

ARKANSAS COURT OF APPEALS

DIVISION IV

No. CA08-983

CLEMONS TIMBER, INC.

APPELLANT

V.

AMERICAN INTERSTATE
INSURANCE CO.

APPELLEE

Opinion Delivered April 1, 2009

APPEAL FROM THE CLEBURNE
COUNTY CIRCUIT COURT,
[NO. CV2007-275-2]

HONORABLE JOHN NORMAN
HARKEY, JUDGE

AFFIRMED

DAVID M. GLOVER, Judge

In this summary-judgment case, the Cleburne County Circuit Court ruled that appellee, American Interstate Insurance Company, owed no duty to defend its insured, appellant, Clemons Timber, Inc., against a counterclaim filed by Deltic Timber Corp. Clemons argues that the circuit court erred and that American must provide a defense. We affirm the circuit court.

Clemons is insured under a commercial general liability policy issued by American. The policy provides that American will defend Clemons in certain lawsuits but not in those “seeking damages ... to which this insurance does not apply.” The policy excludes coverage for, among other things, “bodily injury or property damage expected or intended from the standpoint of the insured.”

In early 2007, Clemons contracted with Deltic to cut Deltic's timber and deliver it to designated sawmills. In July 2007, Clemons sued Deltic to collect \$41,890 due on the contract. Deltic counterclaimed for \$1,000,000 in damages, alleging that Clemons had perpetrated a fraudulent scheme to misappropriate Deltic's timber. Specifically, Deltic claimed that Clemons cut timber owned or controlled by Deltic; that Clemons delivered the timber to sawmills using the names of third parties or fictitious drivers and owners; and that Clemons kept the proceeds from the timber for itself and its third-party conspirators. The counterclaim asserted that Clemons was unjustly enriched by its actions and pled causes of action for breach of contract, fraud, conversion, trespass to chattels, trespass to land, and civil conspiracy.

Clemons reported the counterclaim to American, who initially provided a defense under a reservation of rights. However, on November 2, 2007, American filed a complaint seeking a declaration that it owed no defense to Clemons. American's subsequent motion for summary judgment argued that the policy's exclusion for "bodily injury or property damage expected or intended from the standpoint of the insured" barred coverage for any damages that Deltic might recover and, consequently, absolved American of any duty to defend Clemons against Deltic's counterclaim.¹ Clemons responded that the fact-finder in the underlying action might find Clemons liable for accidental, mistaken, or negligent conduct

¹ American also relied on a contractual-liability exclusion. Because we decide this case on the basis of the expected-or-intended-injury exclusion, we need not determine the effect of any other exclusion.

rather than intentional conduct and that such a possibility required American to provide a defense. To support this contention, Clemons filed an affidavit from its president, Tracy Clemons, stating that neither he nor his employees intentionally caused damage to Deltic; that the only basis for Clemons's potential liability would be mistake, accident, or negligence; and that "it is always possible that too much timber was cut from certain tracts of land, that timber was cut from the wrong tract of land, that timber was taken to the wrong mill, [or] that receipts and records were not properly verified or accidentally misplaced" Following a hearing, the circuit court granted American's motion for summary judgment. Clemons filed this appeal.

The question before us is whether the circuit court erred in ruling as a matter of law that American owed no duty to defend Clemons in the Deltic lawsuit. Summary judgment should be granted only when it is clear that there are no genuine issues of material fact to be litigated, and the moving party is entitled to judgment as a matter of law. *See Bradley Ventures, Inc. v. Farm Bureau Mut. Ins. Co. of Ark.*, 371 Ark. 229, 264 S.W.3d 485 (2007). Once the moving party establishes a prima facie entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Id.* On appellate review, we determine if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion leave a material fact unanswered. *Id.* We view the evidence in a light most favorable to the

party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Id.*

In deciding whether an insurer has a duty to defend, we look to the allegations made against the insured in the underlying lawsuit. *See Parker v. Southern Farm Bureau Cas. Ins. Co.*, ___ Ark. App. ___, ___ S.W.3d ___ (Feb. 4, 2009). It is the pleadings against the insured that determine the insurer's duty to defend. *See Madden v. Continental Cas. Co.*, 53 Ark. App. 250, 922 S.W.2d 731 (1996). In testing the pleadings to determine if they state a claim within policy coverage, we resolve any doubt in favor of the insured. *See Murphy Oil USA, Inc. v. Unigard Sec. Ins. Co.*, 347 Ark. 167, 61 S.W.3d 807 (2001). The duty to defend is broader than the duty to indemnify and arises where there is a possibility that the damages sought against the insured may fall within policy coverage. *Madden, supra.*

