IN THE SUPREME COURT OF FLORIDA

PRUDENTIAL PROPERTY AND CASUALTY COMPANY,

Petitioner,

vs. CASE NO. 80,217

LARRY S. SWINDAL, ET AL.

Respondent

ON REVIEW FROM A CERTIFIED QUESTION FROM THE SECOND DISTRICT COURT OF APPEAL

PETITIONER'S INITIAL BRIEF

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PRELIMINARY STATEMENT

Petitioner, Prudential Property and Casualty Insurance Company, is referred to as "Prudential."

Respondent, Larry Swindal, is referred to as "Swindal."

Nicholas Castellano, (Prudential's insured) is referred to as "Castellano." The Second District's opinion incorrectly referred to Castellano as an appellant, but Castellano was not named as an appellant in the notice of appeal (R 291; see Fla. R. App. P. 9.020(f)).

References to the record on appeal are designated by the prefix "R", except that references to Castellano's previous trial testimony are designated by the prefix "Castellano Tr."

STATEMENT OF THE CASE AND FACTS

The Second District's opinion accurately sets forth the facts of Castellano's shooting of Swindal, but attributes some holdings to the trial court which it did not make in its summary judgment. Swindal v. Prudential Property and Casualty Insurance Company, 599 So.2d 1314 (Fla. 2d DCA 1992), (hereinafter "Swindal").

As Swindal noted, the facts come largely from the shooter, Castellano, because he rendered Swindal incapable of testifying (see footnote 3 at p. 1316).

According to Castellano, it was Swindal's abusive behavior which prompted Castellano to take action. Castellano was married to Swindal's ex-wife, and testified that Swindal had been harassing him and threatening him with a shotgun (Castellano Tr. 6, 26; R 200).[1]

Castellano had to go to his closet to get his gun (R 209). He had to remove the gun from its case (R 209). Castellano did not have to check if it was loaded because he knew it was loaded (R 209-10). During the period between when he took the loaded gun from the closet and the time he chased down Swindal, Castellano removed the safety on the gun (R 211).

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[1] Perhaps this is the reason the jury did not convict Swindal in the criminal action. Passages in the brief may refer to Swindal as being the "victim" of Castellano's gunshot. This does not mean that Castellano was also not a victim of Swindal's repulsive harassment. While that perception may have aided Castellano in the criminal matter, it does not entitle him to insurance coverage, as discussed below.

Castellano pursued Swindal in a car chase, caught him and walked to Swindal's car (R 201). When Castellano thrust the loaded gun through the window of Swindal's car, Castellano had his finger on the trigger (R 206). Castellano grabbed Swindal's hammer, and as he pulled it, he also pulled the trigger of the gun he was holding, shooting Swindal (R 214-16).

Castellano testified in his deposition that the reason he took his gun to go after Swindal was "to frighten him the way he had frightened me many times." (R 210; at Castellano Tr. 46, he had testified that he wanted to threaten Swindal). Castellano continued:

> "And I thought that maybe he deserved to be taught a lesson that time by frightening him a little bit, and see how he felt with a gun."

(R 210). Swindal acknowledged that Castellano's actions were an "undisputed intentional act," an "assault or assault with a deadly weapon." 599 So.2d at 1318. As discussed below, Castellano's grabbing Swindal's hammer was also a battery.

Shortly before the hearing on the motion for summary judgment in this cause, and long after his deposition in this matter, Castellano provided Swindal with an affidavit.[2] Castellano's

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[2] The Swindal court indicated it was unaware of the outcome of Swindal's tort action against Castellano. The panel overlooked an October 19, 1990 filing in the prior appeal indicating Castellano had given Swindal a consent judgment in the tort action. Castellano discharged his defense counsel provided by Prudential and agreed to entry of a judgment for several million dollars, with execution to be limited to insurance proceeds. Prudential believes

affidavit contradicted his earlier testimony, and asserted that he had no intention to frighten Swindal (R 283). Swindal's declination to discuss the affidavit indicates its rejection of this attempt to revise history.

Cynthia Fink Harwell also testified by deposition. She was residing with Castellano and his wife at the time of the shooting (R 141). Ms. Harwell did not see the shooting, but saw the events before and after. She saw Castellano retrieve the gun and remove the gun from its case (R 153). When Castellano returned he said that he had shot Swindal (R 156, 162-164, 168).

In a previous appeal the Second District reversed a dismissal of this declaratory action brought by Prudential against Castellano and Swindal. Prudential Property & Casualty Insurance Company v. Castellano, 571 So.2d 598 (Fla. 2d DCA 1990). The opinion noted the trial court could consider Prudential's previously filed motion for summary judgment on remand. As Swindal noted, Prudential's policy contained an exclusion for bodily injury "which is expected or intended by the insured." 599 So.2d at 1316.

On remand the trial court granted Prudential's motion for summary judgment (R 289-90). The trial court observed that the undisputed facts and even the insured's (Castellano's) own testimony demonstrated Castellano's intent to harm Swindal in some manner (R 289). The trial court was "also troubled by the public

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this is not important to this appeal, but would be if the summary judgment were not affirmed and the case returned to the trial court. Castellano's affidavit came after he had given Swindal the consent judgment.

policy ramifications of providing insurance coverage for insureds who engage in intentional, aggressive conduct which then results in injury to their victims" (R 290).

Swindal appealed and the Second District reversed the summary judgment. The Second District stated "The trial court concluded that the supreme court in Landis and Marshall expanded the intentional injury exclusion and empowered the trial judge to exclude coverage for damages that may 'inevitably flow' from an intentional act, even though the injuries are proximately caused by a separate negligent act." Swindal, at 1317. With all due respect, the trial court made no such statement in its summary judgment or anywhere else in the record (there was no transcript of the summary judgment hearing). The trial court did not even cite Landis or Marshall.

Swindal recognized that there would be no coverage in this case if the language in Landis were literally applied stating:

> In Landis, the supreme court referred to harm that "inevitably flows" from an intentional act and stated that "specific intent to commit harm is not required by the intentional acts exclusion. Rather, all intentional acts are properly excluded by the express language of the homeowners policy." 546 So.2d at 1053. Thus, it is not unreasonable to conclude that Landis effectively changed the intentional injury exclusion into a broader intentional acts exclusion. We are uncertain whether this was the supreme court's intent.

Swindal, at 1317.

The panel's footnote following this discussion concluded with "[w]e recognize, however, that if the supreme court intended to permit insurance companies to exclude coverage on a different standard of causation, the trial court may have had authority to reach the result it reached" (Swindal at footnote 6, p. 1317).

The Swindal panel stated it had "considerable collective difficulty in discerning the correct outcome" of the case. It confessed that "we are not certain that our interpretation of Landis v. Allstate Ins. Co., 546 So.2d 1051 (Fla. 1989), and State Farm Fire & Casualty Co. v. Marshall, 554 So.2d 504 (Fla. 1989), is correct." The panel also stated it had "been unable to agree whether the 'inevitably flowed' test of foreseeability of injuries, if that is the test of Landis, is more or less restrictive than established concepts of substantial certainty and proximate causation." Swindal, at 1317.

Swindal concluded its opinion by certifying the following question as a matter of great public importance:

> 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?

