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IN THE SUPREME COURT OF FLORIDA

CASE NO. 72,412

CLAY SHEARER,

Petitioner,

vs.

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,

Respondent.

On review from the Fifth District Court *of* Appeal, Florida

INITIAL BRIEF

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STATEMENT OF THE CASE AND FACTS

On January 6, 1986, Plaintiffs, C[redacted] A. T[redacted] as mother and next friend of C[redacted] T[redacted] P[redacted] J. P[redacted] as mother and next friend of R[redacted] P[redacted]; and S[redacted] M[redacted], as mother and next friend of C[redacted] M[redacted] filed separate lawsuits against CENTRAL FLORIDA YMCA, alleging that an employee or agent of the CENTRAL FLORIDA YMCA "acted in a willful, wanton and reckless manner in sexually molesting the minor plaintiffs, by fondling their genitals." (See the initial Complaint filed in the case of S[redacted] as mother and next friend of C[redacted] M[redacted] vs. CENTRAL FLORIDA YMCA, (R.1-2).

The three initial actions were consolidated by order of the trial court dated April 15, 1987 (R.18-19).

On April 29, 1986, Plaintiffs filed an Amended Complaint, setting forth a cause of action for each of the Plaintiffs against Defendants CENTRAL FLORIDA YMCA and CLAY SHEARER. The Amended Complaint alleges that the minor plaintiffs were on the premises of the CENTRAL FLORIDA YMCA during an overnight event on April 15, 1985. The Amended Complaint alleges that during the overnight event, CLAY SHEARER, an employee of the CENTRAL FLORIDA YMCA "did act in a willful, wanton, and reckless manner by sexually molesting (each plaintiff) by fondling his genitals." (R.21-34) On May 1, 1986, Defendant CLAY SHEARER filed his Answer and Affirmative Defenses admitting he was present on the premises of the CENTRAL FLORIDA YMCA during the

overnight event alleged in Plaintiffs' Amended Complaint but denied any wrongdoing or inappropriate behavior (R.37-40).

On October 10, 1986, THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, liability insurer for the CENTRAL FLORIDA YMCA, filed a Motion to Intervene (R.48-50). The trial court granted the Motion to Intervene filed by THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA in its order of November 6, 1986 (R.55).

On February 19, 1987, Intervenor, THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, filed a Motion for Summary Judgment. Essentially, it was the position of THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA that the allegations set forth in the Plaintiffs' Amended Complaint were intentional acts, and therefore it had no duty to defend or indemnify Defendant CENTRAL FLORIDA YMCA or CLAY SHEARER R. 73-151).

On February 20, 1987, the deposition of Defendant CLAY SHEARER was taken. CLAY SHEARER testified that he had obtained a teaching certificate from the State of Kentucky (R.173). Prior to being employed by the CENTRAL FLORIDA YMCA, Defendant CLAY SHEARER had taught elementary school in Kentucky and Manatee County, Florida. (R.177, 178). Defendant CLAY SHEARER began his employment with the CENTRAL FLORIDA YMCA on October 1, 1984 (R.182). Defendant CLAY SHEARER admitted being present on the premises of the CENTRAL FLORIDA YMCA during the overnight event on April 15, 1985, but denies that he fondled or molested any of the minor plaintiffs. (R.168, 169). In fact, CLAY SHEARER testified that he has never had any complaint or accusation leveled against him for the unwelcome touching of a child (R.204).

On July 2, 1987, a hearing was held before the trial court on the Motion for Summary Judgment filed by Intervenor, THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA. In its order of July 6, 1987, the trial court granted Partial Final Summary Judgment in favor THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, finding that THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA had no duty to defend or indemnify CLAY SHEARER under the provisions of the liability insurance policy issued by THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA to CENTRAL FLORIDA YMCA. (R.348-349).

