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 RESPONDENT JACK GRISS

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STATEMENT OF THE CASE AND OF THE FACTS

CASE

Respondent submits that there is no conflict with the recent decision in State Farm Fire and Casualty Company v. Marshall, **14** FLW 599 (Fla. December **22, 1989).** Marshall was not a Summary Judgment case, as is the present action. In fact, Marshall was decided only after a trial. In the present action, there has been no trial and it is the procedural error of granting a Summary Judgment at this stage of the preceedings which was reversed by The Third District Court of Appeal.

AETNA'S essential argument is that all shootings are **per se** intentional and that under no view of the facts could the shooting death of FRANK M. AMMIRATA be described as negligent. Defendant believes this is a question of fact, one which should not have been summarily determined by the trial judge.

The decision in State Farm Fire and Casualty Company v. Marshall, 14 FLW **599** (Fla. **1989)** holds 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. This decision resolved the conflict between Clemmons v. American States Insurance Company, **412** So.2d **906** (Fla. 5th DCA **1982)** and Marshall v. State Farm Fire and Casualty Company, 534 So.2d **776** (Fla. 4th **DCA** 1988). The Marshall holding is inapplicable in this instance because the issue for issuance coverage purposes is whether the homicide was a negligent

homicide. The Marshall case never held that coverage would not be afforded if the homicide were negligent. The reversal of the Summary Judgment is therefore correct and the opinion of the Third District Court of Appeal in Griss v. Aetna Casualty and Surety Company, **14** FLW **2793** (Fla. 3rd DCA **1989)** should be affirmed.

For purposes of this appeal, the Petitioner will be referred to as "AETNA" and the Defendant as "GRISS". References to the Record will be designated by the symbol **[R].** The **symbol** [SR.] will refer to the Supplement to the Record (consisting of the depositions of Jack and Agnes GRISS).

On September **17,** 1987, a Complaint for a Wrongful Death was filed by the Personal Representative of the Estate of FRANK M. AMMIRATA against GRISS [R. 4-61. The action arose out of the shooting death of FRANK M. AMMIRATA which occurred on September 21, **1985.** The Complaint sought damages for both the intentional and negligent acts of GRISS. The suit was filed in the 11th Judicial Circuit in and for Dade County, Florida, bearing Case No. **87-24255,** and is styled DENYSE AMMIRATA, as Personal Representative of the Estate of Frank M. AMMIRATA, deceased and Individually, and FRANK M. AMMIRATA, JR. vs JACK GRISS.

Subsequent to the filing of the Complaint for Wrongful Death, AETNA filed a Complaint against GRISS for Declaratory Relief. [R. **1-26].** The Complaint for Declaratory Relief asked the Court to determine the rights, duties and liabilities of AETNA under its homeowner's policy issued to GRISS for the acts

committed by GRISS on the night of September 21, 1985.

After the initial Complaint for Declaratory Relief was dismissed, AETNA amended its Complaint for Declaratory Relief and specifically requested enforcement of an exclusion-from-coverage provision contained in the policy. The exclusion appears on page 9 in sub-paragraph 1 under the section labeled "exclusions". It provides that:

> Coverage E - Personal Liability and Coverage F - Medical Payments to others do not apply to bodily injury or property damage:
>
> (a) Which is expected or intended by the insured. [R. 16].

AETNA filed its Motion for Summary Final Judgment on March 23, 1989. [R. 110-1621. The Trial Court entered the Final Summary Judgment on May 1, 1989. [R. 181-1821. When the Trial Court entered the Final Summary Judgment in favor of AETNA, it ruled, as a matter of law, that GRISS acted intentionally when he shot and killed AMMIRATA on the night of September 21, 1985. In addition, the Trial Court ruled that AETNA did not have any responsibility to provide coverage to GRISS nor any responsibility to defend GRISS in the wrongful death action brought against him by DENYSE AMMIRATA, as Personal Representative of the Estate of FRANK M. AMMIRATA, deceased, and Individually, and FRANK M. AMMIRATA, JR.

GRISS then appealed the Summary Final Judgment entered in favor of AETNA. On Appeal, GRISS argued that the trial Court erred in granting the Summary Final Judgment in favor of AETNA because the intentional acts exclusion in the AETNA policy of

insurance did not constitute a bar to coverage for an act of self-defense and because the issue of whether the shooting was negligent or intentional was not a matter of insurance policy construction.

Citing to Marshall v. State Farm Fire and Casualty Company, 534 So.2d 776 (Fla. 4th DCA 1988), the Third District Court of Appeal reversed the Summary Final Judgment entered in favor of AETNA.

FACTS

The Petitioner has omitted certain crucial facts from the statement of facts in his initial brief and therefore, the Respondent must present his own statement of the facts.