Prudential filed its petition for discretionary review with this Court, seeking jurisdiction based on certification and on conflict.

Prudential agrees with Swindal that the case does present an important question, because "this opinion could impact on standard language in virtually every homeowners policy in Florida." 599 So.2d at 1316. Prudential argues below that the certified question should be answered so as to hold there is no coverage under the facts of this case in which the insured chased down and shot a person, only to claim later that the gun discharged accidently. Prudential also believes the same result is reached under a more direct analysis of this Court's decisions and public policy considerations, without resort to sorting through the concepts of "inevitably flow", "proximately caused" or "substantially certain."

ISSUES ON APPEAL

I. WHETHER THE INSURED'S ACT OF CHASING DOWN AND SHOOTING A PERSON IS COVERED UNDER A POLICY EXCLUDING EXPECTED OR INTENDED INJURY WHEN THE INSURED CLAIMS HE WAS ONLY TRYING TO FRIGHTEN HIS VICTIM?

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. WHETHER THIS COURT SHOULD ACCEPT JURISDICTION?

SUMMARY OF ARGUMENT

The series of calculated steps --undisputed facts-- leading up to the actual shooting confirm Castellano's own testimony that he intended to injure Swindal by at least assaulting him. As a matter of law, the injury which resulted was expected or intended.

Florida cases repeatedly recognize that there is no coverage for injuries expected or intended by the insured. This does not change simply because the insured (Castellano) may have been more successful than he now claims he planned to be in harming his victim (Swindal).

This Court's recent decisions in Landis and Marshall illustrate that public policy will not permit coverage for such aggressive behavior which results in an inevitable injury, even though it is not the precise injury the assailant later claims he envisioned.

Landis demonstrates that the insured's subjective belief does not control over the objective facts.

Swindal's attempted reliance on out-of-state cases is misplaced. While all of those cases involved accidental shootings, none of them involved the type of aggressive behavior found here. Out-of-state cases with more similar facts deny coverage.

Swindal's interjection of a negligent act which proximately causes a particular injury does not alter the lack of coverage for an injury that "inevitably flows" from the insured's intentional act.

ARGUMENT

I. THE INSURED'S ACT OF CHASING DOWN AND SHOOTING A PERSON IS NOT COVERED UNDER A POLICY EXCLUDING EXPECTED OR INTENDED INJURY WHEN THE INSURED CLAIMS HE WAS ONLY TRYING TO FRIGHTEN HIS VICTIM.

A. THIS COURT'S DECISIONS IN LANDIS AND MARSHALL PRECLUDE COVERAGE UNDER THE FACTS OF THIS CASE.

Swindal noted that in Landis this Court stated that "all intentional acts are properly excluded by the express language of the homeowners policy." 546 So.2d at 1053.[3]

The simplest argument for Prudential would be to seek a literal application of this language in Landis to Castellano's intentional acts of chasing down Swindal and thrusting his loaded gun in the car window. Those were clearly intentional acts. If

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[3] In the district court, Swindal argued that the policy language in some cases differed from that in the Prudential policy. Marshall has the same exclusion for expected or intended injuries as found in the Prudential policy. 554 So.2d 505. Landis uses "injury intentionally caused by an insured person." See the Third District opinion at 516 So.2d 306. While a slight grammatical variation, this is the legal equivalent. The Second District recognized this is a common exclusion found in "virtually every homeowners insurance policy in Florida."

Swindal also argued Landis does not apply because it is a child molestation case. However, "Landis did not limit its application to sexual molestation cases." Allstate Insurance v. Cruse, 734 F.Supp. 1574, 1580 (M.D. Fla. 1989). The Second District cited Landis in both appeals in this matter. 571 So.2d at 599.

those acts are not covered, then the resulting injury is not covered.

But the exclusion at issue in these policies does not exclude all intentional acts. It excludes expected or intended injuries. Prudential believes the quoted language from Landis was a shorthand way of expressing the view that some intentional acts are so certain to result in some sort of harm --or are so contrary to public policy-- that there can be no insurance coverage for them under a policy which excludes expected or intended injuries.

Florida case law has historically permitted insurance coverage where an intentional act results in unexpected and unintended harm. In Gulf Coast Insurance Company v. Nash, 97 So.2d 4 (Fla. 1957), this Court held an insured's shooting of himself with a gun was covered under an ordinary life policy. The insured was pointing the gun at his chest and pulling the trigger, obviously an intentional act. 97 So.2d at 7. However, according to witnesses, when the gun discharged on the third time, the insured "immediately cried, 'My God, the gun was loaded. I am shot. Call a doctor.'" 97 So.2d at 7.

Thus, because the insured did not intend to shoot himself, he did not commit suicide and his death was covered under the life policy. In proceeding to discuss another accident policy the Court stated "the result was not intended." 97 So.2d at 7. Many of the district court cases discussed hereafter draw the same distinction between intentional acts and intended injuries. The injury from an

intentional act may or may not be covered. If an injury was intended, it is not covered.[4]

In sum, not every intentional action an insured takes which results in an injury is excluded under these policies. An automobile driver who negligently collides with a pedestrian intended to drive the car, but there is still coverage. However, if the driver meant to run over the pedestrian's foot, but misjudged and hit him broadside, there should be no coverage because an injury was expected or intended. If the driver intended to frighten the pedestrian by driving close to him, misjudged and hit him, that is likewise an intended or expected injury (for which there is no coverage).

Landis held it defied logic to state that a child molester intended anything but harm to his victim, no matter what his proclaimed subjective intent. 546 So.2d at 1053. The Court quoted Judge Frank's dissent in Zordon v. Page, 500 So.2d 608 (Fla. 2d DCA 1986): "It is inherent in the logic of our system that 'some form

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[4] Clemmons v. American States Insurance Company, 412 So.2d 906 (Fla. 5th DCA 1982), review denied, 419 So.2d 1196 (Fla. 1982), discusses a number of decisions drawing the distinction between intended acts and injuries. It reached a result on self defense approved by this Court in Marshall.

C.M. Life Insurance Company v. Ortega, 562 So.2d 702 (Fla. 3d DCA 1990), review denied, 576 So.2d 289 (1991), distinguished its facts from those in Nash. In Ortega, the insured knew he had loaded one bullet into the gun and then proceeded to play Russian Roulette. The court held this knowledge the gun was loaded distinguished the case from Nash. It held "where the harm which befalls the insured is a reasonable and probable consequence of his volitional act, the harm cannot be deemed unintentional." 562 So.2d at 704.

of harm inheres in and inevitably flows from the proscribed behavior.'" 546 So.2d at 1053.

The panel opinion in Swindal appears to have fixed on the "inevitably flows" language, and admits difficulty with the concept. Prudential argues below that the certified question from Swindal should be answered in the affirmative. Namely, if the insured puts in motion through his intentional acts an event from which an injury will "inevitably flow," then there should be no coverage even if some negligent act proximately causes the precise injury. As the cases below indicate, it is not necessary for the insured to foresee the extent of the harm he will cause. If he intended any harm, there is no coverage.[5]

Prudential believes there is a clear answer in the Court's decisions in Landis and Marshall. Landis held that Florida law will not sanction coverage for an insured who molests children, despite his professed lack of intent to harm them. Florida law will not condone that behavior, or protect and encourage the insured who does it by protecting him through insurance coverage.

