O/A 10-3-89

IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,652

Florida Bar No: 184170

ST TE FARM FIRE ND CASUALTY COMPANY,)

Petitioner,)

vs.)

EDWARD L. MARSHALL,)

Respondent.)

FILED
SID J. WHITE
JUN 14 1989
CLERK, SUPREME COURT
By
Deputy Clerk

ON PETITION FOR DISCRETIONARY JURISDICTION
FROM THE FOURTH DISTRICT COURT OF APPEAL

BRIEF OF PETITIONER ON THE MERITS
STATE FARM FIRE AND CASUALTY COMPANY

Law Offices of
RICHARD A. SHERMAN, P.A.
Suite 102 N Justice Building
524 South Andrews Avenue
Fort Lauderdale, FL 33301
(305) 525-5885 - Broward
(305) 940-7557 - Dade

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LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDEROALE, FLA. 33301 • TEL. (305)525-5885
SUITE 518 BISCAYNE BUILDING. 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

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SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305)525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305)940-7557

POINTS ON APPEAL

I. THIS HONORABLE COURT SHOULD REJECT THIS DECISION BELOW, AND INSTEAD REAFFIRM AS THE LAW OF FLORIDA CLEMMONS THAT AN INTENTIONAL ACT IS EXCLUDED FROM COVERAGE AND A DEFENSE, EVEN IF THE INSURED PLEADS SELF DEFENSE.

11. THE TRIAL CORRECTLY ENTERED SUMMARY JUDGMENT WHERE THE UNDISPUTED FACTS ESTABLISHED AN INTENTIONAL ACT; WHICH ACT IS EXCLUDED FROM COVERAGE UNDER THE STATE FARM POLICY.

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

INTRODUCTION

The Petitioner, State Farm Fire and Casualty Company will be referred to as State Farm. The Respondent/Defendant/Insured, Edward L. Marshall, will be referred to as Marshall. The Plaintiff below, Mark Bailey, will be referred to as Bailey.

The Record on Appeal will be designated by the letter "R".

The Transcript of the Deposition of Edward Marshall, appearing in the Record at 54-246, will be designated by the letter "T" followed by the page number as it appears in the Deposition Transcript, for ease of reference.

The Transcript of the Hearing on the Summary Judgment, appearing in the Record at 303-318, will be designated by the letter "H" followed by the page number as it appears in the Hearing Transcript. All emphasis in the Brief is that of the writer unless otherwise indicated.

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 102 N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

STATEMENT OF THE FACTS AND CASE

Overview

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, and Mr. Marshall shot Mr. Bailey. Marshall testified that he intended to strike and hit Bailey and that when he swung at Mr. Bailey with an automatic pistol in his hand, the gun discharged and Bailey sustained a serious gun shot wound. Marshall never testified that Bailey ever threatened him. Bailey had not been disposed at the time of the Summary Judgment.

Marshall's insurer, State Farm, filed a Declaratory Judgment action* (R 1-3). Based on the undisputed facts at the time that Marshall intended to strike and hit Bailey, State Farm moved for a Summary Judgment under its policy exclusion asserting that its coverage did not apply to "bodily injury or property damage which is expected or intended by an insured." (R 45-49). After the Hearing on the Summary Judgment Motion, where all the relevant caselaw and Mr. Marshall's own testimony was considered by the court (R 303-318); a Summary Judgment was entered in favor of State Farm finding that the injury suffered by Bailey was

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* State Farm defended Marshall, under a reservation of rights, and at trial the jury found that Marshall committed an intentional assault and battery and was not acting in self-defense when he shot Bailey. Those trial proceedings occurred after the Summary Judgment and while this case was on appeal, and therefore are not part of the appellate record. The Petitioner does not know if this Honorable Court wants to supplement the appellate record with the verdict, or other portions of that proceeding, but will be happy to supply certified copies of any portion this Honorable Court requests.

excluded from State Farm's coverage, and State Farm had no duty to defend (R 291-292).

Marshall appealed and the Fourth District reversed the Summary Judgment; holding that the exclusionary clause in State Farm's policy did not preclude coverage for an act of self defense. Marshall, infra. The District Court acknowledged conflict between its holding and the holding in Clemmons, infra. Marshall, infra. State Farm petitioned this Court for review, to resolve the certified conflict and jurisdiction was accepted.*

Specific Facts

What happened in this case was that Edward Marshall was renting the master bedroom from his ex-wife Carolyn Marshall and around midnight on October 21, 1985 he was awakened by someone pounding on the bedroom windows (T 152, 153). At that point

---

* It should be pointed out to this Honorable Court why there is no appearance for the Respondent. This suit was filed and due to the reservation of right because of the intentional act, State Farm retained one law firm to defend the insured, and a separate law firm to represent State Farm. A Summary Judgment was entered holding there was no duty to defend, and the insured Marshall appealed. However, since this was on appeal the attorney retained by State Farm continued to defend the insured through trial.

After trial the insured hired his own attorney. The attorney hired by State Farm therefore withdrew, and the personal attorney proceeded to settle the case.

In other words State Farm defended the insured through the litigation and trial. Therefore the insured Marshall has filed no briefs in the Supreme Court, apparently because from his point of view this is moot, since State Farm in fact did defend him and he expended no attorneys' fees for a defense.

Of course from State Farm's view and the view of the law of the State of Florida, this certainly is not moot. This opinion changes the law and effects millions of insurance policies in Florida, and it is essential to have the law clarified as to this.

