IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,851

RANGER INSURANCE COMPANY,

Petitioner,

vs.

BAL HARBOUR CLUB, INC.

Respondent.

RESPONDENT BAL HARBOUR CLUB, INC.'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE

Petitioner Ranger Insurance Company (hereinafter "Ranger") brought a declaratory action in Circuit Court seeking a determination whether coverage was afforded its insured, Respondent Bal Harbour Club, Inc. (hereinafter "Club"), under a certain Comprehensive Liability Policy No. SMP 301862. The Club counterclaimed for a declaration that coverage existed. All coverage issues were resolved by Judge Richard Fuller at the Club's Motion for Summary Judgment, upon the parties' stipulation that the Court could decide all issues upon the pleadings and uncontested facts. No public policy issue or defense to coverage was raised by Ranger before the Trial Court. In a four page decision, Judge Fuller found coverage and entered judgment against Ranger and in favor of the Club (R. 314-317; App. 30-33). Ranger appealed that judgment to the Third District Court of Appeals.

Before the Third District, Ranger again raised no public policy argument, arguing only coverage issues. In its first opinion, filed May 21, 1985, the Third District found coverage on the insurance issues, but Judge Ferguson dissented raising for the first time the question whether the public policy of the State of Florida would prevent coverage for allegations of acts of international religious discrimination. (App. 41,42).

Upon Ranger's Motion for Rehearing, the Third District requested supplemental briefs on the public policy issue and held a rehearing en banc. On June 9, 1987, the Third District entered its Opinion on Rehearing En Banc, deciding by a 6 to 3 majority that "recovery [under the policy] should not be precluded by public policy and Ranger, after accepting premiums, must provide coverage for a claim falling within the personal injury provision of the policy." (App. 43-56). The Third District, however, certified the public policy issue to this Court as a question of great public importance, pursuant to Article V, Section 3(b)(4) of the Florida Constitution.

In this brief, Respondent Bal Harbour Club, Inc. shall refer to Petitioner as "Ranger", and to itself as "The Club", consistent with Petitioner's brief. All references to the Record shall be "(R. ____)" and to Respondent's Appendix shall be "(App. _____)". No transcript exists in this case.

STATEMENT OF THE FACTS

The Club submits that Ranger's statement of the facts is somewhat confusing. The lack of any discussion of the issue of public policy in the Trial Court creates the confusion. Although the parties stipulated to a set of facts which were substantially restated in the Trial Court's Order, **(R.314-317;** App. 30-33), the stipulation did not contemplate the later arguments on public policy. **As** the Trial Court noted in paragraph 1 of its Order, a material issue of fact did exist whether the Club had committed any act of discrimination or had violated the Dade County Code prohibiting discrimination in housing. The Trial Court found that the coverage issue could be resolved without the Court reaching such factual issue, because the count of the Complaint relative to violation of the Dade County Code merely sought a determination whether the Club's by-laws were violative of the Code, and did not allege a violation of the statute or seek damages for any violation. (Paragraph **7** of Trial Court's Order; App. **32).**

Unlike the Trial Court and the Third District in its first opinion, this Honorable Court is not asked to decide the technical insurance coverage issues which can be decided from the face of the Skolniks' Complaint. In deciding the public policy issue certified to this Court, the Skolniks' Complaint and other undisputed facts in the record must be reviewed. The significant facts are detailed below in chronological order.

1. Ranger issued a policy of insurance to the Club, bearing No. SMP 301862, and containing a "Broad Form Comprehensive Liability Endorsement No. L6111,"[1/] effective for the period July 13th, 1980 through July 13th, 1983. (Exhibit "A" to Ranger's Complaint; R. 4-44).

2. In February 1981, Phil and Rhona Skolnik entered a contract with a William Logan for the purchase of two unimproved lots in the Bal Harbour Section of Dade County, Florida. (Skolnik Complaint, Exhibit B to Ranger's Complaint; R. 45-52; App. 4-11). The Sales Contract expressly conditioned the purchase upon the Skolniks' approval for membership in the Club. (Skolnik Complaint, Exhibit A; R. 53-55 App. 12-14).

3. On March 16, 1981, Phil Skolnik filed an application for membership in the Bal Harbour Club. (Skolnik Complaint Paragraph 9; R. 47; App. 6).

4. The Skolniks were informed by the Club that no action could be taken on their application because it was incomplete, as they had not submitted the requisite two letters of reference

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1/ The "Broad Form Comprehensive Liability Endorsement No. L6111" is found at R 23-26, and is similar in language and intent to the "personal catastrophe" insurance policy discussed in Hartford Fire Ins. Co. v. Spreen, 343 So.2d 649 (Fla. 3rd DCA 1977), in that the endorsement specifically covered intentional torts, such as false arrest, malicious prosecution, libel, slander and violations of rights of privacy and of occupancy of property.

from members in good standing of the Club. (Skolnik Complaint Paragraph 12; R. 47; App. 6).

5. On January 18, 1982, the Skolniks submitted the necessary two letters of reference, completing their application. (Skolnik Complaint, Paragraph 13; R. 47-48; App. 6-7).

