IN THE SUPREME COURT OF FLORIDA

RENUKA PRASAD,

Appellant,

vs. Supreme Court No.: 81,825

ALLSTATE INSURANCE COMPANY,

Appellee.

APPELLEE'S ANSWER BRIEF

SHARON LEE STEDMAN
Florida Bar No. 0303781
SHARON LEE STEDMAN, P.A.
1516 East Hillcrest Street
Suite 200
Orlando, Florida 32803
(407) 894-7844

LORI J. CALDWELL
Florida Bar No. 0268674
DAVID SHELTON
Florida Bar No. 0710539
RUMBERGER, KIRK & CALDWELL, P.A.
P.O. Box 1873
Orlando, Florida 32802
(407) 972-7300

Attorneys for the Appellee,
Allstate Insurance Company

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

PRELIMINARY STATEMENT

This action arises from an incident in which Toreshwar Nauth stabbed his sister, Renuka Prasad, and his mother, Chandra Palat. Toreshwar Nauth will be referred to as Nauth. His sister will be referred to as Prasad and his mother will be referred to as Palat.

Criminal charges were brought against Nauth in Case No. CR89-1925 in the Circuit Court in and for Orange County, Florida. Such proceedings will be referred to as the criminal case or matter.

Prasad brought a civil suit against Nauth and Palat in Case No. CI 91-15 in the Circuit Court in and for Orange County, Florida. Such proceedings will be referred to as the state court action. Prasad's complaint filed in CI 91-15 will be referred to as the state court complaint.

Allstate Insurance Company filed a declaratory judgment action in the United States District Court for the Middle District of Florida, Case No. 91-32-CIV-ORL-19. This will be referred to as the declaratory judgment action or federal action.

The federal district court entered judgment on the pleadings in Allstate's favor declaring that the policy does not provide coverage. Appeal was taken to the Eleventh Circuit Court of Appeals which certified three questions to this court:

> (1) Under Florida law does the intentional acts exclusion of the policy in question apply in the circumstances alleged in the state court complaint?

(2) Are the injuries alleged in the state court complaint an "accidental loss" as described in the policy?

(3) Does the criminal acts exclusion of the policy apply in the circumstances alleged in the state court complaint.

Allstate Insurance Co. v. Prasad, 991 F.2d 669, 672 (11th Cir. 1993).

STATEMENT OF THE CASE AND FACTS

The appellee, Allstate Insurance Company ["Allstate"] accepts the appellant's state of the case and facts with the following additions and/or corrections:

Allstate commenced a declaratory judgment action in the United States District Court for the Middle District of Florida. The complaint included as defendants Renuka Prasad, as well as the insureds, Toreshwar Nauth and Chandra Palat[1]. Because the instant case has as its genesis a state court criminal action against insured Nauth, Allstate is requesting that this Court take judicial notice of the criminal court file of Toreshwar Nauth in case number CR89-1925 pursuant to section 90.202(6), Florida Statutes (1991). Allstate submits that judicial notice of the criminal court file is relevant because the state court complaint filed by Prasad makes allegations and references to the criminal file by citing two psychiatrists appointed in the criminal matter, Doctors Gutman and Danzinger, who stated that Nauth was a chronic paranoid schizophrenic. The doctors, in turn, based their opinion on the arrest report in the matter. (Appendix 1). Because Prasad's counsel who signed the state court complaint specifically cited to

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[1] Allstate joined as defendants all parties to the state court action including the insureds and the party claiming against the insureds. This procedure avoids the risk of inconsistent adjudications which might arise if all parties were not joined. *Allstate Insurance Company v. Conde*, 595 So.2d 1005 (Fla. 5th DCA 1992). *See also Irvine v. Prudential Property and Casualty Insurance Co.*, 18 Fla. L. Weekly D1324, 1325 n. 2 (Fla. 3d DCA 1993) (insurer did not bring suit against claimant as well as the insured).

Dr. Danzinger and Dr. Gutman, he knew the true facts involving the criminal incident.

Dr. Danzinger declared:

> On the morning of the alleged offense, the defendant [Nauth] was apparently acting bizarrely and in a peculiar fashion and also was apparently drinking. The motivation for the defendant stabbing his mother and sister is unclear, but the defendant did state to the police officer that he thought his family was trying to harm him and that he was acting in self-defense. ...the alcohol he was drinking may have worsened his mental state. It seems that we can deduce that the defendant was perhaps acting in a paranoid fashion and felt that his family members may have been trying to kill him.

(Appendix 1). Dr. Danzinger specifically noted that in his earlier evaluation of February 4, 1990, he did not have the arresting officer's report so that he declined to comment on the question of the ***criminal responsibility***. At the time of the March 13, 1990 report, however, Dr. Danzinger declared that he had an opportunity to review the arresting officer's report.

The arresting officer's report declared that the officer received the information from Palat who is the mother of Nauth. Palat told the officer that her son had been ranting and raving all day long and swearing at her very heavily and acting extremely irrational. When the daughter, Renuka Prasad, came over to pick up the laundry, the son became very upset. Prasad asked Nauth to go outside and take a walk to calm down. Nauth became enraged and grabbed a kitchen knife from the knife holder. At that point Palat ran out the rear sliding glass door but while fleeing, she heard Prasad scream. Palat then went back into the house and tried to take the knife away from Nauth. At that point, Nauth stabbed Palat

in the right upper arm. (Appendix 2). Accordingly, both Palat and Prasad were victims of Nauth's stabbing.

The information charging Nauth with aggravated battery with a deadly weapon is attached hereto as Appendix 3. The third psychiatrist appointed to examine Nauth was Dr. Jose M. Suarez. The report of Dr. Suarez was also filed in criminal case number CR89-1925. In Dr. Suarez' report, Nauth related that his sister, Renuka Prasad, came to his house and told him that she noticed that he (Nauth) was sick and was in need of hospitalization. Mr. Nauth stated he refused to go to the hospital and his sister grabbed a knife and threatened him to the point that he also grabbed a knife from the kitchen and stabbed her in the abdomen and arms[2]. (Appendix 4).

Allstate submits that the facts set forth above either were known or should have been known by Prasad's attorney prior to the filing of the state court complaint. Consequently, certain allegations in the state court complaint were known to be false when they were alleged. For instance, Prasad was well aware that

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[2] Renuka Prasad also gave a recorded statement to Allstate on March 10, 1989 wherein she declared that her brother had been acting up the past week and that he had been bothering Prasad's mother. Prasad kept telling Nauth to leave the mother alone but he kept cursing at Prasad instead. Nauth became nasty and Prasad kept telling Nauth to stop it and to get out. Nauth would not listen to her and (she guessed) he got mad and picked up the knife from the countertop block. She tried to defend herself and that's when she got slashed on her hand. When she started picking up her hand, Nauth started for her chest and stabbed her around eight stabs. Prasad had called the police the Friday before and begged them to take Nauth down to the hospital where he could get some help. She stated that he was on medication and was taking it but she guessed he wasn't taking it the way he was supposed to. (Appendix 5).

the mental condition of Nauth had deteriorated when she went to her mother's home on February 26, 1989. Prasad was also well aware that Nauth had been threatening Palat.

Also, it is simply not true that when Renuka Prasad arrived, Nauth approached her simply carrying a knife and then without warning stabbed her repeatedly. The stabbing was precipitated by an argument between Prasad and Nauth which resulted in Nauth deliberately going into the kitchen, picking up a kitchen knife, and returning to stab Prasad approximately eight times. This negates any allegation that Nauth was so deranged that without volition on his part Prasad was severely injured.

