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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THOMAS SHOURT,

Plaintiff and Appellant,

v.

FIRE INSURANCE EXCHANGE,

Defendant and Respondent.

F066432

(Super. Ct. No. CV56581)

OPINION

APPEAL from a judgment of the Superior Court of Tuolumne County. William G. Polley and James A. Boscoe, Judges.*

Young Ward & Lothert, Bradley L. Young, and Jennifer J. Lothert for Plaintiff and Appellant.

Hansen, Kohls, Sommer & Jacob, Daniel V. Kohls, and Gina M. Bowden for Defendant and Respondent.

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* Judge Polley presided over the September 19, 2012, motion for summary judgment; Judge Boscoe presided over the October 6, 2011, motion to strike punitive damages.

FACTS

Appellant Thomas Shourt's property shares a boundary line with the property of George and Pamela Bitner (the "Bitners"). On several occasions, Shourt crossed the boundary line and "deliberately" cut down and removed trees on the Bitner property. Shourt maintains that he cut down the trees for "fire clearance," and that the Bitners had given him permission to do so. The Bitners sued Shourt for trespass and for destroying 24 indigenous oak trees and undergrowth on their property (the "Bitner suit").

Shourt tendered defense of the Bitners suit to his own homeowner's insurance carrier, respondent Fire Insurance Exchange (FIE). Soon thereafter, Shourt informed FIE that he had entered onto the Bitners' property and "deliberately" cut down trees.

FIE denied coverage and refused to defend Shourt in the Bitner suit. FIE's denial letter stated that "cutting and removing trees and shrubs does not meet the definition of an occurrence" in Shourt's policy with FIE (the "policy"). It also stated that "intentionally cutting trees and shrubs is an intentional act[]" and liability arising therefrom was excluded under the policy.

Shourt sued FIE alleging it wrongfully denied coverage and refused to defend him against the Bitner suit. Shourt's complaint also alleged that FIE's investigation of his claim was inadequate and sought punitive damages. FIE filed a motion to strike the prayer for punitive damages. Shourt filed a second amended complaint, and again FIE sought to strike the punitive damages prayer. The trial court granted FIE's motion without leave to amend. Shourt petitioned this court for a writ of mandate overturning the trial court's ruling, which we summarily denied.

FIE then moved for summary judgment. FIE contended that the Bitner suit fell outside the scope of the policy's insuring language because Shourt's conduct was not an "accident." FIE also argued that intentional acts are excluded under the policy.

Shourt did not dispute any facts FIE offered in support of its motion for summary judgment. Shourt offered several additional facts of his own, mostly relating to his

allegations that FIE’s investigation of his claim was inadequate. FIE objected to several exhibits offered by Shourt on multiple grounds.

The trial court sustained virtually all of FIE’s objections, and granted the motion. The court held that “the underlying incident” was not “an occurrence as defined by the policy.” It further held that Shourt’s “statement that the acts in question were intentional is conclusive evidence that they were not accidental....”

Shourt now appeals.

DISCUSSION

Shourt raises three issues on appeal: (1) whether the trial court erroneously granted FIE’s motion for summary judgment; (2) whether the trial court abused its discretion in sustaining FIE’s evidentiary objections during summary judgment proceedings; and (3) whether the trial court erroneously granted FIE’s motion to strike the prayer for punitive damages. We conclude the court properly granted summary judgment because Shourt’s claim falls outside the scope of the policy’s insuring language.¹ We therefore do not reach Shourt’s remaining contentions. (See *Liberty National Enterprises, L.P. v. Chicago Title Ins. Co.* (2013) 217 Cal.App.4th 62, 75 [exclusions]; *Burton v. Security Pacific Nat. Bank* (1988) 197 Cal.App.3d 972, 979, fn. 4, [punitive damages] abrogated on another point by *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 351.)

I. STANDARD OF REVIEW

“We independently review an order granting summary judgment, viewing the evidence in the light most favorable to the nonmoving party. [Citations.] In performing

¹ The relevant portion of the insuring clause is set forth in Discussion § II, *post*. We refer to this excerpt from the policy as the “insuring language” or the “insuring clause.” (e.g., *Powerine Oil Co., Inc. v. Superior Court* (2005) 37 Cal.4th 377, 391, 396-397.)

our independent review of the evidence, ‘we apply the same three-step analysis as the trial court. First, we identify the issues framed by the pleadings. Next, we determine whether the moving party has established facts justifying judgment in its favor. Finally, if the moving party has carried its initial burden, we decide whether the opposing party has demonstrated the existence of a triable, material fact issue.’ [Citation.] Where ‘the facts are undisputed, the issue is one of law and the “appellate court is free to draw its own conclusions of law from the undisputed facts.” [Citations.]’ [Citation.]” (*Eden Township Healthcare Dist. v. Sutter Health* (2011) 202 Cal.App.4th 208, 218.)