Similarly, Florida law does not and should not encourage an insured person with a loaded gun to chase down and assault another person. Prudential need not and does not argue that every discharge of a gun which injures a person is excluded from

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[5] See also, Clemmons at p. 908 (observing death is intentional where insured did not intend death, but did intend to cause some injury). Castellano has admitted he intended a form of harm or injury to Swindal. Even without Castellano's admission, the conclusion would be inescapable in light of his calculated and persistent conduct in taking the loaded gun and chasing down Swindal.

coverage. Even those injured in a struggle over a gun may have insurance coverage depending on the circumstances.

But under the specific facts of this case, Florida law should not encourage an insured to retrieve a loaded gun, remove the safety, pursue another person by car, and thrust the loaded gun through the victim's car window. To permit coverage based on the insured's self serving assertion that there was then a "negligent discharge" of the gun ignores the fact that the insured's conduct was intended to result in some form of harm to his victim.

Focussing only on the split second the gun discharged --as Swindal did-- ignores Castellano's calculated actions --actions which could only be intended to harm Swindal. As in Landis, it defies logic to suggest Castellano did not intend some harm to Swindal. Indeed, Castellano admitted he intended some harm to Swindal -- through frightening him. And Castellano intentionally battered Swindal by grabbing the hammer.[6]

Any harm that resulted after Castellano thrust the loaded gun, finger on the trigger, through the window is excluded, whether that harm is a gunshot hole in the car's upholstery, a bruise to Swindal, or a bullet striking Swindal.

In other words, Castellano had to expect some harm to Swindal as a matter of law. Just as the child molester in Landis had to

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[6] The tort of battery has long been recognized as including the harmful or offensive touching of objects on the plaintiff's person or in his hand. Prosser and Keeton, The Law of Torts, §9 (5th ed. 1984). Florida law has also recognized this principle for criminal battery. See Malczewski v. State, 444 So.2d 1096 (Fla. 2d DCA 1984), dismissed, 453 So.2d 44 (Fla. 1984).

intend some harm as a matter of law, despite his subjective belief. If this were not the law, an insured could murder children and seek insurance coverage on the ground that he believed that he was improving their lives by sending them to a better place.

Contrasting the facts of this case with Marshall magnifies the absurdity of permitting Castellano to obtain insurance coverage here. In Marshall this Court held that a homeowner who shot an intruder in self defense, while the intruder was in his house, had no coverage for this intended act.

Here Castellano did not shoot Swindal while Swindal was in Castellano's house. Swindal had not even been in the house, but merely nearby. Castellano pursued him and discharged the gun into his head after a car chase.

Consider the effect of providing coverage here. It would mean that a insured who shot an intruder in the insured's home had no coverage. Marshall, supra. But if the insured pursues the intruder from the house, chases him down, and then shoots him, he can be covered. All the insured has to do is tell an unverifiable story that he negligently discharged the gun. This makes a mockery of Marshall and encourages behavior much more aggressive than the defense of one's home.

Prudential makes one final observation on Marshall and self defense. During his deposition Castellano originally testified that he shot Swindal in self defense: "I felt it was self-defense, yes." (R 195). When coached by his attorney, Castellano then said the gun discharged accidently (R 199).

In sum, under the specific facts of this case, Castellano admits he intended to harm Swindal in some manner. By the time he chased Swindal down and thrust the loaded gun through the window, Castellano should be deemed to have intended whatever harm followed from that act. The decisions of the district courts of appeal of Florida are consistent with this result.

B. OTHER DECISIONS OF FLORIDA'S DISTRICT COURTS OF APPEAL PRECLUDE COVERAGE UNDER THE FACTS OF THIS CASE.

Prudential was entitled to a judgment because Castellano caused injuries that were expected or intended, and thus expressly excluded by Prudential's policy. Castellano took a gun he knew was loaded from the closet, removed it from its case, released the safety and got into his car to pursue his victim. Castellano chased down Swindal, thrust the gun into Swindal's car with his finger on the trigger, and the gun discharged, allegedly as Castellano pulled at Swindal's hammer. The shooting, under these circumstances, comes within the exclusion.

In Draffen v. Allstate Insurance Company, 407 So.2d 1063 (Fla. 2d DCA 1981) (affirming a directed verdict), the court held that when an insured fired in the direction of his pursuers, the exclusion for "injury expected or intended" applied. 407 So.2d at 1065. The court noted that it was clear the insured intended some injury to one or more of his pursuers, although he may not have expected as much success as he actually had. Id.

Swindal purported to distinguish Draffen by noting that the discharge of the gun was intentional. But if the intentional discharge is the legal distinction, it would then preclude coverage for an intentional firing of a gun where the bullet hit an unintended victim. However, the Second District and other courts have found coverage in such situations. See Grange Mutual Casualty Company v. Thomas, 301 So.2d 158 (Fla. 2d DCA 1974); Spengler v. State Farm Fire and Casualty Company, 568 So.2d 1293 (Fla. 1st DCA 1990), review denied, 577 So.2d 1328 (Fla. 1991), (struggling to distinguish Peters v. Trousclair, 431 So.2d 296 (Fla. 1st DCA 1983)).

Swindal did not even attempt to distinguish the decision in Bosson v. Uderitz, 426 So.2d 1301 (Fla. 2d DCA 1983) (affirming summary judgment). In Bosson the plaintiff was injured when the insured grabbed the plaintiff's purse while driving by in a car. The court held that where the insured's plan or intent was to steal a purse, there was no coverage for the injuries resulting from his intentional actions. It did not matter that the insured had not intended the specific injury to the plaintiff which actually occurred.

The court noted that at a minimum, the insured's acts were an assault and therefore intentional. As the panel noted, Castellano's pursuing Swindal with a loaded gun to frighten him (and ultimately shoving it into Swindal's car) was an assault or an assault with a deadly weapon. See, §§784.011, 784.021, Florida

Statutes (1989). And as noted above, Castellano also committed a battery on Swindal.

Also close to the facts of this case is Etcher v. Blitch, 381 So.2d 1119 (Fla. 1st DCA 1979), cert. denied 386 So.2d 636 (Fla. 1980). Castellano has claimed that he did not intend to shoot Swindal, but only to frighten him (R 210). Etcher v. Blitch rejected this argument and held there was no coverage under similar circumstances. Etcher and Blitch were involved in a running encounter with their automobiles. The court described what happened when Blitch tried to "frighten" Etcher:

> When the cars stopped, Etcher rushed defendant's automobile, pounded on the top, and thrust his hand through the half-open window in an attempt to open the locked door. Then defendant [Blitch] pointed the revolver in Etcher's general direction intending, he said, to frighten Etcher by shooting out the window; he shot Etcher instead. His act was in law intentional, not negligent.

381 So.2d 1119, emphasis added.

In Cruse, supra, the insured also injured several people by shooting them. He stated that he intended "to scare them" but that matters then got out of hand. The court held that the insured's admission "that he wanted to scare the victims indicates that he intended some harm to them. The fact that the harm may have been

greater than he intended does not warrant coverage under the policy." 734 F. Supp. at 1581.