Prasad argues that the court below erred in granting a motion for judgment on the pleadings because there were circumstances which if proven would have been covered by the insurance policy. This argument cannot be supported. If the actual facts had been pleaded in Prasad's state court complaint, Allstate probably never would even have been notified of the action, much less have been required to defend the insureds. This is just one more example of artful pleading that is done in order to reach the deep pocket of an insurance company.

If insurance companies are going to be required to defend based on the allegations in the complaint, then there should be a corresponding duty on the drafter of the complaint to allege the actual facts, not the facts dreamed up by the drafter in order to reach the deep pocket of an insurance company. There must be corresponding duties on both sides in order for the law of

insurance to continue working.

If filed in federal court, Prasad's state court complaint would be subject to Federal Rule of Civil Procedure 11 sanctions. Rules Regulating the Florida Bar, Rules of Professional Conduct, Rule 4-3.1 is similar to federal rule 11 in that a lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous. The allegation that Allstate has a duty to defend the actions of its insured in the instant case is frivolous.

The insurance policy

Allstate brought the declaratory judgment action against its insureds and Prasad in order to determine its rights under Deluxe Homeowners Policy number 060 071 646, Form AU9601. The insuring contract's definitions involved in the declaratory judgment action are:

> **Definitions Used In This Policy**
>
> . . . .
>
> 3. **'Insured person'** - means **you** and, if a resident of **your** household:
> (a) any relative; and
> (b) any dependent person in **your** care.

(Appendix 6, at p.4) (p.3 of policy).

The insuring agreement portion of the policy declares, in pertinent part:

> The terms of this policy impose joint obligations on persons defined as an **insured person.** This means that the responsibilities, acts and failures to act of a person defined as an **insured person** will be binding upon another person defined as an **insured person.**

(Appendix 6, at p.5) (p.4 of policy).

The family liability and guest medical protection portion of the policy declares, in pertinent part:

> **Losses We Cover:**
>
> **Allstate** will pay all sums arising from an accidental loss which an **insured person** becomes legally obligated to pay as damages because of **bodily injury** or **property damage** covered by this part of the policy.
>
> **Losses We Do Not Cover:**
>
> 1. **We** do not cover any **bodily injury** or **property damage** which may reasonably be expected to result from the intentional or criminal acts of an **insured person** or which are in fact intended by an **insured person.**

(Appendix 6, at p.24) (p.23 of policy).

It was the position of Allstate that defendants, Renuka Prasad, Chandra Palat, and Toreshwar Nauth, were not entitled to insurance coverage due to the policy provisions related to, among other things, lack of an accidental loss and intentional or criminal acts. Allstate based its position on the allegations of the state court complaint brought by Prasad against Allstate's insureds. That complaint specifically alleged that Nauth approached Prasad with a knife and then repeatedly stabbed Prasad about the arms, hands and body. Such actions of Nauth could not constitute an accidental loss which formed the basis of the contract of insurance between Allstate and its insureds[3].

Allstate also based the premiums charged to its insureds on its exclusion from coverage for bodily injury that reasonably could

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[3]The insureds bargained for and paid a premium for coverage for accidental losses arising out of an insured's negligence. In turn, Allstate set its premium based on coverage of accidental losses.

be expected to result from the intentional or criminal acts of an insured person (or which are in fact intended by an insured person). The repeated stabbing about the hands, body and arms of Prasad constitutes a criminal act under Florida statutes. In fact, Nauth was charged with aggravated battery with a deadly weapon in violation of section 784.045(1)(b), Florida Statutes. The exclusion does not require criminal responsibility but only that the actions of the insured constitute a criminal act. Consequently, whether or not Nauth was insane at the time of the criminal acts is likewise irrelevant since Nauth's state of mind is irrelevant in determining whether or not the act was criminal in nature.

Likewise, because the insuring contract imposes joint liability on the insureds, the intentional and criminal act of Nauth that caused the personal injuries of Prasad precludes coverage for any claims against Palat.

Orders of the District Court

The federal district court granted Allstate's motion for judgment on the pleadings on July 29, 1991 by ruling that the homeowners policy specifically excluded coverage for "any bodily injury or property damage which may reasonably be expected to result from the intentional or criminal acts of an insured or which are in fact intended by an insured." The court stated that the defendants apparently relied on their allegation that Nauth was insane and unable to form intent at the time of the incident as grounds for avoiding application of that provision. "This

provision, however, contemplates an objective standard for determining the nature of the acts causing the injury. *Allstate Insurance v. Cruse*, 734 F.Supp. 1574, 1579 (M.D. Fla. 1989); *Allstate Insurance Company v. S.L.*, 704 F.Supp. 1059, 1060 (S.D. Fla. 1989); *Allstate Insurance Company v. Travers*, 703 F.Supp. 911, 915 (M.D. Fla. 1988). The intentional acts exclusion applies when a reasonable person would expect the acts to result in injury to the victim; a subjective intent to do harm is not required. *S.L.*, 704 F.Supp. at 1060; *Travers*, 703 F.Supp. at 915; *Landis v. Allstate Insurance Company*, 546 So.2d 1051, 1053 (Fla. 1989)."

The court then declared that it was self-evident that bodily injury could reasonably be expected to have resulted from Nauth's alleged knife attack on Renuka Prasad. The court, consequently, determined that the exclusion's objective standard was satisfied.

The district court, after granting Prasad's motion for relief from order of July 29, 1991, entered a subsequent order. The court declared that Prasad's position was apparently based on the argument that Nauth's actions lacked any element of directive conduct and thus were distinguishable from the conduct of the tortfeasors relied on by the court in its prior order. "Such distinction, however, is illusory. Defendants' pleadings describe a vicious knife attack on Prasad. Although Nauth may have lacked the intent to hurt Prasad or to commit a crime, it is undisputed that he attacked her with a knife and stabbed her repeatedly."

SUMMARY OF ARGUMENT

The instant case involves a vicious aggravated battery with a deadly weapon committed by Nauth against his sister Renuka Prasad. Nauth was charged with aggravated battery with a deadly weapon, found incompetent to stand trial, subsequently found competent and was in fact tried by a jury. The jury found that Nauth committed the act but that he was not criminally responsible due to insanity.

In the police report on the matter, Nauth's mother, Chandra Palat, stated that Prasad came to the house, got into an argument with Nauth and Nauth went to the kitchen, grabbed a kitchen knife and attacked Prasad.

In the recorded statement to Allstate, Prasad verified Palat's version of the facts. Prasad declared that she had called the police the Friday before and begged them to take Nauth down to the hospital where he could get some help. On the date of the aggravated battery with a deadly weapon, Prasad went to her mother's house and Nauth was bothering the mother. Prasad kept telling Nauth to leave the mother alone but he kept cussing at Prasad instead. (Nauth was drinking at the time.) Nauth would not listen to Prasad and eventually got so mad that he picked up a knife from the countertop block and proceeded to stab Prasad in her chest and slashed her hand.

Based on these facts, Prasad filed a civil complaint in the state court against both Nauth and Palat. The complaint alleged negligence on the part of the mother for failure to give Prasad his anti-psychotic medicine. Prasad, however, stated in her recorded

statement to Allstate that Nauth was on medication and was taking the medication. Prasad also alleged in the state court complaint that she was not warned that Nauth was not taking his medicine and was acting crazy. Prasad further alleged that Nauth came at her without warning.

