



## A Wolf in Sheep's Clothing Is Still a Wolf

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By: [Bethany K. Culp](#)

[Geovera Specialty Ins. Co. v. Hutchins, 2013 WL 257426 \(11th Cir. Jan. 24, 2013\)](#) (applying Florida law)

On January 24, 2013, the U.S. Court of Appeals for the Eleventh Circuit issued an opinion finding that the underlying plaintiff's characterization of the inherently intentional act of pressing a gun against the decedent's neck as "negligent" did not make it so or avoid the preclusive effect of the policy's assault or battery exclusion.

The underlying wrongful death action arose out of an altercation between a man and a woman in a parking lot outside of a club where the two had previously been observed talking, joking and hugging.

The woman was at the wheel of her vehicle, in the process of leaving the club with two of her friends, when the man approached the vehicle, carrying a nine-millimeter handgun. After the woman stopped the car, the man reached his hand through the open window and pressed the gun against her neck.

Witnesses reported that the victim told the perpetrator that she was not scared because he was not going to shoot her. After the victim instructed him to "get that thing away," the gun discharged, killing the woman.

The perpetrator testified that he had never intended to shoot the victim and he had been "showing off". The perpetrator acknowledged that he knew there were bullets in the magazine, but he was not aware there were bullets in the chamber.

The perpetrator was insured as a "resident relative" under his grandmother's policy. He sought defense and indemnity from the insurer in the wrongful death action. The complaint sought damages for negligence alleging that the defendant "placed the handgun to [the decedent's] neck and pulled the trigger."

The insurer filed a declaratory judgment action in federal court seeking a determination that the "occurrence" based liability policy, expressly excluding assault and battery from the definition of "occurrence," did not provide coverage for the wrongful death suit. The trial court found, and the Eleventh Circuit agreed, that without regard to the perpetrators intent to shoot the victim, the act of pressing the gun against her neck was a "harmful or offensive contact" that could not be characterized as an "occurrence." In its affirming opinion, the Eleventh Circuit quoted the following passage from the trial court's opinion:



A duty to defend cannot be triggered merely by labeling an intentional act "negligent." Where the facts alleged establish intentional conduct, but the claim asserts negligence, the negligence label should be disregarded. A wolf dressed in a sheep's clothing may present a clever disguise; however, a wolf is still a wolf. As Plaintiff has no duty to defend, Plaintiff cannot have a duty to indemnify.

(quoting *Geovera Specialty Ins. Co. v. Hutchins*, 831 F. Supp. 2d 1306 (M.D. Fla. 2011)).

### **Practice Note**

The coverage litigation was handled by [Andrew Grigsby](#) and [John J. Cavo](#) of Hinshaw's Miami Office.

The fact that the definition of "occurrence" in the insurance policy expressly excluded the acts of assault and battery made it unnecessary for the court to consider the arguments relating to the defendant's subjective intent. Insurers can look to the factual allegations of the complaint in determining their coverage obligations and are not bound by the label the plaintiff assigns to the cause of action.

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