

IN THE SUPREME COURT OF FLORIDA

VICTOR GINSBERG and
ELAINE SCARFO,

Appellants,

v.

Case No. SC00-2614

ALLSTATE INSURANCE CO.,

Appellee.

**BRIEF AMICUS CURIAE OF THE NATIONAL
EMPLOYMENT LAWYERS ASSOCIATION, FLORIDA CHAPTER**

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

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SUMMARY OF THE ARGUMENT

Answering the first certified question in the negative would effect a fundamental change in the Florida common law of privacy. Such a departure from precedent would work an onerous burden on the rights of individuals.

The overwhelming public policy of this state as articulated in this Court's landmark sexual harassment ruling favors maximum access to remedies for sexual harassment whether they be statutory or common law. A cause of action for unwelcome intimate touching in the workplace is an integral part of the remedial scheme for sexual harassment victims. To jettison that protection would work an undue hardship on employee rights.

Florida courts and federal courts applying Florida law have heretofore been unanimous in recognizing a common law cause of action for unwelcome touching under the tort of invasion of privacy. The decision in this case represents the first departure.

Florida is in the national mainstream in recognizing the conduct at issue to be part of the intrusion branch of invasion of privacy. Not only most other states, but the significant scholarly commentators support Florida's present jurisprudence in this area.

The alleged conflict among Florida cases is illusory. Cases cited in support of

not recognizing unwanted touching as an aspect of invasion of privacy are in fact cases that do not and could not address the subject. Those cases recognize other conduct as being part of the tort. In doing so they do not exclude intimate touching. Case law is not to read like statutory law. Judicial opinions do not commonly anticipate and rule in advance on questions not presented nor do they purport to exhaustively catalogue every aspect of a tort that might arise in other cases.

Battery does not preempt the unwanted touching aspect of invasion of privacy. The torts overlap, but serve distinct interests. The common law of trespass similarly overlaps other aspects of the intrusion tort, but precedent dictates that neither cause of action preempts the other.

ARGUMENT AND AUTHORITY

I. PUBLIC POLICY DISFAVORS SHRINKING THE SCOPE OF THE TORT OF INTRUSION ON PHYSICAL SECLUSION IN THE CONTEXT OF SEXUAL HARASSMENT

Allstate seeks a fundamental change in the common law of Florida that would drastically constrict the tort of intrusion upon seclusion as it has been traditionally applied in sexual harassment cases in this state. Such a contraction would violate the public policy of the state, would depart from established law upon which the public has come to rely, and would promote cynicism about the ability of employees to secure justice against employers in the courts of this state.

A. Basic Policy Framework

This Court’s landmark sexual harassment ruling, *Byrd v. Richardson-Greenshields Securities, Inc.*, 552 So. 2d 1099 (Fla. 1989), noted the “overwhelming public policy” (*id.* at 1103) that “uniformly and without exception condemn[s] sexual harassment in the strongest possible terms.” This Court found these policies to trump countervailing interests, even the exclusivity of worker’s compensation statutes, regardless of whether the claim sued upon be statutory or not:

Public policy now requires that employers be held accountable in tort for the sexually harassing environments they permit to exist, **whether the tort claim is premised on a remedial statute or on the common law.**

Id. at 1104 (emphasis added). At the broad policy level, *Byrd* resolved the issue in this case which this Amicus seeks to address.¹ First, our state policy favors the broadest access to causes of action for personal invasions such as sexual harassment; second, where such interests are implicated, policy favors that such causes of action proceed side-by-side with parallel causes of action rather than being preempted by them.

In this regard, the Court in *Byrd* drew the distinction between the types of battery that had traditionally been preempted by worker’s compensation and the type

¹ Florida NELA in this Brief addresses only the scope of the tort of intrusion upon physical seclusion.

of battery that commonly accompanies sexual harassment -- a type involving an “injury to intangible personal rights.” *Id.* The latter type of workplace battery was permitted to proceed in tort as an exception to the exclusivity of worker’s compensation.

