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IN THE SUPREME COURT OF FLORIDA

PRUDENTIAL PROPERTY AND
CASUALTY COMPANY,

Petitioner,

vs.

LARRY S. SWINDAL et al.

Respondent

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CASE NO. 80,217

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Petitioner, PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY, is referred to as "PRUDENTIAL".

Respondent, LARRY S. SWINDAL, is referred to as "LARRY SWINDAL."

NICHOLAS CASTELLANO, (Prudential's insured) is referred to as "NICHOLAS CASTELLANO".

References to the record on appeal are designated by the prefix "R".

As it is referred to repeatedly, the decision on appeal is referred to as "SWINDAL v. PRUDENTIAL".

STATEMENT OF FACTS AND OF THE CASE

The "facts" of this case have been set out by the Second District Court of Appeals. SWINDAL V. PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY, 559 So. 2d 1314 (Fla. 2d DCA 1992) (hereinafter "SWINDAL v. PRUDENTIAL"). Petitioner has set out facts. LARRY SWINDAL believes it is important that certain of the facts be presented for a more balanced review of them.

It is undisputed that NICHOLAS CASTELLANO and LARRY SWINDAL had previous bad relations (R-200). On the day the shooting occurred, they had attended a voluntary citizens dispute conference meeting to no avail. (R-207). Later, when NICHOLAS CASTELLANO observed LARRY SWINDAL drive through his driveway he determined to follow him. (R-200, Lines 15-22)

NICHOLAS CASTELLANO first obtained his automatic pistol to take with him. (R-206, Lines 10-11) NICHOLAS CASTELLANO has given several reasons for taking the pistol. (R-216, lines 19-20; R-283, para. 6) NICHOLAS CASTELLANO was not angry, however. (R-216, lines 17-19)

NICHOLAS CASTELLANO and LARRY SWINDAL stopped their cars when they met on the roadway. NICHOLAS CASTELLANO exited his car carrying his pistol in open view in his hand as, he noted in his Affidavit (R-283 para. 6) "a precaution".

There has been no testimony or proof that NICHOLAS CASTELLANO's pistol was pointed at LARRY SWINDAL or exhibited to him in any threatening manner. There is likewise no proof of any

threatening language or any other words passing between the two men.

When NICHOLAS CASTELLANO approached LARRY SWINDAL's car, he saw an object which he thought was a weapon. NICHOLAS CASTELLANO reached into LARRY SWINDAL's car to remove this "weapon" and in pulling on the object, somehow the pistol discharged striking LARRY SWINDAL in the head causing very severe and permanent bodily injury to LARRY SWINDAL.

The facts surrounding the approach by NICHOLAS CASTELLANO to LARRY SWINDAL's car and the firing of the pistol are disputed, contradictory and are subject to several inferences. The carrying of the pistol by NICHOLAS CASTELLANO has been explained, in several different ways and inferences from the explanations are different. (R-210; R-283 para. 6, 10, 11, 12 and 13)

The statements in the record as to NICHOLAS CASTELLANO's intent to frighten LARRY SWINDAL (R-210) or to "see how he felt" (Castellano Tr. 46) were both made in response to questions as to why he obtained the pistol and took it with him when he left his home. NICHOLAS CASTELLANO was not asked why he took the pistol from his car to walk over to LARRY SWINDAL's car other than in NICHOLAS CASTELLANO's affidavit where he stated he did so as a precaution. (R-283, para 6).

It is submitted that the differing facts establish a dispute as to why the pistol was taken when NICHOLAS CASTELLANO exited his car to go to LARRY SWINDAL's car. There is likewise a dispute over the nature of the firing of the pistol Was it intentional or

accidental? In SWINDAL v. PRUDENTIAL the Court ruled there was such a dispute so reversed the Summary Judgment and remanded for trial. With such factual disputes, it is submitted that it was improper and premature for the Court in SWINDAL v. PRUDENTIAL to determine as a matter of law that an assault or assault with a deadly weapon occurred. 599 So.2d at 1318.

PRUDENTIAL argues that NICHOLAS CASTELLANO's affidavit is a contradiction of previous testimony. It may be an explanation of prior testimony but a close reading will show it is not a contradiction.

LARRY SWINDAL asserts that the Affidavit (R-283) is a partial explanation of earlier statements and is directly concerned with NICHOLAS CASTELLANO's intentions at the scene of the meeting as compared to his thoughts or intentions when he obtained the pistol from his home prior to the meeting. All statements of NICHOLAS CASTELLANO can be true but his earlier intentions can very easily have changed prior to the pistol accidentally discharging or at the time of the meeting when the pistol was carried by NICHOLAS CASTELLANO to LARRY SWINDAL's car (R-283, para. 6)

It is not the duty of this Court to review disputed facts or varying inferences from undisputed facts and make a determination as to which is true. This is the function of the trial jury.

