SUPREME COURT OF FLORIDA

STATE FARM FIRE AND CASUALTY COMPANY,

Petitioner,

vs.

CTC DEVELOPMENT CORP., INC. and GREGORY UZDEVENES,

Respondents.

CASE NO. 91,717

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

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

ANSWER BRIEF OF RESPONDENTS ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Respondents, CTC Development Corporation and Gregory Uzdevenes, accept petitioner's statement of the case and facts. Copies of the following decisions are appended to the brief:

CTC Dev. Corp. v. State Farm Fire and Cas. Co., Case No. 96-2976 (Fla. 1st DCA August 26, 1997)	Tab 1
Hardware Mut. Cas. Co. v. Gerrits, 65 So. 2d 69 (Fla. 1953)	Tab 2
Grissom v. Commercial Union Ins. Co., 610 So. 2d 1299 (Fla. 1st DCA 1992), rev. denied, 621 So. 2d 1065 (Fla. 1993).	Tab 3

ISSUE PRESENTED FOR REVIEW

Whether the decision of the district court of appeal below expressly and directly conflicts with this court's decision in Hardware Mut. Cas. Co. v. Gerrits, 65 So. 2d 69 (Fla. 1953), on the same question of law

SUMMARY OF ARGUMENT

Because the controlling language contained in the insurance policy in the decision subject to review differs materially from the policy language found in Hardware Mut, Cas. Co. v. Gerrits, 65 So. 2d 69 (Fla. 1953), the present decision does not expressly and directly conflict with Gerrits.

ARGUMENT

The jurisdiction of this court is strictly defined by Article V of the Florida Constitution. Lawvers Title Ins. Corp. v. Little River Bank & Trust Co., 243 So. 2d 417 (Fla. 1970). Article V limits this court's 'conflict" jurisdiction to decisions of the district courts of appeal "that expressly and directly conflict[] with a decision of another district court of appeal or of the supreme court on the same question of law." Art. V, § 3(b)(3), Fla. Const. (emphasis supplied). As the constitution clearly indicates, jurisdictional conflict must be express and direct, not inferential or implied. See Desartment of Health & Rehab. Services v. National Adoption Counseling Services, Inc., 498 so. 2d 888 (Fla. 1986); Reaves v, State, 485 so. 2d 829 (Fla. 1986). When the controlling facts of the decision subject to review differ materially from the controlling facts of the decision cited for conflict, jurisdictional conflict is not established. cf. Nielsen v. Citv of Sarasota, 117 So. 2d 731, 734 (Fla. 1960)(conflict jurisdiction can be predicated on "the application of a rule of law to produce a different result in a case which involves substantially the same controlling facts as a prior case disposed of by this Court.")(emphasis supplied).

Although the underlying factual scenarios found in Hardware Mut. Cas. Co. v. Gerrits, 65 So. 2d 69 (Fla. 1953), and the present case are substantially the same, the respective insurance policy provisions which controlled the outcome of the two cases

differ markedly, eliminating jurisdictional conflict. In Gerrits, the insured building contractor erected a structure that encroached upon adjacent property based on a surveyor's error. The adjoining property owner sued the building contractor who was forced to pay damages. The building contractor was covered by an insurance policy which provided liability coverage for bodily injury or property damage 'caused by an accident." The insured called upon his liability insurer to pay the damages, but the insurer denied coverage, contending that the damages were not the result of an 'accident."

The Gerrits opinion does not disclose any policy provisions that defined the critical terminology "caused by accident." In the absence of a contractual definition of the word "accident" or other guidance from the policy, this court resorted to common law tort principles to hold that although the contractor had not intended to cause harm to the adjoining property owner by mistakenly erecting the structure beyond the property line, his conduct was nonetheless intentional and therefore could not be classified as an "accident":

> 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

> conseo-uence 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 (italic's the court's; underlining supplied). In other words, in the absence of policy language to the contrary, this court applied the common law standard 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.").

In the present case, the insured architect and building contractor located and erected a structure which encroached upon a set back line established by subdivision restrictive covenants which precipitated a damage suit brought against the insureds by the adjoining property owner. CTC Dev. Corp., slip op. at 2. In contrast to the Gerrits insurance policy, the policy issued by petitioner to respondents, which provided liability coverage for the incident sued upon, adequately defined the scope of the insured's conduct which triggered coverage in terms which produced a different result from the result obtained in Gerrits. The district court's opinion discusses and quotes the pertinent policy language:

Under the policy, the "Comprehensive Business Liability" coverage obligates the insurer to:

> 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.

"Occurrence" is defined in the policy as follows:

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

The term 'accident" is not defined in the policy. The policy contains the following exclusions, among others, stating that business liabilitv does not apply:

> 1. to **bodily injury** or **property damage**:
>
> a. expected or intended from the standpoint of the insured; or
>
> b. to any person or property which is the result of willful and malicious acts of the insured.

CTC Dev. Corp., slip op. at 3-4 (bold type the court's, indicating that defined terms are printed in the policy in bold type; underlining supplied).

When construing a policy to determine coverage, every provision should be given meaning and effect and the pertinent provisions should be read *in pari materia*. See Praetorians v.

Fisher, 89 So. 2d 329 (Fla. 1956); Nationwide Mut. 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), rev. dismissed, 485 So. 2d 426 (Fla. 1985). Reading the above-quoted insuring clause, definition of "occurrence" and exclusions in *pari* materia, the policy at bar covers the insured for bodily injury or property damage resulting from an "accident" or "occurrence" neither 'expected [n]or intended from the standpoint of the insured." (emphasis supplied). This construction of the policy is virtually identical to the policy language found in Grissom v. Commercial Union Ins. Co,, 610 So. 2d 1299 (Fla. 1st DCA 1992), rev. denied, 621 So. 2d 1065 (Fla. 1993), upon which the court below relied, where the policy defined "occurrence" 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). Based on the similarity in policy language, the district court below felt constrained by ***stare decisis*** to follow Grissom and further held "that the result reached here is an acceptable one considering the terms and language of the insurance policy at issue." CTC Dev. Corp., slip op. at 5.

Construing the insurance policy definition of "occurrence," the Grissom court concluded that the policy term "accident" included "an unexpected or unintended injury or damage that

results from a known cause." Grissom, 610 So. 2d at 1306. This result, based entirely on policy language rather than common law tort principles, yields an entirely different result from that reached in Gerrits because it allows coverage for intentional acts which result in unintended consequences. See Prudential Property & Cas. Ins. Co. v. Swindal, 622 So. 2d 467 (Fla. 1993) (intentional injury exclusion in homeowner's policy did not exclude coverage for bodily injuries sustained where although insured committed an intentional act intending to cause fear, bodily injuries were caused accidentally and were not expected or intended by insured to result).

In short, in the absence of definitive policy language, the scope of the coverage provided in Gerrits was determined based on common law tort principles, while the present decision and Grissom, on the other hand, were based on construction of insurance contracts which sufficiently defined the scope of coverage without resort to sources outside the four corners of the policies. Therefore, because the case at bar and Grissom are based on different policy language and rationale, they are factually distinguishable from Gerrits and, in fact, are entirely consistent with the long-standing rule recognized by this court "that tort law principles do not control judicial construction of insurance contracts." Prudential Prorsertv & Cas. Ins. Co. v. Swindal, 622 So. 2d at 470.

Respondents acknowledge the following statement made below in the district court's majority opinion:

> We would also point out, however, that notwithstanding the explanation set out in Grissom, we do not agree that there is a meaningful difference in the policy provisions set out in Grissom and those involved in Hardware Mut. Casualty Co. v. Gerrits, 65 So. 2d 69 (Fla. 1953). We cannot state that there is meaningful difference in language between an 'accident" and an 'occurrence" defined as an "accident."

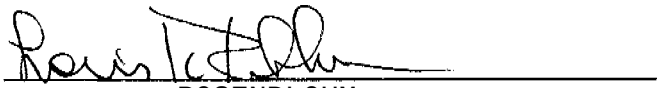
CTC Dev. Corp., slip op. at 5. This observation made by the district court was neither essential nor necessary to the decision and therefore represents dicta that cannot function as binding precedent. See Continental Assur. Co. v. Carroll, 485 So. 2d 406 (Fla. 1986); State v. Florida State Improvement Comm'n, 60 So. 2d 747 (Fla. 1952). In that respect, this court has expressly declined to accept jurisdiction based on purportedly conflicting language contained in the district court's opinion which is "mere *obiter* ***dicta."*** See Cionqoli v. State, 337 so. 2d 780, 781 (Fla. 1976). The rationale of Cionsoli is strengthened considerably by the language of the 1980 amendment to Article V which requires "direct" and "express" conflict to support jurisdiction. See Department of Health & Rehab. Services v. National Adoption Counseling Services, Inc., 498 So. 2d at 889 (so-called "inferential" or "implied" conflict

no longer serves as basis for supreme court jurisdiction after 1980 amendment to Article V).[1]

CONCLUSION

Petitioner has failed to demonstrate express and direct conflict and its petition for review should be denied.

