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IN THE SUPREME COURT, STATE OF FLORIDA
SUPREME COURT CASE NO. 89,124
THIRD DISTRICT COURT OF APPEAL CASE NO. : 96-842

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ILLINOIS INSURANCE EXCHANGE, an Illinois Corporation and BRITAMCO UNDERWRITERS, INC., and Illinois Corporation,

Petitioners,

vs.

SCOTTSDALE INSURANCE COMPANY a/s/o GAMEL PROPERTIES, INC., d/b/a CARILLON RESORT and TIFFANY'S and CARYLANN HOTEL PROPERTIES, INC. d/b/a CARILLON RESORT and TIFFANY'S,

Respondents.
_____/

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PREFACE

Respondents, SCOTTSDALE INSURANCE COMPANY a/s/o GAMEL PROPERTIES, INC. d/b/a CARILLON RESORT and TIFFANY'S, will be referred to as "SCOTTSDALE" in this Brief. Petitioner, ILLINOIS INSURANCE EXCHANGE and BRITAMCO UNDERWRITERS, INC., will be referred to as "ILLINOIS" in this Brief, Respondents, CARYLANN HOTEL PROPERTIES, INC. d/b/a CARILLON RESORT and TIFFANY'S, will be referred to as "TIFFANY'S" in this Brief.

All references to the record will appear as follows:

(R._____)

STATEMENT OF THE CASE AND FACTS

Defendant/Respondent, **SCOTTSDALE,** agrees, for the most part, with the Statement of the Case and Facts set forth in Petitioners' Brief on the Merits, and therefore the following summary will address those areas of disagreement.

The action in the Trial court brought by SCOTTSDALE and TIFFANY'S against ILLINOIS, sought recovery of 50% of the sums expended by SCOTTSDALE in the defense and indemnification of the mutual insured, TIFFANY'S.

The claimants in the underlying action were deposed in the within action and each testified that they were each minors and had been **served** alcohol on TIFFANY'S premises without being required to show I.D. Contrary to Petitioners' Brief, each claimant testified that he consumed multiple liquor cocktails within a short period of time and one claimant admitted that he was "buzzed slightly", while the claimants' self-serving statement that they were not intoxicated is in the record clearly, *so* is the number of drinks they consumed in a short period of time in addition to the testimony of Daniel Trujillo, that after he was stabbed, he was arrested because he continued to fight and started hitting a Police Officer. The record clearly demonstrated that there was a factual basis supporting the claimants' alleged liquor liability claim against **TIFFANY'S. TIFFANY'S** sponsored a fraternity party, which was attended by 300 to 500 young people. The majority of those attending the fraternity party were college students, under the legal drinking age of 21, presumably. (R. 44, pp. **76-81, 98-141).**

The claimants' altercation with the unknown assailants occurred on the premises in the valet parking area, not as they were walking to their car, as indicated in Petitioner's Brief. The fact that the claimants did not know their assailants, nor could they identify whether or not they were in **TIFFANY'S,** does not preclude liquor liability in this case.

The underlying Complaint in the action of Francisco Frances v. Tiffany's, alleged, in part, that **TIFFANY'S** engaged in the selling, distributing, and serving of alcoholic beverages, that **TIFFANY'S** owed a duty to it's patrons, including the Plaintiffs, to refrain from willfully and unlawfully selling or furnishing alcoholic beverages to persons who were not of lawful drinking age, that **TIFFANY'S** breach the duty aforementioned by willfully and unlawfully selling or furnishing acholic beverages to persons who are not of lawful drinking age, resulting in intoxication to such minors, and that as a direct and proximate result of the negligence and carelessness of **TIFFANY'S,** the Plaintiff was injured. (R. **44, pp.** 25-29). Clearly, the underlying Complaint stated a **cause** of action for liquor liability under which **ILLINOIS** was obligated **to** provide it's insured a defense.