Both times this matter has been reviewed by the Second District, in SWINDAL v. PRUDENTIAL and PRUDENTIAL PROPERTY & CASUALTY INSURANCE COMPANY V. CASTELLANO, 571 So.2d 598 (Fla 2d DCA 1990.), the lower Court noted the need for a determination of

disputed facts. In SWINDAL v. PRUDENTIAL, the Court noted difficulty in discerning the correct outcome but held, "... we reverse because there is a disputed question of fact whether Mr. Castellano fired this gun intentionally or by accident". The Court correctly focused on the issue of whether firing the gun was intentional. In the first appeal, the Second District stated that, upon reversing, that the fact finder must determine whether "the injury was caused by a negligent or an intentional act". 571 So.2d 598, 1599 (Fla. 2d DCA 1990).

PRUDENTIAL's policy language dictates the focussing on the intent of the act which causes the bodily injury. Paraphrasing the policy language by removing irrelevant words states that coverage does not apply to:

"Bodily injury...which is expected or intended by the insured."

It is somewhat of a misnomer to state the language excludes "intentional" acts which result in bodily injury. PRUDENTIAL even recognizes this in its Initial Brief beginning at page 11. The bodily injury must be intended or expected. It would perhaps be more appropriate to term this clause as excluding "intentional injury".

The injury in this case resulted from the firing of the pistol. The question to be determined is, as stated in SWINDAL v. PRUDENTIAL, was the gun discharged intentionally or accidentally. This is a jury question and should be determined by a jury, not this Court.

The facts leading up to the firing of the pistol are all

relevant and the inferences which can be reached from those facts are relevant. All should be allowed to be presented to a jury for its determination.

PRUDENTIAL's argument that the facts support only one conclusion is simply and factually wrong. NICHOLAS CASTELLANO's testimony creates the issues which cannot be ignored or decided by this Court. The dispute was aptly stated in PRUDENTIAL's Initial Brief beginning on page 4 thereof, to wit:

"The injury from an intentional act may or may not be covered. If an injury was intended, it is not covered."

It was unstated by PRUDENTIAL but obviously implied that if an injury was unintended, it is covered. No intentional act caused bodily injury to LARRY SWINDAL. NICHOLAS CASTELLANO has never testified he intended to cause bodily injury. NICHOLAS CASTELLANO has stated he did not intend or expect LARRY SWINDAL to be injured.

(R-243)

After its ruling that there was a factual dispute to be determined by a trier of fact, the SWINDAL V. PRUDENTIAL, opinion went on to analyze this Court's and other Court's opinions regarding "intentional act" exclusions, if child molestation cases should apply to the facts in this case and if the "inevitably flows" test applied or not.

The "inevitably flowed" test, LANDIS V. ALLSTATE, 546 So.2d 1051 (Fla 1989) should only apply to limited factual situations. In the instant case, perhaps it could be argued that such a struggle where one person has a gun in his hand would usually or probably result in some sort of injury. It is submitted that such

a struggle would not "inevitably" lead to an injury. Clearly, if a child is sexually molested, such conduct inevitably causes injury and the injury thus "inevitably flows" from the intentional molestation.

It would appear then that the "LANDIS" inevitably flows test would not apply to the instant fact situation.

In that regard, even if such a test was appropriate here, the disputed facts of the intentional/accidental shooting would have to be resolved prior to the rules application. In LANDIS the "insureds" had admitted the molestation but were arguing that the injury was not caused by the molestation. Here, there is a dispute as to the commission of the "intentional" act. If a jury determines that NICHOLAS CASTELLANO shot LARRY SWINDAL intentionally, thereby causing intentional injury, then the exclusion would seem to apply. But any determination of intent must first be made by jury on the disputed facts and the several inferences arising therefrom.

LARRY SWINDAL submits that the question posed by the Court in SWINDAL V. PRUDENTIAL is not dispositive of this case due to the continued disputed facts as found in the actual ruling of the Court. The question notes that the injury arises out of an "incident involving an intentional tort...". Whether or not there was an intentional tort is disputed and is not supported by the record. Further the Court does not set out what it feels the "intentional act" is from which the injuries "inevitably flow". Is the intentional act the obtaining of the pistol, taking the safety

off, taking it from the car, carrying it in plain view to LARRY SWINDAL's car, is it the act of reaching into the car or the act of pulling on the object in the car? Without knowing what act the District Court means in using the term it is impossible to accurately respond to the question. It is submitted however, that none of the listed "intentional" acts caused any injury or was such an act that injury would inevitably occur. The firing of the pistol did cause injury but is not shown to have been intentional.

