IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,851

RANGER INSURANCE COMPANY

Petitioner,

vs.

BAL HARBOUR CLUB, INC.,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Pursuant to Article V, Section 3(b)(4), Florida Constitution, the following question was certified by the District Court of Appeal of Florida, Third District, as one of great public importance:

> "DOES THE PUBLIC POLICY OF FLORIDA PROHIBIT AN INSURED FROM BEING INDEMNIFIED FOR A LOSS RESULTING FROM AN INTENTIONAL ACT OF RELIGIOUS DISCRIMINATION?"

In the trial court, Ranger Insurance Company sought declaratory relief concerning the question of coverage under a policy of insurance issued to the Bal Harbour Club, Inc. The Complaint for Declaratory Relief (R.1-88), alleges that the Club has called upon Ranger for full coverage and defense of a suit brought against the Club by Phil Skolnick and Rona Skolnick. Ranger provided a defense under a reservation rights. Ranger asserts doubt as to its rights and obligations under the policy of insurance inasmuch as the suit brought by the Skolnicks makes allegations which appear to take the claim outside the policy coverage or within certain exclusions.

The Skolnick Complaint upon which the obligation to provide a defense or coverage would depend alleges the following: In February, 1981, the plaintiffs purchased unimproved real property in the residential section of Bal Harbour, Florida. The property was subject to a deed restriction which prohibited use or occupation "by anyone not a member of the Caucasian race, nor anyone having more

than one-fourth Hebrew or Syrian blood." The deed also provided that it was a condition of transfer that the seller could not convey the property to any person who was not at that time a member of the Bal Harbour Club, Inc. A reverter clause provided that violation of any covenant or restriction of the deed would cause the described property to revert immediately to the grantor.

Under the terms of the Charter and By-laws of the Club, in order to purchase property the plaintiffs were required to apply for membership, only members being eligible to become owners of property in the residential section of Bal Harbour. Copies of the Charter and By-laws were attached to the Complaint.

Application for membership to the Club was made by the Skolnicks on March 16, 1981. In the ensuing months the application was returned as "incomplete" and was not completed in accordance with the requirements of the Club until January 18, 1982. As a result of the deed restrictions, it is alleged the plaintiffs were precluded from having good and marketable title to their property.

It is further alleged that the sole basis upon which the Club did not proceed with plaintiffs' request for membership was because the plaintiffs were Jewish. Even though the deed restriction precluding Jews from ownership of real property in the residential section of Bal Harbour lapsed in 1968, the further restriction requiring an owner to be a member of the Club rendered elimination of the

previous restriction on ownership meaningless and was a "sham to exclude Jews from use and occupancy of real property in the Residential section of Bal Harbour."

Subsequent allegations assert that a group of individuals who control the Club conspired to prevent the plaintiffs from obtaining good and marketable title to their property. Count I was for tortious interference with a contractural relationship claiming that the failure of the Club to approve plaintiffs' appliction for membership was willful, wanton, reckless and in total disregard of plaintiffs' rights resulting in damage in that they were unable to obtain good and marketable title to the above-referenced real property. In addition, plaintiffs were prevented from use and occupancy of the real property which they purchased: suffered financial damage since they paid for the professional services of an architect; were not able to receive the benefit of those services and were embarrassed both socially and professionally as a result of the failure to approve the application.

A count for declaratory relief alleges that Chapter 11A, Article I of the Code of Metropolitan Dade County, makes it unlawful for a person to refuse to sell or otherwise deny any housing accomodation to a person because of his religion, as does Article I, Section 2 and Article I, Section 9, of the Florida Constitution. In this count, plaintiffs requested that a judgment be entered declaring that enforcement by the Club of those discriminatory

provisions of the warranty deed amounts to a violation of the Metro Code, a denial of equal protection by unlawful restraint on the alienation of property, and a denial of due process.

Based upon the allegations contained in the Complaint filed by the Skolnicks against the Club, Ranger Insurance Company proceeded to defend that action under a reservation of rights and sought a determination by way of declaratory decree that there was no coverage to the Club under the policy issued to it.[1, 2]

In its Answer and Counterclaim, the Club asserted that Ranger's insurance contract obligated the insurer to defend the Club in the suit brought by the Skolnicks. The Club counterclaimed for attorney's fees. (R.89-92) By Amended Counterclaim (R.158-160), the Club asserted that the Skolnick litigation had been terminated as the result of a negotiated settlement obligating the Club to pay the sum of $25,000 to the Skolnicks. Ranger refused to pay the settlement.