The underlying Complaint contained two Counts. Count I was against GAMEL PROPERTIES, INC. d/b/a CARILLON RESORT and TIFFANY'S, as owners, controllers, and possessors of the premises known as the **CARILLON RESORT.** Count II was against **CARILLON PROPERTIES INC. d/b/a CARILLON RESORT and TIFFANY'S, as** owners, controllers, and possessors of the premises known as the **CARILLON** RESORT. **The**

Counts are otherwise identical and allege that **TIFFANY'S,** as owner **of** the premises, had a duty to maintain the premises in a safe condition and to guard against subjecting patrons to dangers known or which reasonably might have been foreseen, including policing and supervising the premises to protect patrons from being injured from assault at the hands of other persons upon the premises. The Complaint further alleged that **TIFFANY'S** owed a **duty** to it's patrons to refrain from willfully and unlawfully selling or furnishing alcoholic beverages to persons who were not of lawful drinking age. The Plaintiff alleged that these duties were breached by **TIFFANY'S** and that the breach of these duties, resulted in the injuries to the Plaintiff. Clearly, the Complaint in the underlying action stated a claim for liquor liability upon which **ILLINOIS** owed a **duty** to defend. (R. **44, pp. 25-29).**

SCOTTSDALE'S Motion for Summary Judgment at the Trial level included the argument that **ILLINOIS** failed to comply with the Florida Claims Administration Statute, Florida Statute **$627.426,** whereby, under Florida law, ILLINOIS was barred from raising any coverage defenses. (R. 44, pp. 65-83). **SCOTTSDALE** further based it's Motion for Summary Judgment on the Doctrine of Equitable Subrogation in seeking **50%** reimbursement from **ILLINOIS** for defense fees and costs expended by **SCOTTSDALE** in the defense of the mutual insured and **50%** of the settlement monies paid to the four claimants, on behalf of the mutual insured. It was noted that **ILLINOIS** provided a liquor liability policy to **TIFFANY'S,**

specifically insuring liquor liability claims while **SCOTTSDALE** issued a general premises liability policy specifically excluding liquor liability claims. SCOTTSDALE and **ILLINOIS** did not have concurrent coverage and did not insure the same risks.

ILLINOIS failed to notify it's insured, **TIFFANY'S,** of it's coverage defense(s) as required by the Claims Administration Statute and flatly refused and failed to defend or indemnify it's insured, both during the prosecution of the underlying case and after it's conclusion.

The Honorable Thomas **S.** Wilson granted **SCOTTSDALE'S** Motion for Summary Judgment, finding that **ILLINOIS** owed **SCOTTSDALE** reimbursement for **50%** of the defense and indemnification costs, not a proportionate share. (R. 44, p. 177).

The Third District Court of Appeal affirmed the Trial court's Order granting **SCOTTSDALE'S** Summary Judgment **on** the issue of reimbursement for defense costs and fees and remanded the case to the Trial court for a factual determination as to whether the service of alcohol had caused the claimants' injuries.

SCOTTSDALE argued, in it's Appellee Brief, that the case of Arqonaut Insurance Company v. Maryland Casualty Company, 372 So.2d 960 (Fla. 3rd DCA 1979) was not persuasive and in fact was distinguishable because the insurers in Arqonaut insured the mutual insured for the same risk wherein, **SCOTTSDALE** and **ILLINOIS** insured the mutual insured for different risks and therefore did not owe concurrent duties regarding the separate claims.

Similarly, the insurers in Continenta Casua ty Company v. United Pacific Insurance Company, 637 So.2d 270 (Fla. 5th DCA 1994) insured their mutual insured for the same risks and had concurrent coverage, facts which are distinguished from the facts at bar.

POINTS OF APPEAL

I. The Trial and Appellate courts correctly determined that Illinois had a primary duty to defend the mutual insured for the covered claim for liquor liability and under the Doctrine of Equitable Subrogation, must pay half of the defense costs incurred by Scottsdale, which defended all claims, including the liquor liability claim excluded by Scottsdale's policy.

II. The Trial and Appellate courts correctly determined that Illinois owed 50% reimbursement to Scottsdale for defense costs incurred; there were two, not five, Counts in the Complaint; Illinois and Scottsdale did not provide concurrent coverage nor insure the same risk to the mutual insured whereby pro-rata does not apply.

111. Illinois provided coverage to the mutual insured specifically for liquor liability whereby, the Trial and Appellate courts correctly determined that Illinois had a duty to indemnify Scottsdale for the settlement wherein liquor liability was supported by the record evidence. Illinois further is estopped from raising it's coverage defense herein where it failed to comply with Florida Statute $627.426.