Our review of Deltic's counterclaim reveals that it is made up solely of allegations that Clemons intended to harm Deltic. The counterclaim asserts that Clemons harvested timber from Deltic land, sold the timber to sawmills while misrepresenting the timber's ownership, kept the proceeds from the timber sales for itself, and altered its books to conceal its wrongdoing. These allegations contemplate no reasonable possibility of unintentional conduct by Clemons. Unequivocal assertions that an insured created or intentionally inflicted damages release the insurer from its duty to defend. *See Mattson v. St. Paul Title Co.*, 277 Ark. 290, 641 S.W.2d 16 (1982) (holding that an insurer had no duty to defend where the plaintiff's pleadings asserted fraud and undue influence by the insured); *Fisher v. Travelers*

Indem. Co., 240 Ark. 273, 398 S.W.2d 892 (1966) (holding that the insurer had no duty to defend where the plaintiff's pleadings asserted assault and battery by the insured); *Farmers Ins. Co. v. Suiter*, 61 Ark. App. 99, 964 S.W.2d 408 (1998) (holding that the insurer had no duty to defend where the plaintiff's pleadings asserted harassing and threatening phone calls by the insured). These cases may be distinguished from *Bradley Ventures, supra*, cited by Clemons. In *Bradley*, our supreme court ruled that an insurer may not escape its duty to defend where the policy covered at least some of the damages actually asserted in the underlying complaint.

Clemons acknowledges that "Deltic has made very specific allegations of what [Deltic] contends are intentional acts undertaken by Clemons" However, Clemons asserts that "there could very well be explanations for what occurred which would not constitute intentional torts or intentional wrongdoing." This possibility was raised below in Tracy Clemons's affidavit stating that he and his employees did not intend to harm Deltic. However, Clemons's subjective beliefs do not alter the definitive assertions of intentional conduct in Deltic's counterclaim. *See generally U.S. Fidelity & Guar. Co. v. Continental Cas. Co.*, 353 Ark. 834, 120 S.W.3d 556 (2003); *Little Rock Elec. Contrs. v. Entergy Corp.*, 79 Ark. App. 337, 87 S.W.3d 842 (2002).

Clemons also poses the possibility that Deltic might amend its counterclaim to bring a cause of action for negligence, which would trigger American's duty to defend. Clemons cites Deltic's answers to interrogatories in the underlying action, in which Deltic stated:

Deltic is not seeking damages for negligence in this matter Also, Deltic has not sought damages under any theory that involves negligent actions in its case against [Clemons and others]. However, without waiving any possible avenues of recovery or causes of action, [Clemons and others] are the actual and proximate causes of injuries sustained by Deltic. Deltic reserves the right to supplement its Response to [this interrogatory].

We disagree with Clemons that this answer foreshadows any likelihood of Deltic's bringing a claim for negligence. In fact, the answer virtually forecloses the possibility of Deltic doing so.

The posture of Deltic's counterclaim is evident from its allegations—it seeks damages for Clemons's intentional, wrongful conduct. That being the case, American has no duty to defend Clemons in light of the policy's expected-or-intended-injury exclusion. This is true not only with regard to Deltic's theories of fraud, conversion, trespass, and conspiracy, but also with regard to Deltic's breach-of-contract theory, which is based on the same factual scenario as the intentional-tort claims. In determining whether an insurer owes a duty to defend, we focus on the facts pled as a whole rather than on the plaintiff's theories of recovery. *See Fisher, supra; Suiter, supra. See also Indian Harbor Ins. Co. v. Valley Forge Ins. Group*, 535 F.3d 359 (5th Cir. 2008). We therefore affirm the circuit court's summary-judgment order.

We hasten to add that, should Deltic amend its counterclaim to seek recovery for negligently inflicted damages, the question of American's duty to defend has not been answered and must be re-examined by the circuit court.

Affirmed.

GRUBER and MARSHALL, JJ., agree.