On July 27, 1987, Plaintiffs filed an Appeal from the trial court's order granting Partial Final Summary Judgment in favor of THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA with the Fifth District Court of Appeal. (R.352). Defendant CLAY SHEARER joined this appeal by filing his Notice to Join Appeal on July 30, 1987. (R.353).

On March 7, 1988, oral argument on the above-referenced appeal was held before the Fifth District Court of Appeal. In its opinion dated March 31, 1988, the Fifth District Court of Appeal affirmed the ruling of the trial court granting Partial Final Summary Judgment in favor of THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA. In its opinion, the Fifth District Court of Appeal based its decision on Landis v. Allstate Insurance Company, 516 So.2d 305 (3rd DCA 1987), and Judge Frank's dissent in Zordan v. Page, 500 So.2d 608 (2nd DCA 1986), Rev. Denied Sub Nom., South Carolina Insurance v. Zordan, 508 So.2d 15 (Fla. 1987).

On April 14, 1988, Plaintiffs in the underlying action filed a Motion for Rehearing and Suggestion of Certified Question. The Fifth District Court of Appeal entered an Order Denying Plaintiff's Motion for Rehearing and Suggestion of Certified Question on April 26, 1988.

On May 10, 1988, CLAY SHEARER filed his Notice to Invoke the Discretionary Jurisdiction of this Court. On May 19, 1988, CLAY SHEARER filed his Initial Brief on the Issue of the Supreme Court's Jurisdiction. Simultaneously, CLAY SHEARER filed a Motion to Consolidate the Appeal in the instant case with the Appeal in the case of Landis v. Allstate Insurance Company, CA #71-910, which is presently pending before this Court. On June 14, 1988, this Court's Order Denying CLAY SHEARER's Motion to Consolidate was received.

On September 8, 1988, this Court issued an Order accepting jurisdiction over this case and setting the matter for Oral Argument. This is Petitioner's Initial Brief on the Merits.

SUMMARY OF THE ARGUMENT

The Plaintiffs' Complaint alleged that Petitioner CLAY SHEARER sexually molested each of the minor Plaintiffs by fondling their genitals. Petitioner, both in his Answer and his testimony on deposition denied any improper conduct. The trial court granted Respondent's motion for summary judgment, excluding coverage as a matter of law. In its order granting summary judgment, the trial court found there was no "occurrence" as defined by the policy of liability insurance issued by Respondent under which Petitioner was an insured. "Occurrence," is defined in the policy as an accident, which results in bodily injury neither expected nor intended from the standpoint of the insured. It is the well settled law of this state that intentional act exclusion clauses such as the one in the policy issued by Respondent, does not exclude coverage for intentional acts, unless the insured subjectively intended to cause injury. As the Petitioner denied any wrongdoing, it was improper for the trial court to grant summary judgment in favor of Respondent, on motion for summary judgment.

The Fifth District Court of Appeal affirmed the decision of the trial court, adopting the reasoning set forth in Judge Frank's dissent in Zordan v. Page, **500** So.2d **608** (2nd DCA **1986)** and the majority decision in Landis v. Allstate Insurance Company, **516** So.2d **305** (3rd DCA **1987).** The dissent in Zordan, and the majority decision in Landis, stand for the proposition that intent to injure can be inferred from certain acts.

It is the position of the Petitioner that inten to injure should not be inferred in cases such as the instant case, as this inference is a clear departure from the well established precedents of this state involving the interpretation of intentional injury exclusion clauses.