Marshall and his ex-wife went to the front door and recognized Mrs. Marshall's son, Mark Bailey, as the person pounding on the windows (T 160-163). Just as Mr. Marshall opened the door, the plastic that Mark was pounding on broke and fell to the floor (T 164). When Mr. Bailey stepped into the living room from the outside, Marshall was holding a purple club in his hand (T 159). The club was two feet long and approximately one quarter (1/4) to one and a half (1 1/2) inches thick and it was painted purple (T 147-148). Mr. Marshall fashioned the stick himself for use as a club and kept it leaning against his night table in the bedroom (T 149-150). Marshall was holding the club straight up in the air, in an effort to discourage Bailey (T 110; 151). Marshall testified he got the purple club after he saw who was pounding on the door and figured he better get some kind of protection (T 151). When he saw that the purple club would not discourage Bailey, he then decided to get his gun which was hanging on a nail behind his nightstand in the master bedroom (T 58, 150, 173).

When Mr. Bailey entered his mother's house he was very excited, his eyes were big, and he was mumbling (T 172). His hands were flying around and he began advancing towards Mr. Marshall (T 173). Marshall stated that the purple club would not stop Bailey in his condition, but he thought the club would hold him back (T 116, 174). Marshall found that it did not do any good to threaten Bailey with the purple club, so he put it back (T 150, 158).

Even though Bailey had never threatened Marshall with his

physical violence against him on the night in question; Marshall felt that Bailey was intent on striking him and doing him bodily harm (T 119, 123, 104, 105). Marshall could not recall Bailey ever touching him during the entire evening, he felt that Mr. Bailey's arms flying around were a vicious and violent attempt against him and put him in fear of his life (T 106). Therefore when the club would not discourage Bailey, Marshall got rid of it and backed up into his bedroom, reached behind the nightstand, and got the gun (T 173). He testified that he got the gun to scare Bailey, fully intending to show the gun to Bailey and to fire it in the house, in Bailey's presence (T 64-65).

Marshall knew that the gun was loaded and intended to use it in order to frighten Bailey (T 62, 66). Marshall testified that he figured that if Bailey saw the gun it would hold him back (T 80). Two to three seconds after Marshall reached behind the nightstand and took the gun out, he fired what he described as an "intentional warning shot", into the living room toward the bottom of the couch (T 76). Marshall could not recall whether he said anything to Bailey before he fired the first shot. At any rate, Marshall testified that he realized that the warning shot was not going to deter Bailey, so immediately, within a second of firing the first warning shot, he switched from aiming the gun to lying it flat in the palm of his hand, with the barrel pointing out (T 126, 127, 131).

He testified that he swung at Bailey, with the intent to hit him, the gun fired and Bailey was seriously wounded. The following excerpts of Mr. Marshall's testimony unrefutedly

established his intent to strike and harm Bailey:

(Mr. Warren)
Q: After you discharged the gun the first time, you said about half a second later you apparently changed the position of your hand on the gun so it was flat in your hand?

(Mr. Marshall)
A: Yes. (T 131)

. . .

Q: What did you do concerning the gun after you got it flat in the palm of your hand?

A: Then I tried to strike him with the gun, see if that would deter him.

Q: Well, how did you try and strike him with the gun?

A: Hit him.

Q: How?

A: Like that.

MR. POMEROY: For the record --

A: I don't recall to be frank with you.

MR. POMEROY: For the record, you indicated swinging your arm from the right across towards the left indicating with the gun in your hand?

THE WITNESS: right. (T 133-134)

. . .

Q: But you recall swinging at him?

A: Yes.

Q: Do you recall what part of his body you were attempting to strike?

A: No.

Q: Were you attempting to strike some part of his body?

LAW OFFICES RICHARD A. SHERMAN. P. A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE. FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

Q: Were you attempting to strike some part of his body?

A: That's true.

Q: You weren't just swinging to keep him away?

A: I was hoping to keep him away, too.

Q: Which is it? Were you swinging in order to make him keep his distance or were you trying to strike him?

A: Both. I wanted him to stay out of my way. I want to get by him because I wanted to get the hell out of there.

Q: What was your intent, Mr. Marshall? Was your intent to strike him?

MR. POMEROY: Let me again object. It is asked and answered. He stated both to strike and to keep him away. I don't know how many more times you want to ask him... (T 136-137).

. . .

(Mr. Warren):
Q: Were you holding the gun from which a bullet was discharged which struck and entered Mark Bailey's body?

(Mr. Marshall)
A: I was.

Q: Were you doing that at the time the bullet was discharged and struck Mr. Bailey's body?

A: I was holding a gun.

(Marshall was uncertain as to how the gun discharged without his having pulled the trigger.)

. . .

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SUITE 102 N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE. FLA. 33301 • TEL. (305) 525-5885
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(Mr. Warren)
Q: Can you explain to me, Sir, how the operation of the gun was that it went off without a trigger being pulled by you?

Mr. Pomeroy: If you know.

(Mr. Marshall)
A: I had the gun flat in my hand. I couldn't stop him. I was trying to hit him with it.

(T 46-47)

. . .

Bailey then filed a Complaint against Marshall, alleging that Marshall had placed Bailey in fear of grievous bodily injury and harm and negligently shot him; and in the alternative that he intentionally shot him. Bailey sought compensatory damages in excess of $5,000 and punitive damages in excess of $1 million (R 4-5). Mr. Marshall is insured by State Farm, under a policy which expressly excludes coverage for bodily injury which is "expected or intended by an insured" (R 10).

State Farm then filed its Petition for Declaratory Action, asserting that the policy of insurance when read in conjunction with the allegations in the Complaint, did not give rise to either coverage or a duty to defend on the part of State Farm (R 2). State Farm then filed a Motion for Summary Judgment incorporating a Memorandum of Law and also filed a copy of Mr. Marshall's Deposition (R 45-49; 53-246). Marshall filed a Memorandum in Opposition of the Motion for Summary Judgment, asserting that since Bailey's Complaint alleged negligence State Farm still had a duty to defend, and furthermore that Marshall's actions did not amount to an intentional assault and battery

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

(R 281-290).

