SUPREME COURT OF FLORIDA

STATE FARM FIRE AND CASUALTY COMPANY,

Petitioner,

vs.

CASE NO. 91,717

CTC DEVELOPMENT CORPORATION, INC. and GREGORY UZDEVENES,

DISTRICT COURT OF APPEAL FIRST DISTRICT, NO. 96-02976

Respondents.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL, FIRST DISTRICT

RESPONDENTS' ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Factual Background

Respondent Gregory Uzdevenes, a registered and licensed architect, designed and constructed a residence through his wholly-owned construction company, respondent CTC Development Corporation, for John D. Bray and Annette Bray in the Baycliffs Subdivision in Gulf Breeze, Florida. (R 33-34). The subdivision lot upon which the Bray residence was constructed was governed by a restrictive covenant which required buildings constructed in the subdivision to be situated at least fifteen feet from the side lot line. (R 55). Uzdevenes and CTC apparently constructed the Bray residence four feet beyond the easterly side setback line in violation of the restrictive covenant. (R 35).

As a result of the construction of the Bray dwelling beyond the side setback line, the adjoining property owners to the east, Finley Holmes and Judy Holmes, filed suit during construction of the Bray residence against Uzdevenes, CTC, the Brays and AmSouth Bank of Florida, the construction lender. (R 33). Dr. and Mrs. Holmes alleged that Uzdevenes and CTC constructed the Bray residence in violation of the restrictive covenant without approval from the homeowners association and sought injunctive relief requiring Uzdevenes and CTC to halt construction and remove or otherwise correct the encroachment, compensatory damages and imposition of a lien on any construction funds due

and owing to Uzdevenes and CTC. (R 35-39, 41-46).

According to the allegations of the Holmes complaint and documents attached thereto, the Brays had requested a variance of the side setback line to preserve two trees on the west side of their property, to create "visually a more equal distance between the houses on either side of the [Bray] property" and "to create an easier turning radius into the side garage." (R 59). According to the Holmes complaint, the request for variance was denied on March 10, 1993, by the Baycliffs Homeowners Association in a letter signed by its president, George Williams. (R 36, 42-43, 60-63).

In a letter to the Holmes' lawyer dated February 16, 1993, Uzdevenes explained that he and his construction company had commenced construction of the Bray residence under the mistaken assumption that the Baycliffs Homeowners Association had approved his request for a variance of the side setback line restriction. The letter explained:

> A day or two after I submitted the plans to the Homeowners Association, the Brays and I walked the lot to discuss the saving of trees and actual placement of the house. It appeared that several waterfront residences in the Subdivision "violated" the fifteen foot side yard setback so I suggested that we request a three foot variance on the east lot line in order to save a tree and facilitate access to the side garage. I called George Williams and "formally" requested the board consider the variance. He did not request a written request. A week or ten days after

> that conversation I received a letter from George approving the "plans submitted." It was unclear to me as to whether this constituted approval of the variance request. I immediately called him for clarification and, as I recollect, was told the variance was "no problem" but I needed to revise the site plan for the record. I called AmSouth[] (the lender)[,] informed them of the "variance" and proceeded with the layout of the foundation.

(R 63). At the time Uzdevenes wrote the letter, construction of the Bray residence was sixty percent complete and removal of the setback line obstruction and relocation of the building would have cost approximately $275,000. (R 63).

At page 4 of its initial brief on the merits, petitioner State Farm asserts that none of the materials filed by respondents in opposition to its motion for summary judgment "raised an issue as to whether CTC's actions during construction were anything but knowing and intentional." Although respondents do not dispute the fact that they intentionally constructed the Bray residence four feet beyond the side setback line, the contents of the above-quoted letter and the allegations of the complaint, which Uzdevenes verified by affidavit filed in opposition to State Farm's motion for summary judgment (R 133-34), indicate that respondents located the dwelling beyond the side setback line under the mistaken assumption that a variance in fact had been approved by the homeowner's association based on assurances Uzdevenes had received from the association president.