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[1] An excess umbrella policy was issued by Michigan Miller's Mutual Insurance Company to the Club. Michigan Miller's filed a Motion to Intervene and an Intervenor's Conplaint for Declaratory Relief based along the same lines as the Ranger complaint. The record does not reflect an order permitting intervention. Since the amount awarded against Ranger was not in excess of its limits, the appearance of the excess carrier is moot. (R.96-98, 99-152

[2] The Skolnicks were originally joined as parties defendants by Ranger. Ranger voluntarily dismissed the action as to the Skolnicks prior to the Final Summary Judgment which is here appealed. (R.243)

The Club filed a Motion for Summary Judgment (R.173-180) setting forth the background of the cause, as well as certain "undisputed material facts" describing the coverage afforded by the Ranger policy. A declaration of coverage was sought based upon policy endorsement L6111 titled "Broad Form Comprehensive General Liability Endorsement.''

The Final Summary Judgment of the trial court states that the parties agreed a summary judgment for either party was proper and the court could decide the coverage issue based solely upon the allegations of the Complaint. The judgment determines that the policy of insurance extended coverage to the Club for loss of use of tangible property arising from "incidental contracts," as well as for claims of personal injury arising out of invasion of the right of private occupancy. The trial court ruled against Ranger on its defense that the claim set forth in the Skolnicks' complaint did not meet the policy's definition of an "occurrence" and that any claims of the Skolnicks fell within certain enumerated policy exclusions.

Based upon the findings, it was ordered that the Club recover from Ranger the sum of $25,000 which it had paid to the Skolnicks, as well as attorney's fees. This judgment was appealed to the District Court of Appeal, Third District.

In the initial decision rendered by the District Court, Ranger's argument that the acts of the insured were not an ''occurrence" and therefore not within the coverage of the

policy was rejected since the personal injury liability provision did not contain a requirement that a claim be based upon an occurrence. Similarly, the court rejected Ranger's argument that the policy did not provide coverage because the Club's actions fell within a policy exclusion for violation of a penal statute. The District Court determined that the relevant provision of the Metropolitan Dade County Code was not a penal ordinance and no exclusion applied. The summary judgment entered in favor of the Club was affirmed.

Judge Ferguson dissented, disagreeing with the majority's decision that the designated section of the Metropolitan Code was not a penal ordinance. According to the dissenting judge, the policy exclusion would govern the act of the insurer. Moreover, Judge Ferguson decried the propriety ". . .of saddling the insurer with responsibility for illegalities of this ilk. . ." which ". . .runs against the public policy which makes the acts unlawful in the first instance." In addition, Judge Ferguson would not interpret a policy of insurance to provide coverage for acts of intentional religious discrimination, acts specifically prohibited by constitution and penal laws since to do so would clearly contravene the public policy of this state.

Ranger filed both a motion for rehearing and a motion for rehearing en banc, raising in the motion for rehearing the violation of public policy fostered by the majority decision, which would afford insurance coverage for acts of

religious discrimination.

While Ranger's motions for rehearing were pending, the District Court of Appeal directed the parties to file supplemental briefs on the issue of whether the public policy of the state should prohibit the enforcement of an insurance contract covering damages arising from intentional religious discrimination. The matter was reheard en banc and resulted in the decision which is here reviewed, based upon the above-stated certified question.

In a *6-3* split decision, the majority concluded that ". . .recovery should not be precluded by public policy, and Ranger, after accepting premiums, must provide coverage for a claim falling within the personal provision of the policy." The majority recognizes that no Florida case has decided the issue of whether public policy prohibits recovery under an insurance contract for losses paid by an insured as the result of an act that amounts to intentional discrimination.

Judge Ferguson, joined by two other judges, dissented, stating ". . .an insurer under a general liability insurance policy should not be obligated to pay for damages caused by an insured's intentional acts of discrimination which violate the Constitution and its statutes, and a local ordinance where the non-criminal harm caused to the victims was specifically intended."

ISSUE INVOLVED

As stated by the District Court of Appeal, the question

certified as one of great public importance is as follows:

> "DOES THE PUBLIC POLICY OF FLORIDA PROHIBIT AN INSURED FROM BEING INDEMNIFIED FOR A LOSS RESULTING FROM AN INTENTIONAL ACT OF RELIGIOUS DISCRIMINATION."

SUMMARY OF ARGUMENT

Intentional racial and religious discrimination is an evil of fundamental constitutional dimension. To require an insurer to indemnify an insured who has committed intentional discrimination unquestionably violates the clearly expressed public policy set forth in the Declaration of Rights, Section 2 of the Florida Constitution: "No person shall be deprived of any right because of race, religion or physical handicap." Depriving compensation to the victim of intentional discrimination is not an issue in this case. The perpetrator of religious discrimination has paid its victim. Now that perpetrator seeks to be indemnified by its insurance company.