SUMMARY OF ARGUMENT

The Trial and Appellate courts correctly determined that ILLINOIS had a primary duty to defend TIFFANY'S for the covered claim for liquor liability and under the Doctrine of Equitable Subrogation, must reimburse SCOTTSDALE for half of their defense costs and fees incurred because SCOTTSDALE did not insure TIFFANY'S for liquor liability. A determination of whether a duty to defend exists is restricted to a review of the four corners of the Complaint, alleging the claim against the insured. Clearly, the allegations against TIFFANY'S in the underlying action were based upon premises liability and liquor liability. The Complaint alleged that TIFFANY'S owed the Plaintiff's the duty to maintain the premises in a safe condition and to guard against known and foreseeable dangers and to refrain from willfully and unlawfully selling alcohol to minors, The Complaint further alleged that TIFFANY'S breached these duties which resulted in the injuries alleged. (R. 44, pp. 25-28).

It is clear from reviewing the underlying Complaint, that there are not five Counts in the Complaint, but rather two. Each Count is framed against different owner entities of the bar, but otherwise are identical and allege equally, premises liability and liquor liability allegations.

Although ILLINOIS now claims a coverage defense to the underlying Complaint, ILLINOIS failed to perfect a coverage defense pursuant to Florida Statute S627.426, which requires an insurer to notify the insured within certain time parameters as to any coverage defenses and that failure to do so, bars that coverage defense in the future. It is undisputed that ILLINOIS owed TIFFANY'S a duty of defense for any liquor liability claims being made against it. ILLINOIS'S coverage defense that alcohol did not cause the injures was not properly and timely raised and therefore, ILLINOIS is now barred by raising such a defense.

Although SCOTTSDALE owed an individual duty to defend TIFFANY'S under it's own policy for general premises liability, it did not owe TIFFANY'S a duty to indemnify excluded claims, i.e., the liquor liability claim. Further, SCOTTSDALE, in order to protect it's insured, TIFFANY'S, defended all claims, including the uncovered claim for liquor liability. SCOTTSDALE stepped in to defend the liquor liability claim, although it had no coverage to indemnify this claim, in the place of ILLINOIS, who did owe the duty and indemnity and therefore, under the principals of Equitable Subrogation, is entitled to be reimbursed a proportionate share of the expenses incurred and settlements paid.

Under the principal of Equitable Subrogation, SCOTTSDALE, in essence, was the excess insurer on the liquor liability claim, where ILLINOIS was the primary insurer, and SCOTTSDALE, therefore, is entitled to be afforded relief for paying a legal obligation which ought to have been met either wholly or partially by

ILLINOIS. Florida Courts clearly uphold reimbursement of attorneys fees and costs where the insurers are in an excess/primary or primary/secondary relationship and the excess or secondary carrier indemnifies the insured in the stead of the primary insurer.

ARGUMENT

I. The Trial and Appellate courts correctly determined that Illinois had a primary duty to defend the mutual insured for the covered claim for liquor liability and under the. Doctrine of Equitable Subrogation, must pay half of the defense costs incurred by Scottsdale, which defended all claims, including the liquor liability claim excluded by Scottsdale's policy.

Contrary to Petitioner's argument, this case does not pose a question involving insurers who cover the same claim. It is precisely the contrary factual situation at bar wherein ILLINOIS insured TIFFANY'S for liquor liability only and SCOTTSDALE insured TIFFANY'S for premises liability only. SCOTTSDALE'S policy furthermore had a clear exclusion for liquor liability claims. Therefore, these insurers did not cover the same claim, did not have concurrent coverage, and did not insure the same risks. The two cases relied upon by the Petitioner are not on point and are distinguishable. In both Continental Casualty Company v. United Pacific Insurance Company, supra, and Argonaut Insurance Company v. Maryland Casualty Company, supra, the insurers insured their mutual insured for the same risk. Under that factual scenario, the Fifth and Third District Courts of Appeal held that the insurers were not entitled to contribution of defense costs.