Respectfully submitted:



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'This court has accepted conflict jurisdiction in pre-1980 cases based on dicta contained in the opinion cited for conflict, as distinguished from dicta in the opinion subject to review. See Griffin v. Speidel, 179 So. 2d 569 (Fla. 1965); Shell v. State Road Dept., 135 So. 2d 857 (Fla. 1961); Sunad, Inc. v. City of Sarasota, 122 So. 2d 611 (Fla. 1960).

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, Moore, Hill, Westmoreland, Hook & Bolton, P.A., Post Office Box 1792, Pensacola, Florida 32598-1792 by United States Mail this 18th day of November, 1997.

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APPENDIX

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IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

CTC DEVELOPMENT CORPORATION, INC. and GREGORY UZDEVENES,

Appellants,

v.

STATE FARM FIRE AND CASUALTY COMPANY,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO.: 96-2976

Opinion fiied August 26, 1997.

An appeal from the Circuit Court for Escambia County. Nickolas P. Geeker, Judge.

Louis K. Rosenbloum and Stephen H. Echsner of Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A., Pensacola, for Appellants.

Michael D. Hook and Charles F. Beall, Jr. of Moore, Hill, Westmoreland, Hook & Bolton, P.A., Pensacola, for Appellee.

PER CURIAM.

CTC Development Corporation, Inc. (CTC), and Gregory Uzdevenes (Uzdevenes) appeal a final summary judgment entered in favor of State Farm Fire and Casualty Company (State Farm), appellee. CTC and Uzdevenes, who are the insureds under a "Contractor's Policy" issued by State Farm, contend the trial court erred in ruling that,

as a matter of law, the appellants' mistaken construction of a residence beyond the set back lines of the lot was not an insurable "occurrence" within the meaning of the policy. We agree and reverse.

Uzdevenes, an architect, designed and constructed a residence through his wholly-owned construction company, CTC, for John and Annette Bray. The lot upon which the house was built was subject to certain restrictive covenants which required that the house be situated at least 15 feet from the side lot lines. The house as constructed was located four feet beyond the easterly set back line in violation of the restrictive covenants. Uzdevenes claimed that he built the Bray residence under the mistaken assumption that the homeowners association had approved his request for a variance from the set back line requirements.

Finley and Judy Holmes, who owned the property adjoining the Bray residence, filed suit during construction' of the Bray residence against Uzdevenes, CTC, the Brays and AmSouth Bank of Florida, the construction lender, seeking an injunction and compensatory damages. Uzdevenes and CTC called upon State Farm to defend the Holmes' complaint and to indemnify them for the damages claimed by the Holmes. State Farm declined to defend and denied coverage for this incident. Ultimately, the Holmes' suit was settled by Uzdevenes and CTC jointly paying $22,500 to the Holmes. In addition, CTC and Uzdevenes incurred $29,400 in attorney's fees and other defense costs.

Uzdevenes and CTC filed suit against State Farm seeking

damages against the insurer based upon its failure to defend the Holmes' action and to indemnify Uzdevenes and CTC for their losses. In its answer, among other things, State Farm denied any defense or coverage obligations under the policy, contending that the damages claimed by the Holmes did "not constitute property damage caused by an occurrence" or an "accident" under the terms of the policy.

State Farm's policy which is the subject of the instant action is entitled a "Contractor's Policy." For an annual policy premium of $5,927, the policy provided business liability insurance coverage of $500,000 and other coverages up to $1,000,000 to CTC as the named insured and to Uzdevenes as an executive officer of the named insured. under the policy, the "Comprehensive Business Liability" coverage obligates the insurer to:

> 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.

"Occurrence" is defined in the policy as follows:

> a. an accident, including continuous or repeated exposure to- substantially the same general harmful conditions which result in bodily injury or property damage; or
>
> b. the commission of an offense, or a series of similar or related offenses, which results in personal injury or advertising injury.
>
> For purposes of this definition bodily injury or property damage resulting from the use of reasonable force to protect persons or

property will be considered an **accident.**[1]

The term "accident" is not defined in the policy. The policy contains the following exclusion, among others, stating that business liability coverage does not apply:

> 1. **to bodily injury** or property damage:
>
> a. expected or intended from the standpoint of the insured; or
>
> b. to any person or property which is the result of willful and malicious acts of the insured.

State Farm moved for summary judgment arguing that under Hardware Mut. Cas. Co. v. Gerrits, 65 So. 2d 69 (Fla. 1953), the construction of the Bray home beyond the set back line resulting in damage to the Holmes did not constitute an "accident" within the meaning of its liability policy because the construction was an intentional act. The trial court agreed and granted summary judgment. This appeal followed.

This case is controlled by the earlier decision of this court in Grissom v. Commercial Union Ins. Co., 610 So. 2d 1299 (Fla. 1st DCA 1992), rev. denied, 621 So. 2d 1065 (Fla. 1993). For that reason, the case must be reversed. We also feel that the result reached here is an acceptable one considering the terms and language of the insurance policy at issue. In short, it is reasonable to conclude that the injury endured by Finley and Judy Holmes fits into the policy's coverage of "property damage" caused

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[1]In the State Farm policy, defined terms are printed in bold type face.

by an "occurrence" defined as an "accident."

We would also point out, however, that notwithstanding the explanation set out in Grissom, we do not agree that there is 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). We cannot state that there is a meaningful difference in language between an "accident" and an "occurrence" defined as an "accident." However, because of the requirements of *stare decisis,* the dictates of the Grissom case apply here.

Reversed and remanded for proceedings consistent with this opinion.

JOANOS and WOLF, JJ., concur; VAN NORTWICK, J., concurring specially with written opinion.

VAN NORTWICK, J., concurring specially.

I agree with the majority that Grissom v. Commercial Union Ins. Co., 610 So. 2d 1299 (Fla. 1st DCA 1992), compels that we reverse here. I write separately because I disagree with the majority's conclusion that there is not a meaningful distinction between the applicable insurance policy provisions in the instant case and in Grissom and the policy provisions in Hardward Mut. Cas. Co. v. Gerrits, 65 So. 69 (Fla. 1953).

The central question posed by this case is whether, under the instant policy language, the mistaken construction of a house in violation of a set back line requirement constitutes an "accident" or "occurrence." Few insurance policy terms have provoked more controversy in litigation than the word "accident." See Appleman, Insurance Law and Practice (Berdal ed.), § 4492 (Appleman). As this court has recognized, "[a]s used in various types of insurance policies, the term 'accident' . . . has been given various meanings, with no indication of uniform agreement on a single accepted definition." Grissom, 610 So. 2d at 1304. 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.

The policy language in Gerrits, upon which the appellee relies, is an example of the ambiguous use of the term "accident" discussed by Appleman. In Cerrits, the insured constructed a building, locating it on the lot based upon a survey. The owner of an adjacent property brought suit claiming the insured's building encroached upon his property. The insured sought coverage under his liability insurance policy claiming that his construction of the building in a location encroaching on an adjacent lot was based on an erroneous survey and constituted an "accident" under the policy.

The policy in **Gerrits** provided, in pertinent part, as follows:

> Coverage *B. Property Damage Liability. To* pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages because of injury to or destruction of property, including the loss of use thereof, caused by accident and arising out of the hazards hereinafter defined. (emphasis added).

Cerrits, 65 So. 2d at 70. Significantly, the **Gerrits** policy did not define "accident." In holding that the insured's construction of the building was not an "accident" within the insurance policy, the **Gerrits** court in effect defined the term "accident" for the

purposes of coverage under the policy, explaining:

> 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 insured's] act in erecting the building was the encroachment on the adjoining property.

Id. at 70-71.

In Grissom, this court addressed insurance policy language markedly different from the Gerrits policy, but similar to the policy at bar. The Grissom court held that the term "accident," as defined in the policy, included "an unexpected or unintended injury or damage that results from a known cause." **610 So.** 2d at 1306. In Grissom, the insured property owner allegedly altered the natural water course across his property causing drainage problems that resulted in the flooding of the adjoining landowner's property. Adjoining and upstream landowners sought to recover against the insured, who sought defense and indemnification from his insurance carrier. The subject insurance policy insured the property owner for damages caused by an "occurrence." "Occurrence" was defined in the policy 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 . . ." Id. at 1304.

In Grissom, the trial court agreed with the insurer that the insured's action in altering the water course across his property was intentional and therefore was not an "accident." On appeal, this court found the term "accident" ambiguous and construed the

policy in a light most favorable to the insured following

> the settled rule that insurance policies are to be construed liberally in favor of the insured and strictly against the insurer, and that whenever the language is susceptible of two or more constructions, the court must adopt that which is most favorable to the insured.