In State Auto Mutual Insurance Company v. Scroggins, 529 So.2d 1194 (Fla. 5th DCA 1988), the policy excluded "bodily injury ... intended by the insured." The court held the insurer was entitled to judgment as a matter of law when the insured had pulled a chair away as the plaintiff went to sit down. "The fact that an unintended serious injury resulted from the intended fall is irrelevant to the issue of coverage." 529 So.2d at 1195.

Aetna Casualty and Surety Company, Inc. v. Miller, 550 So.2d 29, 30 (Fla. 3d DCA 1989), cited Scroggins in holding there was no coverage despite the insured's claim "that he did not intend to cause the resulting physical injury." As a result of being "mildly upset" the insured had grabbed the ends of a stethoscope draped around another doctor's neck, causing a herniated disk.

Castellano's claim that he did not intend the specific injury Castellano suffered does not create coverage. Even Castellano does not claim he harmed an unintended person. Castellano's actions were directed toward his victim. Castellano intended to injure Swindal, at least by frightening him. Castellano's only excuse is that his effort to frighten Swindal so Swindal would stop harassing him turned out to be more successful than he anticipated. This is still an intentional injury and there is no coverage. See, Draffen, Bosson, Etcher, Cruse, Scroggins, Miller.

Here, Castellano's own testimony established he intended to injure Swindal through an assault and a battery. In the district

court of appeal Swindal successfully shifted the focus away from Castellano's admitted intent to harm (frighten)[7], to look only at the moment the gun discharged. To adopt such an approach would nullify the Florida case law discussed above.

No matter how outrageous the intentional act, an insured could avoid the exclusion by testifying he had a change of heart (intent) at the last moment, but couldn't stop from pulling the trigger, swinging the axe, etc. Castellano engaged in a series of deliberate actions intended and expected to assault, frighten and injure Swindal. Claiming in his affidavit there was some "confusion" at the end is simply another variation on arguing he didn't know he would be so successful in his endeavor. It does not change the fact that Castellano admittedly intended to injure Swindal.

Even Castellano's affidavit supports the summary judgment. The affidavit asserts that Castellano did not "expect or intend the injuries which were caused." (R 284 at ¶ 11, emphasis added). In other words, Castellano did expect to inflict some injuries, just not these specific injuries. Again, he was simply more successful than he had anticipated. This does not create coverage.

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[7] Castellano's affidavit, filed just before the summary judgment hearing, contradicted his prior sworn deposition testimony that he did intend to frighten Swindal (R 210, 283). The law has long been that a party is not permitted to so alter his prior deposition testimony to avoid a summary judgment. E.g. Home Loan Company Incorporated of Boston v. Sloane Company of Sarasota, 240 So.2d 526 (Fla. 2d DCA 1970); see also, Ellison v. Anderson, 74 So.2d 680 (Fla. 1954).

Castellano had chased down Swindal, walked to Swindal's car with his finger on the trigger of a loaded gun on which he removed the safety, and had thrust the gun into the car window where Swindal sat. By that time, any injury to Swindal should be deemed to have been expected or intended. Swindal's position would lead to insurance coverage where insureds claimed they shot a bullet only intending to scare the victim by grazing his hair, but through poor aim or a distraction, shot him in the head. See Etcher, supra.

There simply is no dispute in material fact here. Whether the gun went off because Castellano squeezed the trigger as he grabbed Swindal's hammer, or because Castellano decided he was going to permanently end Swindal's harassment is immaterial. By that point Castellano had engaged in a series of acts intended to injure Swindal through frightening and assaulting him. Whatever injury occurred after Castellano thrust the loaded gun through Swindal's car window is excluded.

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

Swindal at footnote 8 cited four out-of-state cases for the proposition that other jurisdictions had not excluded coverage for an "accidental" discharge of a firearm "under circumstances similar

to this case." As demonstrated hereafter, the facts of each of those cases was far different than in Swindal.

In none of the four cited cases did the insured pursue the person who was shot. Later Prudential discusses cases where the insured did pursue his victim -- and the courts found no coverage.

Obviously the facts of each case are crucial. But so is the law. Marshall noted that other states had concluded that a self defense shooting was not excluded. 554 So.2d at 505. Even the result in Landis excluding coverage for child molesters is not universal (see the discussion in the majority opinion in Zordon, supra, citing a New Hampshire Supreme Court decision permitting coverage). Here, the cases Swindal cited are readily distinguishable on the facts, so that one need not consider differences in the law.

In Allstate v. Lewis, 732 F.Supp. 1112 (D. Col. 1990), the court emphasized that the insured seventeen year old boy thought the handgun was not loaded. 732 F.Supp. at 1113, 1115. By contrast, Castellano knew the gun he chased down Swindal with was loaded. The result in this Colorado case is consistent with the mistaken belief in Nash that the gun was not loaded. In both cases that belief may have been negligent, but that negligence meant that the insured lacked the intent or expectation of causing the injury.

Celina Mutual Insurance Company v. Forister, 438 N.E.2d 1007 (Ind. App. 1982), affirmed the entry of a summary judgment against the insurer in the face of the insurer's defense that the shooting was intentional. The only evidence the insurer offered to rebut

the insured's proof was the affidavit of its trial attorney. 438 N.E.2d at 1009. The court noted the affidavit did not even purport to be based on personal knowledge, but on assertions the attorney "verily believes" are true. 438 N.E.2d at 1012. The appellate court concluded that this response to the summary judgment motion "was like no response at all." Id. Celina is not authority for coverage under circumstances similar to this case.

State Farm Fire & Casualty Company v. Shelton, 531 N.E.2d 913 (Ill. App. 1988), contains insufficient facts to provide a meaningful comparison. It does indicate the insured fired a warning shot into the ground, did not intend to harm the victim, and did not remember firing the fatal shot. 531 N.E.2d 918. Even these few facts distinguish the case. There is no suggestion the insured chased down his victim. And the court's suggestion that the jury would have to inquire into the insured's "mental state" appears inconsistent with Landis, which held an insured's subjective belief he was not causing harm would not make the harm covered. 531 N.E.2d at 918.

The other case Swindal cited was Farmers and Merchants Insurance Company v. Cologna, 736 S.W.2d 559 (Mo. App. 1987). Initially, the procedural posture of Cologna distinguishes it. The insurer abandoned its contention that the insured intended to shoot the victim. 736 S.W.2d at 565. The facts distinguish it even more.

In Cologna the insured was the ex-wife of the "victim." The victim was forcing his way into the ex-wife's house and threatening her. 736 S.W.2d at 563. She had a gun for protection and thought

the safety was on. Id. The gun discharged when she stumbled or tripped while backing away from her aggressor. 736 S.W.2d at 564.

By contrast, Castellano was not in his home. Swindal was not approaching him and threatening him. Castellano knew the safety was not on. Even Castellano does not claim the gun discharged while he was backing up to avoid a confrontation. Castellano was the aggressor. The gun fired while he was attacking (battering) Swindal.

