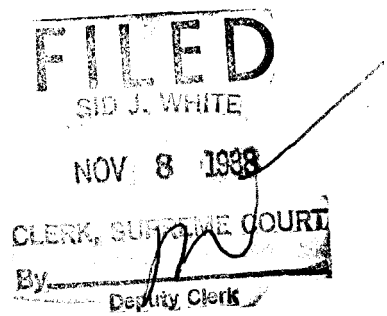
OA 12-6-88

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

- -

REPLY BRIEF

- -

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TABLE OF CONTENTS

TABLE OF CITATIONS

REPLY ARGUMENT

Respondent, INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, filed its Answer Brief, setting forth two arguments in support of its position that the rulings of the trial court and the Fifth District Court of Appeal should be affirmed. Petitioner, CLAY SHEARER, will respond to each of the arguments raised by Respondent seriatim.

I. INTENT TO INJURE SHOULD NOT BE INFERRED AS A MATTER OF LAW TO EXCLUDE COVERAGE UNDER THE INTENTIONAL ACT EXCLUSION CLAUSE IN THE INSTANT CASE.

In its answering brief, Respondent INSURANCE COMPANY FOR THE STATE OF PENNSYLVANIA argues that intent to injure in the instant case should be inferred as a matter of law, as deliberate acts of child molestation were alleged in the Plaintiffs complaint. Respondent suggests that Petitioner CLAY SHEARER's position that the subjective intent of the insured is the proper test in determining whether coverage should be excluded under an intentional act exclusion clause is improper.

Initially, it is clear that the Respondent's position finds no support in the well settled law of this state. The District Courts of Appeal of this state have repeatedly held that coverage for an intentional act is not excluded under an intentional act exclusion clause unless the insured acted with specific intent to cause injury. Phoenix Insurance Company v. 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); also see Allstate Insurance Company v. Steinemer, 723 F.2d 873 (U.S. Ct. App. 11th Cir., 1984). *

To support its position, Respondent cites Judge Frank's dissent Zordan v. Page, 500 So.2d 608 (2nd DCA 1986). Judge Frank's dissent, and the Respondent's position, departs from the well established precedents of this state, in that they urge that intent to injure should be inferred, due to the repulsive nature of acts involving child molestation. Not only is this position a departure from the well reasoned precedents of this state, but it would invoke a blanket rule when a case by case analysis is the only proper approach.

In Zordan, the court reversed the trial court's granting of summary judgment, on the basis that unresolved issues of fact existed. The Zordan court held that intent to injure could not be inferred in that case, where the complaint alleged that the insured did handle, fondle and touch the child in a lewd, lascivious and indecent manner. The Zordan court reasoned that intent

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* Easily distinguished from the above-cited case are the cases of Hartford Fire Insurance Co. v. Spreen, 343 So.2d 649 (3rd DCA 1977); Bosson v. Uderitz, 426 So.2d 1201 (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.

to injure could not be inferred as there were no allegations of penetration, violence or threat thereof. The factual situation which faced the Zordan court is identical to the factual situation in the instant case. The Plaintiff's Complaint in the instant case alleges that Petitioner SHEARER fondled the Plaintiff's genitals sometime between 2:00 and 3:00 A.M., when they would presumably be asleep. There are no allegations of penetration, violence or threats thereof. Therefore, intent to inflict injury cannot be inferred in the instant case.

In their Answer Brief, the Petitioners argue that the majority opinion in Zordan is flawed based on this Court's recent decision in Barrentine v. State, 521 So.2d 1093 (Fla. 1988). Barrentine, as well as the other cases cited by Respondent in their Answer Brief, Connell v. State, 502 So.2d 1272 (2nd DCA 1987); Lerma v. State, 497 So.2d 736 (Fla. 1986) and Kokx v. State, 498 So.2d 534 (1st DCA 1986), are of no aid in disposing of the issue presented in the instant case. These cases involve departures from sentencing guidelines in criminal cases. While all of these cases acknowledge the emotional hardship on a victim in a sexual battery case, they have no bearing on the issues before the court in the instant case, which involve the intent of the insured. These cases, like Judge Frank's dissent in the Zordan opinion focus on the emotional aspects of the legal issue before the court, in an effort to persuade this court to overlook

the well established precedents of this case based on the heinous nature of the alleged acts.

The Respondents also urge that the decision by the Court in Zordan is flawed as it relied on MacKinnon v. Hanover Insurance, 471 A.2d 1166 (N.H. 1984). Respondents argued that MacKinnon was tacitly overruled by Vermont Mutual Insurance Company v. Malcolm, 517 A.2d 800 (N.H. 1986). The Respondents argument is misplaced. In MacKinnon, the plaintiff's complaint alleged that the insured had sexually abused his six year old step-daughter. The court held the intent to injure could not be inferred from the alleged acts, and therefore the intended acts exclusion clause of the policy could not exclude coverage until there was a resolution of the factual issue as to whether the insured intended harm by his acts. In contrast, the plaintiff's complaint in the Vermont Mutual case alleged that the defendant had committed five sexual assaults on the eleven year old victim, including acts of fellatio and sodomy. In Vermont Mutual, the court held that intent to injure could be inferred when the acts of the insured were *so* inherently injurious they could not have been performed without resulting in injury. There is no conflict between the decisions of the Supreme Court of New Hampshire in the decisions of MacKinnon and Vermont Mutual. In fact, well established law of this state would support the decisions in both MacKinnon and Vermont Mutual. For example, the court's decision in the MacKinnon case is supported by the decisions of the District

Courts of Appeal of this state in Phoenix Insurance, Employers Commercial, Greater Palm Beach Symphony and Allstate v. Steinemer. The decision of the New Hampshire Supreme Court in Vermont Mutual is supported by the decisions of the District Courts of Appeal of this state in Hartford Fire, Bosson, Peters and Beaton.

