CASE NOTES

INSURANCE—AN INSURER HAS NO DUTY TO DEFEND ITS INSURED IN AN ASSAULT AND BATTERY ACTION IRRESPECTIVE OF THE INSURED'S CLAIM OF SELF-DEFENSE WHEN FACTS AT THE OUTSET OF THE CASE ESTABLISH THAT THE INSURED ACTED INTENTIONALLY WITHIN THE MEANING OF AN EXCLUSION FOR INTENTIONAL INJURY IN HIS PERSONAL LIABILITY POLICY.—*McAndrews v. Farm Bureau Mutual Insurance Co.* (Iowa 1984).

Paul McAndrews was insured by Farm Bureau Mutual Insurance Company (Farm Bureau Mutual) under a comprehensive farm liability policy.[1] Following the commencement of an assault and battery action brought against him by a third party, McAndrews tendered his defense to Farm Bureau Mutual.[2] The company refused to defend, however, citing an exclusion

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1. McAndrews v. Farm Bureau Mut. Ins. Co., 349 N.W.2d 117, 118 (Iowa 1984).

2. *Id.* The following conditions for personal liability protection are stated in McAndrews' policy:

> This Company agrees to pay on behalf of the insured 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*. This Company shall have the right and duty, at its own expense, 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, but may make such investigations and settlement of any claim as it deems expedient.

Farm Bureau Insurance Country Squire IV Policy, "COVERAGE L—PERSONAL LIABILITY" at 34 (emphasis added). The policy defines "occurance" as "*an accident*, including injurious exposure to conditions, *which results*, during the policy term, *in bodily injury* or property damage." *Id.*, "DEFINITIONS OF WORDS AND TERMS USED IN THIS POLICY" at 49 (emphasis added).

The underlying complaint was filed after an incident at a county fair during which Paul McAndrews challenged William Clemens about the eligibility of a steer entered by Clemens' daughter in a 4-H competition. "Paul McAndrews Statement," Appendix-Exhibits of Appellant at 10, McAndrews v. Farm Bureau Mut. Ins. Co., 349 N.W.2d 117 (Iowa 1984). Clemens denied that either he or his daughter had changed the steer's ear tag, which would have resulted in a violation of competition rules. *Id.* While en route to inspect another of Clemens' steers, Clemens turned to McAndrews and said "You're a big mouth," to which McAndrews replied "Yeah; you're an ass." Statement and Memorandum of Plaintiff in Support of His Resistance to Defendant's Motion for Summary Judgment, McAndrews v. Farm Bureau Mut. Ins. Co., 349 N.W.2d 117 (Iowa 1984). Clemens then swung his fist at McAndrews, but his swing was "wild". Paul McAndrews Statement, Appendix-Exhibits of Appellant at 10, McAndrews v. Farm Bureau Mut. Ins. Co., 349 N.W.2d 117 (Iowa 1984). McAndrews swung back at Clemens and made contact with his face. *Id.*

Following the altercation, Clemens claimed compensatory and punitive damages of $50,000

in the policy for any "bodily injury or property damage which is either expected or intended from the standpoint of the insured."[3] Consequently, McAndrews secured private counsel through whom he conducted his defense.[4]

Upon entry of a jury verdict and judgment against him despite his claim of self-defense, McAndrews petitioned Farm Bureau Mutual, seeking the cost of his defense in the prior action and indemnification for the judgment.[5] The district court ruled that McAndrews was entitled to his defense costs because an adequate "potential for coverage" existed under the policy despite the intentional injury exclusion.[6] The Iowa Court of Appeals affirmed, concluding that there was a "possibility" the exclusion for intentional injury would not apply; thus Farm Bureau Mutual was obligated to provide McAndrews' defense.[7] The Iowa Supreme Court *held*, reversed.[8] An insurer has no duty to defend its insured in an assault and battery action irrespective of the insured's claim of self-defense when facts at the outset of the case establish that the insured acted intentionally within the meaning of an exclusion for intentional injury in his personal liability policy. *McAn-*

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for "pain and suffering" from "injuries. . .of a permanent nature." Petition, Clemens v. McAndrews, Law No. 41288 (D. Dubuque Co. filed Nov. 17, 1977). Clemens allegedly sustained wounds to his left eye and left cheek, bruises about his head and face, a fractured nose and damaged teeth and sinus. *Id.* McAndrews was not injured. *Id.*

3. McAndrews v. Farm Bureau Mut. Ins. Co., 349 N.W.2d at 118 (quoting Farm Bureau Insurance Country Squire IV Policy, "Part III—Exclusions," at 40).

