IN THE SUPREME COURT OF FLORIDA

VICTOR GINSBERG
and ELAINE SCARFO,

Appellants,

vs.

CASE NO.: SC00-2614
L.T. CASE NO.: 99-10983

ALLSTATE INSURANCE COMPANY,

Appellee.
______________________________/

ON REVIEW OF CERTIFIED QUESTIONS FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

INITIAL BRIEF OF ALLSTATE INSURANCE COMPANY

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STATEMENT OF THE CASE

A. Course of Proceedings Below

Allstate Insurance Company and Allstate Indemnity Company brought a declaratory judgment action in the United States District Court for the Southern District of Florida against their insured, Victor Ginsberg, and against Elaine Scarfo. Allstate Insurance Co. v. Ginsberg, 235 F.3d 1331, 1333 (11th Cir. 2000). Ms. Scarfo had previously sued Mr. Ginsberg in federal court based upon his alleged unwelcome sexual touching and comments. Id.

Allstate Indemnity Company had issued a homeowners policy to Mr. Ginsberg. Allstate Insurance Company had issued a personal umbrella policy to Mr. Ginsberg. Id.

In the declaratory judgment action, the parties filed cross-motions for summary judgment on various coverage issues under Allstate Insurance Company's personal umbrella policy. All issues under Allstate Indemnity Company's homeowners policy were moot, as Appellants did not seek coverage under this policy. Id. at n. 2.

The District Court granted summary judgment in favor of Allstate Insurance Company, concluding that its personal umbrella policy did not provide coverage for Ms. Scarfo's claims against Mr. Ginsberg. The District Court's conclusion was that Ms. Scarfo's claims of sexual touching and comments did not constitute an "invasion

of privacy" under Florida law so as to trigger coverage under the policy. Id. at 1334.

Mr. Ginsberg and Ms. Scarfo took an appeal from the summary judgment to the United States Court of Appeals for the Eleventh Circuit. Allstate Insurance Company took a cross-appeal. The Eleventh Circuit issued an opinion on December 20, 2000 in which it certified four questions to this Court:

> (1) Do Pleadings Of Unwelcome Conduct Including Touching In A Sexual Manner And Sexually Offensive Comments State A Cause of Action For The Florida Common Law Tort Law Claim of Invasion Of Privacy?
>
> (2) Do Allegations Of Intentional Unwelcome Conduct Including Touching In A Sexual Manner And Sexually Offensive Comments Constitute An "Occurrence" Under Florida Law For Purposes Of Insurance Coverage?
>
> (3) Do Pleadings Of Unwelcome Conduct Including Touching In A Sexual Manner And Sexually Offensive Conduct Fall Within The Business Exception To Coverage When The Alleged Conduct Occurred In The Workplace In The Context Of An Employer-Employee Relationship But Did Not Pertain To The Purpose Of The Business?
>
> (4) Are Allegations Of Intentional Invasions Of Privacy Excluded From Coverage By An Intentional Acts Exception When The Policy Expressly Provides Coverage For Invasions Of Privacy?

235 F.3d at 1337-8.

B. Statement of the Facts

Ms. Scarfo's Allegations Against Mr. Ginsberg

In her lawsuit against Mr. Ginsberg, Ms. Scarfo made various claims arising in the context of a workplace relationship with Mr. Ginsberg and his companies. She alleged that she was employed by Mr. Ginsberg and his companies from approximately November of 1991 until September 18, 1992. (R.39, Exhibit "C" thereto at page C2, paragraph 3). She alleged that from approximately November of 1987 until November 1991 she worked for her husband at Mr. Ginsberg's corporations. Id. Her husband worked for Mr. Ginsberg's corporations. Id. at pages C4-5, paragraph 14. Ms. Scarfo alleged that "from approximately 1988 and throughout her employment ... [she] was subjected to ongoing and pervasive, sexually offensive, unwelcome conduct by Defendant Ginsberg, who was Plaintiff's direct supervisor." Id. at pages C3-4, paragraph 8. She generally alleged that Mr. Ginsberg's actions "included the unwelcome touching of her body and being subjected to unwelcome sexually oriented comments and actions during and after working hours on an ongoing and repeated basis. " Id. She specifically alleged that Mr. Ginsberg touched her "in a sexually offensive and unwelcomed manner, including kissing her, rubbing her shoulders and back and touching her breasts, and forcing her to touch his penis." Id. at page C4, paragraph 9. She alleged that this conduct created an intimidating, hostile and

offensive work environment. Id. at page C4, paragraph 12.

Ms. Scarfo alleged that when she insisted the sexual harassment cease, Mr. Ginsberg retaliated against her by discharging her from her position. Id. at page C4, paragraph 13. Mr. Ginsberg allegedly further retaliated by terminating her husband's salary and dissolving the corporations which employed her husband. Id. at page C4, paragraph 14.

Ms. Scarfo alleged that Mr. Ginsberg's aforementioned actions constituted a violation of Title VII of the Civil Rights Act of 1964 (Id. at page C5, paragraph 16); a battery (Id. at page C5, paragraph 18); an intentional infliction of emotional distress (Id. at page C6, paragraph 21); and an invasion of privacy (Id. at page C7, paragraph 26).

The Policy Provisions

Allstate Insurance Company issued a Personal Umbrellas Policy to Mr. Ginsberg. The insuring obligation of the subject Personal Umbrella Policy provides as follows:

> **Coverage - When We Pay**
>
> **Allstate** will pay when an **insured** becomes legally obligated to pay for **personal injury** or **property damage** caused by an **occurrence**.
>
> **Personal Activities**
> Coverage applies to an **occurrence** arising only out of:

1. personal activities of an **insured.** Activities related to any **business** or **business property** of an **insured** are not covered.

2. a civic service an **insured** performs. The service must be:
   a) not for profit; or
   b) not a function of an **insured's business**.

3. the occupancy of a land vehicle, aircraft or watercraft by an **insured** for personal transportation. Occupancy of any such conveyance while being used in any way directly related to an **insured's business** or **business property** is not covered.