In the wake of *Byrd*, common law torts such as battery, intentional infliction of emotional distress, false imprisonment, and the intrusion on physical seclusion branch of invasion of privacy became commonplace in sexual harassment cases in Florida. Though the latter two torts were not specifically addressed in *Byrd*, plaintiffs, including those represented by the attorneys in this Amicus organization have routinely won and settled such cases throughout this state in the intervening years. The applicability of the intrusion tort to unwanted intimate touching has not been seriously questioned in Florida before this case.

B. Florida Law Recognizes Unwanted Intimate Touching As Actionable Intrusion

No Florida court has yet rejected unwanted intimate touching as actionable under the intrusion branch of invasion of privacy, and, in fact, several have accepted it. *See, e.g., Hennagan v. Dept. Of Highway Safety & Motor Vehicles*, 467 So. 2d 748, 750 (Fla. 1st DCA 1985) (summary judgment reversed to allow intrusion claim to proceed for touching the plaintiff’s body and sexually molesting her); *State Farm Fire & Casualty Co. v. Compupay, Inc.*, 654 So. 2d 944, 949 (Fla. 3d DCA 1995)

(undesired and offensive touching of plaintiff's body qualifies as tort of intrusion).

Prior to this case, federal courts applying Florida law likewise recognized offensive touching as an actionable invasion of privacy. *See Stockett v. Tolin*, 791 F. Supp. 1536, 1556 (S.D. Fla. 1992) (unwanted sexual fondling of an employee constituted an intrusion into her privacy). In fact, the court entered judgment for the plaintiff on two different claims of invasion of privacy. *See id.* The first violation of her privacy was for the sexual fondling of her body. The second invasion occurred when the supervisor followed the plaintiff into the women's bathroom. *See id.*; *see also, Vernon v. Medical Mgmt. Assoc. of Margate, Inc.*, 912 F. Supp. 1549 (S.D. Fla. 1996) (motion to dismiss intrusion of privacy claim denied where plaintiff alleged that her supervisor fondled her breasts, nipples and buttocks).

When this Court first recognized the general tort of invasion of privacy, the Court stated that the time had come to identify and recognize the right of privacy “*as an independent right of the individual*” rather than attempting to make it fit under the English common law's guise of an invasion of property. *Cason v. Baskin*, 20 So. 2d 243, 248 (Fla. 1944) (emphasis added). The courts of Florida have consistently followed this guiding legal principle in the evolution of the law of privacy and especially so in the intrusion form of the tort. Allstate's position, that the tort protects one's living quarters but not one's body, represents an atavistic throwback to a much

earlier stage in the development of the law.

Equally misguided is the notion that appears in various memoranda and briefs in this case that there is no reasonable expectation of privacy in a workplace because workplaces are inherently public. The Restatement (Second) of Torts, §652B, defines an intrusion into privacy as any intrusion that “would be highly offensive to a reasonable person.” The cases cited above correctly held that physical groping of one’s private parts is “highly offensive to a reasonable person” no matter how crowded or public the place where the intrusion occurs. Nothing in Florida law limits the tort of intrusion into privacy so narrowly that it would fail to impose liability on those who sexually fondle their employees in the workplace. *See Vernon v. Medical Mgmt. Assoc. of Margate, Inc.*, 912 F. Supp. 1549 (S.D. Fla. 1996). Furthermore, even in the most public of places, people still have privacy rights in some areas of their bodies, such as their genitals and other private parts. *See Benn v. Florida East Coast Ry. Co.*, 12 Fla. L. Weekly Fed. D 498, 1999 U.S. Dist. LEXIS 14314, * 23-24 (S.D. Fla., July 21, 1999) (granting summary judgment because plaintiff did not allege inappropriate touching of any kind); *see also*, Prosser, *Law of Torts* 809 (4th Ed. 1971) (“And even in a public place, there can be some things which are still private, so that a woman who is photographed with her dress unexpectedly blown up in a “fun house” has a right of action”).