“Where the underlying facts are not disputed, construction of an insurance policy presents a question of law. The appellate court is not bound by the trial court’s interpretation. Rather, it must independently interpret the language of the insurance contract. [Citation.]” (*Merced Mutual Ins. Co. v. Mendez* (1989) 213 Cal.App.3d 41, 45.)

II. SHOURT’S CLAIM FALLS OUTSIDE THE SCOPE OF THE POLICY’S INSURING CLAUSE

“[T]he ‘insurer’s duty to defend ... is broader than its duty to indemnify ... because the duty to defend arises if the underlying civil claim is potentially covered by insurance. [Citations.] “But where there is no possibility of coverage, there is no duty to defend”’ ” (*Merced Mutual Ins. Co. v. Mendez, supra*, 213 Cal.App.3d at pp. 45-46.) As we will explain, there is no possibility of coverage for Shourt’s claim, and therefore no duty for FIE to defend him against the Bitner suit.

The relevant insuring language from Shourt’s policy is set forth below:

“We [FIE] pay those damages which an insured becomes legally obligated to pay because of bodily injury, property damage or personal injury resulting from an occurrence to which this coverage applies....”
(Bold print omitted.)

This insuring clause contains several express limits on its scope. For one, it only embraces damages an insured is legally obligated to pay arising out of three specific

types of harm: (1) bodily injury, (2) property damage, or (3) personal injury. At least some of the Bitners' alleged damages meet this requirement because the destruction of 24 oak trees would clearly be a form of "property damage."

Shourt claims that at least some of the damages alleged by the Bitners also fall into an additional category: "personal injury." FIE disagrees.² However, resolving this dispute is not necessary because the claim falls outside the insuring language for a different reason, as we now explain.

Another express limitation in the insuring language is that it only covers damages that have ultimately "result[ed] from an occurrence" As relevant here, the policy defines an "occurrence" as "an accident" which results in bodily injury or property damage. The policy does not define "accident." Therefore, we interpret the policy's use of the term "accident" to mean "an 'unintentional, unexpected, chance occurrence.' [Citations.]" (*Modern Development Co. v. Navigators Ins. Co.* (2003) 111 Cal.App.4th 932, 940, fn. 4.)³

² In its brief, FIE claims Shourt has misquoted the policy's definition of "personal injury," which was apparently changed by an endorsement. The policy's original definition of personal injury included "wrongful eviction, entry, invasion of rights of privacy." The endorsement apparently deleted this language and replaced it with the following: "the wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, home, or premises that a person occupies when committed by or on behalf of its owner, landlord, or lessor." Shourt responds by claiming that FIE did not cite the endorsement below and "should not now benefit at the [appellate] level." We need not resolve this dispute. Regardless of whether Shourt's alleged conduct caused property damage, personal injury, or both, the dispositive fact is that Shourt's conduct was deliberate.

³ The relevant provisions of the policy are not ambiguous. Shourt apparently claims that the inclusion of certain covered risks like "false arrest" and "false imprisonment" creates an ambiguity with respect to the meaning of "occurrence." But an event like "false imprisonment" could theoretically "result[] from" an "accident" from the insured's perspective if, for example, the insured negligently supervised the actor who effected the false imprisonment.

Quite simply, Shourt's entry onto the Bitners' property and subsequent destruction of trees was not an "accident" or an "occurrence" because it was not "unintentional or unexpected."⁴

"Because the conduct was not an 'occurrence[,] the insurer has no duty to defend an action arising out of this conduct." (*Merced Mutual Ins. Co. v. Mendez, supra*, 213 Cal.App.3d at p. 50.) Shourt's arguments to the contrary, which we will now address, do not alter this straightforward determination.

A. IT IS IRRELEVANT THAT SHOURT DID NOT INTEND FOR THE BITNERS TO BE HARMED BY HIS DELIBERATE CONDUCT

Shourt argues that his conduct, though deliberate, could be characterized as accidental because he did not act "with a preconceived design to injure or with the express purpose of causing harm to the Bitners."

Shourt's argument effectively boils down to this: I deliberately caused property damage, but I did not intend for the Bitners to be harmed by it. But the property damage *is* the relevant harm here. Shourt mistakenly focuses on whether he intended to "harm ... the Bitners" rather than whether he intended to cause "harm" to their property (i.e., "property damage.") In contrast, our jurisprudence focuses "not on intent of the insured to cause harm, but upon the nature of the harmful act itself – whether it was an "accident...." ' ' " (*Collin v. American Empire Ins. Co.* (1994) 21 Cal.App.4th 787, 811. See also *Chamberlain v. Allstate Ins. Co.* (9th Cir. 1991) 931 F.2d 1361, 1365 [insured's failure to convey property "should not be considered accidental merely because he did not intend [her] to be hurt by his intentional acts"].) As a result, "it is well established in California that the term 'accident' refers to the nature of the act giving rise to the liability; not to the insured's intent to cause harm. [Citation.]" (*Fire Ins. Exchange v. Superior*

⁴ Shourt contends that some trespasses *can* be accidental. We agree, but the extrinsic facts show that *this* trespass was not accidental.