4. McAndrews v. Farm Bureau Mut. Ins. Co., 349 N.W.2d at 118.

5. *Id.* at 118-19. The jury awarded Clemens $2,000 in compensatory damages. Appendix-Exhibits of Appellant at 5, McAndrews v. Farm Bureau Mut. Ins. Co., 349 N.W.2d 117 (Iowa 1984). In light of both McAndrews' subsequent judgment indemnity claim withdrawal and of the parties' stipulation regarding the defense costs he incurred, the Polk County District Court held that no further issues were to be tried in the case; hence, Farm Bureau Mutual's motion for summary judgment was granted on September 2, 1982. Appendix of Appellant at 14-15, McAndrews v. Farm Bureau Mut. Ins. Co., 349 N.W.2d 117 (Iowa 1984). In its ruling, the trial court stated that the "blow or blows [McAndrews] struck were either expected or intended to land on the other person, and thus squarely within the [intentional acts] exclusion." Ruling, McAndrews v. Farm Bureau Mut. Ins. Co., No. 45-26598 (D. Polk Co. filed Sept. 2, 1982). The trial court, however, reversed its decision two weeks later. Ruling, McAndrews v. Farm Bureau Mut. Ins. Co., No. 45-26598 (D. Polk Co. filed Sept. 16, 1982). Upon reconsideration, the court held that the current case presented a fact issue, given "substantially identical facts" in cases from sister jurisdictions introduced by McAndrews in his motion to reconsider. *Id.*

6. McAndrews v. Farm Bureau Mut. Ins. Co., 349 N.W.2d at 118. According to one authority, an insurer has no duty to defend if a policy unambiguously excludes coverage, even on occasions when the insurer is held liable to indemnify as a consequence of subsequent litigation. 7C J. APPLEMAN, INSURANCE LAW AND PRACTICE §4684.01 at 98-99 (Berdal ed. 1979). The duty to defend arises, however, if a claim potentially falls within policy coverage. *Id.* at 99.

7. McAndrews v. Farm Bureau Mut. Ins. Co., No. 83-121, slip op. at 2 (Iowa Ct. App. 1983). The Iowa Court of Appeals noted that it was "quite possible" that a jury could have found the injuries to the plaintiff in the previous assault and battery case to be unintended. *Id.* The finders of fact might have reasoned that self-defense is a reflex movement and not intentional or that even though the act of striking was intentional, the resulting injury was not. *Id.*

8. McAndrews v. Farm Bureau Mut. Ins. Co., 349 N.W.2d at 118.

drews v. Farm Bureau Mutual Insurance Co., 349 N.W.2d 117 (Iowa 1984).

The *McAndrews* decision is particularly notable in that the Iowa Supreme Court treated the case as one of first impression[9] in concluding that Farm Bureau Mutual was not obligated to defend McAndrews in the underlying action.[10] The court in *McAndrews* did not indicate why it found in favor of Farm Bureau Mutual without expressly confronting Farm Bureau Mutual's principal contention, *viz*, that the rule set forth by the Iowa court in *Chipokas v. Travelers Indemnity Co.*,[11] was controlling in the instant case.[12]

In *Chipokas*, the Iowa Supreme Court noted that the "precise question" of whether or not a liability insurer's duty to defend was limited by an exclusion provision in a liability policy had apparently not been addressed by the court.[13] The Iowa court had previously held that an insurer is absolved of its contractual duty to defend its insured "if after construing both the policy in question, the pleadings of the injured party and any other admissible and relevant facts in the record," a claim is found to be outside of liability coverage.[14] Accordingly, the court in *Chipokas* found that since an exclusion in the policy at issue for any "dishonest, fraudulent, criminal or malicious act or omission"[15] on the part of the insured absolved the insurer of any liability to pay, the insurer could not be required to defend suits based upon dishonest or fraudulent acts of the insured.[16]

On appeal to the Iowa Supreme Court, Farm Bureau Mutual maintained that "facts at the outset of the case"[17] indicated that irrespective of

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9. Since this is a case of first impression, the holdings of other jurisdictions considering the issue are persuasive authority. *See* Stuart v. State ex rel. Jannings, 253 N.W.2d 910, 913 (Iowa 1977) (Iowa court looks to relevant holdings in other jurisdictions absent prior pertinent holdings by the court). Accordingly, the *McAndrews* majority turned to the Arizona, Indiana and Washington Courts of Appeals for authority. *See* McAndrews v. Farm Bureau Mut. Ins. Co., 349 N.W.2d at 120.