The letter and allegations of the complaint also indicate that the Bray residence was constructed beyond the side setback line to preserve trees, enhance the appearance of the structure and facilitate construction of the driveway. There was absolutely no evidence presented suggesting that respondents intended any injury or adverse consequences of any kind to adjoining property owners by locating the Bray residence beyond the setback line.

The State Farm Policy

Uzdevenes and CTC were insured by petitioner State Farm under a "Contractors Policy" which furnished insurance coverage to CTC as named insured and extended coverage to Uzdevenes as an executive officer of the named insured with respect to his duties as such. (R 4-32). Section II of the policy provided "Comprehensive Business Liability" coverage under the following insuring agreement (bold type in original):

> We will pay those sums that the insured becomes legally obligated to pay as damages because of **bodily injury**, **property damage**, **personal injury** or **advertising injury** to which this insurance applies . . . . This insurance applies only:
>
> 1. to **bodily injury** or **property damage** caused by an **occurrence** which takes place in the **coverage territory** during the policy period.

(R 23 [reverse side of page]). State Farm further agreed "to defend any claim or **suit** seeking damages payable under this policy . . . ." (R 23 [reverse side of page]).

The policy defined "occurrence," in pertinent part, as:

> an accident, including continuous or repeated exposure to substantially the same general harmful conditions which result in **bodily injury** or **property damage**.

(R 29)(underlining supplied). The term "accident" was not defined in the policy.

The policy contained an exclusion stating that business liability coverage did not apply

> 1. to **bodily injury** or **property damage**:
>
> a. expected or intended from the standpoint of the insured

(R 24-25).

Course of Proceedings Below

Uzdevenes and CTC called upon State Farm to defend the Holmes lawsuit and to indemnify them for the damages claimed by Dr. and Mrs. Holmes.[1] (R 2). After State Farm declined to defend Uzdevenes and CTC and denied coverage for the entire Holmes incident, Uzdevenes and CTC initiated the present action against State Farm which sought damages against the insurer for

[1]The trial judge in the Holmes case did not order removal of the encroaching property but determined that Dr. and Mrs. Holmes were entitled to damages. (R 92-94). Uzdevenes and CTC ultimately settled the case by paying $22,500 in damages to Dr. and Mrs. Holmes after incurring at least $29,400 in attorney's fees and other defense costs. (R 2, 94).

its failure to defend the Holmes litigation and its refusal to indemnify Uzdevenes and CTC for their losses. [2] (R 1-64). As pertinent to these review proceedings, State Farm filed an answer denying coverage, contending that the damages claimed by Dr. and Mrs. Holmes did "not constitute property damage caused by an occurrence" or "accident" as defined by the policy's insuring agreement and that the property damage sustained by Dr. and Mrs. Holmes was excluded from coverage by the policy because it was caused by "actions that were expected or intended from the standpoint of the insured." (R 66-67).

State Farm moved for summary judgment on the ground that the incident described in the Holmes complaint did not constitute an "accident" within the meaning of the policy. (R 69-70). The trial court agreed and entered final summary judgment in State Farm's favor, relying on Hardware Mut. Cas. Co. v. Gerrits, 65 So. 2d 69 (Fla. 1953), which involved a similar factual setting and a liability insurance policy which provided coverage for damages "caused by accident." (R 135).

The District Court of Appeal, First District, reversed the

[2] An insurer's duty to defend is governed by the allegations of the complaint filed against the insured, see National Union Fire Ins. Co. v. Lenox Liquors, Inc., 358 So. 2d 533 (Fla. 1977), while the insurer's obligation to indemnify is controlled by the underlying facts that impose liability for damages against the insured. See Hagen v. Aetna Cas. and Surety Co., 675 So. 2d 963 (Fla. 5th DCA)(en banc), rev. denied, 683 So. 2d 483 (Fla. 1996). For the purpose of deciding the issue before this court, the allegations of the Holmes complaint and the underlying facts which imposed liability against the insureds are the same.