Allstate respectfully submits that it is only by artful pleading that Allstate was called upon to defend the instant case. Allstate's homeowners policy issued to Palat specifically declared that Palat was paying a premium to cover accidental losses. By no stretch of the imagination could the above scenario be called an accidental loss to fall within the homeowners policy. Surely, the average homeowner would not consider that he was buying coverage for the criminal acts of Nauth.

Even assuming *arguendo* that the incidents could somehow by the stretch of the imagination be considered an accidental loss, the incident is excluded from coverage by the intentional or criminal act exclusion. The specific policy that Palat bargained for from Allstate contains an exclusion with an objective test as to whether or not bodily injury is excluded. If a reasonable person would expect injuries to result from the act that forms the basis of the loss, then the damages caused thereby are excluded. One would reasonably expect injuries or damages to result from the repeated stabbing of a person about that person's arm, hand and body.

Additionally, whether or not Nauth was insane at the time of the incident has absolutely no application to the specific exclusionary provision in Allstate's Deluxe Homeowners Policy. The

policy does not require the insured to act with an intent to injure. The policy also does not require that the insured act with criminal responsibility but only that the insured commits a criminal act. Aggravated battery with a deadly weapon is a criminal act although Nauth was not held criminally responsible for that act. The psychiatrists that examined Nauth specifically declared that they were determining whether or not Nauth had criminal responsibility for the act. The fact that he was held not to be criminally responsible does not alter the fact that Nauth committed a criminal act.

Because Nauth committed an intentional and criminal act, the insuring agreement portion of the policy specifically imposes joint obligations on persons defined as insured persons. That portion of the policy specifically declares: "this means that the responsibilities, acts and failures to act of a person defined as an insured person will be binding upon another person found to be an insured person." Both Nauth and Palat are defined as insured persons under the policy so that the act of Nauth is binding upon Palat.

This case illustrates a problem that needs solving in the State of Florida. Absent considerations of insurance, it would never occur to a lawyer to plead this plainly intentional tort as negligence. There is no good faith basis for asserting a claim of negligence in this case, although it is standard practice. The problem is that such a pleading creates a perfect conspiracy between a plaintiff and the insured and the insurer has no remedy.

Allstate submits that if an insurer is going to be bound by the facts as alleged by a complaint, then the drafter of that complaint has a corresponding duty to plead the facts as they are known to the drafter. The fact that lawyers are allowed to plead borderline fraudulent allegations in a complaint in order to reach the deep pocket of an insurance company can only foster the contempt that the public feels toward lawyers and the judicial system. The average homeowner would never consider that they were purchasing insurance to cover such acts as those alleged in the instant state court complaint. Homeowners and insurance companies would cringe at the thought that they had bargained for insurance to cover a vicious attack that the Florida statutes describe as an aggravated battery with a deadly weapon.

Allstate submits that this court should give true effect to the intentions of the parties in entering into this contract as expressed by the plain wording of the contract. The contract specifically covers only losses arising from an accidental loss. The contract also unequivocally and clearly excludes injury or damage which may reasonably be expected to result from the intentional or criminal acts of an insured person. That is what the parties bargained for and that is what this court should enforce.

ARGUMENT

POINT I

THE ALLSTATE'S DELUXE HOMEOWNERS POLICY IS NOT AMBIGUOUS AND SHOULD BE CONSTRUED TO GIVE TRUE EFFECT TO THE INTENTIONS OF THE PARTIES.

Allstate acknowledges the principle of law that if in fact a policy provision is deemed ambiguous then it should be construed in favor of coverage. However, the counter principle of law which is applicable to the instant case provides that where an insurance contract is not ambiguous, the contract must be given effect as written. *State Farm Fire & Casualty Company v. Oliveras*, 441 So.2d 175 (Fla. 4th DCA 1983). Allstate's policy language is not ambiguous and has been repeatedly applied in analogous cases without difficulty by courts throughout the country. *E.g., Allstate Insurance Co. v. Bailey*, 723 F.Supp. 665 (M.D. Fla. 1989); *Allstate Insurance Co. v. Talbot*, 690 F.Supp. 886 (N.D. Cal. 1988).

The appellant is requesting that this Court find an unambiguous policy ambiguous in order to reach the deep-pocket of Allstate. However, as eloquently declared by the *Oliveras* court, "The rule that ambiguities in insurance contracts are to be construed in favor of the insured *see, e.g., Gayfer's, supra* [366 So.2d 1199 (Fla. 1st DCA 1979)], is not license for our raiding the deep pocket [of insurers]". *Id.* at 177.

As the Fourth District more recently noted in *Marr Investments, Inc. v. Greco*: 18 Fla. L. Weekly D568, 569 (4th DCA Feb. 24, 1993):

> However, it appears abundantly clear to us that the plaintiff's complaint has been framed in negligence solely to reach the 'deep pocket' of the insurance company (or its insured), as there is a clear distinction in the policy for assault and battery by a patron, which is what occurred in this case. It is wrong to require the insurance company to defend against facts that are clearly not within the coverage of the policy, even though the 'complaint' may be. We wholeheartedly agree with the concurring opinion of Judge Griffin in *Allstate Insurance Company v. Conde*, 595 So.2d 1005 (Fla. 5th DCA 1992) on this issue.

18 Fla. L. Weekly D568, 569 (Fla. 4th DCA, Feb. 24, 1993).

The court in *Marr Investments* referred to *Allstate Insurance Co. v. Conde*, 595 So.2d 1005 (Fla. 5th DCA 1992)[4], whose facts are analogous to the facts of this case. After a ten day separation from his family, Oswaldo Conde knocked on Margarita Montero's bedroom window in the early hours of June 29. *Id.* at 1006. Ms. Montero, accompanied by one of the children, admitted Mr. Conde into the home. Mr. Conde followed Ms. Montero back to the bedroom where the children were sleeping. Mr. Conde pulled a gun and, after stating "I'm tired of everything" or "I have come to end it all," shot Ms. Montero through the chest. He then shot the two children and shot Ms. Montero again with his last bullet. *Id.*

Ms. Montero filed a civil suit against Mr. Conde. She alleged both intentional wrongdoing (not covered by the policy) and negligent conduct. *Id.* Judge Griffin, concurring specially, noted that the case illustrated a problem which needs to be solved:

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[4] The *Conde* court certified the case as being one of great public importance but neither party invoked the jurisdiction of this court.

> Given the undisputed facts of this case, absent considerations of insurance (the intentional act exclusion), it would never occur to a lawyer to plead this plainly intentional tort as negligence. ... I can see no good faith basis for asserting a claim for negligence in this case, although I recognize it as standard practice. The problem is that such a pleading creates a perfect conspiracy between a plaintiff and the insured and the insurer has no remedy.

Id. at 1008-9.

Judge Griffin further noted that a plaintiff pleads negligence in a case such as *Conde* because he wants a deep pocket from which to satisfy a judgment or, even better, to obtain a settlement:

> Normally when a defendant is sued on a theory that is inadequately pleaded, he gets the claim dismissed or, if the claim is invalid under controlling law, he gets a summary judgment. But in cases such as this the normal antidotes for invalid claims do not work. An insured defendant is often totally committed to the negligence pleading of the plaintiff because as long as the negligence claim is included in the complaint, the insured must be provided a defense on the intentional tort claim, a benefit he would not have if the spurious negligence claim were missing. It is also more likely the insurer will come up with the money to settle the entire case based on the cost of defending the negligence claim. In many of these cases, the defendant even has some relationship with the victim, or a sense of remorse, and thus has either an emotional or financial stake in having the plaintiff succeed in recovering a judgment under a theory covered by insurance. In a case where neither the plaintiff nor the defendant wants the covered claim disposed of, it is most unlikely to disappear.