10. McAndrews v. Farm Bureau Mut. Ins. Co., 349 N.W.2d at 120.

11. 267 N.W.2d 393 (Iowa 1978).

12. McAndrews v. Farm Bureau Mut. Ins. Co., 349 N.W.2d at 119-20.

13. Chipokas v. Travelers Indem. Co., 267 N.W.2d at 395.

14. Central Bearings Co. v. Wolverine Ins. Co., 179 N.W.2d 443, 445 (Iowa 1970). *See also* State Farm Auto. Ins. Co. v. Malcolm, 259 N.W.2d 833, 835 (Iowa 1977); Stover v. State Farm Ins. Co., 189 N.W.2d 588, 592 (Iowa 1971).

15. Chipokas v. Travelers Indem. Co., 267 N.W.2d at 396.

16. *Id.* In *Chipokas*, an attorney brought an action against his insurer to recover costs incurred in defending a suit filed against him by the heirs at law of a testator for whom the attorney had drafted a will. *Id.* at 394. The plaintiffs in what was termed the "probate action" alleged that the attorney had fraudulently conspired to forge the testator's signature on the will to obtain an inheritance. *Id.*

17. McAndrews v. Farm Bureau Mut. Ins. Co., 349 N.W.2d at 119 (quoting 7C J. APPLEMAN, INSURANCE LAW AND PRACTICE §4684 at 83 (Berdel ed. 1979)). The fact that McAndrews subsequently dropped his indemnity claim is irrelevant to the determination of whether it initially appeared that Farm Bureau Mutual was liable to provide coverage to McAndrews. *See* Grenga v. National Sur. Corp., 113 R.I. 45, _, 317 A.2d 433, 435-36 (1974) ("whether the in-

the outcome of the underlying assault and battery action, it would not be obligated to indemnify McAndrews.[18] If McAndrews had prevailed in his self-defense claim, he would have had no indemnity claim against Farm Bureau Mutual because no loss would have been payable to the third party.[19] Conversely, if the jury would have found McAndrews guilty of the intentional tort of assault and battery, the intentional injury exclusion would unquestionably exclude him from coverage.[20] Therefore, since McAndrews' claim was "wholly outside liability coverage,"[21] Farm Bureau Mutual argued that under *Chipokas* it would have no duty to defend.[22]

Instead of directly addressing the more limited question posed by Farm Bureau Mutual, the *McAndrews* court chose to discuss the "fighting issue" of whether or not the intentional injury exclusion in McAndrews' policy applied in an assault and battery action when the insured claimed to have acted in self-defense.[23] Since the Iowa court had apparently never faced this issue,[24] and since decisions from other jurisdictions which had considered the question were not in harmony,[25] the *McAndrews* court was committed to

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sured can or cannot avoid liability on the grounds of self-defense is of no concern to the insurer"). *But see* Farmers Ins. Exch. v. Sipple, 255 N.W.2d 373, 377 (Minn. 1977) (issue of intent is question of fact properly submitted to the jury).

18. Brief of Appellant at 4-10, McAndrews v. Farm Bureau Mut. Ins. Co., 349 N.W.2d 117 (Iowa 1984).

19. *See id.* Farm Bureau Mutual argued that since the company could not be held liable for the "subject claim" it could in no way be required to defend McAndrews. *Id.*

20. *Id.*

21. Chipokas v. Travelers Indem. Co., 267 N.W.2d at 395.

22. *See* Brief of Appellant at 4-10, McAndrews v. Farm Bureau Mut. Ins. Co., 349 N.W.2d 117 (Iowa 1984).

23. McAndrews v. Farm Bureau Mut. Ins. Co., 349 N.W.2d at 118.

24. *See supra* note 9.

25. Three overall views have been propounded by the courts:

(1) The minority view follows the classic tort doctrine of looking to the natural and probable consequences of the insured's act;

(2) The majority view is that the insured must have intended the act *and* to cause some kind of bodily injury;

(3) A third view is that the insured must have had the intent to cause the specific type of injury suffered.