Beginning in May of 1985, FRANK M. AMMIRATA commenced his verbal assaults against GRISS. [SR. 13, 161. Once a month, AMMIRATA would call GRISS at home to threaten and harass him. [SR. 16]. GRISS knew that AMMIRATA had an extremely violent nature and owned a number of guns. [SR. 39]. GRISS was also aware that AMMIRATA'S violent nature had previously led to numerous skirmishes with the police, as well as verbal and physical altercations with neighbors and business customers.

The barrage of verbal threats came to a head on the night of September 21, 1985. At approximately 8:45 p.m., AMMIRATA phoned the GRISS house. [SR. 44]. Unlike the prior phone calls, which GRISS dismissed as bluffing on the part of AMMIRATA, the phone call of September 21, 1985, was markedly different. AMMIRATA threatened not only GRISS, but also his mother and in fact entered the conversation with the threat:

"I'm coming over and I'm taking you both out.'' [SR. 451.

Approximately forty-five minutes after AMMIRATA issued his threat, he stormed into the GRISS' home. After GRISS' mother opened the front door, AMMIRATA barged in and shoved her out of his way. According to Mrs. Griss, AMMIRATA had foam coming out of the sides of his mouth. [SR. 1273.

Mrs. Griss attempted to calm AMMIRATA down and talk to him, but AMMIRATA continued ranting and raving and screaming numerous obscenities at Mrs. Griss. He then grabbed her by the shoulders and pushed her toward the sliding glass doors at the rear of the house. [SR. 46-47]. With AMMIRATA holding her by the shoulders, Mrs. Griss opened the sliding glass doors and called out to Griss to advise him that AMMIRATA was now in the house. [SR. 47].

Immediately, GRISS became concerned for his mother's safety. This was a seventy-four year-old woman who was still recuperating from a broken hip. Her hip was broken on July 9, 1985, when DENYSE AMMIRATA, the victim's wife knocked Mrs. Griss down and left her lying helplessly on the floor. [SR. 19].The phone call, AMMIRATA'S appearance at the house, and Mrs. Griss' frail condition placed GRISS in immediate fear for not only his own safety but also the safety of his mother.

Immediately after his mother called out to him, GRISS got up from where he had been sitting in the back yard and began walking slowly toward the house. GRISS kept an eye on AMMIRATA to see whether he was carrying a weapon. GRISS did not draw his gun at that point because AMMIRATA was still holding on to Mrs. Griss. As GRISS opened the sliding glass door to enter the house, AMMIRATA threw Mrs. Griss away from him and charged directly at GRISS. GRISS saw only the "eyes of a maniac." [SR. 52]. In an instinctive reaction, he pulled his gun and shot AMMIRATA. [SR. 53].

According to GRISS' deposition testimony. He was

"surprised when the gun went off"..."because he didn't consciously pull the trigger." [SR. 56-57]. He was merely reacting to an attack on his life. He stated that he pulled the trigger instinctively and the gun just went off when AMMIRATA lunged at him.

GRISS testified that he "never had an intent to do anything outside of stop him [AMMIRATA]. That was the only thought in my mind the entire time, was I have got to stop him before he kills mother too." [SR. 58]. In response to a specific question as to whether he intended to injure AMMIRATA when he pulled the trigger, GRISS stated that "I really didn't think one way or the other. The only thought in my mind was that I had to stop him before he kills mother and me. I never thought, never consciously did I think I'm going to shoot him, much less anything else." [SR. 91-92].

Even though GRISS did not actually see a weapon on AMMIRATA'S person on the night of the shooting, he was fully aware that AMMIRATA owned several guns. In fact, he knew that AMMIRATA always carried a Saturday night special under the seat of his car. Once he became aware that AMMIRATA was in his house he assumed that AMMIRATA was armed and that he was there specifically to carry out the threats he had made earlier on the phone.

SUMMARY OF ARGUMENT

The Respondent believes that only in the event that a jury finds that GRISS intended to harm FRANK M. AMMIRATA while committing an act of self-defense, the a judgment in GRISS'S favor may be in direct conflict with the recent Marshall decision. If, on the other hand, the fact-finder were to find that GRISS'S shooting of AMMIRATA was negligent and not intentional, then there would be no conflict and no basis for jurisdiction under Rule 9.030(a)(2)(A)(vi) of the Florida Rules of Appellate Procedure. The Respondent believes the matter cannot be resolved summarily by the trial court, and therefore the result reached by the District Court was correct.

In the event that the court finds against Respondent in this case, the Respondent believes that the matter should be remanded to the Third District Court of Appeal for determination of the other issues not reached by the District Court of when it reversed the Summary Final Judgment entered in favor of AETNA on the Amended Complaint for Declaratory Judgment.