6. On January 27, 1982, before the Club had the opportunity to act on Mr. Skolnik's application, the Skolnik's filed a lawsuit, Case No. 82-1497 CA (08), in Dade County Circuit Court, charging the Club with tortious interference with a contract in Count I, and seeking declaratory relief in Count II to determine if the Club's actions constituted a violation of the Dade County Code. (Skolnik Complaint; R. 45-52; App. 4-11).

7. The Skolnik Complaint alleges that the two lots that they were purchasing from Logan were, at one time, subject to a deed restriction excluding ownership of the property by Jews. The Complaint further alleged that such restriction, however, had expired by its own terms in 1968. (Skolnik's Complaint, Paragraphs 6 and 16; R. 46, 48; App. 5-7).

8. Both the earlier deed restriction and the Skolniks' purchase contract with Logan required that Skolniks become members of the Club. (Skolnik's Complaint, Paragraph 7 and Exhibit A; R. 46, 47, 53-55; App. 5, 7, 12-14).[2/]

2/ Despite the conditions of the deed and the purchase contract, Skolniks apparently closed before becoming

Footnote Continued

9. Contrary to the arguments in Petitioner's Statement of Facts, the Charter and By-laws of the Club, which are attached to Skolnik's Complaint as Exhibit "C", do not require that all owners of property in the Bal Harbour Subdivision be members of The Club, and specifically provides for open membership:

> No person shall be denied membership on the basis of race, creed, color, religion, or national origin. (Skolnik's Complaint, Exhibit C; R. 68, 69; App. 15-16).

10. On February 3, 1982 the Skolniks were accepted for membership in the Club. (R. 182; App. 26).

11. After service of the Skolnik Complaint, Ranger was promptly notified, and Ranger provided the Club with a defense in the suit by the Skolniks, but this defense was subject to a reservation of rights on the part of the Ranger. (Ranger's Complaint, paragraph 7; R. 1; App. 1).

12. In April 1982, Ranger filed its Complaint against the Club for Declaratory Relief on insurance coverage. No issue of public policy was raised in the Complaint. (R. 1-3; App. 1-3).

Footnote Continued from Previous Page

members, since their Complaint alleges that they were owners of the property in question.

13. In November 1982, the Club, acting upon the advice of counsel appointed by Ranger, negotiated a settlement with the Skolniks, which included a payment by the Club of $25,000 to the Skolniks as a partial payment for their attorneys fees. (Club's Motion for Summary Judgment and attachments; R. 181-185; App. 25-29).

14. The settlement protected the interests of both the Club and Ranger, in the event coverage should later be found. (Club's Motion for Summary Judgment and attachments; Letter of G. Cesarano dated November 29, 1982; R. 184-185; App. 28,291.

15. On March 9, 1984, the Trial Court entered into its Order Granting Summary Judgment to the Club in the Ranger lawsuit on the insurance coverage issues. (R. 314-317; App. 30-33).

SUMMARY OF ARGUMENT

This Court should not take jurisdiction of the certified question because it is not germane to the cause presented in the Trial Court. The public policy issue which is the heart of the certified question was neither raised nor decided by the Trial Court. Since the issue was not raised, there exists no proof of any intentional act of discrimination by the Club. A summary judgment was entered on the coverage issues because the Complaint did not even clearly allege any intentional act or violation of a statute or ordinance by the Club. A decision to declare void a contract of insurance due to the public policy of the state may only be reached where the illegality of the contract is alleged and proven.

If the public policy issue is addressed by this Court, the Club submits that the established public policy of this state is and should remain that liability insurance coverage of wrongful acts, including religious discrimination is encouraged to fully compensate the victims of such acts. This Court should not allow insurance companies to circumvent this well established public policy in this case, or any other, in which the alleged wrongdoer cannot benefit from the alleged wrongful act.

The Constitution of Florida announces a public policy in favor of the right to freely contract. Such right would be infringed by this Court's declaration that the present insurance

policy was void. No violation of public policy exists in the present case, since the allegations do not arise to a violation of the Florida Constitution or Florida Statute. Instead of limiting liability insurance for compensatory damages, Florida public policy is and should continue to expand liability insurance to compensate all victims of wrongful acts.

The public policy of the State of Florida which prevents insurance for punitive damages serves as an adequate deterrent to prevent intentional misconduct, while safeguarding the rights of victims to collect their compensatory damages.

ARGUMENT

I

THIS COURT SHOULD NOT TAKE JURISDICTION OF THE CERTIFIED QUESTION BECAUSE IT IS NOT GERMANE TO THE CAUSE PRESENTED IN THE TRIAL COURT.

The question whether the public policy of the State of Florida prohibits an insured from being indemnified for a loss resulting from an intentional act of religious discrimination should not be accepted by this Court in this case. This public policy issue is not germane to this case because the issue was neither raised in the Trial Court by the Petitioner Ranger, nor decided by that Court. For the Supreme Court to entertain a certified question, the question must be one that is indispensable to the disposition of the litigation before the Court. Such a prerequisite is only met when such issues have been properly raised by the party and the case may be decided on no other issue. Dade County v. Philbrick, 162 So.2d 266(Fla. 1964). It is not mandatory upon this Court to answer questions certified as being a great public importance when this Court finds that the questions are not germane to the cause. Cleveland v. City of Miami, 263 So.2d 573(Fla. 1972).