The hearing on the Motion for Summary Judgment was held on May 27, 1987 and State Farm argued that not only did Marshall admit that he intended to strike and hit Bailey with the gun, the fact that Marshall may have acted in self-defense still did not bar the application of the exclusionary clause to his intentional acts (R 303-318; H 4-5). In response Marshall argued that, based on his Deposition where he stated that he did not want to shoot Bailey, but only swung to hit him, a fact question existed because Marshall could not remember or did not know whether he actually had any contact with Bailey's body (H 8). Marshall asserted that even if he had the intent to hit Bailey and harm him, his lack of recollection as to whether he actually struck him precluded Summary Judgment (H 8). Counsel for Bailey also appeared at the Summary Judgment hearing and asserted that Marshall's statement that he was attempting to strike some part of Bailey's body was negligent action and not intentional (H 12).

At the hearing the court appeared concerned only with the possibility that Marshall might have been acting in self-defense, when Bailey was shot and that therefore the insurance coverage should apply (H 13). At that point State Farm cited to Clemmons v. American States Insurance Company, 412 So.2d 906 (Fla. 5th DCA 1982), which held that an insured acting in self-defense still acted intentionally and was excluded from bodily injury liability coverage (H 13-14). Marshall argued that he intended to strike and hit Bailey, but he did not intend any damages or harm (H 14). State Farm relying on the Hartford Fire Insurance Company v.

Spreen 343 So.2d 649 (Fla. 3d DCA 1977) case, noted that in Spreen the defendant stated that he had intended to strike the plaintiff but not to damage him and the exclusionary clause still applied to preclude the insurer from having to defend or provide coverage in that case (H 15). No evidence was presented that Bailey ever threatened Marshall the night Marshall shot him.

Based on the Motion, Memoranda of Law, the deposition of Appellant Marshall and the evidence at the hearing, the trial court entered a Summary Judgment in favor of State Farm (R 291-292). It stated that the determinative legal question, on whether State Farm owed Marshall the duty to provide him with a legal defense and indemnification for any judgment entered against him in favor of Bailey, was to be answered in the negative. Marshall then filed a Notice of Appeal from the Summary Judgment (R 294, 295).

On appeal the Fourth District reversed the Summary Judgment; holding that the exclusion in State Farm's policy did not, as a matter of law, constitute a bar to coverage for an "act of self-defense". Marshall v. State Farm Fire and Casualty Company, 534 So.2d 776 (Fla. 4th DCA 1988). The appellate court acknowledged direct conflict between the holding in Clemmons and Marshall.

Based on the acknowledged conflict with Clemmons and the direct and express conflict with Spreen, State Farm invoked this Court's jurisdiction to resolve the legal questions and jurisdiction was accepted. In addition to the legal inconsistencies in the Fourth District's opinion, strong public

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI. FLA. 33130 • TEL. (305) 940-7557

policy considerations are also involved in the erroneous finding of coverage below, which policy will be affected by this Court's resolution of the conflict in Florida law.

The decision by the Fourth District may be theoretically logical, but its practical effect in the real world would be far different, and that is why the courts have long rejected this as the law. In practical effect a person performing an assault even shooting someone, can create a defense by the insurance carrier by simply claiming he committed the assault in self defense. Therefore in practical effect every person performing an intentional assault will be awarded a defense by his insurance company, simply because he will claim it was self defense. This certainly defeats the long policy of the law against coverage for intentional acts, and is the reason the courts of Florida have long rejected it as the law of Florida and this Court should continue to do so.

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET. MIAMI, FLA. 33130 • TEL. (305) 940-7557

SUMMARY OF ARGUMENT

Mr. Marshall first fired a warning shot and then shot Mr. Bailey in the stomach. Bailey had not been deposed at the time of the Summary Judgment, but the deposition testimony of the insured, Edward Marshall, was to the effect that the insured intended to strike the person of Mark Bailey with and intended the gun to cause him bodily harm. Florida law is clear that there is no coverage, where the insured deliberately intends to inflict harm on the other person. Spreen; Clemmons; supra.

It is respectfully submitted that the decision of the Fourth District is a valid intellectual argument and makes sense in a vacuum, but in the real world it totally impractical and would drastically change the law and public policy of Florida.

The holding of the Fourth District is that if the insured claims he committed the act of shooting someone in self defense, he is entitled to a defense and coverage.

Of course the problem is that practically everyone who commits an assault or shoots someone claims self defense. Therefore this decision would mean in practical effect that with every felonious assault, the assaulter will be entitled to a defense by his insurance carrier for the intentional felonious assault. This is totally contrary to decades of Florida law, and public policy, that there is no insurance coverage available nor a duty to defend for intentional acts.

Additionally, there is a very liberal policy of the law in Florida for finding insurance coverage if there is any ambiguity. Therefore a holding that intentional torts committed allegedly in

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE.. FORT LAUDERDALE, FLA. 33301 • TEL. (305)525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

self defense are covered would, under this liberal policy, provide coverage for these intentional acts if the insured alleges the acts were done in self defense. This is clearly contrary to the public policy of the State of Florida.

Another situation which would arise would be the situation where the assaulter admits the assaultee was not threatening harm to him, but alleges he shot the person to prevent him from harming a third person, who was either present or not present.

In other words, this decision is valid in an abstract intellectual world but is impractical in the real world for one simple reason; people who commit intentional assault and shoot people tend to lie and claim they did it in self defense; or to protect a third person; or through some similar artifice to escape culpability.

Therefore this decision in practical effect would defeat the public policy of the State of Florida, that there be no insurance coverage for intentional acts.

Based on the Record below, especially the testimony of Marshall, that Bailey was not deterred after being threatened with a purple club and after Marshall fired a warning shot, and that Marshall swung at Bailey with a automatic pistol in his hand with the full intent to strike and hit Bailey causing him harm, the Summary Judgment entered for State Farm was eminently correct. Even ignoring the jury's verdict that Marshall acted intentionally and not in self defense and assuming arguendo that Marshall was acting totally in self-defense, his attempt to pistol whip Bailey, as opposed to just shooting him, as a matter

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 102N JUSTICE BUILDING. 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING. 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

of law, is an intentional act and cannot be viewed as negligent and there is no coverage or duty to defend. Hartford v. Spreen, supra; MacDonald v. Ford, Bosson v. Uderitz, infra.

