O/a 10-3-89

IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,652

Florida Bar No. 313246

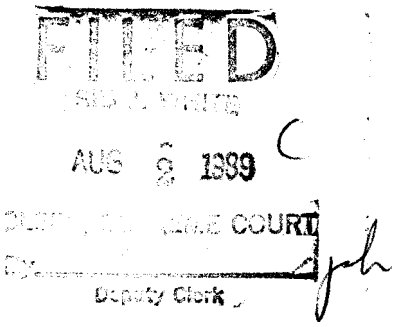
STATE FARM FIRE AND CASUALTY COMPANY,

Petitioner,

vs.

EDWARD L. MARSHALL,

Respondent.



RESPONDENT'S AMENDED BRIEF

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WHETHER THE FOURTH DISTRICT COURT OF APPEAL FOR THE STATE OF FLORIDA ERRED IN DETERMINING THAT INTENTIONAL ACTS OF *AN* INDIVIDUAL WHICH CAUSE HARM TO OTHERS DO NOT APPLY TO THOSE INSURANCE POLICIES WHICH EXCLUDE SUCH ACTS FROM COVERAGE, IF SUCH ACTS ARE PERPETRATED IN SELF-DEFENSE.

THE STATEMENT OF FACTS

This case arose out of a shooting incident which took place on October 21, 1985, in which the Plaintiff, Mark Bailey, broke into his mother's house and had a confrontation with his former step-father, Edward Marshall, who was at the time sleeping in one of the bedrooms. Initially, Marshall awoke to the sound of someone pounding on the bedroom windows, and he and his ex-wife went to the front door and recognized Mrs. Marshall's son, Bailey, as the person pounding on the windows. Breaking onto the scene, Bailey appeared very excited, and his eyes were enlarged and he was incoherent. As he entered, the plastic that Bailey was pounding broke and smashed onto the floor. Marshall retracted in fear, in fear for his life, whereupon he raised a two foot club in the air which he previously secured in anticipation of trouble. Undeterred, Bailey continued to advance. Marshall, recognizing his efforts were fruitless, sought out an additional weapon, this time a gun, in which to secure his defense against Bailey's threatening advances. Marshall said he intended to show the gun to Bailey and to fire it in the house to frighten him, which Marshall did by firing a shot towards the bottom of the sofa. Bailey was yet undaunted, and the confrontation persisted. Marshall then quickly secured the gun in the flat of his palm and swung his hand toward Bailey, hoping to at least compel Bailey to keep his distance, and if necessary strike him in order to once again impede Bailey's actions.

It is undisputed that Bailey did enter the house, that he break the plastic on which he was pounding, that he did make advances toward Marshall, and that he did instill fear of a life threatening force or action to which Marshall responded in his own defense. Inadvertently, the gun which Marshall was holding, fired and wounded Bailey. Marshall's intent was not to shoot Bailey, nor necessarily to cause him harm. Marshall intended simply to defend himself, which, unfortunately, led to the accident which did occur.

STATEMENT OF THE CASE

In the Lower Court, the Plaintiff, Mark Bailey, filed a two count Complaint. In Count One, Bailey alleged that Edward Marshall negligently discharged his firearm which fired and caused a wound in his body. In Count Two, Bailey alleged that Marshall intentionally shot the weapon at him, causing injury for which he sustained damages. The Lower Court action included State Farm Fire and Casualty Company, who subsequently filed its responsive pleadings and, more particularly, a Petition for Declaratory Relief to determine its duty under the pertinent homeowner's policy issued to Edward Marshall.

In its Petition, State Farm stated that it was not required to defend Marshall against the suit filed by Bailey due to certain language contained in the policy, which provided in part as follows:

1. Coverage L (Personal Liability) and Coverage M (Medical Payments to Others) do not apply to:

   a. Bodily Injury or Property Damage which is expected or intended by an insured:

In his answer, and in response to State Farm's Petition, Marshall denied the allegation that he intentionally shot Bailey and affirmatively stated that his actions were, at most, negligent and that he was acting in self-defense, "based upon a real and apparent fear of bodily harm and/or death at the hand of the Respondent, Mark Bailey". Marshall v. State Farm Fire and Casualty Company, November 16, 1988 (Fla. 4th D.C.A.).

