OA 12-6-88

IN THE SUPREME COURT OF FLORIDA

CASE NO. 72,412

CLAY SHEARER, ET AL

Petitioners,

vs.

CENTRAL FLORIDA YMCA, ETC., ET AL

Respondents.

PETITIONERS' INITIAL BRIEF

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INTRODUCTION

The Appellants from the Fifth District Court of Appeals, S[redacted] M[redacted], as Mother and next friend of C[redacted] M[redacted], a minor; P[redacted] P[redacted], as Mother and next friend of R[redacted] P[redacted], a minor and C[redacted] T[redacted] as Mother and next friend of C[redacted] T[redacted] will be referred to as Appellants or Co-Petitioners in this Brief.

CLAY SHEARER, will be referred to as Co-Petitioner or by individual name.

The Respondents, CENTRAL FLORIDA YMCA and THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, shall be referred to either as Respondents or individual names.

POINTS ON APPEAL

1. THE FIFTH DISTRICT COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S DECISION, AFFIRMING THE TRIAL COURT'S GRANTING OF A SUMMARY JUDGMENT FOR THE INTERVENOR, THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, SINCE THE TRIAL COURT FAILED TO FOLLOW THE STANDARDS AS SET FORTH IN SIMILAR CASES.

STATEMENT OF THE CASE AND OF THE FACTS

This is an appeal that originated from the partial finding of Summary Judgment for the Intevenor, The Insurance Company of the State of Pennsylvania.

After the Trial Court granted the partial Final Summary Judgment for the Intevenor, an appeal to the Fifth District Court of Appeals was taken, which rendered a decision affirming the decision of the Trial Court. The Fifth District Court of Appeals decision conflicts with a decision of the Second District Court of Appeals and the Supreme Court of Florida has accepted jurisdiction over this matter.

The Co-Petitioner will set forth reasons why the ruling of the Trial Court, granting The Insurance Company of the State of Pennsylvania's Motion for Summary Judgment was in error.

SUMMARY OF THE ARGUMENT

This case arose from the filing of a Complaint on January 6, 1986, in which the Co-Petitioners, M[redacted], P[redacted] and T[redacted] alleged that the Co-Petitioner, SHEARER, molested three boys during an overnight activity sponsored and held by the CENTRAL FLORIDA YMCA. Mr. Shearer was employed by CENTRAL FLORIDA YMCA as Manager at the time. The Complaint was later amended and sought claim against CLAY SHEARER and CENTRAL FLORIDA YMCA.

On October 10, 1986 THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, moved to intervene, based upon their being comprehensive general liability insurance carrier for CENTRAL FLORIDA YMCA. Intervention was sought to determine whether the alleged acts of CLAY SHEARER constituted "an occurrence" which would give rise to coverage under the policy of insurance.

A Motion for Summary Judgment of the Intervenor, THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, was filed February 19, 1987 and an Order granting the Motion was entered July 6, 1987.

Following the decision of the Trial Court, an Appeal to the Fifth District Court of Appeals was heard. By Order, dated March 31, 1988, and subsequent Order on a Motion for Rehearing and Suggestion of Certified Question, dated April 26, 1987, filed with the Fifth District Court of Appeals, affirmed the decision of the Trial Court.

The Supreme Court of Florida has accepted jurisdiction to determine conflicts of decisions of the District Courts of Appeals of Florida.

ARGUMENT AND CITATIONS OF AUTHORITY

THE FIFTH DISTRICT COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S DECISION, AFFIRMING THE TRIAL COURT'S GRANTING OF A SUMMARY JUDGMENT FOR THE INTERVENOR, THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, SINCE THE TRIAL COURT FAILED TO FOLLOW THE STANDARDS AS SET FORTH IN SIMILAR CASES.