Id. at 1009.

Finally, Judge Griffin noted that an insurer covenants to defend claims against the insured that are false, fraudulent or groundless. However, the covenant declares that the insurer will provide a defense if an insured person is sued for <u>covered</u> damages, even if the allegations are groundless, false or fraudulent. *See* Allstate's Deluxe Homeowners Policy (Appendix 6) at page 23.

In the instant case, the insured person cannot be sued for

covered damages because the policy only covers damages arising from an accidental loss. The insured repeatedly stabbed Prasad about the arms, hand and body and thereby negated any possibility of her injuries being an accidental loss. Consequently, the incident that was the subject of the state court complaint unequivocally shows that the incident did not involve a covered loss which Allstate either had the duty to defend or indemnify against the loss.

If allegations in a complaint are to be accepted as true, then the drafter of the complaint has an obligation to allege true facts. In the instant case, there can be no question as to the actual facts because all three parties to the complaint, Prasad, Nauth, and Palat, have agreed to the facts in documents filed in court pleadings. It does not further the integrity of the courts to allow false and/or incomplete facts that are known by the drafter to be alleged in order to reach a deep-pocket of a defendant. This turns the law of contracts as well as torts in general on its head and gives ammunition to the general public to hold the court system and attorneys up to ridicule.

POINT II

THE INJURIES ALLEGED IN THE STATE COURT COMPLAINT ARE NOT AN "ACCIDENTAL LOSS" AS REQUIRED BY THE POLICY.

A. The Allstate Deluxe Homeowners Policy creates one contract between Allstate and all of the insureds.

The first paragraph of appellant's argument under Point II is incorrect. Allstate's policy provides that "Allstate will pay all sums arising from an accidental loss which an **insured person** becomes legally obligated to pay . . . ." What is included in this provision is a specifically defined class of injury, *i.e.*, injury

arising from accidental loss. Inasmuch as the injuries giving rise to the claims here were caused by Nauth stabbing Prasad, there is no accidental loss and Prasad's injury is not covered. This is true regardless of whether Prasad can bring claims against Palat as well as Nauth.

The allegations against Palat were in actuality for damages arising out of Nauth's attack against Prasad. The complaint alleged negligence against the mother for failure to warn and for failure to see that Nauth took his anti-psychotic medicine but all of the injuries sustained by Prasad were a direct result of the acts of Nauth. In other words, if Nauth had not committed the acts he did upon Prasad, the fact that the mother did not warn Prasad or was negligent in failing to see that Nauth took his anti-psychotic medicine would be meaningless because Palat's failures to act did not in actuality cause injuries to Prasad.

The insuring provision of the policy declares, in pertinent part:

> The terms of this policy impose *joint obligations* on the persons defined as an **insured person.** This means that the responsibilities, acts and failures to act of a person defined as an **insured person** will be binding upon another person found to be an **insured person.**

Palat is an insured person under the policy because she is a specifically named insured. Nauth is likewise an insured person under the policy because he is a resident of Palat's household and a relative, *i.e.*, Palat's son. Because the policy specifically provides that the responsibilities, acts and failures to act of an insured person will be binding upon another insured person, the

criminal act of Nauth is binding on Palat. In other words, because of this specific policy provision, the insureds cannot be viewed separately as appellant requests. The policy could not be any clearer than to inform Palat that if an insured commits an act that is excluded under the policy, then the exclusion is binding on her. Consequently, even though the state court complaint alleged negligence against Palat, the specific language of the policy requires that she is not covered because of the intentional or criminal act committed by Nauth.

The use of the language "an insured" in the intentional or criminal acts exclusion, discussed *infra* in Part III, also combines to impose joint obligations on all insureds. The exclusion negates coverage for "bodily injury or property damage which may reasonably be expected to result from the intentional or criminal acts of an insured person[.]" This language is significant since it refers to the acts of "an insured person" rather than "the insured person." Case law draws a distinction between exclusionary language referencing acts of "the insured person" and "an" or "any insured person." Under exclusionary language referencing "the insured person," there would be coverage for a negligent insured despite another insured's intentional act. *See, e.g., Pawtucket Mut. Ins. Co. v. Lebrecht*, 190 A.2d 420 (N.H. 1963); *Farmers Ins. Co. of Washington v. Hembree*, 773 P.2d 105 (Wash. App. 1989); *Uniguard Mut. Ins. Co. v. Argonaut Ins. Co.*, 579 P.2d 1015 (Wash. App. 1978). The court in *Uniguard* stated the significance of the language "the insured":

> The policy extends defense and indemnification to 'the insured,' and it excludes from coverage intentional acts resulting in injury or damage 'expected or intended from the standpoint of the insured.' The parties concede that the boy and the Hensleys are all 'insureds' under the policy. In such instances, **where coverage and exclusion** are defined in terms of 'the insured,' the courts have uniformly considered the contract between the insurer and the several insureds to be severable, rather than joint, *i.e.*, they are separate contracts with each of the insureds. The result is that an excluded act of one insured does not bar coverage for additional insureds who have not engaged in the excluded conduct.

579 P.2d at 1019 (footnote omitted). In *Uniguard*, the minor insured set fire to a school building. The court held that the policy did not provide coverage for the minor insured's intentional act. *Id.* at 1017. However, the policy did provide coverage to the parents, who were sued for failure to supervise their child, since the policy used the language "the insured person" rather than "an" or "any insured person." *Id.* at 1019.

The significance of **not** using the language "the insured person" is demonstrated by the decision in *U.S.F.& G. Insurance Company v. Brannon*, 589 P.2d 817 (Wash. App. 1979). In *Brannon*, the insured shot both of his business associates while on the business premises. The insurer brought a declaratory judgment action to determine whether coverage was excluded for both the insured and his wife. *Id.* at 819. The insurer relied in part on the business pursuit exclusion which excluded coverage for bodily injury or property damage arising out of the business pursuits of any insured. *Id.* at 820.

The court noted the significance of the policy's nonuse of the language "the insured": the policy provides no coverage if the

business pursuits of any of the separate insureds gave rise to the damage. *Id.* at 821. Consequently, the court held that the *Uniguard* analysis was inapplicable and that no coverage was provided for the wife since the insured's conduct was excluded. *Id.*

In *Farmers Ins. Co. of Washington v. Hembree, supra*, 773 P.2d 105, the complaint alleged that the minor plaintiffs had been molested by three minor defendants. Plaintiff brought suit against the minor defendants and their parents. The complaint alleged that the parents had failed to properly care for the plaintiffs. *Id.* The trial court granted summary judgment for the insurer and concluded that the insurer had no duty to defend or indemnify any of the insureds.

On appeal, the plaintiffs argued that the insurer should defend and indemnify the parents since they were being sued for negligence. The plaintiffs conceded that there was no coverage for the minor defendants because of the intentional act exclusion. *Id.* at 107. The court held that there was no coverage for the parents also because the exclusion applied to acts of "an insured person":

> In the instant case, coverage and exclusion are expressed in terms of an insured. Here, the exclusion is not restricted to intentional acts of the particular insured sought to be held liable, but broadly excludes coverage for all intentionally caused injury or damage by an insured, which excludes anyone insured under the policy.
>
> . . .
>
> Thus, it does not matter that the event did not arise out of the intentional acts of John and Ruth Hembree [the parents]. The policy provides no coverage if the intentional acts of *an insured* give rise to the injury or damages.

