IN THE SUPREME COURT OF THE STATE OF FLORIDA

RENUKA PRASAD,
Appellant,
v.

SUPREME COURT CASE NO. 81,825

ALLSTATE INSURANCE COMPANY,
Appellee.
_____/

AMENDED
REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Appellant filed a Motion to Strike the brief of Appellee before this Honorable Court, Appellant would incorporate those exhibits by reference in the brief herein.

On the emotional side, for purposs of justification, but not intended as a retaliatory strike, how many times have we heard that if an advocate does not have the facts on their side, then the advocate should argue the law, and if the advocate does not have the law on their side, then she must argue the facts, but should the advocate not have either the law or the facts, then the advocate should attack the integrity of the opposing counsel. The latter problem has confronted Allstate, and counsel for Appellee has acted consistantly with this theorum. The attacks on the personal integrity of Appellant's counsel contained in the Answer Brief of Appellee, and the dearth of case law, or factual support for Appellee's position, demonstrate the weakness of Appellee's position.

Contrary to Appellee's assertion, it is not lawyers properly performing in their jobs that breed contempt for the legal system, nor is it lawyers representing their injured clients. Insurance Companies, backed by their well-compensated legal staffs, sell insurance, refuse to honor their contractual responsibilities, and use any excuse conceivable to deny a lawful and appropriate claim. These companies seek to define insurance policies in a fashion that no coverage exists for any event. This breeds contempt for the legal system.

Comments by counsel, fashioned as obsequious personal attacks on the opposing counsel, are unprofessional and are placed more for the consumption of the insurance company's client than for this Honroable Court. It is not Appellant's counsel, who is attaching erroneous material in their brief. It is not Appellant's counsel who is arguing non-record, as well as erroneous matters within the brief; it is not Appellant's counsel who mistates and conceals evidence, in an appeal involving a motion for a judgment on the pleadings, and; it is not

Appellant's counsel who attempts to bolster its position with false assertions of economic politics, and through the utiliziation of false statements and deception. These tactics, utilized by Appellee, cannot be sanctioned. These tactics, utilized by Appellee are contagious, as it places the wronged counsel in the position of needing to, at the least, set the record straight. This need may in itself result in a retaliatory volley to the attacking counsel. It is not however the intention of Appellant's counsel to retaliate against counsel for Appellee. Appellant's position was set out in the Motion to Strike Appellee's brief. Appellant will attempt throughout the remaining portion of their brief to avoid any such attacks which on balance, appear ubiquitous throughout Appellee's answer brief.

RE-STATEMENT OF THE CASE AND FACTS

In an attempt to avoid this Honorable Court being presented with what appears to be the third new Statement of the case and facts, Appellant would present a summary.

Allstate's insane, additional insured Nauth failed to take his antipsychotic medication and became unmanageable. Appellant was invited over to Allstate's insured home, where Nauth resided with his mother, Palat, and upon entering the home Appellant was stabbed repeatedly by Nauth. Appellant was invited to the home by Palat, without Palat informing Appellant that Nauth was acting strangely and not taking his medications.

Nauth was determined to be insane by three psychiatrists, without exception. There was no jury trial or bench trial in Nauth's case, and the Court found him insane and involuntarily committed him for treatment.

Appellee, Allstate has indicated that Nauth was an additional insured under the policy and that they were aware, and stipulate that Nauth was insane at the time of the incident. Allstate has a duty to insure Nauth for his insane actions. There in fact is no action of an insane individual which is not an accident. There is no clause in Allstate's policies which deals with exceptions to coverage for the actions of insane individuals.

As utilized in Allstate's deluxe Homeowner's Policy, Allstate insured both Palat and Nauth under the definition of Insured. This question of who was an insured, was never in issue.

