IN THE SUPREME COURT OF FLORIDA

SUPREME COURT CASE NO. 75,195

DISTRICT COURT OF APPEAL CASE NO. 89-1310

CIRCUIT COURT CASE NO. 88-9569

ON APPEAL FROM THE THIRD DISTRICT COURT OF APPEAL

AETNA CASUALTY AND SURETY COMPANY,

Petitioner,

vs.

JACK GRISS,

Respondent.

INITIAL BRIEF OF PETITIONER AETNA CASUALTY AND SURETY COMPANY

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CASE

Jurisdiction in this case is pursuant to Rule 9.030 (a)(2)(A)(vi) (1989) of the Florida Rules of Appellate Procedure, pertaining to decisions of district courts of appeal that are certified to be in direct conflict with decisions of other district courts of appeal. The dispositive question in the Third District Court of Appeal was whether the use of deadly force in self defense constitutes intentional conduct causing harm to another within the exclusion-from-coverage provision of a homeowner's insurance policy. See, Griss v. Aetna Casualty and Surety Company, 14 FLW 2793 (Fla. 3d DCA December 15, 1989) (Appendix 1). The court answered the question by holding that self-defense is not intentional conduct, but certified it as being in direct conflict with Clemmons v. American States Insurance Company, 412 So.2d 906 (Fla. 5th DCA 1982). This Court's recent decision in the case of State Farm Fire and Casualtv Company v. Marshall, 14 FLW 599 (Fla. December 22, 1989) has resolved the afore-referenced conflict and mandates that the opinion of the Third District Court of Appeal be quashed and that the Summary Final Judgment entered by the trial court be affirmed.

In this appeal, the Plaintiff will be referred to as "AETNA" and the Defendant as "GRISS". The symbol "R" will stand for the Record on Appeal and "SR" will stand for the Supplement to the

Record on Appeal (consisting of the depositions of JACK and Agnes GRISS).

The Defendant AETNA now appeals the Third District Court of Appeal's reversal of a Summary Final Declaratory Judgment entered on May 1, 1989 in favor of AETNA. (R 181-182) (see Appendix 2). The Honorable Harold Solomon initially ruled that AETNA was not responsible to provide coverage nor did it have the duty to defend GRISS in a separate wrongful death action brought against him by his daughter, DENYSE AMMIRATA, as Personal Representative of the ESTATE OF FRANK M. AMMIRATA, Deceased, and Individually, and by FRANK M. AMMIRATA, JR. The Complaint in that action was filed in the 11th Judicial Circuit in and for Dade County, Florida, Case No. 87-24255, and sought damages for alleged negligent or intentional acts of GRISS arising out of the September 21, 1985 shooting death of his son-in-law, FRANK M. AMMIRATA. (R 4-6).

Subsequent to the filing of the Complaint for wrongful death, AETNA filed an Amended Complaint for Declaratory Relief against GRISS seeking to have the trial court determine the rights, duties and liabilities of AETNA under the policy issued to GRISS for the killing of his son-in-law. (R 1-26). The wrongful death and declaratory actions were then consolidated for the purpose of discovery. (R 31). In its declaratory action, AETNA sought to have enforced the following "intentional acts" exclusion:

> Coverage E - Personal Liability and Coverage F - Medical Payments to others do not apply to <u>bodily injury</u> or <u>property damase</u>:
>
> (a) Which is expected or intended by the insured.

(R 16).

On March 23, 1989, AETNA filed its Motion for Summary Final Judgment, which was heard on April 24, 1989. (R 110-162; 181-182). On May 1, 1989, the trial Court granted AETNA'S Motion, ruling as a matter of law that GRISS was not entitled to coverage pursuant to the afore-referenced exclusion, nor was AETNA required to defend GRISS in the wrongful death action. (R 181-182).

In Griss v. Aetna Casualty and Surety Company, 14 FLW 2793 (Fla. 3d DCA December 15, 1989), the Third District Court of Appeal reversed and remanded the Summary Final Judgment on the authority of Marshall v. State Farm Fire and Casualty Company, 534 So.2d 776 (Fla. 4th DCA 1988), however, certifying the question to be in direct conflict with Clemmons v. American States Insurance Company, 412 So.2d 906 (Fla. 5th DCA 1982).