Id. at 1304 (citation omitted). This court then construed the term "occurrence" under the Grissom policy to 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, even though damages are caused by the insured's intentional acts and are reasonably foreseeable by the insured. Id. at 1305. The policy language was interpreted to exclude from coverage only an event where the resulting bodily injury or property damage was expected or intended by the insured. Id. at 1306. Accordingly, although the insured's intentional alteration of the water course across his property was not accidental, the flooding and damage to the adjoining landowner's property was neither expected or intended from the insured's standpoint and therefore constituted a covered "accident" within the policy definition of the term "occurrence." Id. at 1307.

I recognize that the policy definition of "occurrence!' here appears somewhat different than the policy language in Grissom. The Grissom policy, as well as the model policies discussed by Appleman, define "occurrence" to mean "an accident . , . which results in bodily injury or property damage neither expected or intended from the standpoint of the injured. , . ." Grissom, 610

So. 2d at 1304; see Appleman at § 4492. The State Farm policy here reaches the same point by placing similar language in the exclusionary provision, which excludes coverage for bodily injury and property damage "expected or intended from the standpoint of the insured." It is clear that, when the State Farm policy definition of "occurrence" is read together with this exclusionary provision,[1] the effect of the policy language in the instant case is identical to that in Grissom. See also Spencler v. State Farm & Cas. Co., 568 So. 2d 1293, 1295 (Fla. 1st DCA 1990)(coverage 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 policy should not be precluded for an expected or intended act which results in unexpected or

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[1]As stated in section 627.419(1), Florida Statutes (1995), governing construction of policies:

> Every insurance contract shall be construed according to the entirety of its terms and conditions as set forth in the policy and as amplified, extended, or modified by any application therefor or any rider or endorsement thereto.

See e.g. Price v. Southern Home Ins. Co. of the Carolinas, 100 Fla. 338, 129 so. 748 (1930). 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. Co v. Employers' Liab. Assurance Corp., 171 So. 2d 40 (Fla. 1st DCA 1965). The interpretation here is also consistent with the purpose of the exclusionary provision. The exclusionary clause "marks the boundary of the coverage of the policy . . . " New Hamwshire 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.

unintended injury).

Here and in Grissom, unlike the insurance policy in Gerrits, the policy covers injury or damage "caused by an occurrence" and defines "occurrence" to include injury or damage which was neither expected nor intended by the injured. As recognized by Appleman, this modified policy language provides broader coverage for the injured than the Gerrits definition of "accident," which limited coverage to injury or damage caused by an accidental event. Appleman at § 4492; see also Grissom, 610 So. 2d at 1305-06. Because the parties in Grissom and in the instant case contractually provided for insurance coverage broader than that provided in the Cerrits policy, I find the coverage provisions of the policy in Gerrits clearly distinguishable from the provisions in Grissom and the instant case.

the crime was committed, the evidence is contradictory." Ex parte Pelinski, Mo. Sup., 213 S.W. 809, 810.

[7,8] The court, therefore, is not required, upon petition for writ of habeas corpus in an extradition proceeding, to make a ruling on that issue upon the weight of the evidence, nor is it required to resolve any genuine conflict. Its duty is to determine if there is competent evidence to sustain the warrant.

> "* * * the court will not discharge a defendant arrested under the governor's warrant where there is merely contradictory evidence on the subject of presence in or absence from the state * * *." Munsey v. Clough, 196 U.S. 364, 25 S.Ct. 282, 285, 49 L.Ed. 515.

When, as in the instant case, the evidence on the issue is in direct conflict, it is the plain duty of the court to enter an order of remand. See U. S. ex rel. Austin v. Williams, D.C., 6 F.2d 13; State ex rel. Rogers v. Murnane, 172 Minn. 401, 215 N.W. 863; Chandler v. Sipes, 103 Neb. 111, 170 N.W. 604; People ex rel. Buxton v. Jeremiah, 364 Ill. 274, 4 N.E.2d 373; Ex parte Wallace, 265 Mass. 101, 163 N.E. 870.

Moreover, in such a case an appellate court will not determine the question on appeal from an order of remand, as the duty of resolving the conflicts is one for the trial court in the demanding state. People ex rel. Hauptmann v. Hanley, 242 App.Div. 257, 274 N.Y.S. 824.

[9] The appellants have presented two other questions on this appeal for our determination. However, these questions were not presented in the court below and; under the allegations of the petition for the writ, could not have been presented. Under these circumstances it would be improper for us to decide the questions here.

The judgment appealed from should be affirmed.

It is so ordered.

ROBERTS, C. J., and TERRELL and THOMAS, JJ., concur.

HARDWARE MUT. CAS. CO. v. GERRITS.

Supreme Court of Florida,
Special Division A.

May 12, 1953.

Suit by insured for a declaratory judgment as to his right to recover on a policy issued by defendant. The Circuit Court for Dade County, rendered a final decree for plaintiff, and defendant appealed. The Supreme Court, Jones, A. J., held that fact that Insured constructed a building on his land so that it encroached on adjoining lot did not constitute an accident within coverage of policy insuring against liability for injury to property caused by accident.

Decree reversed.

1. Insurance ⇐434

That insured constructed a building on his land so that it encroached upon adjoining lot, though he did so in reliance upon an erroneous survey, did not constitute an "accident" within coverage of policy insuring against liability for injury to property caused by accident and arising out of ownership, maintenance or use of described premises.

> See publication Words and Phrases for other judicial constructions and definitions of "Accident".

2. Insurance ⇐434

An effect which is the natural and probable consequence of an act or course of action is not an "accident" within coverage of policy insuring against liability for injury to property caused by accident.

3. Insurance ⇐434

The purpose of policy insuring against liability for injury to or destruction of property caused by accident and arising out of specified hazards is only to make whole the insured.

4. Insurance ⇐434

Interpretation of policy insuring against liability for injury to property caused by accident as covering insured's liability for constructing a building on his land so as to encroach on adjoining lot would result in insured being reimbursed for amount paid adjoining owner and also gaining land

covered by his building, thereby permitting an unjust enrichment which is unconscionable in equity.

- -

Brown, Dean & Hill, Miami, for appellant.

Raphael K. Yunes, Miami Beach, for appellee.

JONES, Associate Justice.

This cause comes before this Court upon an agreed statement of facts presenting a question on the proper interpretation of the word *"accident"* as used in an insurance policy.

The Hardware Mutual Casualty Company, Defendant in lower Court and Appellant here, insured Edward J. Gerrits, Plaintiff in lower Court and Appellee here, according to the terms and conditions of a policy of insurance which, insofar as it is pertinent to the issues in this case contained the following insuring agreement:

> "Coverage *B. Property Damage* Liability. To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages because of injury to or destruction of property, including the loss of use thereof, caused by accident and arising out of the hazards hereinafter defined."
>
> "*Definition of* hazards: **Division** *1. Operations and Premises (Manufacturers'* and *Contractors'* (a) All operations during the policy period which are necessary or incidental to the ownership, maintenance or use of the premises and (b) the ownership, maintenance or use of the premises".

While the foregoing insurance agreement was in force and effect, Plaintiff, owner of the subject property, secured the services of one Thomas J. Kelly, a Registered Surveyor, who staked out the lot and thereafter, Plaintiff constructed a building on the premises. It is to be noted that Plaintiff was an experienced contractor and builder by profession'.

Subsequently, Plaintiff sold and conveyed the property, with improvements thereon, to one Phil Koffman.

Approximately, three years thereafter, Plaintiff was notified by Robert H. Fatt, Jr., owner of the contiguous lot, that the building erected by Plaintiff encroached upon his adjacent property and that by reason of said encroachment, he suffered great damage and made claim against Plaintiff for the alleged loss which Plaintiff paid in the amount of $1000. Plaintiff notified Defendant insurance company of the aforesaid claim, as required by the policy, and thereafter, Defendant denied all liability under provisions of the policy herein quoted upon the contention that the damage, if any, as claimed by Plaintiff was not the result of an *"accident"*.

Plaintiff contends that at no time did he or his employees knowingly or intentionally construct the building in such a manner as to encroach upon the adjoining property and the encroachment occurred without foresight or expectation on the part of Plaintiff.

In a suit filed by Plaintiff-insured for a Declaratory Judgment, the lower Court held that, under the foregoing stated circumstances, the Plaintiff was entitled to recover on the policy upon the theory that the encroachment was *an "accident"*, the chancellor decreeing that "the building across the line was the result of the *mistake* of the surveyor, Mr. Kelly, but that the building *across* the line was an accident so far as the Plaintiff was concerned." From this Final Decree the Defendant-insurer has appealed.

[1,2] 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 con-

sequence 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.