The Lower Court entered a Final Summary Judgment against Marshall and in favor of State Farm. It held that State Farm did not have a duty to defend or to indemnify the Appellant in the Claim filed by Bailey, and that State Farm was not responsible for paying for the legal expenses or for the damages sustained by Marshall should Bailey prevail.

Marshall appealed said ruling to the Fourth District Court of Appeal for the State of Florida, wherein the Court held in favor of the Appellant, Marshall, and against State Farm Fire and Casualty Company, the Appellee, and ruled that State Farm did in fact retain the responsibility for indemnifying Marshall as to any damages which he may sustain, including the requirement to defend Marshall in the action, insofar as the intentional acts perpetrated by Marshall were done in self-defense.

From this ruling, the Appellee, State Farm, has filed its Petition for review by this Court, in that it has identified a conflict with Clemmons v. American States Insurance Company, 412 So. 2d 906 (Fla. 5th D.C.A. 1982). It is to this asserted conflict to which we address our argument.

SUMMARY

The important question at the level of the District Court of Appeals regarding the intentional aspect of Edward Marshall's action is no longer a question at this level. Despite the extensive case law regarding the intent to cause harm and the extent to which an insurance policy will cover such intent, such case law focuses on a single conclusion and is, indeed, resolved in the Florida Courts. Actions with the intent to cause harm are not covered by insurance policies which contain the subject exclusionary language, and an insured can have neither damages nor his attorney's fees paid for in such a situation.

However, when in fact, an insured is seeking to defend himself when he is in fear of another, then the issue now becomes one which rests on a totally different line of cases regarding the applicability of the subject insurance clause. In attempting to be consistent with Florida Law, the public policy of this state and that of every state of the union is to protect and uphold the rights and interests of those who seek to defend themselves when they are being threatened by the actions of

another. Plainly, fault is not attributed to individuals who seek to defend themselves, yet fault was the very basis for excluding intentional acts in the subject insurance policy. To treat an individual as if he was at fault, when in fact both the facts and public policy would suggest otherwise, would be tantamount to constructing a facade which succeeds only in construing the language of the policy in its literal fashion rather than within the spirit and context within which it was intended to be applied.

This Court and its ruling cannot be undermined by a facade. The very nature of law as it is written, and the very operation by which it is applied, cannot be subverted to the detriment of those who seek its protection.

ISSUE AND ARGUMENT

WHETHER THE FOURTH DISTRICT COURT OF APPEAL FOR THE STATE OF FLORIDA ERRED IN DETERMINING THAT INTENTIONAL ACTS OF *AN* INDIVIDUAL WHICH CAUSE HARM TO OTHERS DO NOT APPLY TO THOSE INSURANCE POLICIES WHICH EXCLUDE SUCH ACTS FROM COVERAGE, IF SUCH ACTS ARE PERPETRATED IN SELF-DEFENSE.

There appears to be an obsession in the discussion by the Petitioner regarding the nature of the acts perpetrated by Marshall, and the clear purpose of this discussion is quite plainly geared toward characterizing Marshall as some doomed culprit who both instigated and consummated the scene between Bailey and himself that fateful night of October 21, 1985. To even suggest that Marshall was a wrongdoer not only distorts

the truth of the record, but is a deliberate attempt to neutralize the sympathies of the Court away from Marshall and thus find State Farm victimized and entangled in an event to which it never sought to play any part.