Court (Bourguignon) (2010) 181 Cal.App.4th 388, 393.) “We know of no case from this or any other jurisdiction where a harm knowingly and purposefully inflicted was held ‘accidental’ merely because the person inflicting it erroneously believed himself entitled to do so....” (*Swain v. California Casualty Ins. Co.* (2002) 99 Cal.App.4th 1, 10.)

Here, the insuring language requires that the *property damage* result from an accident. Thus, it is irrelevant that Shourt may have intended for the Bitners to welcome that property damage as helpful fire clearance.⁵ What matters is Shourt intended to cause the property damage. This fact causes the incident to fall outside the scope of the insuring language, which covers property damage “resulting from an occurrence.”

B. SHOURT’S “SPEEDING DRIVER” ANALOGY IS INAPPLICABLE

Shourt nonetheless insists that the deliberate nature of his acts is not dispositive. He poses the analogy of a driver who deliberately exceeds the speed limit and thereby causes a collision. Shourt argues that the incident would be covered under an automobile policy even though the speeding was deliberate. (See *J.C. Penney Casualty Ins. Co. v. M.K.* (1991) 52 Cal.3d 1009, 1020.)

Shourt’s “speeding driver” hypothetical is incomplete and relies on an unstated premise for its viability: that the speeding driver did not intend to hit the other car. Unlike a driver who intentionally speeds but *accidentally* hits another car, Shourt intended all of his relevant acts and the resultant property damage.⁶ As we explained in *Merced Mutual Ins. Co. v. Mendez, supra*, 213 Cal.App.3d at page 50:

⁵ Of course, this may be highly relevant in the underlying Bitner suit.

⁶ If one of the trees Shourt had deliberately cut down had accidentally fallen on the Bitners’ home, and the Bitners were suing for the damage to their home, Shourt’s speeding driver hypothetical might be appropriate. Those are not the allegations in this case, however.

“When a driver intentionally speeds and, as a result, negligently hits another car, the speeding would be an intentional act. However, the act directly responsible for the injury – hitting the other car – was not intended by the driver and was fortuitous. Accordingly, the occurrence resulting in injury would be deemed an accident. *On the other hand, where the driver was speeding and deliberately hit the other car, the act directly responsible for the injury – hitting the other car – would be intentional and any resulting injury would be directly caused by the driver’s intentional act.*” (Italics added.)

C. THE BITNER COMPLAINT’S LEGAL ALLEGATIONS DO NOT ALTER OUR ANALYSIS

Shourt correctly points out that the Bitners’ complaint alleges that he “negligently” entered onto their property.⁷ But, as Shourt acknowledges, using the word “negligence” does not always trigger coverage under an accident policy. The legal allegations in the third party’s complaint are not determinative of an insurer’s obligation to defend the suit. (See *State Farm Mut. Auto Ins. Co. v. Flynt* (1971) 17 Cal.App.3d 538, 548.) Rather, the *factual* allegations of the underlying complaint have a bearing on the duty to defend. Put another way, “coverage turns not on ‘the technical legal cause of action pleaded by the third party’ but on the ‘facts alleged in the underlying complaint’ or otherwise known to the insurer. [Citation.]” (*Swain v. California Casualty Ins. Co.*, *supra*, 99 Cal.App.4th at p. 8, italics in original.) Mere allegations of general negligence, without allegations of *facts* constituting negligence, cannot be given the effect of erasing exclusions in an insurance policy. (See *Fire Ins. Exchange v. Jiminez* (1986) 184 Cal.App.3d 437, 443 fn., 2.) To the contrary, “general boilerplate pleading of ‘negligence’ adds nothing to a complaint otherwise devoid of *facts* giving rise to a potential for covered liability. [Citation.]” (*Swain v. California Casualty Ins. Co.*, *supra*, 99 Cal.App.4th at p. 8, italics in original.) And, “where the extrinsic facts eliminate the potential for coverage, the insurer may decline to defend even when the bare allegations

⁷ Nothing in this opinion should be construed as an adjudication of the merits of the Bitner suit or the allegations made therein.

in the complaint suggest potential liability. [Citations.]” (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 19.)

