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 REPLY BRIEF

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PRELIMINARY STATEMENT

Prudential uses the same designations as in its initial brief, with the following additions: references to Prudential's initial brief are designated by the prefix "IB," and references to Swindal's answer brief are designated by "AB."

SUMMARY OF ARGUMENT

The answer brief repeatedly asserts there is a dispute over Castellano's intent at the precise moment he pulled the trigger and shot Swindal. That is, did Castellano have a change of heart in his admitted plan to frighten Swindal and put an end to Swindal's harassing ways?

The short response is, "so what?" This "dispute" is not a dispute in a material issue of fact.

Florida law precludes coverage for an expected or intended injury, even though the precise nature of the injury is more severe than the insured later claims he intended.

The case presents a question of great public importance, as the Second District certified.

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. INTRODUCTION

Swindal says he wants to present a more "balanced" statement of the facts, which turns out to be almost entirely legal argument (AB 2). For the most part, Swindal does not address the issues raised by the district court opinion, and does not attempt to sustain the court's opinion. Prudential adopts its arguments from its initial brief, and limits its reply to the arguments the answer brief raises.

The one "issue" Swindal repeats beyond the point of tedium throughout his brief is his assertion that there is a factual dispute as to what Castellano's intent was at the instant his finger pulled the trigger, shooting Swindal. Namely, did Castellano have a change of heart from his announced intent to frighten Swindal. Swindal argues that Castellano's differing explanations create a factual dispute (AB 3).

Even if this could be deemed a factual dispute, it is not a material dispute in fact that precluded summary judgment here, unless this case is to re-write Florida law. The following facts are undisputed in the record:

1. Swindal had been harassing Castellano and threatening him with a shotgun (Castellano Tr. 6, 26; R 200).
2. Swindal had just driven by Castellano's house (R 200-201; Castellano Tr. 41).
3. Castellano wanted to frighten and threaten Swindal (R 210; Castellano Tr. 46).
4. Castellano went to his closet to get his gun (R 209).
5. Castellano removed the gun from its case (R 209).
6. Castellano knew the gun was loaded (R 209-10).
7. Castellano removed the safety on the gun (R 211).
8. Castellano pursued Swindal in a car chase (R 201).
9. Castellano caught up to Swindal (R 201).
10. Castellano carried his gun and walked to Swindal's car (R 201, AB 2).
11. Castellano thrust the loaded gun through the window of Swindal's car (R 206).
12. Castellano had his finger on the trigger of the loaded gun when he thrust it through Swindal's car window (R 206).
13. Castellano grabbed Swindal's hammer (R 214-16).
14. As Castellano pulled at Swindal's hammer, Castellano also pulled the trigger of the gun he was holding, shooting Swindal (R 206, 214-16).
15. Castellano returned to his house and said that he had shot Swindal (R 156, 162-4, 168).

Swindal claims that despite these undisputed facts, there is a factual question precluding judgment presented by the possibility that Castellano's "earlier intentions can very easily have changed prior to the pistol" discharging (AB 4; see AB 12: "There may have been such an intent just prior to the shooting."). Aside from being preposterous, this misses the point of Prudential's argument and the numerous decisions discussed in its initial brief. Simply because an insured inflicts a different type of harm than he claims to have originally intended does not create coverage.

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

Swindal attempts to distinguish Landis v. Allstate Ins. Co., 546 So.2d 1051 (Fla. 1989), by arguing that it contained "the true intentional act exclusion," rather than an exclusion for intended injuries (AB 13). This is wrong. Landis excluded "injury intentionally caused by an insured person" (IB 10 at n. 3; AB 13).

The Landis exclusion does not even mention the word "act" or the phrase "intentional act." It focuses on whether the injury was intended by the insured, just as the exclusion here does. The exclusions are functionally equivalent, both as to their English and legal meanings.[1] As the Second District noted, the exclusion

[1] Actually, if there is a substantive difference in the two exclusions, the Prudential exclusion would exclude more injuries, because it excludes injuries which are "expected or intended".

is "standard language in virtually every homeowners policy in Florida." Swindal v. Prudential Property and Casualty Insurance Company, 599 So.2d 1314 (Fla. 2d DCA 1992), (hereinafter "Swindal").

Swindal then purports to distinguish Landis by saying that there it was undisputed that "intentional acts of child molestation had occurred" (AB 13). However, if coverage for intentional acts is excluded (as opposed to injuries), then there is no coverage for Castellano in light of the series of intentional acts outlined above and the demonstrated equivalent policy exclusion.

As discussed at IB 10-16, Landis holds that child molestation causes injury, regardless of the insured's subjective belief. The insured's claim that he did not intend to harm his victims does not create coverage for child molesters. Neither should it create coverage under the egregious facts under which Castellano shot Swindal.