(R.39, Exhibit "B" thereto at page B5). The Personal Umbrella Policy has the following relevant definitions:

3. "**Business**" – means any full or part-time activity of any kind engaged in for economic gain. It does not include:
   a) farming; or
   b) the rental or holding for rental of any premises in a one, two, three or four family residence owned or controlled by an **insured** as a dwelling, office, school or studio.

   * * *

6. "**Occurrence**" – means an accident or a continuous exposure to conditions. An occurrence includes **personal injury** and **property damage** caused by an **insured** while trying to protect persons or property from injury or damage.

7. "**Personal Injury**" – means:
   a) bodily injury, sickness, disease or death of any person. Bodily injury includes disability, shock, mental anguish and mental injury;
   b) false arrest; false imprisonment; wrongful entry; invasion of rights of occupancy; or malicious prosecution;
   c) libel; slander; misrepresentation; humiliation; defamation of character; invasion of rights of privacy; and

d) discrimination and violation of civil rights, where recovery is permitted by law. Fines and penalties imposed by law are not included.

(R.39, Exhibit "B" thereto at page B3). The subject Personal Umbrella Policy contains the following relevant exclusions:

This Policy Will Not Apply:

1) to any act, or failure to act, of any person in performing functions of that person's **business.**

2) to any **occurrence** arising out of a **business** or **business property.**

(R.39, Exhibit "B" thereto at page B10).

SUMMARY OF THE ARGUMENT

This appeal raises significant insurance coverage issues which need to be resolved by this Court. These issues arise under a personal liability policy, not a commercial policy. These issues arise, however, in the context of a workplace relationship. Regardless of how the claims against the insured are styled or titled, claims of sexual harassment arising from the workplace should not trigger coverage under a personal liability policy.

In this particular case, there is no coverage under Allstate's Personal Umbrella Policy for several reasons. First, Ms. Scarfo's claims that she was sexually harassed and battered by Mr. Ginsberg, although titled "invasion of privacy," do not fall within

the tort as recognized by this Court. Instead, these claims are nothing more than a repetition of her claims of sexual harassment and battery. The tort of invasion of privacy has a unique and limited function in the law and should not be expanded beyond its common law roots to include sexual harassment and battery.

This Court described the “intrusion” form of invasion of privacy as “physically or electronically intruding into one's private quarters.” That did not happen in this case.

Labeling a sexual battery an invasion of privacy is an example of the “creative” pleading which is often used in an attempt to trigger insurance coverage. Manipulation of coverage obligations in this manner should not be permitted, and this Court should help put an end to this practice by refusing to adopt the label sought by Ms. Scarfo.

Second, even if this sexual battery could be treated as an invasion of privacy, there would be no coverage because there is no occurrence under the policy. Allstate’s policy only covers accidental losses. Thus, any cognizable invasion of privacy would need to be committed accidentally or negligently to create coverage. Here, the allegations are that Mr. Ginsberg intentionally harassed and battered Ms. Scarfo. Harassment and batteries are not accidents.

Finally, the policy only covers Mr. Ginsberg for his personal activities and does not cover claims related to or arising out of his business. Ms. Scarfo’s claims relate to and arise out of the companies that Mr. Ginsberg operated. She was an employee

of his companies, and this employment relationship provides the foundation for her claims of harassment in violation of Title VII of the Civil Rights Act of 1964. Consequently, the business provisions would also exclude coverage.

ARGUMENT

RESPONSE TO CERTIFIED QUESTION NO. 1:

ALLEGATIONS OF SEXUAL HARASSMENT, SEXUAL TOUCHING AND SEXUAL COMMENTS DO NOT CONSTITUTE AN INVASION OF PRIVACY.

Florida's tort of invasion of privacy does not include the allegations in this case which specifically involve claims that Mr. Ginsberg touched Ms. Scarfo "in a sexually offensive and unwelcomed manner, including kissing her, rubbing her shoulders and back and touching her breasts, and forcing her to touch his penis." (R.39, Exhibit "C" thereto at page C4 par. 9). Although these allegations might demonstrate a trespass or battery of Ms. Scarfo, they do not amount to any invasion of privacy.

This Court first recognized the tort of invasion of privacy in Cason v. Baskin, 20 So. 2d 243 (Fla. 1944). That case involved defendant's publication of a book which included a biographical sketch and life history of plaintiff including an unflattering description of her work as a census taker. Plaintiff maintained that she was a private person and that the publication brought her unwanted publicity and notoriety.

This Court concluded that the publication constituted an invasion of plaintiff's privacy.

In reaching its decision, this Court discussed the history of the right of privacy in the common law. In the earliest times, the law gave a remedy only for physical interference with a person's life and property and recognized battery in its various forms. 20 So. 2d at 247. From battery developed actions for assault, nuisance, slander and libel. Id. at 248. This Court recognized that people have "become more sensitive to publicity, so that solitude and privacy have become more essential to the individual." Id. This Court quoted early authors who "defined the right of privacy, in substance, 'to be the right to be let alone, the right to live in a community without being held up to the public gaze if you don't want to be held up to the public gaze.'" Id. This Court quoted from the Restatement of the Law of Torts: "Interferences with privacy: A person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other." Id. at 248-9.

Based on the various authorities, this Court recognized the right of privacy "distinct in and of itself and not merely incidental to some other recognized right, and for breach of which an action for damages will lie." 20 So. 2d at 250. This Court recognized that "mere spoken words cannot afford a basis for an action based on an

invasion of the right of privacy." Id. at 252.

It is clear from this Court's opinion in Cason that the recognized tort is based on unwanted publicity. This point was underscored when the Cason case returned to this Court:

> The design of the law must be to protect those persons with whose effairs the community has no legitimate concern, from being dragged into an undesirable and undesired publicity and to protect all persons whomsoever; their position or station, from having matters which they may properly prefer to keep private, made public against their will.