Plaintiff deliberately and designedly (although erroneously) located the building on a part of the adjoining property and he intended to build it at that particular site. The fact that he relied upon a survey does not change the situation in the least. To hold that the mere fact the surveyor made a *mistake* and that the Plaintiff in reliance on the erroneous survey, constructed his building on the adjoining property by *accident* would lead to the result that one insured, who relied on his own calculations of where the true boundary line existed, and encroached on contiguous property would be denied a recovery, and another insured, who relied on a survey, would be allowed to recover. The inequitable consequences of such an interpretation forbid our concurrence therein.

[3, 4] Moreover, to sustain the reasoning of the chancellor would result in the Plaintiff-insured "having his cake and eating it, too". Thus, he is reimbursed for the $1000 which he paid to the adjoining owner, and also gains the property covered by his building. Since the purpose of an insurance policy of the type here in question is only to "make whole" the insured, it would appear that such an interpretation would permit an unjust enrichment which is unconscionable in equity.

The parties devoted the major portion of their briefs to argument on the distinction and meaning of the word *"accident"* and "mistake". However, we think no useful purpose would be served by delving into the numerous fine, shaded and ofttimes confusing definitions or distinctions which have been so made. Suffice to say, that the action of the Plaintiff-Appellce in constructing the building on the adjoining property is well within the definition of a *"mistake"* contained in 58 C.J.S., page 829, that 'Mistake is internal, it is a mental condition, conception, or conviction of the understanding, erroneous, but none the less a conviction, which influences the will and leads to some outward physical manifestation".

For the ***reasons stated, the*** decree appealed from should be, and **it is** hereby, reversed.

TERRELL, Acting C. J., and MATHEWS and DREW, JJ., concur.

OLIVIER v. CITY OF ST. PETERSBURG.

Supreme Court of Florida, en Banc.
Feb. 13, 1953.

On Rehearing April 14, 1953.

Suit against city for wrongful death of child, allegedly caused by city's failure to maintain its streets in a safe condition. The Circuit Court, Pinellas County, John Dickinson, J., entered summary judgment for defendant, and plaintiff appealed. The Supreme Court, Drew, J., held that where city charter required, as condition precedent to personal injury suit against city, that written notice of such injury be given the City Manager within sixty days from date of injury, with specifications as to time and place of injury, written notice which set forth time, but which was silent in regard to place of accident, was insufficient.

Affirmed.

Roberts, J., Hobson, C. J., and Terrell, J., dissented from original opinion: Roberts, C. J., Hobson and Terrell, JJ., dissented from opinion on rehearing.

1. Automobiles ⇐293

Where charter of city of St. Petersburg, required, as condition precedent to suit against city for personal injuries, that written notice of injury be given to City Manager within sixty days from date of injury, with specifications as to time and place of injury, written notice which set forth time, but which was silent in regard

The Defendant was not bound to use only the Plaintiffs in developing the several versions of the Wheel of Fortune computer program since the Agreement entered into between the parties was non-exclusive. If, however, the Defendant or one of its contract programmers used Plaintiffs' material in the development of a version of the computer program, the plaintiffs were entitled to royalties on that particular version.

[1] Timely argues that the trial court was without jurisdiction to hear I.J.E.'s motion for clarification as it was not a motion properly the subject of Florida Rule of Civil Procedure 1.540 and, even if it were, it was not timely as it was filed more than one year after the entry of the final judgment. We disagree and conclude that I.J.E.'s motion was properly within the scope of 1.540(b)(5) seeking to avoid the prospective application of a judgment or decree and, therefore, not subject to the one year limitation. The ruling on that motion is before us on appeal in our case number 91-00974.

In addition to its motion for clarification, I.J.E. also filed a separate action for declaratory and supplemental relief wherein it sought to determine its right under the final judgment to refuse to pay royalties to Timely for sales of the New Junior Edition, the All New Family Edition and the Gameboy versions of the Nintendo programs. The trial judge entered partial summary judgment of liability in favor of Timely on I.J.E.'s entire declaratory judgment complaint. That summary judgment is the subject of the appeal before us in our case number 91-02802.

[2] We find that the trial judge erred in entering summary judgment for Timely in regard to the Gameboy product and I.J.E.'s obligation to pay Timely royalties thereon based upon the February 2, 1990 final judgment. We conclude that there is an unresolved issue of fact as to whether Timely's program material was utilized in development by I.J.E. of the Gameboy program for Nintendo which occurred after the February 2, 1990 final judgment. Summary judgment was not proper where I.J.E. filed the unrefuted affidavit of an individual involved with I.J.E.'s development of the Gameboy Wheel of Fortune program stating that Timely's material was not used in the development of the Gameboy program.

We conclude that the res judicata effect of the final judgment is not dispositive of the right of Timely to royalties on the Gameboy program developed after entry of the final judgment. Accordingly, we reverse the partial summary judgment only as it pertains to Gameboy products. We also reverse the order of March 6, 1991, which disbursed the royalties on the Gameboy program that were deposited pursuant to the stay order. Those Gameboy royalties shall be redeposited in the trust account to await the final determination of I.J.E.'s declaratory action as it pertains to the Gameboy program. We otherwise affirm the orders in both appeals. We remand for further proceedings. Affirmed in part and reversed in part.

DANAHY, A.C.J., and FRANK, J., concur.

Joseph 'I'. GRISSOM, Jr., Appellant,

v.

COMMERCIAL UNION INSURANCE COMPANY, **a corporation, Appellee.**

No. 91-1031.

District Court of Appeal of Florida, First District.

Dec. 22, 1992.

Rehearing Denied Feb. 1, 1993.

Insured under owner's liability policy brought suit against insurer for breach of duty to defend insured and to **recover** litigation expenses incurred defending claims

against insured by adjoining property owners for flood damages allegedly resulting from insured's intentional blockage of water drainage system. The Circuit Court, Duval County, Michael R. Weatherby, J., entered judgment in favor of insurer. Appeal was taken. The District Court of Appeal, Zehmer, J., held that: (1) unintentional damage which resulted from intentional filling of water course was accident under policy, and (2) five-year statute of limitations accrued when all cases against insured for blockage of water course drainage system were dismissed.

Reversed and remanded.

Webster, J., dissented and filed opinion.

1. Insurance ⇐146.7(1)

Insurance policies are to be construed liberally in favor of insured and strictly against insurer, and whenever language is susceptible of two or more constructions, court must adopt that which is most favorable to insured.

2. Insurance ⇐435.36(6)

Definition of accident in owner's liability policy was ambiguous, but included injury or damage resulting from created or preexisting condition for which insured is legally responsible, *even* though it may have occurred or persisted over extended period of time.

3, Insurance ⇐514.10(1)

Insurer's duty to defend is determined from allegations in complaint against insured.

4. Insurance ⇐514.10(1)

Insurer must defend if allegations in complaint could bring insured within policy provisions of coverage.

5. Insurance ⇐514.10(1)

If complaint alleges facts primarily within and partially outside coverage of policy, insurer is obligated to defend entire suit.

6. Insurance ⇐514.9(1)

Duty to defend is separate and apart from duty to indemnify and insurer is required to defend suit even if true facts later show that there is no coverage.

7. Insurance ⇐514.10(1)

All doubts as to whether duty to defend exists in particular case must be resolved against insurer and in favor of insured.

8. Insurance ⇐514.10(1)

So long as complaint alleges facts that create potential coverage under policy, insurer must defend suit.

9. Insurance ⇐514.10(1)

If it later becomes apparent that claims not originally within scope of pleadings are being made, which are now within coverage, insurer upon notification becomes obligated to defend.

10. Insurance ⇐435.36(6)

Flood damage to neighboring church property was an occurrence under property owner's liability policy, even though insured was alleged to have intentionally filled water drainage system, where insured was alleged to have negligently failed to provide adequate alternative drainage thereby causing unintentional damage by flooding of church during heavy rainfall; allegations of unintended damage fell within policy definition of accident.

11. Limitation of Actions ⇐46(6)

In cases *for* breach of insurer's duty to defend, time period for measuring statute of limitations commences at time litigant's liabilities or rights have been fully adjudicated. West's F.S.A. § 95.11(2)(b).

12. Limitation of Actions ⇐46(6)

Limitations on suit for breach of insurer's duty to defend ordinarily commences on date when judgment is entered and litigation has come to an end. West's F.S.A. § 95.11(2)(b).

13. Limitation of Actions ⇐46(6)

When two or more related lawsuits arising out of same occurrence are filed against insured and insurer wrongfully declines to defend them, insured must await final outcome of all such suits to sue insurer for damages in single action.

14. Limitation of Actions ⇐46(6)

Suit for insurer's breach of duty to defend under owner's liability policy was timely when commenced within five years of dismissal of suits against insured arising out of insured's having blocked water course drainage and thereby causing damage on adjoining properties, even though insurer declined to defend insured 14 years earlier. West's F.S.A. § 95.11(2)(b).

