IN THE SUPREME COURT OF FLORIDA

STATE FARM FIRE AND CASUALTY COMPANY,

Defendant/Petitioner

vs. CASE NO.: 91,717

CTC DEVELOPMENT CORPORATION, INC. and GREGORY UZDEVENES,

Plaintiff/Respondent.

ON REVIEW FROM THE DISTRICT COURT OF APPEAL, FIRST DISTRICT
LOWER TRIBUNAL NO. 96-2976

PETITIONER'S REPLY BRIEF ON THE MERITS

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SUMMARY OF ARGUMENT

This case cannot be meaningfully distinguished from this Court's prior controlling decision in Hardware Mut. Cas. Co. v. Gerrits, 65 So.2d 69 (Fla. 1953). In its brief, CTC Development essentially concedes that the facts of this case are substantively identical to those in Gerrits. CTC Development's attempt to distinguish this case from Gerrits based upon the language in the underlying policies is misplaced. First, both policies cover "accidents" and neither policy provides a separate definition of the term. Second, the fact that the policy in this case contains a separate exclusion for injuries "expected or intended" by the insured is irrelevant. CTC Development cannot use the language in an exclusion to expand the coverage otherwise available under a policy.

In addition, CTC Development's argument that Gerrits should be overruled is completely without merit. CTC Development suggests that Gerrits is inconsistent with prevailing law because it relied upon common law tort principles to define the scope of an "accident" for coverage reasons. A closer reading of the Gerrits decision and a review of recent cases from this Court, however, reveals otherwise.

This Court has held in recent cases that "foreseeability" is not an appropriate test for purposes of an intentional acts exclusion. Instead, courts should look to determine whether the injury was "expected or intended" as set forth in the policy language itself. Similarly, in Gerrits, this Court held that a covered "accident" did not include injuries that were the "natural

and probable" result of an action. The Gerrits Court, therefore, did not rely upon the tort principle of "foreseeability," but rather relied upon "probability," which is synonymous with the "expected" language found in modern policies.

Because the injuries caused by CTC Development's actions were clearly the "expected" or "probable" result of its intentional act of locating the building over a set back line, CTC Development's actions fall squarely under the intentional acts exclusion. Accordingly, the District Court's decision should be quashed.

ARGUMENT

The Decision Of The First District Court Of Appeal Should Be Quashed Because It Conflicts With The Decision Of This Court In Hardware Mut. Cas. Co. v. Gerrits, 65 So.2d 69 (Fla. 1953).

In its initial brief on the merits, State Farm demonstrated that the First District Court of Appeal erred by expressly refusing to follow this Court's prior binding decision in Hardware Mut. Cas. Co. v. Gerrits, 65 So.2d 69 (Fla. 1953). In its answer brief, CTC Development attempts to distinguish the Gerrits decision by rehashing the same arguments that were rejected by the majority opinion below, and argues that this Court should overrule the Gerrits decision because it is inconsistent with prevailing Florida law. Finally, and most telling, CTC Development all but concedes the error of law in the District Court opinion, and instead asks the Court to adopt and approve the concurring opinion below by Judge Van Nortwick. This Court should reject CTC Development's arguments, and quash the District Court decision.

I. This Case Cannot Be Meaningfully Distinguished From The Gerrits Decision

In its answer brief, CTC Development makes no attempt to distinguish the underlying facts of this case from the underlying facts in Gerrits. To the contrary, CTC Development readily acknowledges that the facts of the two cases are "similar." Respondent's Brief at 6, 14. Instead, CTC Development simply resurrects its prior argument that the cases can be distinguished due to differences in the language of the underlying insurance policies -- an argument expressly rejected by the trial court and the District Court majority.

As State Farm demonstrated in its initial brief, the coverage issues in both this case and Gerrits revolve around the plain

meaning of the word "accident." In Gerrits, the policy provided coverage for property damage "caused by accident." Gerrits, 65 So.2d at 70. In this case, the policy provided coverage for property damage caused by "an occurrence," and "occurrence" was further defined as "an accident." R 23 (back of page) and 29. Significantly, neither policy defined the word "accident."