C. Florida Policy Is In Harmony With The General Common Law Around The Nation On The Intrusion Branch Of Privacy Law

As in Florida, most courts and commentators around the nation have long assumed that the intrusion branch of privacy law applies with stronger reason to bodily invasions since it applies to trespasses into living quarters, voyeuristic behavior, and eavesdropping. Many authorities have taken it for granted to such an extent that they have felt no need to elucidate it at any great length as they have with the more complex and troublesome aspects of the tort. Consider the Restatement (Second) of Torts:

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.

Restatement (Second) of Torts, § 652B, comment a (emphasis added). “Person” in the sense used here can mean naught but the human body. Indeed, this may be the first generation in which it is seriously argued that placing a hand in a woman’s purse is an actionable invasion of privacy while placing a hand down her blouse is not. It is perhaps not our finest hour that such a notion is respectfully entertained.

In any case, the courts of other states have reached the obvious conclusion that fondling an employee’s groin, buttocks or breasts constitutes an actionable intrusion into privacy. *See, e.g., Kelley v. Worley*, 29 F. Supp. 2d 1304 (M.D. Ala. 1998)(a

reasonable jury could find that plaintiff's privacy is invaded when she alleges more extreme acts than looking up her skirt such as supervisor putting his hands under her dress); *Cunningham v. Dabbs*, 703 So. 2d 979, 982 (Ala. App. 1997) (sexual touching constitutes invasion of privacy); *Smith v. Welch*, 967 P.2d 727 (Kan. 1998) (IME doctor's sexual fondling of plaintiff with a neck injury sufficient to state claim for invasion of privacy); *Waltman v. International Paper Co.*, 47 Fair Empl. Prac. Cas. (BNA) 671, 678 (W.D. La. 1987), *rev'd on other grounds*, 875 F.2d 468 (5th Cir. 1989) (putting an air hose between woman's legs); *Pease v. Alford Photo Indus, Inc.*, 667 F. Supp. 1188 (W.D. Tenn. 1987) (stroking employee's breasts, thighs, and buttocks "obviously" invaded her privacy); *Aguinaga v. Sanmina Corp.*, 1998 U.S. Dist. LEXIS 6630 (N.D. Tex., May 1, 1998) (invasion of privacy to pry employee's legs open and insert a banana in vagina).

The commentators are in accord with the courts. The two leading treatises on sexual harassment law each devote sections to discussing the actionability under the intrusion branch of privacy law for bodily invasions in the workplace. Lindemann & Kadue, *Sexual Harassment in Employment Law* (BNA 1992) at 351; Conte, *Sexual Harassment in the Workplace*, (Aspen 1994) at § 10.04[E].

D. The Alleged Conflict in Florida Law Is an Illusion

The asserted conflict in Florida law over the applicability of the intrusion tort to

bodily invasions is simply manufactured. The courts that have had to apply Florida law to such facts have unanimously concluded that such conduct is actionable, as shown above. The case for conflict consists of quoting fugitive passages from cases in which bodily invasions were not at issue. Even the quoted passages do not reject bodily invasion as qualifying for the tort at issue. They simply omit reference to it. *See Agency for Health Care Admin. v. Associated Indus. of Fla., Inc.*, 678 So. 2d 1239, 1252 (Fla.1996), *cert. denied*, 520 U.S. 1115 (1997) (“intrusion -- physically or electronically intruding into one’s private quarters”); *see also, Guin v. City of Riviera Beach*, 388 So. 2d 604, 606 (Fla. 4th DCA 1980) (“intrusion upon the plaintiff’s physical solitude or seclusion, as by invading his home”). *Guin* was about a search of unoccupied premises. There was no one present in who could have been touched by the defendant. So why should the court have discussed all the hypothetical applications of the intrusion branch of privacy rather than deciding the case before it?