30 So. 2d 635, 638 (Fla. 1947).

Here, Ms. Scarfo did not allege that any of her private matters have been made public. She did not allege that Mr. Ginsberg made her affairs known to the public or forced her to be held up to the public gaze.

At most she alleged that she was battered. The right of privacy is supposed to be distinct from and not incidental to other rights. Thus, her battery claim cannot also masquerade as an invasion of privacy.

[1] Further, her allegations of unwelcome sexual comments are insufficient because

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[1] Prosser and Keeton agree that this tort has a limited purpose in the law. In their treatise they discuss the history of the tort and conclude that it began as an effort to fill a gap in the law. Prosser and Keeton, The Law of Torts Section 117, pages 849-850 (5th Ed. 1984). They note that its origin was an attempt to create a remedy upon a distinct ground essential to the protection of private individuals against the unjustifiable infliction of mental pain and distress. Id. Because the tort was intended to fill a gap in the law, there is no need for it to be read broadly to include another tort such as battery which is well established in Florida jurisprudence. See Stewart v. The Pantry, Inc., 715 F.Supp. 1361, 1368 (W.D. Ky. 1988)("Invasion of privacy protects one from intrusions into one's seclusion, not one's person. Restatement

mere spoken words cannot form the basis of an invasion of privacy.

2

The tort was most recently described by this Court to have four categories:

> (1) appropriation - the unauthorized use of a person's name or likeness to obtain some benefit; (2) intrusion - physically or electronically intruding into one's private quarters; (3) public disclosure of private facts - the dissemination of truthful private information which a reasonable person would find objectionable; and (4) false light in the public eye - publication of facts which place a person in a false light even though the facts themselves may not be defamatory.

Agency For Health Care Administration v. Associated Industries of Florida, Inc., 678 So.2d 1239, 1252 (Fla. 1996), cert. denied, 520 U. S. 1115 (1997) . Ms. Scarfo maintains that her allegations fall within category 2 as an intrusion; however, contrary to this Court's description in Agency For Health Care Administration, there was no physical or electronic intrusion into her private quarters. See also Guin v. City of

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(Second) of Torts Section 652. Moreover, this type of allegedly offensive touching is in the nature of battery, not invasion of privacy.").

[2] Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311, 1315 (11th Cir. 1989), previously relied upon by Appellants, is inconsistent with this Court's decision in Cason and should not be followed. In any event, it is inapplicable under the facts of this case. There, the court held that an invasion of privacy claim based on comments must demonstrate that the comments were published to the public in general or to a large number of persons. Id. at 1315. Here, there is no allegation that Mr. Ginsberg's comments were published to anyone other than Ms. Scarfo. In fact, her allegation is simply that she was subjected to his comments. Thus, her allegations are insufficient even if the mere spoken word could constitute an invasion of privacy despite Cason.

Riviera Beach, 388 So. 2d 604, 606 (Fla. 4th DCA 1980)("The tort of invasion of privacy is ordinarily considered to encompass four categories, one of which consists of 'intrusion upon the plaintiff's physical solitude or seclusion, as by invading his home….'").

The description of "intrusion" as "physically or electronically intruding into one's private quarters" maintains the fundamental purpose of the tort: to protect private matters, i.e. what one does in her own home, from being made public. Ms. Scarfo's attempt to expand the tort to allegations that she was sexually touched and propositioned must fail since her allegations have nothing to do with publicizing private information or otherwise intruding into her privacy. See also Ponton v. Scarfone, 468 So. 2d 1009 (Fla. 2d DCA)(court affirmed dismissal of invasion of privacy claim based on allegations that employer made utterances designed to induce female employee to join him in a sexual liaison), review denied, 478 So. 2d 54 (Fla. 1985) . Ms. Scarfo seeks to expand the tort far beyond the original claims of Ms. Cason that she was a private person and that Ms. Baskin's book brought her unwanted publicity and notoriety.

Invasion of privacy has been further codified in the law since this Court's decision in Cason. See, e.g. The Restatement (Second) of Torts Section 652B. The comments to Section 652B do not evidence any intention to have the invasion of

seclusion aspect of the tort include a sexual battery. The comments provide:

> a. The form of invasion of privacy covered by this Section does not depend on any publicity given to the person whose interest is invaded or to his affairs. It consists solely of an intentional interference with his interest in solitude or seclusion, either as to his person or as to his private affairs or concerns, of a kind that would be highly offensive to a reasonable man.
>
> b. The invasion may be by physical intrusion into a place in which the plaintiff has secluded himself, as when the defendant forces his way into the plaintiff's room in a hotel or insists over the plaintiff's objection in entering his home. It may also be by the use of the defendant's senses, with or without mechanical aids, to oversee or overhear the plaintiff's private affairs, as by looking into his upstairs windows with binoculars or tapping his telephone wires. It may be by some other form of investigation or examination into his private concerns, as by opening his private and personal mail, searching his safe or his wallet, examining his private bank account, or compelling him by a forged court order to permit an inspection of his personal documents. The intrusion itself makes the defendant subject to liability, even though there is no publication or other use of any kind of the photograph or information outlined.

Comments a and b to The Restatement (Second) of Torts Section 652B. The foundation of the tort, as described in these comments, is inconsistent with the tort encompassing a battery.[3]

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[3] State Farm Fire & Casualty Co. v. Compupay, Inc., 654 So. 2d 944 (Fla. 3rd DCA), review denied, 662 So. 2d 341 (Fla. 1995), previously relied upon by Appellants, did not reach a different result. That case involved a business liability policy not a Personal Umbrella Policy. Id. at 945 . Because of the specific policy language at issue there, the court was not asked to find, and did not find, that an invasion

Other courts have refused to characterize a sexual battery as an invasion of privacy. For example, in Cornhill Insurance PLC v. Valsamis, Inc., 106 F.3d 80 (5th Cir. 1997), a female employee brought suit against her employer and others claiming that she was sexually harassed by her supervisor. The supervisor allegedly made sexual remarks to her, touched her in an inappropriate and offensive manner, exposed himself, made threatening and obscene gestures, and attempted to force himself on her. Id. at 83. Her complaint included claims for intentional and negligent infliction of emotional distress, tortious assault and battery, intentional and negligent invasion of privacy, and negligent hiring and supervision. Id.

