OA 6-2-97

IN THE SUPREME COURT, STATE OF FLORIDA

SUPREME COURT CASE NO. 89,124

THIRD DISTRICT COURT OF APPEAL CASE NO. 96-842

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.

PETITIONER'S REPLY BRIEF ON THE MERITS

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II. Even if the lower courts did not err in concluding that SCOTTSDALE was entitled to recover a portion of its defense costs expended on behalf of the mutual insured, the courts erred in presuming that SCOTTSDALE was entitled to recover 50% of those costs in light of the fact that SCOTTSDALE'S pro rata share of those costs exceeded ILLINOIS' and in liuht of the fact that of the five (5) counts cantained in the Complaint, only one (1) of those counts was arguably covered under ILLINOIS' policy.

III. The Third District Court of Appeal erred in remanding the case to the trial court on the issue of whether SCOTTSDALE was entitled to summary judgment in its favor on coverage; the Record reflects that there is no evidence supporting SCOTTSDALE'S contention that ILLINOIs actually had coverage for the insured's claim and both parties admitted that further discovery was unlikely to unearth any further evidence in support of SCOTTSDALE'S claim.

REPLY ARGUMENT

I. The Trial and Appellate courts erred in determining that ILLINOIS was obliged to contribute to SCOTTSDALE'S defense costs given that SCOTTSDALE had a separate, independent duty to its insured and was therefore not entitled to recover any portion of its defense costs under general subrogation principles as espoused in Continental Casualty Co. v. United Pacific Ins. Co.

SCOTTSDALE incorrectly argues that the two insurers did not cover the same claim and continues to focus on the undisputed fact that each insurer covered different aspects of the same claim, as dispositive of the question of whether subrogation principles require that each carrier contribute to the defense of their mutual insured. The underlying litigation arose from a single occurrence and therefore, constituted a single claim. Whether that single claim triggered coverage under one or both policies is a separate issue and is hotly contested in this appeal, but the answer to that question does not dispose of the conflict between this case, Continental Casualty Co. v. United Pacific Insurance Co., 637 So. 2d 270 (Fla. 4th DCA 1994)(en banc) and Argonaut Ins. Co. v. Maryland Casualty Co., 372 So. 2d 960 (Fla. 3d DCA 1979).

SCOTTSDALE continues to argue, without foundation, that Continental and Argonaut are distinguishable because in those cases, the two carriers insured their mutual insured for the same risk. There is nothing in those opinions that indicates that the policies were redundant. Even if there was, by focusing on the scope of coverage as opposed to the scope of the duties to defend, SCOTTSDALE misses the

point.' The issue before this Court is whether, where two carriers have the same duty to defend, irrespective of the nature and extent of their respective coverage, a defending insurer has the right to seek equitable subrogation from the non-defending carrier. SCOTTSDALE'S insistence on briefing a non-existent issue only underscores the fact that it simply has no explanation for the appellate court's refusal to address in its opinion the only two Florida cases directly on point.

SCOTTSDALE claims, on page 17 of its Answer Brief, that "[t]he 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". SCOTTSDALE has yet again purposefully sidestepped the issue before the Court. The nature and extent of the two carriers' coverage is irrelevant to the issue of whether SCOTTSDALE can recover a portion of its defense costs from ILLINOIS. The only issue is whether the two carriers had concurrent duties to defend their mutual insured. Once it was established by the Court that the two carriers had the same duty to defend Tiffany's, then the only way SCOTTSDALE could recover defense

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[1] While both Continental and Argonaut involved cases where the loss was covered under two (2) liability policies, the opinions do not reveal the nature and extent of the coverage provided under those policies. The term "liability policy" refers only to insurance providing coverage for claims made by third parties, as opposed to claims made against the insurer by the insured. See, Black's Law Dictionary 824 (5th ed. 1979)(defining "liability insurance" as "[t]hat type of insurance protection which indemnifies one from liability to third persons as contrasted with insurance coverage for losses sustained by the insured"). Hence, the fact that the carriers in Continental and Argonaut all provided liability insurance does not distinguish those cases from this one, because, as in those cases, SCOTTSDALE and ILLINOIS both provided liability insurance to Tiffany's.

costs from ILLINOIS would be for SCOTTSDALE to demonstrate that 1) it was a true excess carrier or 2) it had an excess "other insurance" clause in its policy ahd that ILLINOIS had a pro-rata "other insurance" clause, thereby rendering SCOTTSDALE'S coverage *excess* over ILLINOIS'. Since SCOTTSDALE can not da so, SCOTTSDALE can not rely upon this "well established line of Florida cases" which are legally and factually distinguishable from the case at bar.