The trial court correctly based the Summary Judgment on the Plaintiff's Complaint and the deposition testimony of the Appellant and correctly found that Marshall acted intentionally and therefore within the exclusionary provision of his insurance policy. With the undisputed facts having established an intentional act on the part of Marshall, the duty to defend issue is irrelevant. Peters v. Trousclar, infra. Viewing the facts in the light most favorable to the insured, that Marshall acted in self-defense when he swung at Bailey with the pistol in his hand, the issue of coverage for this act was a question of law to be determined by the trial court. Based on the law of Florida as expressed in Clemmons and Spreen, the trial court correctly determined that State Farm owed no duty to provide Marshall with a legal defense or indemnification for any judgment entered against him in favor of the Plaintiff Bailey, based on Marshall's admitted intentional acts.

The fact that Marshall intended to simply strike Bailey with the pistol, as opposed to shooting him, does not change the legal result that Marshall acted with the intent to strike and harm Bailey and therefore his actions fell within the exclusionary provisions of State Farm's policy. As a matter of law State Farm had no duty to defend or indemnify Marshall for these acts and the Summary Judgment must be affirmed.

Additionally to affirm the decision below and overrule

Clemmons and Spreen would vastly change the law of Florida, so that every assaulter could create a defense by claiming the act was done in self defense, and every insurance company would have to provide a defense and coverage. This should not be the law in Florida.

LAW OFFICES RICHARD A. SHERMAN, P A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

I. THIS HONORABLE COURT SHOULD REJECT THIS DECISION BELOW, AND INSTEAD REAFFIRM AS THE LAW OF FLORIDA CLEMMONS THAT AN INTENTIONAL ACT IS EXCLUDED FROM COVERAGE AND A DEFENSE, EVEN IF THE INSURED PLEADS SELF DEFENSE.

Affirming this decision would vastly change the law of Florida, so that assaulters could create a defense by claiming the act was done in self defense, even if he used a gun to shoot someone, as was pointed out in the Summary of Argument section. Needless to say, almost everyone who shoots someone claims it was done in self defense, and therefore this decision would in practical effect create a defense for all intentional torts.

It is important to remember in this case that the coverage question was decided on Summary Judgment, where sufficient evidence was presented that the insured did not act in self defense. This evidence was later substantiated by the jury's verdict finding that the insured committed an intentional assault and battery, which resulted in the shooting of Mark Bailey. However, the Fourth District held that while it was undisputed that the insured Marshall acted intentionally, because he alleged that he was defending himself, he was not precluded from insurance coverage, under the policy provision which excluded coverage for "bodily injury either expected or intended from standpoint by an insured". Marshall, 780. The District Court recognized that its holding was in direct and express conflict with that in Clemmons; which case upheld the exclusionary provision finding no coverage for an intentional act, whether or not committed in self defense. It is respectfully submitted that this Court, in resolving the conflict, should reverse Marshall

and under well established rules for construction of insurance contracts, the plain and unambiguous language of the State Farm policy should be upheld to exclude coverage for the insured's intentional act. See, Rigel v. National Casualty Company, 76 So.2d 285 (Fla. 1954); Excelsior Insurance Company v. Pomona Park Bar and Package Store, 369 So.2d 938 (Fla. 1979).

The Summary Judgment in this case is eminently correct based on the Deposition testimony of the insured, Mr. Marshall. He testified that he tried to strike or hit Bailey with a gun; he fired a "warning shot" at Bailey; he testified that he was trying to strike part of Bailey's body; and that he was holding the gun from which the bullet was discharged, which struck and entered Bailey's body. Therefore the insured's own undisputed testimony established that he deliberately intended to strike Bailey with the gun. Based on these undisputed facts, it became a question of law, whether there was insurance coverage under the State Farm policy which was expressly excluded coverage for bodily injury which is "expected or intended by an insured".

Marshall drew a distinction without any difference, in alleging that while he admittedly intended to strike and hit Bailey with the gun, he did not intend the end result, which was the gun firing and causing a serious bullet wound in Bailey. Florida caselaw clearly holds that even when the insured is acting in self-defense, an intentional act directed at the plaintiff cannot be construed as negligent, even when the ultimate damage or injury is not intended by the defendant.

In this case, where it was completely undisputed that

Marshall intended to strike and hit Bailey with the gun and Bailey was injured as a result of that intended act, there can be no coverage under State Farm's exclusionary provision. Therefore the Summary Judgment was correct as a matter of law and must be affirmed.

It is important to remember that this Summary Judgment followed a Petition for Declaratory Action in which State Farm requested the trial court to determine whether there was a duty to defend and provide coverage under its policy with Mr. Marshall. Therefore the trial court properly took into consideration not only the Complaint of the Plaintiff, but also the pleadings in the case, the deposition of Mr. Marshall, etc.

Rule 1.510(c) Florida Rules of Civil Procedure, allows a summary judgment to be entered whenever the pleadings, plus affidavits, depositions or other factual showings, reveal that there exists no genuine issue of material fact and that the movant is entitled to a judgment as a matter of law. Horton v. Gulf Power Company, 401 So.2d 1384 (Fla. 1st DCA 18981) review denied, 411 So.2d 382 (Fla. 1981). The movant must show conclusively the absence of any genuine issue of material fact. Wills v. Sears, Roebuck & Co., 351 So.2d 29 (Fla. 1977); Holl v. Talcott, 191 So.2d 40 (Fla. 1966). Once the movant tenders competent evidence to support his Motion, the opposing party must come forward with counter-evidence sufficient to reveal a genuine issue. Landers v. Milton, 370 So.2d 368 (Fla. 1979). It is not sufficient for the opposing party merely to assert that an issue does exist, Harvey Building, Inc. v. Haley, 175 So.2d 780 (Fla.