The line of cases cited and relied upon by Respondent in the Appellate action, support the Trial court and Third District Court of Appeals' rulings that SCOTTSDALE is entitled to equitable subrogation from ILLINOIS. Equitable subrogation arises by operation of law and is determined by weighing the equities between

the parties. Equitable subrogation is the appropriate form of relief in a dispute between a primary and excess insurer arising from payment of a claim by the excess insurer. Phoenix Insurance Corp. v. Florida Farm Bureau Mutual Insurance Company, 558 So.2d 1048 (Fla. 2nd DCA 1990). In Phoenix Insurance Company v. Florida Farm Bureau Mutual Insurance Company, supra, the facts are similar to the case at bar. In Phoenix Insurance Company, supra, the insured had two insurance policies, one with PHOENIX under a homeowner's policy and another with FLORIDA FARM BUREAU under a commercial farm policy. The PHOENIX Court stated that in that somewhat unusual case of dual primary coverage, both insurers had a duty to defend the insured, which required the insurers to investigate the facts and make a good faith offer to settle if a prudent man would do so. The court further held that in that case, a primary/excess relationship existed between the two insurers where the excess insurer stood in the shoes of the insured in regard to this duty. As in the PHOENIX case, SCOTTSDALE defended TIFFANY'S and pursued a good faith settlement. ILLINOIS refused to undertake the defense, failed to notify TIFFANY'S of any coverage defenses, and forced SCOTTSDALE to defend the entire action, including non-covered claims, and to settle with the claimants in protecting it's insured.

Petitioner argues in it's Brief that ILLINOIS denied coverage on the grounds that the Complaint did not state a claim for liquor liability, and accordingly, refused SCOTTSDALE'S request to contribute to the defense and indemnification costs. A liability

insurer's duty to defend is distinct from and broader than a duty to indemnify an insured against damages assessed, so that if a Complaint alleges facts showing two or more grounds for liability, one being within insurance coverage and the other not, the insurer is obligated to defend the entire suit. Baron Oil Company v. Nationwide Mutual Fire Insurance Company, 470 So.2d 810 (Fla. 1st DCA 1985). Clearly, the underlying Complaint alleged facts showing grounds for liquor liability and ILLINOIS owed a duty to defend the action. ILLINOIS could have brought a Declaratory Judgment Action to determine it's obligation to defend TIFFANY'S, but failed to do so.

ILLINOIS argues in it's Brief that the law in Florida is well settled that where two carriers have primary duties to defend on the same claim, the carrier who defends the claim has no right of subrogation from the non-defending insurer, citing Continental Casualty, supra, and Arqonaut, supra. This is exactly the distinction between the cases relied upon by Petitioner and the case at bar. ILLINOIS and SCOTTSDALE do not have primary duties to defend the same claim. They each owed a primary duty to defend separate and distinct claims. Therefore, Continental Casualty, supra and Arqonaut, supra, are not persuasive nor on point. Clearly, the Third District Court of Appeal's opinion in the within action is not in direct conflict with Continental Casualty, supra, and Arqonaut, supra, as SCOTTSDALE and ILLINOIS, did not insure the same claim.

The Continental Casualty Company court further recognized and acknowledged that there is a substantial divergence of views on this issue and that the trend may be to the contrary of that set forth therein.

The Continental court acknowledged the Equitable Subrogation Doctrine and recognized that courts have theorized that the imposition of a duty to contribute to the cost of defense will discourage insurers who are not concerned with their obligations to their insureds from "lagging behind" and "shirking" their duty to defend in the hope that the other primary insurer will defend and relieve them of the expense. Not only did ILLINOIS fail to defend it's insured, it failed and refused to comply with Florida Statute S627.426 and failed to notify TIFFANY'S of any coverage defense or, at the minimum, to reserve it's rights.

Contrary to the facts in Continental, supra, ILLINOIS was put on notice of the claim covered under it's policy immediately upon notice of the suit. However, ILLINOIS continued to refuse to defend or even to investigate the claim on behalf of it's insured. A lengthy dissent is contained within the Continental Casualty, opinion, which even supports Equitable Subrogation and contribution between insurers who insured the same risk.

The policy behind the Doctrine of Equitable Subrogation is to prevent unjust enrichment by assuring that a person, who in equity and good conscience is responsible for a debt, is ultimately

answerable for it's discharge. Kala Investments, Inc. v. Sklar, 538 So.2d 909 (Fla. 3rd DCA 1989). See also American Home Assurance Company v. City of Opa Locka, 368 So.2d 416 (Fla. 3rd DCA 1979).