A number of Florida cases have held that Appellate Courts should not answer certified questions where there has not been a prior judicial determination by the Trial Court of the question so certified. First National Bank & Trust Company v. Greater

American Insurance Company, 257 So.2d 73 (Fla. 2d DCA 1972); Jordan v. Aetna Insurance Company, 172 So.2d 483 (Fla. 1st DCA 1965); Rosenberg v. Ryder Leasing, 159 So.2d 873 (Fla. 3rd DCA 1964). Even though the task may be difficult, the initial burden of applying the law to the facts is for the trial judge. Wallace v. Cochran, 349 So.2d 767 (Fla. 3rd DCA 1977).

In the present case, the public policy issue was not raised in the Trial Court by Ranger, either expressly or implicitly. The issue was not even raised on appeal by Ranger to the Third District Court of Appeals. The first discussion of public policy arose at the time of oral argument and was addressed in Judge Ferguson's dissent in the first opinion entered in the Third District Court of Appeals.[3/]

Appeals are taken to obtain consideration of errors alleged to have been committed by the Trial Court. It follows that this Court and the Third District should not determine issues not raised by the pleadings, not presented to the Trial Court, or ruled upon by the Trial Court. De La Cova v. State, 355 So.2d 1227 (Fla. 3rd DCA 1978); Davis v. Major Oil Company, 164 So.2d 558 (Fla. 3rd DCA 1964); Thompson v. City of Jacksonville, 130

3/ Although Ranger argues that coverage cannot be created by estoppel, Florida cases have held that an insurer is estopped to raise a new ground for denial of coverage on appeal, when the insurer has specified the grounds upon which it has denied coverage and the insured has pursued a course of action in reliance upon the insurer's position. American States Insurance Co. v. McGuire, 12 F.L.W. 1972 (Fla. 1st DCA 1987).

So.2d 105 (Fla. 1st DCA 1961), cert. denied, 147 So.2d 530 (Fla. 1961).

In the en banc decision, the Third District justified their consideration of a slightly differently worded public policy issue because of the constitutional ramification raised by Judge Ferguson's earlier dissent. See Footnote 1, Opinion on rehearing en banc, filed June 9, 1987. The Third District's reliance upon Marinelli v. Weaver, 187 So.2d 690 (Fla. 2d DCA 1966), is not justified. In Marinelli, the Court found that an appellant may raise as fundamental error an issue of law of constitutional importance that was not raised below. The opinion is not appropriate to the present case because the public policy issue certified to this Court seeks to establish the illegality of a contract based upon public policy of the State of Florida. Such a decision is not merely an issue of law, but rather can only be determined by a decision on the facts of the case and then the application of such facts to the law of the State of Florida.

Florida law is well established that contracts are presumed to be lawful and valid on their face. The illegality of a contract, based upon public policy arguments, or otherwise, must be alleged and proven by the party seeking to void the contract. Cunningham v. Weatherford, 159 Fla. 864, 32 So.2d 913 (Fla. 1947); Janet Realty Corporation v. Hoffman, 154 Fla. 144 17 So.2d 114 (Fla. 1943).

The public policy of the State of Florida has only arisen in two types of insurance cases. First, whether a beneficiary may recover for the death of an insured who committed suicide under a life insurance policy; and second, whether a party who was directly liable or vicariously liable for punitive damages due to another's wrong may recover such damages under his insurance policy. In both instances, the Courts have held that issues of fact exist that should be raised and tried by the lower Court. Gulf Life Insurance Company v. Weathersbee, 126 Fla. 568, 172 So. 235 (Fla. 1936); Gulf Life Insurance Company v. Nash, 97 So. 2d 4 (Fla. 1957); Highlands Insurance Company v. McCutchen, 486 So.2d 4 (Fla. 3rd DCA 1986).

In the same fashion that Florida Courts will not presume that a death was a suicide merely because an allegation was made by the life insurance company, the Court in this case cannot presume that the Club committed an intentional act of discrimination against the Skolniks, merely because an allegation was made. It is important to note that the issue whether the Club committed any acts of discrimination was never decided by the trial Court. The trial Court specifically avoided the issue by stating, in paragraph 1 of its Order granting summary judgment, that a material issue of fact did exist on the question, but it found that it need not reach the issue in deciding the coverage claims. The Trial Court was eminently correct in that there was no "public policy" issue raised before

it and the coverage issues could be determined solely from the Skolniks' complaint.