Pachucki v. Republic Ins. Co., 89 Wis.2d 703, _, 278 N.W.2d 898, 901 (1979) (citing Home Ins. Co. v. Neilsen, 165 Ind. App. 445, _, 332 N.E.2d 240, 242 (1975). According to the court in *Home Ins. Co. v. Neilsen*, the third definition of "intentional" has been uniformly rejected by the courts. *See* Home Ins. Co. v. Neilsen, 165 Ind. App. at _, 332 N.E.2d at 242 (citing Hartford A & I Co. v. Drekeler, 363 F. Supp. 354 (E.D. Mo. 1973); Pendergraft v. Commercial Std. F. & M. Co., 342 F.2d 427 (10th Cir. 1965); Pearlmen v. Mass. B & I Co., 126 Ind. App. 294, 130 N.E.2d 54 (1955); People's Life Ins. Co. v. Menard, 124 Ind. App. 606, 117 N.E.2d 376 (1959)). *But see* Farm & City Ins. Co. v. Potter, 330 N.W.2d 263, 267 (Iowa 1983) (court held collisions to be accidents because insured's only intent was to injure herself and to do damage to her own automobile and not to damage the property of others).

Several jurisdictions follow what the *Pachucki* court denoted as the "minority view". Under this line of reasoning, injury is intentional if it is the foreseeable consequence of the insured's act. *See, e.g.*, Group Ins. Co. v. Morelli, 111 Mich. App. 510, 314 N.W.2d 672 (1982);

the task of determining which line of authority would become the law of the state.[26]

Upon its review of the record, the Iowa Supreme Court was urged by McAndrews to adopt the rationales of sister jurisdictions which recognized "the potential for coverage in self-defense situations."[27] In *Farmer's Insurance Exchange v. Sipple*,[28] the Minnesota Supreme Court ruled that the trial court had properly submitted to the jury the question of the insured's intent to injure the plaintiff.[29] The court said that "if [the insured's] testimony is to be believed, there is doubt he had any time to form an intent, but rather acted instinctively in the form of a reflex."[30] In addition, McAndrews cited the Nebraska Supreme Court case of *Allstate Insurance Co. v. Novak*[31] for the proposition that if an insured commits an act in self-defense which results in an injury to a third party, the act is not expected or intended within the meaning of an insurance policy exempting from coverage injuries which are either expected or intended from the insured's standpoint.[32] The Nebraska court reasoned that an insured might intend to strike

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National Investors Life & Casualty Ins. Co. v. Arrowood, 606 S.W.2d 97 (Ark. Ct. App. 1980); Hines v. Heer, 259 N.W.2d 38 (N.D. 1977); Vittum v. New Hampshire Ins. Co., 117 N.H. 1, _, 369 A.2d 184, 187 (1977); Rankin v. Farmers Elevator Mut. Ins. Co., 393 F.2d 718 (10th Cir. 1968).

Most courts, including the Indiana Supreme Court, have apparently adopted *Pachucki* rule number one:

> Indiana follows the general rule that for purposes of liability in an action for assault and battery, a person will be presumed, as a matter of law, to have intended the natural and probable consequences of his wrongful act. (Citations omitted). It is thus urged that since this is the liability standard for the intentional tort, it should be the contractual standard which invokes the exclusion. Yet the contract of the parties does not expressly exclude damages from an assault and battery.

Instead it speaks of damages *caused intentionally*. Home Ins. Co. v. Neilsen, 165 Ind. App. at _, 332 N.W.2d at 243 (emphasis added). Accordingly, the majority of jurisdictions have held that the tort standard is irrelevant to the issue of contractual construction. *See, e.g.*, Stein v. Massachusetts Bay Ins. Co., 172 Ga. App. 811, 324 S.E.2d 510 (1984); Transamerica Gp. v. Meere, 694 P.2d 181 (Ariz. 1984); Hanover Ins. Co. v. Newcomer, 585 S.W.2d 285 (Mo. Ct. App. 1979); Jones v. Norval, 203 Neb. 549, 279 N.W.2d 388 (1979).

26. *See* Dawson v. Sisk, 231 Iowa 1291, 1299-1300, 4 N.W.2d 272, 276-77 (1942) (court weighs relative merits of each line of cases and adopts what it perceives to be most persuasive).

27. Brief for Appellee at 7-8, McAndrews v. Farm Bureau Mut. Ins. Co., 349 N.W.2d 117 (Iowa 1984). These jurisdictions were followed by the trial court. Ruling McAndrews v. Farm Bureau Mut. Ins. Co., No. 45-26598 (D. Polk Co. filed Sept. 16, 1982).