The discussion in the Petitioner's Brief does nothing less than beat a dead horse as it draws the attention of the Court into an elongated analysis on the intentional acts of Marshall and the fact that Marshall sought to cause harm to Bailey when he swung at him with the gun in the palm of his hand. To put an end to the Petitioner's tiresome analysis, it is plainly admitted by all that Marshall did in fact act intentionally, and that he did in fact, among other things, intend to strike at Bailey in defense of Bailey's advances. Thus, the discussion regarding the finding in Hartford Fire Insurance Company v. Spreen, 343 So. 2d 649 (Fla. 3d D.C.A. 1977) is no longer relevant at this juncture insofar as its holding relates to the application of the policies exclusionary clause and the consequences of an intentional act. Plainly, the harm that is caused by the intentional act of a perpetrator is excluded from coverage, to the extent that such acts conform to the scenerio found in the case underlying those before the Court in Spreen.

The true issue before the Court is whether or not these same intentional acts, done in self-defense, were meant to be excluded by the coverage in the subject insurance policy, especially since the subject policy excludes "bodily injury or pro-

perty damage which is expected or intended by an insured". In reviewing the purpose and effect of the clause, one must necessarily look to the standard by which such policies are to be read. As pointed out by the Fourth District Court of Appeals, "it is a general rule of law that terms of an insurance policy must be construed to promote a reasonable practical and sensible interpretation consistent with the intent of the parties". United States Fire Insurance Company v. Pruess, 394 So. 2d 468 (Fla. 4th D.C.A. 1981). In applying the exclusionary language of the insurance policy, one must, again, look to the purpose of the clause and the effect which was intended.

A consistent trend in the case law points to the fact that intentional acts intended to cause harm to others were to be excluded from coverage by an insurance policy basically because since such a policy was an indemnification contract, such acts could not be deemed an accident, for which coverage was permitted. Leatherby Insurance Company v. Willoughby, 315 So. 2d 553 (Fla. 2d D.C.A. 1975). To permit the indemnification of intentional wrongs is to absolve an intentional tortfeasor from the consequences of his actions by creating a safety net upon which the insured could rely and feel forever absolved from suffering the consequences of his actions. This philosophy was further upheld in the Spreen court, which stated that "indeed the law is well settled that there can be no coverage under an insurance policy which insures against an "accident" where "the

(insureds') wrongful act (emphasis supplied by Court) complained of is intentionally directed specifically toward the person injured by the act ...." Spreen at 651.

The consistency found in the series of cases which address themselves to this issue focus on the nature of the act which they characterize as wrongful. In fact, the Fourth District Court of Appeals cites a litany of cases which exclude coverage due to wrongful acts perpetrated by individuals. One may find it incredulous to even consider that a tortfeasor would seek to have an insurance company indemnify his actions as if an individual were to be permitted to run rampant with impunity knowing that the resources of such a company would be there to back him up.

However, the issue in the instant case is the context in which Marshall perpetrated his intentional acts. Regardless of whether they were intended to inflict harm, Marshall indeed perpetrated these acts in self-defense. The question is, are such acts considered wrongful in the eyes of the law. Generally speaking, "a person unlawfully assaulted may repell force to the extent which to him seems reasonably necessary under the circumstances to protect themself from injury." Price v. Gray's Guard Service Incorporated, 298 So. 2d 461 (Fla. 1st D.C.A. 1974). In fact, this State has established a public policy which specifically states that "a person is justified in the use of force, except deadly force, against another when to the

extent that he reasonably believes that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force'' Fla. Stat. Section 776.012.

To the extent that the public will is embodied in a policy defined by the Florida legislature in the Statutes which it promulgates, this policy must be carried into full force and effect as it regards all activity which is conducted within its jurisdiction. If one were to attempt to secure a "reasonable, practical, and sensible interpretation consistent with the intent of the parties" as it concerns the subject insurance policy, one must consider whether such the policy was intended to contradict the public policy of this State. It is clear that the State seeks to support an individual's use of self-defense, and insurance coverage should not be excluded at the insuror's whim, especially when public policy in support of self-defense has never yielded.