Worse yet, *Agency*, is not even a privacy case. Privacy law was mentioned in *Agency* as one of five illustrative examples of causes of action created by either statute or common law in which this Court had found abolition of an affirmative defense to be constitutional. It is over-reaching in the extreme to seize upon this offhand dictum as though it were meant to be an exhaustive catalogue of all the acts that might constitute the tort of intrusion.

The central error in the “conflict” argument in this case is reading judicial opinions as though they were statutes. Statutes are drafted with an eye to covering exhaustively the situations to which they might apply. Judicial opinions, by contrast, are designed to apply narrowly to the facts presented. The principle of *expressio unius* has never applied to judicial opinions. The fact that a court might declare that punching someone constitutes battery will not give purchase to the next defendant to argue that this language excludes kicking someone.

If *Guin* and *Agency* are taken to encompass the entire scope of the intrusion tort in Florida, such other common matters as improperly accessing another’s private financial data and all the voyeuristic intrusions are down the drain along with intimate touching, for they too make no appearance in these two cases.

II. BATTERY DOES NOT PREEMPT A CLAIM FOR INTRUSION BY INTIMATE TOUCHING

The preemption argument in this case is that unwanted touching is already covered by battery and that, since that turf is already occupied, the intrusion branch of privacy law must be restricted to situations in which there is no physical contact.

This Court effectively decided the issue of preemption (when an invasion of privacy overlaps with another tort) when it first recognized the tort of invasion of privacy. *See Cason v. Baskin*, 20 So. 2d 243, 250 (Fla. 1944). In fact, the specific

holding in *Cason* reads: “there is a 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.” *Id.* Other states agree with this guiding legal principle of privacy law. For example, an Illinois court rejected a preemption defense argument holding that the mere fact that the elements of privacy may overlap with elements of other torts “is no reason to reject intrusion upon seclusion as a viable cause of action.” *Benitez v. KFC Nat’l Mgmt. Co.*, 714 N.E.2d 1002 (Ill. App. 2d Dist. 1999); *see also, N.O.C. Inc. v. Schaefer*, 484 A.2d 729 (N.J. Super. Ct. Law Div. 1984) (the right of privacy is an independent right and not merely incident to other long recognized rights such as property or contract).

It is no small irony that the preemption argument is advanced by a party that vigorously urges that the intrusion tort be restricted to intrusions into plaintiffs’ living quarters. For this turf is occupied by the civil law of trespass. Consistency would seem to require a corresponding preemption. But that would leave the intrusion tort all but abolished. There is no reason for battery to preempt one aspect of invasion of privacy by intrusion if trespass does not preempt a similarly overlapping aspect of that same tort. *Guin v. City of Riviera Beach*, 388 So. 2d 604, 606 (Fla. 4th DCA 1980), has already resolved the latter in favor of allowing trespass and invasion of privacy to proceed side-by-side.

CONCLUSION

The first certified question should be answered in the affirmative. Touching in a sexual manner is a recognized aspect of the tort of invasion of privacy by physical intrusion.

CERTIFICATE OF COMPLIANCE

Pursuant to Fla.R.App.P. 9.210(a)(2), I hereby certify that this brief was prepared using proportionately spaced Times New Roman 14 point font.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Amicus Brief has been furnished by U. S. Mail to Martha A. Chapman, Esq., 823 Irma Avenue, Orlando, FL 32803; to Lori J. Caldwell, Esq. And David B. Shelton, Esq., Rumberger, Kirk & Caldwell, P.O. Box 1873, Orlando, FL 32802-1873; and to Maurice Baumgarten, Esq., Anania, Bandklayder & Blackwell, One International Place, 100 E. Second St., Suite 3300, Miami, FL 33131-2144, this ____ day of March 2001.

Richard E. Johnson