28. 255 N.W.2d 373 (Minn. 1977). In *Sipple*, the insured state highway employee struck a farmer with his fist following an argument concerning potential drainage problems created by the roadbed of an uncompleted highway. *Id.* at 374.

29. *Id.* at 377.

30. *Id.*

31. 210 Neb. 184, 313 N.W.2d 636 (1981). In *Novak*, an altercation erupted between the insured and a man working next door after the insured's wife had complained that the man had urinated in their yard. 210 Neb. at _, 313 N.W.2d at 637. The insured claimed that the man "began to hurl obscene epithets" at him and to suddenly move toward him. *Id.*

32. 210 Neb. at _, 313 N.W.2d at 641.

someone, but unless he intended harm, he "engaged only in nonintentional tortious conduct."[33] Additionally, the court held that an act might not be intended or expected within the terms of an insurance policy exclusion even if the policyholder "exceeded the reasonable bounds of self-defense."[34]

Unpersuaded by these decisions, the *McAndrews* court adopted the approaches taken by the Washington and Indiana Courts of Appeals in *Briscoe v. Travelers Indemnity Company*[35] and *Home Insurance Company v. Neilsen*,[36] respectively.[37] The Iowa court quoted a segment from each of these cases and held that McAndrews' act of striking Clemens was intentional, irrespective of his possible justification of protecting himself from harm.[38]

The excerpt from *Briscoe* upon which the *McAndrews* court relied is brief, but it provides the simple foundation for the court's apparent conclusion that when one person strikes another, intent to injure is self-evident and inescapable; hence McAndrews' act was excluded from coverage by his policy's intentional injury exclusion.[39] According to the Washington court in *Briscoe*, it "belies reason" to say that the insured, who intended the forceful clenching of his fist and the movement of his arm, did not intend to injure the third party.[40] After all, "[W]hy else the contact between fist and nose?"

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33. *Id.* at _, 313 N.W.2d at 640.

34. *Id.*

35. 18 Wash. App. 662, 571 P.2d 226 (1977). The Washington court held that an "intentional act" exclusion applied, relieving the insurer of a production line worker from the duty to defend following a fight when the insured attempted to cross a picket line. *Id.* at _, 571 P.2d at 229.

36. 165 Ind. App. 445, 332 N.E.2d 240 (1975). The court here construed self-defense as falling within the intentional act policy exclusion after a declaratory action was brought by a homeowner's insurer for a determination on whether it was obligated to defend the insured farmer who struck his neighbor. *Id.* at _, 332 N.E.2d at 242.

37. McAndrews v. Farm Bureau Mut. Ins. Co., 349 N.W.2d at 120.

38. *Id.* (quoting Briscoe v. Travelers Indem. Co., 18 Wash. App. at 667, 571 P.2d at 229). The *McAndrews* court also cited with approval *Lockhart v. Allstate Ins. Co.*, 119 Ariz. 150, 579 P.2d 1120 (Ariz. Ct. App. 1978) and *Heshelman v. Nationwide Mut. Fire Ins. Co.*, _ Ind. App. _, 412 N.E.2d 301 (1980). Both cases cited *Neilsen* in holding that the potential justification of self-defense does not exempt an otherwise intentional act from a policy's intentional injury exclusion. Lockhart v. Allstate Ins. Co., 119 Ariz. at _, 579 P.2d at 1122; Heshelman v. Nationwide Mut. Fire Ins. Co. 412 N.E.2d at 302. "A defendant may assert that a rock was accidentally released or was not aimed at the victim, but he will not be heard to say he intended to throw the rock softly." *Id.*

39. Briscoe v. Travelers Indem. Co., 18 Wash. App. at _, 571 P.2d at 229. The *Briscoe* court noted that although "accident" and "accidental means" in insurance policies had been interpreted in different ways, "the definitions [all] include the idea that the means as well as the result must be unforeseen, involuntary, unexpected, and unusual; that it must be a happening by chance." Briscoe v. Travelers Indem. Co., 18 Wash. App. at _, 571 P.2d at 228. *See supra* note 2. If the *McAndrews* court had held that McAndrews' act was "an accident. . .which result[ed]. . .in bodily injury," then the company would have been obligated to pay McAndrews by virtue of the policy's conditions for personal liability protection. Briscoe v. Travelers Indem. Co., 18 Wash. App. at _, 571, P.2d at 228.