Subsequent to the final date within which AETNA could have moved for rehearing in the Third District Court of Appeal, this Court in State Farm Fire and Casualty Company v. Marshall, 14 FLW 599 (Fla. 1989) expressly resolved the foregoing conflict, quashing the opinion of the District Court in Marshall, holding that self-defense is "intentional" conduct as defined by the "exclusion-from-coverage" provision in the liability policy.

AETNA'S attempts to persuade counsel for GRISS to stipulate to the applicability of the recent Marshall decision in lieu of this appeal were to no avail, notwithstanding that there truly remain no genuine issues of law to be decided by this Court.

FACTS

The depositions of JACK and Agnes GRISS reveal the following: GRISS first encountered FRANK AMMIRATA in the spring of 1979 when AMMIRATA was contracted to do some plumbing work at GRISS' Golden Beach home. (SR 7). The two became "social acquaintances" and frequented each others' homes. (SR 8). AMMIRATA subsequently married GRISS' daughter, DENYSE, in July, 1985. (SR 8).

In the time that followed, GRISS began to develop "a little anxiety" (SR 20) about his new son-in-law. AMMIRATA was discovered to have become involved in "shylocking" and bookmaking, and GRISS had even personally observed AMMIRATA taking bets. (SR 11-13). AMMIRATA also had a history of violent behavior recounted in over thirty-four pages of deposition testimony (SR 8-42) revealing numerous threats, assaults, batteries, property damage, and even attempted murder, involving more than eighteen named individuals which include neighbors, business associates, police officers, his daughter Denyse, and the mayor. (SR 8-42).

During one of these incidents, AMMIRATA appeared at the GRISS household in May of 1985, intoxicated, screaming obscenities, and then proceeded to attack one man and to grab and bruise GRISS' arm (SR 8-9, 29). Police were called, subsequently charging AMMIRATA with battery. (SR 15). From that point on, AMMIRATA embarked upon a campaign of telephone threats to GRISS. (SR 13,16). Consequently GRISS would call the police approximately once a month, each time he was threatened. (SR 16).

At his deposition, GRISS described numerous other incidents

of violent behavior wherein AMMIRATA threatened and/or assaulted various police officers (SR 21, 23, 27, 30, 32, 34, 63, 64, 65, 67, 76), a plumber (SR 22), building inspectors (SR 36), AMMIRATA'S next-door-neighbor (SR 31), his lawyer (SR 38, 66), the Mayor of Golden Beach (SR 69), and the female owner of a Chinese restaurant (SR 75). GRISS also believed AMMIRATA to have battered his daughter DENYSE and had noticed bruises on her body. (SR 41). GRISS observed that AMMIRATA possessed numerous weapons including riot shotguns and a "Saturday night special" which AMMIRATA kept under the front passenger seat of his automobile. (SR 39). GRISS believed AMMIRATA to have shot someone at the "Follies" after which AMMIRATA was arrested for attempted murder. (SR 37). Prior to the incident giving rise to this case, AMMIRATA had been seen "spying" on the GRISS household. (SR 72, 95).

On the evening of September 21, 1985, GRISS was home with his seventy-four year-old mother, Agnes. (SR 6, 43). At 8:45 P.M., GRISS received a threatening phone call from AMMIRATA wherein AMMIRATA threatened to come over and kill them both. (SR 44-45). AMMIRATA stated that he would "punch [GRISS'] f------ face in ... [and b]reak every bone in [his] body". (SR 44-45). AMMIRATA ended the conversation by warning,"I'm coming over and I'm taking you both out." (SR 45).

As usual, GRISS had no idea what provoked his son-in-law but sensed that "there was a difference" between this and the previous phone calls. (SR 45-48-49). Specifically, this was the first time the threats had involved murder and had extended to GRISS' mother.

(SR 49). GRISS, recalling AMMIRATA's shotguns and "Saturday night special," retrieved his own revolver from under his mattress and placed it on the shelf behind his patio bar. (SR 47). GRISS was also mindful of the fact that AMMIRATA lived only two minutes away. (SR 49). GRISS did not mention his conversation with AMMIRATA to his mother (SR 50) but instead waited behind the bar of his patio. (SR 47, 123).