The Club itself has consistently denied that there was ever an intentional, or unintentional, act of discrimination committed by it. In the Affidavit of Hugo Scala, filed in support of the Club's motion for summary judgment, it was noted that the Scholniks' were accepted for membership within twenty (20) days of their completion of the membership application by submitting two letters of reference from members in good standing of the Club. (R 181-183; App. 25-27). Scala also stated in his Affidavit that the settlement entered into by the Club with Skolniks was not an admission by the Club of any liability but was entered into upon the advice of counsel for the Club and Ranger to avoid defense costs and to avoid the possible adverse publicity of a trial. The payment of $25,000 in settlement to the Skolniks was specifically as a partial reimbursement of the Skolniks of attorney's fees incurred in the suit.

The Club has consistently taking the position that the lawsuit by the Skolniks was unfounded and scurrilous. An argument supported, at least in part, by the fact that the Scholniks attached to their complaint the by-laws of the Club which specifically state:

> No person shall be denied membership on the basis of race, creed, color, religion or national origin.

In their complaint, the Skolniks did not allege that they were

ever denied membership, nor did they allege that they were denied membership or that their property rights were interfered with because they were Jewish. The complaint, in fact, is carefully crafted and, in paragraph 28, the Scholniks specifically allege:

> Plaintiffs are uncertain as to their rights under the Sales Contract and Warranty Deed and seek a declaratory decree of this Court determining whether the enforcement by Defendant Bal Harbour Club, Inc. of paragraphs 3 and 18 of the warranty deed constitute any or all of the following:
>
> a. Discrimination within the meaning of Chapter 11 A, Article I of the Code of Metropolitan Dade County;

In the Order granting summary judgment entered by the Trial Court, Judge Fuller determined that "Count II [of the Complaint] does not specifically allege a violation of the statute, nor seek damages for its violation."

Therefore, a serious question exists whether or not the Skolniks' complaint even alleged intentional religious discrimination in the form of denial of membership or interference with their property rights by the Club. If the complaint can be read to allege an intentional act of discrimination, certainly the illegality of the insurance contract between Ranger and the Club was never alleged, pleaded or proved by Ranger in the Trial Court. There can be no logic in voiding a contract of insurance, when coverage clearly exist under the terms of the contract merely because unsupported allegations are made which could, if proven, have public policy consequences.

Liability insurance has, as one of its features and attractions, the providing of a defense to claims which may be false or scurrilous. The Club has consistently taking the position that the claims made by the Skolniks were scurrilous unsupportable allegations. When met with such allegations, the Club looked to its liability insurer to defend, which it did, and to indemnify the cost of the settlement approved by the insurer's defense counsel, If this important public policy issue is to be reached, it should only be decided where the claims of discrimination are established, pled and proven by the insurance company, not merely alleged by a third party without any basis or facts to support them.

Respondent Club submits that this Court should decline to answer the certified question in this case, since the question is not germane to the cause and neither raised by the parties, nor necessary for the determination of this case.

11.

THE PUBLIC POLICY OF THIS STATE IS TO PERMIT INSURANCE TO COMPENSATE VICTIMS FOR DAMAGES ARISING FROM ALLEGED WRONGFUL ACTS OF INSURED PARTIES. NO SPECIAL EXCEPTION TO THIS POLICY SHOULD BE MADE FOR VICTIMS OF DISCRIMINATION.

If the certified public policy issue is accepted by this Court, the Club submits that no public policy exists to prohibit recovery by victims of discrimination or insureds under a policy of liability insurance which clearly covers such intentional acts. Ranger's brief attempts to make a distinction between the victims of such wrongful acts and the insureds under policies covering liability for such acts. Florida law does not support such a strained distinction.[4/] Even the case relied upon heavily by Petitioner Ranger and the dissent in the en banc opinion, Northwestern National Casualty Company v. McNulty, 307 F.2d 432 (5th Cir. 1962), establishes the proposition that an injured third person, after recovery from an insured, succeeds to the insured's rights under a liability policy.

Respondent Club submits that the certified question from the Third District should be answered "No", for three reasons: First, the public policy of Florida favors enforcement of valid contracts, including liability insurance contracts; Second, the

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4/ **See** discussion of Shingleton v. Bussey, 223 So.2d 713 (Fla. 1969), at pages 25-26 and 28, infra. Liability insurance is no longer a private contract merely between two parties, but is made to directly benefit members of the public. This argument is also adequately addressed by footnote 5, District Court's en banc opinion. (App. 45).

public policy of Florida favors recovery of compensatory damages by victims of wrongful acts where insurance is available; Third, the public policy of Florida should encourage liability insurance to protect the innocent victims of discrimination.

A. FLORIDA PUBLIC POLICY FAVORS ENFORCEMENT OF VALID CONTRACTS, INCLUDING LIABILITY INSURANCE POLICIES.

In its haste to clothe its arguments with the State and Federal Constitutions, Ranger forgets two important constitutional principles well established by this Court. First, that the right to contract and to protect one's property by contract, including liability insurance, are also fundamental rights guaranteed by the State and Federal Constitutions. Second, the State Constitution provision depended upon by Ranger requires a deprivation of rights because of race, religion or physical handicap through "state action", not merely through the action of a private individual or entity.