These types of distinctions were made by the court in Cologna to distinguish the facts in Blue Ridge Insurance Company v. Nicholas, 425 F.Supp. 827 (E.D. Mo. 1977). 736 S.W.2d at 566. In Nicholas the insured knew the safety did not work on his gun. He had left a party to retrieve his gun and returned, pointing it at the chest of his victim. The gun discharged in a struggle. 736 S.W.2d at 566; 425 F.Supp. at 829.

The court in Nicholas found there was no insurance coverage because the insured intended to injure his victim. 425 F.Supp. at 830. The court in Cologna emphasized that by contrast, the ex-wife there was not the aggressor and the gun discharged only when she tripped. 736 S.W.2d at 566.

If out-of-state law is to be considered, it is clear that of the Missouri cases, Nicholas is much closer factually. It would dictate a finding of no coverage.

In Tobin v. Williams, 396 So.2d 562 (La. App. 1981), the court affirmed the trial court's dismissal of claims against the insurers. Much like Castellano, the insured there testified that

he took his gun to keep away a bigger man. The insured swore he never aimed the gun, had no recollection of pulling the trigger, and had no intention of shooting the plaintiff. 396 So.2d at 564.

The court agreed that it could be inferred from the circumstances that the injury inflicted was expected or intended. "Any reasonable person would have to conclude that injuries were almost certain to result from" drawing a loaded pistol, thrusting it in the direction of the victim and causing it to discharge. Such a person "should not be absolved from liability simply by claiming: 'I only meant to scare him.'" 396 So.2d at 564.

The court cited from Prosser to the effect that intent includes not only those consequences which are desired, but also those a reasonable person would believe would were substantially certain to follow from what he does. 396 So.2d 564. The court cited another decision where there was no coverage for a doorman who pulled a pistol which then discharged in a struggle.

Of course, Castellano went even further, chasing down his victim before the gun discharged, allegedly in a struggle.

In State Farm Fire & Casualty Company v. King, 851 F.2d 1369 (11th Cir. 1988), the court affirmed the finding of no coverage where the insured successfully attempted to shoot out the tires of the other vehicle during a car chase, but also shot a passenger. The court noted that Alabama applied a purely subjective standard for determining intent. However, it had adopted the analysis of a Minnesota decision "which held that intent to inflict bodily injury could be inferred as a matter of law." 851 F.2d at 1371.

The Eleventh Circuit observed that the insured "was the pursuer and the aggressor in the action leading up to the shooting. He could have avoided these events." 851 F.2d at 1371. Again, Castellano was the pursuer and aggressor; he could have avoided injuring Swindal. Castellano's intent to injure Swindal in some manner should be inferred as a matter of law. It should not matter that he was more successful than he now claims he contemplated.

The foregoing indicate that Louisiana, Minnesota, and Alabama infer an intent to injure from the facts of a specific case. The Wisconsin Supreme Court applied the same analysis in Raby v. Moe, 153 Wis.2d 101, 450 N.W.2d 452 (1990).

In Raby, the victim was shot dead in an armed robbery. Moe was the getaway car driver. He never entered the store, never held the gun, and never pulled the trigger. Yet the court found his homeowners insurer was entitled to a summary judgment.

The court held Moe's intent to inflict harm could be inferred from his participation in such a dangerous act. 450 N.W.2d at 455-56. The court said Moe could not create coverage simply by saying he did not intend the result:

> Moe must be held to know the substantial risk of injury inherent in his criminal wrongdoing and cannot expect his homeowners insurer to provide coverage for damages resulting from that wrongdoing simply by saying, after the fact, that he did not intend for any such harm to result.

450 N.W.2d at 456. Castellano cannot create coverage simply by saying he did intend to shoot Swindal. Castellano created the substantial risk by thrusting his loaded gun through Swindal's car window.

II. THE "INTENTIONAL ACT" EXCLUSION IN A TYPICAL HOMEOWNERS INSURANCE POLICY EXCLUDES 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.

The foregoing demonstrates that the trial court's summary judgment here should be affirmed on several bases. The principles announced in this Court's decisions in Landis and Marshall mandate affirmance.

The Landis holding that intent to harm exists as a matter of law inherent in certain actions is consistent with the view of Wisconsin, Minnesota, Louisiana, and Alabama, that the intent to injure is inferred from such illegal, aggressive actions.

The principle that intent to injure exists even though the actual injury is different from what the insured/actor envisioned mandates affirmance.

The same result is reached if the question is analyzed as posed by Swindal's certified question. Swindal's certified question assumes the injuries here inevitably flowed from Castellano's intentional acts. Indeed, that is clear. The gun would never have been (1) thrust through the window, (2) pointed at Swindal's head, (3) while loaded with the safety off, (4) with Castellano's finger on the trigger, if Castellano had not chased Swindal down in his aggressive --and admitted-- effort to assault Swindal.

The certified question then asks if it should make a difference if the injuries are then proximately caused by a negligent act. The simplest answer is: why should it? Namely, why should the occurrence of a negligent act alter the responsibility of the actor who sets in motion the wheels of destruction that will inevitably harm his victim. Again, the precise type of harm may differ, but some harm would inevitably flow.

If all one needs for coverage is a negligent act just before the ultimate injury, the courts will need to rewrite the insurance law discussed above. A poor shot who says he only intended to wing his victim could have coverage for a wrongful death action. A child molester who says he negligently strangled his victim while trying to keep the child quiet could have coverage.

To adopt this logic would be to embrace the rationale of the Zordon majority opinion, unanimously rejected by this Court in Landis. To allow self-serving assertions of a negligent act -- where no one can dispute the shooter's story-- would be analogous to allowing the child molester's testimony that he didn't mean any harm to create coverage.

Swindal recognized that a heart attack resulting from Castellano's threatening Swindal with the gun would likely be excluded because it would be related to the assault. It simply does not make sense to then say the shooting injury can be covered. Common sense dictates --and thus a reasonable person should be charged with knowing-- that chasing a person and struggling with him while you hold your finger on a loaded gun is more likely to

result in a discharge of the gun injuring the person, than in the person suffering a heart attack.

This case presents a narrow and egregious set of facts which make clear Castellano should not be rewarded for his actions with insurance coverage. People who shoot in self defense of their homes are not covered in the face of an expected or intended exclusion. It is even clearer that Castellano should not be covered.

III. THIS COURT SHOULD ACCEPT JURISDICTION.

As Swindal observed, the expected or intended clause is found in nearly every homeowners insurance policy in Florida. Thus, this case presents a question of great public importance.

The fact that the Swindal panel admitted it had so much difficulty in discerning the correct result and application of Landis and Marshall to this case also demonstrates the importance of a decision by this Court as guidance for future cases.

Jurisdiction also lies based on conflict. Swindal conflicts with the district court decisions in Etcher v. Blitch, Scroggins, Miller and Clemmons. Conflict also exists based on Swindal's misapplication of Landis and Marshall.

CONCLUSION

Based on the foregoing, the trial court was eminently correct in determining there was no coverage in this matter and its decision should be reinstated.