773 P.2d at 108 (emphasis added).

In the instant case, the Allstate Deluxe Homeowners Policy uses the language "an insured person." The effect of such language is to create *one* contract between Allstate and *all of the insureds*. An exclusion applicable to **an insured person** would therefore preclude all insureds from coverage under the policy. *Allstate Ins. Co. v. Mugavero*, 581 N.Y.S.2d 142 (N.Y. Ct. App. 1992). The intentional and criminal acts of Nauth gave rise to Prasad's injuries thereby providing no coverage to Palat or Nauth.

This case is analogous to *Allstate Insurance Company v. McCranie*, 716 F.Supp. 1440 (S.D. Fla. 1989). In *McCranie*, Richard McCranie was sued for sexually molesting a minor. His sister, Virginia McCranie, was sued for failing to prevent the molestation and for failing to supervise the minor. The court held that the policy did not cover Richard McCranie's conduct of molesting the minor. Additionally, the court held that the policy did not cover the claims against Virginia McCranie based on the specific language of the exclusion:

> The language in both policies provide for exclusion of coverage for injuries intentionally caused by an insured, whether or not that insured person is a party being sued or the intentional actor. The use of 'an insured' in the exclusion language as opposed to 'the insured' results in denial in coverage for a negligent insured if another insured committed an intentional act.

Id. at 1447-48. Additionally, the policy in *McCranie* contained the above-quoted joint obligations language and such language was also relied on by the court.

The court in *McCranie* relied on *Allstate Insurance Company v. Roelfs*, 698 F.Supp. 815 (D. Alaska 1987). In *Roelfs*, Raymond E.

Roelfs was sued for allegedly sexually molesting two minor girls. His parents were sued under a negligence count for failure to properly care for the girls. The district court held that coverage was excluded for the allegations of sexual molestation committed by their son. Further, the court held that coverage was also excluded for the parents due to the specific policy language:

> Because this exclusion applies to intentional acts of an insured as opposed to the insured, it applies to all claims which arise from the intentional acts of any one insured, even though the claims are stated against another insured.
>
> . . .
>
> I conclude the exclusion is unambiguous; if the claims arise from bodily injury intentionally caused by any one insured, all claims are excluded, regardless of whether they are stated against a different insured for unintentional conduct.

698 F.Supp. at 822, relying on *Travelers Ins. Co. v. Blanchard,* 431 So.2d 913 (La. App. 1983). *Compare, American States Ins. Co. v. Borbor*, 826 F.2d 888 (9th Cir. 1987) (since the policy used the language "the insured," the policy provided coverage for the wife even though coverage was excluded for husband's child molestation). Both Chandra Palat and Toreshwar Nauth are persons defined as an insured person under the deluxe homeowners policy. Consequently, since coverage is excluded for Nauth based upon his intentional and criminal conduct, coverage is also excluded for his mother according to the plain language of the policy, the joint obligations provision, and the case law distinction between "the

insured person" and "an" or "any insured person."[5]

The appellant's argument that if either of the insureds' conduct constitutes an accident, then that person is covered unless an exclusion applies is not accurate. Only if the policy provides separate contracts for the insureds would appellant's argument have any force. Since Allstate's policy imposes one contract on all insureds, appellant's argument is without merit.

B. The incident alleged in the state court complaint is not covered under the Deluxe Homeowner's Policy as it is not an accidental loss.

The threshold question in the present case is not whether an exclusion applies but, rather, the scope of coverage itself: Whether the conduct in question constituted an accident within the meaning of the policy provision. The insuring obligation of the subject policy provides:

> Losses we cover:
>
> Allstate will pay all sums arising from **an accidental loss** which an insured person becomes legally obligated to
>
> pay as damages because of bodily injury or property damage covered by this part of the policy.

(emphasis added). Accordingly, the policy provides coverage for the injuries alleged in the state court action only if they arose

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[5]Chandra Palat may indeed have a duty to control Toreshwar Nauth and to warn others if he is a danger but that does not alter the fact that Palat's injuries were caused by the repeated stabbing of Nauth. Because the injuries caused to Palat were caused by the conduct of "an insured" - Nauth - which was not an accident, the policy imposes one contract between Palat and Nauth, and not two separate contracts as advanced by Prasad in her Initial Brief.

from an "accidental loss."

With respect to this threshold question, appellant carries the burden of proof. Appellant must prove a prima facie case bringing this claim within the terms of the policy. *Gilman v. United States Fidelity and Guaranty Co.*, 517 So.2d 97, 98 (Fla. 1st DCA 1987); *Kimbro v. Metropolitan Life Insurance Co.*, 112 So.2d 274, 277 (Fla. 3d DCA 1959). Appellant cannot make a prima facie case that the subject incident constitutes an accidental loss.[6]

The court should apply the term "accident" in the homeowners policy as it is commonly understood by the purchasing public. The test of coverage is what a reasonable person in the insured's position would have believed to be covered. *Lund v. American Motorists Ins. Co.*, 619 F.Supp. 1535, 1537 (D.C. Wis. 1985). The question, then, is whether the purchasing public would consider the repeated stabbing about the hand, arm and body of a person to be an accident.

The manifest design of a homeowners' policy is to protect homeowners from risks arising from the homeowner's negligence. Allstate submits that the general public would be hard pressed to believe that they were buying homeowners insurance which covered the criminal act of aggravated battery with a deadly weapon. Homeowners would expect coverage for an incident in their home wherein they were carrying a knife from the kitchen to another room

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[6]Because appellant cannot carry this burden, there is no need for the court to address the applicability of the intentional or criminal acts exclusion discussed *infra* at point III.

and slipped on a rug and accidentally cut another person.

However, the result would be different if those same homeowners were asked whether coverage would exist if a resident of the home got into an argument with his sister and viciously attacked her. Common sense, using a reasonable person standard, would demonstrate that such an attack is not an accidental loss. It does not take deep or complex analysis to arrive at what a reasonable homeowner would consider an accidental loss for which he paid a premium in obtaining a homeowners insurance policy.

An appellate court should construe an insurance policy as a reasonable person in the position of an insured would understand it. *Hagen v. Gulrud*, 151 Wis. 2d 1, 442 N.W. 2d 570 (Ct. App. 1989). After all, this court has declared that the central concern of the law of contracts, even in the realm of insurance, is to give true effect to the intention of the parties. *Excelsior Insurance Company v. Pomona Park Bar and Package Store*, 369 So.2d 938, 942 (Fla. 1979).

Florida courts have adopted the following definition of "accident":

> [I]n legal parlance an accident under the terms of an insurance policy, such as we have here, is variously defined as an **unusual and unexpected event: happening without negligence**; an undesigned, sudden and unexpected event; chance or contingency; happening by chance or unexpectedly; and event from an unknown cause or an unexpected event from a known cause.

Christ v. Progressive Fire Ins. Co., 101 So.2d 821, 822 (Fla. 2d DCA 1958), quoting *Midland Co. v. United States Cas. Co.*, 214 F.2d 665, 666 (10th Cir. 1954)(emphasis added). Under this definition,

the "unexpected" nature of the event is an important element. *Bennett v. Fidelity Cas. Co. of New York*, 132 So.2d 788, 790 (Fla. 1st DCA 1961). Nauth's conduct in stabbing his sister cannot and does not constitute an accident within the meaning of the policy.