In any event, the District Court of Appeal correctly reversed the trial court's entry of Summary Final Judgment in favor of AETNA on its Amended Complaint for Declaratory Judgment because genuine issues of material fact remained for determination by the trier fact when the Summary Final Judgment was entered.

This Court's recent decision in State Farm Fire and Casualty Company v. Marshall, 14 FLW 599 (Fla. December 22, 1989), is

factually distinguishable from the instant case. Marshall holds 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. Marshall specifically conceded that he intended to harm his assailant. No such concession is made in the instant case and therefore, the holding from Marshall is inapplicable.

If there is a finding by the jury that GRISS acted intentionally, and not negligently even if in self-defense, then the holding from Marshall would come into play. If, on the other hand, the jury determines that GRISS acted negligently, then Marshall would have no bearing on this case.

Not surprisingly, AETNA strenuously argues that the facts are frozen and there is no doubt that GRISS acted intentionally, albeit in self-defense, with the specific intent to cause harm to AMMIRATA. The Record is, however, replete with testimony from GRISS that he did not intend to harm his attacker, FRANK M. AMMIRATA. The testimony in the Record raises numerous different issues regarding the nature of GRISS' acts, including: whether he acted intentionally; whether he acted intentionally but in self-defense; whether he acted unintentionally; whether he acted unintentionally, but in self-defense; whether he acted negligently, and; whether he did not act negligently. **As** the record is to be reviewed in the light most favorable to the non-moving party, the existence of genuine issues of material fact in the record demonstrates that the District Court of Appeal

properly reversed the Summary Final Judgment.

Notwithstanding the District Court of Appeal's assertion that the 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, there were additional grounds requiring a reversal of the Summary Final Judgment. As the District Court found sufficient grounds to reverse the Summary Final Judgment, other matters were not reached.

Because a Declaratory Judgment action should not be used to determine fact issues upon which insurance coverage questions turn, the trial court erred in granting the Summary Final Judgment in favor of AETNA on its Amended Complaint for Declaratory Judgment. Vanquard Insurance Company v. Townsend, 544 So.2d 1153 (Fla. 5th DCA 1989). Petitioner admits that the language of the policy is clear and unambiguous. The only matters which AETNA sought determination of were factual matters upon which insurance coverage questions turned. A Declaratory Judgment is not the proper vehicle to make such a determination.

Based upon the foregoing, the decision of the District Court of Appeal must be affirmed.

ARGUMENT

THE DISTRICT COURT OF APPEAL'S RULING WAS PROPER WHERE THERE REMAINED GENUINE ISSUES OF MATERIAL FACT FOR DETERMINATION BY THE TRIER OF FACT AND WHERE THE ISSUE OF WHETHER THE SHOOTING WAS NEGLIGENT OR INTENTIONAL WAS NOT A MATTER OF INSURANCE POLICY CONSTRUCTION.

In State Farm Fire and Casualty v. Marshall, 14 FLW 599 (Fla. December 22, 1989), an "intentional act" exclusion in a liability insurance policy excluded coverage for an act of self-defense where the insured had a trial. The holding in Marshall recognized that a finding of fact must first be made before the coverage question could be determined. Marshall never held that a matter could be determined summarily as AETNA seeks to do under the present facts.

The Petitioner has already recited the facts set forth **by** this Court from the Marshall decision. For purposes of this proceeding, the most important fact is the concession **by** Marshall that "he intended to harm his assailant". Id. In addition, the jury found that Marshall had committed an intentional assault or battery on his assailant. These facts take the present case outside of the holding of Marshall and require affirmance of the District Court of Appeal's reversal of the Summary Final Judgment.

GRISS has never conceded that he intended to harm his assailant. To date, jury has never found that GRISS had committed an intentional act. In the absence of these key facts, the reversal of the Summary Final Judgment entered in favor of

AETNA was entirely correct.

The trial court entered the Summary Final Judgment based upon three pages of deposition testimony filed by the Petitioner, AETNA, in support of its Motion for Summary Final Judgment. The express admission of self-defense by GRISS does not appear on any of those pages. The evidence in the Record at that point, when viewed in the light most favorable to GRISS, clearly demonstrated the existence of genuine issues of material fact concerning GRISS' actions on the night of September 21, 1985.

The only way that AETNA stands to lose anything in this proceeding is if the trier of fact determines that GRISS negligently shot and killed FRANK M. AMMIRATA. The wrongful death Complaint filed against GRISS seeks damages for both the negligent and intentional acts of GRISS. Most certainly, the Plaintiff in the wrongful death action will argue that the shooting was done negligently. Not unexpectedly, AETNA contends that a person would have to take leave of one's senses to reach the conclusion that GRISS acted negligently. For purposes of this appeal, respondent does not see any point in engaging in speculation on what a jury may or may not do. The fact remains that the issue of whether GRISS acted negligently or intentionally is a matter best left for determination by a jury.