The Petitioner boldly asserts that a practice which would insure the consequences of individuals who engage in intentional acts in self-defense would be totally impractical. Such a comment is nothing less than self-serving, for insurors repeatedly attempt to restrict coverage due to its being "impractical". To be realistic, not all persons who perpetrate intentional torts possess insurance. Furthermore, not all those who possess insurance claim self-defense for their actions. But since there are those who do commit such acts in self-defense, and since

there are those who do pay the price for coverage, they should at least be able to reap some small benefit for their yearly premiums. People who are asked to pay always look for a way not to pay. To undermine the long standing public policy of self-defense by withdrawing the means with which to assert it is tantamount to denying one's constitutional right to due process. Insult is added to injury when one considers that one has already paid for it when one purchases the policy.

This case was brought before this Court based on an assertion that there is a conflict with the finding in the Fourth District Court of Appeal and the Clemmons ruling rendered by the Fifth District Court of Appeal. Indeed, the result in each case is contradictory. However, one can hardly find support for the decision in the Clemmons case if one carefully reviews the Court's argument. That Court properly analyzed the fact situations and the decisions rendered by Courts in previous cases which concern similar fact situations. It even recognized that Courts in other jurisdictions permit coverage where injuries are afflicted in self-defense. Clemmons at 909. The Court acknowledged that the basis for these findings in other jurisdictions is that the exclusionary language was intended to remove coverage from wrongful acts perpetrated by an insured, that acts of self-defense are not considered wrongful, and therefore the exclusionary language was not applied. However, they consider this reasoning "circular and fallacious". Id. We

find this argument and logical and sequential. The Clemmons Court establishes its rationale based on an earlier case where a criminal was attempting his escape and sought insurance protection when he shot at those attempting to avert his escape. We find this connection tenuous at best. In basing its analysis on this fact situation, one can hardly sympathize with the acts of the criminal, and to characterize them as acts in self-defense truly stretches its meaning beyond the intention of lexicographers.

A summary conclusion by the Clemmons Court, without an intelligible foundation simply cannot stand as a basis for law in this State. Laws are intended to have meaning and purpose, and not be vague and arbitrary. By arriving at its conclusion, the Clemmons Court divested the exclusionary clause of any purpose for which it was intended and sapped it of any meaning for which it was intended to protect the insured. Clemmons chose a narrow interpretation of the subject insurance clause, thus ignoring not only the broad standard of contractural interpretation as previously defined, but more significantly, the specific public policy as mandated by the Florida Legislature.

The Petitioner's argument is weakest when it continues to assert some perceived impracticality in eliminating self-defense situations from the exclusionary language of the policy. The Fourth District Court of Appeals plainly points to numerous other jurisdictions which permit coverage in self-defense

situations. Marshall at 7. The veiled contention that insurance companies would not be in a position to afford to defend each and every action where a self-defense was asserted in an intentional tort claim is simply specious. For, in no jurisdiction where the acts of self-defense are covered does the Petitioner point to a failing insurance trade, and in no instance does the Petitioner statistically identify any sort of undermining effect which a ruling adverse to it would cause it to suffer.

Therefore, this court should find in favor of the Respondent, Edward Marshall, sustain the ruling rendered by the Fourth District Court of Appeal, and remand this cause for further proceedings consistent with said ruling.

CONCLUSION

This Court should find that as a matter of law that the exclusionary clause in the subject insurance policy should not apply to situations where one has acted in self-defense. This case should be remanded to the trial level so that a determination can be made solely as to the issue of self-defense, and for any further proceedings as may be necessary which are consistent with this Court's ruling.

Respectfully submitted,

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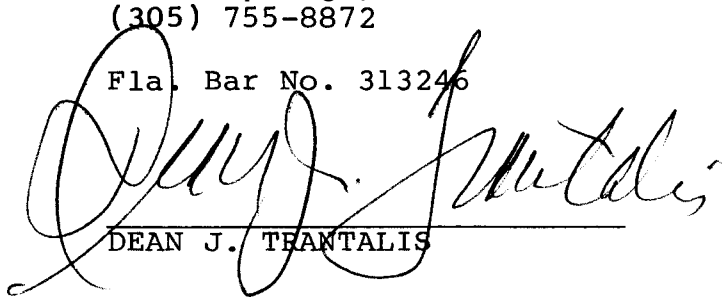

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 31st day of July, 1989 to:

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