In the alternative, it is the position of the Petitioners that intent to injure should not be inferred in cases such as the instant one, despite the alleged intentional act. In the instant case, the Complaint alleges that the Petitioner sexually assaulted the minor Plaintiffs by fondling their genitals between 2:00 a.m. and 3:00 a.m. while the minor Plaintiffs were on the premises of the CENTRAL FLORIDA YMCA for a "overnight event." Intent to injure the minor Plaintiffs cannot be inferred in the instant case, as there is no allegation of penetration, violence, or threat or violence. In the instant case, even assuming the acts alleged in the Complaint occurred, they were performed only for the sexual gratification of the Petitioner, with no intent to harm the sleeping child. This distinction is particularly important, as many of the cases that have been decided by courts of this nation excluding coverage in sexual abuse situations involve acts where intent to injure can be inferred. Under the facts of the instant case, there is no way that intent to injure can be presumed. As the Petitioner has denied that the acts alleged in the Plaintiffs' Complaint occurred, the Petitioner's intent can only be an issue for the trier of fact.

ARGUMENT

I. THE FIFTH DISTRICT COURT OF APPEAL ERRED IN AFFIRMING SUMMARY JUDGMENT EXCLUDING COVERAGE AS A MATTER OF LAW.

It is the position of Petitioner, CLAY SHEARER, that the courts below erred in excluding coverage as a matter of law in the instant case, as unresolved fact issues exist. As unresolved fact issues exist, the decisions of the courts below constitute a departure from the established precedents of this state interpreting intentional injury clauses.

A brief review of the facts is in order. Plaintiffs' Amended Complaint alleges that on April 15, 1985, the minor Plaintiffs were on the premises of the CENTRAL FLORIDA YMCA facility to participate in a "overnight event" (R.21-34). At approximately 2:00 to 3:00 a.m., CLAY SHEARER, acting manager and supervisor of the "overnight event" acted in a wilfull, wanton, and reckless manner by sexually molesting each of the minor Plaintiffs, by fondling their genitals. (R.21-34) At his deposition, CLAY SHEARER specifically denied sexually molesting, assaulting, or touching any of the minor Plaintiffs (R.168-169).

Respondent/Intervenor below, THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, filed a Motion for Summary Judgment contending that the events alleged in the Plaintiffs' Complaint "were done intentionally" and therefore CLAY SHEARER was not entitled to coverage. (R.73-74).

The policy issued by Respondent to the CENTRAL FLORIDA YMCA provided Coverage only for "occurrences" as that term is defined by the policy. The policy specifically defines an occurrence as follows:

> "Occurrence" means an accident, including continuous or repeated exposure to conditions, which result in bodily injury or property damage neither expected nor intended from the standpoint of the insured. (emphasis added) (R.81).

The order of the trial court, granting Respondent's Motion for Summary Judgment specifically states:

> ...The allegations of the Complaint and the record before the Court showed there was no "occurrence" as defined by the policy. Therefore, THE INSURANCE COMPANY OF THE STATE OF PENNYSLVANIA has no duty to defend CLAY SHEARER or indemnify him... (R.348-349)

It is the position of CLAY SHEARER, that the trial court erred in granting summary judgment, as unresolved fact issues existed. It is the position of Petitioner CLAY SHEARER, that there was no evidence before the court that he intended to harm any of the minor Plaintiffs, and therefore summary judgment was improper.

In Cloud v. Shelby Mutual Insurance Company of Shelby, Ohio, 248 So.2d 217 (3rd DCA 1971), the court concluded that intentional act exclusion clauses in liability insurance policies did not exclude coverage as a matter of law for intentional acts, unless the insured intended the resulting injury. The court specifically adopted the rule regarding intentional act exclusion clauses, as found in 44 *Am* Jur 2d "Insurance", §1411, page 259, as follows:

> "The courts have generally held that an injury or damage is 'caused intentionally' within the meaning of an 'intentional injury exclusion clause' if the insured has acted with the specific intent to cause harm to a third party, with the result that the insurer will not be relieved of its obligations under the liability policy containing such an exclusion unless the insured has acted with specific intent." (emphasis added) 248 So.2d at 218

In Cloud, the insured, Raymond Cloud, drove his vehicle into another vehicle that was blocking his driveway. The parties stipulated that Raymond Cloud did "intentionally push" the automobile occupied by Mrs. Miller (the plaintiff who claimed to be injured as a result of the collision). In refusing to adopt the "reasonably foreseeable" test of causation to exclude coverage, the court reversed the trial court's entry of summary judgment, as a genuine issue of material fact existed as to whether Raymond Cloud intentionally caused the injury allegedly sustained by Mrs. Miller.