The Fifth District Court of Appeals in affirming the Trial Court's granting of a partial Final Summary Judgment for THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA failed to make a determination of the subjective intent of the insured or any resolution. It further failed to resolve other factual issues relevant to the determination of the insured's intent. The Trial Court's decision was based upon the deposition of CLAY SHEARER and does not consider the subjective intent of the insured as set forth as a test in determining the liability of a Summary Judgment as the test is set forth in Zordan by & through Zordan vs. Page, **500** So.2d **608** (2nd DCA, **1986).** In Zordan, cert. den. April 14, 1987, the District Court was faced with a case quite similar to the matter subjudice. A personal injury suit for emotional injuries and damages for alleged sexual fondling of a child. The Complaint alleges the insured sexually fondled his step-grandaughter. The insured's deposition denies any improper behavior. The Trial Court denied insurance on Summary Judgment. No finding or reasoning was contained in the Summary Judgment Order. The District Court reversed the Summary Judgment based upon their being unresolved facts.

In a lengthy opinion, the District Court reasoned that coverage would not be excluded under intentional injury exclusion clause, unless the insured acted with specific intent to cause injuries to the Plaintiff. The District Court further distinguishes between specific and general intent. Even in a person has the general intent to commit an act, he may not be found to have the specific intent to cause the results unless it can be shown he subjectively intended the results.

Based on the foregoing principal, the Trial Court must make a specific determination of the insured's intent before coverage can be excluded.

The District Court further reasons that coverage should not be excluded under the language of the policy because the insured's intent to injure should not be inferred simply from his intent to act. There is somewhat of a distinction drawn between sexual molestation including penetration or violence as opposed to the facts of Zordan and the instant matter dealing with sexual fondling.

The Fifth District Court of Appeals affirmed the Trial Court's finding of no coverage based on Landis vs. Allstate Insurance Company, 516 So.2d 305 (3rd DCA 1987). The Landis decision clearly conflicts with Zordan, in that in Landis the acts of child molestation were clearly intentional and deliberate acts of the insured and that the insurance carrier was not required to provide coverage or a defense under the intentional injury exclusion of the insurance policy. The Third District Court of Appeals, in Landis, rejects the subjective intent test

as set forth in Zordan and adopts Judge Frank's dissent in Zordan. Thus there is a direct conflict between Zordan, Landis and the matter subjudice that is now before this Court to determine what criteria must be met in order for a Summary Judgment to be upheld to exclude coverage under an insurance policy for intentional acts.

The Second District Court of Appeals recently dealt with a similar issue. In M.V. a minor, by & through his Mother and next friend, W.W. and W.W., individually, vs. Gulf Ridge Counsel Boy Scouts of America, Inc., a Corporation, **13** Fla. Law Weekly, **1953** (2nd DCA August 26, **1988),** which involves damages for alleged emotional distress caused to a boy scout by the intentional homosexual acts of a first aid attendant at a camp operated by the Counsel of the Boy Scouts, the Second District Court of Appeals writes an opinion concerning the liability under respondent's superior for an employee's intentional infliction of an injury upon a third party. The District Court appears to hold that the employer may be held liable for the intentional act of the employee under the theory of respondent's superior if the employee's misconduct occurred within the scope of the employment. The test to determine is whether the employee was doing what his employment contemplated. A jury question of whether the employee's intentional tort was within the scope of employment is then raised under the facts of the case. If liabilty can be found for intentional acts of molestation of an employee, then argument could be made that the insurance policies would have to cover such acts if it was determined that they were done in the

course and scope of employment, even though it would fall under the intentional acts exclusions of a policy of insurance.

This Court needs to set forth the criteria necessary for a Trial Court to determine on Summary Judgment or otherwise, what factors must be applied or found to intentional acts of employees in order to exclude the insurance carrier from providing coverage under an intentional acts exclusion. It appears under Zordan that the Court would have to make a determination of a subjective intent of the alleged employee to determine whether his acts were indeed intentional. Under Landis, the test would be whether or not the acts were classically an intentional tort, irregardless of the subjective intent of the tort feasor.