SCOTTSDALE'S attempt to convince this Court that, as to the liquor liability portion of the claim, ILLINOIS was the primary insurer and SCOTTSDALE a true excess carrier, is futile. An excess carrier is, by definition, a carrier who has secondary coverage for a particular claim, not a carrier who has no coverage for a particular claim. See, Black's Law Dictionary 504, 505 (5th ed. 1979)(defining "excess insurance" as "[t]hat amount of insurance coverage which is beyond the dollar amount of coverage of one carrier but which is required to pay a particular loss as distinguished from other insurance which may be used to pay or contribute to the loss" and defining an "excess policy" as "[o]ne that provides that the insurer is liable only for the excess above and beyond that which may be collected on other insurance"). Since SCOTTSDALE provided no liquor liability coverage to Tiffany's, it is not a true excess carrier for those claims.[2]

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[2] SCOTTSDALE'S counsel evinces a complete lack of understanding regarding the concept of excess insurance. On page 20 of her Brief, counsel states, "[i]t 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 . . . ." If SCOTTSDALE has no liquor liability coverage, it can not act as an excess insurer far purposes of the liquor liability claim.

Nor does **SCOTTSDALE'S** policy contain an "excess other insurance" clause which could make it an excess carrier for purposes of the duty to defend. For that reason, **SCOTTSDALE'S** attempt to analogize this case to Phoenix Ins. Co. v. Florida Farm Bureau Mutual Ins, Co., 558 So. 2d **1048 (Fla. 2d DCA 1990)** must fail. In Phoenix, as in **the** present case, there were two liability insurers who apparently provided primary coverage for the subject loss. However, in contrast to the case at bar, the Florida Farm Bureau policy contained a **"pro** rata other insurance" clause while the Phoenix policy contained an "excess other insurance" clause, which meant that Florida Farm would be deemed primary and Phoenix would be deemed excess for the subject loss.[3] For that reason, the Court concluded that **"where . . .** a primary/excess relationship exists between two insurers, the excess insurer stands in the shoes **of** the insured in regard to [the duty to defend]." Id. at 1050. See also, United States Automobile Assoc. v. Hartford Ins. **co.,** 468 So. 2d 545 (Fla. 5th DCA 1985)(where two policies covered the same loss and one policy contained a pro-rata other insurance clause while the other contained an excess other insurance clause, effect would be given to the latter clause, thereby placing the insurers in a primary/excess relationship).

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[3] FFB'S policy provided that "[t]he insurance afforded by this policy is primary insurance, except when stated to apply in excess of or contingent upon the absence of other **insurance."** Id. at 1050. Phoenix' policy provided that "Coverage N [personal liability] is excess insurance over other valid and collectible insurance. This provision does not apply to other insurance written specifically as excess over this **policy."** Id.

In contrast to Phoenix, SCOTTSDALE'S policy does not contain an excess "other insurance" clause which would convert its primary coverage to excess in the event of the existence of other insurance covering a given loss. In fact, SCOTTSDALE'S policy does not contain any "other insurance" clause. Since it is undisputed that SCOTTSDALE'S policy provided the mutual insured with primary liability coverage and since it is further undisputed that the policy does not contain an excess "other insurance" clause which would enable it to stand in the insured's shoes in seeking subrogation from another carrier with primary coverage, this case is wholly distinguishable from Phoenix as well as the "well established line of cases" relied on by apposing counsel.

SCOTTSDALE also contends that ILLINOIS "argued" that it denied coverage because the Complaint did not state a claim for liquor liability. ILLINOIS did, in fact, deny coverage on the ground. There is no "argument" -- that is a fact. ILLINOIS had no coverage for the claim, and no duty to defend, for the simple reason that the Complaint did not contain facts or state a cause of action for liquor liability and its policy contains no coverage for claims that do not arise out of liquor liability. The underlying Complaint did not contain facts indicating that the claim arose out of the service of alcohol to or the inebriation of the claimants; it simply alleged that alcohol was served to unidentified minors and that some unidentified minors became intoxicated. The Complaint did not even allege which minors Were served alcohol, who became intoxicated or how that service resulted in

injury to the claimants.[4] Without those facts, the Complaint did not allege a liquor liability claim.