summary judgment in a decision reported as CTC Development Corp. v. State Farm Fire & Cas. Co., 704 So. 2d 579 (Fla. 1st DCA 1997)("CTC"). A copy of the decision is appended to this brief. In reversing, the majority per curiam opinion relied on an earlier first district decision, Grissom v. Commercial Union Ins. Co., 610 So. 2d 1299 (Fla. 1st DCA 1992), rev. denied, 621 So. 2d 1065 (Fla. 1993), although the majority opinion noted that it could not find "a meaningful difference in the policy provisions in Grissom and those involved in Hardware Mut. Casualty Co. v. Gerrits, 65 So. 2d 69 (Fla. 1953)." CTC, 704 So. 2d at 581. In a comprehensive concurring opinion, Judge Van Nortwick disagreed with the majority's analysis and found "the coverage provisions of the policy in Gerrits clearly distinguishable from the provisions in Grissom and the instant case." CTC, 704 So. 2d at 583 (Van Nortwick, J. specially concurring).

ISSUE PRESENTED FOR REVIEW

WHETHER THE DISTRICT COURT OF APPEAL CORRECTLY HELD THAT THE INSUREDS' ACT OF MISTAKENLY CONSTRUCTING A BUILDING BEYOND THE SIDE SETBACK LINE WAS A COVERED "OCCURRENCE" OR "ACCIDENT" WITHIN THE MEANING OF THE SUBJECT POLICY

SUMMARY OF ARGUMENT

This court's decision in Hardware Mut. Cas. Co. v. Gerrits, 65 So. 2d 69 (Fla. 1953), relied on by petitioner, should not be followed in this case for several reasons. First, the insuring language found in the Gerrits policy is readily distinguishable from the language found in the subject policy and other more recently drafted comprehensive general liability policies. The Gerrits policy covered property damage "caused by accident" without defining the critical term "accident." In the absence of a policy definition, the Gerrits court resorted to tort law principles to determine that "[a]n effect which is the natural and probable consequence of an act or course of action is not an accident." In contrast, the policy at bar adequately defines the scope of coverage without resort to tort law principles by providing coverage for an "occurrence" which is defined as an "accident," excluding coverage for injuries "expected or intended from the standpoint of the insured." This policy language and configuration of policy provisions is equivalent to current standard insurance policy language found in several Florida cases which defines "occurrence" as "an accident . . . which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." The quoted standard policy language provides coverage not only for accidental events, but also for unexpected injuries or damage resulting from intentional

acts committed by the insured. Applying the policy language to the facts at bar, although respondents intentionally located the structure beyond the side setback line established by restrictive covenant, coverage nonetheless would be provided in the instant case because the resulting damage to the adjoining property owners was neither expected nor intended by the insureds and therefore constitutes a covered "accident" under the policy.

Gerrits also should not be followed in this case because it conflicts with the general rule that tort principles, such as those applied by the Gerrits court to define the term "accident," do not control construction of insurance contracts. Gerrits also conflicts with a line of Florida cases which specifically rejects, for the purpose of interpreting insurance policies, application of the tort law causation principle holding a person responsible for the "natural and probable consequences" or "reasonably foreseeable consequences" of his actions.

Further, Florida courts have determined that the undefined term "accident" as used in liability insurance policies is ambiguous. Accordingly, following settled rules of construction, the policy in this respect should be interpreted in favor of the insured, and the court should define the undefined term in a manner which favors coverage.

Finally, although the majority opinion below reached the correct result, respondents respectfully urge this court to adopt

Judge Van Nortwick's specially concurring opinion. Judge Van Nortwick's opinion correctly recognizes that the policy language in Gerrits is clearly distinguishable from the policy language at bar. Judge Van Nortwick's opinion also is consistent with more recent Florida cases postdating Gerrits which have interpreted policy language similar to the policy provisions at bar to provide coverage for intentional acts committed by the insured which cause unintended injury or damage.

ARGUMENT

THE DISTRICT COURT OF APPEAL CORRECTLY HELD THAT THE INSUREDS' ACT OF MISTAKENLY CONSTRUCTING A BUILDING BEYOND THE SIDE SETBACK LINE WAS A COVERED "OCCURRENCE" OR "ACCIDENT" WITHIN THE MEANING OF THE SUBJECT POLICY.