The fact that a carrier, which is secondarily liability, also had a duty to defend an insured, does not deprive such a carrier of it's right to be indemnified by the primary insurer for the cost of defending the insured. United States Automobile Association v. Hartford Insurance Company, 468 So.2d 545 (Fla. 5th DCA 1985); American and Foreign Insurance Co. v. Avis Rent-A-Car System, Inc., 401 So.2d 855 (Fla. 1st DCA 1981). In United State Automobile Association, supra, the court held that where two policies provided liability coverage for the negligent operator of a boat and one policy contained a pro-rata clause, and the other contained excess insurance clause, effect would be given to the excess insurance clause, placing the two insurers in a primary/ excess capacity.

In the case at bar, SCOTTSDALE excluded liquor liability coverage therefore, clearly stands in the shoes of an excess insurer with regard to the defense costs incurred and settlement payments made on behalf of ILLINOIS for the liquor liability claim. (R. 44, p. 18).

The Third District Court of Appeal did not decline to address Continental, supra, or Argonaut, supra, and clearly cited the case law upon which it relied in reaching it's decision. The Third District Court of Appeal previously has upheld reimbursement of

defense costs in similar situations. In F&R Builders, Inc. v. United States Fidelity and Guaranty Company, 490 So.2d 1022 (Fla. 3rd DCA 1986), the Third District Court of Appeal held that the excess insurer was entitled to reasonable attorneys fees and reimbursement for costs incurred in defending negligence actions brought against the mutual insured, and in bringing the Declaratory Judgment action.

ILLINOIS takes the untenable position that it did not have a duty to defend the insured, because the Complaint did not state a claim for liquor liability. Not only does the underlying Complaint allege that the claimants were minors who were served alcohol by TIFFANY'S, it further claims that TIFFANY'S duty to refrain from wilfully and unlawfully selling or furnishing alcoholic beverages to persons who were not of lawful drinking age, directly and proximately resulted in the injuries claimed by the Plaintiffs. There is a clear claim of resulting injury and therefore it -is unquestionable that ILLINOIS had a duty to defend TIFFANY'S in the underlying action.

ILLINOIS admits in it's Brief that, where a primary insurer abandons it's insured and fails to defend covered claims, the excess carrier is entitled to recoup those expenditures from the insurer who had the sole obligation to defend the insured. ILLINOIS clearly abandoned TIFFANY'S in this action and SCOTTSDALE, in it's effort to protect it's insured, defended all claims, including the excluded claims, and reached a good faith settlement of the claims against it's insured. ILLINOIS had the sole duty to

provide a primary defense to the liquor liability claim, as it was the only insured claim under ILLINOIS' policy with TIFFANY'S and therefore, SCOTTSDALE is rightfully entitled to recoup 50% of it's defense costs based upon ILLINOIS' abandonment of TIFFANY'S,

Interestingly, ILLINOIS acknowledges the fact that insurers have significant incentives to comply with their contractual obligations by virtue of statutory and contractual remedies provided to the insured, TIFFANY'S herein. TIFFANY'S was a named Plaintiff in this action as well, and ILLINOIS* blatant refusal to defend or investigate the claim is exactly the danger recognized by the Continental court.

Petitioner cites a multitude of holdings in cases in foreign jurisdictions which do not bind this court.

The glaring deficiency in Petitioner's position is that a well established line of Florida cases uphold reimbursement of defense costs where two carriers do not provide concurrent coverage or insure the same risks. The Third District Court of Appeal's opinion affirming the Trial court's Order granting Summary Judgment on ILLINOIS' duty to reimburse SCOTTSDALE for 50% of it's defense attorneys fees and costs is supported by Florida law and the Principals of Equitable Subrogation. It is respectfully submitted that, in light of the foregoing, this court should approve the decision of the Third District Court of Appeal in this case and distinguish the Continental and Argonaut cases on their facts.

11. The Trial and Appellate courts correctly determined that Illinois owed 50% reimbursement to Scottsdale for defense costs incurred; there were two, not five, Counts in the Complaint; Illinois and Scottsdale did not provide concurrent coverage nor insure the same risk to the mutual insured whereby pro-rata does not apply.

SCOTTSDALE, in it's Complaint for Declaratory Relief and it's Motion for Summary Judgment at the Trial level, sought recovery of 50% of the defense attorneys fees and costs as well as 50% of the settlement amounts paid to the claimants from ILLINOIS. This was based on the fact that there were two claims against TIFFANY'S, one for premises liability and one for liquor liability. Petitioners suggestion that the appropriate measure of recovery should be pro-rata rather than equal has no basis in law or equity.