CTC Development raises two arguments in an effort to distinguish the two policies; neither argument is persuasive. First, CTC Development argues that the Gerrits court used tort law principles to determine the scope of coverage. This argument is both incorrect and irrelevant. It is incorrect because nowhere in the Gerrits decision did this Court even suggest that its decision was based on tort law principles. Instead, the Court looked to the plain and ordinary meaning of the term "accident." Cf. Berkshire Life Ins. Co. v. Adelberg, 698 So.2d 828 (Fla. 1997) (construing undefined policy term according to its ordinary meaning). The argument is irrelevant because it focuses on the language of the Gerrits opinion rather than on the language of the underlying policy. Thus, it does not advance CTC Development's argument that the policies themselves were meaningfully different.

Second, CTC Development argues that the policy provision in this case contains a more specific definition of accident than the Gerrits policy because the policy in this case contains a separate exclusion for property damage "expected or intended from the standpoint of the insured." R 24. CTC Development argues that this exclusion somehow broadens the definition of "accident." CTC Development is incorrect. First, despite its protest to the contrary, CTC Development is attempting to use language in an exclusionary clause to expand the reach of a coverage clause. This

construction is contrary to the well-established rule in Florida that exclusionary clauses cannot be used to expand available coverage. See LaMarche v. Shelby Mut. Ins. Co., 390 So.2d 325, 326 (Fla. 1980). Second, as explained in more detail below, the Gerrits decision is entirely consistent with the more recent cases involving policies with language similar to the policy State Farm issued to CTC Development. Any minor differences in policy language, therefore, are irrelevant.

II. The Gerrits Decision Should Not Be Overruled

CTC Development next argues that the Gerrits case is inconsistent with other decisions from this Court and, therefore, should be overruled. Specifically, CTC Development suggests that the Gerrits Court incorrectly resorted to "tort law principles" to define the scope of coverage. A closer examination of Gerrits and the recent decisions from this Court interpreting so-called "intentional acts" exclusions reveals, however, that Gerrits is remarkably consistent with these recent cases. Accordingly, the Gerrits decision should be reaffirmed, and the District Court decision should be quashed.

A. Recent Decisions From This Court Established The Limits Of Coverage For Intentional Acts

Beginning in 1989, this Court decided four cases that established the boundaries of insurance coverage for intentional acts under intentional acts exclusions. First, in Landis v. Allstate Ins. Co., 546 So.2d 1051 (Fla. 1989), the Court addressed whether an intentional acts exclusion precluded coverage for the intentional sexual molestation of children. The Court held

unanimously that it did. In its ruling, the Court noted that "[t]o state that a child molester intends anything but harm and long-term emotional anguish to the child defies logic." Id. at 1053. The Court added that "specific intent to commit harm is not required by the intentional acts exclusion. Rather, all intentional acts are properly excluded by the express language of the homeowner's policy." Id. Later that year, in State Farm Fire and Casualty Co. v. Marshall, 554 So.2d 504 (Fla. 1989), the Court held that a similar exclusion precluded coverage for self defense because the insured conceded that he intended to harm his assailant. Id. at 505.

In Prudential Property and Casualty Ins. Co. v. Swindal, 622 So.2d 467 (Fla. 1993), this Court clarified its holdings in Landis and Marshall and further explained the proper interpretation of intentional acts exclusions. In Swindal, the insured committed the intentional act of reaching inside an automobile with a loaded gun, but denied any intent to fire the gun. During a struggle, the gun discharged, severely injuring the passenger. The district court held that the policy excluded coverage for any injuries that were the "direct and proximate result" of an intentional act. Id. at 469. This Court reversed. The Court expressly rejected foreseeability of the injuries as the proper basis for excluding coverage. Instead, the Court held that coverage was only excluded for injuries "expected or intended" by the insured, as set forth in the policy. The Court explained Landis by noting that Landis was based on the proposition that "an intent to injure is inherent in the act of sexually abusing a child." Id. at 472.

Most recently, in Prasad v. Allstate Ins. Co., 644 So.2d 992 (Fla. 1994), the Court addressed whether an intentional injury

caused by someone legally insane is excluded under an intentional acts exclusion. The Court held that the injuries were excluded. In its holding, the Court reiterated its prior holding in Landis that "`specific intent to commit harm is not required by the intentional acts exclusion.'" Id. at 993 (quoting Landis, 546 So.2d at 1053) (emphasis in Prasad opinion).