A. Gerrits is distinguishable.

State Farm argued in support of its motion for summary judgment that "[t]he Florida Supreme Court has held that under identical circumstances, such a mistake [erroneously locating a building] during the course of construction does not constitute an 'accident' within the meaning of a liability insurance policy and therefore, there is no coverage for said incident." (R 70). State Farm's reference in its motion for summary judgment to the Florida Supreme Court decision directs our attention to Hardware Mut. Cas. Co. v. Gerrits, 65 So. 2d 69 (Fla. 1953). Based on the following discussion and Judge Van Nortwick's concurring opinion below, respondents submit that the coverage provisions in the subject policy and the policy in Gerrits are clearly distinguishable, and, accordingly, the district court below correctly held that the insureds' act in this case of mistakenly locating a building beyond the side setback line was an "occurrence" or "accident" within the meaning of the subject policy.

In Gerrits, the insured building contractor erected a

structure that encroached upon adjacent property based on a surveyor's error. The building contractor's policy provided liability insurance coverage for property damage "caused by accident." Gerrits, 65 So. 2d at 70. The opinion does not indicate that the term "accident" was defined by the policy or that the scope of coverage was otherwise delineated. In the absence of policy language defining the term "accident" or otherwise limiting the scope of the coverage provided, this court defined the term "accident" by applying the common law tort principle which holds a party responsible for the "natural and probable consequences" of his conduct irrespective of specific intent to cause harm. See Spivey v. Battaglia, 258 So. 2d 815, 817 (Fla. 1972)("The settled law is that a defendant becomes liable for reasonably foreseeable consequences, though the exact results and damages were not contemplated."). Thus, although the insured contractor in Gerrits had no intention of causing harm to the adjoining property owner, this court determined that the natural and probable consequences of his act could not be considered an "accident" covered under his policy. The court explained:

> Assuming that the surveyor made a mistake in locating the boundary line and that the Plaintiff relied on the erroneous survey, nevertheless the fact Plaintiff constructed his building so that it encroached upon the adjoining lot cannot be termed an accident. When a person understands facts to be other

> than they are and is free from negligence, a "mistake of fact" occurs. 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 consequence 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.

Gerrits, 65 So. 2d at 71 (italics the court's; underlining supplied).

Although the underlying facts of the present case are similar to those in Gerrits, the scope of the coverage provided in Gerrits was determined by common law tort principles rather than definitive policy language. This factor distinguishes Gerrits from the case at bar and from Grissom v. Commercial Union Ins. Co., 610 So. 2d 1299 (Fla. 1st DCA 1992), rev. denied, 621 So. 2d 1065 (Fla. 1993), discussed hereafter, because coverage in the present case and Grissom was based on specific policy language which adequately defined the scope of coverage without resort to tort law principles or other extraneous sources.

Both the majority and concurring opinions below relied on Grissom. In that case, the insured property owner, Grissom, allegedly altered the natural watercourse across his property causing drainage problems that resulted in the flooding of the adjoining landowner's property. The adjoining landowner filed suit against the insured who in turn filed a third-party

complaint against upstream landowners and the city, contending they caused the drainage problems. The upstream landowners counterclaimed for damages and injunctive relief against the insured, alleging that the insured altered the flow of water across his land.

Commercial Union insured Grissom for damages caused by an "occurrence." The term "occurrence" was defined as "'an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.'" Grissom, 610 So. 2d at 1304 (emphasis supplied). The insurer declined to defend either the initial complaint or counterclaim because it contended that Grissom's action in altering the watercourse across his property was intentional and therefore was not an "accident." The trial court agreed and awarded summary judgment to the insurer.

In reversing the summary judgment, the first district decided that the trial court erred by determining that the policy definition of "occurrence" was clear and unambiguous. The court also found the term "accident" ambiguous and, accordingly, construed the policy in the light most favorable to the insured. Citing several case law definitions of the term "accident," the Grissom court adopted the following analysis from Hartford Fire Ins. Co. v. Spreen, 343 So. 2d 649 (Fla. 3d DCA 1977):

> "The Florida courts in a line of cases have consistently held that insurance policies covering liability for an 'accident' apply to any bodily injury or property damage inflicted by the insured on a third party where the insured does not intend to cause any harm to the third party; this result obtains even though damages are caused by the insured's intentional acts and were reasonably foreseeable by the insured."

