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.

REPLY BRIEF OF PETITIONER AETNA CASUALTY AND SURETY COMPANY

Law Offices of
Howland & Krieger
145 Almeria Avenue
Coral Gables, Florida 33134
Telephone Number: 305/446-1200

Attorneys for Petitioner
Aetna Casualty and Surety Company

TABLE OF CITATIONS

ARGUMENT

INTENT TO CAUSE HARM: The Respondent commences his Statement of the Case with the outlandish contention that it was the "procedural error of granting a Summary Judgment . . . which was reversed by the Third District Court of Appeal." (Respondent's Brief at 1). Wishful thinking aside, that court's opinion belies any indication that the court was concerned with anything other than "[t]he dispositive question [of] whether the use of deadly force in self-defense constitutes intentional conduct . . .". (SR 183). This was because GRISS admitted having acted in self-defense (SR 56, 86-87, 101), and there was no factual question with regard to GRISS' intent to cause harm.

GRISS urges that the record lacks some sort of requisite fact-finding or concession that he intended to harm FRANK AMMIRATA, now claiming that he only intended to "stop Ammirata" from harming GRISS and his mother. (Respondent's Brief at 7). This was the identical argument advanced in Clemmons v. American States Insurance Company, 412 So.2d 906 (Fla. 5th DCA 1982), wherein the insured testified that his intent was not to kill his aggressor, but merely to keep the aggressor from shooting him first with a shotgun. The court in that case directed a verdict for the insurance company, holding as a matter of law that the aggressor's shooting death was caused by the insured's intentional act. The appellate court affirmed.

As the Clemmons' court instructed, an insured's motive or

purpose in shooting is irrelevant, and must not be confused with "intent to cause harm" where an insured "intentionally discharg[es] a firearm while intentionally aiming toward another human being." Clemmons at 909-910. This issue was further put to rest by this Court in Marshall, wherein it was explained:

> 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 act exclusions by a majority of courts.

Marshall at 599 (emphasis added).[1]

GRISS seeks to distinguish his case on the basis that the insured in Marshall conceded that he intended to harm his assailant. However, it would have been preposterous for the insured in Marshall to have claimed otherwise, in view of the fact that he deliberately hit his assailant over the head with a gun which subsequently discharged. Likewise, neither can GRISS negate the presence of intent to cause harm to AMMIRATA after he admitted to having deliberately aimed and fired a pistol into his face. Whether GRISS' motive or purpose was merely to "stop" AMMIRATA, as he puts it, or whether he was instead propelled by pure aggression, his intent to cause harm would have been present in either scenario. While GRISS may have regretted the immediate result that was necessary in order for the act of self-defense to have achieved

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[1] See Petitioner's Initial Brief at pp. 13-16 for further discussion of the meaning of "intent to cause harm" and the irrelevancy of motive, notably the quoted passage from Clemmons found on page 13-14.

its intended ultimate purpose, it simply cannot be argued that he did not intend to cause harm along the way. Marshall and Clemmons were clearly not intended to create a distinction between those who act reluctantly in self-defense and those who do so with aggression; in either scenario, the insured is undeniably well aware that his actions are designed to cause harm to his attacker.

Accordingly, it is of no consequence that GRISS did not expressly concede his intent to cause harm in view of those facts which he did concede:

> (1) that he knew Ammirata to be a highly volatile and dangerous individual (see numerous record citations in Petitioner's Initial Brief at 4-5);
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> (2) that on the evening of September 21, 1985, Griss believed that Ammirata was armed and was on his way over to kill him (SR 39, 44-45, 48-49);
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> (3) that Griss intended to transfer the gun from under his mattress to the patio bar and subsequently into his back pocket (SR 85);
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> (4) that he intended to aim it toward the body of Frank Ammirata (SR 85-86);
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> (5) that substantial pressure was needed to fire the gun, which required a 12 to 16 pound trigger pull (SR 88);
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> (6) that Griss had received signicant training in the use of firearms (SR 86-87);
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> (7) that "you don't produce a gun, whether you point it or anything else unless, you're going to use it" (SR 86-87);
>
> (8) that Griss then shot Frank Ammirata point blank in the face as Ammirata advanced toward him, unarmed, in order to "defend [his] mother and [him]self." (SR 101).

It has never been AETNA'S "essential argument" that all shootings are per se intentional." (Respondent's Brief at 1).

However, the requirement of an express finding or concession that GRISS had the "intent to harm" AMMIRATA, here he already admitted to having intentionally aimed and fired a pistol into his face, would be an exercise in redundancy. The trial court was therefore eminently correct in finding as a matter of law that GRISS intentionally shot AMMIRATA in self-defense, placing his actions within the AETNA policy exclusion.

TEE PROPRIETY OF A DECLARATORY ACTION: The Appellant's assertion that the declaratory judgment action was wrongfully used as a vehicle "to determine fact issues upon which insurance coverage questions turn" is inaccurate. As a preliminary matter, it should be realized that procedurally, this case is no different from Marshall.