Several insurers brought a declaratory judgment action to determine whether there was a duty to defend and indemnify under their policies. Id. Americas Insurance Company had issued a comprehensive general liability policy which provided personal injury coverage. Id. at 84. Like Allstate's policy, "personal injury" was defined to include invasion of privacy. Id. In determining whether there was coverage, the Fifth Circuit looked at the underlying complaint "to see if [plaintiff] alleged facts that constitute a claim for invasion of privacy…under Texas law." Id. at 85. Texas law is similar to Florida law in that invasion of privacy was recognized to include intrusion

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of privacy can be met by a physical touching. Id. at 949 . Any discussion of the tort is dicta because the policy language would not allow the court to reach such issue.

upon the plaintiff's seclusion or solitude or into his private affairs. Id. The Fifth Circuit concluded that the allegations of sexual comments and advances would not be a cognizable cause of action for invasion of privacy so it held that there was no coverage. Id.

See also Commercial Union Insurance Co. v. Sky, Inc., 810 F.Supp. 249, 255 (W.D. Ark. 1992)(claims of sexual harassment do not constitute "personal injury" which was defined by policy to include invasion of privacy); Roman Mosaic and Tile Co. v. Aetna Casualty and Surety Co., 704 A.2d 665 (Pa. Super. 1997)(court found that allegations of sexual harassment and gender discrimination did not constitute a "personal injury").

[4]

In prior proceedings, Ms. Scarfo contended that the title of her count against Mr. Ginsberg should control the issue of whether her claim constitutes an invasion of privacy. Florida law does not support this contention. Under Florida law, the duty to

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[4] Appellants previously relied on Vernon v. Medical Management Associates of Margate, Inc., 912 F. Supp. 1549 (S.D. Fla. 1996), and its progeny, Sparks v. Jay's A.C. & Refrigeration, Inc., 971 F. Supp. 1433 (M.D. 1997). The statement of the law in Vernon is inconsistent with this Court's description of the tort in Agency For Health Care Administration. The Vernon opinion is dated January 16, 1996 so the court there did not have the benefit of this Court's opinion which is dated June 27, 1996. Thus, Appellant's earlier reliance on Vernon is misplaced. Also, the Sparks opinion does not outline any facts related to the sexual harassment, and the court did not find that a claim for invasion of privacy was stated. Instead, it only permitted leave to amend the complaint.

defend is determined based on the factual allegations of the complaint against the insured. National Union Fire Insurance Co. v. Lenox Liquors, Inc., 358 So. 2d 533 (Fla. 1977). There is no case law which holds that the title of a count should create coverage even if the factual allegations in such count do not. See Fun Spree Vacations, Inc. v. Orion Insurance Co., 659 So. 2d 419 (Fla. 3rd DCA 1995) (inferences from the complaint are insufficient to create a duty to defend if the factual allegations do not create a duty). Coverage cannot be created by Ms. Scarfo titling the count "invasion of privacy," when the specific factual allegations establish nothing more than a sexual battery or assault.

In Amerisure Insurance Co. v. Gold Coast Marine Distributors, Inc., 771 So. 2d 579 (Fla. 4th DCA 2000), Amerisure issued a commercial general liability policy to Gold Coast. The policy included coverage for "advertising injury" and "personal injury" which were defined to include libel and slander. Id. at 581. The complaint against Gold Coast used the term "defamation" but included no factual allegations that Gold Coast made any false statement which libeled or slandered anyone. Id. at 581-2. The Fourth District found no coverage, concluding that the use of the buzzword "defamation" will not create coverage when the complaint against the insured does not contain allegations sufficient to state a cause of action for libel or slander. Id. at 582.

Here, although Ms. Scarfo has used the buzzwords "invasion of privacy" in the

title of one count of her complaint, her allegations do not support finding an invasion of privacy under Cason, Agency For Health Care Administration, or any other authority. It is apparent that the buzzwords were used in an attempt to create coverage so as to attack the deep pockets of an insurance company. This type of pleading should not be rewarded.[5] This Court should ignore the title of Ms. Scarfo's count and find that her allegations of sexual touching and propositioning do not constitute an invasion of privacy under Florida law.

RESPONSE TO CERTIFIED QUESTION NO. 2:

ALLEGATIONS OF SEXUAL HARASSMENT, TOUCHING AND COMMENTS DO NO CONSTITUTE ACCIDENTAL LOSSES OR OCCURRENCES.

If the Court concludes that Ms. Scarfo's allegations do not constitute an invasion of privacy, there is no coverage. If an invasion of privacy is found, the Court must determine whether Ms. Scarfo's allegations also constitute an occurrence.

The Personal Umbrella Policy only provides coverage for an "occurrence"

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[5] Courts have commented unfavorably on this practice. E.g., Marr Investments, Inc. v. Greco, 621 So. 2d 447, 449 (Fla. 4th DCA 1993)("it appears abundantly clear to us that the plaintiff's complaint has been framed in negligence solely to reach the 'deep pocket' of the insurance company (or its insured), as there is a clear exclusion in the policy for assault and battery by a patron, which is what occurred in this case. It is wrong to require the insurance company to defend against facts that are clearly not within the coverage of the policy, even though the 'complaint' may be.").

which is defined as an accident. (R.39, Exhibit "B" thereto at pages B3 and B5).[6] There is no accident alleged in Ms. Scarfo's suit against Mr. Ginsberg. She specifically alleged:

> 8. From approximately 1988 and throughout her employment with the corporate Defendants, Plaintiff was subjected to ongoing and pervasive, sexually offensive, unwelcome conduct by Defendant GINSBERG, who was Plaintiff's direct supervisor. These actions included the unwelcome touching of her body and being subjected to unwelcome sexually oriented comments and actions during and after working hours on an ongoing and repeated basis.
>
> 9. On repeated occasions, Defendant GINSBERG physically touched Plaintiff in a sexually offensive and unwelcomed manner, including kissing her, rubbing her shoulders and back and touching her breasts, and forcing her to touch his penis.
>
> 10. Plaintiff repeatedly indicated to Defendant GINSBERG that such remarks and touching were not welcomed by her.