Grissom, 610 So. 2d at 1305 (quoting Spreen, 343 So. 2d at 650-51)(emphasis supplied). Spreen's analysis is consistent with the following rule recognized by Professor Appleman:

> For purposes of determining whether recovery can be had under an "accident" provision of a liability policy, the resulting damage can be unintentional and therefore accidental even though the original acts were intentional. . . . If the consequences consisting of damages from intentional acts are not intended and are unexpected they are "accidental" within a policy.

Appleman, Insurance Law and Practice § 4492.02 (Berdal ed.)§

Based on Spreen's analysis of the term "accident" and the controlling policy language, the Grissom court concluded that the term "accident" in Grissom's policy included "an unexpected or unintended injury or damage that results from a known cause." Grissom, 610 So. 2d at 1306. The court explained further:

> The definition of "occurrence" is further clarified by the clause, "results in bodily injury or property damage neither expected nor intended from the standpoint of the insured...." This clause connotes that coverage exists for any accident where the acts or condition for which the insured is legally responsible results in bodily injury

> or property damage. This clause further connotes that coverage exists if the resulting damage is unintentional in the sense that it is "neither expected nor intended from the standpoint of the insured." The phrase "from the standpoint of the insured" means that whether the result was expected or intended by the insured is a critical element. In short, the definition in this sentence is simply a use of negative language to express a positive intent to exclude from coverage any occurrence where the resulting bodily injury or property damage was intentional, i.e., either expected or intended by the insured.

Grissom, 610 So. 2d at 1306 (emphasis the court's). Thus, although Grissom's alteration of the watercourse across his property was not itself an "accident," the unintentional flooding and damage to the adjoining landowner's property was neither expected nor intended from the insured's standpoint and therefore constituted a covered "occurrence" as an accident resulting in "property damage neither expected nor intended from the standpoint of the insured." Grissom, 610 So. 2d at 1307.

Comparing Grissom to the present case, the subject policy defines a covered "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions which result in bodily injury or property damage." (R 29). The policy also excludes coverage for bodily injury and property damage "expected or intended from the standpoint of the insured." (R 24)(emphasis supplied). This policy language and configuration of policy provisions are

identical to the policy provisions found in the Spreen case relied on by the Grissom court. See Spreen, 343 So. 2d at 650.

Although both the Grissom policy and the policy at bar define "occurrence" as an "accident," the language "neither expected nor intended from the standpoint of the insured" was located in Grissom's insuring agreement, while similar language in the subject policy is covered by an exclusion. Nonetheless, as Judge Van Nortwick's concurring opinion recognizes, section 627.419(1), Florida Statutes, requires every Florida insurance policy to be construed according to the entirety of its terms and conditions. See CTC, 704 So. 2d at 582 n.1 (Van Nortwick, J., specially concurring)§§. Similarly, when construing a policy to determine coverage, every provision in the policy should be given meaning and effect and the pertinent provisions should be read in pari materia. See Nationwide Mutual Fire Ins. Co. v. Olah, 662 So. 2d 980 (Fla. 2d DCA 1995); American Employers' Ins. Co. v. Taylor, 476 So. 2d 281 (Fla. 1st DCA), dismissed, 485 So. 2d 426 (Fla. 1985). As Judge Van Nortwick explained in his concurring opinion below:

> Thus, we are obligated to adopt the construction of the policy which will give effect to the whole instrument and to each of its various parts and provisions. Miller Elec. v. Employers' Liab. Assurance Co., 171 So. 2d 40 (Fla. 1st DCA 1965). The interpretation here is also consistent with the purpose of the exclusionary clause. The exclusionary clause "marks the boundary of

> the coverage of the policy . . .” New Hampshire Ins. Co. v. Carter, 359 So. 2d 52, 54 (Fla. 1st DCA 1978). Further, the object of the exclusionary clause is to exclude that which would otherwise be included within the policy coverage, so as to prevent misinterpretation. Appleman at § 7387.