Ranger relies upon Article I, Section 2, of the Florida Constitution for its arguments that the public policy of Florida condemns discrimination by any person. A full reading of the same section shows that it also protects the right to contract to protect one's property:

> §2. Basic Rights
>
> All natural persons are equal before the law and have inalienable rights, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by

> aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race, religion or physical handicap.

The constitutional right to contract has long been recognized and protected by Florida Courts. A lengthy discussion and history of this "fundamental right" was articulated by Justice Roberts in this Court's decision in Palm Beach Mobile Homes, Inc. v. Strong, 300 So.2d 881, at 884-885 (Fla. 1974). Such principles were applied to insurance policies by the early Florida cases of Continental Casualty Co. v. Bows, 72 So. 278, 72 Fla. 17 (Fla. 1916), and Georgia Home Ins. Co. v. Hoskins, 71 So. 285, 71 Fla. 282 (Fla. 1916).

Florida courts have either refused to impair or abrogate the right to contract, New England Mutual Life Insurance Co. v. Luxury Home Builders, Inc., 311 So.2d 160 (Fla. 3rd **DCA** 1975), referred such decisions to the Florida legislature, Desandolo v. F & C Tractor & Equipment Co., 211 So.2d 576 (Fla. 4th **DCA** 1968); France v. Liberty Mutual Ins. Co., 380 So.2d 1155 (Fla. 3rd **DCA** 1980), or have expressed extreme caution when called upon to declare a contract provision void on the ground of public policy. France v. Liberty Mutual, Id.; Bituminous Casualty Corp. v. Williams, 154 Fla. 191, 17 So.2d 98 (Fla. 1944). In Russell v. Martin, 88 So.2d 315 (Fla. 1956), Justice Terrell described "public policy" as a "fickle concept. No fixed rule has ever been defined by which it may be shown." Twenty years earlier, Justice Terrell called public policy "a very unruly horse, and,

when once you get astride it, you never know where it will carry you." Story v. First National Bank and Trust Co., 115 Fla. 436, at 439, 156 So. 101, at 103 (Fla. 1934).

The most detailed analysis of the clash of the constitutional right to contract with "public policy", in an insurance policy case is found in Prudential Insurance Co. of America v. Prescott, 130 Fla. 11, 176 So. 875 (Fla. 1937). In that case, the insurer argued that a life insurance policy containing an incontestability clause was void as against public policy as tending to put fraud on a par with honesty, and preventing the insurer from showing that it was induced into the policy by fraud. This Court denied the insurer's claims, reasoning that policies of insurance are prepared by insurance companies and the insured has no voice in the preparation. In cases where the insurer seek to declare void a provision or contract which it prepared, this Court stated:

> "The liberty of contract, being one of those rights secured by our Constitution, is not to be restrained upon any insufficient or mere fanciful concept of what may possibly happen. The citizen who is sui juris has a right to make a contract beneficial to himself, when neither immoral, fraudulent, nor illegal; and he should not be restrained in the exercise of such right unless the public welfare clearly compels it."
>
> "It is manifest from many decisions that judicial tribunals hold themselves bound to the observance of rules of extreme caution when invoked to declare a transaction void on grounds of public policy and prejudice to the public interest must clearly appear before a court would be warranted in pronouncing the transaction void on this account."

The facts of the present case do not meet the test of Prudential v. Prescott, supra, and other Florida decisions on when a contract or insurance policy may be declared void on the extreme grounds of public policy. In its brief, Ranger cites Article I, Section 2 of the Florida Constitution as the only Florida support for its argument that the allegation of religious discrimination in this case is a violation of "organic law." Ranger also cites to the Fourteenth Amendment of the United States Constitution, but acknowledges that state action is clearly required before a violation is present. Shelley v. Kraemer, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948). Ranger also mentions 42 U.S.C.§1982, but does not rely thereon, since the statute refers by its terms to racial, not religious discrimination.

Ranger's argument under Article I, Section 2 of the Florida Constitution completely ignores the key significant case on the issue whether a private act of discrimination is a violation of the Florida Constitution. If, in fact, the alleged acts of the Club are not in violation of the Constitution, then, insurance for such allegations cannot be a violation of the public policy of Florida under the cases cited above. This Court recently decided that state action was required before a violation of Article I, Section 2 can be found to exist in answering a certified question in Schreiner v. McKenzie Tank Lines, Inc., 432 So.2d 567 (Fla. 1983). This Court followed the U. S. Supreme

Court's decision in Shelley v. Kraemer, supra, holding specifically that "article I, secton 2, deals with the relationship between the people and the state and that, consistent with the construction of the fourteenth amendment, individual invasion of individual rights was never intended to be the subject matter of this provision." Ranger, therefore, has no basis for its argument that insurance coverage for private acts of religious discrimination is void due to public policy, since no provision of Florida statute or Constitution can be cited for the more basic issue that private acts of religious discrimination are themselves unlawful.