In construing whether a certain result is accidental, it is customary to look at the incident from the insured's point of view. *Allstate Ins. Co. v. Cruse*, 734 F.Supp. 1574, 1578 (M.D. Fla. 1989), citing to Appleman, *Insurance Law and Practice*, section 360 at 452-54 (1981). When viewed from Nauth's perspective, this stabbing was not an accident. Prasad has not alleged, as well she cannot allege, that the knife accidentally fell from Nauth's hand and stabbed her. Nor, is this a case where appellant could argue, as in a gun case, that the knife accidentally went off in Nauth's hand or that it went off accidentally when he was cleaning it. Instead, this case involves the allegation that Nauth <u>stabbed</u> Prasad. The act of stabbing requires deliberate, designed conduct on the part of Nauth. The dictionary defines "stab" as "to wound or pierce by the thrust of a pointed weapon". Websters New Collegiate Dictionary p. 1122 (1979). In turn, "thrust" is defined as "to push or drive with force". *Id.* at 1209.

The test is whether or not the act that caused the injury was an accident. The act of stabbing Palat is not an accident. The fact that she was stabbed multiple times enforces the conclusion that this was not an accident.

Prasad has attempted to turn the repeated stabbing with a butcher knife into an accident by putting the emphasis on the

allegation that Nauth stopped taking his medicine. Prasad alleges that Nauth stopped taking his medicine and this led to Nauth becoming insane and deranged which in turn caused him to stab Prasad. The act of stabbing, Prasad continues, was totally unexpected. Allstate submits that such flies in the face of common sense as well as the law and the insurance policy itself. Moreover, Prasad alleged that Nauth stopped taking his medication even though Palat told him to continue. Under those circumstances, it was deliberate, rather than accidental, that Nauth stopped taking his medication.

Prasad's reliance on *Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Insurance Corporation*, 17 Fla. L. Weekly S579 (Sept. 3, 1992), is misplaced. The insurance provision in *Dimmitt Chevrolet* is dissimilar to and has no application to the Allstate Deluxe Homeowners Policy. This court in *Dimmitt Chevrolet* was presented with a pollution exclusion clause, specifically:

> **Bodily injury** or **property damage** arising out of the discharge, disbursal, or release or escape of smoke, vapors, soot, fumes, acids, alkalis toxic chemicals, liquids, or gases, waste materials . . . into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, disbursal, release or escape is sudden and accidental.

Id. This court was concerned with the meaning of "sudden and accidental," not an accidental loss under a homeowners policy. This court was focused mainly on the definition of "sudden" and not on "accidental." In any event, the opinion relied upon by appellant was subsequently withdrawn and replaced. *See* 18 Fla. L. Weekly S400 (July 1, 1993). In its new opinion, this court held

that the terms "sudden and accidental" were not ambiguous.

Florida law and law from other jurisdictions support the conclusion that Nauth's conduct was not an accidental cause of Prasad's alleged injuries. An accident has been defined as an unforeseen occurrence, usually of an untoward or disastrous character or an undesigned sudden or unexpected event of an inflictive or unfortunate character. "The natural and ordinary consequences of an act do not constitute an accident." *Aetna Cas. Ins. Co. v. Freyer*, 411 N.E.2d 1157, 1159 (Ill. 1st Dist. 1980); *see also, Kemper Ins. Co. v. Stone*, 269 N.W. 2d 485 (Minn. 1978); *Wendell v. Union Mutual Fire Ins. Co.*, 123 Vt. 294, 187 A.2d 331 (1963); *MacDonald v. United Pacific Ins. Co.*, 210 Or. 395, 311 P.2d 425 (1957). The natural and ordinary consequences of a repeated stabbing is an injury. Therefore, the injury sustained by Prasad as a result of Nauth's repeated stabbing is not an accident. Allstate submits that a reasonable person would not have believed that an insured's stabbing of a third person would be an accident thereby coming within a homeowners policy which that provided coverage for accidental losses. *Draffin v. Allstate Insurance Company*, 407 So.2d 1063 (Fla. 2d DCA 1981); *Gulf Insurance Company v. Lloyd*, 651 F.Supp. 518 (S.D. Miss 1986); Allstate Insurance Company v. Cannon, 644 F.Supp. 31 (E.D. Mich. 1985).

This court first interpreted the term "accident" in *Hardwood Mutual Casualty Company v. Geritts*, 65 So.2d 69 (Fla. 1953). In *Geritts*, the owner of a piece of property constructed a building on the premises based upon a survey prepared by a registered surveyor.

The owner of a contiguous piece of property made a claim that the newly constructed building encroached upon his premises. The plaintiff paid the claim in the amount of one thousand dollars ($1,000.00) and submitted a claim to his insurance company. The insurance company denied liability stating that the damage was not the result of an accident. This court gave the following construction to the word "accident":

> An effect which is the natural and probable consequence of an act or course of action is not an accident. The effect which was the natural and probable consequences of the plaintiff's act in erecting the building was the encroachment on the adjoining property. This is true whether the plaintiff knew the facts as they were or understood them to be other than they were. The result or effect would be the same.

Id. at 70-71. Accordingly, the court held that the construction of the building that encroached upon the adjoining property was not an accident since the plaintiff had deliberately located the building on that part of the adjoining property. The knowledge or understanding of the facts was irrelevant.

It defies logic for Prasad to argue that Nauth's stabbing of Prasad was an accident because there was no volition on of the part of Nauth. Nauth was not having a spastic convulsion and in the process flailed his arms around accidentally stabbing Prasad. It took volition to stab someone repeatedly. The state court complaint alleged that Nauth stabbed Prasad repeatedly about the arms, hand and body. Prasad cannot argue that she consented in any way to the stabbing, nor can it be said that the incident was done by mistake. Consequently, the subject policy did not provide coverage since there has been no accidental loss.

Appellant has cited no case in which the court found conduct accidental because the insured was insane. The few cases which exist on the issue support Allstate's position that insanity is irrelevant. For example, in *Landis v. Allstate Insurance Co.*, 546 So.2d 1041 (Fla. 1989), the insureds were sued for molesting several children. This court found no coverage for such molestation in part because of the intentional acts exclusion. This court dismissed the insured's argument that coverage should exist because of the insured's diminished mental capacity. Similarly, in *Allstate Insurance Company v. Cruse, supra*, 734 F.Supp. 1574, the insured claimed both in the criminal trial and the coverage litigation that he was insane. Despite the issue of insanity, the federal district court concluded that the shootings and kidnappings had not been accidents under the policy.

Another case that supports the conclusion that insanity does not render an insured's conduct accidental is *Allstate Insurance Co. v. Talbot*, 690 F.Supp. 886 (N.D. Cal. 1988). In *Talbot*, the claimants alleged that Allstate's insured molested their daughter, Jane Doe. The complaint specifically alleged that the insured "assaulted, struck and sexually molested Jane Doe." *Id.* at 887. In the coverage litigation, the court was asked to determine whether molestation was an accident and whether the molestation was an intentional or criminal act. In defense of his position, the insured submitted a psychiatrist's declaration that he "lacked the mental capacity to govern his conduct according to reason." *Id.* at 888. The insured argued that his mental incapacity precluded the

finding of an intentional or criminal act, but the insured did not specifically argue that mental incapacity affected the determination of the existence of an accidental loss. The court concluded that the molestation was not an accident and further found that the assertion of mental incapacity did not prevent a finding of no accident. The court wrote:

> Sexual molestation of a young child connotes the opposite of what a person would reasonably describe as accidental. The fact that the molestation occurred repeatedly and over a significant stretch of time belies any notion that it was unforeseen, sudden or unexpected. Talbot did not admit to accidentally exposing himself to the child upon stepping out of a shower, or because his shorts slipped in the pool, or because of some unforeseen event. Rather he recognizes that it was an 'evil' thing to do, which he did repeatedly. **Although the molester in this case has raised the defense that the conduct, by virtue of mental incapacity, may not have been intentional, he has not completely strained his credibility with an assertion that the conduct was 'accidental.'**

Id. at 889 (emphasis added).