Stephen P. Smith III of Smith & Smith, P.A., Jacksonville, for appellant.

Bruce S. Bullock and Bert A. Rasmussen of Bullock, Childs & Pendley, P.A., for appellee.

ZEHMER, Judge.

Joseph T. Grissom, Jr., appeals an adverse final judgment in his suit to recover litigation expenses incurred in defending a claim for damages allegedly within the coverage of Grissom's liability insurance policy with Commercial Union Insurance Company based on its refusal to defend. The trial court denied Grissom relief on two grounds. First, the court ruled that the complaint in the original suit against Grissom did not allege facts constituting an insured "occurrence" or "accident" within policy coverage, so Commercial Union had no duty to defend. Second, the court ruled that this action was barred by the applicable statute of limitations because it was not timely brought within five *years* of the date Commercial Union declined coverage. Concluding that both of these rulings are erroneous, we reverse and remand for further proceedings.

I.

This action was commenced on August 11, 1989, when Grissom filed a complaint against Commercial Union for breach of contract. Commercial Union had issued Grissom an owner's, landlord's, and tenant's liability insurance policy insuring him against liability for bodily injury or property damage "caused by an occurrence and arising out of the ownership, maintenance. or use of the insured premises." Under the policy, Commercial Union agreed to defend Grissom in any lawsuit based on a covered liability claim. The case ultimately went to trial on the issues raised in the complaint, the amended answer and affirmative defenses, and the reply to the affirmative defenses. The evidence was largely undisputed.

In 1975, Grissom was sued in circuit court, case number 75-9302-CA, by Ayers and Thompson, as trustees of the Seaboard Avenue Baptist Church located across the street from Grissom's property. The complaint, as amended, alleged that Grissom had intentionally filled and elevated a natural watercourse across his land, with knowledge that the drainage of a natural stream was being blocked, and that by reason of filling and raising the elevation of his land, and "by reason of failing to provide for adequate drainage facilities," waters backed up and flooded the church's property. The church sought monetary damages and a permanent injunction requiring Grissom to restore and maintain the previously existing watercourse drainage.[1]

1. The amended complaint alleged in pertinent pan:

10. The plaintiffs are entitled to relief against the defendant upon the following facts:

* * * * * *

(b) At all times herein material, a certain natural watercourse was located in and passed through the defendant's land in Duval County, Florida, which said natural watercourse and said land is across the street from and in the vicinity of plaintiffs' property. Said natural watercourse served as natural drainage for the plaintiffs' property.

(c) Within the last year, defendant did knowingly and intentionally completely fill and elevate or caused to be completely filled and elevated, this natural water course. The watercourse which was filled and elevated consisted of a channel with banks, bed and running water. This watercourse was filled in for a distance of several hundred feet and was filled by the defendant with full knowledge that the drainage of a natural stream was being blocked.

(d) By reason of the filling in of the natural watercourse, by reason of raising the elevation of his land and ***by reason of failing to provide for adequate drainage facilities,*** the defendant blocked the natural flow of the stream and caused the waters to back up and to flood the plaintiffs' property. The water which has been discharged upon the lands of the plaintiffs was

Commercial Union initially assumed the defense of this claim under a reservation of rights, but subsequently declined coverage and withdrew its defense, asserting in its letter of September 12, 1975, that the actions for which Grisaom was sued "are alleged to be intentional" and "[t]he alleged consequences appear to have been forseeable [sic], in general nature if not in specific extent." [2]

Grissom assumed the defense of the action and filed third-party complaints alleging claims arising out of the drainage problem that was the basis of the church's suit against him. The third-party defendants were upstream owners and the City of Jacksonville, and Grissom alleged that these third-party defendants had altered the natural drainage system so as to cause the drainage problems suffered by the church and Grissom himself. These third-party defendants counterclaimed for damages and injunctive relief against Grissom based on his having altered the flow of water across his land. Although the counterclaim in evidence alleges that Grissom filled in his land, it does not allege that he intended to harm the property of the other owners or the City. By letter of October 6, 1976, Grissom notified Commercial Union of these counterclaims and requested that it reconsider its decision declining coverage under the circumstances. Commercial Union did not provide a defense in response to this request.

The original claim for property damage by the church was settled pursuant to an agreement executed on September 25, 1976. However, the injunction claim was tried and the temporary injunction against Grissom was made permanent in an amended final judgment entered March 22, 1979. Grissom continued to prosecute the surviving third-party claims and counterclaims in that case until all claims were voluntarily dismissed on December 19, 1984.

Certain third-party defendants were dismissed from the original suit, case number 75-9302-CA, in 1976 and Grissom immediately filed another suit against them in circuit court, case number 76-12676-CA. The claims asserted in this second suit were essentially the same as the third-party claims in case number 75-9302-CA, in that Grissom sought monetary damages and injunctive relief in respect to changes made by the defendants to upland drainage that allegedly caused damage to Grissom's real property and the church's property. Similar counterclaims were asserted against Grissom by the defendants in that case. All claims in the second suit were litigated between Grissom and the defendants until the action was dismissed pursuant to a stipulation executed on October 4, 1988.

The evidence also established that Grissom had purchased the real property in-

in such great quantity on the plaintiffs' land that it was flooded to great depths.

(e) The said acts of the defendant constitute a continuing wrong against the plaintiffs and demand has been made upon the defendant to correct his continuing wrong and to clear the natural drainage way. The *defendant has totally failed to voluntarily correct his wrong and to* clear *the watercourse as requested* Temporary relief was obtained only after this Honorable Court granted a temporary mandatory injunction requiring the defendant to partially open the watercourse. Continuation of this nuisance would result in irreparable damage to the plaintiffs' property.

11. As a direct and proximate result of the wrongful and intentional acts of the defendant, the church building and the contents therein, parking lot. shrubbery, septic tank and grounds of the plaintiffs have been damaged along with personal property located thereon.

(Emphasis added.)

2. The letter recited:

> Coverage is declined because the policy of insurance under which the Commercial Union Insurance Company insures Mr. and Mrs. Grissom obligates the company to pay "on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of property damage . to which this insurance applies, caused by an occurrence and arising out of the ownership, maintenance or use of the insured premises , . .". "Occurrence" means accident.
>
> "Accident" is defined as "that which happens by chance or fortiutously [sic], without intention or design, and which is unexpected, unusual, and unforseen." 18 Fla.Jur., Insurance, § *687.* The actions for which Mr. Grissom is being sued are alleged to be intentional. The alleged consequences appear to have been forseeable [sic], in general nature if not in specific extent.

volved in 1962. The property lay adjacent to Seaboard Avenue, and a drainage ditch or swale ran down Grissom's property from a culvert that ran underneath Seaboard Avenue from the other (east) side and drained a large area. The swale meandered across Grissom's land, across adjoining property to the north of Grissom's land, and thence into a creek. In 1964, Superior Homes, Inc., owner of a large tract on the east side of Seaboard Avenue, improved drainage of its property by construction of a canal 1000 feet long, 20 feet wide, and 5 feet deep, extending eastward from the culvert underneath, Seaboard Avenue. This canal was connected to a drainage system that drained some 40 acres of land. The canal increased the velocity and volume of water emptying onto Grissom's land, causing substantial erosion to his land. Grissom re-routed the swale, after consulting with the Soil Conservation Service of the United States Department of Agriculture, in an attempt to minimize this increased erosion. In 1975, extremely heavy rains fell on this neighborhood-up to 50 percent higher than normal during some months. As a consequence, the church experienced flooding of its property, and it sued Grissom on August 15, 1975, alleging the claims set forth in note 1, *supra.*

Underlying the settlement of all claims arising out of this drainage dispute in both lawsuits was the installation of an underground culvert by the City of Jacksonville to adequately drain the area in question. This culvert was installed immediately north of Grissom's property line at a cost of more than $200,000. This installation allowed the development planned on the east side of Seaboard Avenue to proceed without flooding the area and without causing the erosion that had been occurring on the west side of the street, primarily on Grissom's property.

In this suit against Commercial Union, Grissom sought to *recover* damages for expenses and attorneys' fees incurred in defending the drainage litigation initiated by the church and the defense of the various counterclaims against Grissom spawned thereby. The trial court entered final judgment for Commercial Union on two grounds.

First, the trial court found that the policy definition of an "occurrence" was clear and unambiguous. It ruled that the insurance company's duty to defend must be determined from the allegations of the complaint alone, and if the complaint affirmatively shows either the non-existence of coverage or applicability of a policy exclusion, the insurer has no obligation to defend. Reviewing the allegations of the complaint, the judgment concluded that "the alleged intentional acts of the Plaintiff Grissom in blocking the alleged waterway, and in the continued willful blockage into the year of coverage, while the complaining church's lands and buildings were allegedly flooded and damaged, was neither an 'occurrence' nor an 'accident' as defined by the policy."