40. Briscoe v. Travelers Indem. Co., 18 Wash. App. at 667, 571 P.2d at 229 (quoting Hart-

the court questioned.[41]

The holding of the Indiana court in *Home Insurance Company v. Neilsen*[42] was also supportive of the majority's ruling in *McAndrews*.[43] In accordance with the *Briscoe* court's rationale, the court in *Neilsen* rejected the contention that the insured intended self-defense rather than injury and inferred that intent to harm necessarily follows the deliberate blow to another person's face.[44]

Since the *McAndrews* court had presumably never been presented with the issue it chose to address, the court might have deemed suitable a more comprehensive explanation for its position.[45] The court's seemingly cursory approach to the issue, however, might have been with good cause.

The lone dissenter, Justice McCormick, based his argument almost exclusively on the well established principle that when an insurance policy can be construed in two ways, it will be construed strictly against the insurer and in a light most favorable to the insured.[46] Hence, it would appear that the basis for the majority's lack of a thorough explanation of inherent ambiguities in the phrase "intentional injury" was that the more the court strained to explain itself, the closer it came to recognizing Justice McCormick's and McAndrews' primary contention that ambiguities did indeed exist.[47]

It seems somewhat surprising that the majority did not follow Farm Bureau Mutual's argument, since by so doing the court could have circumvented the problem of dealing with the somewhat cryptic "intentional injury" exclusion. The majority, however, may have recognized at least one potential flaw in Farm Bureau Mutual's argument that *Chipokas* was controlling in the current case.[48] According to the California Supreme Court in

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ford Accident & Indem. Co., 363 F. Supp. 354, 357-58 (E.D. Mo. 1973)).

41. *Id. See also* McAndrews v. Farm Bureau Mut. Ins. Co., 349 N.W.2d at 120.

42. *See supra* note 35 and accompanying text.

43. *See* McAndrews v. Farm Bureau Mut. Ins. Co., 349 N.W.2d at 120 (quoting Home Ins. Co. v. Neilsen, 165 Ind. App. at 451-52, 332 N.E.2d at 244).

44. Home Ins. Co. v. Neilsen, 165 Ind. App. at 451-52, 332 N.E.2d at 244.

45. *See, e.g., id.* at _, 332 N.E.2d at 242-45; Pachucki v. Republic Ins. Co., 89 Wis. 2d 703, _, 278 N.W.2d 898, 900-04 (1979).

46. *See* McAndrews v. Farm Bureau Mut. Ins. Co., 349 N.W.2d at 121 (McCormick, J., dissenting) (citing State Farm Auto. Ins. Co. v. Malcolm, 259 N.W.2d 833, 836 (Iowa 1977). *See also* Connie's Constr. v. Fireman's Fund Ins., 227 N.W.2d 207, 210 (Iowa 1975); Benzer v. Iowa Mut. Tornado Ins. Ass'n, 216 N.W.2d 385, 388 (Iowa 1974). This argument was also McAndrews' primary contention. *See* Brief of Appellee, McAndrews v. Farm Bureau Mut. Ins. Co., 349 N.W.2d 117 (Iowa 1984).

47. The Indiana court in *Neilson* recognized that the applicable intentional injury exclusion is "arguably ambiguous" and under Indiana's established law the court was obliged to accept that reasonable interpretation which most favors the insured. Home Ins. Co. v. Neilsen, 165 Ind. App. at _, 332 N.E.2d at 244. The court seemed to espouse the view that even though the insured is granted the benefit of the doubt, there is no doubt that intent is inferred as a matter of law from the act of striking someone. *See id.*

48. Brief of Appellant at 4-10, McAndrews v. Farm Bureau Mut. Ins. Co., 349 N.W.2d 117

the case of *Gray v. Zurich Insurance Company*:[49]

> [the insured] might have been able to show that in physically defending himself, even if he exceeded the reasonable bounds of self-defense, he did not commit willful and intended injury, but engaged only in nonintentional tortious conduct. Thus, even accepting the insurer's premise that it had no obligation to defend actions seeking damages not within the indemnification coverage. . .upon proper measurement of the third party action against the insurer's liability to indemnify, it should have defended because the loss *could have fallen within that liability*.[50]

This tort of "excessive force" seems to be viewed as "nonintentional tortious conduct" under the rationale that minimal blame should be placed upon a person who overreacts in a self-defense situation.[51] Thus, it might be argued that there is potential for coverage under McAndrews' policy since the possibility *always* exists that initial relevant facts surrounding the assault and battery action could indicate that McAndrews' acts were negligent conduct covered by his liability policy.[52] Therefore, it would appear that since McAndrews' acts are potentially covered by his policy, Farm Bureau Mutual would not be relieved of the duty to defend him.