Following the decision of the Third District Court of Appeal in Cloud, other District Courts of Appeal have repeatedly held that coverage for an intentional act is not excluded under an intentional injury exclusion clause unless the insured acted with specific intent to cause injury. See Phoenix Insurance Company vs. Helton, 298 So.2d 177 (1st DCA 1974); Employers Commercial Union Insurance Company of America v. Kottmeier, 323 So.2d 605 (2nd DCA 1975); Greater Palm Beach Symphony Association, Inc., v. Hughes, 441 So.2d 1171 (4th DCA 1983); and also see Allstate Insurance Company v. Steinemer, 723 F.2d 873 (U.S.Ct. App. 11th Cir., 1984). *

In Zordan v. Page, 500 So.2d 608 (2nd DCA 1986) Cert. Den. 508 So.2d 15, the Second District Court of Appeal addressed the

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* Easily distinguished from the above-cited cases are the cases of Hartford Fire Insurance Co. v. Spreen, 343 So.2d 649 (3rd DCA 1977); Bosson v. Uderitz, 426 So.2d 1301 (2nd DCA 1983); Peters v. Trousclair, 431 So.2d 296 (1st DCA 1983); Beaton v. State Farm Fire & Casualty Company, 508 So.2d 556 (4th DCA 1987). Coverage was excluded in all of these cases, as the acts of the insured involved assaults, batteries, stabbings.

same issue present in this case. In Zordan, the plaintiff had filed suit for damages sustained by the alleged sexual fondling of a child. The insured specifically denied touching the child in any improper manner. The trial court in Zordan granted the insured's motion for summary judgment, on the basis that there was no coverage for injuries which were intended *ox* expected by the insured. The Second District Court of Appeal reversed the decision of the trial court, and held that the ruling of the trial court was error, as there were unresolved factual issues. The Court held that there was no evidence on the part of the insured to inflict injury, and that intent to inflict injury could not be inferred from the alleged acts.

The court in Zordan rejected the insurer's argument that intent to inflict injury can be inferred from intent to commit an act. The Zordan court reasoned that intent to inflict injury could not be inferred, and that coverage would only be excluded under the intentional injury exclusion clause if the insured acted with specific intent to cause injury. Id. at 609.

The court in Zordan was far from being in accord. The majority opinion is followed by a dissent written by Judge Frank. In his dissent, Judge Frank suggests the test should not be based on the subjective intent of the insured, and suggests an alternative as follows:

> "The test is what a plain, ordinary person would expect and intend to result from a mature man's deliberately 'debauching' his seven-year-old stepdaughter for many years." Id. at 5614.

Obviously, Judge Frank was suggesting that the "reasonably foreseeable" test of causation in tort cases should be applied to cases involving interpretation of liability insurance policies. This test had been expressly rejected in the cases previously cited. See Cloud, Phoenix Insurance Company, Employers Commerical Union Insurance, Greater Palm Beach Symphony, and Allstate, supra. While Judge Frank acknowledged the presence of these precedents, he stated in his opinion that they are "instructive but not imprisoning." 500 So.2d at 613.