LARRY SWINDAL does not agree that this case presents an important question of great public importance. Some of the facts and inferences herein are in dispute and must be resolved before any decision can be made herein. Once the facts and inferences are decided, it is unlikely that such factual findings would ever be the subject of an appeal. The issues raised by PRUDENTIAL here are premature. There is no present dispute regarding the policy language or its application as such. The present issue is whether there are factual issues remaining or not. LARRY SWINDAL argues there are. The trial Court disagreed and entered Summary Judgment. The Second District found there are factual issues and reversed the trial Court. The question posed by the Second District is an academic one not yet "ripe" for response.

LARRY SWINDAL's position is that this Court should refuse to respond to the question and allow the case to be sent back to the trial Court for trial.

ISSUES ON APPEAL

- I. THE INSURED'S ACTIONS IN THIS CASE ARE IN DISPUTE AS ARE THE INFERENCES FROM UNDISPUTED FACTS REQUIRING A TRIAL HEREIN WHEREIN THE QUESTION OF THE INTENTIONAL OR EXPECTED NATURE OF THE BODILY INJURY WILL BE DETERMINED.

- II. DOES THE "INTENTIONAL ACT" EXCLUSION IN A TYPICAL HOMEOWNERS INSURANCE POLICY EXCLUDE COVERAGE FOR INJURIES ARISING OUT OF AN INCIDENT INVOLVING AN INTENTIONAL TORT IF THE INJURIES "INEVITABLY FLOW" FROM THE INSURED'S INTENTIONAL ACT, BUT ARE "PROXIMATELY CAUSED" BY A NEGLIGENT ACT.

- III. THIS COURT SHOULD NOT ACCEPT JURISDICTION.

SUMMARY OF ARGUMENT

There are disputed facts and inferences from undisputed facts remaining in this case which must be heard and decided by a jury. This was the District Court's ruling in SWINDAL V. PRUDENTIAL and part of its decision in PRUDENTIAL V. CASTELLANO.

The remaining disputed facts cause this case to be one of little public importance. If the jury determines the shooting, hence the bodily injury, was intentional that will probably end the matter. A jury decision that the shooting was unintentional or unexpected will also probably end the matter as to the declaratory action.

PRUDENTIAL sensationalizes the disputed facts with its stated Issue I including that NICHOLAS CASTELLANO chased down and shot LARRY SWINDAL. PRUDENTIAL may argue its conclusion to a jury. This does not establish that PRUDENTIAL's conclusions are the only conclusion that can be drawn. LARRY SWINDAL submits that a jury could, and will, find that LARRY SWINDAL's bodily injury was not intended or expected by NICHOLAS CASTELLANO. This is what NICHOLAS CASTELLANO has testified to and included in his Affidavit. (R 283; R-199, lines 19-22)

The cases cited by Plaintiff are all distinguishable on the facts, law or policy language. Without exception, in each case where the exclusion was found to apply, the insured intentionally did the act which caused the injury. Some of the insureds said they did not intend to injure. But in each of those cases, the

undisputed facts were that the gun was intentionally aimed or pointed at the injured party and then intentionally fired. Here, NICHOLAS CASTELLANO intentionally had the pistol in his hand but has denied the gun was aimed at or intentionally fired. There are inferences or testimony which could lead to a jury determination contrary to LARRY SWINDAL's position or could lead to a determination in favor of LARRY SWINDAL's opinion. Such a decision is made by a jury and not by this Court or an Appellate Court. This Court should refuse to review the question or the lower Court's decision should be affirmed, the question not responded to and this case sent back for trial of the issues.

ARGUMENT

- I. THE INSURED'S ACTIONS IN THIS CASE ARE IN DISPUTE AS ARE THE INFERENCES FROM UNDISPUTED FACTS REQUIRING A TRIAL HEREIN WHEREIN THE QUESTION OF THE INTENTIONAL OR EXPECTED NATURE OF THE BODILY INJURY WILL BE DETERMINED.
 - A. THIS COURT'S DECISIONS IN LANDIS AND MARSHALL DO NOT PRECLUDE COVERAGE UNDER THE FACTS OF THIS CASE.

The first issue here is not the same as PRUDENTIAL's. It is asserted that this is the proper issue to be ruled upon here. It is disputed that NICHOLAS CASTELLANO chased down and shot LARRY SWINDAL. It is not literally true as it is not totally true. The impression given is that NICHOLAS CASTELLANO pursued a running LARRY SWINDAL and, upon catching him, intentionally shot him. This impression is wrong and PRUDENTIAL knows it.