In Marshall, the assailant filed suit alleging that Marshall acted negligently, or in the alternative, that he acted intentionally. State Farm filed a separate petition for declaratory relief to determine its obligations under Marshall's homeowner policy, which contained an exclusion for "intentional acts." State Farm contended that because the assailant 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 summary final judgment in favor of State Farm. The district court reversed, but that decision was subsequently quashed by this Court in the most recent Marshall opinion.

Accordingly, it does not appear that the instant case presents a procedural abnormality, as it is virtually indistinguishable from the Marshall case. Respondent is thus correct to point out that the Third District Court of Appeal did not deem it necessary to address this alternative procedural argument. Further, the Appellant's cited case of Vanguard Insurance Co. v. Townsend, 554 So.2d 1153 (Fla. 5th DCA 1989) is inapposite. In Townsend, there were factual questions at issue which the court was being asked to apply to the policy exclusion, unlike the instant case, where self-defense was expressly admitted. Also, unlike Townsend, the wrongful death and declaratory actions in the instant case were consolidated for discovery purposes. Any reading of GRISS' deposition, in which self-defense was admitted, could only serve to compel a summary ruling on that issue in the wrongful death case. It would have thus been meaningless, subsequent to that deposition, to have required AETNA to await the outcome of the wrongful death case where there could have been only one result--a determination that GRISS acted in self-defense and hence, intentionally. A lawyer should not be compelled to pursue a completely useless course of conduct. Thomas v. State, 419 So.2d 634 (Fla. 1982); Brown v. State, 206 So.2d 377 (Fla. 1968); Birge v. State, 92 So.2d 819 (Fla. 1957) .

Additionally, at the time that the declaratory action was brought, there certainly existed an ambiguity or uncertainty with regard to the AETNA exclusion as applied to self-defense, by virtue of the then existing conflict between Clemmons and Marshall

(district court opinion). AETNA had the right to a judicial determination so as to ascertain its duties and obligations under the policy, given the admission of self-defense and the then existing conflict of authority.

As a final matter, had AETNA merely denied coverage in the wrongful death suit, questions would have immediately arisen as to whether AETNA could dispute coverage in a subsequent suit brought by GRISS for failure to defend, or whether AETNA could defend a later garnishment action should a judgment somehow be obtained against GRISS by claiming that GRISS' shot was negligent. AETNA could be bound by the wrongful death judgment, assuming there was no collusion or fraud. Columbia Casualty Co. v. Hare, 116 Fla. 29, 156 So.2d 370 (1934) (surety bound by issues settled in prior suit against insured by collateral estoppel); Cunningham v. Austin Ford, Inc., 189 So.2d 661 (Fla. 3d DCA 1966), cert.discharged, 198 So.2d 829 (Fla. 1967); Westinghouse Electric Corporation v. J.C. Penny Co., 166 So.2d 211 (Fla. 1st DCA 1964); American Fire and Casualty Co. v. Blaine, 183 So.2d 605 (Fla. 3d DCA 1966); Restatement of Judgments Section 57; 31 Fla.Jur. Insurance Section 841; 7C Appelman, Insurance Law and Practice, Section 4685.01, (Berdal Ed. 1979). Even under the present scenario in which AETNA defended GRISS, providing independent defense counsel because of the conflict, AETNA may be bound by the issues determined in the wrongful death suit, notwithstanding a non-waiver agreement or a reservation of rights. See Grain Dealers Mutual Insurance Company v. Quarrier, 175 So.2d 83 (Fla. 1st DCA 1965); Centennial Insurance

Company V. Tom Gustufson Industries. Inc., 401 So.2d 1143 (Fla. 4th DCA 1981) review denied, 412 So.2d 471 (Fla. 1982). There are numerous examples in Florida jurisprudence that AETNA, as a surety and "privy" to its insured, may be bound by collateral estoppel or res judicata as to issues tried in the tort suit in subsequent coverage litigation. See, e.g. Florida Farm Bureau Mutual Co. V. Florida Fruit and Vesetable Association, 436 So.2d 1052 (Fla. 4th DCA 1983) (surety bound in subsequent litigation by res iudicata); Columbia Casualty Company v. Hare, supra (surety bound by issues settled in prior suit against insured by collateral estoppel); Jones v. Bradley, 366 So.2d 1266 (Fla. 4th DCA 1979) (insured bound by res iudicata). Even the Townsend case, cited by GRISS, purports to make no ruling on "the legal issue of whether collateral estoppel or res iudicata will bar [the insurance company] in a subsequent case." Townsend at 1474.

Under the foregoing circumstances, AETNA was placed in a position in which it was necessary to have preserved its position of non-coverage, in the extremely unlikely event of a determination in the wrongful death suit that GRISS was somehow negligent. A declaratory judgment action was therefore appropriate in this case, and the summary final judgment granted by the trial court should be affirmed and the district court opinion quashed.

Respectfully submitted,

LAW OFFICES OF HOWLAND AND KRIEGER

By: David R. Howland

DAVID R. HOWLAND

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 12 day of March, 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.

LAW OFFICES OF
HOWLAND & KRIEGER
145 Almeria Avenue
Coral Gables, FL 33134

By: David R. Howland
DAVID R. HOWLAND