

IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,652

Florida Bar No: 184170

STATE FARM FIRE AND CASUALTY
COMPANY,

Petitioner,

vs ■

EDWARD L. MARSHALL,

Respondent.

FILED

SID J. WHITE

FEB 10 1989

CLERK, SUPREME COURT

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Deputy Clerk

ON PETITION FOR DISCRETIONARY JURISDICTION
FROM THE FOURTH DISTRICT COURT OF APPEAL

BRIEF OF PETITIONER ON JURISDICTION
STATE FARM FIRE AND CASUALTY COMPANY

(With Appendix)

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STATEMENT OF THE FACTS AND THE CASE

This case arose out of a shooting incident which took place on October 21, 1985; in which the Plaintiff Mark Bailey broke into his mother's house and had a confrontation with his former step father Edward Marshall, which resulted in Mr. Bailey being shot. It was undisputed, that Marshall intended to strike and hit Bailey and that when he swung at Mr. Bailey with an automatic pistol in his hand, the gun discharged and Bailey sustained a serious gun shot wound to the stomach.

Marshall's insurer, State Farm, filed a Declaratory Judgment^{*} action. Based on the undisputed facts that Marshall intended to strike and hit Bailey, State Farm moved for a Summary Judgment under its policy exclusion, asserting that its coverage did not apply to bodily injury or property damage which is "expected or intended by the insured." After the Hearing on the Summary Judgment Motion, where all the relevant caselaw and Mr. Marshall's own testimony was considered by the court; a Summary Judgment was entered in favor of State Farm, finding that the injury suffered by Bailey was excluded from State Farm's coverage, and State Farm had no duty to defend. The Summary Judgment was correct as a matter of law and must be reinstated.

At the Summary Judgment hearing the trial court appeared concerned only with the fact that Marshall was allegedly acting in self-defense, when Bailey was shot and questioned whether the

* State Farm defended Marshall, under a reservation of rights, and at trial the jury found that Marshall committed an intentional assault and battery and was not acting in self-defense when he shot Bailey.

insurance coverage should apply (H 13). State Farm cited to Clemmons v. American States, supra, which held that an insured, acting in self-defense, still acted intentionally and was excluded from bodily injury liability coverage (H 13-14). Marshall argued that he intended to strike and hit Bailey, but he did not intend any damages or harm (H 14). State Farm relying on Hartford Fire Insurance Company v. Spreen, supra, argued that in Spreen the defendant stated that he had intended to strike the plaintiff, but not to damage him and the exclusionary clause still applied to preclude the insurer from having to defend or provide coverage in that case (H 15).

The trial court entered Summary Judgment in favor of State Farm; stating that the determinative legal question, whether State Farm owed Marshall the duty to provide him with a legal defense and indemnification for any judgment entered against him in favor of Bailey, was to be answered in the negative. Marshall appealed and the Fourth District reversed the Summary Judgment; holding that the exclusionary clause in State Farm's policy did not preclude coverage for an act of self defense (A 1-5). The District court acknowledged conflict between its holding and the holding in Clemmons. Marshall, 778; (A 1-5). State Farm petitioned this Court for review, to resolve the certified conflict.

SUMMARY OF ARGUMENT

The Fourth District Court of Appeal has recognized and acknowledged direct and express conflict with its decision in Marshall and the Fifth District Court of Appeal's decision in Clemmons v. American States Insurance Company, 412 So.2d 906

(Fla. 5th DCA, rev. denied 419 So.2d 1196 (Fla. 1982)).

State Farm relies upon Hartford Fire Insurance Company v. Spreen, 343 So.2d 649 (Fla. 3d DCA 1977) and Clemmons v. American States Insurance Company, 412 So.2d 906 (Fla. 5th DCA), petition for rev. denied, 419 So.2d 1196 (Fla. 1982). We agree with the holding in Spreen, however we find the facts of Spreen distinguishable from this case. We disagree and acknowledge conflict with the holding in Clemmons as it applies to an insured who causes injury during an act of self-defense. (Emphasis added)

Marshall v. State Farm Fire & Casualty Company, 534 So.2d 776, 778 (Fla. 4th DCA 1988); (A 1-5).

It is submitted that this decision by the Fourth District is theoretically logical, but its practical effect in the real world would be far different, and that is why the courts have long rejected this as the law. In practical effect a person performing an assault can create a defense by the insurance carrier by claiming he did the assault in self defense. Therefore in practical effect every person performing an intentional assault will be awarded a defense by his insurance company, simply because he will claim it was self defense. This certainly defeats the long policy of the law against coverage for intentional acts, and is the reason the courts of Florida have long rejected it as the law of Florida.