Ranger cites Shingleton v. Bussey, 223 So.2d 713 (Fla. 1969), as authority for the principle that the courts will not enforce an insurance contract that collides with principles of due process, equal protection, or the right to a full and adequate remedy in the courts, and argues that this principle be applied in this case. Application in this case is inappropriate. This Court, in Shingleton, sought to protect the constitutional right to recover on his claim of the victim of a tort, who was a third party to the insurance contract. Thus it held that an insurance contractual provision which purported to limit the right of a victim to an adequate remedy at law was not to be enforced. Ranger turns the decision on its head to argue that Shingleton should limit coverage here.

The insurance contract in the present case does not collide with constitutionally protected rights. The policy does not purport to limit the constitutional rights of either a party, or a victim. It simply provides coverage for the victim of the insured's wrongdoing, including specifically such intentional acts as libel and slander, defamation, violation of the right to privacy, and malicious prosecution. The logic of the Ranger brief is that allowing insurance for discrimination somehow validates unconstitutional behavior. But this does not follow. Allowing recovery here no more validates the wrongful act than allowing recovery validated or approved other wrongful acts which Florida courts have held to be insurable. See Everglades Marina Incorporated v. American Eastern Development Corporation, 374 So.2d 517 (Fla. 1979), not against Florida public policy for victims of intentional criminal arson to recover from arsonist's liability carrier; U.S. Fidelity & Guaranty Co. v. Perez, 384 So.2d 904 (Fla. 3rd DCA 1980), insured convicted of second degree murder but plaintiff's decedent recovers under insurance policy; Hartford Fire Insurance Company v. Spreen, 343 So.2d 649 (Fla. 3rd DCA 1977), victim recovered for insured's intentional assault and battery; Caplan v. Johnson, 414 F.2d 615 (5th Cir. 1969), victim recovered for insured's false arrest.[5/] Ranger should not be allowed to avoid its obligations under the contract it agreed

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5/ See also, Allstate Insurance Company v. Steinemer, 723 F.2d 873, and cases discussed therein at 875-876, (11th Cir. 1984).

to and benefitted from, on the unsupported allegation that the insured's behavior was in violation of the Florida Constitution.

B. PUBLIC POLICY PROHIBITS LIFE OR DISABILITY INSURANCE FOR SELF-INFLICTED INJURIES BUT PUBLIC POLICY IS AND SHOULD REMAIN IN FAVOR OF LIABILITY INSURANCE TO COMPENSATE VICTIMS OF INTENTIONAL WRONGS.

In its brief, Ranger cites a New York decision by Justice Cardozo in 1921, Messersmith v. American Fidelity Co., 232 N.Y. 161, 133 N. E. 432, 19 ALR 876 (1921), and a treatise, Couch on Insurance 2d, to support its argument that its policy should be declared void as against Florida public policy because the Club may benefit from its own alleged wrongful act. Couch cites only one Florida case for its statement, Hussar v. Girard, 252 So.2d 374 (Fla. 2d DCA 1971). Ranger relied upon the Hussar decision in its supplemental brief before the district court. In a one paragraph opinion, the Court in Hussar affirmed a decision that the plaintiff not be permitted to recover for self-inflicted and intentional injuries under a disability policy. There is no Florida case which states that all intentional torts must be precluded from liability insurance coverage on public policy grounds. Indeed, Ranger admits Florida law clearly allows the recovery of damages against insurers when the insured's acts arise to intentional torts. See Hartford Fire Insurance Company v. Spreen, 343 So.2d 649 (Fla. 3rd DCA 1977), and cases cited at Page 23, supra.

The rationale behind the long established rule, that a person may not recover under life or disability insurance for his intentional act, is that the insured must not be allowed to benefit from his own wrongdoing. Messersmith v. American Fidelity Company, 232 N.Y. 161, 133 N.E. 432 (1921). There is no doubt that Florida follows the rule that a wrongdoer may not benefit from his deed. As the Fourth District stated in Lopez v. Life Insurance Company of America, 406 So.2d 1155 (Fla. 4th DCA 1981), "a life insurance policy is void ab initio if it is shown that the beneficiary procured the policy with an intention to murder the insured." But the reasoning of the Lopez case and other similar decisions has nothing to do with allowing recovery under liability insurance policies. The insured here gains no benefit. It is the victim of the discrimination who benefits from the coverage and it is the victim who will suffer if this Court holds that public policy prevents such insurance. The public policy of Florida does not prohibit third party beneficiaries from recovering benefits even when the loss was intentionally caused by the criminal acts of the insured. Everglades Marina Incorporated v. American Eastern Development Corporation, 374 So.2d 517 (Fla. 1979).

This Court, in Shingleton v. Bussey, 223 So.2d 713, at 716 (Fla. 1969) recognized that liability insurance is no longer a private contract between two parties, but is made to directly benefit members of the public injured through the acts of the

insured. The District Court in the en banc majority opinion recognized that the only effect of invalidating the insurance policy in the present case would be to "frustrate the recovery of damages by innocent third parties." As did the Federal Court in Union Camp Corp. v. Continental Casualty Co., 452 F. Supp. 565, 568 (S.D. Ga. 1978), the District Court foresaw that not all defendants in discrimination cases will be sufficiently solvent to pay actual compensatory damages sustained by their victims.

