IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,851

RANGER INSURANCE COMPANY,

Petitioner,

vs.

BAL HARBOUR CLUB, INC.,

Respondent.

PETITIONER'S REPLY BRIEF ON THE MERITS

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POINT I

JURISDICTION

Respondent argues that this Court should not accept jurisdiction of the certified question presented by the District Court of Appeal because "it is not germane to the cause presented in the trial court." Respondent repeatedly asserts that the public policy issue inherent in the certified question was not raised by petitioner in the trial court. Only slavish adherance to the untenable doctrine of form over substance will support this assertion.

The complaint for declaratory relief filed by the petitioner asserts that the insurance carrier was in doubt as to its obligation to provide a defense or extend coverage in the litigation initiated by the Skolnicks as set forth in the attached complaint previously filed against the Bal Harbour Club. The essence of the Skolnicks' complaint is that through an interrelationship of deed restrictions and association by-laws, the complainants were the subject of an act of intentional religious discrimination.

As part of the complaint for declaratory relief filed by petitioner, it was asserted that the insurer was in need of a declaration concerning an alleged violation by its insured of Chapter 11A of the Dade County Code. This provision makes it unlawful for a person or corporation to refuse to sell or otherwise deny any housing accomodation to a person because of his religion.

The order granting summary judgment to the defendant in

the trial court mentions questions as to whether the club willfully violated Chapter 11A of the Dade County Code which deals with discrimination in housing and acknowledges that one of the two defenses to coverage raised by petitioner was the willful violation of a code section dealing with discrimination.

In the initial brief of appellant filed by petitioner in the District Court of Appeal, it was argued that the circumstances causing the Skolnicks to seek recovery arose out of deed restrictions and membership requirements set forth in the club's charter and by-laws.[1] These restrictions and provisions were characterized as constituting an intentional undertaking to implement discriminatory policies towards Jews in the acquisition of property in the Bal Harbour subdivision. (Brief of Appellant, page 8)

The reply brief of appellant also asserts that under the allegations of the Skolnick complaint the acts of the club were deliberately designed to cause harm to a specific class of persons--namely those of the Jewish religion (Reply Brief of Appellant, page 4)

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[1] It is interesting to note that respondent argues in its brief that the charter and bylaws of the club do not require that all owners of property in the subdivision be members of the club. This argument overlooks Article 11, Section c of the amended charter of the club which sets forth as one of the purposes of the club to duly enforce deed restrictions. Section 15 of the deed to the property sought to be purchased by the Skolnicks required that an owner must be a member of the club.

Thus, for respondent to argue that the question of religious discrimination and the implications of such discrimination upon insurance coverage somehow magically appeared in this litigation only after the dissenting opinion of Judge Ferguson is simply not accurate. The public policy issue of providing insurance coverage for an act of intentional religious discrimination was the underlying theme of this litigation from the outset--that is the complaint filed by the Skolnicks--and continuing through the settlement of that litigation and the subsequent declaratory action concerning insurance coverage.

To argue that the policy issue contained in the certified question of the District Court of Appeal is not "germane to this case" is to ignore the underlying ramifications which have existed in this case from the outset. While, as the District Court of Appeal stated in its decision on rehearing, the precise issue concerning public policy had not been raised it cannot be seriously argued that constitutional ramifications were not involved. These constitutional ramifications undoubtedly caused the District Copurt of Appeal to require both parties to submit supplemental briefs and to argue before an en banc panel the public policy issue now set forth in the certified question presently before this Court.

The petitioner does not argue with the general proposition that questions not passed upon by a trial court should not be raised for the first time on appeal. This

rule, however, has been repeatedly subjected to the exception that an error affecting fundamental rights may be raised for the first time on appeal. See Love v. Hannah, 72 So.2d 39 (Fla. 1954); Marinelli v. Weaver, 187 So.2d 690 (Fla. 2d DCA 1966).

Six judges of the Third District Court of Appeal have recognized the ''importance of the interests involved" and asked this Court to answer the question of whether the public policy of Florida prohibits indemnification for a loss resulting from an intentional act of religious discrimination. Three judges of that court would have answered that question in the affirmative without certification. The question is obviously of fundamental proportion.

Ultimately involved is whether the petitioner must reimburse its insured for money paid to the Skolnicks in settlement of the litigation arising from allegations of intentional religious discrimination. Whether or not the trial judge chose to extend coverage based on his interpretation of policy exclusions does not change the ultimate impact of what occurred. The Skolnicks sued for acts of intentional religious discrimination allegedly committed by the Bal Harbour Club. The club, rather than litigating the issue, chose to terminate the litigation by making a cash payment to the complainants. The issue is whether the club's insurer must reimburse it for the amount of settlement paid to the Skolnicks. The certified

question, encompasses this issue, was deemed vitally important by all members of the Third District Court of Appeal, and should be answered.