At 9:30 P.M., FRANK AMMIRATA appeared at the front door of the GRISS home. (SR 42). Agnes Griss was unable to see who was at the front door, but opened it anyway. (SR 151). AMMIRATA pushed the door open further, stating, "get out of my f------ way ... I'm going to break your other f------ hip" (SR 34), additionally threatening to shoot both Agnes Griss and her son, although AMMIRATA appeared to have no gun. (SR 125, 127, 132). Agnes Griss testified that AMMIRATA was foaming at the mouth, and that he proceeded to grab her by the back of the shoulders. (SR 127, 129-131). She was able to smell liquor on his breath. (SR 152). She pulled away from him, ran and opened the sliding glass patio door, and said, "Jack, Frank is here." (SR 129).

JACK GRISS saw his mother leaning out of the sliding glass patio door with AMMIRATA'S hands on her shoulder. (SR 47). GRISS became concerned because his mother was positioned at an awkward angle and had recently broken a hip. (SR 47). Agnes Griss closed the patio door and AMMIRATA pulled her back into the house. (SR 51). Assuming that AMMIRATA was armed and that he had arrived to fulfill his death threats (SR 90), GRISS removed his gun from the

patio bar, placed it in his back pocket, and entered the house. (SR 51). AMMIRATA was approximately five or six feet away, with "the eyes of a maniac." (SR 52). AMMIRATA then "came" at him, taking about three steps in GRISS' direction, at which time GRISS pulled out his gun and shot him in the face in an "instinctive reaction." (SR 51-53). AMMIRATA fell backwards and was dead. (SR 139).

Agnes Griss testified that AMMIRATA had become "paralyzed" when he saw the gun and had then put his hands up in the air. (SR 144, 146). Agnes Griss testified that it didn't even enter her mind that she needed protection at that time. (SR 156). AMMIRATA then started to call GRISS names and the shooting occurred. (SR 146).

GRISS claimed that he "didn't consciously pull the trigger at that particular time" (SR 57), and that he was "surprised" when the gun went off (SR 56), but was unable to honestly say that he didn't intend to shoot him. (SR 57). GRISS explained that his conscious intent was to "stop him" (SR 58) at any cost because he believed that both he and his mother were "in danger of serious bodily harm." (SR 102-103).

> My intention was to stop Frank Ammirata before he killed my mother and myself.

(SR 56).

GRISS admitted that he intended to transfer the gun from under his mattress to the patio bar and that he intended to subsequently place it in his back pocket. (SR 85). He intended to aim it

toward the body of FRANK AMMIRATA (SR 85-86). Substantial pressure was needed to fire the gun (SR 60), which required a 12 to 16 pound trigger pull. (SR 88). GRISS had received significant training in the use of firearms and admitted:

> You don't pull a gun unless you intend to use it.
>
> ...
>
> You don't produce a gun, whether you point it or anything else unless, you're going to use it.

(SR 86-87).

At the conclusion of his deposition, the following colloquy occurred wherein GRISS himself claimed to have acted in self-defense:

> Q: Was it your intention to use the gun in your self-defense?
>
> ...
>
> A: I was there to defend my mother and myself, period. There was no separation of defending me and not her and not me. It was --
>
> Q: Based on what you have just said, then, your use of the gun was also in your own self-defense, correct?
>
> A: As well, yes.

(SR 101).

This appeal follows the Third District Court of Appeal's reversal of the trial court's entry of Summary Final Judgment in favor of AETNA.

SUMMARY OF ARGUMENT

The District Court erred in reversing the trial court's entry of Summary Final Judgment in favor of AETNA on its Amended Complaint for Declaratory Judgment. In State Farm Fire and Casualty Company v. Marshall, 14 FLW 599 (Fla. December 22, 1989), this Court resolved existing conflict in the district courts as to whether an "intentional act" exclusion in a liability insurance policy excludes coverage for an act of self-defense where the insured intends to harm the attacker. This Court chose to align itself with the majority of jurisdictions holding that self-defense is not an exception to the "intentional acts" exclusion and that the clear terms of the policy control.