ILLINOIS' position that insurers with differing amounts of insurance covering the mutual insured are measured on a pro-rata basis does not apply here. Because SCOTTSDALE and ILLINOIS did not insure TIFFANY'S for the same risk or coverage, pro-rata reimbursement is inapplicable.

ILLINOIS takes a quantum leap in it's Brief in concluding that indemnity is to be allocated on a pro-rata basis and that therefore, defense costs should likewise be apportioned in accordance with the formula simply because ILLINOIS' policy contains a pro-rata "other insurance" clause. However, the "other insurance" clause contained in ILLINOIS' policy provides as follows:

"6. Other insurance: The insurance afforded by this policy is primary insurance, except when stated to apply in excess of or contingent upon the absence of other

> insurance. When this insurance is primary and the insured has other insurance, which is stated to be applicable to the loss on an excess or contingent basis, the amount of the company's liability, under this policy, shall not be reduced by the existence of such other insurance.
>
> When both this insurance and other insurance apply to the loss on the same basis, whether primary, excess or contingent, the company shall not be liable under this policy for a greater proportion of the loss than that stated in the applicable contribution provision below:
>
> (a) Contribution by equal shares. If all of such other valid and collectible insurance provides for contribution by equal shares, the company shall not be liable for a greater proportion of such loss than would be payable if each insurer contributes an equal share until the share of each insurer equals the lowest applicable limit of liability under any one policy or the full amount of the loss is paid, and with respect to any amount of loss not so paid, the remaining insurers then continue to contribute equal shares of the remaining amount of the loss until each such insurer has paid it's limit in full, or the full amount of the loss is paid.
>
> (b) Contribution by limits. If any of such other insurance does not provide for contribution by equal shares, the company shall not be liable for a greater proportion of such loss than the applicable limit of liability under this policy for such loss, bears to the total applicable limit of liability of all valid and collectible insurance against such loss." (R. 44, p. 58).

The other insurance clause of ILLINOIS" policy does not come into play in the within lawsuit for a very simple, basic reason; SCOTTSDALE does not cover the loss that ILLINOIS covers, i.e., the liquor liability claim. Therefore, Petitioner's reliance on the other insurance clause in it's policy, is inapplicable because the "other insurance" available to TIFFANY'S was not applicable to the liquor loss. Further, ILLINOIS' own policy provides in the "other insurance" clause that, if the insured has other insurance, which

is stated to be applicable to the loss on an excess or contingent basis, ILLINOIS* liability shall not be reduced by the existence of such other insurance. It is SCOTTSDALE'S position that not only did it's insurance not apply to the liquor liability loss, but that it acted as an excess insurer for purposes of the liquor liability claim and therefore, ILLINOIS is not entitled, under it's own policy, to pro-rata reimbursement.

Interestingly, Petitioner cites only two cases in foreign jurisdictions in support of it's unpersuasive position requesting pro-rata contribution.

It is respectfully submitted that Equitable Subrogation in this case also justifies payment of the claim in equal shares whereby ILLINOIS should be determined to reimburse SCOTTSDALE for 50% of attorneys fees and costs expended by SCOTTSDALE in the defense of TIFFANY'S in the underlying action.

III. Illinois provided coverage to the mutual insured specifically for liquor liability whereby, the Trial and Appellate courts correctly determined that Illinois had a duty to indemnify Scottsdale **for** the settlement wherein liquor liability was supported by the record evidence. Illinois further is estopped from raising it's coverage defense herein where it failed to comply with Florida Statute f5627.426.

Petitioner has mis-characterized the record evidence in this matter and confuses the issues of coverage defense versus exclusion or lack of coverage.

The depositions of the three claimants, FRANCISCO JAVXER FRANCES, JAMES ARANAEZ, JR., and DANNY TRUJILLO, clearly set forth that alcohol played a role in the unfortunate injuries sustained by these claimants.