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 102 N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET. MIAMI, FLA. 33130 • TEL. (305) 940-7557

1965) or to raise paper issues, Colon v. Lara, 389 So.2d 1070 (Fla. 3d DCA 1980).

When the material facts are undisputed, they form a question of law which the trial court is empowered to decide on a motion for summary judgment. Richmond v. Florida Power and Light Co., 58 So.2d 687 (Fla. 1952); Johnson v. Gulf Life Insurance Co., 429 So.2d 744 (Fla. 3d DCA 1983); Travelers Insurance Co. v. Spencer, 397 So.2d 358 (Fla. 1st DCA 1981); Stone v. Rosen, 348 So.2d 387 (Fla. 3d DCA 1977). In this case, where the only testimony presented was that of Mr. Marshall and it was undisputed that he clearly intended to strike Mr. Bailey with the gun, there were no genuine issues of material fact, and the trial properly granted State Farm's Motion for Summary Judgment.

Marshall incorrectly argued below that State Farm had the duty to defend and to provide coverage based solely on the allegations contained in Bailey's Complaint. As previously noted the Rules of Civil Procedure allow the trial court in deciding a Motion for Summary Judgment to take into consideration not only the pleadings, but the depositions, affidavits, etc. filed in the case. Even the case heavily relied upon by Marshall, Baron Oil Company v. Nationwide Mutual Fire Insurance Co., 470 So.2d 810 (Fla. 1st DCA 1985) stated the preferable method for deciding the question of insurance coverage and the duty to defend should be determined by the insurer by filing a declaratory judgment action. Barron, 815; Caldwell v. Allstate Ins. Co., 453 So.2d 1187 (Fla. 1st DCA 1984); Accredited Bond Agencies, Inc. v. Gulf Insurance Co., 352 So.2d 1252 (Fla. 1st DCA 1978). Therefore the

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305)525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

trial court properly considered on State Farm's Motion for Summary Judgment following its Petition for Declaratory Action, not only the Complaint filed by Bailey, but also the Deposition testimony of the Respondent, Mr. Marshall.

Marshall attempted to create coverage by arguing that under Florida law the mere allegation of negligence in a complaint, automatically requires an insurer to defend, as well as an answer containing a self-defense defense. If this were true there would be no purpose in having declaratory actions, for every insurance company would be required to defend its insured any time any plaintiff had a count for negligence or the defendant claimed self-defense. In the present case the declaratory action was litigated through discovery resulting in a declaratory judgment. The allegations of the Complaint only govern until a declaratory judgment is entered. Marshall was defended up through the time the Declaratory Judgment was entered and at trial, where the jury rejected his claim of self-defense. Furthermore taking the allegations of Bailey's Complaint as true, Florida law has clearly held that intentional act, such as the assault and/or battery upon Bailey cannot be regarded as negligence, in order to invoke coverage. MacDonald v. Ford 223 So.2d 553 (Fla. 2d DCA 1969).

In MacDonald the plaintiff could not maintain an action for injuries sustained on the theory of negligence, when the evidence conclusively showed an assault and battery. In that case the defendant was attempting to kiss the plaintiff when she struck her face upon an object and injured her jaw. The court provides

the following definition of assault and battery:

> "[A]n assault is an intentional, unlawful offer of corporal injury to another by force, or force unlawfully directed toward the person of another, under such circumstances as to create a fear of imminent peril, coupled with the apparent present ability to effectuate the attempt. The essential element of an assault is the violence offered, and not actual physical contact," and "a battery is defined as an unlawful touching or striking or the use of force aaainst the person of another with the intention of bringing about a harmful or offensive contact or apprehension thereof. The degree of force used is immaterial, except upon the question of damages." 3 Fla.Jur., Assault and Battery, Section 3.

MacDonald, 555.

The court then went on to state that an assault and battery is not negligence, for such action is intentional, while negligence connotes an unintentional act. MacDonald, 555. Numerous summary judgments have been upheld where the plaintiff has alleged both an intentional act and negligence and the courts have found that the insurer is entitled to a judgment, as the act of the insured was intentional.

Directly on point is Hartford v. Spreen, supra, a case handled by undersigned counsel. As Bailey did below, the plaintiff filed an action for both assault and battery and negligence. The insured's policy with Hartford excluded coverage for "bodily injury and property damages which is either expected or intended from the stand point of the insured". Spreen, 650. The Third District Court of Appeal stated that the law is well settled that there can be no coverage under an insurance policy which insures against an "accident" where "the insured's wrongful

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 102 N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

act complained of is intentionally directed specifically toward the person injured by such act". Spreen, 651, citing, Grange Mutual Casualty Co. v. Thomas, 301 So.2d 158, 159 (Fla. 2d DCA 1974).

Spreen was at a party when somebody made a nasty remark about his wife. Spreen walked six to nine paces to where the plaintiff King was standing, and took a swing with his right fist at King. Spreen struck King in the area of his left eye, causing a blow out fracture of the orbital floor of the eye. By deposition and affidavit Spreen stated that he intended to strike King in the face, but not to damage King's face or eye. He further stated that he was reacting to what he regarded to be a crude and vulgar remark about his wife. All parties moved for summary judgments and the trial court entered a summary judgment against Hartford on the coverage issue.

The appellate court reversed, as no case had ever found coverage under such an exclusion, when the insured's act was deliberately designed to cause harm to the injured party; and assault and battery could not be considered to be an "accident" covered under the Hartford policy. Spreen, 651.