In the instant case, there can be no question but that JACK GRISS acted in self-defense with the intent to cause harm to FRANK AMMIRATA. He clearly admitted doing so in the course of his uncontroverted deposition testimony. There can be no dispute but that JACK GRISS intentionally shot FRANK AMMIRATA in the face with the express purpose of defending himself and his mother:

> My intention was to stop Frank Ammirata before he killed my mother and myself.

(SR 56). This was no accident; in the words of FRANK AMMIRATA, "[y]ou don't produce a gun, whether you point it or anything else unless, you're going to use it." (SR 86-87).

This case is indistinguishable from Marshall and the decision Of the district court below must be quashed.

ARGUMENT

PURSUANT TO THIS COURT'S DECISION IN STATE FARM FIRE AND CASUALTY COMPANY V. MARSHALL, 14 FLW 599 (FLA. DECEMBER 22, 1989), THE DISTRICT COURT'S REVERSAL OF THE TRIAL COURT'S GRANTING OF SUMMARY FINAL JUDGMENT IN FAVOR OF AETNA ON ITS AMENDED COMPLAINT FOR DECLARATORY JUDGMENT WAS IMPROPER WHERE GRISS ADMITTED HAVING ACTED IN SELF-DEFENSE THEREBY ELIMINATING ANY GENUINE ISSUES OF MATERIAL FACT AND BRINGING HIS ACTIONS WITHIN THE AETNA INTENTIONAL ACTS EXCLUSION

In State Farm Fire and Casualty Company v. Marshall, 14 FLW 599 (Fla. December 22, 1989), this Court held that an "intentional act" exclusion in a liability insurance policy excludes coverage for an act of self-defense where the insured intends to harm the attacker. The facts of Marshall were as follows:

> Marshall was renting the master bedroom in the home of his ex-wife, Carolyn, when he was awakened by someone pounding on his bedroom windows. He and Carolyn went to the door and saw Carolyn's son, Bailey. It was Marshall's testimony that Bailey broke a window, came in through the opening, and advanced on him wildly swinging his fists. Fearing for his life, Marshall tried to discourage Bailey by holding up a wooden club: failing in this effort, he got his semi-automatic pistol from the bedroom and threatened Bailey by firing a warning shot. When Bailey continued to advance, he placed the gun flat in the palm of his hand, with his finger away from the trigger, and struck Bailey.
>
> The gun discharged injuring Bailey, who filed suit alleging that Marshall "did negligently discharge the aforesaid firearm," or in the alternative, that he "did intentionally shoot the Plaintiff with the intent of inflicting grievous harm." State Farm filed a separate petition for declaratory relief against Marshall and Bailey to determine its obligations under Marshall's homeowner's policy, which contained the following provision:
>
> SECTION II-EXCLUSIONS
> 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. . . .
>
> State Farm contended that because Bailey's complaint alleged that the shooting was intentional, State Farm had no duty to defend or indemnify Marshall in the action. Marshall countered by asserting that the shooting was done in self-defense. The trial court entered final summary judgment in favor of State Farm. The district court reversed, holding that an intentional act exclusion does not constitute a bar to liability coverage for an act of self-defense, and that State Farm thus was obligated to defend Marshall.
>
> State Farm petitioned for review before this Court based upon conflict with Clemmons, in which the court expressly ruled that an intentional act exclusion eliminates an insurer's duty to defend or indemnify for intentional acts of self-defense.

Marshall, at 599.

This Court then chose to align itself with the majority of jurisdictions holding that self-defense is not an exception to the intentional acts exclusion and that the clear terms of the policy control. Marshall at 599. The Court specifically rejected Marshall's argument that public policy should support coverage because he was acting in self-defense, explaining:

> We disagree. Courts have pointed out that the purpose underlying the intentional act exclusion is twofold. First, insurance companies set rates based on the random occurrence of insured events; if an insured is allowed to consciously control the occurrence of these events through the commission of intentional acts, the principle is undercut. Second, indemnification for intentional acts would stimulate persons to commit wrongful acts. Courts favoring coverage conclude that neither of these reasons apply where self-defense is concerned, since acts of self-defense are not the type of deliberate act that one would consciously undertake based on insurance coverage and such acts are not wrongful. These courts also express a concern that if the exclusion embraces self-defense, liability coverage is nonexistent for the homeowner defending his home and family, because an intentional act exclusion is present in practically every policy and is nonnegotiable.