CTC Development correctly notes that these cases unambiguously reject the tort law notion of "foreseeability" as the test for determining the scope of coverage. Instead, these cases were decided based upon the language of the particular exclusions. In other words, by the plain language of the policies in all four cases, coverage is excluded if the injury was either expected or intended by the insured. Thus, the injury in Landis was excluded not because the injury was foreseeable, but because the injury resulting from sexual molestation was so inherent in the act itself that it could reasonably be "expected." The injury in Swindal, on the other hand, would only be expected or intended if the insured discharged the gun intentionally, a question left by the Court for jury resolution.

B. Gerrits Is Completely Consistent With Recent Cases Addressing Intentional Acts Exclusions

CTC Development's primary argument throughout its answer brief is that the Gerrits decision was based upon principles borrowed from tort law and, thus, is out of step with this recent line of decisions from this Court. Again, CTC Development is incorrect.

First, as demonstrated above, the decision itself makes no mention of tort law, but instead discusses the meaning of the word

"accident" from the standpoint of its plain meaning. Second, the definition of accident adopted by the Court in Gerrits is not derived from "common law tort principles." In Gerrits, the Court held that the word "accident" does not include effects which are "the natural and probable consequence" of actions. Gerrits, 65 So.2d at 71 (emphasis added). In contrast, common law tort principles are based upon foreseeability, not probability, a distinction established by the very case cited by CTC Development in its brief. See Spivey v. Battaglia, 258 So.2d 815, 817 (Fla. 1972) (under tort law, defendant becomes liable for "reasonably foreseeable consequences" of his actions) (emphasis added).

Thus, under this Court's decision in Gerrits, coverage is not precluded for all foreseeable consequences of an intentional act. Rather, coverage is precluded for consequences that are both foreseeable (i.e. "natural") and expected (i.e. "probable"). See Webster's New Collegiate Dictionary (1981 ed.) at 399 (defining "expect" as "to consider probable or certain") (emphasis added).

The decision in Gerrits, therefore, is completely consistent with the more recent cases addressing coverage for intentional acts. All stand for the proposition that coverage is not available for injuries that are "intended" or that can be "expected" to result from an intentional act. Thus, the builder in Gerrits was denied coverage because appropriation of the land on which the building was constructed was the "probable" or "expected" result of the intentional decision to locate the building on that site. See West Building Materials, Inc. v. Allstate Ins. Co., 363 So.2d 398 (Fla. 1st DCA 1978) (policy excluded coverage for fire damage caused by smoke bomb because the fire was the "probable" result of setting off smoke bomb, and the ignition of the building was not an

"unexpected" result).

Ironically, the consistency of the Gerrits decision was recognized in the primary case relied upon by CTC Development, Grissom v. Commercial Union Ins. Co., 610 So.2d 1299 (Fla. 1st DCA 1992), rev. denied, 621 So.2d 1065 (Fla. 1993). In Grissom, the District Court distinguished Gerrits by noting that the builder's appropriation of the land "was clearly the natural and probable consequence of the alleged intentional act as a matter of law." Grissom, 610 So.2d at 1308. In contrast, the Grissom court observed that "it cannot be said as a matter of law that Grissom's filling of the swale would necessarily and intentionally flood the church property." Id.

C. The District Court Decision Is Inconsistent With Both Gerrits And More Recent Precedent

The District Court decision in this case should be quashed not only because of the court's refusal to follow Gerrits, but also because the decision is inconsistent with the more recent decisions from this Court. In this case, the underlying complaint alleged repeatedly that CTC Development "knew" of the set back requirements prior to starting construction, but proceeded with construction across the set back lines anyway. R 44 at ¶ 27. In fact, CTC Development acknowledges that the construction of the house across the set back lines was intentional. Respondent's Answer Brief at 3. CTC Development's sole argument is that the record contained no evidence that CTC Development "intended any injury or adverse consequences" from the location of the house. Respondent's Answer Brief at 3-4.