CTC, 704 So. 2d at 582-83 n.1 (Van Nortwick, J., concurring specially).

Giving effect to the entire policy in this case, the definition of “occurrence” must be read in pari materia with the exclusionary clause that excludes coverage for bodily injury and property damage “expected or intended from the standpoint of the insured.” (R 24). That exclusion clearly contemplates coverage under the converse situation, that is, coverage is provided for bodily injury or property damages that is not expected or intended from the standpoint of the insured. Compare Grissom, 610 So. 2d at 1306 (policy defining the term “occurrence” as “accident” that causes damage “neither expected nor intended from the standpoint of the insured” evinces “a positive intent to exclude from coverage any occurrence where the resulting bodily injury or property damage was intentional, i.e., either expected or intended by the insured.”). Thus, as Judge Van Nortwick recognized below, when the policy term “occurrence,” defined as an “accident,” is read with the exclusion of coverage for bodily injury and property damage “expected or intended from the standpoint of the insured,” the controlling policy language in

this case becomes virtually identical to the policy definition of "occurrence" found in Grissom, that is, "an accident . . . neither expected nor intended from the standpoint of the insured." See CTC, 704 So. 2d at 582 (Van Nortwick, J., specially concurring).

State Farm argues that respondents' reliance in this case on language from an exclusionary clause to explain the term "accident" violates the rule holding that an exclusion cannot create coverage. See LaMarche v. Shelby Mut. Ins. Co., 390 So. 2d 325 (Fla. 1980). Respondents, however, have not cited the exclusion to create coverage, but have cited the exclusion, as well as other parts of the policy, to construe the term "accident" and determine the contracting parties' intent.

Applying the Grissom rationale to the present case, Uzdevenes and CTC intentionally located the Bray residence beyond the side setback line established by restrictive covenant, albeit under the mistaken impression that the homeowners association had approved the requested variance. However, the resulting damage to the adjoining landowners, Dr. and Mrs. Holmes, clearly was unintentional, that is, it was neither expected nor intended from the standpoint of the insureds. Thus, although the insureds did not erroneously locate the Bray residence by "accident," the resulting unintentional damage caused to the adjoining landowners, as in Grissom, was neither expected nor intended from

the standpoint of the insureds and such damage therefore should be covered as an "accident" within the meaning of the policy definition of "occurrence" and should not be excluded from coverage as an intentional act.

The interpretation of the policy advanced by respondents and the result reached by the district court should be contrasted with cases such as Spreen where, under identical policy language, coverage for an assault and battery which inflicted greater damage than intended by the insured was denied because there is no coverage when "'the [insured's] wrongful act complained of is intentionally directed specifically toward the person injured by such act . . . ." Spreen, 343 So. 2d at 651 (emphasis supplied). Here, the wrongful act, locating the Bray residence beyond the side setback line, was not intentionally directed toward the persons injured by such act, the adjoining property owners.

This court's decisions in Landis v. Allstate Ins. Co., 546 So. 2d 1051 (Fla. 1989), and State Farm Fire & Cas. Co. v. Marshall, 554 So. 2d 504 (Fla. 1989), are distinguishable on similar grounds. In Landis, this court held that an intentional injury exclusion clause excluded coverage for injuries suffered by children who were sexually molested while under the insured's care, rejecting the insured's argument that coverage should not be excluded because the insured intended no harm. The court instead reasoned that harm always results from child abuse such

that any intent to molest a child necessarily involves an intent to cause harm. In Marshall, this court held that an intentional injury exclusion clause excluded coverage for an act of self-defense where the insured intended to harm an attacker, rejecting the insured's contention that coverage should not be excluded for "public policy" reasons.

In both Landis and Marshall, the insureds, like the insured in Spreen, intended some harm, even though neither insured may have anticipated the full extent of the injuries and damages inflicted by their intentional conduct. In the present case, however, although respondents committed an intentional act by locating the structure beyond the setback line, they did not intend any harm to adjoining property owners.