Respectfully submitted,

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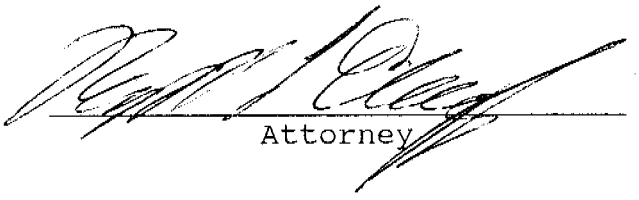
Counsel for Prudential

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to: W. C. AIRTH, JR., ESQ., Williams & Airth, P.A., P. O. Box 3444, Orlando, Florida 32802, Attorney for Appellant, and to: PAULA M. WALSH, ESQ., 800 West Deleon Street, Tampa, Florida 33606-2722, by U. S. Mail, this 24th day of August, 1992.



Attorney

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dominant tenement owner's easement interest by a form of private eminent domain.[8] This raises serious constitutional problems.[9] *See Griffin v. Red Run Lodge, Inc.*, 610 F.2d 1198 (4th Cir.1979). That is no doubt why courts usually refuse to apply this balancing doctrine where the encroachment is done intentionally or willfully. As the court said in *Pradelt v. Lewis*, 297 Ill. 374, 130 N.E. 785 (1921):

> [T]he duty of the court is to protect rights, and innocent complainants cannot be required to suffer the loss of their rights because of the expense to the wrongdoer.

No Florida court that we have found has applied the "balancing" doctrine described above to a situation where the servient tenement owner intentionally and consciously encroached onto the easement and the dominant tenement owner was not guilty of some form of estoppel or laches. In *Johnson v. Killian*, the encroachment was built eleven years before appellants purchased the land and twenty years before it was discovered. The court described appellant as "innocent." It specifically noted the issuance of a mandatory injunction requires the finding of "strong reasons." One was that the encroachment was intentional.[10]

In *Monell v. Golfview Road Assn.*, 359 So.2d 2 (Fla. 4th DCA 1978), our sister court ruled that the "balancing of the equities" doctrine should not be applied where the servient tenement owner intentionally interfered or obstructed the dominant tenement owner's easement rights. We agree with that view. Accordingly, we hold that the trial court abused its discretion by failing to defend Diefenderfer's fifty-foot private road easement by entering a mandatory injunction requiring appellees to remove the subdivision wall from the whole of the fifty-foot easement area. We reverse the judgment appealed and remand for entry of an order consistent with this opinion.

REVERSED and REMANDED.

PETERSON, J., concurs.

DAUKSCH, J., dissents with opinion.

DAUKSCH, Judge, dissenting.

I respectfully dissent.

In my opinion something less than a mandatory injunction would suffice to recompense appellant for any loss he may have suffered. Money damages, for example. Appellant has not really lost much. He still has the ingress and egress to which he is entitled. He lost some easement land but no accessibility. Appellees were wrong in building the encroachment and should pay the penalty for such wrongdoing; but the extreme mandatory injunction is overkill. *See Willis v. Hathaway*, 95 Fla. 608, 117 So. 89 (1928). *See also Johnson v. Killian*, 157 Fla. 754, 27 So.2d 345 (1946); *Waters v. School Bd. of Broward County, Florida*, 401 So.2d 837 (Fla. 2d DCA 1981); *Goldberger v. Regency Highland Cond. Ass'n, Inc.*, 383 So.2d 1173 (Fla. 4th DCA 1980); *Do Couto v. ITT Comm. Dev. Corp.*, 347 So.2d 1059 (Fla. 1st DCA 1977), *cert. den.*, 357 So.2d 186 (Fla.1978).

8. *See* 3 R. Powell, *The Law of Real Property*, para. 420 (1988); Restatement (Second) of Torts § 941 pp. 580, 584 (1979).

9. U.S. Const. Amend. V; Art. 10, § 6, Fla. Const.

10. *See also Langhorst v. Riethmiller*, 52 Ohio App.2d 137, 368 N.E.2d 328 (1977).

Larry S. SWINDAL and Carl Castellano, Appellants,

v.

PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY, Appellee.

No. 91-01219.

District Court of Appeal of Florida, Second District.

April 10, 1992.

Rehearing Denied July 2, 1992.

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1. Judgment ⇐18

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owner's policy for injuries sustained when insured shot another person during an argument. Following remand, 571 So.2d 598, summary judgment for insured was entered by the Circuit Court for Polk County, E. Randolph Bentley, J., and insureds appealed. The District Court of Appeal, Altenbernd, J., held that: (1) exclusion for bodily injuries expected or intended by insured does not apply unless injuries are direct and proximate result of intentional act, and does not exclude coverage if damages are caused by a separate act of negligence, even if it occurs in the same general time frame as some intentional act, and (2) there was issue of fact, precluding summary judgment, as to whether insured fired gun intentionally or by accident.

Reversed and remanded and question certified.

1. Judgment ⇐181(23)

In action for declaratory judgment as to coverage under homeowner's policy, there was issue of fact as to whether insured fired gun intentionally or by accident, precluding summary judgment on applicability of exclusion for bodily injuries expected or intended by the insured.

2. Insurance ⇐139

Insurance coverage should not, as a matter of general public policy, protect insured from the known and necessary consequences of his own criminal conduct, but such policy is not invoked where injuries are caused by negligent discharge of a firearm.

3. Torts ⇐4

Generally, where reasonable person would believe that particular result is substantially certain to follow, person will be treated, for purposes of tort liability, as if result was intended.

4. Insurance ⇐146.5(4)

Insurance exclusion must be construed in favor of coverage.

5. Insurance ⇐435.36(6)

Exclusion in homeowner's policy for bodily injuries expected or intended by the insured does not exclude coverage for bodily injuries unless, at a minimum, the injuries are the direct and proximate result of an intentional act, and if the damages are caused by a separate act of negligence, even if it occurs in the same general time frame as some intentional act, the damages are not excluded if they are the result of an unexpected or unintended negligent act and are not the result of an intentional act.

W.C. Airth, Jr. of Williams & Airth, P.A., Orlando, for appellant Larry S. Swindal.

Raymond T. Elligett, Jr. of Schropp, Buell & Elligett, P.A., Tampa, for appellee.

ALTENBERND, Judge.

[1] Larry S. Swindal and Nicholas Castellano appeal a final summary judgment in favor of Prudential Property and Casualty Insurance Company in Prudential's action for declaratory judgment.[1] Prudential issued Mr. Castellano's homeowners insurance policy. Mr. Castellano shot Mr. Swindal during an argument. The summary judgment determined that Mr. Swindal's injuries were not covered by Prudential because the homeowners policy excluded coverage for bodily injuries expected or intended by the insured. After considerable collective difficulty in discerning the correct outcome, we reverse because there is a disputed question of fact whether Mr. Castellano fired the gun intentionally or by accident. Thus, we conclude there is a disputed issue of fact whether Mr. Castellano expected or intended to cause bodily injury to Mr. Swindal during this argument. As we stated during the last visit of this case to this court, the fact finder must determine whether "the injury was caused by a negligent or an intentional act." *Prudential Property & Casualty Ins. Co. v.*

1. This case first came before this court on Prudential's appeal from an order dismissing its action for declaratory judgment to determine the parties' rights under Mr. Castellano's homeowners policy. The trial court had dismissed the action for lack of jurisdiction, and we reversed and remanded for further proceedings. *Prudential Property & Casualty Ins. Co. v. Castellano,* 571 So.2d 598 (Fla. 2d DCA 1990).