Spreen asserted that while he intended to hit King he did so on the spur of the moment and did not foresee the extent of King's injury and therefore did not intend them. The court found the argument unpersuasive and a subtle method of introducing the tort rule of reasonable foreseeability into insurance contract cases through the back door. Such a notion had been repeatedly rejected by Florida courts. Spreen, 651. "The fact that Spreen did not

foresee the extent of King's injuries when he swung at King could no more provide coverage under the Hartford policy than coverage be denied by the fact that Spreen should have foreseen such injury." Spreen, 651. The court found foreseeability irrelevant to the coverage question, as the sole issue was whether Spreen intended to inflict any harm on King. The court held that Spreen clearly intended to do so and the fact that he did not foresee or intend the extent of the harm inflicted did not convert the admitted assault and battery into an "accident".

Upholding the specific exclusion from coverage under the Hartford policy for any damages which are either "expected or intended", the Third District noted that courts have generally held that an injury or damage is "caused intentionally" within the meaning of an intentional injury clause, if the insured acted with a specific intent to cause harm to the third party. Spreen 652; Cloud v. Shelby Mutual Insurance Company, 248 So.2d 217, 218 (Fla. 3d DCA 1971). The court found that Spreen clearly acted to cause harm to King which thereby defeated coverage under the intentional injury exclusion clause.

The decision in Spreen is directly on point and it is clear that not only is there no coverage under State Farm's policy in the present case, but that the actions of Marshall, which amounted to an assault and battery, cannot be construed as anything other than intentional and therefore cannot be negligent, and there is no duty to defend.

The insured in Peters v. Trousclair similarly relied on the allegation of negligence in the plaintiff's original complaint to

raise a duty to defend. Peters, infra. The court found that the duty to defend was irrelevant, because the facts before the trial court established an intentional act on the part of the insured bringing it within the policies' exclusionary clause. Peters v. Trousclair, 431 So.2d 296, 298 (Fla. 1st DCA 1983) 298.

In the present case Marshall testified that he placed the gun flat in his hand and swung at Bailey. He testified that he tried to strike or hit Bailey with the gun. He testified that he was trying to strike some part of Bailey's body. He testified he was holding the gun from which the bullet was discharged which which struck and entered Bailey's body. Marshall never testified that Bailey ever threatened him. Where the insured has testified that he used both a club and a gun to deter Bailey and that he intended to strike and hit him with a gun, there is no question that his actions can only be classified as intentional. The fact that he swung at Bailey attempting to hit him with the automatic pistol and the resulting injury was a gunshot wound is irrelevant to whether or not Marshall was acting intentionally, especially where Marshall in fact committed an assault and battery on Bailey.

Florida law has clearly held that where the insured acts intentionally, and the act amounts to assault and battery, this cannot be construed as negligence, therefore Summary Judgment was properly entered in favor of State Farm and must be affirmed.

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

11. THE TRIAL CORRECTLY ENTERED SUMMARY JUDGMENT WHERE THE UNDISPUTED FACTS ESTABLISHED AN INTENTIONAL ACT; WHICH ACT IS EXCLUDED FROM COVERAGE UNDER THE STATE FARM POLICY

The insured gratuitously argued below that he did not shoot Bailey. This was incredible in light of his own testimony that he intended to strike and hit Bailey with the automatic pistol and that at the time Bailey was shot he was holding the gun in his hand.

> Q: Were you doing that at the time the bullet was discharged and struck Mr. Bailey's body?
>
> A: I was holding a gun ...
>
> . . .
>
> A: I had the gun flat in my hand. I couldn't stop him. I was trying to hit him with it.

A. No Jury Question Where Insured Admits Intent to Harm

The insured was trying to create a jury question based on his testimony that he did not pull the trigger on the gun. However whether or not he pulled the trigger, the facts were undisputed that Marshall had the loaded automatic pistol in his hand, he swung with the intention to strike or hit Bailey's body and as a result of swinging the gun and his intent to hit him, a bullet was fired causing a serious gunshot wound to Mr. Bailey. Contrary to Marshall's statements to the contrary, the evidence was undisputed based on Marshall's own testimony, that he fully intended to strike and harm Bailey, in an attempt to "escape" the advances of Bailey who never threatened him (T **133-134;** T **136-137).**

Marshall's claim that he did not intend to shoot Bailey,

when he swung at him intending to strike him with the gun, is no more persuasive, then the claim made by the insured in West Building Materials Inc. v. Allstate Insurance Co., 363 So.2d 398 (Fla. 1st DCA 1978). In West Building Materials the insured's son detonated a smoke bomb in the appellant's building. In that case the insurer, Allstate, had an exclusion for damage "which is expected or intended by the insured". The boy allegedly set off a smoke bomb in the building and the building burned as a result. The trial court held as a matter of law that the fire was not an accident and rejected the claim that the boy intended to cause smoke, but not fire. "Ignition of the bomb was the natural, probable, and intended result of Keith's act." West Building Materials, 399.

Similarly in Peters v. Trousclair, supra, the plaintiff brought counts of intentional tort and negligence against the insured, who had stabbed the plaintiff, under the misconception that the plaintiff was romantically involved with his wife. The court found that the stabbing was intentional and specifically directed towards the person of the plaintiff, even though it was a case of mistaken identity. In other words the insured asserted that he intended to stab the person involved with his wife and not Peters, who in fact was his wife's cousin.

Summary judgments were also affirmed for the insurance companies in Darragh v. Brock, 366 So.2d 801 (Fla. 1st DCA 1979) and Bosson v. Uderitz, 426 So.2d 1301 (Fla. 2d DCA 1983). Both of these cases involved claims by the plaintiff of intentional and/or negligent injury and in both cases the summary judgment in

favor of the insurer was based on the exclusionary clause that coverage did not apply for bodily injury which was either "expected or intended by the insured".

In Darragh the court noted that, whatever the insured's degree of force was in the physical confrontation between the plaintiff and defendant, it was clear from the appellant's own deposition, that the natural probable and intended result of his act was to harm the plaintiff. Therefore based on that type of record the insurer's liability was precluded as matter of law; citing, West Building Materials v. Allstate, supra; Hartford v. Spreen, supra. Similarly in Bosson the court held, that where the acts committed against the plaintiff amounted at a minimum to assault, they were intentional and not negligent and therefore were in the purview of the insurance policies' intentional act exclusionary clause; relying on MacDonald v. Ford and Hartford v. Spreen, supra.

