offensive contact. The term “battery” is not defined in the policy. However, under AMI Civ. 418, the tort of battery must be based on actions *intended* to cause a harmful or offensive contact. The appellee, however, counters that the term “assault or battery incident” is defined in the policy itself and urges that the definition unambiguously has no

element of intent, so it is unnecessary to resort to any other definitions. The essence of Houston's definition of "assault or battery incident" is that *any* harmful or offensive contact is excluded. The absurdity of this definition can best be revealed by a few common examples:

- A bartender gives a patron an overly enthusiastic high five and the patron falls and injures himself—That would be "harmful or offensive contact" that caused an occurrence, and therefore excluded.
- A waitress making her way through a crowded floor bumps into a patron and he falls and injures himself—That would be "harmful or offensive contact" that caused an occurrence, and therefore excluded.
- A bouncer guides an inebriated patron to the door and the patron falls and injures himself—That would be "harmful or offensive contact" that caused an occurrence, and therefore excluded.

In none of these examples did an assault occur because there was no "intent to cause apprehension of immediate harmful or offensive contact." Similarly, a battery did not occur because there was no "intent to cause a harmful or offensive contact." However, under Houston's interpretation of the policy, "harmful contact" without more triggers the "assault and battery incident" exclusion.

In *Norris v. State Farm Fire & Casualty Co.*, 341 Ark. 360, 16 S.W.3d 242 (2000), the issue was whether an insurance policy issued by the appellee, State Farm, excluded coverage for unintended or accidental results of its insured's actions. The policy contained an exclusion for bodily injury caused to any person "which is the result of willful and malicious acts of the insured." The insurance claim arose from an incident where a boy was injured after "smarting off" and being struck in the jaw, resulting in his falling face first

onto the pavement and sustaining serious injuries. State Farm argued that the exclusion precluded coverage; the injured party claimed that the exclusion was, at a minimum, ambiguous and did not apply because the injury was the result of *accidental or unintended* results of willful or malicious acts. State Farm was granted summary judgment based on the exclusionary language, but the supreme court reversed. The supreme court wrote:

State Farm contends that the second provision of this exclusion clause eliminates coverage for accidental or unintended results of willful and malicious acts. We disagree. *Words excluding coverage for accidental or unintended results are not found in this clause. It would have been easy to include such language, if that had been State Farm's intent.* Such language might have stated:

SECTION II—EXCLUSIONS

Coverage L and Coverage M do not apply to:

A. Bodily injury or property damage:

- (1) which is either expected or intended by an insured; or
- (2) to any person or property which is the *accidental or unintended* result of willful and malicious acts of an insured.

The policy promises to cover accidental results of an insured's actions in its general language. To unambiguously exclude coverage for accidental or unintended results of willful and malicious acts of an insured, those words might have been used, but that was not done. It appears that there is an ambiguity between the general provision, extending coverage for accidents, and the exclusion clause as drafted in the policy.

.....

We have determined that the language of the policy is internally inconsistent, and in light of our decision in *Talley [v. MFA Mut. Ins. Co., 273 Ark. 269, 620 S.W.2d 260 (1981)]*, and in accordance with the principle that in the event of ambiguity we will construe the policy liberally in favor of the insured, we conclude that the policy does not exclude accidental or unintended results of willful and malicious acts from coverage.

Norris, 341 Ark. at 365-66, 16 S.W.3d at 245-46 (emphasis added).

In deciding this case, we must endeavor to read together and harmonize different parts of the insurance policy. The general liability coverage covers injuries arising out of “occurrences,” defined in the policy as “accidents.” The term “accident” is commonly defined as “an unexpected happening without intention or design,” and it may include “unintended or unforeseen consequences of reckless or negligent acts.” *Liberty Mut. Ins. Co. v. Tabor*, 553 N.E.2d 909, 912 (Mass. 1990). In *Wood v. Safeco Insurance Co. of America*, 980 S.W.2d 43 (Mo. Ct. App. 1998), it was held that when a liability-insurance policy defines “occurrence” as meaning “accident,” an “occurrence” means injury caused by the negligence of the insured. Conversely, intentional or willful acts are not “occurrences” as that term is commonly defined in insurance policies. *Old Republic Ins. v. Comprehensive Health Care*, 786 F. Supp. 629 (N.D. Tex. 1992). Generally speaking, protection against liability on the ground of negligence is the principal purpose of commercial-liability policies such as this one.

The exclusion at issue provides that an assault, a battery, or an “assault or battery incident” is excluded from coverage under the general-liability coverage and its limits. “Assault and battery incident” is defined in the policy as “harmful or offensive contact between or among two or more persons.” The exclusion language makes no specific provision for whether the “harmful or offensive contact” must result in an intentional injury or whether it may be the result of mere negligence. However, if the exclusion is interpreted to cover mere negligent acts with no element of any willful intent to injure, it

would arguably conflict with the general-liability coverage for accidental acts of negligence. Including the element of intent harmonizes the otherwise conflicting provisions. In my view, this creates an ambiguity that must be construed in favor of Ernie Biggs, as the insured under the policy. An insurance policy may not contain a provision that negates the very coverage that the policy purports to provide. See *Liberty Mutual, supra*. Here, the trial court concluded that there is no coverage if a patron is touched (contacted). There is no protection. That cannot be the insurance coverage the insured purchased. Houston perhaps might have written this endorsement to exclude coverage for “harmful or offensive contact, *whether intentional or unintentional.*” But because the endorsement language contains no such clarifying language, it is ambiguous and should be interpreted in favor of a duty to defend if the harmful or offensive contact was merely negligent, as alleged in the complaint, as opposed to intentional.

Having determined that based on the current state of the proceedings (summary judgment) a duty to defend exists, I am providing no opinion as to whether that duty could change in the future. Similarly, the issue of whether there is a duty to indemnify is not ripe for review.

I would reverse and hold that Houston Specialty has a duty to defend under the general-liability insurance coverage in the litigation below.

ABRAMSON, VIRDEN, and WHITEAKER, JJ., join.

J. Andrew Vines, P.A., by: J. Andrew Vines, for appellants.

Friday, Eldredge & Clark, LLP, by: *William A. Waddell, Jr.*, for appellee Houston
Specialty Insurance Company.