There is no testimony that the shot which injured LARRY SWINDAL occurred when NICHOLAS CASTELLANO was trying to "frighten his victim". There may have been such intent earlier. There may have been such intent just prior to the shooting. NICHOLAS CASTELLANO has testified and stated that the pistol discharged accidentally, unintentionally and unexpectedly. (R 283; R-199 lines 17-22)

PRUDENTIAL argues on page 10 of its Initial Brief that its simplest argument would be to seek a literal interpretation of this Court's language in the LANDIS case where this Court said "...all intentional acts are properly excluded by the express language of

the homeowners policy." 545 So.2d at 1053.

This "simple" argument would not be applicable to the instant case regardless of the Plaintiff's position. First, the policy language in LANDIS is substantially different. The Allstate Policy in LANDIS states in pertinent part:

"... 1. We do not cover bodily injury intentionally caused by an insured person."

This is the true intentional act exclusion. PRUDENTIAL's policy excludes intentional or expected injury.

Second, in LANDIS it was undisputed that intentional acts of child molestation had occurred. Here the intentional nature of the injury, whether intentional or accidental is in dispute.

Allstate's insured's efforts to argue that there was no intent to cause harm resulted in this Court's ruling that harm inevitably flows from molestation. To do the act is to cause the harm. Here, there is no intentional act from which injury would "inevitably flow".

LANDIS is therefore distinguishable from the instant case.

LARRY SWINDAL agrees with PRUDENTIAL that not every intentional act of an insured which results in an injury is excluded under the subject policy. Initial Brief, page 12.

PRUDENTIAL's Brief at page 12, includes several scenarios using driving situation and whether each would qualify as intentional or not. The difficulty here is that the dispositive facts in the instant case are disputed. None of these scenarios can work if there is uncertainty about the intent of the driver. NICHOLAS CASTELLANO has testified and sworn that the pistol was

fired accidentally, unexpectedly and unintentionally. None of the case scenarios used or the cases cited involved disputed facts. These facts must be determined first by a jury before the appropriate legal principle can be applied.

It is difficult to respond to some of the arguments and cases because of the unresolved factual disputes. However any case cited where the bodily injury resulted from an admitted intentional act should be distinguished on that basis alone.

The SWINDAL v. PRUDENTIAL opinion seemed to concentrate on this court's discussion in LANDIS as to bodily injury which "inevitably flows" from intended acts. As noted, the LANDIS Court was dealing with a different exclusionary clause involving bodily injury intentionally caused by the insured.

It is submitted that there is no bodily injury that "inevitably flows" from any of the admitted "intentional" acts which occurred in the instant case. Perhaps it could be argued that an injury could possibly occur or even probably occur but none of this approaches "inevitably". That would require a holding that the admitted factual situation always results in injury when common sense would dictate that such is not the case.

PRUDENTIAL argues that Florida law should not encourage an insured to do some of the admitted acts of NICHOLAS CASTELLANO. This ignores the position that the bodily injury was not intended. Florida law, to knowledge, does not encourage anyone to intentionally injury someone but if the injury is accidental then there should be coverage. Even the alleged "self serving

assertion" of a party to a law suit is, standing alone, in fact evidence to be weighed with all the evidence by a jury to determine disputed facts. It would not be appropriate for this Court to decide these facts of inferences. Such is a jury's function.

Much is made by PRUDENTIAL of the supposed "assault" by NICHOLAS CASTELLANO. The same point is seemingly accepted by the Court in SWINDAL V. PRUDENTIAL. Neither the Court nor PRUDENTIAL has stated where or when this "assault" occurred. It could not have occurred when NICHOLAS CASTELLANO took his pistol from his home to his car. It is admitted it could have occurred when NICHOLAS CASTELLANO left his car and walked over to LARRY SWINDAL's car. However, there simply is no proof that an "assault" occurred at that time. There is no showing that any threatening gestures were made, no threatening words, no "putting in fear", etc. Such is a requirement of an "assault" or an assault with a deadly weapon. See 784.011 and 784.021 (1989), Florida Statutes.

The MARSHALL case is also distinguishable. STATE FARM FIRE AND CASUALTY COMPANY V. MARSHALL, 554 So.2d. 504 (Fla. 1989). It is clear that the insurance in MARSHALL excluded bodily injury intentionally caused by the insured. The issue in MARSHALL concerned self defense. Whether self-defence took an admittedly intentional act out of the exclusionary language. There were differing District Court opinions. This Court accepted jurisdiction and ruled that an intentional act even if done in lawful self defence still fell within the intentional act exclusion.