Subsequent to the Zordan decision, the Third District Court of Appeal decided the case of Landis v. Allstate Insurance Company, 516 So.2d 305 (3rd DCA 1987). In Landis, the Third District Court of Appeal followed Judge Frank's dissent in Zordan, excluding coverage on a basis that the acts of child molestation alleged in the underlying complaint were clearly intentional or deliberate acts. The Landis court, never discussed the issue of intent, which was discussed at great length in the Zordan opinion. In Landis, the court cited the cases of Beaton v. State Farm Fire & Casualty Company, 508 So.2d 556 (4th DCA 1987), and Peters v. Trousclair, 431 So.2d 296 (1st DCA 1983), to support their position that coverage was excluded because of the insured's intentional act. The court's opinion does not mention the cases of Cloud, Phoenix Insurance Company, Employers Commercial Union Insurance, Greater Palm Beach Symphony and Allstate, or attempt to distinguish them. The Landis court erred in excluding coverage, because it failed to consider the specific intent of the insured, a well established

requirement in cases involving coverage disputes under intentional injury exclusion clauses.

Cases involving allegations of sexual molestation or abuse of minors are particularly prone to arouse the emotions of all participants. Notwithstanding the heinous nature of the alleged acts, in this case and in similar cases, the issue of insurance coverage should turn on the established precedent, rather than on the outrage of the participants. It is clear from Judge Frank's dissent in the Zordan case, that his revulsion with the alleged acts of the insured led him to support the "reasonable foreseeable consequences" test, that had been repeatedly rejected by the Appellate Courts of this state, including the court of which Judge Frank was a member. Further, in Landis v. Allstate, it was clear that the Court of Appeal could have affirmed summary judgment in favor of the insured on the business pursuits exception, but instead decided to announce a new rule of law based on Judge Frank's dissent in Zordan.

Logic should succeed over emotion. The position suggested by Petitioners requires adherence to the well established precedents of the courts of this state. On the other hand, the position of the Respondent, and the court's decision in Landis, requires a departure from precedents, without valid reason.

It is the position of the Respondent that a subjective analysis should be applied in the instant case as suggested by the precedents of the courts of this state. Utilizing subjective analysis, summary judgment would never be proper as it would

always be an issue for the trier of fact to decide whether the insured, specifically intended injury. The fact that an injury was intentional, is immaterial.

Other than the court in Zordan, two courts of this nation, have utilized the subjective analysis test. State Auto Mutual Insurance Company v. McIntyre, 652 F.Supp. 1177 (N.D.Ala. 1987); MacKinnon v. Hanover Insurance Company, 471 A.2d 1166 (N.H. 1984). (Also see the following cases involving claims for sexual abuse under the professional liability policies; where courts in coverage disputes focused on the behavior of the insured. Public Service Mutual Insurance Company v. Goldfarb, 442 N.Y.S.2d 422 (N.Y. Ct.App. 1981) St. Paul Fire & Marine Insurance Company v. Mitchell, 296 SE 2d 126 (Ga.App. 1982).

Other courts of this nation that have had an opportunity to address the question facing the court in the instant case, have applied an objective approach. Under the objective approach, courts have found that bodily injury is expected or intended by an insured, when the character of the insured's acts is *so* reprehensible that intention to inflict injury can be inferred as a matter of law. See Fireman's Fund Insurance Company v. Hill, 314 N.W.2d 834 (Minn. 1982); Mutual Service Casualty Insurance Company v. Puhl, 354 N.W.2d 900 (Minn.App. 1984); Horace Mann Insurance Company v. Independent School District, 355 N.W.2d 413 (Minn. 1984) State Farm Fire and Casualty Company v. Williams, 355 N.W.2d 421 (Minn. 1984); Illinois Farmers Insurance Company v. Judith G., 379 N.W.2d 638 (Minn.App. 1986);

Rodriguez v. Williams, 729 P.2d 627 (Wash. 1986); Grange Insurance Association v. Authier, 725 P.2d 642 (Wash. App. 1986); Allstate Insurance v. Sena, No. 87-6148 (9th Cir. April 14, 1988) (APP. "1"); Allstate Insurance Company v. Thomas, No. CIV. 87-522-B (W.D. OK April 27, 1988) (APP. "2"); Allstate Insurance Company v. Roelfs, No. A-87-061 (W.D. AK Aug. 14, 1987). (APP. "3")

Many of the cases cited above are easily distinguished from the instant case. Many of the cases above, in apparent contrast to the facts of this case, involve penetration, violence, or threat thereof. In cases where there is rape, penetration, violence, or threat thereof, then perhaps the intent of the insured, could be inferred from the nature of his acts. In other words, if this Court is inclined to find that intent to injure can be inferred from an intentional act, coverage should still be afforded in the instant case, as intent to injure cannot be presumed as a matter of law under the facts of the instant case.