Castellano, 571 So.2d 598, 599 (Fla. 2d DCA 1990). *See Perez v. Otero*, 348 So.2d 564 (Fla. 3d DCA 1977). Because we are not certain that our interpretation of *Landis v. Allstate Ins. Co.*, 546 So.2d 1051 (Fla.1989), and *State Farm Fire & Casualty Co. v. Marshall*, 554 So.2d 504 (Fla. 1989), is correct and this opinion could impact on standard language in virtually every homeowners insurance policy in Florida, we certify a question to the supreme court.

In early 1983, these two men engaged in an ongoing feud, apparently because Mr. Castellano's wife had been married to Mr. Swindal. In July 1983, Mr. Swindal allegedly threatened Mr. Castellano with a shotgun and held him at gunpoint for 45 minutes. In an effort to resolve their differences, the two participated in citizen's dispute settlement mediation on August 15, 1983.[2] After the meeting, Mr. Swindal drove through the Castellanos' driveway at high speed. Mr. Castellano thought he saw a gun in Mr. Swindal's hand. Actually, it was a hammer.

Mr. Castellano obtained his handgun from his closet. He left his home, got in his car, and proceeded to chase Mr. Swindal. He admits that he intended to frighten Mr. Swindal. Mr. Castellano then exited his car and approached Mr. Swindal's car with the loaded gun, safety off, and finger on the trigger. Mr. Castellano reached inside Mr. Swindal's car to grab what he thought was a gun. Mr. Swindal grabbed for Mr. Castellano's gun, which fired. Mr. Castellano admits that his finger was on the trigger, but denies that he fired the gun on purpose. He maintains that the gun accidentally discharged during the brief struggle.[3] Mr. Swindal sustained serious injuries.

2. § 44.201, Fla.Stat. (1987).

3. We note that the version of the incident described in this opinion is based primarily upon the testimony of Mr. Castellano. Apparently, Mr. Swindal is not able to provide competent testimony concerning this incident. Obviously, a jury could question the accuracy of Mr. Castellano's testimony.

In addition to this lawsuit, the incident resulted in two other legal proceedings. The record in this appeal contains limited information concerning the other two cases. First, the state charged Mr. Castellano with a criminal offense arising out of the incident. He was tried by a jury and found not guilty. Second, Mr. Swindal filed a civil action against Mr. Castellano. We have no information concerning the allegations in that complaint. Thus, we do not know whether the complaint alleged an intentional tort or an act of negligence or both. Apparently, the civil case was settled, but the record does not disclose the terms of the settlement.

The homeowners insurance policy involved in this case is entitled "The Prudential Homeowners Three" and appears comparable to the standard form supplied by the Insurance Services Office as HO–3. Section II, Coverage E, of the policy provides liability coverage under a comprehensive insuring agreement.[4] The coverage is limited by an exclusion which provides that Coverage E does "not apply to **bodily injury** or **property damage:** a. which is expected or intended by the **insured.**"

The trial court decided that Mr. Castellano's admitted conduct, at a minimum, constituted an intentional assault. Thus, it concluded that the insured intended to frighten his victim and that fright was a legal harm. As a matter of law and undisputed fact, it held that Mr. Castellano intended some harm to Mr. Swindal. That the nature and extent of the actual harm was far greater than that allegedly intended by the insured was not relevant to the trial court. The trial court was "troubled" by the fact that any other ruling might permit coverage for an illegal act or for the consequences of intentional, aggressive conduct.

4. The policy's insuring agreement states:

> If a claim is made or suit is brought against any **insured** for damages because of **bodily injury** or **property damage** to which this coverage applies, we will:
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> a. pay up to our limit of liability for the damages for which the **insured** is legally liable;

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Spengler v. State

[2] We share the trial court's concern that insurance coverage should not, as a matter of general public policy, protect an insured from the "known and necessary consequences" of his own criminal conduct. *Everglades Marina, Inc. v. American Eastern Dev. Corp.*, 374 So.2d 517 (Fla. 1979). On the other hand, Mr. Castellano was found not guilty in the criminal proceeding. *See generally* Annotation, *Criminal Conviction as Rendering Conduct for which Insured Convicted within Provision of Liability Insurance Policy Expressly Excluding Coverage for Damage or Injury Intended or Expected by Insured*, 35 A.L.R. 4th 1063 (1985). The insurance 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." If Mr. Swindal's injuries were caused by a negligent discharge of the firearm, the public policy that denies insurance coverage for the known and necessary consequences of criminal acts is not invoked. Instead, the invoked public policies are those that encourage compensation for victims of negligence and promote the cost-spreading of identified risks among a relevant segment of the population.[5]

The trial court concluded that the supreme court in *Landis* and *Marshall* expanded the intentional injury exclusion and empowered the trial judge to exclude coverage for damages that may "inevitably flow" from an intentional act, even though the injuries are proximately caused by a separate negligent act. In *Landis*, the supreme court referred to harm that "inevitably flows" from an intentional act and stated that "specific intent to commit harm is not required by the intentional acts exclusion. Rather, all intentional acts are properly excluded by the express language of the homeowners policy." 546 So.2d at 1053. Thus, it is not unreasonable to conclude that *Landis* effectively changed the intentional injury exclusion into a broader intentional acts exclusion. We are uncertain whether this was the supreme court's intent. This panel has been unable to agree whether the "inevitably flowed" test of foreseeability of injuries, if that is the test of *Landis*, is more or less restrictive than established concepts of substantial certainty and proximate causation.[6]

[3] As a general principle, where a reasonable person would believe that a particular result is substantially certain to follow, the person will be treated as if the

5. Insurance companies regularly charge a higher premium to insure a home that has a pool or some other special risk. When they underwrite such a risk, they have a monetary incentive to encourage and promote safety concerning the risk. Guns in homes are clearly a special risk. Many children and adults are injured or killed in incidents involving guns. Those incidents are frequently filled with emotion and occur under circumstances that render the conduct less than criminal. No public policy prohibits insurance companies from charging a higher premium for homes with guns and spreading the cost of these unfortunate occurrences among the households that choose to have guns. Such coverage provides the insurance companies with a monetary incentive to promote gun safety. It is quite likely that more lives are saved by gun safety education than by the deterrence of a broad insurance exclusion that is unknown to many homeowners.

6. The First District, employing that language from *Landis*, has indicated that the exclusion only precludes coverage for injuries that "inevitably flow" from the insured's intentional acts. *Spengler v. State Farm Fire & Casualty Co.*, 568 So.2d 1293 (Fla. 1st DCA 1990), *review denied*, 577 So.2d 1328 (Fla.1991). This analysis seems consistent with Judge Frank's dissenting opinion in *Zordan v. Page*, 500 So.2d 608, 614 (Fla. 2d DCA 1986). As we discuss in the body of this opinion, whether the "inevitably flows" test is the same as "proximate causation" is questionable. The injury in *Spengler* almost certainly was proximately caused by an intentional act that was accidentally directed at an unintended victim. In our case, the victim is the intended victim, but the injuries may have been proximately caused by an unintended, accidental act. In this context, we choose to employ "proximate causation," a well-defined concept of tort law, rather than create a new concept that could require a greater or lesser connection between the insured's act and the injury. We are inclined to believe, from the "inevitably flows" language, that *Landis* intended merely to hold that sexual battery, as a matter of law, always results in intentional injury. We recognize, however, that if the supreme court intended to permit insurance companies to exclude coverage on a different standard of causation, the trial court may have had authority to reach the result it reached.

result was intended. *See* W.L. Prosser, *Handbook of the Law of Torts* 32 (4th ed. 1971) The evidence in this case could readily support a finding that the shooting was substantially certain, not merely foreseeable. We conclude, however, that *Landis* does not authorize a trial judge to make this finding prior to trial if a question of fact exists. *Snyder v. Cheezem Dev. Corp.*, 373 So.2d 719, 720 (Fla. 2d DCA 1979).