FRANCISCO FRANCES testified at his deposition that at the time of this incident, he was under the legal drinking age at age nineteen (19). He testified that on the date of loss, he attended a fraternity party at TIFFANY'S, was not asked for identification and was served alcohol. MR. FRANCES admitted that he was "buzzed slightly" and that he drank about two or three drinks. MR. FRANCES further testified that the reason he and his friends left the party at TIFFANY'S was that there was a big fight that started on the dance floor. As MR. FRANCES and his friends were leaving TIFFANY'S and going out the front door by the valet parking area, MR. FRANCES testified that someone tapped him and started to hit him. After he was hit, MR. FRANCES testified that he grabbed his assailant and was attacked by the assailant's friends. MR. FRANCES received multiple stab wounds to the chest, back, face, and left flank. There were approximately 300 or 400 people at the fraternity party

at TIFFANY'S according to MR. FRANCES' testimony. MR. FRANCES was hospitalized for a month and a half and incurred approximately THIRTY-FIVE THOUSAND FIVE HUNDRED SEVENTY DOLLARS ($35,570.00) in hospital bills. (R. 44, pp. 98-114).

The deposition of JAMES ARANAEZ was also taken in this matter. MR. ARANAEZ testified that he was not asked for identification and that he had about five (5) alcoholic drinks. MR. ARANAEZ also testified that the reason he and his friends were leaving the premises was due to a fight that broke out in the lobby of.the hotel. As MR. ARANAEZ was walking on the valet ramp, he testified that some guys bumped into him and a fight ensued thereafter. MR. ARANAEZ sustained injuries involving stab wounds to his lung, liver, and abdomen. He estimated that approximately 500 people were in TIFFANY'S on this night. MR. ARANAEZ was hospitalized for 12 days. (R. 44, pp. 115-130).

The deposition of DANNY TRUJILLO was taken in this matter. MR. TRUJILLO testified that he had three (3) Alabama Slammers, was under the legal drinking age and was not asked for identification. He also testified that he and his friends decided it was time to leave because fights were already breaking out inside the lobby. MR. TRUJILLO testified that as he was walking down the valet area, an individual came up to them and started a fight. MR. TRUJILLO was stabbed on the right side and received other cuts. He also admitted that as a result of this incident, he was subsequently

arrested because he ultimately began hitting a Police Officer. MR. TRUJILLO testified that all of the people who he was with were served with alcohol and were under the legal drinking age. (R. 44, pp. 131-141).

Although the deponents could not identify their assailants, the attacks occurred on the valet parking ramp as the claimants were leaving TIFFANY'S bar. All claimants admitted that they drank at least three (3) alcoholic beverages, that they were served liquor at TIFFANY'S without being requested to present identification, and that they were all minors. The facts that these minors drank at least three (3) alcoholic beverages in a short period of time and immediately became involved with an altercation at the valet parking area, disputes their self-serving denial that they were not intoxicated or Petitioner's conclusion that alcohol was not involved in these injuries.

Violation of Florida Statute 5768.125 with regard to the sale of alcoholic beverages to a minor is a per se Negligence Statute. Ellis v. NGN of Tampa, Inc., 586 So.2d 1042 (Fla. 1991). It is undisputed that TIFFANY'S wilfully and unlawfully sold alcoholic beverages to the claimants, who were minors, and possibly to their assailants, who were probably also minors.

ILLINOIS is barred from raising this coverage defense at this time. Florida Statute §627.426 provides in pertinent part as follows:

(2) A liability insurer shall not be permitted to deny coverage based on a particular coverage defense unless:

(a) Within 30 days after the liability insurer knew or should have known of the coverage defense, written notice of reservation of rights to assert a coverage defense is given to the named insured by registered or certified mail sent to the last known address of the insured or by hand-delivery; and

(b) Within 60 days of compliance with paragraph (a) or receipt of a Summons and Complaint naming the insured as a defendant, which ever is later, but in no case later than 30 days before trial, the insurer;

(1) Gives written notice to the named insured by registered or certified mail of it's refusal to defend the insured;

(2) Obtains, from the insured, a non-waiver agreement following full disclosure of the specific facts and policy provisions upon which the coverage defense is asserted and the duties, obligations, and liabilities of the insurer during and following the pendency of the subject litigation settlement; or

(3) Retains independent counsel which is mutually agreeable to the parties. Reasonable fees for the counsel may be agreed upon between the parties or, if no agreement is reached, shall be set by the court.

ILLINOIS takes the position that it is not bound by Florida Statute §627.426 claiming that no coverage exists under it's policy for the claims alleged in the Complaint. Clearly, ILLINOIS confuses the terms, coverage defense with lack of coverage. It is clear that ILLINOIS* position that liquor was not involved in the injuries is a coverage defense, not a lack of coverage. ILLINOIS undisputedly provided coverage for the liquor liability claim as it was the only risk insured by ILLINOIS.