The only "dispute" Swindal suggests is Castellano's purely subjective intent at the split second his finger pulled the trigger and he shot Swindal. But if there was an intent to cause any injury, there is no coverage although the actual injury is greater than envisioned (IB 13, 16-21). Just as in Landis, Castellano's intent is inferred as a matter of law.

Swindal attempts to dispute the Second District's holding that Castellano's actions were an assault (AB 15). Swindal argues there is "no proof of any threatening language or any words passing between the two men" (AB 3; AB 15). Of course not. Castellano

shot Swindal and rendered him incapable of providing testimony, and there were no other eyewitnesses at the time Castellano shot Swindal (R 206).

If Swindal's argument prevails, there could never be an assault case (much less a successful denial of coverage) any time the aggressor's actions rendered his victim incapable of testifying. Namely, the victim would not be able to testify that he was in fear, so there could be no assault charge based on "putting the victim in fear" (AB 15).[2]

As Prudential noted, Castellano's reaching inside Swindal's car, grabbing Swindal's hammer, and trying to pull it away from Swindal constituted a battery (IB 14, R 283-84). Swindal does not and cannot dispute the legal authority Prudential cited. Instead he asserts there is no proof that the touching which took place constituted a battery (AB 16). Presumably Swindal thinks a court must have direct testimony from the victim, as he claims for his assault argument. Understandably he cites no case law for an argument which would effectively nullify battery law for all cases with severely injured victims.

The aggressor holding a gun while reaching into the victim's car to grab an object from the victim is a battery without need of any additional facts. Swindal's argument that this point was not

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[2] Swindal's attempts to distinguish State Farm Fire & Casualty Co. v. Marshall, 554 So.2d 504 (Fla. 1989), ignore the fact that Castellano was the aggressor here and chased down Swindal (AB 15). He has no comment on Castellano's testimony that he shot Swindal in self defense (R 195, IB 15).

raised below ignores the record evidence of the battery (and he apparently forgets this point was discussed in the Second District oral argument). In any event, Landis holds the summary judgment must be affirmed on any ground presented by the record. 546 So.2d at 1053.

Swindal proffers a definition of "bodily harm" which includes "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" (AB 17, emphasis added). As noted, Castellano's struggling with Swindal over Swindal's hammer constitutes a battery under Florida law. Even under Swindal's definition (which is worded in the alternative), the "projecting" of such force occurred here where Castellano admittedly approached Swindal "carrying the pistol in open view in his hand" (AB 2; R 283).

Swindal's concluding comments reveal the essence of his argument. He asserts no court can decide this case despite Castellano's admitted intent to frighten Swindal because "there is no proof that the intent was carried out" (AB 18). Swindal's desire to have this Court adopt a standard that would depend on Castellano's unverifiable, after-the-fact, subjective intent is the legal and logical equivalent to letting child molesters obtain coverage by saying they intended no harm. This Court rejected that assertion in Landis, and should here.

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

Swindal purports to distinguish the numerous district court opinions which would preclude coverage here by asserting "in each of them the intentional nature of the act is undisputed" (AB 18, emphasis added). Thus, Swindal suggests that if the act of shooting was intended, there would be no coverage. And he argues in his case, the act of shooting may not have been intended. As noted above and in the initial brief, this is a faulty legal analysis.

Even Swindal's own brief is inconsistent with his premise. On the following page he cites Spengler v. State Farm Fire and Casualty Company, 568 So.2d 1293 (Fla. 1st DCA 1990), review denied, 577 So.2d 1328 (Fla. 1991). However, in Spengler the insured did intend the act of firing his gun. He shot an unintended victim. The court found coverage.

Similarly, Swindal then attempts to distinguish Etcher v. Blitch, 381 So.2d 1119 (Fla. 1st DCA 1979), cert. denied 386 So.2d 636 (Fla. 1980), on the grounds there was an "intentional act of firing the gun" (AB 21). The key is not intentional acts, but whether some harm was intended. There is then no coverage for any harm, even if greater than allegedly intended (IB 18-21).

Swindal cannot distinguish Bosson v. Uderitz, 426 So.2d 1301 (Fla. 2d DCA 1983). In Bosson there was no coverage where the insured grabbed the victim's purse and injured her (even though he

may have intended only to grab the purse and not to injure her). Here, Castellano grabbed Swindal's hammer and injured him. As in Bosson, there is no coverage. Simply because a different or more severe injury occurs, it does not create coverage.[3]

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

Swindal does not really attempt to square the result in Swindal with the out-of-state cases discussed in Prudential's initial brief, and Prudential relies on that brief without repeating those arguments here.