Second, the court ruled that the five-year statute of limitations applicable to Grissom's claim for breach of contract commenced running in 1975 when Commercial Union notified Grissom that it declined to defend the suit, or alternatively, when Grissom settled the damage claim with the church in 1976, and thus the limitations period had expired long before the present action against Commercial Union was filed *in* August 1989. The court further found no basis in the evidence for waiver or estoppel by reason of Commercial Union's representations or conduct that would avoid application of the statute of limitations defense.

Grissom challenges both rulings on this appeal.

II.

Addressing Grissom's first point, we hold that the court erred in ruling that the alleged claims were not within the policy coverage. We have no disagreement with the principles of law recited in the final judgment, but conclude that these principles were incorrectly applied due to a misinterpretation of both the legal effect of the policy definitions and the implication of the allegations in the amended complaint.

A.

The explicit reason stated in Commercial Union's letter declining coverage and defense of the church's lawsuit was that the complaint did not allege an "occurrence" or "accident" within the meaning of the policy because it alleged that Grissom's actions were intentional. (See note 2, *supra.*) Agreeing with Commercial Union's contentions, the trial court focused entirely *on* Grissom's intentional filling of the drainage watercourse, concluding therefrom that no "occurrence" *or* "accident" within the policy coverage had been alleged. Thus, we must first determine the meaning of an "occurrence" or "accident" within the meaning of the policy.

The explicit terms of the Commercial Union policy insured Grissom for "all sums which the insured shall become legally obligated to pay as damages because of . . . bodily injury or . . property damage to which this insurance applies caused by an *occurrence* and arising out of the ownership, maintenance or use of the insured premises. . " [3] (Emphasis added.) The policy further provided that Commercial Union "shall have the right and *duty to defend* any suit against the insured seeking damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent. . . ." (Emphasis added.) The term "occurrence" was explicitly defined in the policy to mean "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...."

[1] We first note that the trial court erred in ruling that the policy definition of "occurrence" is clear and unambiguous. 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. Accordingly, in determining the meaning of these policy provisions, we apply the settled rule that insurance policies are to be construed liberally in favor of the insured and strictly against the insurer, and that whenever the language is susceptible of two or more constructions, the court must adopt that which is most favorable to the insured. *E.g., Roberson v. United Services Automobile Ass'n,* 330 So.2d 745, 746 (Fla. 1st DCA), *cert. denied,* 342 So.2d 1104 (Fla.1976).

[2] As used in various types of insurance policies, the term "accident," when not otherwise explicitly defined or clarified by language in the policy itself, has been given varying meanings, with no indication of uniform agreement on a single accepted definition. Thus, in *Hardware Mut. Cas. Co. v. Gerrits,* 65 So.2d 69 (Fla.1953), the supreme court, without citing a single precedent, concluded on the facts of that case that:

> 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.*

63 So.2d at 70–71. In *Bennett v. Fidelity & Cas. Co. of* N.Y., 132 So.2d 788 (Fla. 1st DCA1961), this court recognized the difficulty encountered by the courts in defining "accident" in discussing and applying the concept of accident set forth in the *Gerrits* opinion. Other Florida decisions have defined "accident" to include an unexpected result of a known cause as distinguished from an unexpected cause of an expected injury, applying the so-called "man-on-the-street" definition. *E.g., Beneficial Standard Life Ins. Co. v. Forsyth, 447* So.2d 459 (Fla. 2d DCA1984); *Braley v. American Home Assur.* Co., 354 So.2d 904 (Fla. 2d DCA), *cert. denied, 359* So.2d 1210 (Fla. 1978). In *Roberson v. United Services Automobile Ass'n,* 330 So.2d 745 (Fla. 1st

3. No issue is made in this case that the events here involved did not arise out of the ownership, maintenance, and use of the insured premises.

DCA1975), this court defined the term "accident" as meaning variously "an unexpected or unusual event; it is something which happens by chance and without design; it is an event from an unknown cause.. . . An average person buying a personal accident policy assumes that he is covered for any fortuitous and undesigned injury." *330* So.2d at 746.

The meaning of "accident" as that term is used in insurance policies was particularly well described by Judge Hubbart in *Hartford Fire Ins. Co. v. Spresn, 343* So.2d 649 (Fla. 3d DCA1977), wherein he explained:

> 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. Insurance coverage has accordingly been found under such policies where an insured unintentionally shoots himself while playing "Russian Roulette," *Gulf Life Insurance* Co. *v.* Nash, 97 So.2d 4 (FIa.1957); or unintentionally shoots himself while attempting to disarm a person in a fight in which the insured is the aggressor, *Harvey v. St. Paul Western Insurance Cos.,* 166 So.2d 822 (Fla. 3d D.C.A.1964); or unintentionally shoots a bystander during a family quarrel, Grange Mutual *Casualty Co. v. Thomas, 301* So.2d 158 (Fla. 2d D.C.A.1974); *or* unintentionally hits a person in a crowd of people with a car while slowly driving into the edge of the crowd intending to disperse them, *Phoenix Ins. Co. v. Helton, 298* So.2d 177 (Fla. 1st D.C.A.1974), or unintentionally injures a person in a car while unintentionally pushing the car which was blocking a driveway, Cloud *v.* Shelby *Mutual Insurance Co., 248* So.2d 217 (Fla. 3d D.C.A.1971). Running through all of these cases is an act of negligence by the insured, sometimes gross or even culpable negligence. But never has coverage been found under such policies where the insured's act was deliberately designed to cause harm to the injured party.
>
> Indeed the law is well-settled that there can be no coverage under an insurance policy which insures against an "accident" where "the [insured's] wrongful act complained of is intentionally directed specifically toward the person injured by such act...." Grange Mutual Casualty Co. v. Thomas, 301 So.2d 158, 159 (Fla. 2d D.C.A.1974). "Early on it became the overwhelming consensus in those cases that since such a policy was in essence an indemnification contract public policy mandated that an intentional tort was not an 'accident' within the coverage for the reason that *one* ought not to be permitted to indemnify himself against his intentional [torts]." *Lathery* Insurance Co. *v. Willoughby, 315* So.2d 593 (Fla. 2d D.C.A.1975).

343 So.2d at 650–51. Holding that the assault and battery in that case was an intentional tort and not an accident under the policy, the court rejected the argument that the insured did not intend to cause the serious injury that actually resulted from the intentional battery, since the determination of coverage does not turn on the extent of injury the insured intended to inflict but whether the insured intended to cause any injury at all.

Similarly, in *Spengler v. State Farm Fire* & Cas. Co., 568 So.2d 1293 (Fla. 1st DCA1990), rev. *denied, 577* So.2d 1328 (Fla.1991), where the insured intended to shoot a supposed burglar but actually shot his girlfriend instead, we held that the exception in the insured's liability policy excluding coverage for bodily injury or property damage "which is either expected or intended by an insured" did not apply, explaining that:

> [T]he policy exception at issue and exceptions similarly worded mean that liability is not precluded for an expected or intended "act" but rather for an expected or intended "injury" and that when the act is intentional, but the injury is not, the exclusionary clause is not applicable.

Id. at 1295. We also cited to similar insurance policy provisions in Grange *Mut. Cas.* Co. *v.* ***Thomas, 301*** So.2d 158 (Fla. 2d DCA1974), wherein the insured shot Thomas, who was a nonparticipant in a family quarrel in which the insured was involved, and it was shown that the bullet was not intended to hit Thomas (although it may have been intended for someone else). Discussing the ruling in that case, we stated:

> The second district ruled that the provision of the insured's policy that excluded coverage for bodily injury that is expected or intended by the insured did not apply to that situation. In so holding, the court stated:
>
> > ... unless the wrongful act complained of is intentionally *directed* ***specifically toward the person injured*** ***by such act,*** the injury, *as* ***that victim,*** is an accident or "occurrence" for which an insured tortfeasor may become legally answerable in damages as contemplated by the coverage provision of his homeowners liability policy.
>
> 301 So.2d at 159 (emphasis added).
>
> 568 So.2d at 1295.

In the Commercial Union policy, the word "accident" in the definition of "occurrence" is not explicitly defined, but it is used in a sentence that contains additional exemplifying or qualifying language. Therefore, in arriving at the meaning and intent of this definition of "occurrence," we construe the word "accident" to include an unexpected or unintended cause of an injury or damage as well as an unexpected or unintended injury or damage that results from a known cause. This meaning, however, is further exemplified by the remaining language in that sentence.

Thus, the parenthetical phrase, "continuous or repeated exposure to conditions," immediately follows the word "accident" and connotes a concept of "accident" that includes not only a single, sudden, unexpected event that causes damage, but also includes injury or damage that results from a created or pre-existing condition for which the insured is legally responsible, even though it may have occurred or persisted over an extended period of time. 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.[4]

B.