However, neither Gerrits nor the more recent cases require any specific intent to cause injury. See Prasad, 644 So.2d at 993

(intentional acts exclusion does not require specific intent to cause harm); Landis, 546 So.2d at 1053 (same). Instead, it is sufficient if the damage to the neighbors was a "probable" consequence of construction (under Gerrits) or could be "expected" (under Landis). Here, there is no question that the intentional violation of set back provisions could be "expected" to damage the neighbors; indeed, preventing such damage is the very reason for the restrictive covenants in the first place. If anything, the damage here was even more "expected" or "probable" than in Gerrits, because CTC Development, unlike the builder in Gerrits, knew of the problems with the location of the residence before construction began. In short, CTC Development's actions simply were not "accidental."

III. The Remaining Arguments Raised By CTC Development Are Without Merit

A. The Policy Language In This Case Is Unambiguous

CTC Development next argues that the District Court opinion should be approved because it correctly applied the rules of contract interpretation to the underlying policy. Specifically, CTC Development suggests that the term "accident" is ambiguous and that the term, therefore, should be interpreted in favor of coverage. See Woodall v. Travelers Indem. Co., 699 So.2d 1361 (Fla. 1977). This argument should be rejected for at least two reasons.

First, CTC Development cannot demonstrate that the term "accident" is ambiguous in the context of CTC Development's policy. The only Florida case cited by CTC Development for the proposition that the term "accident" is ambiguous is the First District's decision in Grissom, 610 So.2d at 1304. Notably, despite being

called on to interpret the term accident countless times, this Court has apparently never held the term to be ambiguous. See, e.g., Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp., 636 So.2d 700 (Fla. 1993) (rejecting argument that phrase "sudden and accidental" was ambiguous). Further, the absence of a definition of a policy term does not automatically render the term ambiguous. See Container Corp. of America v. Maryland Cas. Co., 23 FLW S163 (Fla. March 26, 1998). As demonstrated above, in the context of this policy, the term "accident" is plain and unambiguous. See Dimmitt Chevrolet, 636 So.2d at 704 ("[t]he term accidental is generally understood to mean unexpected or unintended").

Second, the internal inconsistency of CTC Development's argument is readily apparent and further demonstrates the weakness of its position. On the one hand, CTC Development asserts that the term "accident" in the context of its policy "is ambiguous and subject to varying interpretations." Respondents' Answer Brief at 25. On the other hand, CTC Development earlier asserts that CTC Development's policy contained "specific policy language which adequately defined the scope of coverage." Respondents' Answer Brief at 14. Respondents cannot have it both ways.

B. The Concurring Opinion Below Is Inconsistent With Controlling Precedent

Finally, CTC Development urges the Court to adopt and approve the concurring opinion below by Judge Van Nortwick rather than the majority opinion. While this concession all but confirms the error of the majority opinion below, the result reached by the concurring opinion is also inconsistent with prevailing Florida law. Accordingly, the Court should reject this approach as well.

In his concurring opinion, Judge Van Nortwick attempted to distinguish this case from Gerrits by referring to the differences in the language in the underlying policies. The opinion, however, completely ignores Landis, Marshall, Swindal, and Prasad, much less the similarities between the Gerrits opinion and the holdings in these cases. In particular, the opinion fails to explain how the injuries caused by CTC Development's intentional actions were anything but "expected." Finally, the concurring opinion is based largely upon the assumption that the term "accident" is ambiguous in the context of this policy. As demonstrated above, the term accident is unambiguous as used in this policy. The concurring opinion, therefore, does not accurately state Florida law and should be rejected.

CONCLUSION

This case cannot be meaningfully distinguished from this Court's prior decision in Gerrits. Moreover, Gerrits is consistent with this Court's recent decisions interpreting intentional acts exclusions. This Court, therefore, should reaffirm its holding in Gerrits and quash the District Court decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to **Louis K. Rosenbloum, Esquire**, One Pensacola Plaza, Suite 212, 125 West Romana Street, Pensacola, FL 32501, and to **Stephen H. Echsner, Esquire**, Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A., 316 South Baylen Street, Pensacola, FL 32501 by **U.S. Mail** this _____ day of May, 1998.

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