Marshall points out that the purpose for the intentional act exclusions appearing in insurance policies is twofold. In the first place, insurance companies set their rates based upon the "random occurrence of insurance events". Id. "Second,

indemnification for intentional acts would stimulate persons to commit wrongful acts." **Id.** For these reasons, this Court disagreed with Marshall's contention that pubic policy supports coverage because he was acting in self-defense, albeit intentionally.

This Court also rejected Marshall's argument that the public policy promoting self-defense is evidenced by Section 776.012, Florida Statute (1987), which authorizes the use of force in defense of one's person under certain circumstances. Marshall points out that:

> 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 to is self-defense. The difference between the two lies in the motive or purpose governing the acts; 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 act exclusions by a majority of courts. Marshall at 599.

This language again refers to a situation where the defender intends to harm his assailant. Unlike the situation in Marshall, **GRISS** does not contend that his actions were authorized because they were solely in self-defense. Instead, **GRISS'** own testimony is that he "never had an intent to do anything outside of stop him." He added "I never thought, never consciously did I think I'm going to shoot him, much less anything else." This testimony, viewed in the light most favorable to **GRISS,** raises, at the very least, a genuine issue of material fact as to **GRISS'** intent to cause harm to AMMIRATA.

Even the Clemmons decision recognized that the exclusion-from-coverage clause in the insurance policy is applicable only in those circumstances where the insured intends to cause harm to the person injured. The Fifth District Court of Appeal referred to a long line of cases which have held that "where the insured did not intend to cause harm to the person injured, such exclusion in insurance policies did not apply, even though the acts were intentional and the injuries reasonably foreseeable to result from the act." Clemmons at 908.

The exclusion relied upon by AETNA is identical to the exclusion appearing in the Marshall decision. AETNA admits that this exclusionary clause is plain and unambiguous. There is nothing in the Record nor any argument made to show that the Declaratory Judgment was used by AETNA to settle the meaning of ambiguous language in AETNA'S own insurance policy.

A Declaratory Judgment action should properly be used to settle the meaning of ambiguous language or clauses in an insurance policy and should not be used to determine factual issues upon which insurance coverage questions turn. Vanguard Insurance Company v. Townsend, 544 So.2d 1153 (Fla. 5th DCA 1989).

In the Townsend case, the insurer filed a Motion to Intervene in a personal injury suit, seeking to file a Complaint for Declaratory Relief to determine whether a shooting by an insured was an intentional act. If it was determined that the shooting was an intentional act, as opposed to a negligent one,

then coverage under the policy would be excluded. The trial court denied the insurer's Motion. The trial court's decision was affirmed by the Fifth District Court of Appeal. The trial court denied the insurer's Motion to Intervene because the insurer was asking the Court to determine factual issues upon which insurance coverage questions turned. The District Court of Appeal pointed out that the application of the intentional acts exclusion "rests on a fact finding as to whether the shooting was negligent or intentional. This is not a matter of policy construction. Accordingly, Declaratory Judgment suit is not the proper vehicle to make such a determination." Id. at 1155.

As previously pointed out, AETNA'S self-interest in the Ammirata v. Griss litigation is in direct conflict with its insured's interest. In all probability, AMMIRATA will press for a jury verdict based on negligence. AETNA will attempt to prove that the shooting was intentional and therefore, barred by the policy exclusion. As the District Court pointed out in Townsend, "whether the Declaratory suit is brought by the insurance company before or after the tort litigation against the insured, courts will not permit the insurance company to pre-empt the resolution of fact issues necessarily involved in both **suits."** Id. Moreover, **"a** surety with a duty to defend its insured which may sweep broader than its duty to indemnify, will not be permitted to litigate against its insured's interest." Id. at 1156.

Although the Third District Court of Appeal did not find it

necessary to reach this alternative argument supporting a reversal of the Summary Final Judgment, it is clear that the action for Declaratory Relief is not the proper vehicle for the determination of the issues involved herein.

There is no admission of an intent to harm by GRISS nor is a declaratory action the proper method to have factual matters determined and therefore, the reversal of the Summary Final Judgment by the Third District Court of Appeal must be affirmed.

CONCLUSION

Based upon the foregoing authorities and argument, the Respondent respectfully requests that this Court affirm the reversal of the Summary Final Judgment entered by the Third District Court of Appeal, with instructions to remand this case to the trial Court for further proceedings.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 15th day of February, 1990, to: The Law Offices of Howland & Krieger, 145 Almeria Avenue, Coral Gables, FL 33134; Norman Segall, Esq., SEGALL & GOLD, 1570 Madruga Avenue, Suite # 211, Coral Gables, FL 33116; and to Gordon Evans, Esq., LIGMAN, MARTIN & EVANS, 230 Catalonia Avenue, Coral Gables, FL 33134.

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