Both the dissent in the en banc opinion and Ranger's brief argue that Florida cases preventing insurance coverage for punitive damages are analogous authority for the present issue. The Club agrees that the issues are analogous, but submits that the reasoning supports a public policy in favor of insurance coverage for compensatory damages caused by intentional acts. Judge Ferguson's dissent accurately states the disputed issue:

> The principal disagreement between the majority and dissenting views, as I understand it, is whether securing compensation to the victims of intentional discrimination, by shifting the obligation to the insurer, should override the public policy which seeks to place the risk of loss squarely on the shoulders of the wrongdoer as a penalty and a deterrent.

The fallacy of Ranger's argument is the failure to recognize the distinction between compensatory and punitive damages. "The objective of compensatory damages it to make the injured party whole. Punitive damages are imposed as a punishment of the defendant and a deterrent to others." Mercury Motors Exp., Inc.

v. Smith, 393 So.2d 545, at 547 (Fla. 1981); Nicholson v. American Fire and Casualty Insurance Company, 177 So.2d 52 (Fla. 2d DCA 1965). Ranger and the dissent below would take away insurance coverage for compensatory damages through their misguided desire that all damages in such cases serve a "penalty and a deterrent."

The numerous Florida cases beginning with Northwestern National Casualty Co. v. McNulty, 307 F.2d 432 (5th Cir. 1962) and Nicholson v. American Fire and Casualty, supra, which squarely stand for the proposition that punitive damages are not covered by insurance also stand for the important corollary that compensatory damages arising from intentional wrongful acts can be covered by liability insurance. As this Court is well aware, a wrongful act must arise to the "intentional violation" of another's rights before punitive damages are recoverable. Carraway v. Revell, 116 So.2d 16 (Fla. 1959); White Construction Co. v. DuPont, 455 So.2d 1026 (Fla. 1984). In Como Oil Company v. O'Loughlin, 466 So.2d 1061 (Fla. 1985), this Court restated the rule, again emphasizing the intentional nature of the wrongful acts.

> In White we held that the degree of negligence necessary for punitive damages is willful and wanton misconduct equivalent to criminal manslaughter.

The relevance of such strong language to the present case is that such intentional wrongful acts, "misconduct equivalent to

criminal manslaugter," give rise to two types of damages, compensatory and punitive. Although Florida public policy prevents insurance coverage for punitive damages resulting from such acts, the same policy clearly allows insurance coverage for compensatory damages which result from the same acts. The purpose of the policy covering compensatory damages is to protect the victim of such acts, as is the sole purpose of compensatory damges.

C. FLORIDA PUBLIC POLICY SHOULD ENCOURAGE LIABILITY INSURANCE TO PROTECT THE INNOCENT VICTIMS OF DISCRIMINATION.

Since liability insurance is no longer a private contract merely between two parties, but rather a contract to cover and benefit members of the public, any expansion in liability insurance to compensate victims of discrimination should be encouraged, not restricted. Shingleton v. Bussey, 223 So.2d 713 (Fla. 1969). The District Court recognized the benefits of liability insurance coverage for claims of discrimination, as have other courts and commentators.

In 1983, the Equal Employment Opportunity Commission of the Federal Government received 70,252 claims of discrimination in employment (Complaints Statistical Reporting System, Fiscal Year 1984, Summary). Perhaps more importantly, approximately 20,000 private civil rights cases were filed in both 1985 and 1986 in The Federal Courts. Statistically, the number of private civil rights cases filed in Federal Courts was exceeded by only one

other category, "other contract actions," in 1986. Annual Report of the Director, Administrative Office of The United States Court, p. 58 (1986). (App. 57-59). In addition, untold claims are made each year of discrimination in housing, health services, police or fire protection, access to public facilities under other federal, state and local laws. Employers, businesses, municipalities, and other governmental units must take steps to protect themselves from discrimination suits whether founded or unfounded. Seeking such protection is not inconsistent with public policy. In fact, one court has suggested that insurance for discrimination suits might actually promote compliance with the law.

> We do not think that allowing an employer to insure itself against losses incurred by reason of disparate impact liabilities will tend in any way to injure the public good, which we equate here with that equality of employment opportunity mandated by Title VII. To the contrary, the fact of insurance may be helpful toward achieving the desirable goal of voluntary compliance with the Act.

Solo Cup Company v. Federal Insurance Company, 619 F.2d 1178, at 1188 (7th Cir. 1980).