The result in MARSHALL would not change if the insured had chased the intruder and intentionally shot him. It is submitted however that there would have been no Summary Judgment in MARSHALL to affirm if the insured testified that he tripped and the gun fired accidentally. Or if the evidence showed that the insured threw his pistol on the floor to be able to push the intruder away and the gun fired when it hit the floor. Nor would there have been a Summary Judgment under any other factual situation where there was a dispute as to the nature of the act whether intentional or unintentional. In MARSHALL, this Court ruled that when bodily injury is caused by an intentional act the exclusion would apply even if the act was in lawfull self-defense. Here, there is an undetermined issue as to whether the shooting was accidental or intentional therefore MARSHALL does not yet apply. It will if the jury determines the shooting was intentional. It will not if the jury determines the shooting was accidental. This Court cannot make such a decision.

There is no mockery of MARSHALL or the law if the jury finds on disputed evidence that the shooting was unintentional and not within the exclusion. This is the usual method of determining disputed facts. However strident PRUDENTIAL tries to make its point, that truth remains and a jury should decide the issue.

Similarly, there is no proof that the touching which took place constituted a "battery" contrary to what is urged by PRUDENTIAL. Not all touching is a battery nor was this point raised below.

PRUDENTIAL and the lower Court may not have been aware that "bodily injury" is defined in the subject policy at page 3. (R-7) The pertinent words of the definition are "1. "Bodily Injury" means bodily harm, sickness or disease...". Black's Law Dictionary defines "Bodily Harm" as:

"Any touching of the person of another against his will with physical force, in an intentional, hostile, and aggressive manner, or a projecting of such force against his person. People v. Moore, 50 Hun, 356, 3 N.Y.Supp. 159. Any impairment of physical condition of another's body or physical pain or illness, but does not include minute disturbance of nerve centers caused by fear, shock or other emotions. Clark v. Associated Retail Creditmen of Washington, 70 App.D.C. 183, 105 F.2d 62, 64." Black's Law Dictionary, Revised Fourth Edition.

It is submitted that this definition does not include an "assault" of any nature as such by its very terms do not include bodily harm but rather fright etc. Fright may be the basis of a tort but there is nothing in this record to show that any "assault" caused any bodily injury as that is defined in the subject policy. Of course, to come within the subject exclusion, the bodily injury must also be intended or expected. NICHOLAS CASTELLANO has denied any such intent or expectation. (R-283).

There is no basis in fact for PRUDENTIAL's assertion that NICHOLAS CASTELLANO "had to expect some harm to LARRY SWINDAL as a matter of law." Initial Brief page 14. This incident cannot be truly compared to a sexual assault on a child. The child molester's intentional act of molestation "inevitably" results in harm to the child. There is simply no way to compare the molester's intentional act and NICHOLAS CASTELLANO's asserted

intent to frighten particularly where there is no proof the intent was carried out. NICHOLAS CASTELLANO states he had no intent to cause bodily harm and the pistol was not fired intentionally. (R-283) The disputed facts of intent/accident distinguish this case from any case involving child molestation.

This Court's decision in MARSHALL is not any support for PRUDENTIAL's claim that it would be absurd for NICHOLAS CASTELLANO to have coverage. The intentional act in MARSHALL was undisputed. The insured intentionally struck the intruder who suffered bodily injury.

B. OTHER DECISIONS OF FLORIDA'S DISTRICT COURT OF APPEAL DO NOT PRECLUDE COVERAGE UNDER THE FACTS OF THIS CASE.

PRUDENTIAL asserts that other District Court decision's support its position. There cases are all distinguishable as in each of them the intentional nature of the act is undisputed. Here it is disputed.

The DRAFFEN case involved an insured who admittedly and intentionally fired his gun at his pursuers and struck them. DRAFFEN V. ALLSTATE INSURANCE COMPANY, 407 So.2d 1063 (Fla. 2d DCA 1981). Such an intentional act, if bodily injury was caused, clearly is within the exclusion. It is not simply the intentional discharge of the gun which is significant. The pointing of the gun toward the pursuers before firing it at the pursuers is equally critical to the holding in DRAFFEN.

The recent First District case of SPENGLER V. STATE FARM FIRE

& CASUALTY CO., 568 So.2d 1293 (Fla. 1st DCA 1990), review denied 577 So.2d 1328 (Fla.1991) is somewhat instructive. Ms. Spengler's roommate awoke to the sound of a bugler, he thought. When the figure of a person appeared, he aimed and shot the person. Alas, it was not a burglar but Ms. Spengler returning from a trip to the bathroom. Ms. Spengler made claim against State Farm.