Arguably, Landis and Marshall are consistent with Gerrits because in each case the damage inflicted by the insured was the "natural and probable consequence" of his actions. If that reasoning is applied to the present case, one could argue that damage to the adjoining property owner was the "natural and probable consequence" of the insureds' act of locating the structure beyond the side setback line. However, although that argument may be appealing from a tort law perspective, this court subsequently confirmed in Prudential Prop. & Cas. Co. v. Swindal, 622 So. 2d 467, 472 (Fla. 1993), that Landis and Marshall were decided by the specific language contained in the respective

contracts of insurance and not by tort law principles governing the issue of foreseeability. Moreover, as will be discussed in the next section of this brief, the tort law principle holding a person responsible for the "natural and probable consequences" of his conduct has no application to construction of insurance contracts.

B. The Gerrits decision conflicts with decisions rejecting the application of tort law to interpret insurance contracts.

In Prudential Prop. & Cas. Co. v. Swindal, this court held that a homeowners' insurance policy's "intentional injury" exclusion did not exclude coverage for bodily injuries caused by the insured's intentional act (brandishing a handgun intending to cause fear to the victim), where the bodily injuries were caused accidentally and were neither expected nor intended by the insured. In so holding, this court significantly emphasized that "Florida law has long followed the general rule that tort law principles do not control judicial construction of insurance contracts." Swindal, 622 So. 2d at 470.

In apparent conflict with the general rule confirmed by Swindal, the Gerrits court resorted to tort law principles to define the policy term "accident," specifically defining an "accident" to exclude "the natural and probable consequence of an act or course of action." Gerrits not only conflicts with Swindal in this respect, but also with numerous decisions which

have expressly rejected, for the purpose of interpreting insurance policies, application of the tort law causation principle holding a person responsible for the "natural and probable consequences" or "reasonably foreseeable consequences" of his actions. In this regard, this court in Gulf Life Ins. Co. v. Nash, 97 So. 2d 4, 9 (Fla. 1957), stated that the tort "doctrine of foreseeability is a doctrine totally unsuited and unadaptable in construing accident policies." The district courts have consistently followed this holding from Gulf Life in construing accident and liability insurance policies. See Spreen, 343 So. 2d at 651; Grange Mut. Cas. Co. v. Thomas, 301 So. 2d 158 (Fla. 2d DCA 1974); Phoenix Ins. Co. v. Helton, 298 So. 2d 177 (Fla. 1st DCA 1974), cert. denied, 330 So. 2d 724 (Fla. 1976); Cloud v. Shelby Mut. Ins. Co., 248 So. 2d 217, 218 (Fla. 3d DCA 1971); Harvey v. St. Paul Western Ins. Co., 166 So. 2d 822 (Fla. 3d DCA 1964). See also Appleman, Insurance Law and Practice § 4492.02 (Berdal ed.)("The rebuttable presumption that a person intends the ordinary consequences of his voluntary act that is used in determining responsibility for the consequences of a voluntary act has no application to the interpretation of terms used in insurance contracts."). To the extent Gerrits conflicts with Swindal, Gulf Life and the cases cited above which have rejected the application of tort law to interpret insurance contracts, respondents respectfully submit that Gerrits should be

overruled.

C. The result reached by the district court is consistent with settled rules governing construction of insurance policies.

The result reached by the district court comports with established rules governing construction of insurance policies. Respondents acknowledge the rule cited by State Farm that courts may resort to the "plain meaning" of the words when interpreting insurance policy terminology. The "plain meaning rule," however, applies only to policy language which is unambiguous on its face. See Green v. Life & Health of America, 23 Fla. L. Weekly S42, S43 (Fla. January 22, 1998). Ambiguous policy language is construed against the insurer and in favor of the insured. See, e.g., Woodall v. Travelers Indem. Co., 699 So. 2d 1361 (Fla. 1997). Further, when insurers, as here, omit from the policy the definition of a critical term which is susceptible to varying interpretations, the undefined term should be defined by the court in a manner that favors the insured and affords coverage. See Container Corp. of America v. Maryland Cas. Co., 23 Fla. L. Weekly S163, S164 (Fla. March 26, 1998)(construing undefined terms "operations" and "operations site" in favor of insured); Berkshire Life Ins. Co. v. Adelberg, 698 So. 2d 828, 830 (Fla. 1997)(construing undefined term "your occupation" in disability insurance policy in favor of insured); Westmoreland v. Lumbermans Mut. Cas. Co., 22 Fla. L. Weekly D2389 (Fla. 4th DCA October 4, 1997)(construing undefined term "arising out of" in favor of

insured, holding that "[w]here a critical term is not defined in an exclusionary clause of the policy, it will be liberally construed in favor of an insured.").