Another case which involved an allegation by the insured that he did not intend the resulting injury, but merely intended to frighten the plaintiff is Draffen v. Allstate Insurance Co., 407 So.2d 1063 (Fla. 2d DCA 1981). In this case the plaintiff sued the insured and his insurer Allstate under a homeowner's policy for damages caused when the insured, while being chased by the plaintiff, negligently and carelessly caused the gun to fire striking the plaintiff in his back and neck. Allstate raised as an affirmative defense, that the policy did not apply to bodily injury which was either "expected or intended from the standpoint of the insured". The trial court granted Allstate's motion for a

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

directed verdict and entered a final judgment in favor of Allstate against the plaintiff and the Defendant insured.

The insured in Draffen robbed some women and was escaping around the back of a restaurant into a very dark area. Considering the evidence in the light most favorable to the insured, he could not see his pursuers once he rounded the corner. However he knew he was being chased and heard the voices of his pursuers. He shot his gun six times in the general direction of his pursuers, jumped a fence and made good his escape. One of those bullets struck the plaintiff in the face and knocked him to the ground and two more bullets struck him in the back.

The appellate court agreed with the trial court that one would simply have to take leave of ones senses to conclude that this incident was an accident. The court goes on to note that if the insured had intended to merely frighten his pursuers he could have fired at the ground or in the air. He did neither. Instead he fired in the direction of his pursuers. Therefore it was clear that the insured most certainly did intend to kill or injure one of his pursuers. Relying on Hartford v. Spreen and Darragh v. Brock, the appellate court affirmed the judgment for the insurance company.

It is just as ludicrous in the present case for the insured to suggest that while he intended to strike and hit Bailey with the automatic pistol, he did not intend to shoot him, so he did not act with the intent to harm. There was no question that the serious gunshot wound suffered by Bailey was a natural, probable

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

and intended result of the act of the insured, just as if he had aimed the gun and fired it. See also, Colonial Life and Accident Insurance Co. v. Cooper, 378 So.2d 806 (Fla. 3d DCA 1979)(holding that the insurer was not liable under the policy where the uncontroverted evidence showed that the insured died not as a result of a "accident", but of injuries which he intentionally inflicted upon himself.)

B. Intentional Acts, Even in Self-Defense, Are Still Excluded From Coverage

At the Hearing on State Farm's Motion for Summary Judgment, the court's only concern seemed to be with the fact that Marshall may have acted in self-defense, and that regardless of the reason for his intentional act, he would still be excluded from coverage (H 13). The trial court requested case law that upheld the exclusionary clause in an insurance policy, when the insured acted in self-defense and State Farm presented the definitive case on this issue; Clemmons v. American States Insurance Company, supra. The appellate court rejected Clemmons and distinguished Spreen on the facts, in order to find coverage based on Marshall's claim of self-defense. Marshall, 778.

The defendant in Clemmons was accosted by some strangers at a shooting range. The defendant shot the plaintiff, as he was entering the defendant's car to reload a shotgun, that he had taken from the defendant. The plaintiff's estate filed a lawsuit against the defendant and his insurer pled as an affirmative defense that the policy that excluded coverage as to "bodily injury either expected or intended from the standpoint of the insured". The

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305)525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305)940-7557

defendant testified that he believed that the shotgun held by the plaintiff was loaded and that when he shot the plaintiff he intended not to kill him but, to merely prevent the plaintiff from shooting him with the shotgun. The trial court entered a verdict for the insurer, American States, holding that under the facts, as a matter of law, the plaintiff's death was caused by an intentional act within the meaning of the policy exclusion. The Fifth District affirmed the trial court's decision, stating that injuries inflicted by an insured acting in necessary self-defense, were "intentional" injuries within the meaning of the provisions of the liability policy, which excluded coverage for bodily injuries "intended from the standpoint of the insured". Clemmons, 910.

The appellate court noted that in deciding the issue it was not really controverted that the defendant was acting in necessary self-defense and therefore the court assumed that he was acting in self-defense. Therefore the remaining coverage question was one strictly of law. In the present case assuming all the facts in the light most favorable to the non-moving party, Mr. Marshall, he acted in self-defense when he swung at Mr. Bailey with the intent to strike or hit him, with the gun in his hand. As a direct result of Marshall's attempt to strike the Plaintiff, the gun discharged and the Plaintiff was shot. As previously discussed it is irrelevant that Marshall did not intend to shoot Bailey, since it was clear that he had the intent to strike and harm him, even though he did not foresee the extent or type of injuries suffered by Bailey. Spreen, supra.

The court in Clemmons quickly ran through the line of cases where the insured acted with no intent to cause harm to the person injured and the exclusionary clauses in the policies did not apply. For example: Gulf Life Insurance Company v. Nash, 97 So.2d 4 (Fla. 1957)(coverage was found where the insured unintentionally shot himself playing Russian roulette because the insured did not intend to injure himself); Grange Mutual Casualty Company v. Thomas, 301 So.2d 158 (Fla. 2d DCA 1974)(coverage excluded where insured intended to shoot one person, but accidentally and unintentionally shot a bystander); Phoenix Insurance Company v. Helton, 298 So.2d 177 (Fla. 1st DCA 1974), (insured, attempting to disperse a crowd with his automobile, accidentally and unintentionally injured a member of the crowd); Cloud v. Shelby Mutual Insurance Company, supra, (insured unintentionally caused injuries to the driver of another automobile, which automobile plaintiff insured was intentionally pushing out of the way of his car). See also, Harvey v. St. Paul Western Insurance Company, 166 So.2d 822 (Fla. 3d DCA 1964) (insured unintentionally shot himself while attempting to disarm a person in a fight, in which the insured was the aggressor).