Two federal district courts have faced the same issue as the Seventh Circuit did in Solo Cup Company, and have also resolved that liability insurance for acts of discrimination should be encouraged, not declared void. Union Camp Corp. v. Continental Casualty Co., 452 F. Supp. 565, (S.D. Ga. 1978); Harris v. County of Racine, 512 F. Supp. 1273 (E.D. Wis. 1981). Both courts

recognized that insurers could, if they wish, exclude coverage for any claim of discrimination from their policies. In the absence of such exclusion, however, the courts saw no public policy reason to exclude coverage. Other courts have not considered public policy, but have found insurance coverage of claims of discrimination and breach of civil rights. Grant v. North River Insurance Company, 453 F. Supp. 1361 (N.D. Ind. 1978) (allegations of civil rights violations by police officers covered); Community Unit Sch. Dist. No. 5 v. Country Mutual Ins. Co., 419 N. E. 2d 1257 (Ill. App. 1981) (allegations of race and sex discrimination covered by policy); Insurance Company of North America v. Chinoise Restaurant and Trading Corp., 445 N.Y.S. 2nd 835 (N.Y. App. Div. 1981) (allegations of discrimination against handicapped covered by insurance); NPS Corporation v. Insurance Co. of North America, 517 A.2d 1211 (N.J. Super A.D. 1986) (claim of sexual harassment and discrimination covered by insurance).

Although Ranger cites no cases in its brief for the specific point that insurance for claims of discrimination should be void as against public policy, the dissent in the district court's en banc opinion argues that the Washington Supreme Court supported its position in the case of E-Z Loader Boat Trailers, Inc. v. The Travelers Indemnity Co., 106 Wash. 2nd 901, 726 P.2d 439 (1986). A close reading of the E-Z Loader case, however, shows that public policy is not discussed or mentioned in the case. The sole basis of the opinion is that the policies involved did not

provide coverage for intentional acts of discrimnation by their express terms and exclusions. Dicta in the E-Z Loader case could be read to support the view that the Washington Supreme Court would allow coverage of discrimination, if the insurance policy included such a liability within its terms:

> We decline to impose on an insurer coverage of a liability not set forth in the policy. The majority of decisions that enforce coverage for discrimination claims involve liability policies that expressly included discrimination within the definitions of personal injury or bodily injury. See Solo Cup Co. v. Federal Ins. Co., supra, and Union Camp Corp. v. Continental Cas. Co., 452 F. Supp. 565 (S.D. Ga. 1978).

In this case there is no issue that the terms of the policy cover the claim. Even Judge Ferguson, in his dissent, in the initial district court opinion, agreed that the Skolnicks' claim was within the policy definition of "occurrence."

It is only reasonable to allow an employer, a business dealing with the public, or a governmental unit to insure itself against discrimination suits which may arise from the wrongful actions of its own employees. It is also fair that businesses and governmental units be allowed protection from unfounded and scandalous claims of discrimination. Neither public policy nor common sense support denial of an insured's right to a defense against unsupported claims of unproven wrongful conduct. Once proven, neither policy nor wisdom support denial of a victim's right to recovery on a insurance policy, expressed purchased to protect the public.

Insurance companies have a strong interest in avoiding claims against them. Thus, they demand certain standards of behavior from the parties they insure. A company with a history of discrimination will not be able to get insurance against such suits. The natural operation of the market place makes a legal ruling unnecessary, especially when an inflexible rule will cause many innocent victims of discrimination an injustice. Repeated wrongdoers would be unable to obtain such insurance. Single or first time wrongdoers will be penalized under the established public policy of the state which disallows insurance for punitive damages. U.S. Concrete Pipe Company v. Bould, 437 So.2d 1061 (Fla. 1983). There is no need for a public policy against recovery from an insurer by innocent victims of religious discrimination. The law as it stands adequately punishes the wrongdoer, without penalizing the victim, or preventing the defense to an insured of unfounded claims.

CONCLUSION

Petitioner Ranger's true motive in pursuing this issue is revealed at page 14 of its brief: "nor is there any indication from the cut-throat marketplace of the insurance industry that companies are desirous of doing so [excluding coverage] and losing business as a result of such a policy exclusion." Ranger seeks protection from itself and its competitors, by asking this Court to declare "off limits" a broad field of liablity insurance on the basis of public policy.

Obviously, Ranger and each other insurance company has the right to refuse to write such coverage. They are unwilling to do so, because they would exclude themselves from a sizeable segment of the market and the profits to be received thereby. If a decision is to be made to close this insurance market to employers, businesses, and governmental agencies, as well as to many other insurance companies who may not share Ranger's views, it should not be made by this Court upon this scanty record. Such decision should be made by the Florida legislature after hearing from all of the interests involved: representatives of groups who have been historically the victims of discrimination; businesses, employers, and governmental units who desire to purchase such insurance against discrimination claims; and insurance companies who seek to sell such liability protection. One can only speculate as to how the Legislature would establish public policy, but it is certainly possible that, of the

interested parties, only Ranger would argue against the validity of insurance.

Respondent Club submits that this Court should not reach the issue whether the public policy of Florida prevents insurance coverage for suits involving claims of intentional religious discrimination. Respondent further submits that, if the issue is reached, the public policy of Florida supports liability insurance for the victims of intentional torts including victims of religious discrimination, and requests that the certified question be answered in the negative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was hand-delivered this 28th day of August, 1987, to the Law Offices of Joe N. Unger, P.A., 606 Concord Building, 66 West Flagler Street, Miami, Florida 33130 and Corlett, Killian, Hardeman, McIntosh & Levi, P.A., 116 West Flagler Street, Miami, Florida 33130.

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