Next, we review the allegations of the church's amended complaint (see note 1, ***supra)*** to determine whether the facts alleged constitute an "occurrence" within the meaning of the policy. Resolution of this issue is governed in part by the following general principles concerning an insurer's duty to defend a claim.

[3-9] An insurer's duty to defend is to be determined from the allegations in the complaint against the insured. ***National Union Fire*** *Ins. Co.* ***v.*** *Lenox* ***Liquors,***

4. Professor Keeton indicates that the "occurrence" definition in this policy is intended to function as the equivalent of an intentional injury exclusion clause:

> [L]iability insurance policies have generally included clauses that explicitly preclude coverage for an "injury . caused intentionally." For example, contemporary liability insurance policies frequently state that insurance is provided For damages that are causes by an "occurrence" which is generally defined as an "accident" that "results in bodily injury or property damage neither *intended* From the standpoint of the insured."

Keeton and Widiss, *Insurance* Law, § 5.4(d)(1) (1988).

Inc., 358 So.2d 533 (Fla.1977); State *Farm Fire and Cas. Co. v. Edgecumbe,* 471 So.2d 209 (Fla. 1st DCA1985); *Baron Oil Co. v. Nationwide Mut. Fire Ins. Co., 470* So.2d 810 (Fla. 1st DCA1985). The insurer must defend if the allegations in the complaint could bring the insured within the policy provisions of coverage. *State* Farm. Mu*tual Auto. Ins. Co. v. Universal Atlas Cement Co.,* 406 So.2d 1184 (Fla. 1st DCA1981), *rev. denied,* 413 So.2d 877 (Fla. 1982). If the complaint alleges facts partially within and partially outside the coverage of the policy, the insurer is obligated to defend the entire suit. *Tropical Park, Inc. v. United States Fidelity and Guaranty* Co., 357 So.2d 253, 256 (Fla. 3d DCA1978). The duty to defend is separate and apart from the duty to indemnify and the insurer is required to defend the suit even if the true facts later show there is no coverage. *Klaesen Bros., Inc. v. Harbor Ins. Co.,* 410 So.2d 611 (Fla. 4th DCA1982). All doubts as to whether a duty to defend exists in a particular case must be resolved against the insurer and in favor of the insured. *Baron Oil Co., 470* So.2d at 814. So long as the complaint alleges facts that create potential coverage under the policy, the insurer must defend the suit. *Tropical Park,* 357 So.2d at 256. If it later becomes apparent (such as in an amended complaint) that claims not originally within the scope of the pleadings are being made, which are now within coverage, the insurer upon notification would become obligated to defend. *Broward Marine, Inc. v. Aetna Ins. Co.,* 459 So.2d 330 (Fla. 4th DCA1984).

[10] The church's amended complaint alleged that Grissom intentionally filled in the watercourse across his land and thereby raised its elevation so as to block the flow of water from its original course, with full knowledge that the drainage was being blocked. It further alleged, however, that by reason of this act, "and by reason of failing to provide for adequate drainage facilities . [Grissom] caused the waters to back up and to flood the plaintiffs' prop erty." There are no allegations that Grissom filled the watercourse and elevated his land with the intention to flood the church's property or otherwise intentionally damage church property; nor is it alleged that Grissom knew or intended that filling in the watercourse would necessarily cause the church property across the street to flood and be damaged in some rainstorms. The language of the complaint, "at least marginally and by reasonable implication," *Klaesen Bros.,* 410 So.2d at 613, could be construed to mean that Grissom intentionally filled in the watercourse to avoid damage to his own property, but negligently failed to provide adequate alternative drainage and thereby created a condition that resulted in unintentional damage by flooding of the church property across the street during a heavy rainfall.: Clearly, the intentional filling of the watercourse was not an "accident" under the policy; but the unintentional flooding and damage to church property resulting from the negligent failure to provide adequate drainage facilities, being neither expected nor intended, does constitute an accident within the case law definitions previously discussed. These allegations of unintended damage were legally sufficient to state a claim against Grissom for property damage caused by the flooding, and to obtain recovery the church would not have to prove that Grissom either intended or expected the resulting property damage.

We are mindful that the amended complaint further alleged a "continuing wrong" in that Grissom "has totally failed to voluntarily correct his wrong and to clear the watercourse as requested." However, this allegation was made to support the claim for injunctive relief to correct a continuing nuisance, and it does not vitiate a reasonable interpretation of the complaint as alleging a claim for unintend-

5. The court must look not only to the facts alleged but to their implications as well in determining whether the complaint may charge a covered occurrence, as this liberal interpretation of the complaint in favor of coverage "is authorized under the principle that any ambiguous term of an insurance policy will be most strongly construed against the insurance company." *Continental Cas. Co. v. Florida Power & Light Co., 222* So.2d 58, 59 (Fla. 3d DCA), cert. denied, 229 So.2d 867 (Fla.1969).

ed or unexpected damages due to flooding. The complaint does not allege that the property damage was attributable to intentional or expected flooding on more than one occasion.

For these reasons, the trial court erred in ruling that "the alleged intentional acts of the Plaintiff Grissom in blocking the alleged waterway, and in the continued willful blockage into the year of coverage, while the complaining church's lands and buildings were allegedly flooded and damaged, was neither an 'occurrence' nor an 'accident' as defined in the policy." The error lies in limiting consideration to the intentional filling of the waterway rather than determining whether the resulting damage to the church's property was "neither expected nor intended" by the insured.

C.

The cases cited to us by Commercial Union and relied on in the final judgment are materially and factually distinguishable from this case.

In *Hardware Mut. Cas. Co. v. Gerrits*, 65 So.2d 69, the insured intentionally located his building on a particular piece of property belonging to a neighbor, and the fact that the insured was mistaken about the exact location of the property line showed only a mistake of fact; this mistake did not amount to an accident because the intentional placement of the building appropriated that particular spot of land to the insured's use and was clearly the natural and probable consequence of the alleged intentional act as a matter of law. In this case, it cannot be said as a matter of law that Grissom's filling of the swale would necessarily and intentionally flood the church property.

In *Bennett v. Fidelity & Cas. Co. of N. Y.*, 132 So.2d 788 (Fla. 1st DCA1961), the insured built a dam that caused flooding of adjacent property and immediately removed the dam when it became apparent that the adjacent landowner's property had been flooded. However, the insured thereafter reconstructed the dam and did not remove it when another rain occurred and flooded the adjacent land. The insured's subsequent conduct of rebuilding the dam and not removing the dam manifested an intent to cause the flooding, and this court held that these "allegations effectively eliminate the idea of the 'unexpected,' which we think is an important element in a legal definition of the term 'accident.' " *Id.* at 792. No such intentional injury was alleged against Grissom.

In *West Building Materials, Inc. v. Allstate Ins.* Co., 363 So.2d 398 (Fla. 1st DCA1978), this court held that the insured's act of intentionally setting off a smoke bomb in a building and causing it to burn was within the policy exclusion of coverage for damage that is expected or intended by the insured. The court rejected the insured's contention that the fire was an accident because the insured intended to cause only smoke, not fire. The setting of the bomb was an intentional act committed for the purpose of causing damage to the building, and the fact that the bomb started the fire as well as caused smoke damage went only to the extent of the expected injury to the building. The rationale of this decision is similar to that in *Hartford Fire Ins. Co. v. Spreen*, 343 So.2d 649, in which the court likewise rejected the notion that an injury from assault and battery was not an accident because the insured intended to injure the victim, and a dispute over the extent of the intended injury did not overcome the intentional character of the injury.

In *State Farm Fire and Cas. Co. v. Edgecumbe*, 471 So.2d 209 (Fla. 1st DCA1985), the complaint for malicious prosecution explicitly alleged that the insured made the false accusations, "intending to injure" the plaintiff. We held that State Farm did not owe the insured a defense of that action because this allegation of injury brought "the claim within the exclusion of the State Farm policy providing no coverage for claims or suits brought against the insured for bodily injury or property damage which is expected or intended by the insured." Id. at 210.

These cases are materially distinguishable from the instant case because the complaint against Grissom did not allege facts

showing, directly or by necessary implication, that Grissom expected or intended to cause any injury by flooding the church's property or any counterclaiming third-party defendant's property.

We hold, therefore, that the claims alleged in the church's complaint, and the third-party counterclaims asserted against Grissom in connection with this water drainage dispute arising out of the church's complaint, involved potential claims for damages that were apparently within the policy coverage. Thus, Commercial Union wrongfully breached its duty under the policy when it declined to defend these claims against Grissom.

III.