Unlike the insured in *Talbot*, Prasad has, however, strained her credibility with an assertion that this repeated stabbing was "accidental" by virtue of Nauth's alleged insanity. The physical conduct of Nauth in stabbing his sister was deliberate and non-accidental. This deliberate conduct is not rendered accidental by allegations of insanity.

An accident would be slipping and falling and in the process stabbing someone. That is not what occurred in the instant case and cannot be alleged to be so. Such an allegation would fly in the face of the criminal file, Prasad's recorded statement to Allstate, and Prasad's answer to interrogatory number 14 given in the state court litigation. (Appendix 7). All of the fancy

footwork, mental gyrations, and artful pleading cannot turn an aggravated battery with a deadly weapon into an accidental loss.

POINT III

COVERAGE IS NEGATED BY THE INTENTIONAL OR CRIMINAL ACTS EXCLUSION.

Although Prasad couched the state court complaint in terms of negligence, the **act** that caused her injury was when Nauth approached Prasad carrying a knife and repeatedly stabbed Prasad about the arms, hand and body.

It is the law that an insurer must afford its insured a defense unless it can show that the allegations of the complaint put it solely within the policy exclusion. *Allstate Insurance Company v. Mugavero*, 581 N.Y.S.2d 142 (N.Y. Ct.App. 1992). But the analysis depends on the facts which were plead, not the conclusions asserted. *Id.* Here, Prasad plead the factual allegations of an intentional stabbing of the head, hands and arms but then states the totally inconsistent assertion that this intentional act was committed by negligence due to the fact Nauth stopped taking his anti-psychotic medication. Allstate submits that it was not that Nauth stopped taking the anti-psychotic medication which caused Prasad's injuries but, rather, the intentional stabbing about her hands, head and arms.

The intentional or criminal acts exclusion contained in the instant homeowners policy provides:

> **We** do not cover any **bodily injury** or **property damage** which may reasonably be expected to result from the intentional or criminal acts of an **insured person** or which are in fact intended by an **insured person.**

According to the first part of the exclusion, coverage is excluded in this case since Prasad's bodily injury may reasonably be expected to result from Nauth's stabbing.

The first part of the above-quoted language incorporates an objective test in the exclusion as so found by the federal district court in the instant case. Accord, *Allstate Insurance Company v. Travers*, 703 F.Supp. 911 (N. D. Fla. 1988). The test is what a plain ordinary person would expect to result from Nauth stabbing Prasad. *Id.* Under this test, Allstate submits that Prasad's injuries were reasonably expected and therefore not covered.

The instant policy exclusion has never been the subject of review by this court. The exclusion is an "intentional act" exclusion rather than an "intentional injury" exclusion. This court in *Prudential Property and Casualty Insurance Co. v. Swindal*, 18 Fla. L. Weekly S376 (Fla. July 1, 1993), construed an "intentional injury" exclusion: the policy excluded coverage for "bodily injury . . . which is expected or intended by the insured." *Id.* at S378. Because of this specific language, this court held that an intent to injure was required and that intentional, aggressive conduct was insufficient to defeat coverage:

> As the district court said, "[t]he insurance policy does not have an exclusion for damages that directly or indirectly arise from intentional, aggressive conduct. It only excludes coverage for 'bodily injury expected or intended by the insured'"

Id. at S378.

In contrast, Allstate's exclusion negates coverage for damages that directly or indirectly arise from intentional, or criminal, conduct. There is no requirement that the insured expect or intend any bodily injury from his acts. The insured's subjective intent to injure has been removed from Allstate's exclusion.

Allstate's policy only requires an intentional **or** criminal act. Nauth's conduct in repeatedly stabbing his sister constitutes both an intentional and criminal act which would preclude coverage. The activity involved in grabbing a knife and repeatedly stabbing someone is both intentional and criminal. Coverage is negated if this court finds the stabbing to constitute either intentional or criminal conduct.

As was held in *Hooper v. Allstate Insurance Company*, 571 So.2d 1001, 1002 (Ala. 1990), when presented with the identical exclusionary provision found in the instant case, "criminal acts" is not modified by any descriptive culpability requirement and the two clauses of the exclusion are phrased in the disjunctive. Therefore, the exclusion unambiguously excluded coverage for injury or damage that might reasonably be expected to result from criminal acts by an insured, without a requirement that the acts be intentional or that the injury be intended.

Cases dealing with exclusionary clauses that are different from the exclusionary clause in the instant case are irrelevant. In *Swindal*, this court recognized that insurance contracts are construed in accordance with the plain language of the policies as bargained for by the parties. 18 Fla. L. Weekly S376 (July 1, 1993). Because the instant exclusionary clause incorporates an

objective test, not a subjective test, the state of mind of the actor is totally irrelevant. Because insanity relates to the state of mind of the actor, insanity has no application to whether Allstate's exclusion is applicable.

Insanity under Florida law is a limited concept. A person is insane when he cannot determine right from wrong or understand the nature of his act. *Gurganus v. State*, 451 So.2d 817 (Fla. 1984). Insanity prevents the imposition of criminal responsibility against someone who has committed an *actus reus*. The act of stabbing someone is an *actus reus* under Florida law. The *actus reus*, or criminal act, is all that is required by Allstate's policy. An intent to injure, scienter or a *mens rea* is not required. Accordingly, the alleged insanity of Nauth is irrelevant.

It is of paramount importance to look at the reports of the psychiatrists that examined Nauth in his criminal case. They specifically were discussing whether or not there was criminal **responsibility** on the part of Nauth, not whether or not he committed the criminal act. None of the psychiatrists stated that he was incapable of volition. The psychiatrists simply testified that Nauth was delusional and therefore was not responsible under the law for the criminal acts he committed. That does not alter the fact that Nauth committed criminal acts. There is a vast distinction and one that should not go unnoticed by this court.

If Nauth did not have the *mens rea* to commit aggravated battery with a deadly weapon, then the state court jury would have been required to acquit Nauth of the charges because of failure to prove an element of the offense. Aggravated battery with a deadly weapon is a specific intent crime. *State v. Horvatch*, 413 So.2d

469, 470 (Fla. 4th DCA 1982). Therefore, a defendant who did not intend the injuries received by the victim did not commit aggravated battery. *Knott v. State*, 573 So.2d 179 (Fla. 2d DCA 1991). Here, the jury found that Nauth committed aggravated battery with a deadly weapon but found him not criminally responsible for the crime.

Furthermore, the specific act of stabbing someone with a knife is an intentional act. It is both a volitional and voluntary act from the actor's standpoint[7]. The fact that the actor may be insane does not change the intentional nature of the conduct. Stabbing is still intentional conduct even if the actor does not understand that it is wrong to stab someone, even if the actor feels justified, even if the actor believes that he is not hurting the victim, and even if the actor does not realize the consequences of his act. Under the particular language of this exclusion, the focus is on the nature of the act. Focusing on the nature of the alleged stabbing of Prasad, this is an intentional act which precludes coverage under the policy.