Allstate seeks to defend coverage based upon a distant view of the facts of the case. Allstate presents the picture of Nauth stabbing Prasad, with the subtitle, this could not be an accident, this must be intentional, or; this must not

be an accident, this must be a criminal act. Allstate would argue the same position if they viewed a car speeding through a red light into an intersection and killing a pedestrian. It certainly appears to be intentional from a distance, but a closer inquiry must be made to determine what the status of the driver was to determine whether it was an accident or whether it was intentional. The actions of Nauth were not "reasonably expected," nor were they the result of an intentional or a criminal act. Allstate seeks to insert new, modified and irrelevant facts into the case presently before the Supreme Court, despite the fact that the Eleventh Circuit stated: **"In the present case the district Court, as it was required to do, treated the allegations of the State Court complaint as true."** See Allstate v.Prasad 991 F. 2d 669 at p 671 (11th Cir 1993). The Court went on to say: "It (sic. the District Court) accepted that the son's mental condition was as alleged..." The Eleventh Circuit questioned Judge Fawsett's holding that the intentional act exclusion applied in cases where the insured was incapable of forming intent. The Court in footnotes 2 and 3 of their opinion raised the issue quite succinctly. The issue was that Allstate's child molester cases, where the molester is not found insane, do not appear to overturn the Florida decisions of Northland Insurance Company v. Mautino 433 So2d 1225 (Fla 3d DCA 1983), nor Arkwright-Boston Mfrs v. Dunkel 363 So2d 190 (Fla 1st DCA 1978). Judge Fawsett in Allstate Insurance v. Cruse 734 F. Supp 1574 (M.D. 1989) specifically found that Cruse WAS **NOT** INSANE. Cruse was specifically found NOT INSANE in his criminal case. Despite Judge Fawsett's finding that Nauth was Insane and Cruse not, Judge Fawsett applied the ruling in Cruse to Nauth in Appellant's case. Allstate continues to rely on these non-insane child molester cases, which are typified in Landis v. Allstate 546 So2d 1051(Fla 1989) and Shearer v. Central Florida YMCA 546 So2d 1050 (Fla 1989). These cases clearly do not apply to the case before this Honorable Court, only Northland and Arkwright are

applicable. Allstate also ingnores Spengler v. State Farm 568 So2d 1293 (Fla 1st DCA 1990), wherein the First District ruled that a shooting although intentional, was an accident where the shooter did not intend to shoot the person he shot (the shooter believed the victim was a burglar, not his room mate). The First District Court cited Sabri v. State Farm 488 So2d 630 (La App 1985), where a daugther recovered against her father for another intentional shooting but an accident, due to a mistake in fact as the the victim's identity. The First District Court in Sabri, discussed the sexual molestation cases, cited herein by Allstate, and found them inapplicable.

Nauth did not possess the requisite mental capacity to form intent, and despite the way the "attack" may have been viewed from a distance, a closer look at Nauth disclosed the nature of the act, and the fact that it was clearly an accident, brought about by the negligence of Nauth, in not taking his medication and the negligence of Palat, in inviting Prasad to her house without warning.

RESPONSE TO ALLSTATE'S SUMMARY OF ARGUMENT

Allstate again seeks to argue alleged fact not in the record before this Honorable Court. Due to the nature of this action, the facts alleged in the original complaint were accepted as true by both the district Court and the Eleventh Circuit. Allstate seeks to distract this Honorable Court from objectively evaluating the law with regard to insane individuals, by first arguing that Nauth was not insane, and then accepting that he was. Allstate presents misplaced non-record assertions in attempt to support its position.

There has been no deceptively artful pleading. The complaint, filed by Appellant was no ploy, it was attempt to force Allstate to honor their bargain with Palat and not their stockholders. If an insured gets in his car and runs

intentionally backward running over a child on his property, is that an accident, or is that intentional and excluded? From the distant view, it does not appear to be an accident, but looking closer at the driver, you discover that it was not intentional. If the insane Nauth was driving the very same car, and the same incident occurred, you would never be able to ascertain intent, so the tragedy would be viewed as an accident. Insane individuals are incapable of volition, all incidents which they are involved in, are accidents. Even the definition of insane refutes Allstate's position.

Allstate states that "absent considerations of insurance it would never occur to a lawyer to plead this plainly intentional tort as negligence." (page 13 Appellee's brief). This is plainly not an intentional tort. Allstate knows that these actions accidental and non-intentional. Allstate know that Appellant's case is sound, they have seen Appellant's scars, they are aware that Appellant cannot adequately perform her accounting employment as the tendons in her right hand were severed.