Even though the insurance carrier has accepted premiums, it cannot be estopped from denying coverage. That same public policy which forbids commission of an illegal act also prohibits requiring payment for that act by an estoppel.

Permitting the perpetrator of an intentional act of religious discrimination to be indemnified for the act committed encourages rather than deters similar conduct. Prohibiting insurance coverage for discrimination is both desirable and necessary to deter others from engaging in

similar conduct.

ARGUMENT

THE PUBLIC POLICY OF FLORIDA AS WELL AS THE UNITED STATES PROHIBITS AN INSURED FROM BEING INDEMNIFIED FOR A LOSS RESULTING FROM AN INTENTIONAL ACT OF RELIGIOUS DISCRIMINATION.

While it is unthinkable that this Court would perpetuate or condone racial bigotry and religious prejudice, this case could be a vehicle to accomplish that end. No amount of legal rationalization, nor reference to the ease with which an insurer can exclude coverage for intentional acts of discrimination, nor statements about how the marketplace will discourage wrongful acts of discrimination, can change the simple fact that a negative answer to the question certified requires an insurance company to repay the perpetrator of intentional religious discrimination those damages which the perpetrator was required to pay to the victim of the discrimination.

To paraphrase the language involved in those cases involving employment discrimination, this is not an unintentional discrimination occurring through facially neutral conduct, but an intentional act in violation of state and federal law. See, E-Z Loader Boat Trailers, Inc. v. Travelers Indemnity Co., 106 Wash.2d 901, 726 P.2d 439 (1986).

The precise nature of the intentional act committed by respondent cannot be ignored. In fact, the particular heinous nature of the discrimination practiced in the

instant case violates the most basic precepts of both the federal and state constitutions.

Recently, in Wygant v. Jackson Board of Education, **476 U.S. ___, 106** S.Ct. **1842, 90** L.Ed.2d **260 (1986),** the Supreme Court recognized that it had consistently repudiated distinctions between citizens solely because of their ancestry ". . .as being odious to a free people whose institutions are founded upon the doctrine of equality. [Citations omitted]." The decision also states that ". . .racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination. [Citations omitted].'' Wygant v. Jackson Board of Education, supra at page **1846.**[3]

The extraordinary dimension of religious and racial discrimination is also touched upon by the Supreme Court in Shelley v. Kremer, **334** U.S. **1, 68** S.Ct. **836, 92** L.Ed. **1161 (1948).** While the primary focus is upon the necessity of state action as a violation of the Fourteenth Amendment, the public policy of the Court is clearly stated: Any discriminatory act based on considerations of race or color violate the fundamental aim of the framers of the United States Constitution.

This unvarying principle is given legislative voice in

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[3] Ironically, these statements were made in a decision which found a school board policy of extending preferential protection against layoff to some employees because of race a violation of the Fourteenth Amendment.

42 U.S.C. $1982: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

The Declaration of Rights of the Florida Constitution mandates that the public policy of Florida must prohibit an insured from being indemnified for a loss resulting from an intentional act of religious discrimination: "No person shall be deprived of any right because of race, religion or physical handicap." Article I, Section 2, Florida Constitution. To permit a person or organization to insure itself against damages imposed for intentional religious discrimination violates this simply and clearly announced organic law. How can it rationally be argued that religious discrimination violates organic law, but one who perpetrates that discrimination should be indemnified for committing the act?

Seventy-five years ago, this Court said that every word of the state Constitution should be given its intended meaning and effect. Essential constitutional provisions ought to be regarded as mandatory. Crawford V. Gilchrist, 64 Fla. 41, 59 So. 963 (1912). How can provisions of Section 2 of the Declaration Rights be regarded as mandatory if a person can intentionally engage in religious discrimination and thereafter secure indemnification for the damages caused?

Parties to an insurance policy are free to contract as they please, but that policy of insurance cannot be illegal

or violative of the public policy of this State. See, Georgia Home Insurance Company v. Hoskins, 71 Fla. 282, 71 So. 285 (1916); Shingleton v. Bussey, 223 So.2d 713 (Fla. 1969); American Empire Insurance Company of South Dakota v. Fidelity and Deposit Company of Maryland, 408 F.2d 72 (5th Cir. 1969), cert.den., 396 U.S. 818. Furthermore, where public policy forbids a particular insurance contract, public policy also forbids the accomplishment of the result by an estoppel, that is enforcing a contract merely because one party has paid a premium and the other party has issued the policy. Northwestern National Casualty Company v. McNulty, 307 F.2d 432 (5th Cir. 1962); St. Paul Insurance Companies v. Talladega Nursing Home, Inc., 606 F.2d 631 (5th Cir. 1979).