In the instant case, the minor Plaintiffs have alleged the Petitioner fondled their genitals, some time between 2:00 a.m. and 3:00 a.m., while they were on the premises of the CENTRAL FLORIDA YMCA for a "overnight event." There is absolutely no allegation or evidence of penetration, violence, or threat of violence. Accepting the allegations in the Complaint as true, they do not provide a basis from which intent to injure can be inferred, as the Petitioner, would have supposedly performed the fondling while the children were asleep. Assuming that the Petitioner did perform the acts alleged in the Complaint, it is clear that those acts would have been performed only for the

sexual gratification of the Petitioner, and that no intent to harm the sleeping child, can be inferred.

The distinction made by the Petitioner in the preceding paragraphs, was also made by the court in Zordan. In Zordan, the court acknowledged that other courts of this nation had inferred intent to injure, based on the nature of the alleged intentional act. The court in Zordan specifically referred to the case of CNA Insurance Company v. McGinnis, 666 S.W. 2d 689 (Ark. 1984). The Zordan court noted that in McGinnis, the insured had "sexual relations" with his stepdaughter almost daily from the time she was 6 years old until she was 16. In discussing the obvious contrast between the facts in Zordan and the facts in McGinnis and similar cases, the Zordan court stated:

> "We are not taking issue with the holdings of the out-of-state cases cited by the insurers. Those cases seem to stand for the proposition that intentional sexual molestation which involves penetration or violence or fear thereof may be presumed to cause intentional injury."

The Zordan court further discusses that the proposition that intent to injure could be inferred from intentional sexual molestation was clearly in line with the decisions of this court in the cases of Hartford Fire Insurance Company v. Spreen, 343 So.2d 649 (3rd DCA 1987), and Bosson v. Uderitz, 426 So.2d 1301 (2nd DCA 1983). Coverage in the instant case should be afforded as the alleged acts of the Petitioner did not rise to a level where intent to injure could be presumed from the nature of the alleged injury. See Cloud, Phoenix Insurance Company, Employers Commercial Union Insurance, Greater Palm Beach Symphony, Allstate, supra. If in the instant case the Plaintiffs'

Complaint had alleged that Petitioner had repeatedly sodomized the minor Plaintiffs, then Petitioner submits that intent to injure could be inferred under the authority of Hartford, Bosson, Peters, Beaton, supra.

Under the facts of the instant case, there is no way that intent to injure can be presumed. As the Petitioner has denied that the acts alleged in the Plaintiffs' Complaints occurred, the Petitioner's intent can only be an issue for the trier of fact.

CONCLUSION

In summary, it is the position of the Petitioner that the intentional injury exclusion clause cannot operate to exclude coverage in the instant case as there was no evidence before the trial court that the Petitioner intended to injure the minor Plaintiffs below. Further, since the Petitioner has denied any misconduct, the issue of intent is one for the trier of fact, and was improperly considered by the court in granting summary judgment in favor of the insured.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by hand delivery to SCOTT L. STERLING, ESQUIRE, **1214** E. Robinson Street, Suite One, Orlando, Florida **32801**; and THOMAS **G.** KANE, ESQUIRE, **2816** E. Robinson Street, Suite One, Orlando, Florida **32803**; and JOHN R. McDONOUGH, ESQUIRE, 19 E. Central Blvd., Orlando, Florida **32801** this 3rd day of October, **1988.**

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