Allstate, in conclusion, asks that the Court give a breath of life to a new meaning offered by Allstate of its Deluxe Homeowner's insurance policy. However this was not the plain meaning of language of the policy. It was never Ms. Palat's understanding that Allstate would decline coverage. In fact Palat and Appellant fully cooperated with Allstate to the fullest, after the incident, as Allstate was giving signs that they fully intended to cover the Appellant under the policy, despite any equivocal reservation language which Allstate may have written to Ms. Palat. There was no doubt from Palat, that after Nauth was determined insane and not guilty, that Appellant would be compensated by the insurance company. Allstate is obligated under the policy, and they should not be allowed to avoid their contractual obligation.

REPLY TO ARGUMENT I

Allstate's policy is ambiguous. Allstate simply asserts a claim that the word "accident" is not ambiguous, and then begins arguing cases concerning persons who are not insane. The major distinguishing factor in Allstate's position, versus the position of Appellant, is that Nauth was an insane person, and was alleged as such within the complaint. Allstate accepted that proposition, in its motion for judgment on the pleadings. Yet Allstate will simply not grasp the fact that Nauth is insane. This insanity differentiates Allstate's sex offender cases from Appelant's case herein.

The Appellee's Answer brief does not address the test for ambiguity which is cited clearly and plainly in the Initial Brief. The test is whether a policy word is susceptible of more than one meaning. The cases Allstate cite, clearly demonstrate, that Allstate's policy words have more than one meaning. The multiple meanings of the word "accident," itself, show the word to be clearly ambiguous, and thus the term accident must be contrued in favor of coverage. A closer reading of the policy seems to indicate that there would be no coverage for any accident.

Later in Allstate's Answer brief, Allstate seeks to discuss the criminal acts exclusion. Allstate asserts that its policy words are not ambiguous, and then discusses such things as actus reus, mens re, and scienter to try to define the phrase criminal act. This would appear unnecessary, if the criminal acts exclusion itself were not ambiguous, and capable of at least two disparate interpretations. If a person is not guilty of a criminal act, how could the criminal acts exclusion be used to deny coverage? Isn't that ambiguous? If someone is incapable of intent due to insanity, how could the intentional acts exclusion apply? Isn't that ambiguous? What is ambiguous, is this attempt by Allstate to avoid the

clear meaning of their own terminology.

Without the necessity of string citations within this brief, it is abundantly clear that Allstate's cases do not apply to the facts here at issue. In Allstate v. Conde on page 17 of Appellee's brief, found at 595 So2d 1005 (Fla 5th DCA 1992), an intentional shooting occurred. As this was an intentional shooting, and there was no issue of insanity, claims of negligence were incredulous. The attorney for the the Conde claimant pled negligence, and Allstate cites Conde for the proposition of how absurd Conde was, so therefore ipso facto, Appellant's case must likewise be absurd. Analogies to Appellant's case are not found in Conde. Appellant's case, involving the insanity of the actor, was never addressed in the Conde opinion, and the dicta of that case, has no application to the facts herein. Allstate's refusal to honor the opinion of this Honorable Court in Dimmitt Chevrolet v. Southestern Fidelity Insurance Corporation 17 FLA S 579 (September 3, 1992) is truly remarkable. This case appears precisely on point for the proposition that the word accident is susceptible to more than one definition. The definitions discussed by this Honrable Court in Dimmitt appear to clearly apply to Appellant's case. This injury to Appellant was an accident, and the intentional act exclusion does not apply.

REPLY TO ARGUMENT II

Allstate wishes this Court to define the term "accident," because its policy fails to. In their attempt to define "accident," Allstate urges a reasonable person test to define accident. Is this an aid to the understanding, by the insured, of what the policy states, when Allstate seeks to define a term by asking a Court, after the fact, to apply a reasonable person test? Isn't this ambiguous? What is the plain meaning of the policy word? The law is clear that if a word is susceptible to more

than one interpretation, the word must be construed broadly for coverage if such a definition exists. However even if the reasonable person test is applied to the facts herein, Allstate's position must fail.