POINT II

THE MERITS

Respondent argues that the question certified to this Court should be answered in the negative because no exception to the policy of insurance should be made for victims of discrimination.

First, it is argued that the public policy of Florida favors enforcement of valid contracts. Petitioner deems it unnecessary to expound at length on respondent's constitutional argument that the right to contract to protect one's property is constitutionally guaranteed. To argue reluctance to impair the right to contract as a basis for justifying the reimbursement of an insured for acts of intentional religious discrimination is facially absurd.

It is true that the insurance contract in the present case does not on its face collide with constitutionally protected rights. There is nothing in the insurance contract which says that an insured may engage in acts of intentional religious discrimination and still recover from the insurance company for any damages caused by those acts. As in most other cases involving insurance contracts, it is not the explicit words of the contract which cause problems, but rather how a written contract is to be interpreted.

Respondent supports its position by reference to

various decisions which have allowed recovery where damages arose from the wrongful act of an insured. Examination of this Court's decision in Everylades Marina, Inc. v. American Eastern Development Corporation, 374 So.2d 517 (Fla. 1979) clearly sets forth the distinguishing feature of this case. In Everglades Marina, the insured intentionally set fire to a building owned by a corporation of which he was president and sole stockholder in which pleasure boats were stored and destroyed.[2] The boat owners made claims against their own insurance companies. These claims were paid and the insurers brought a subrogated claim against the marina and its insurer.

As phrased by this Court, the issue for determination was whether the insurance policy sold by the marina's insurer covered the damage caused by the fire originating from the criminal conduct of the principal of the insured corporation.

The Court rephrased the question which had been certified to it by the United States Court of Appeals, Fifth Circuit, pursuant to Section 25.031, Florida Statutes (1977) to be whether the public policy as established by the laws of Florida prohibited third-party beneficiaries of an insurance policy from recovery of benefits because a loss was intentionally caused by criminal acts of the insured.

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[2] This Court also notes that while the building was intentionally set on fire it was not done with the purpose or motive of destroying the boats.

In answering this question in the negative, the Court recognized the long established law of Florida that an insurer is not liable to indemnify the insured for losses directly incurred by the fraud or misconduct of that insured. This same public policy precludes recovery under an insurance policy where the insured has committed a criminal act with known and necessary consequences. The Court refused to extend that policy to third-party beneficiaries of the insurance policy by imputing the criminal act of the insured to those who suffered loss because of the criminal act.

The instant case, it must be noted, is not an action by third-party beneficiaries or their insurer bringing a subrogated claim against the insurance company of the criminal perpretator. In this case, the party alleged to have committed an act of intentional religious discrimination, the Bal Harbour Club, Inc., is seeking by virtue of this action to reimburse itself for the amount paid in settlement of the litigation brought by the Skolnicks.

For this Court to answer the certified question in this case in the negative would be to violate the long established law of this State set forth in the Everglades Marina case that an insurer is not liable to indemnify the insured for losses directly incurred by the insured's fraud or misconduct.

For this same reason, the last argument put forth by

respondent is meritless. Respondent argues that the public policy of this State should remain in favor of liability insurance to compensate victims of intentional wrongs. The victims in this case, the Skolnicks, were the victims of a wrongful act of an insured which caused an intended rather than unintended harm. As noted in Judge Ferguson's dissent, this distinction has been noted and honored in Florida cases. The "victims" have been compensated.

Furthermore, as noted in Judge Ferguson's dissent, the discrimination cases cited by respondent in which insurance coverage has been permitted were cases based upon disparate impact as imposed to disparate treatment. Clearly the latter situation is involved and, as Judge Ferguson points out, this is not a case where injury resulted from a course of conduct which had discriminatory impact without discriminatory intent. Here, the litigation which was settled by respondent involved a longstanding policy of intentional religious discrimination which must be discouraged by prohibiting reimbursement to the perpetrator under the general provisions of a business policy.

This Court can answer the question certified to it, that is prohibiting an insured from being indemnified for a loss resulting from an intentional act of religious discrimination, without depriving innocent victims of compensation for their loss. At the same time, by answering the certified question in the affirmative, this Court will judicially discourage similar acts in the future by those

who would seek to insure themselves against loss caused by intentional religious discrimination.

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 16th day of September, 1987.

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