It is undisputed that ILLINOIS failed to give TIFFANY'S written notice of reservation of rights to assert a coverage defense at any material time hereto. The statute clearly provides

that a liability insurer shall not be permitted to deny coverage based on a particular coverage defense unless it provides the written notice of reservation of rights to assert the coverage defense. ILLINOIS claims that SCOTTSDALE did not establish a nexus between alcohol and the injuries claimed however, that is not the test. ILLINOIS always provided liquor liability coverage to TIFFANY'S, It is ILLINOIS' coverage defense that alcohol did not play a part in the injuries. Clearly, Florida Statute S627.426 does not create or extend non-existent coverage. However, failure to comply with the statute estops an insurer from maintaining a coverage defense. Doe v. Allstate Insurance Company, 653 So.2d 371 (Fla. 1995).

A lack of coverage is distinguished from a coverage defense in that a lack of coverage may exist because the insuring clause does not, by it's express terms, apply to the kind of claim being made, or simply because the policy elsewhere expressly excludes coverage. State Farm Mutual Automobile Insurance Company v. Hinestrosa, 614 So.2d 633 (Fla. 4th DCA 1993); AIU Insurance Company v. Block Marina Investment, Inc., 544 So.2d 998 (Fla. 1989). A coverage defense, within the meaning of the statute, means a defense to coverage that otherwise exists or could exist under law. Country Manors Association, Inc. v. Master Antenna Systems, Inc., 534 So.2d 1187 (Fla. 4th DCA 1988).

Clearly, under the ILLINOIS policy, liquor liability is not excluded. Therefore, ILLINOIS was required to comply with Florida Statute S627.426 and it's failure to do so, bars it from raising a coverage defense at this time.

ILLINOIS acted at it's peril in refusing to defend TIFFANY'S and must be held responsible for the consequences. Florida Farm Bureau Mutual Insurance Company v. Rice, 393 So.2d 552 (Fla. 1st DCA 1980).

If an insurance company refuse3 to assume it's contractual obligation and defend it's insured, then it cannot challenge the reasonableness of a settlement made with the injured party. It can only challenge settlement if the parties settled in bad faith, fraudulently, collusively, or without any effort to minimize the insured's liability. United States Automobile Association v. The Hartford Insurance Company, 468 So.2d 545 (Fla. 5th DCA 1985).

For it's failure to comply with Florida Statute 5627.426 in asserting it's coverage defense that liquor was not related to the injuries, ILLINOIS is barred from raising the coverage defense at this time. Therefore, it's only challenge to dispute its responsibility to reimburse SCOTTSDALE for the settlement amount would be to claim that the settlements were in bad faith, fraudulent or collusive, which is has not claimed, nor under the circumstances would it be appropriate to do so.

The Third District Court of Appeal in the within matter properly concluded that ILLINOIS is obligated to reimburse SCOTTSDALE for 50% of the settlement funds expended by SCOTTSDALE

in the settlement of the underlying claims. *The* Third District Court of Appeal however should have affirmed the Summary Judgment in this regard based on ILLINOIS' failure to comply with Florida Statute §627.426 and the principals of Equitable Subrogation discussed above.

It is respectfully submitted that there is sufficient record evidence to show that the service of alcohol to the minor claimants had a causal nexus to the injuries sustained, that ILLINOIS failed to comply with Florida Statute S627.426, to it's peril and the Third District Court of Appeal should have affirmed SCOTTSDALE'S -Summary Judgment in it's entirety.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Honorable Court affirm the decision of the Third District Court of Appeal with regard to reimbursement of attorneys fees and costs and reverse the decision of the Third District Court of Appeal remanding the matter for further proceedings and affirm the entry of Final Summary Judgment in favor of SCOTTSDALE by the Trial court on all issues.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail this 11th day of April, 1997 to: **HINDA** KLEIN, ESQ., Attorneys for Petitioner, Venture Corporate Center I, Second Floor, 3440 Hollywood Blvd., Hollywood, FL 33021.

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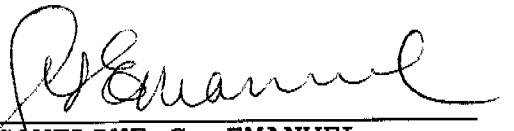
By: 
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