We now address Grissom's second point, that the trial court erred in ruling that his cause of action against Commercial Union was barred by the statute of limitations. There is no dispute that this action for breach of Commercial Union's duty to defend is governed by the five-year statute of limitations for breach of contract. § 95.11(2)(b), Fla.Stat. (1991). The critical issue is whether this cause of action accrued and started the statute of limitations to run more than five years before this suit was filed.[6]

The trial court ruled in the final judgment that:

> 12. . . . [T]he Plaintiff knew and considered the insurance contract to be breached by the insurer at the outset, when the insurer notified Mr. Grissom of its denial of coverage in September 1975....
>
> ....
>
> 14. If Condition No. 5 of the policy could be argued to put an insured in doubt as to the timing of his remedy for breach, there is no question that Mr. Grissom had removed the risk of liability for property damage contained in the suit tendered to his insurer when he entered the settlement agreement executed between himself and the Plaintiff church in 1976. His failure to commence action against Commercial Union Insurance Company within five years thereafter also bars this action.

Condition five referred to by the court is a standard "no action" provision in the policy.[7]

Clearly, the trial court treated this cause of action against Commercial Union as having accrued, thus starting the five-year limitation period to run, from the date the notice declining to defend was sent in September 1975, or, alternatively, no later than the date in September 1976 when the settlement agreement was executed between the church and Grissom. This ruling fails to accord with the applicable law for the following reasons.

[11, 12] It is the rule in Florida, as well as generally, that in cases for breach of an insurer's duty to defend, "the time period for measuring a statute of limitations commences at the time a litigant's liabilities or rights have been finally and fully adjudicated." *Employers' Fire Ins. Co. v. Continental Ins. Co.*, 326 So.2d 1'77, 181 (Fla. 1976). Ordinarily, the statutory time commences on the date when judgment was entered and the litigation has come to an end. *Continental Cas. Co. v. Florida Power & Light Co.*, *222* So.2d 58, 59–60 (Fla. 3d DCA), *cart. denied, 229* So.2d 867 (Fla.1969) ("We hold that Florida Power & Light's cause of action, a right to recover expenses incurred in defending a third-party action resulting from Continental's refusal to defend the third-party action in violation of its contractual duty, did not

6. In view of our disposition of this issue, we find it unnecessary to discuss the alternative theories of estoppel and waiver Grissom asserted as legal grounds to extend the statute of limitations beyond five years period, even though these grounds were rejected by the trial court.

7. This condition reads:

> 5. **Action Against** Company: No action shall lie against the company unless, as a condition precedent thereto, there shall have been full compliance with all of the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the Insured after actual trial or by written agreement of the insured, the claimant and the company.

accrue until the third-party litigation ended. *Terteling v. United States, 334* F.2d 250, 254-255, 167 Ct.Cl. 331 (1964). Cf. cases cited in 54 C.J.S. Limitation of Actions § 141."). *E.g., Boyd Bros. Transp. Co. v. Fireman's Fund Ins, Cos.,* 540 F.Supp. 579 (M.D.Ala.1982); *Kielb v. Couch, 149* N.J.Super. *522,* 374 A.2d *79 (1977); Bush v. Safeco Ins. Co. of America, 23* Wash.App. 327, 596 P.2d 1357 (1979). Similarly, when a policy contains a no-action clause like the one in Commercial Union's policy, that provision creates a condition precedent to the insured's right of action for the insurer's wrongful failure to defend, so that the insured's suit for recovery of the expenses for defending the claims can be initiated only after such claims have been finally determined and come to an end. *Gilbert v. American Cas. Co. of Reading Pa., 219* So.2d 84 (Fla. 3d DCA), cert. *denied, 225* So.2d 920 (Fla.1969); *Ginn v.* State *Farm Mut. Automobile Ins. Co.,* 417 F.2d 119 (5th Cir.1969); *Kielb v. Couch,* 374 A.2d 79. The rationale underlying these decisions is often expressed in terms of waiting until all claims have come to an end so that all expenses will be known and the insured can avoid splitting the cause of action, a practice looked upon with disfavor in the law.

[13] Accordingly, when two or more related lawsuits arising out of the same occurrence are filed against the insured and the insurer wrongfully declines to defend them, the insured must await the final outcome of all such suits to sue the insurer for damages in a single action; otherwise, the insured's bringing separate actions against the insurer to make recovery of expenses incurred in defending each suit constitutes an impermissible splitting of the insured's cause of action that bars a second action against the insurer. *Beck* v. Pennsylvania *National Mut. Cas. Ins. Co., 279* So.2d 377, 379 (Fla. 3d DCA1973) (approving insurance company's argument that "it was incumbent on Beck [the insured] to have awaited the conclusion of the two cases, which would have established the expenses in both cases, and to have filed one action for such expenses when so determined, in order to avoid splitting the cause of action."). [14] Applying these principles to the facts in this case, it is readily apparent that the statute of limitations did not begin to run in 1975 when Commercial Union notified Grissom that it was declining to provide a defense. Likewise, the statute did not begin to run in 1976 when Grissom reached a settlement with the church on the damage claim, because at that time other issues remained open for adjudication in that case, and the third-party counterclaims against Grissom (which arose out of the same transaction) that Commercial Union had also declined to defend after receiving notice, also remained open for trial. Those third-party claims were not resolved with finality until they were dismissed pursuant to settlement agreements on December 19, 1984 (in case number 75-9302-CA), and on October 4, 1988 (in case number 76-12676-CA). Grissom was entitled, indeed required, to await the final resolution of all cases and claims arising out of Grissom having blocked the watercourse drainage cases before suing Commercial Union to avoid splitting his cause of action. Since the instant action against Commercial Union was filed within five years of either date of dismissal, it is not barred by the statute of limitations.*

The appealed judgment is reversed and this cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

SHIVERS, J., concurs.

WEBSTER, J., dissents with opinion.

WEBSTER, Judge, dissenting.

I agree with part III of the majority's opinion, which concludes that the statute of limitations is not a bar to appellant's action. I also agree, generally, with the principles of law recited in part II of the majority's opinion. However, I am unable to agree

8. None of the cases cited in our discussion of this point were brought to the attention of the trial court or this court. Had the trial court been aware of these Florida decisions, we are confident that its ruling on this point would have been otherwise.

that either the church's amended complaint or any of the third party counterclaims can be read as alleging that the flooding and consequent damage constituted an "accident," as that term is used in the insurance policy and has been interpreted by the courts of this state in similar circumstances. Rather, it seems to me that all of those pleadings can only be read as alleging that the flooding and consequent damage were the natural and probable results of appellant's intentional acts. This being so, I am unable to comprehend how they can be characterized as unintended. See *generally, Landis v. Allstate Ins. Co., 546* So.2d 1051 (Fla.1989) (intent to commit harm is not required to exclude coverage under homeowners policy exclusion for bodily injury intentionally caused by the insured-all intentional acts are properly excluded); *Swindal v. Prudential Property* and *Casualty Ins. Co., 599* So.2d 1314 (Fla. 2d DCA1992) (homeowners policy exclusion for bodily injury expected or intended by the insured excludes coverage for injuries which are the direct and proximate result of an intentional act). For this reason, I would affirm the final judgment. Therefore, respectfully, I dissent.

Vinney TRIPP, **Appellant,**

v.

STATE **of Florida, Appellee.**

No. 91-1540.

District Court of Appeal of Florida, First District.

Dec. 22, 1992.

Defendant was convicted before the Circuit Court, Escambia County, Joseph Q. Tarbuck, J., of attempted first-degree murder, aggravated battery, and attempted robbery, and he appealed. The District Court of Appeal, Wigginton, J., held that: (1) reclassification of attempted armed robbery offense as a first-degree felony for use of a weapon and aggravated battery was improper since offense is a felony in which use of a weapon is an essential element, and (2) reclassification of attempted first-degree murder as a life felony was precluded by absence of specific jury finding that defendant committed an aggravated battery and used a weapon in connection with that offense.

Convictions affirmed; sentences reversed; remanded for resentencing; question certified.

Wolf, J., concurred in part and dissented in part with opinion.

1. Criminal Law ⇐1208.6(4)

Reclassification of attempted armed robbery offense from second degree to first-degree felony, pursuant to statute authorizing reclassification of felony if felony involved use of weapon or firearm was improper, since offense was a felony in which use of a weapon was an essential element. West's F.S.A. §§ 775.087(1), 777.04, 812.13.

2. Criminal Law ⇐1319

Attempted first-degree murder conviction could not be reclassified as a life felony, pursuant to statute, even though charging documents alleged, evidence showed, and jury specifically found that defendant committed an aggravated battery and used weapon in course of his criminal episode, which included offense of attempted first-degree murder, in absence of necessary jury finding that defendant committed aggravated battery and used weapon specifically as to that offense. West's F.S.A. §§ 775.087(1), 777.04, 782.04.

Nancy A. Daniels, Public Defender, Glen P. Gifford, Asst. Public Defender, for appellant.

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