Prasad takes issue with *Allstate Insurance Company v. S.L.*, 704 F.Supp. 1059 (S.D. Fla. 1989); *Allstate Insurance Company v. Travers, supra,* 703 F.Supp. 911; and *Allstate Insurance Company v. Cruse*, 734 F.Supp. 1574 (M.D. Fla. 1989) by arguing that all of the acts done by those insureds were volitional, *i.e.*, intentionally done. Prasad mistakenly declares that the holdings of those cases were that specific intent to injure was not required with a

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[7]As indicated *supra* at page 25, the dictionary defines "stab" as "to wound or pierce by the thrust of a pointed weapon" and, in turn, "thrust" is defined as "to push or drive with force".

volitional, *i.e.*, intentional act, in order for the exclusion to apply. (Initial Brief at p.23). What those cases in fact held was that the intentional or criminal act exclusion contained an objective, rather than a subjective, test so that intent was irrelevant.

Allstate Insurance Company v. Cruse, *id.*, supports Allstate's position in the instant case. In *Cruse*, the identical exclusionary clause was applicable. Allstate asserted that coverage was excluded because it was reasonable to expect bodily injury from Mr. Cruse's intentional actions, *i.e.*, taking his gun, aiming it at strangers, pulling the trigger numerous times, and taking hostages. Allstate further asserted that whether or not Mr. Cruse was sane or not at the time of those events was irrelevant because the language required an objective, rather than a subjective, standard.

The defendant on the other hand asserted that the intentional acts exclusion was inapplicable because a subjective test was required, and Mr. Cruse's temporary insanity at the time of the events in question prevented him from forming this specific intent to harm the victims. That is precisely the same argument that is being advanced by Prasad in the instant case. The district court in *Cruse* ruled that Allstate's position was correct.

The district court correctly ruled in *Cruse* that insanity or state of mind of Cruse was irrelevant. The district court in the instant case likewise disagreed with Prasad's position that Nauth's insanity at the time of the stabbing prevented him from committing an intentional or criminal act.

Even assuming *arguendo* that Nauth was insane at the time of the events at issue here and that he did not form a specific intent

to injure the victims, it still cannot be said that there is coverage under the policy. Nauth declared that when Prasad wanted to take him to the hospital and he refused, Prasad grabbed a knife and threatened him to the point where he also grabbed a knife from the kitchen and stabbed her in the abdomen and arms. (Appendix 4). Unquestionably, then, Nauth took the knife from the kitchen, went toward Prasad, and repeatedly stabbed her. The fact that he may have believed he was acting in self-defense does not alter the fact that he acted intentionally.[8]

Only if the exclusionary clause in the instant case required a subjective intent would Nauth's insanity have any relevance. Subjective intent is required in "intentional injuries" exclusion clauses. *E.g., Bolin v. State Farm Fire and Casualty Company*, 557 N.E.2d 1084 (2d Dist., Ct. App. Ind. 1990)(the insurance policy excluded "bodily injury . . . which is expected or intended by an insured"); *Indiana Farmers Mutual Insurance Company v. Graham*, (3d Dist. Ct. App. Ind. 1989)(provision that excludes bodily injury "which is either expected or intended from the standpoint of the insured"). Again, however, it must be stressed that the instant case does not involve an intentional <u>injury</u> exclusion but, rather,

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[8]Nauth thought he had killed Prasad. He intended to injure Prasad because he felt that she was threatening him. Based on the police reports, psychiatrists found that Prasad had not threatened Nauth so that their only conclusion was that Nauth was delusional and therefore not criminally responsible for his acts. Nauth acknowledged to his psychiatrist that he committed the criminal acts. Nauth has never denied that he committed the criminal acts. The fact that he was found not guilty by reason of insanity means that he was indeed guilty of the acts but was not held criminally responsible. Of significance, he was not acquitted.

an intentional or criminal act exclusion.

The cases relied on by Prasad are cases that involve an intentional injury exclusion, not the exclusion involved in the instant case. *Arkwright - Boston Manufacturers Mutual Insurance Company v. Dunkel*, 363 So.2d 190, 193 (Fla. 3d DCA 1978)(an insured's alleged insanity precluded application of an "intentional injury exclusion clause" found in an insurance policy); *George V. Stone,* 260 So.2d 259, 261-262 (Fla. 4th DCA 1972)(insured's insanity at the time he shot and injured plaintiff precluded application of an exclusionary clause which declared that coverage did not apply to any injury "caused feloniously or intentionally by or at the direction of an insured"); *Northland Insurance Company v. Mautino*, 433 So.2d 1225 (Fla. 3d DCA 1983)(intentional tort exclusion clause in an indemnification policy). Accordingly, they have no application here.

As declared by this Court in *Swindal*, contracts of insurance must be construed by resorting to the plain language of the policies as freely bargained for by the parties. This court, therefore, should give effect to the intent of the parties as expressed in the policy language which explicitly excludes coverage for an act from which reasonable people would expect injury to occur. Reasonable people would expect injury to occur from the repeated stabbing about the arm, hands and body.

Finally, Allstate submits that it cannot be seriously argued that Nauth's conduct in repeatedly stabbing Prasad about her arm, hands and body is not a criminal act. He was criminally charged,

he was criminally tried, and all three parties agreed to the facts via the police report. The fact that Mr. Nauth was found not to be criminally **responsible** for those criminal acts does not alter the nature of the acts, *i.e.*, they were criminal. The exclusionary clause in question does not state that coverage is not provided if no criminal responsibility attaches to the criminal acts. The exclusion applies if an insured commits a criminal act, whether or not they are charged, tried, acquitted, or, as in the instant case, found not guilty by reason of insanity. It simply cannot alter the fact that Nauth committed a criminal act.

CONCLUSION

Based on the foregoing arguments and authorities therein, Allstate submits that this court should answer the certified questions from the eleventh circuit as follows:

1. Under Florida law, the intentional acts exclusion of the policy in questions applies in circumstances alleged in the state court complaint.

2. The injuries alleged in the state court complaint are not the result of an "accidental loss" as required by the policy.

3. The criminal acts exclusion of the policy applies in the circumstances alleged in the state court complaint.

Respectfully submitted,

SHARON LEE STEDMAN
Florida Bar No. 0303781
SHARON LEE STEDMAN, P.A.
1516 East Hillcrest Street
Suite 200
Orlando, Florida 32803
(407) 894-7844

LORI J. CALDWELL
Florida Bar No. 0268674
DAVID SHELTON
Florida Bar No. 0710539
RUMBERGER, KIRK & CALDWELL, P.A.
P.O. Box 1873
Orlando, Florida 32802
(407) 972-7300

Attorneys for the Appellee,
Allstate Insurance Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by Hand Delivery this 20th day of September, 1993, to Harvey B. Hardy, Esq., 200 E. Robinson Street, Suite 1100, Orlando, Florida 32801; and to H. Scott Gold, Esq. 703 East Pine Street, Orlando, Florida 32801.

David Shelton

SHARON LEE STEDMAN, Attorney at Law
Florida Bar No. 0303781
Sharon Lee Stedman, P.A.
1516 E. Hillcrest Street, Ste.200
Orlando, Florida 32803
(407) 894-7844

LORI J. CALDWELL
Florida Bar No. 0268674
DAVID B. SHELTON
Florida Bar No. 0710539
RUMBERGER, KIRK & CALDWELL, P.A.
P.O. Box 1873
Orlando, Florida 32802
(407) 972-7300

Attorneys for Appellee,
Allstate Insurance Company