Allstate has argued that Nauth's stabbing of Appellant was not an accident, therefore this stabbing must have been intentional. A reasonable person would agree to the proposition that the one statement excludes the other. Allstate however has stipulated that this stabbing was not an intentional act, in its motion for judgment onthe pleadings. The experts say, and the lower Courts have accepted, the fact that the incident was not intentional (See Prasad supra), therefore it was an accident occasioned by an insane individual. An insane individual is an accident waiting to happen, and; Allstate sought to insure this individual under its policy of insurance; a policy of insurance which never discussed any exclusions for the actions of an insane insured. There is no intent, without an ability to formulate intent. nauth was not capable of intent, he formulated no intent. Nauth, if anything, was, previous to the incident, negligent, by failing to take his medication. Palat was negligent, in her capacity as guardian of Nauth by failing to make sure that Nauth took his medication, and Palat was negligent in inviting Appellant to her home with no warning, at a time when Nauth was uncontrollable. Nauth did not intend his actions and, absent his negligence, it would never have occurred. Nauth's negligence in not taking his medication created his insane condition, and thus the accident which ensued.

It is important to note that this is an appeal involving a judgment on the pleadings. Allstate could have waited for a summary judgment or a trial, but chose instead this avenue of relief, and now Allstate is arguing that it is not fair to force Appellee to confine their argument to the complaint. This is why Allstate talks about requesting judicial notice (of erroneous facts) in its brief without making a formal motion. It is all smoke and mirrors. Appellant never asked

Allstate to file a Declaratory judgment action in federal court. Appellant never asked Allstate to file a motion for judgment on the pleadings. These were not Appellant's pleadings but Allstate's. Allstate has made its bed as the saying goes. Let us not rewrite the Appellate rules, because Allstate now argues unfairness. The unfairness resides with Allstate. The reason that this incident is covered is that it was in fact an "accident." It was an event occurring without volition on the part of the actor Nauth. The actor had no intent, no volition, no knowledge, at the time the event was happening. Prasad has pled the insanity of Nauth in her complaint, which insanity has been accepted by Allstate, and; Appellant should have had the opportunity to prove this insanity, because if proven it would make the coverage defenses of Allstate inapplicable.

Allstate lists more than five definitions of Accident on page 27 of their answer brief. More than one of these definitions apply to the facts herein. The policy should be constued in favor of Appellant. These accident definitions do not result in coverage for child molesters, due to the knowledge and volition on the part of the molester. One definition of "accident," "*is an undesigned sudden and unexpected event.*" This definition surely applies to the injuries sustained by Appellant by Nauth. The act was clearly sudden, and Nauth lacked the intent to knnow what he was doing, and therfore it was undesigned. This act was clearly unexpected by both the insureds and Appellant. Another definition offered by Allstate is *"happening by chance or unexpectedly."* This definition applies, as no one could have foreseen the violent culmination of actions from this unmedicated, severely decompensated, individual. The insane person is no different from the epileptic, who being unmedicated, has an involuntary seizure, and drives off the road hitting someone, or who being unmedicated has a seizure and flails his arms, in a violent fashion severely striking and substantially harming an innocent other, or; who bites off the fingers of an attending good samaritan who is

trying to pry the seizing epileptic's mouth open. Allstate would not seriously argue that these were not accidents. How are these examples different from Nauth's situation. Allstate would not seriously argue that these were uncovered due to the intentional act and criminal act exclusion.

Appellant has discussed the other references by Allstate to its policy language, as contained in Page 20 and 21 of its brief, and Appellant would rely on its previous argument. This incident did not constitute an intentional act, and therefore this argument by Appellee is superfluous. The quotation from Unigard v. Argonaut 579 P.2d 1015 (Wash App 1978), cited by Appellee with approval, as consistant with Allstate's policy, is worth noting for the purpose of justifying and substantiating Appellant's, and **not** Appellee's argument:

> "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..."

From the standpoint of the insured, whether Palat or Nauth, this was not an intentional act. Allstate has conceded this issue. This act was not expected or intended. Palat had not idea what Nauth would do in his insane condition. Nauth had no idea.