(R.39, Exhibit "C" thereto at pages C3-C4). Ms. Scarfo's complaint does not allege that the kissing, touching, rubbing and/or comments occurred by accident or through inadvertence. Without an accident, i.e. an occurrence, the policy does not provide coverage.

Numerous courts have held that acts of sexual harassment are not accidents. In the only Florida decision on the issue, the court in <u>State Farm Fire & Casualty Co. v.</u>

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[6] The definition includes a continuous exposure to conditions. This must be read as accidental continued exposure to injurious conditions. <u>Allstate Insurance Co. v. Belezos</u>, 744 F. Supp. 992 (D. Or. 1990).

Compupay, Inc., 654 So.2d 944 (Fla. 3rd DCA 1995), held that a liability policy does not provide coverage for claims of sexual harassment and discrimination. Among other things, the court concluded that sexual harassment and discrimination fall outside of the definition of occurrence. The court reasoned:

> It can be reasoned that an act of discrimination or harassment, like an act of sexual abuse, has but one end: to harm the victim. Indeed several courts have concluded that sexual harassment is deemed an intentional act as a matter of law. Harassment and discrimination are neither negligent nor accidental; the perpetrator focuses on a chosen victim for the express purpose of carrying out the acts of harassment and discrimination.

654 So.2d at 947 (citations omitted).

Courts in other jurisdictions agree that harassment is not an accident. For example, the court in Commercial Union Insurance Companies v. Sky, Inc., 810 F.Supp 249, 253 (W.D. Ark. 1992), noted that "it strains the imagination to speculate how a pattern of sexual overtures and touching can be 'accidental.'" See also Sena v. Travelers Insurance Co., 801 F.Supp. 471, 475 (D.N.M. 1992); State Farm Fire & Casualty Co. v. Panko, ___F.Supp. ___ (N.D. Cal. 1996)(1996 WL 162977)(court found no accident or occurrence under homeowner and umbrella policies for claims of sexual harassment); Board of Education v. Continental Insurance Co., 604 N.Y.S.2d 399 (N.Y. App. Div. 1993)(court found nothing accidental about claims of sexual harassment); Hain v. Allstate Insurance Co., 471 S.E.2d 521 (Ga. App.

1996)(court found no accident under homeowner and umbrella policy for claims of sexual harassment).

In this case, it strains the imagination to speculate how the pattern of conduct involving kissing, touching, rubbing and commenting, as alleged by Ms. Scarfo, could be accidental. Since there is no accident or occurrence as required by the policy, there is no coverage. See also Russ v. Great American Insurance Companies, 464 S.E.2d 723, 725 (N.C. App. 1995)(held that "since sexual harassment is substantially certain to cause injury to the person harassed, intent to injure may be inferred as a matter of law"), review denied, 467 S.E.2d 905 (N.C. 1996); compare Landis v. Allstate Insurance Co., 546 So.2d 1051 (Fla. 1991)(the court held that a homeowners policy does not provide coverage for claims of sexual molestation of a minor) .[7]

In the earlier proceedings in this case, Appellants did not seriously question whether Ms. Scarfo's allegations constituted an occurrence. Appellants argued instead that Allstate could not rely on the policy's occurrence requirement when the policy provides coverage for torts such as invasion of privacy which, Appellants contend, can only be committed intentionally. However, there is no conflict between the

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[7] Pursuant to Florida law, a person seeking to recover on an insurance policy has the burden of proving a loss from causes within the terms of the policy. U.S. Liability Ins. Co. v. Bove, 347 So.2d 678 (Fla. 3rd DCA 1977). Consequently, in the instant action, Mr. Ginsberg bears the burden to establish that Ms. Scarfo's claim arises out of an "accident" or "occurrence".

requirement of an “occurrence” and the general provision of coverage for torts such as invasion of privacy. Under Florida law, an insurance policy must be read in its entirety, every provision and term should be given meaning and effect, and any apparent inconsistency should be reconciled if possible. Excelsior Ins. Co. v. Pomona Park Bar & Package Store, 369 So.2d 938 (Fla. 1979). The policy should receive a reasonable, practical, and sensible interpretation which is consistent with the intent of the parties and not a strained, forced, or unrealistic interpretation Lindheimer v. St. Paul Fire & Marine Ins., 643 So.2d 636, 638 (Fla. 3d DCA 1994)(citations omitted); State Farm Fire & Cas. v. Compupay, Inc., 654 So.2d 944, 946 (Fla. 3d DCA 1995). This Court should not adopt any approach which would result in rewriting the policy. Gulf Ins. Co. v. Dolan, Fertig & Curtis, 433 So.2d 512, 515-16 (Fla. 1983)(courts may not "rewrite" policies to provide coverage plainly not meant to be granted by the insurer); State Farm v. Metropolitan Dade County, 639 So.2d 63, 66 (Fla. 3d DCA 1994)(a court should not extend the coverage afforded by an insurance policy "beyond that plainly set forth in the insurance contract").

This Court can give effect to the “occurrence” requirement and the coverage for invasion of rights of privacy within the definition of “personal injury.” The policy does not cover all "personal injury." The policy covers an insured who becomes legally obligated to pay for "personal injury ... caused by an occurrence." This Court

can and should give effect to all terms of this provision. There is no irreconcilable conflict between the definition of "personal injury" and the “occurrence” requirement because a "personal injury" such as "invasion of privacy" can occur unintentionally or without design to injure the victim. For example, under Florida law, an invasion of privacy can be committed negligently. Jacova v. Southern Radio and Television Co., 83 So.2d 34, 39 (Fla. 1955)("The invasion of the right of privacy ... occurs when a photograph is published where the publisher should have known that its publication would offend the sensibilities of a normal person[.]")(emphasis added); Thompson v. City of Jacksonville, 130 So. 2d 105 (Fla. 1st DCA 1961)(complaint alleging that city policy officers negligently broke into and searched premises with negligent disregard for plaintiff’s right to privacy stated cause of action), review denied, 147 So. 2d 530 (Fla. 1962). Accordingly, the “occurrence” requirement and the “personal injury” coverage can be reconciled as follows: the policy covers a negligent invasion of privacy, but not an intentional invasion of privacy. Under this reading, there would be no coverage for the intentional conduct of sexual harassment alleged in this case to have been committed by Mr. Ginsberg.