The First District reversed a Summary Judgment entered against her and remanded for further proceedings. The Court reasoned that while the boyfriend intended the act of aiming and shooting the non-existent "bugler", he did not intend to shoot or injure Ms. Spengler. Therefore State Farm's exclusion, which is identical to Plaintiff's, did not apply and there was coverage. Liability was not precluded for an expected or intended act but rather for an expected or intended injury and that when the act is intentional but the injury is not, the exclusionary clause is not applicable. See SALON V. STATE FARMS, 488 So.2d 362 (La.App.), writ denied, 493 So.2d 630 (La. 1986)

This Court denied review of the SPENGLER decision and should do so in this case.

The case of BOSSON V. UDERITZ, 426 So.2d 1301 (Fla. 2d DCA 1983) is also distinguishable. First, there was no dispute that the intentional act of grabbing the Plaintiff's purse resulted in her injury when she tried to stop the car and fell to the ground. Second, there was no decision by NICHOLAS CASTELLANO to go and deliberately commit an obvious criminal act. Initially NICHOLAS CASTELLANO may have intended to frighten LARRY SWINDAL but there is

no indication that he was actually aware that such an act, if actually done, may be a violation of the law concerning assault. Third, there is no proof that a criminal act of any nature actually occurred. Fourth, there are disputed facts regarding whether the gun was discharged accidentally or intentionally. BOSSON does not apply.

It is submitted that the SWINDAL V. PRUDENTIAL Court was incorrect in noting that it felt that at least an assault or an assault with a deadly weapon had occurred. The evidence is not clear as to whether either was shown. NICHOLAS CASTELLANO's earlier intent, as testified by him when he procured his pistol is not shown to have continued. There is no proof of any threatening display of the pistol, no proof the pistol was intentionally pointed at LARRY SWINDAL, no proof of any other threatening gestures or words. If this is considered a material issue then there is no proof to support the Court's conclusion. This would constitute another issue to be decided by a jury.

PRUDENTIAL asserts that ETCHER V. BLITCH, 381 So.2d 1119 (Fla. 1st DCA 1979) supports its position that if NICHOLAS CASTELLANO intended only to frighten LARRY SWINDAL but "accidentally" shot him then the exclusion would still apply. ETCHER's facts distinguish it from this case. ETCHER did not involve an issue regarding frightening a person by having a pistol. It involved Mr. Blitch intentionally pointing the pistol at Mr. Etcher, firing the pistol and shooting Mr. Etcher. Blitch tried to claim his intent was to shoot out the window and not shoot Mr. Etcher. Clearly, Blitch's

admitted intentional act of firing the gun was the cause of Mr. Etcher's injuries. Here, there was no intentional pointing of the pistol or firing of the pistol by NICHOLAS CASTELLANO. ETCHER is distinguishable.

An examination of ALLSTATE INSURANCE V. CRUSE, 734 F.Supp. 1574 (M.D. Fla. 1989), shows it is distinguishable on its facts. First the Allstate policy language is substantially different. It excluded "bodily injury which may reasonably be expected to result from the intentional or criminal acts of an insured person". Second, although Cruse said he only intended to scare the people, the facts were that to accomplish this intent, he loaded a high powered rifle, carefully aimed and shot several persons, some fatally. Cruse may have said he only intended to scare but his admitted intentional acts of carefully aiming and firing his weapon excluded coverage for the bodily injury which resulted. NICHOLAS CASTELLANO's conduct is far removed from the intentional shootings by Mr. Cruse. NICHOLAS CASTELLANO stated an earlier intent to frighten, it is true. But there is no showing that he maintained such an intent or had the intent when the pistol fired. NICHOLAS CASTELLANO has testified that the firing was accidental and he has said he had no intent to fire the pistol nor did he expect the pistol to fire. (R-283) So third, there is a factual dispute in the instant case that did not exist in the CRUSE case.

Contrary to PRUDENTIAL's Brief, the Court in SWINDAL V. PRUDENTIAL has ruled there is a factual dispute to be resolved by a jury. The undisputed acts of NICHOLAS CASTELLANO do not give

rise to any ongoing rule of law that: "Whatever injury occurred after NICHOLAS CASTELLANO thrust the loaded gun through LARRY SWINDAL's car window is excluded". Initial Brief, page 21. Surely it cannot be seriously argued that once some one intends an act, the intent can never be abandoned, changed or not followed through. It is disputed that NICHOLAS CASTELLANO fired the pistol intentionally. His Affidavit (R-283) specifically states that he had no intention of firing the pistol and the firing was unintentional. It is not PRUDENTIAL's duty to determine which facts and inferences to believe and which to discard nor is it this Court's. The lower court should be affirmed, the Court should decline to answer the question and this matter returned to the trial Court for trial.