Here, the pivotal fact remains undisputed: Shourt “deliberately” cut down the Bitners’ trees.⁸ The Bitners’ legal allegation that Shourt acted negligently, without accompanying factual averments demonstrating an “accident” occurred, adds nothing of relevance to this crucial fact. (Cf. *Swain v. California Casualty Ins. Co.*, *supra*, 99 Cal.App.4th at p. 8.)

III. ONCE FIE LEARNED SHOURT’S CONDUCT WAS DELIBERATE, IT HAD NO CONTINUING DUTY TO INVESTIGATE THE CLAIM

Shourt claims that FIE’s investigation of his claim was inadequate. He notes that FIE did not interview the Bitners or inspect the property.

“[A]n insurer does not have a continuing duty to investigate whether there is a potential for coverage. If it has made an informed decision on the basis of the third party complaint and the extrinsic facts *known* to it at the time of tender that there is no potential for coverage, the insurer may refuse to defend the lawsuit. [Citations.]” (*Gunderson v. Fire Ins. Exchange* (1995) 37 Cal.App.4th 1106, 1114, italics in original.)

Here, FIE learned that Shourt had deliberately cut down the Bitners’ trees. As a result, FIE correctly determined that there was no potential for coverage because the damages at issue did not “result[] from an occurrence” as required by the insuring clause. Once FIE made this informed decision that there is no potential for coverage, it was entitled to refuse to defend the lawsuit and it had no continuing duty to investigate

⁸ This fact is dispositive even though the Bitner suit was brought, in part, under statutes dealing with removal of timber. (See Code Civ Proc., § 733; Civ. Code, § 3346.) Shourt argues that his state of mind is highly relevant under those statutes. This contention is a nonsequitur. Shourt’s claimed lack of “ ‘intent to vex, harass, or annoy or injure’ ” may be highly relevant to the issue of treble damages in the Bitner suit (see *Caldwell v. Walker* (1963) 211 Cal.App.2d 758, 762), but that is not the standard for coverage set forth in the policy.

whether there was a potential for coverage. (See *Gunderson v. Fire Ins. Exchange*, *supra*, 37 Cal.App.4th at p. 1114.)

Shourt contends that FIE should have done more, such as interviewing the Bitners. But the reason there was no potential for coverage was the intentional nature of Shourt's conduct. Thus the relevant inquiry for coverage purposes was Shourt's mental state. Once FIE learned, *from Shourt himself*, that the conduct was deliberate, there was no potential for coverage. This is true despite what the Bitners may have said.

Shourt disputes this conclusion, claiming that if the Bitners had been interviewed, they might have said Shourt had permission but proceeded to cut the wrong trees or cut too many trees. But even if the Bitners had made either of these statements, it would not change the basis for the denial: Shourt's cutting of the trees was deliberate and therefore not an "occurrence."

IV. THE TRIAL COURT'S EVIDENTIARY RULINGS WERE NOT PREJUDICIALLY ERRONEOUS

Shourt also claims the court prejudicially erred in its evidentiary rulings. We disagree.

Shourt offered several exhibits in opposition to FIE's motion. FIE objected to Shourt's exhibits four through seven on multiple grounds. Exhibits four and five were FIE discovery responses regarding its investigation of Shourt's claim. Shourt described exhibit six as "portions of a Farmers document entitled 'Liability Strategies and Standards.'" Shourt described exhibit seven as "portions of Farmers document entitled 'Claim Summary.' I-Log entry by Steve Hill," an FIE employee. Shourt offered the evidence to argue that FIE's investigation was inadequate and that individual FIE employees incorrectly understood certain legal concepts.

The trial court sustained FIE's objections to exhibits four through seven on "relevance" grounds. Shourt claims the court erred by "provid[ing] inadequate information as to why the objections were sustained." But the court did identify the

grounds for sustaining the objections: relevance. And, even if the court should have provided further explanation, there is no prejudice unless the rulings were substantively incorrect. Shourt offers little argument on this important issue.

Shourt does not discuss individual exhibits and why they are relevant. Virtually the sum of his argument regarding the substance of the court's evidentiary rulings is the following: "it appears the trial court mistakenly agreed with FIE's analysis of its duty to defend and felt that no information other than Mr. Shourt's deposition testimony was necessary or required as part of FIE's investigation." But, as explained *ante*, we also conclude that FIE did not have an ongoing duty to investigate once it obtained information from Shourt that showed there was no potential for coverage. Consequently, evidence that FIE did not interview the Bitners or inspect the property is irrelevant to the motion and the trial court's rulings were correct.

The remaining evidence pertained to Shourt's claim that certain FIE employees had an incorrect understanding of certain legal doctrines. We do not see the relevance of that evidence in the context of FIE's motion for summary judgment.

DISPOSITION

The judgment is affirmed. FIE is awarded costs as the prevailing party.

Poochigian, J.

WE CONCUR:

Gomes, Acting P.J.

Franson, J.