Numerous courts have reconciled analogous provisions in the same manner. For example, in Aromin v. State Farm Fire & Casualty Co., 908 F.2d 812 (11th Cir. 1990), the Eleventh Circuit affirmed a summary judgment granted in favor of the insurer. The

claimant argued that there was an ambiguity in the policy which provided coverage for "personal injury" including assault and battery but which also excluded coverage when the insured intended to cause the personal injury. Id. at 813. The court gave effect to both provisions, as it was required to do under Florida law, and held that coverage would exist for assaults and batteries where the insured did not intend to injure the victim. Id. at 816. There was no coverage under the facts of the case because the injury was intended. Id. Under this rationale, there would be no coverage in this case because Ms. Scarfo specifically alleged that Mr. Ginsberg acted maliciously and in a manner calculated to injure her.

The Aromin court relied on Ladas v. Aetna Insurance Co., 416 So.2d 21 (Fla. 3rd DCA 1982). In Ladas, the court refused to find an irreconcilable conflict in an excess policy's provision of coverage for "personal injury" which included "intentional torts" and the policy's exclusion of intentional injuries. Other Florida authorities have refused to find the conflict that Appellants seek to impose in this case. E.g. Federal Insurance Co. v. Applestein, 377 So.2d 229 (Fla. 3rd DCA 1979); Employers Commercial Union Insurance Co. of America v. Kottmeier, 323 So.2d 605 (Fla. 2nd DCA 1975).

The decision of Purelli v. State Farm Fire and Casualty Co., 698 So. 2d 618 (Fla. 2nd DCA 1997), departed from the majority approach and found a conflict.

However, the Purelli decision is not good law and should be rejected by this Court. First, the court interpreted Florida law to hold that an invasion of privacy could not be committed negligently or unintentionally. Id. at 620. Its holding is, therefore, inconsistent with this Court's decision in Jacova v. Southern Radio and Television Co., 83 So.2d 34, 39 (Fla. 1955), which the Purelli court never cited. Second, the Purelli decision is a unique position within Florida, and the court had to distinguish the numerous precedents cited above to achieve its result. Id. at 621. This Court should adopt the well-reasoned majority approach. E.g. Ladas, Applestein and Kottmeier.

Numerous cases from other states have also read policies to avoid the conflict urged previously by Appellants. E.g. Edquist v. Insurance Co. of North America, ___ N.W.2d ___, 1995 WL 635179 (Minn. App. 1995)(court found no irreconcilable conflict between definition of "personal injury" and requirement of an "occurrence"); Monumental Life Insurance Co. v. United States Fidelity and Guaranty Co., 617 A.2d 1163, 1177-78 (Md. App. 1993)(court found no irreconcilable conflict between definition of "personal injury" and intentional injury exclusion); State Farm Fire & Casualty Co. v. Doe, 797 P.2d 718 (Ariz. App. 1990)(court found no irreconcilable conflict between the definition of "personal injury" and the exclusion of intentional torts).

Thus, this Court should give effect to all provisions in the Personal Umbrella

Policy, reconcile the asserted inconsistency, and find no coverage based on the additional ground that there was no "occurrence."

RESPONSE TO CERTIFIED QUESTION NO. 3:

ALLEGATIONS OF SEXUAL HARASSMENT AND TOUCHING FALL WITHIN THE BUSINESS EXCLUSIONS.

Allstate issued a Personal Umbrella Policy to Mr. Ginsberg. The title of the insurance contract clearly indicates that it is a personal policy, not a business policy. The policy has numerous provisions which make it clear that it is intended to cover only Mr. Ginsberg's personal activities and not activities related to his business.

The insuring obligation of the subject Personal Umbrella Policy provides as follows:

> **Coverage - When We Pay**
>
> **Allstate** will pay when an **insured** becomes legally obligated to pay for **personal injury** or **property damage** caused by an **occurrence**.
>
> **Personal Activities**
> Coverage applies to an **occurrence** arising only out of:
> 1. personal activities of an **insured.** Activities related to any **business** or **business property** of an **insured** are not covered.
>
> * * * *

(R.39, Exhibit "B" thereto at page B5). The subject Personal Umbrella Policy contains the following exclusions:

> **This Policy Will Not Apply:**

1) to any act, or failure to act, of any person in performing functions of that person's **business.**

2) to any **occurrence** arising out of a **business** or **business property.**

(R.39, Exhibit "B" thereto at page B10).

As demonstrated by these provisions, the Personal Umbrella Policy covers only the insured's personal activities and does not cover activities related to his business. Further, no coverage exists for occurrences arising out of his business. Ms. Scarfo's claims in the underlying litigation arise from and relate to Mr. Ginsberg's business activities. The claims of sexual harassment arise from the business relationship which existed between Ms. Scarfo and Mr. Ginsberg.

Ms. Scarfo specifically alleged that she was employed by Mr. Ginsberg and his companies from approximately November of 1991 until September 18, 1992. She alleged that from approximately November of 1987 until November 1991 she worked for her husband at Mr. Ginsberg's corporations. Her husband worked for Mr. Ginsberg's corporations. Ms. Scarfo alleged that "from approximately 1988 and throughout her employment ... [she] was subjected to ... sexually offensive, unwelcome conduct by Defendant Ginsberg, who was Plaintiff's direct supervisor." She alleged that his conduct created an intimidating, hostile and offensive work environment.