ILLINOIS had every right to deny coverage, and a defense, based on its assessment that there was no liquor liability claim and contrary to SCOTTSDALE'S contention, there is no statutory requirement that it bring a declaratory judgment action seeking judicial approval of its assessment. Likewise, ILLINOIS had no obligation to send its insured a reservation of rights letter pursuant to Florida Statute 627.426 because there was and is no coverage for the claim. AIU Insurance Co. v. Block Marina Investment, Inc., 544 So. 2d 998 (Fla. 1989). SCOTTSDALE'S blatant attempt to influence the Court by claiming, on page 14 of its Brief, that ILLINOIS did not even investigate the claim on behalf of its insured, has no basis in fact and is not established by the Record. SCOTTSDALE has never been privy to ILLINOIS' claim file and can not prove this allegation.

SCOTTSDALE'S Answer Brief fails to address the issue of whether two carriers with primary duties to defend a mutual insured have the concomittant obligation to indemnify each other for their respective defense costs in the event one carrier defends and the other does not. The only two Florida cases addressing this issue, Argonaut and Continental Casualty, have held to the contrary and SCOTTSDALE'S refusal to address these cases demonstrates that it has no response as to why this Court should overrule this established precedent in light of the public policy ramifications set forth in ILLINOIS' Initial

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[4] Contrary to SCOTTSDALE'S representation on page 16 of its Brief, the Complaint did **not** allege that the claimants were minors.

Brief. It is respectfully submitted that this Court should reverse the Summary judgment in favor of SCOTTSDALE, with directions to the trial court to enter final summary judgment in favor of ILLINOIS.

II. Evan if the lower courts did not err in concluding that SCOTTSDALE was entitled to recover a portion of its defense costs expended on behalf of the mutual insured, the courts erred in presuming that SCOTTSDALE was entitled to recover 50% of those costs in light of the fact that SCOTTSDALE'S pro rata share of those costs exceeded ILLINOIS' and in light of the fact that of the five (5) counts contained in the Complaint, only one (1) of those counts was arguably covered under ILLINOIS' policy.

Given that SCOTTSDALE has made no effort to legally support the appellate court's decision to award it 50%, rather than a pro-rata share of the defense costs, ILLINOIS will rest on its Brief.

III. The Third District Court of Appeal erred in remanding the case to the trial court on the issue of whether SCOTTSDALE was entitled to summary judgment in its favor on coverage; the Record reflects that there is no evidence supporting SCOTTSDALE'S contention that ILLINOIS actually had coverage for the insured's claim and both parties admitted that further discovery was unlikely to unearth any further evidence in support of SCOTTSDALE'S claim.

SCOTTSDALE'S Response on this point is perplexing at best. The Third District Court of Appeal partially reversed the summary judgment in SCOTTSDALE'S favor, finding that "[t]he record, as it presently exists, fails to prove whether or not the improper service of alcohol by Tiffany's to minors was the proximate cause of the injury or loss suffered by the claimants." SCOTTSDALE argues, in its Answer Brief:

> 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.

Answer Brief, p. 23.

SCOTTSDALE'S endorsement of the claimants' version of the facts juxtaposed with its simultaneous characterization of this testimony as at least partially "self-serving", and presumably false, is bizarre. Both parties hereto are stuck with the testimony of Record at the time of Summary Judgment. SCOTTSDALE can no more pick and choose which portions of the testimony should be accepted as gospel and which should be summarily discarded than can ILLINOIS. SCOTTSDALE'S inability to articulate how or why the service of alcohol to the minor claimants resulted in their injuries only serves to demonstrate that the appellate court was correct in concluding that SCOTTSDALE had not met its burden of demonstrating the requisite connection between the service of alcohol and the injury.