C. THE OUT-OF-STATE CASES DO NOT CONFIRM THAT THE SHOOTING HERE SHOULD NOT BE COVERED.

The discussion of the several out-of-state cases, while interesting, is not particularly helpful or on point in the instant case. Several will be commented on but by and large they are similar to Florida cases and none were decided where there were disputed facts to be resolved.

The Louisiana case of TOBIN V. WILLIAMS, 396 So.2d 562 (La. App. 1981) seems to have some similarity particularly with the statement of the insured that "I only meant to scare him". However, the significant proof was that the insured intentionally pointed the gun at the Plaintiff, did not remember pulling the trigger and stated he had no intention of shooting the Plaintiff.

Not remembering pulling the trigger does not create any issue where it is undisputed that the trigger, in fact, was pulled. The case seems closer to the ETCHER case. In both cases the gun was intentionally fired while pointed at the Plaintiff. The firing was intentional and it follows that the injury was intentional. Here, there is a dispute as to whether the pistol was fired accidentally or intentionally.

Again, in STATE FARM FIRE & CASUALTY CO. V. KING, 851 F.2d 1369 (11th Cir. 1988), the gun was intentionally discharged. This is still an issue in the instant case.

The undisputed facts in the Wisconsin Case, RABY V. MOE, 450 N.W. 2d 452 (1990), show that Moe was the get away driver during an armed robbery of a store. The case is clearly distinguishable on the facts. Moe's admitted intentional act of participating in the armed robbery was found to be enough to show that insurance coverage would not be provided. Here, the "intentional" act is denied creating an unresolved issue.

This Court must not forget that exclusionary provisions are strictly construed against the insurer and in favor of providing coverage in order that the purpose of insurance is not defeated. GEORGE V. STONE, 260 So.2d 259 (Fla 4th DCA 1992) The subject policy does not have an exclusion for all damages that directly or indirectly arise from intentional, aggressive conduct. It only excludes coverage for "bodily injury expected or intended by the insured". SWINDAL V. PRUDENTIAL, at page 1317. There continues to be disputed issues of fact and inference.

This Court should affirm the lower Court, refuse to answer the question and return the case to the trial court for trial.

II. DOES THE "INTENTIONAL ACT" EXCLUSION IN A TYPICAL HOMEOWNERS INSURANCE POLICY EXCLUDE COVERAGE FOR INJURIES ARISING OUT OF AN INCIDENT INVOLVING AN INTENTIONAL TORT IF THE INJURIES "INEVITABLY FLOW" FROM THE INSURED'S INTENTIONAL ACT, BUT ARE "PROXIMATELY CAUSED" BY A NEGLIGENT ACT.

As noted above, LARRY SWINDAL submits that this Court should refuse to answer the certified question.

As phrased, the question should be answered NO. The issue here is not nearly as complex as this certified question indicates. Simply put, there are disputed issues of fact and inferences raised in this case which required the reversal of the trial court's Summary Judgment. While the Court in SWINDAL V. PRUDENTIAL did make other comments, the ruling was that there was a disputed issue of fact whether NICHOLAS CASTELLANO expected or intended to cause bodily injury to LARRY SWINDAL and a disputed question of fact whether NICHOLAS CASTELLANO fired the gun intentionally or by accident. SWINDAL V. PRUDENTIAL, at page 1315.

The certified question is not framed to resolve the disputed issues of fact found by the lower court to exist.

The question includes the statement that the incident involved an intentional tort. There is no proof that NICHOLAS CASTELLANO ever threatened or tried to frighten LARRY SWINDAL in his presence. It is not an intentional tort to make threats or to intend to frighten someone if you are not in that persons presence when you make the threats etc. see 714.011 and 714.021, Florida Statutes (1989) What is the "intentional tort" contained in the question? How can the question be answered when all of the terms therein are

undefined?

The question next states the injuries "inevitably flowed" from the insured's intentional act. Again, what intentional act of the insured caused the injuries? This is not stated. There were many intentional acts done but it is submitted that no known intentional act was the cause of any injury to LARRY SWINDAL.