In addition the holding in Marshall is also in direct and express conflict with the holding in Hartford Fire Insurance Company v. Spreen, 343 So.2d 649 (Fla. 3d DCA 1977), which like Clemmons, holds that if the insured acts intentionally and the plaintiff is harmed as a result, there is no insurance coverage for the intentional act.

ARGUMENT

THE DECISION IN THIS CASE ACKNOWLEDGES THAT ITS HOLDING IS IN EXPRESS AND DIRECT CONFLICT WITH CLEMMONS v. AMERICAN STATES; IN ADDITION THE HOLDING IS IN DIRECT AND EXPRESS CONFLICT WITH HARTFORD v. SPREEN, WHICH CASES HOLD THAT INTENTIONAL ACT, EVEN IN SELF-DEFENSE, IS EXCLUDED FROM INSURANCE COVERAGE.

This decision would vastly change the law of Florida so that assaulters could create a defense by claiming the act was done in self defense, as was pointed out in the Summary of Argument section.

It is important to remember in this case that the coverage question was decided on Summary Judgment, where sufficient evidence was presented that the insured did not act in self defense. This evidence was later substantiated by the jury's Verdict finding that the insured committed an intentional assault and battery, which resulted in the shooting of Mark Bailey. However, the Fourth District held that while it was undisputed that the insured Marshall acted intentionally, because he alleged that he was defending himself, he was not precluded from insurance coverage under the policy provision which excludes coverage for "bodily injury either expected or intended from the standpoint of the insured". The District Court recognized that its holding is in direct and express conflict with that in Clemmons; which upheld the exclusionary provision finding no coverage for an intentional act, whether or not committed in self defense. It is respectfully submitted that this Court has jurisdiction to resolve the conflict and under well established rules for construction of insurance contracts, the plain and

unambiguous language of the State Farm policy should be upheld to exclude coverage for the insured's intentional act. See, Rigel v. National Casualty Company, 76 So.2d 285 (Fla. 1954); Excelseior Insurance Company v. Pimona Park Bar and Package Store, 69 So.2d 938 (Fla. 1979).

The trial court requested case law that upheld the exclusionary clause in an insurance policy, when the insured acted in self-defense and State Farm presented the definitive case on this issue; Clemmons v. American States, supra.

The defendant in Clemmons was accosted by some strangers at a shooting range. The defendant shot the plaintiff, as he was entering the defendant's car to reload a shotgun, that he had taken from the defendant. The plaintiff's estate filed a lawsuit against the defendant and his insurer pled as an affirmative defense that the policy excluded coverage as to "bodily injury either expected or intended from the standpoint of the insured". The defendant testified that he believed that the shotgun held by the plaintiff was loaded and that when he shot the plaintiff, he intended not to kill him but to merely prevent the plaintiff from shooting him with the shotgun. The trial court entered a verdict for the insurer, American States, holding that under the facts, as a matter of law, the plaintiff's death was caused by an intentional act within the meaning of the policy exclusion. The Fifth District affirmed the trial court's decision, stating that injuries inflicted by an insured acting in necessary self-defense, were "intentional" injuries within the meaning of the provisions of the liability policy, which excluded coverage for bodily injuries

"intended from the standpoint of the insured". Clemmons, 910.

The appellate court noted that in deciding the issue it was not really controverted that the defendant was acting in necessary self-defense and therefore the court assumed that he was acting in self-defense. Therefore the remaining coverage question was one strictly of law. Similarly in the present case assuming all the facts in the light most favorable to the non-moving party, Mr. Marshall, he acted in self-defense when he swung at Mr. Bailey with the intent to strike or hit him, with the gun in his hand. As a direct result of Marshall's attempt to strike the Plaintiff, the gun discharged and the Plaintiff was shot. It is irrelevant that Marshall did not intend to shoot Bailey, since it was clear that he had the intent to strike and harm him, even though he did not foresee the extent or type of injuries suffered by Bailey. Spreen, supra.

The Fifth District in Clemmons, found no coverage in the self-defense situation relying upon Colonial Life and Accident Insurance Company v. Cooper, 378 So.2d 806 (Fla. 3d DCA 1979) (where the court stated that when an insured intends to cause an injury, the result of his action does not constitute an accident, even if the damage is more severe than he wished to anticipate); and Hartford v. Spreen, supra, (where the insured struck the victim not intending the eye injury suffered by the plaintiff). The Fifth District noted that coverage has never been found under the exclusionary clause, where the insured's act was deliberately designed to cause harm to the injured party. Clemmons, 909.