[4, 5] We conclude that this standard insurance exclusion, which must be construed in favor of coverage, does not exclude coverage for bodily injuries unless, at a minimum, the injuries are the direct and proximate result of an intentional act.[7] If the damages are caused by a separate act of negligence, even if it occurs in the same general time frame as some intentional act, the damages are not excluded if they are the result of an unexpected or unintended negligent act and are not the result of an intentional act.

This case demonstrates that the occurrence of an intentional act does not necessarily mean that the insurance coverage excludes all injuries arising during the period when that intentional act takes place. In this case, the only undisputed intentional act is assault or assault with a deadly weapon. Fright may well be an excluded injury that is proximately related to the act of assault. Quite arguably, a resulting heart attack would also be related. But the injury in this case is a massive physical injury to the victim's head. This injury is not the result of fright. It was caused either by an intentional battery with a deadly weapon or by a negligent discharge of the weapon. Thus, there is an unresolved dispute of fact as to whether the damaging act is intentional or negligent.

We distinguish cases in which the insured intentionally fired a gun and thereafter maintained that the bullet wounds were not injuries connected to the shooting. *Compare Draffen v. Allstate Ins. Co.*, 407 So.2d 1063 (Fla. 2d DCA 1981) (excluding coverage for injuries incurred when insured "met his mark" four out of six times, firing gun at his pursuers) with *Spengler v. State Farm Fire & Casualty Co.*, 568 So.2d 1293 (Fla. 1st DCA 1990) (intentional harm exclusion did not apply where insured's intent to harm was not directed against person actually suffering harm), *review denied*, 577 So.2d 1328 (Fla.1991). The injuries caused by an intentional discharge of a gun are far more likely to be excluded from insurance coverage than are

7. In a recent case, the New York Court of Appeals held that harm was "inherent" in the act of sexually abusing a child. *Allstate Ins. Co. v. Mugavero*, 79 N.Y.2d 153, 581 N.Y.S.2d 142, 589 N.E.2d 365 (1992). As a result, it excluded coverage for acts of child sexual abuse under an exclusion for bodily injury "intentionally caused by an insured person." This result is comparable to the result in *Landis*, but the reasoning does not place the same emphasis upon the existence of an intentional act. The court states:

> Clearly, more than a causal connection between the intentional act and the resultant harm is required to prove that the harm was intended. Allstate acknowledges this but counters that in the exceptional case of an act of child molestation, cause and effect cannot be separated; that to do the act is necessarily to do the harm which is its consequence; and that since unquestionably the act is intended, so also is the harm. We think the argument finds support in logic and in the generally accepted conception of harm as being inherent in the act of sexually abusing a child. By requiring more than a causal connection between the intentional act and the resultant harm, the New York court is creating a test more favorable to the insured and the victim than the test we apply in this case. In light of the language in *Landis* that "all intentional acts are properly excluded by the express language of the homeowners policy," we do not believe that we can require more than proximate causation between the intentional act and the resultant harm.
>
> On the other hand, the New York court adopted its test because it believed "that the ordinary person would be startled, to say the least, by the notion that [the insured] should receive insurance protection for sexually molesting these children, and thus, in effect, be permitted to transfer the responsibility for his deeds onto the shoulders of other homeowners in the form of higher premiums."
>
> After chasing his victim down the street and pointing a loaded handgun at his victim's head at point blank range, the ordinary person might also be startled to discover that insurance premiums paid for the resulting injuries that "inevitably flowed" from this intentional altercation.

those caused by an accidental discharge.[8] Likewise, *Marshall* is arguably distinguishable because the jury expressly rejected the theory of negligent discharge and found that the insured had committed an intentional battery that was not a reasonable use of force. 554 So.2d at 505.

We certify the following question as a matter of great public importance:

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?

Reversed and remanded.

LEHAN, A.C.J., and THREADGILL, J. concur.

Ruth MARCY, Appellant,

v.

CHARLOTTE COUNTY SHERIFF'S OFFICE and Executive Risk Consultants, Appellees.

No. 91–803.

District Court of Appeal of Florida, First District.

April 30, 1992.

Workers' compensation claimant appealed order by Judge of Compensation Claims, Patrick J. Murphy, denying her claim for payment of chiropractic care provided by unauthorized physician. The District Court of Appeal, Smith, J., held that claimant's mere request to be treated by a certain physician of her choice, other than physician previously authorized by employer/carrier, did not obligate employer/carrier to either authorize physician preferred by claimant or to offer treatment by yet another physician.

Affirmed.

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Mere request by workers' compensation claimant to be treated by certain physician of her choice, other than physician previously authorized by employer/carrier, did not obligate employer/carrier to either authorize the physician preferred by the claimant or to offer treatment by yet another physician; there was no evidence that employer/carrier was ever made aware that claimant objected to further treatment by physician who had been previously authorized and in fact had treated claimant for conditions resulting from initial compensable accident. West's F.S.A. § 440.13(3).

Brian O. Sutter of Wilkins, Frohlich, Jones, Hevia & Russell, P.A., Port Charlotte, and Bill McCabe of Shepherd, McCabe & Cooley, Longwood, for appellant.

Gerald W. Pierce of Henderson, Franklin, Starnes & Holt, P.A., Ft. Myers, for appellees.

SMITH, Judge.

Ruth Marcy, claimant below, appeals an order by the judge of compensation claims

8. It should be noted that other jurisdictions have not excluded coverage for an accidental discharge of a firearm under circumstances similar to this case. Annotation, *Construction and Application of Provision of Liability Insurance Policy Expressly Excluding Injuries Intended or Expected by Insured,* 31 A.L.R. 4th 957, § 7(b) (1984); *Celina Mut. Ins. Co. v. Forister,* 438 N.E.2d 1007 (Ind.App.1982); *Farmers & Merchants Ins. Co. v. Cologna,* 736 S.W.2d 559 (Mo. App.1987); *State Farm Fire & Casualty Co. v. Shelton,* 176 Ill.App.3d 858, 126 Ill.Dec. 286, 531 N.E.2d 913 (1988), *appeal denied,* 125 Ill.2d 574, 130 Ill.Dec. 489, 537 N.E.2d 818 (1989); *Allstate Ins. Co. v. Lewis,* 732 F.Supp. 1112 (D.Colo. 1990). *See also* 7A J. Appleman, *Insurance Law and Practice* § 4501.09 (Berdal ed. 1979).