> Marshall claims that the public policy promoting self-defense is evidenced by Section 776.012, Florida Statutes (1987), which authorizes the use of force in defense of one's person under certain circumstances. This argument is unpersuasive. The intent underlying an act of self-defense where the defender intends to harm the attacker is identical to that underlying an assault. In each, the actor intends to inflict harm on the other. Just as assault is often impulsive or reactive, so too is self-defense. The difference between the two lies in the motive or purpose governing the act; the motive for one is worthy, that for the other is not. See Clemmons. Nevertheless, such acts of self-defense are undeniably intentional and have been held to be embraced within intentional acts exclusions by a majority of courts. See, e.g., Western World Ins. Co. v. Hartford Mut. Ins. Co., 600 F. Supp. 313 (D. Md. 1984); Home Ins. Co. v. Nielsen, 165 Ind.App. 445, 332 N.E.2d 240 (Ct. App. 1975); Grange Ins. Co. v. Brosseau, 113 Wash.2d 91, 776 P.2d 123 (1989). But see State Farm Fire & Casualty Co. v. Poomaihealani, 667 F.Supp. 705 (D. Haw. 1987); Transamerica Ins. Group v. Meere, 143 Ariz. 351, 694 P.2d 181 (1984). See generally Annotation, Acts in Self-defense as Within Provision of Liability Insurance Policy Expressly Excluding Coverage for Damage or Injury Intended or Expected by Insured, 34 A.L.R. 4th 761 (1984).
>
> We align ourselves with the majority of jurisdictions, which hold that self-defense is not an exception to the intentional acts exclusion and the clear terms of the policy control. In such cases, the sanctity of the parties to freely contract prevails. Members of the public may wish to insure themselves against liability incurred while lawfully defending themselves, but they must bargain for such coverage and pay for it. We will not rewrite a policy under these circumstances to provide coverage where the clear language of the policy does not; nor will we invoke public policy to override this otherwise valid contract. We quash the decision of the district court below.

Marshall at 599-600.

The Fifth District Court of Appeal addressed this identical issue i Clemmons v. i n States Insurance Company, 2 d 906 (Fla.5th DCA 1982), upheld by this Court in the Marshall

opinion. In Clemmons, the insured testified that his intent was not to kill his aggressor, but was merely to keep the aggressor from shooting him first with a shotgun. The court directed a verdict for the insurance company, holding that under the facts, as a matter of law, the aggressor's shooting death was caused by the insured's intentional act within the meaning of the policy exclusion. The appellate court affirmed, citing the case of Draffen v. Allstate Insurance Company, 407 So.2d 1063 (Fla.2nd DCA 1981). In Draffen, an insured robber being pursued in the dark, shot six times in the direction of his pursuers; three of the six shots hit one of the pursuers, who then sued the insured robber. However, the insured's policy contained an exclusion for intentional acts. A directed verdict in favor of the insurer was upheld on the basis that the insured robber "most certainly did intend to kill or injure one or more of his pursuers.'' 407 So.2d at 1665. The Clemmons court analogized the facts of Draffen to those of a self-defense case in the following way:

> Each did the same act: intentionally discharging a firearm while intentionally aiming it toward another human being. Each caused the same obviously foreseeable immediate result: the projectile intentionally sent forth struck the human to which it was intentionally directed and, as was to be expected, inflicted serious bodily injuries. Each did his act for a specific ultimate purpose or motive: Draffen [insured in Draffen] to avoid being caught, Leeper [insured in Clemmons] to avoid harm to himself. Each can fairly and charitably be assumed to have preferred to accomplish his ultimate purpose (the avoidance of capture or the avoidance of harm to himself) without the necessity of causing injury to another. Each found he was 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 Leeper and Draffen, morally and under criminal law concepts, when each intentionally caused bodily injuries to another by intentionally shooting him, each acted within their insurance policy exclusion, notwithstanding that the ultimate purpose of each was to accomplish a distant objective or goal quite beyond and detached from the intended act of shooting and the immediate obvious result of thereby inflicting serious bodily harm.