While SCOTTSDALE intimates that all the claimants had to prove was that there was service of alcohol to minors in order to state a claim for liquor liability, Florida Statute 768.125 expressly states that:

> A person who sells or furnishes alcoholic beverages to a person of lawful drinking age shall not thereby become liable for injury or damage caused by or resulting from the intoxication of such person, except that a person who willfully and unlawfully sells or furnishes alcoholic beverages to a person who is not of lawful drinking age or who knowingly serves a person habitually addicted to the use of any or all alcoholic beverages may become liable for injury or damage caused by or resulting from the intoxication of such minor or person.

Id. Thus, the statute clearly provides that a defendant is only civilly liable for the service of alcohol to minors if the damage or injury complained of was "caused by or resulting from the intoxication of such minor". It is black-letter law that there is no cause of action, for liquor liability or any other tort, if the Plaintiff cannot prove that the wrong complained of caused his or her injury. See, Harvin v. Kenan, 26 So. 2d 668 (Fla. 1946)(negligence is not actionable unless there is a causal connection between such neglignce and injury for which recovery is sought). SCOTTSDALE's characterization of a violation of Florida Statute 768.125 as negligence per se does not change its burden to prove that the alleged unlawful service of alcohol to the claimants resulted in their intoxication which, in turn, resulted in their injuries. Indeed, as SCOTTSDALE itself recognized, it has no testimony or evidence establishing that the claimants were, in fact, intoxicated and without that evidence, it can not establish the requisite causation.

Perhaps because it realizes the futility of its position, SCOTTSDALE once again claims, nonsensically, that ILLINOIS is barred from denying coverage because its denial was based on a coverage defense, versus a complete lack of coverage. Because ILLINOIS' denial was ostensibly based on a coverage defense, SCOTTSDALE claims that ILLINOIS' failure to send its insured a reservation of rights letter bars its denial of coverage as to SCOTTSDALE.

SCOTTSDALE'S basic premise is flawed. SCOTTSDALE argues that "[i]t 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." Answer Brief, p. 24. This ridiculous argument speaks for itself. If ILLINOIS only covered liquor liability claims and denied coverage because liquor was not the cause of the alleged liability, then ILLINOIS was clearly relying on a lack of coverage, and not a coverage defense, in failing to pay the claim.

What SCOTTSDALE continues to misunderstand is that ILLINOIS' coverage for liquor liability is no broader than the statute defining liquor liability. ILLINOIS has no coverage for claims unless liability is or can be imposed pursuant to Florida law. Since under Florida law, there can be no civil liability for the service of alcohol to a minor unless the service resulted in the minor's intoxication and a resultant injury, there is no coverage for the act of serving alcohol to minors when it does not result in civil liability.

Finally, SCOTTSDALE argues that ILLINOIS is precluded from challenging its duty to indemnify the insured because ILLINOIS failed to defend the insured and is barred from challenging the reasonableness of SCOTTSDALE'S settlement with the claimants. The Record reflects that ILLINOIS has never challenged the amount of SCOTTSDALE'S settlement with the insureds and therefore, this argument should be summarily discarded by this Court, as it was by the Third District Court of Appeal.

What is most telling about SCOTTSDALE'S response to ILLINOIS' argument that it can not meet its burden of demonstrating causation sufficient to establish ILLINOIS' liquor liability coverage, is SCOTTSDALE'S failure to dispute ILLINOIS' contention that there is no

further discovery that will assist **SCOTTSDALE** in meeting this burden. As was pointed out in ILLINOIS' Initial Brief, this case is over ten (10) years old and both parties have discovered all the facts that they will ever discover. Given the Third District Court of Appeals' determination that SCOTTSDALE has not met its burden of establishing ILLINOIS' coverage for the loss, it is respectfully requested that this Court put both parties out of their misery and remand the case to the trial court with directions to enter summary judgment in favor of ILLINOXS on the issue of indemnification.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court should reverse the decision of the Third District Court of Appeal, approve the Continental Casualty and Argonaut decisions and remand the case for entry of final summary judgment in favor of ILLINOIS.

Respectfully submitted,

HINDA KLEIN, ESQUIRE

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 6th day of May, 1997, to: Jacqueline Emanuel, Esq., Riley & Knoerr, P.A., 700 Southeast Third Avenue, Suite 401, Ft. Lauderdale, Fla. 33316.

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