If the "intentional act" is assumed to be the carrying of the pistol and holding on to the pistol when NICHOLAS CASTELLANO reached into LARRY SWINDAL's car to grab the gun/hammer, what expected or intended injury occurred? If it is the bullet wound, how can it be said that such an injury inevitably flows from reaching into a car with a pistol and holding on to a gun/hammer? There is no conclusive proof of any nature that doing those acts leads inevitably to an injury. There is no proof that the shooting was intentional or expected. This Court has held that molesting a child inevitably leads to injury by the very nature of child molestation. LANDIS. This is not contradicted here. It is asserted though that there is no proof or showing that there were any acts in the instant case from which injuries "inevitably flow". How can this be a part of the certified question without at least identifying the intentional act from which injuries inevitably flow?

The question is phrased in such a manner that it cannot be answered without more information or should not be answered at all.

The exclusion does not exclude coverage for injuries which are caused by negligence acts. It excludes only those bodily injuries

which are expected or intended by the insured. The "inevitably flow" language was used in LANDIS which was a child molestation case. The Court ruled that the intentioned act of molestation necessarily includes the intentional causing of bodily injury as the bodily injury "inevitably flows" from the intentional molestation. There is no intentional act in the instant case from which bodily injury will inevitably flow.

PRUDENTIAL argues that the intentional acts which end with the pistol being thrust in LARRY SWINDAL's car establish that bodily injury to LARRY SWINDAL was inevitable. This is not supported by logic or common sense. It was not inevitable that the pistol would discharge and injure LARRY SWINDAL or that any other injury would in fact occur. Where is PRUDENTIAL's basis for blandly stating that the precise type of harm may differ but some harm would inevitably flow. PRUDENTIAL has no basis for the statement in law, logic or common sense. The acts of NICHOLAS CASTELLANO are not synonymous with the acts of a child molester!

The assertions on page 29 of the Initial Brief are illogical and not founded in fact or law. If an injury is covered by a negligent act, of course there should be coverage.

The child molester who "negligently" strangles his victim does not thereby gain coverage and it is nonsensical to suggest they would.

No one is asserting that this Court should accept the "self-serving assertions of a negligent act" to create coverage. LARRY SWINDAL is urging that such assertions are evidence and the

acceptance or rejection of this evidence is the duty of a jury.

Again, an argument is made regarding the asserted threatening of LARRY SWINDAL by NICHOLAS CASTELLANO. There is no proof this ever occurred.

There is evidence that this was an earlier intent. There is however, no proof that the pistol was pointed at LARRY SWINDAL or that gestures were made with the pistol or threatening words were used. It is submitted that passively carrying a pistol in your hand, which is admitted, does not constitute an assault or a threat.

This case should not be before this Court. Some facts are still in dispute particularly whether the shooting was intentional or accidental. Until these facts are determined, it is premature to attempt to rule in any substantive way.

Therefore, it is asserted that the District Court should be affirmed, the Court should refuse to answer the certified question and this cause should be remanded to the trial Court for trial.

III. THIS COURT SHOULD NOT ACCEPT JURISDICTION.

It is accepted that most homeowners policies in Florida contain an "expected or intentional" exclusion. However this case is not a proper case for this Court to accept as there are disputed issues of facts and disputed inferences arising from those facts. See SWINDAL at page 1315.

It clearly is not the function of the Second District Court of Appeal or of this Court to determine such factual disputes.

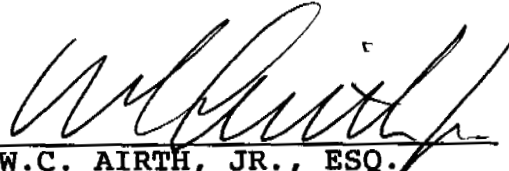
None of the cases relied upon by Prudential involved disputed issues of fact or inference. Each of those cases were distinguished on that basis or other bases in the body of this Answer Brief.

As this Court did in the SPENGLER case, review hereof should be denied which will allow this case to be returned for trial by jury.

CONCLUSION

Based on the foregoing, the Court should either Affirm the decision of the Second District Court of Appeals or deny review, either of which will allow this case to be returned to Polk County Circuit Court for trial by jury.

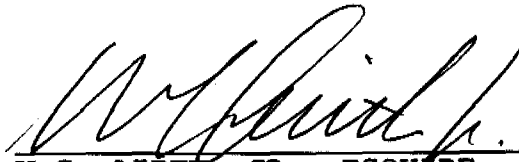
Respectfully submitted



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to RAYMOND T. ELLIGETT, JR., ESQUIRE, and CHARLES P. SCHROPP, ESQUIRE, NCNB Plaza, Suite 2600, 400 North Ashley Drive, Tampa, Florida 33602, and PAULA M. WALSH, ESQUIRE 800 West Deleon Street, Tampa, Florida 33606-2722, this 11th day of September, 1992.



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