Ms. Scarfo's further alleged that Mr. Ginsberg acted "individually and in his capacity as President and Director of corporate Defendants." (R.39, Exhibit "C" thereto at page C7, paragraph 26). The allegation is not in the alternative. Instead, all of Mr. Ginsberg's alleged actions were taken "as President and Director of the corporate Defendants." Claims based on Mr. Ginsberg's actions taken "as President and Director of the corporate Defendants" arise from his business and are not covered.

Further, Ms. Scarfo seeks damages against all defendants including Mr. Ginsberg's corporate defendants. (R.39, Exhibit "C" thereto at page C8, paragraph 29). Such damages could be recovered against the corporate defendants only if Mr. Ginsberg was acting for the corporations. The fact that damages are sought against the corporations further supports the conclusion that these are business related claims.

Appellants have previously relied on Scheer v. State Farm Fire and Casualty Co., 708 So. 2d 312 (Fla. 4th DCA), review denied, 719 So. 2d 893 (Fla. 1998). In that case, three employees of Dr. Scheer sued him for sexual harassment, battery, invasion of privacy and false imprisonment. The trial court entered summary judgment for State Farm and found no coverage under a homeowners policy and an umbrella policy because of business pursuits exclusions. The umbrella policy had an exclusion "for any loss caused by your business pursuits." 708 So. 2d at 313. The Fourth District

reversed the summary judgment, concluding that the doctor's conduct was not "primarily taken in furtherance of a business interest." Id.

The Scheer decision is not good law and should not be adopted. In any event, the decision is distinguishable and does not apply here: the policy provisions in Allstate's Personal Umbrella Policy are materially different from Dr. Scheer's State Farm umbrella policy. As noted above, Allstate's policy has a provision in the insuring agreement which states that "coverage applies to an occurrence arising only out of personal activities of an insured" and that "activities related to any business or business property of an insured are not covered." This is a much broader statement limiting the policy to personal activities. Whereas Allstate's policy states that it does not cover activities "related to" the insured's business, the State Farm umbrella policy only excluded "any loss caused by your business pursuits." State Farm's "caused by" language in its umbrella exclusion is narrower than the language in Allstate's policy so the Scheer decision does not apply.

The court in Scheer misapplied controlling Florida law on this issue and ignored other applicable legal principles. The court referenced Landis v. Allstate Insurance Co., 546 So. 2d 1051 (Fla. 1989), but did not discuss the facts, issues or holding in this case. In Landis, Allstate's insureds were sued for sexually molesting children they were supervising at their day-care business. This Court found no coverage based on

the homeowners policy's business pursuits exclusion and the intentional acts exclusion.

The business pursuits exclusion in Landis differs materially from the exclusion in the instant case. That exclusion had an exception which is not present here:

> We do not cover bodily injury or property damage arising
> out of the business pursuits of an insured person.
> We do cover:
> (a) activities normally considered non-business;

546 So. 2d at 1052. The coverage issue in that case revolved around the question of whether the exception applied. In other words, the insureds argued that their acts of molesting the children are "activities normally considered non-business" and, thus, not excluded. Id., at 1052-53. Specifically, the insureds argued that, based on foreign cases, "the nature of the particular act involved and its relationship to the business controls whether the non-business activity exception applies." Id., at 1053. This Court rejected such argument, found the exception inapplicable, and held that there was no coverage.

The court in Scheer referenced Landis for the proposition that the insured's conduct "must be assessed in light of the relationship of the alleged conduct to the business activity." 708 So. 2d 313. As demonstrated above, this analysis was discussed in Landis only in the context of determining whether the non-business

activity exception applied. To the extent that there was no such policy exception in Scheer, or in this case, that type of analysis is inapplicable.

The holding in Scheer would limit the exclusion to business activities only and would not allow it to apply to claims "related to" or "arising out of" the business activities. In effect, the Scheer court would remove terms such as "related to" and "arising out of" from the policy. Under Florida law, such a rewriting of the policy is not permitted. Gulf Ins. Co. v. Dolan, Fertig & Curtis, 433 So.2d 512, 515-16 (Fla. 1983); State Farm v. Metropolitan Dade County, 639 So.2d 63, 66 (Fla. 3rd DCA 1994).

Furthermore, numerous Florida courts have given effect to the terms "related to" or "arising out of" in these exclusions. For example, the court in Scheer distinguished the case of Liberty Mutual Insurance Co. v. Miller, 549 So. 2d 1200 (Fla. 3rd DCA 1989). In Miller, the insured doctor had a confrontation with another doctor at a hospital regarding the care of a mutual patient. The insured doctor allegedly injured the other doctor by pulling on his stethoscope. Id., at 1200. The court found no coverage based on the business pursuits exclusion even though it had a non-business activities exception. Id., at 1201. The insured doctor's act of pulling another doctor's stethoscope was not a function of his business pursuit in practicing medicine, but the court found no coverage because this act arose out of the business pursuit.

Likewise, the court excluded coverage in Santos v. State Farm Mutual Automobile Insurance Co., 707 So. 2d 1181 (Fla. 2nd DCA 1998), where the insured was a professor at the University of South Florida. It was alleged that after a department meeting he grabbed the secretary who had been taking minutes of the meeting. Id. at 1181. Again, the insured's act of grabbing the secretary was not a function of his business pursuit as a university professor, but the court found no coverage because this act arose out of the business pursuit.

This Court should give effect to the terms "arising out of" and "related to" in Allstate's policy. Giving effect to such terms results in no coverage. Here, Mr. Ginsberg's alleged harassment of Ms. Scarfo arose out of and was related to his business pursuit. In her underlying lawsuits, Ms. Scarfo specifically alleged that she was employed by Mr. Ginsberg and his companies without pay from November of 1987 until November 1991 and was employed with pay from November 1991 until September 1992. Ms. Scarfo alleged that Victor Ginsberg was her direct supervisor. The sexual battery and harassment, which created an intimidating, hostile and offensive work environment, allegedly occurred when she was working for Mr. Ginsberg's corporations either with pay or without pay. The work environment brought them together and gave Mr. Ginsberg the opportunity and ability to commit the alleged acts of sexual harassment. Thus, Ms. Scarfo's claims fall within Allstate's business

provisions as they should be applied under Miller and Santos.