Because the act for which respondent seeks indemnity involved intentional religious discrimination, this situation rises to a level of constitutional importance not otherwise achieved by acts of lesser consequence. Thus, while it has been determined that person can be insured against damage arising from striking someone in the face with a fist, this act certainly does not rise to the constitution dimension of intentional religious and racial discrimination and cannot be authority for providing insurance coverage under the general argument that there are many instances where intentional acts can be covered by insurance. See, Hartford Fire Insurance Company v. Spreen, 343 So.2d 649 (Fla. 3d DCA 1977).

Many years ago, Justice Cardozo stated the principle which common sense dictates should control in the case of an intentional act and its insurability: "Undoubtedly the policy is to be confined to liability for injuries that may be described as accidental. Even if its terms do not so limit it, the fundamental principle that no one shall be permitted to take advantage of his own wrong would import the limitation." Messersmith v. American Fidelity Co., 232 N.Y. 161, 133 N.E. 432, 19 ALR 876 (1921).

One insurance treatise states:

> "It is generally held to be contrary to public policy to insure against liability arising directly against the insured from his willful wrong. Any insurance which purports the insured against any loss which he may purposefully and willfully cause, or which may arise from his immoral, fraudulent, or felonious conduct, is void as against public policy." 9 Couch on Insurance 2d, Section 39:15 (Rev. Ed. 1985).

The judgment of the trial court required the petitioner to indemnify respondent for that amount previously paid as damages arising from intentional religious discrimination. The District Court in its affirmance has determined that prohibiting insurance coverage "is not necessary'' since "the marketplace itself will discourage wrongful acts of discrimination." The Court reasons that since insurance companies have a strong interest in avoiding claims, an entity with a history of discrimination will be unable to procure insurance and insurers can contracturally exclude

coverage for damages arising from acts that amount to intentional discrimination. This argument falls wide of the mark.

Is it any less repugnant to the public policy of this State that an entity ~~without~~ a history of religious discrimination has been able to secure insurance and thereafter claims indemnity for actions specifically prohibited by the organic law of this State? Even though an insurance company can contractually deny coverage for damages arising from acts that amount to intentional discrimination, there is nothing which requires an insurer to do so, nor is there any indication from the cut-throat marketplace of the insurance industry that companies are desirous of do so and losing business as a result of such a policy exclusion.

The majority decision determines that prohibiting an insured from being indemnified for a loss resulting from an intentional act of religious discrimination ". . .would not be desirable from the standpoint of the victims of discrimination." The Court reasons that prohibiting insurance coverage for discriminatory acts will have an adverse impact upon the competing public policy of fostering recovery for damages suffered by the victims of discrimination.

Even if competing public policies are involved, that public policy which would prohibit a perpetrator of intentional religious discrimination from receiving

indemnification for the damages cuased is of much greater constitutional dignity than the policy which would encourage recovery by the victims of discrimination.[4] If the conduct can be discouraged in the first place, there will be less victims of discrimination. Furthermore, it must be remembered that in this instance the perpetrator of intentional religious discrimination was solvent, did pay the victim, and now seeks recompense from its insurer.

The Skolnicks have been paid and will not suffer if this Court were to determine that it is against the public policy of this State to permit the respondent to indemnify itself for the payment already made. Concern about whether the victim is paid puts the cart before the horse. Discourage or eliminate the repugnant conduct and there need be no concern for payment to the victim.

CONCLUSION

The dissenting opinion to the District Court decision on rehearing en banc succinctly summarizes the reasons why this court must answer the question certified to it in the affirmative and determine that the public policy of Florida prohibits an insured from being indemnified for a loss resulting from an intentional act of religious discrimination:

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[4] As pointed out in the dissenting opinion on rehearing en banc, a victim's interest in receiving non-compensatory punitive damages is small compared with the public interest to punish and deter by making the wrongdoer pay. The analogy is clear.

"The acts allegedly committed by the insured are prohibited by the Constitution, statutes, and ordinances, and thus clearly run afoul of strong public policy. Further, the acts we think are not adequately deterred if they are held covered by a general liability policy of insurance.

* * *

In our view an insurer under a general liability insurance policy should not be obligated to pay for damages caused by an insured's intentional acts of discrimination which violate the Constitution statutes, and a local ordinance where the non-criminal harm caused to the victims was specifically intended."

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail upon James M. McCann, Jr., Mershon, Sawyer, Johnston, Dunwoody & Cole, Southeast Financial Center, Suite 4500, Miami, Florida 33131, this 10th day of August, 1987.

_____