Swindal says that in Tobin v. Williams, 396 So.2d 562 (La. App. 1981), "it is undisputed that the trigger, in fact, was pulled" (AB 23). This does not distinguish the case. Castellano admits he pulled the trigger as he struggled with Swindal to grab Swindal's hammer (IB 3; R 206, 214-216).

Furthermore, any reasonable person should have believed some harm would result from the course of actions Castellano undertook (see IB 25). There is no coverage.

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[3] Swindal's assertion that there was no decision by Castellano to commit an "obvious criminal act" ignores Castellano's battery and the Second District's observation that his actions were an assault or assault with a deadly weapon (AB 19). Swindal cites no authority for his implicit argument that the Court should engraft onto the exclusion a requirement that the injury result from an "obvious criminal act."

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.

Swindal's response to the certified question is to continue asserting there is a question over Castellano's intent at the instant he pulled the trigger. He also reiterates his argument that "there is no proof that Nicholas Castellano ever threatened or tried to frighten Larry Swindal in his presence" (AB 25; 28). This is ridiculous.

Where the aggressor has rendered his victim incapable of testifying, there will never be testimony of a threat or that the victim was frightened. Under Swindal's logic, there will be no more prosecutions for such attacks and no exclusion for coverage. It is not surprising that Swindal cites no law from any jurisdiction supporting such a holding.

Furthermore, there is no dispute that Castellano approached Swindal's car with the gun in his hand "in open view" (AB 2). Because any reasonable person would be put in fear of another person with whom he had a running dispute approaching him with a gun in open sight, the facts (even without the victim's testimony) demonstrate the "putting in fear." The undisputed material facts demonstrated Castellano's intentional acts from which the injuries flowed.

Swindal professes bewilderment at what the intentional act was (AB 26). There were a series of intentional acts, as listed above. They can be viewed (as the Second District apparently did) as the intentional act of Castellano chasing down his victim with a loaded gun. Again, although the insured asserts the actual harm differed from the harm he later says he intended, that difference does not create coverage.

Quite simply, Swindal has not answered the certified question. Swindal has suggested no reason why there should be coverage for an injury that "inevitably flows" from the insured's intentional acts. As Prudential argued, the fact that some harm was intended and would inevitably result does not change simply because an allegedly negligent event alters the nature of the injury (IB 29).

Swindal says the acts of Castellano are not synonymous with the acts of a child molester (AB 27). That may be so. But if so, Castellano's are worse. Apparently the child molester cannot help himself. Castellano has no such excuse. He wanted to end Swindal's harassment and took the law into his own hands.

Swindal wants this Court to approve insureds carrying guns "as a precaution" when they approach people with whom they are feuding (AB 3, 28). Prudential suggests the law should encourage insureds who are being harassed to call the police for help, and not stalk their harassers, carrying loaded guns with the safety off.

III. THIS COURT SHOULD ACCEPT JURISDICTION.

Swindal urges this Court not to accept jurisdiction because there are "disputed issues of facts [sic]" (AB 29). If the alleged "dispute" in fact here is deemed material for coverage purposes, then it is all the more reason to accept jurisdiction and announce a new rule precluding summary judgments in cases involving the expected or intended exclusion.

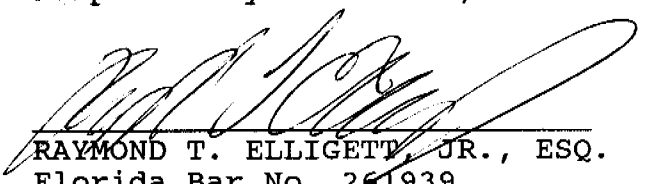
Swindal's suggestion that "none of the cases relied upon by Prudential involved disputed issues of fact" is absurd (AB 29). Does Swindal really think that all of the insureds in the over twenty-five coverage cases in the initial brief conceded there were no disputed issues of fact? The petitioners in Landis argued there were fact questions as to whether the child molesters intended to harm the children by molesting them. 546 So.2d at 1053. The question is whether such disputes are material and preclude a coverage decision under the expected or intended clause. They did not in Landis and do not here.

The Second District properly certified this case as containing a question of great public importance, and it conflicts with the cases noted at IB 31.

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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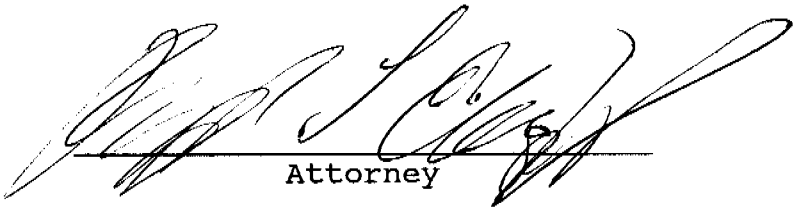
CERTIFICATE OF SERVICE

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 29th day of September, 1992.



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