The Scheer court held that, before a business exclusion applies, it must be found that the insured's activity was taken in furtherance of a business interest. Although Allstate's policy has an exclusion (number 1) for "any act…of any person in performing functions of that person's business" (R.39, Exhibit "B" thereto at page B10), Allstate's policy has an additional exclusion (number 2) for "any occurrence arising out of a business or business property." (R.39, Exhibit "B" thereto at page B10). Exclusion 2 is intended to broaden and strengthen the exclusion of business-related claims. The language of exclusion 2 is inconsistent with a finding that Allstate's policy only excludes claims involving an insured's conduct taken in furtherance of a business interest. In addition, it would be improper to limit exclusion 2 to occurrences based on an insured's conduct taken in furtherance of a business interest since this is already encompassed by exclusion 1. Such a reading would result in exclusion 2 being a redundancy, and a construction resulting in a redundancy should be avoided. Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Insurance Corp., 636 So. 2d 700, 704 (Fla. 1993).

Cases from other jurisdictions further support the finding of no coverage in this case. See Greenman v. Michigan Mutual Insurance Co., 433 N.W.2d 346 (Mich. App. 1988)(the court found among other things that the business pursuits exclusion negated

coverage for claims of sexual harassment and discrimination); Hain v. Allstate Insurance Co., 471 S.E.2d 521, 522 (Ga. App. 1996)(no coverage under homeowner policy and personal umbrella policy for claims of assault and battery and intentional infliction of emotional distress stemming from a pattern of sexual harassment even though the wrongful conduct was not restricted to the office environment and also occurred at places away from work such as at her home and various restaurants); Board of Education v. Continental Insurance Co., 604 N.Y.S.2d 399 (N.Y. App. Div. 1993) (no coverage under the liability policy when insured was sued for sexual harassment and retaliatory discharge arising from conduct by a school principal even though some of the principal's conduct occurred away from the school); State Farm Fire & Casualty Co. v. Hiermer, 720 F.Supp. 1310 (S.D. Ohio 1988), affirmed without opinion, 884 F.2d 580 (6th 1989)(the court found no coverage for claims of racial discrimination under a homeowners policy and an umbrella policy based on the business exclusion). Under this legal authority, the business provisions apply in this case to defeat coverage and a duty to defend.

In order to find coverage, the Court would have to conclude that Ms. Scarfo's claims solely arise from and relate to Mr. Ginsberg's personal activities. Such a conclusion cannot be supported by the allegations of the underlying lawsuits. Furthermore, in issuing its Personal Umbrella Policy to Mr. Ginsberg, Allstate did not

undertake to insure risks associated with his corporations. Allstate did not undertake to insure risks that he would sexually harass an employee of his corporation (whether she was working for the benefit of the corporation with or without pay).

Finally, Florida public policy prevents coverage for the claims in this case. See Ranger Insurance Co. v. Bal Harbour Club, Inc., 549 So.2d 1005 (Fla. 1989). In Bal Harbour, this Court held that the public policy of Florida prohibits an insured from being indemnified for a loss resulting from an intentional act of religious discrimination. Id. at 1009. This Court based its interpretation of public policy on several principles including: (1) that one should not be able to insure against one's own intentional misconduct, and (2) that allowing insurance would be inconsistent with the goal of deterring discrimination. Id. at 1007-8. Finally, this Court noted that the bulk of discrimination cases are brought against commercial enterprises which have the financial ability to compensate victims so coverage is not necessary. Id. at 1009.

These public policy concerns apply equally to the instant case. Mr. Ginsberg should not be able to insure against claims that he touched Ms. Scarfo "in a sexually offensive and unwelcomed manner, including kissing her, rubbing her shoulders and back and touching her breasts, and forcing her to touch his penis." (R.39, Exhibit "C" thereto at page C4, par. 9, and Exhibit "D" thereto at page 3, par. 8). Allowing coverage would be inconsistent with the goal of deterring this behavior. See Bal

Harbour, 549 So.2d at 1009 (primary purpose of Title VII of federal Civil Rights Act of 1964 is to eliminate discrimination in employment). Since the underlying suits were brought against Mr. Ginsberg and his three businesses, there are resources available to compensate Ms. Scarfo for the claims of sexual harassment.

RESPONSE TO CERTIFIED QUESTION NO. 4:

Allstate respectfully submits that the fourth certified question need not be answered by this Court. This question relates to the application of an intentional acts exclusion to the facts of this case. However, the intentional acts exclusion in Allstate's Personal Umbrella Policy was not at issue in the proceedings before the Eleventh Circuit Court of Appeals. The U.S. District Court did not rely on the intentional acts exclusion in entering summary judgment in Allstate's favor, instead relying solely on its conclusion that there was no invasion of privacy. Although Allstate argued on appeal that additional policy provisions supported the summary judgment, Allstate did not urge the Eleventh Circuit to affirm based on an intentional acts exclusion.

CONCLUSION

For the above reasons, Allstate Insurance Company respectfully submits that the Court should:

1. Answer the first certified question in the negative and find that the allegations do not constitute an invasion of privacy under Florida law;

2. Answer the second certified question in the negative and find that the allegations do not constitute an occurrence;

3. Answer the third certified question in the affirmative and find that the allegations fall within the business exclusions;

4. Decline to answer the fourth certified question since it is inapplicable and/or moot.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by U.S. Mail to Maurice Baumgarten, Anania, Bandklayder & Blackwell, One International Place, 100 S.E. Second St., Ste. #3300, Miami, Florida 33131-2144; and Martha A. Chapman, Martha A. Chapman, P.A., 823 Irma Avenue, Orlando, FL 32803, this ________ day of September, 2001.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.210(a)(2), I hereby certify that this brief was prepared using Times New Roman 14-point font.

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