Applying these rules of construction, Florida courts have determined that the undefined term "accident" as used in liability insurance policies is ambiguous and subject to varying interpretations. See Grissom, 610 So. 2d at 1304 ("The case law of this state has given diverse meanings to the word 'accident' when used in insurance policies, and this fact is sufficient in itself to belie the notion that the policy language is clear and unambiguous."); See also CTC, 704 So. 2d at 581 (Van Nortwick, J., concurring specially)("Few insurance policy terms have provoked more controversy than the word 'accident.'"). Accordingly, the undefined and ambiguous term "accident" appearing in the policy issued by petitioner in the present case should be construed most favorably to the insureds in a manner that affords coverage.

D. Judge Van Nortwick's concurring opinion should be adopted.

Although the majority opinion below reached the correct result, respondents submit that the well-reasoned concurring opinion authored by Judge Van Nortwick should be adopted by this court. The concurring opinion, unlike the majority, recognizes the distinguishing policy language previously discussed which differentiates Gerrits from Grissom and the instant case. The

concurring opinion also places the issue presently before this court in proper historical perspective by significantly noting that liability insurance policies drafted after Gerrits was decided have attempted to resolve the ambiguity apparent in the Gerrits decision by expanding upon the definition of "occurrence." Concerning this latter point, Judge Van Nortwick observed below:

> Professor Appleman explains that, as a result of this ambiguity, over the last 20 years insurance carriers have revised the language in comprehensive general liability policies by substituting the word "occurrence" for "accident" and, generally, by defining "occurrence" to mean "an accident, including continuous or repeated exposure to conditions, which result in bodily injury or property damage neither expected nor intended from the standpoint of the insured." Appleman at § 4492. According to Appleman, used in this manner, the meaning of "accident" provides coverage not only for an accidental event, but also for the unexpected injury or damage resulting from an intentional act. Id. As a result, under this policy language, if the resulting damages can be viewed as unintended by a fact-finder, the event constitutes an "accident" for purposes of the liability insurance policy. Id. at § 4492.02.

CTC, 704 So. 2d at 581 (Van Nortwick, J., concurring specially)(citing Appleman, Insurance Law and Practice § 4492 (Berdal ed.)§.[3]

[3] The historical developments outlined by Judge Van Nortwick also were recounted by this court in Dimmit Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp., 636 So. 2d 700, 702-03 (Fla. 1993).

The policy at hand and the result reached by the district court below exemplify the modern trend observed by Professor Appleman and noted by Judge Van Nortwick. Other decisions postdating Gerrits likewise demonstrate that current standard policy language defining an "occurrence" as an "accident which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured" provides liability coverage for intentional conduct of the insured which results in unintended consequences as in the case at bar where the insureds intentionally located the dwelling beyond the side setback line without intending any consequential harm to adjoining property owners. See Grissom; Spengler v. State Farm Fire & Cas. Co., 568 So. 2d 1293 (Fla. 1st DCA 1990)(policy exclusion for bodily injury or property damage "which is either expected or intended by an insured" did not apply where insured intended to shoot supposed burglar but actually shot girlfriend instead, because liability under the policy should not be precluded for an expected or intended act which results in unexpected or unintended injury), rev. denied, 577 So. 2d 1328 (Fla. 1991).

CONCLUSION

Based on the foregoing, the decision of the district court of appeal should be approved and respondents' separately filed motion for attorney's fees granted.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Michael D. Hook, Esquire and Charles F. Beall, Jr., Esquire, attorneys for petitioner, of Moore, Hill, Westmoreland, Hook & Bolton, P.A., Post Office Box 1792, Pensacola, Florida 32598-1792 by United States Mail this 8th day of April, 1998.

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