The Fifth District in Clemmons, found no coverage in the self-defense situation relying on Colonial Life and Accident Insurance Company v. Cooper, supra; (where the court stated that when an insured intends to cause an injury the result of his action does not constitute an accident even if the damage is more severe than he wished to anticipate) and Hartford v. Spreen, supra, (where the insured struck the victim not intending the eye

injury suffered by the plaintiff). The court pointed out that coverage has never been found under the exclusionary clauses, where the insured's act was deliberately designed to cause harm to the injured party. Clemmons, 909. The Marshall opinion is the first such case in Florida to find coverage for an intentional tort.

The court in Clemmons also relied upon Etcher v. Blitch, 381 So.2d 1119 (Fla. 1st DCA 1979) where after an altercation between two drivers Etcher, on foot, attacked Blitch's vehicle with Blitch in it. Blitch pointed a revolver at Etcher intending, he said, to frighten Etcher by shooting at the window glass. Nevertheless the court held that Blitch's act in shooting Etcher was "in law intentional, not negligent." Etcher, 1119. Therefore even if Marshall only intended to pistol-whip Bailey, as opposed to actually shooting him, the end result is the same, in that Marshall intended to hit and harm Bailey.

The Clemmons court went on to compare Draffen v. Allstate (where, to avoid apprehension, the defendant directed deadly force towards the plaintiff) with the actions of the defendant in Clemmons, where the insured innocently acting in good faith, reluctantly directed deadly force toward the aggressor, only in necessary and justified self-defense. The court noted that these are the extremes of the legal comparisons, but that the cases are analogous. In both cases the insured acted for a specific ultimate purpose or motive: Draffen to avoid being caught, Leeper, the defendant in Clemmons, to avoid harm to himself. Each defendant found himself in a dilemma and had to

make a choice between inflicting injury on another or not achieving his ultimate desire. Each made a decision and decided to inflict injury, rather than suffer the alternative presented. Without regard to the difference between the two defendants, morally and under criminal law concepts, when each intentionally caused bodily injuries to another, each acted within their insurance policy exclusions, notwithstanding the ultimate purpose of each: Draffen to avoid being caught, Leeper to avoid harm to himself. Notwithstanding the different objectives of each of the defendants, <u>each acted with the intent to harm the plaintiff</u>. Therefore the actions fell within the exclusionary clause of the policy and no coverage was available. <u>Clemmons</u>, 909-910.

In light of Marshall's own testimony that he intended to strike and hit Bailey somewhere on his body with the loaded automatic pistol, even assuming <u>arguendo</u> such an action was strictly in self-defense, there is no question that Marshall did act intentionally to inflict harm upon Bailey and under Florida law he acted within the exclusionary provisions of his insurance policy. There were no genuine issues of material fact in this case, where Mr. Marshall testified that he could not deter Bailey with a purple club or a warning shot, and therefore allegedly in self-defense swung at Bailey with the loaded pistol in his hand, with the full intent on striking Bailey and causing him bodily harm. As a matter of law, Mr. Marshall's actions were not negligent and his intentional acts are excluded from coverage under the State Farm policy. The decision in <u>Marshall</u> must be reversed and the trial court's judgment for State Farm reinstated.

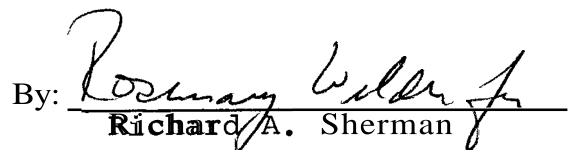
It is submitted that this decision by the Fourth District may be theoretically logical, but its practical effect in the real world would be far different, and that is why the courts have long rejected this as the law. In practical effect a person performing an assault can create a defense by the insurance carrier by claiming he committed the assault in self defense. Therefore in practical effect every person performing an intentional assault will be awarded a defense by his insurance company, simply because he will claim it was self defense. This certainly defeats the long policy of the law against coverage for intentional acts, and is the reason the courts of Florida have long rejected it as the law of Florida. Marshall should not be the law in Florida; and Clemmons and Spreen should be upheld.

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

CONCLUSION

The Summary Judgment was correctly entered as a matter of law and must be reinstated; as it was substantiated by the undisputed facts in the Record before the trial court and the decisions in Clemmons and Spreen should be upheld.

Law Offices of
RICHARD A. SHERMAN, P.A.
Richard A. Sherman, Esquire
Rosemary B. Wilder, Esquire
Suite 102 N Justice Building
524 South Andrews Avenue
Fort Lauderdale, FL 33301
(305) 525-5885 - Broward
(305) 940-7557 - Dade



By: Richard A. Sherman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 12th day of June, 1989 to:

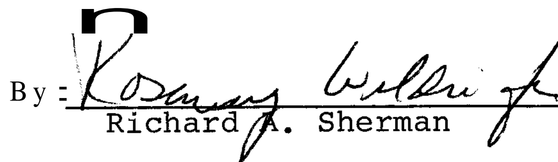
Jay B. Green, P.A.
Suite 200
315 S.E. 7th Street
Fort Lauderdale, FL 33301

Philip M. Warren, Esquire
Suite 300
3350 Atlantic Blvd.
Pompano Beach, FL 33062

Gregg Pomeroy, Esquire
1995 E. Oakland Park Blvd.
Suite 300
Fort Lauderdale, FL 33306

Mr. Edward Marshall
220 N.W. 24th Court
Pompano Beach, FL 33064

Law Offices of
RICHARD A. SHERMAN, P.A.
Richard A. Sherman, Esquire
Rosemary B. Wilder, Esquire
Suite 102 N Justice Building
524 South Andrews Avenue
Fort Lauderdale, FL 33301
(305) 525-5885 - Broward
(305) 940-7557 - Dade



By: Richard A. Sherman