Allstate reargues each of the cases which have been previously briefed and discussed in the briefs to the Eleventh Circuit, which briefs are in the record before this Honorable Court. Appellant has previously submitted a case by case analysis of all of the cases argued by Allstate, demonstrating their inapplicability to the case involving Appellant. The Eleventh Circuit presented, by certification, specific issues to this Honorable Court, along with their specific thinking as to the apparant non-applicability of Allstate's cases to Florida Cases. This discussion is contained in footnote 2 and 3 of their opinion. Allstate v. Miller 438 NW2d 638

(Mich Ct App 1989) dealt with all the issues presented herein, and dealt with Allstate's criminal act exclusion. The Appellate Court stated:

> In the criminal law context, it is well-established that insanity may preclude a person from forming a certain specific intent. See La Fave & Scott, Criminal Law section 36 pp 268-274.... We agree with those states which have held that, when a person cannot form an intent to act because of insanity, he or she has not acted intentionally, as term is used in insurance policies.

In summary, the sexual molester cases are all inapplicable because each molester was aware of what he was doing with the Child, and the act of molestation was found to be intentional in each case. The perpetrator in some of the cases was perhaps unaware of the resulting harm to the molested child. An intentional act, coupled with an awareness of the act, does not equate with the uncontested insanity presented in Appellant's case.

Even using Allstate's "reasonable person standard," if a profoundly retarded or insane, person ran head-on into a guest coming thorough the door of his home, knocking the guest to the ground which contact caused injuries, Allstate could not state with a straight face that this contact was not covered under the policy. Allstate's shareholders may not wish to pay for it, but clearly there would be coverage. Allstate's main preoccupation is with the knife. If a two year old ran up to her visiting aunt, with a knife in her hand stabbing the aunt in her stomach, this incident would never be dealt with as a criminal act, or as an intentional act. No one would seriously argue that coverage would not be available. There is no difference with an insane individual, except that an insane individual possesses less volition. All cases are unexpected and accidental. The true effect of the intention of the parties is that these incidents be insured. If they were not, there would be an exclusion concerning insane individuals and retarded individuals and infants.

Allstate's next assertion that since we refer to the action of Nauth on Appellant a "stabbing," and since "stabbing" is defined as requiring a *wounding* a *piercing* or a *thrusting*, and since "thrust" is defined as requiring a *push* or a *drive with force*, that this means, as asserted by Allstate, that intent is involved inherently in these definitions.

It has been presented that an insane individual may be compared in several respects to a dog of an insured individual. Insurance companies always pay claims of injuries sustained by an invitee as a result of a dog attack. No one discusses the intent of the dog, or whether it would be a criminal act. But when an insane individual is severely decompensated, and is uncontrollable and does not know what he is doing, there is supposed to be some other standard. This standard is not contained within Allstate's policy. When viewed from Nauth's perspective, at the time of the incident, he had no perspective, as he was a raving-mad individual.

Allstate finds the Dimmitt supra inapplicable to Appellant's case. Perhaps Allstate finds it inapplicable because it is accident discussion contained therein is analogous to our discussion in Appellant's case. Appellant would rely upon this Honorable Court's interpretation of its own case. Appellant would cite this case as consistent with Appellant's position, and go no further.

Allstate discusses "natural and ordinary consequences of an act" on page 30 of their brief. The natural and ordinary consequences of Nauth's failure to take his medication was not a stabbing it was his severe and rapid decompensation. This "stabbing" was totally unexpected and accidental. Appellee argues the case of Hardwood v. Geritts 65 So2d 69 (Fla 1953). Like so many of Appellee's cases, Appellant asserts that these cases support Appellant's position. Geritts intentionally, and in Appellee's own words (page 31 0f their brief), **"deliberately"** located the building..," how then could this be accidental. Nauth did not commit a

deliberate or intentional act, so how is this case, or the dicta from this case relevant to Appellee's position?

Appellant has cited Awkwright supra, Northland Insurance supra, and Spengler supra in support of its position, contrary to Appellee's assertion on page 32 of their brief that no cases exist. Appellee once again reargues its child molester cases, attempting to state that a child molester must be insane because no normal person would molest a child. Although it is true that no normal person would molest a child, it is a much longer jump to the level of insanity. All of these decisions cited by Appellee, specifically found that the molester was not insane. How are they applicable to Appellant? Even in Allstate's brief they quote, on page 33 "... rather **he recognizes that it was an evil thing to do**, which he did repeatedly." These molesters always know what they are doing, their actions are planned, their actions are considered, and; molesters act upon their considerations. These are all volitional undertakings. Nauth actions were **a**volitional (unintended).