Clemmons at 909-910.

It should thus be obvious that Marshall and Clemmons govern the case sub judice. The insurance exclusions in Marshall and the instant case are identical, and there can be no question but that JACK GRISS acted in self-defense with the intent to cause harm to FRANK AMMIRATA. The Third District Court opinion indicates that the only dispositive question was "whether the use of deadly force in self-defense constitutes intentional conduct causing harm to another within the exclusion-from-coverage provision of a homeowner's insurance policy." (See Appendix 1).[1] If GRISS' own uncontroverted deposition testimony is to be believed, there can be no doubt but that GRISS acted in self-defense, having "intentionally" aimed the gun and then having pulled the trigger in order to "stop" AMMIRATA because he believed both himself and his mother to be in immediate "danger of serious bodily harm."

'Thus, the District Court did not even deem it appropriate to dignify the absurd notion, set forth by GRISS below, that GRISS may have acted "negligently," thus precluding the propriety of a declaratory action as a vehicle to decide this "factual issue." Reading between the lines, it seems far more plausible that GRISS may have used unreasonable force, in view of the fact that AMMIRATA was completely unarmed, thus taking this case out of the realm of self-defense, but resulting in the same denial of coverage under the Aetna policy for "intentional acts."

(APP 103). As GRISS stated: "My intention was to stop Frank Ammirata before he killed my mother and myself."

(SR 56).

> You don't pull a gun unless you intend to use it.
>
> ...
>
> You don't produce a gun, whether you point it or anything else unless, you're going to use it.

(SR 86-87).

> [Upon being asked "was it your intention to use the gun in your self-defense?"]
>
> I was there to defend my mother and myself period.
>
> [Upon being asked "your use of the gun was also in your own self-defense, correct?"]
>
> As well, yes.

(SR 101).

Accordingly, it would be absurd to argue that GRISS' actions were anything but in self-defense and intentional. Based upon the uncontroverted deposition testimony adduced below, one would have to take leave of one's senses to conclude that this shooting was an accident or the result of negligent conduct. If GRISS had intended merely to frighten AMMIRATA, he could have fired at the ground or into the air. He did neither. Instead, he fired in the direction of FRANK AMMIRATA'S head with what might, in other circumstances, be termed commendable accuracy. It is clear that GRISS most certainly did intend to kill or at least injure AMMIRATA. GRISS' rather lame assertion that he was ''surprised when the gun went off" (SR 56) is meaningless in view of his testimony

when taken as a whole. This assertion is also in direct conflict with his subsequent testimony that "you don't pull a gun unless you intend to use it." (SR 86). A party should not be permitted to modify his position as the occasion may indicate to be expedient in order to evade the consequence of his deposition testimony for summary judgment purposes. See, Ellison v. Anderson, 74 So.2d 680 (Fla. 1954); Inman v. club on Sailboat Key, Inc., 342 So.2d 1065 (Fla. 3d DCA 1977); McKean v. Kloeppel Hotels. Inc., 171 So.2d 552 (Fla. 1st DCA 1965).

This case is virtually indistinguishable from Marshall II and Clemmons, and the decision of the Third District Court of Appeal must be quashed. The Summary Final Judgment entered by the trial court must be affirmed.

CONCLUSION

Based upon the foregoing reasons and authorities, the Appellant respectfully requests that the Third District Court of Appeal's reversal of the trial court's granting of the Summary Final Judgment on AETNA's Amended Complaint for Declaratory Judgment be quashed and the Summary Final Judgment on AETNA'S Declaratory Action be affirmed in all respects.

Respectfully Submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 29th day of January, 1990, to: Andrew J. Anthony, Esquire, LAW OFFICES OF ANDREW J. ANTHONY, 301 Almeria Avenue, Suite #3, Coral Gables, Florida 33134; Norman Segall, Esquire, SEGALL & GOLD, 1570 Madruga Avenue, Suite #211, Coral Gables, Florida 33116; and to Gordon J. Evans, Esquire, LIGMAN, MARTIN & EVANS, 230 Catalonia Avenue, Coral Gables, Florida 33134.

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