A close examination of all the cases cited above permit but one conclusion; intent to injure cannot be inferred from the nature of the act, unless that act in so inherently injurious that it cannot be performed without causing injury. Clearly, intent to injure should be inferred and coverage should be excluded in cases involving allegations of violence, threat thereof, sodomy and so forth. In the instant case, the allegations in the Plaintiff's complaint refer to nothing more than mere fondling, which would have presumably been performed while the Plaintiffs were asleep. Intent to injure cannot be inferred from these allegations as a matter of law.

In its Answer Brief, the Respondent discusses a number of cases from other states that have faced this identical coverage issue. It is submitted that many of these courts excluded coverage and found that intent to injure can be inferred as a matter of law in factual situations where this Petitioner would concede an intent to injure could be inferred as a matter of law.

Great restraint should be exercised from "jumping on the band-wagon" to preclude coverage for those who are accused of what reasonable men consider to be repulsive and heinous acts. Obviously justice will only be served when the intent of the insured is carefully analyzed on a case by case basis. It is submitted that in the instant case the trial court erred in granting summary judgment. As Petitioner SHEARER has continually maintained that he did not engage in any inappropriate touching, the issue as to whether he intended harm, can only be decided by a jury of his peers.

Lastly, on Page 13 of its Answer Brief, the Respondents state that no Florida case has held that an intentional injury exclusion clause did not apply where the insured specifically intended to do a certain act to a specific victim. It is submitted that the Respondents have not thoroughly reviewed Phoenix Insurance, Employer's Commercial, Greater Palm Beach Symphony and Allstate Insurance Company cited herein.

11. THE RECORD IN THE INSTANT CASE DOES NOT CONTAIN SUFFICIENT ALLEGATIONS TO ESTABLISH THAT PETITIONER CLAY SHEARER, IF HE PERFORMED THE ACTS ALLEGED IN THE PLAINTIFFS COMPLAINT, INTENDED INJURY

In the alternative, the Respondents argue that the record in the instant case established that if Petitioner SHEARER performed the acts alleged in the Plaintiff's Complaint, he intended injury

to the minor Plaintiffs. It is the position of Petitioner SHEARER that this argument is a red herring of the most obvious sort, and without basis.

To support its position, the Respondent makes repeated reference to Petitioner SHEARER's deposition. The only significant testimony elicited from Petitioner SHEARER is found in a question and answer on Page 18 of the Respondent's Brief. Counsel for Respondent asks:

> Q. Do you agree with me that an adult who sexually molests a child exposes that child to injury, whether it be physical or psychological?
>
> A. Yes.

The question asked by counsel for Respondents dealt with sexual molestation. The term sexual molestation is not defined, and presumably could include acts of sodomy. Further, the question asked by Respondents' counsel questions Petitioner SHEARER as to an adult, and does not specifically ask Petitioner SHEARER his personal opinions or feelings on the subject.

As this issue was initially presented before the trial court in Respondents' Motion for Summary Judgment, all inferences had to be resolved in favor of Petitioner SHEARER. It is submitted that the testimony as set forth in the Respondents' Brief, is insufficient to establish as a matter of law that Petitioner SHEARER intended harm, presuming, of course, that he did in fact

perform the alleged acts, which he has consistently denied. To maintain, as the Respondents do, that the trial court had overwhelming, substantial, undisputed and unrefuted evidence of an intent to injure by the Petitioner in the instant case, is ridiculous.

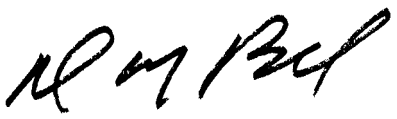
Petitioner SHEARER, who has consistently maintained his innocence throughout these proceedings, answered the questions unfairly posed to him by responding to counsel as any reasonable person would have. It remains an issue for the jury, in light of all the evidence, rather than an issue for a trial judge with benefit of only one deposition to determine whether Petitioner SHEARER intended harm for acts he denies he ever committed.

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 has been provided by U.S. Mail Delivery this 7th day of November, 1988 to SCOTT L. STERLING, ESQUIRE, 1214 East Robinson Street, Suite One, Orlando, Florida 32801; THOMAS G. KANE, ESQUIRE, 2816 East Robinson Street, Suite One, Orlando, Florida 32803 and to JOHN R. McDONOUGH, ESQUIRE, 19 East Central Blvd., Orlando, Florida 32801.



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