In addition the court relied upon Etcher v. Blicht, 381 So.2d 1119 (Fla. 1st DCA 1979); where after an altercation between two drivers, Etcher, on foot, attacked Blicht's vehicle with Blicht in it. Blicht pointed a revolver at Etcher intending, he said, to frighten Etcher by shooting at the window glass. Nevertheless the court held that Blicht's act in shooting Etcher was "in law intentional, not negligent." Therefore even if Marshall only intended to pistol-whip Bailey, as opposed to actually shooting him, the end result is the same in that Marshall undisputedly intended to hit and harm Bailey.

The Clemmons court then goes on to compare Draffen v. Allstate Ins. Co., 407 So.2d 1063 (Fla. 2d DCA 1981)(where, to avoid apprehension, the defendant directed deadly force towards the plaintiff) with the actions of the defendant in Clemmons, where the insured innocently acting in good faith reluctantly directed deadly force toward the aggressor, only in necessary and justified self-defense. The court noted that these are the extremes of the legal comparisons but that the cases are analogous. In both cases the insured acted for a specific ultimate purpose or motive: Draffen to avoid being caught, Leeper, the defendant in Clemmons, to avoid harm to himself. Each defendant found himself in a dilemma and had to make a choice between inflicting injury on another or not achieving his ultimate desire. Each made a decision and decided to inflict injury rather than suffer the alternative presented. Without regard to the difference between the two defendants, morally and under criminal law concepts, when each intentionally caused

bodily injuries to another, each acted within their insurance policy exclusions, notwithstanding the ultimate purpose of each: Draffen to avoid being caught, Leeper to avoid harm to himself. Notwithstanding the different objectives of each of the defendants, each acted with the intent to harm the plaintiff. Therefore the actions fell within the exclusionary clause of the policy and no coverage was available. Clemmons, 909-910.

Directly on point is Hartford v. Spreen, supra, a case handled by undersigned counsel. As Bailey did below, the plaintiff filed an action for both assault and battery, and negligence. The insured's policy with Hartford excluded coverage for "bodily injury and property damages which is either expected or intended from the stand point of the insured". Spreen, 650. The Third District stated that 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". Spreen, 651, citing, Grange Mutual Casualty Co. v. Thomas, 301 So.2d 158, 159 (Fla. 2d DCA 1974).

Spreen was at a party when somebody made a nasty remark about his wife. Spreen walked six to nine paces to where the plaintiff King was standing, and took a swing with his right fist at King. Spreen struck King in the area of his left eye, causing a blow out fracture of the orbital floor of the eye. By deposition and affidavit Spreen stated that he intended to strike King in the face, but not to damage King's face or eye. He further stated that he was reacting to what he regarded to be a

crude and vulgar remark about his wife. All parties moved for summary judgments and the trial court entered a summary judgment against Hartford on the coverage issue.

The appellate court reversed, as no case had ever found coverage under such an exclusion, when the insured's act was deliberately designed to cause harm to the injured party; and assault and battery could not be considered to be an "accident" covered under the Hartford policy. Spreen, 651.

Spreen asserted that while he intended to hit King he did so on the spur of the moment and did not foresee the extent of King's injury and therefore did not intend them. The court found foreseeability irrelevant to the coverage question, as the sole issue was whether Spreen intended to inflict any harm on King. The court held that Spreen clearly intended to do so and the fact that he did not foresee or intend the extent of the harm inflicted did not convert the admitted assault and battery into an "accident".

The decision in Spreen is directly on point and it is clear that not only is there no coverage under State Farm's policy in the present case, but that the actions of Marshall, which amounted to an assault and battery, cannot be construed as anything other than intentional and therefore cannot be negligent, and there is no duty to defend.


In the present case Marshall testified that he placed the gun flat in his hand and swung at Bailey. He testified that he tried to strike or hit Bailey with the gun. He testified that he was trying to strike some part of Bailey's body. Florida law has

clearly held that where the insured acts intentionally, and the act amounts to assault and battery, this cannot be construed as negligence, and Summary Judgment was properly entered in favor of State Farm.

CONCLUSION

The Fourth District has recognized that its holding in Marshall is in direct and express conflict with the holding in Clemmons, it is also in conflict with the holding in Spreen and it is respectfully submitted that this Court has jurisdiction to resolve the conflict between these decisions.

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