An analogous dilemma could have arisen if the *McAndrews* court had adopted Justice McCormick's reasoning.[53] Admissible facts at the outset of the earlier case giving rise to the question of duty to defend will always establish the insurer's possible duty to indemnify since there is inevitably the possibility that the insured will plead self-defense.[54] Moreover, even if it can be argued that ridiculous allegations of self-defense do not constitute facts indicating nonintentional conduct, Justice McCormick's approach is

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(Iowa 1974).

49. 65 Cal. 2d 263, 419 P.2d 168, 54 Cal. Rptr. 104 (1966).

50. Gray v. Zurich Ins. Co., 65 Cal. 2d at _, 419 P.2d at 177, 54 Cal Rptr. at 113 (emphasis added).

51. *See* Transamerica Ins. Group v. Meere, 143 Ariz. 351, _, 694 P.2d 181, 187 (1984) (citing PROSSER, HANDBOOK ON THE LAW OF TORTS, § 19 (4th ed. 1971)).

52. If the plaintiff in the underlying action had pleaded only that the insured engaged in intentional conduct, the possibility always exists that the plaintiff could amend his complaint to allege negligent conduct. *See* Gray v. Zurich Ins. Co., 65 Cal. 2d at _, 419 P.2d at 177, 54 Cal. Rptr. at 113; *see also* Transamerica Ins. Group v. Meere, 143 Ariz. at _, 694 P.2d at 189-90. Hence, Farm Bureau's duty to defend would arise because of the initial *possibility*, however remote, that Farm Bureau Mutual would have to indemnify McAndrews for his nonintentional conduct. Indeed, the McAndrews majority noted that "[an insurer] would not even clearly be prohibited from indemnifying for damages caused where the insured actually, but unreasonably, believed the defense was necessary." McAndrews v. Farm Bureau Mut. Ins. Co., 349 N.W.2d at 120 (quoting Home Ins. Co. v. Neilsen, 165 Ind. App. at 451-52, 332 N.E.2d at 244).

53. *See* McAndrews v. Farm Bureau Mut. Ins. Co., 349 N.W.2d at 120-21; *see also* Brief of Appellee, McAndrews v. Farm Bureau Mut. Ins. Co., 349 N.W.2d 117 (Iowa 1984).

54. *See* Transamerica Ins. Group v. Meere, 143 Ariz. at _, 694 P.2d at 190-91 (Holohan, C.J., dissenting). The dissenter in *Meere* expressed the concern that an insurer would always be mandated to provide coverage "whenever an insured alleges his intentional acts were done in self-defense". *Id.*

impracticable in that judges would undoubtedly be called upon to determine on an *ad hoc* basis whether an insured acted in self-defense, which is within policy coverage, or intentionally, which is outside policy coverage. On the other hand, the majority holding indicates that *whenever* one person strikes another, intent to harm is inferred.[55]

The approach advocated by Justice McCormick might seem more fair on its face to the insured than that followed by the majority,[56] but any redeeming attribute is vitiated by problems in application on the part of the insurer. Irrespective of the approach followed by the majority in *McAndrews*, the result reached was not only the cause for a collective sigh of relief on the part of insurance companies who no longer have the duty to defend their insureds in assault and battery actions, but also signified a higher degree of predictability for the insurer who now may forego the expense of a declaratory judgment action to elicit the court's construction of an insurance policy's intentional injury exclusion in a factual setting similar to that in *McAndrews*.

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55. The *McAndrews* court did not address the question of whether intent to harm is inferred when a basketball player knocks a rival down during a game, for example, but the two situations would seem to be distinguishable. *See* Transamerica Ins. Group v. Meere, 143 Ariz. at _, 694 P.2d at 188.

56. Justice McCormick noted that since the purpose of a comprehensive personal liability policy is to cover "harm caused by unpredictable happenings of daily life," it would seem reasonable that such a policy should cover defensive or reactive conduct. McAndrews v. Farm Bureau Mut. Ins. Co., 349 N.W.2d at 121 (McCormick, J., dissenting).