Again Allstate mistates the findings of the cases it presents, when on page 32 of its brief, Allstate claims that Cruse, in Cruse supra, was found insane. Anyone reading the Cruse case, will determine that neither the Criminal court, nor Judge Fawsett, found Cruze insane at page 1581. The Eleventh Circuit during oral argument pointed out this very same error to Appellee, and it is once again argued herein. **CRUZE WAS NOT FOUND INSANE.**

Judge Conrad found as a matter of law, that Nauth was not guilty of a criminal act. See. Appendix 5 of Appellant's Motion to Strike. See Miller supra for the implications of this ruling. These facts were stipulated as true by Allstate when they sought a judgment on the pleadings. This determination by Judge Conrad, the finder of fact, should be viewed as res judicata for all future proceedings concerning Nauth's insanity. The policy does not specify anything

other than a criminal act is excluded from coverage. Nauth was found not guilty of that criminal act. Is not the policy construction that Allstate seeks to apply to Appellant ambiguous, if Allstate continues to insist that, despite the finding by Judge Conrad, the exclusion still applies?

REPLY TO ARGUMENT III

Allstate v. Mugavero 581 N.Y.S. 2d 142 (N.Y. Ct. App 1992) stands for the proposition that unless Allstate can specifically demonstrate that the allegations of the complaint place it within an exclusion to coverage, Allstate must defend an insured. Allstate reargues the previously argued points within their brief in Argument III. It is the same argument, it still does not apply. Appellant stands by its previous argument countering. Contrary to the Prudential Property v. Swindal case 18 FLW S 376 (Fla Jul 1, 1993), this case involves a non-intentional act. Your honors in Swindal, dealt with a "intentional aggressive conduct."

Appellant would rely on the policy for the determination of whether what is a "covered event" is ambiguous or not. All that matters is that a grievous covered injury was not compensated. Appellee attempts to engage this Honorable Court, in an equitable discussion (similar to a clean hands inquiry) on the relative worthiness of the parties and the attorneys involved in this case. Appellant suggests that such arguments have no place in this forum, but Appellant is prepared for the challenge if necessary. Appellant would inquire into the following: Who made that determination of non-coverage? What are the factors that go into such a determination? Are these determinations based upon the facts of the case, or the economic station or ethnic status of the claimant? Are these considerations relevant factors? Are there other factors considered which ordinarily should have no bearing in a consideration of coverage? How much has

Allstate paid to contest this case? Would it not have been simpler, and less expensive to honor the contract of insurance?

The actions of Nauth were not-intentional and accidental. This incident was clearly not an intentional act. The Criminal acts exclusion does not apply to bar coverage.

CONCLUSION

The word "accident" is ambiguous because it is susceptible of more than one meaning. Allstate's own cases demonstrate this position. There are at least two or more definitions of the policy term "accident," which fit the events alleged in the complaint.Nauth was not capable of formulating intent and consequently he is not guilty of a criminal act, nor is he capable of formlating intent to and consequently neither the criminal acts exclusion, nor the intentional acts exclusion applies to bar coverage.

The case is before the Court on appeal from a Order granting a Motion for Judgment on the pleadings. The attempts by Appellee's counsel to enter into the record non-record matters outside the four corners of the amended complaint, a complaint which was the only matter considered by Judge Fawsett in granting the Motion for Judgment on the pleadings is completely inappropraite and should not be considered, and; doubly because the material presented was erronoeous uncertified and incompetant.

Under Florida law, the actions within the complaint do not constitute intentional acts, and therefore the intentional acts exclusion does not bar coverage.

Under Florida law the injuries sustained by Prasad were accidental and unexpected in nature.

Under Florida law the criminal acts exclusion in the policy does not apply

as determined by the lower tribunal. (Appendix 5)

Appellant requests that this Honorable Court fashion answers to the Certified Questions presented by the Eleventh Circuit consistant with Appellant's position.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the Office of Sharon Stedman, Esquire, 1516 E. Hillcrest St. Suite 108 Orlando, FLorida 32803, this ~~28TH~~ 30 day of ~~DECEMBER~~ JANUARY, 1994.

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