It is the Co-Petitioner's contention that public policy would best be served by having the stricter subjective intent test apply since there has been an apparent increase in child molestation cases. Although, insurance carriers are not in the business of providing coverage for intentional acts of malfeasance, the strict interpretation of Landis would circumvent the close scrutiny by Trial Court of the acts alleged in the Complaint. The Trial Court would not have to discern between different types of behavior as alleged in the Complaint rather than determine coverage merely upon a superficial determination of the type of acts which preclude insurance coverage if the Landis test is applied.

An analogy may be argued that commonly insurance carriers provide coverage for automobile accidents involving drivers who intentionally and voluntarily become intoxicated and drive a

vehicle, causing an accident. Argument could be raised that the intentional driving of a vehicle while one's normal faculties are impaired would be an exclusion under an intentional act, excluded under the automobile liability policy. There are just too many gray areas when a Trial Court deals with allegations of child molestation to simply apply the Landis test, without further inquiry by the Trial Court into the subjective tests as set forth by Zordan.

The intentional exclusion under liability insurance may be necessary for the insurer to enable them to set their rates and supply coverage for losses under the polices. Some cases hold that an injury intentionally inflicted by an employee or caused by his assault of the injured person is not accidental, Cordon vs. Idemnity Insurance Company of North America, 123 Fed.2d 363 (CA Ohio 1941), while others hold the "severability clause" does not need to be recognized explicitly. The majority of the Court's have arrived at a conclusion which is in line with the Cordon concept. Huntington Cab Company vs. American Fidelity Casualty Company, 63 F.Supp. 939 (D.C.W.VA. 1946).

In Maryland Casualty Company vs. Mitchell, 322 F.2d 37 (CA TEX. 1963), a coverage question concerning an assault and battery by an owner's agent during a tenant eviction was presented. In that case, the state of will of the person by whose agency, injury is caused, was held determinative of whether or not the injury was "accidental" within the meaning of a policy of liability insurance. Thus, it would appear that the Maryland Casualty Company, op.cit., case would support the test as set

forth in Zordan, since the subjective intent of the tort feasor would be determinative of whether the injury was accident within the policy of liability insurance.

If the resulting damage can be viewed as unintended by a fact-finder, the result constitutes an "accident" for the purpose of the liability insurance policy. Appleman, Insurance Law and Practice (Berdal ed), Section **4492.02.** Apparently a finder of fact must determine the state of mind as set forth in Zordan in order to determine whether or not the act may be excluded under the policy of insurance, thus precluded by Summary Judgment.

The State of California has a Statute which provides that an insurer will not be liable for losses resulting from an insured's willful act, whether or not the results were intended and irrespective of whether the policy in question contains an intentional act exclusion. The focus under California law is on the intention to do the act which causes the damage, rather than the intention caused as a result of the act. U.S. Fidelity and Guaranty Company v. American Employers Insurance Company, **205** CAL. RPTR. **460, 159** CAL.F3rd **277** (3rd DCA **1984).** Apparently the State of California would look at the intent of the insured rather than the type of act which took place. This would be consistant with an analysis as set forth in Zordan.

Classicly, the word "intent" within the context of a specific exclusion in a liability policy against an intended bodily injury means that the actor desires to cause the consequences of his act or believes that the consequences are

substantially certain as a result. Appleman, Insurance Law and Practice (Berdal ed), Section 4492.02.

Thus the determination of subjective intent as set forth in Zordan is consistent with the classic definition.

CONCLUSION

The Co-Petitioner contends that the conflicts between the Districts should be resolved pursuant to the criteria set forth in Zordan by & through Zordan vs. Page, 500 So.2d 608 (2nd DCA 1986), since a stricter test to determine liability coverage should be made by a Trial Court. Co-Petitioner further seeks that the decision of the Fifth District Court of Appeals be overturned and that this matter be remanded back to the Trial Court for further proceedings.

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioners' Initial Brief has been furnished this 30 day of September, 1988, by U.S. Mail to: MICHAEL M. BELL, ESQUIRE, Post Office Box 536487, Orlando, Florida 32853 and THOMAS G. KANE, ESQUIRE, 2816 E. Robinson Street, Suite 1, Orlando, Florida 32803.

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