IN THE SUPREME COURT OF FLORIDA

Case No. SC00-2614

VICTOR GINSBERG and ELAINE SCARFO,

Appellants/Respondents,

v.

ALLSTATE INSURANCE COMPANY,

Appellee/Movant.

On Review of Certified Questions From The United States Circuit Court Of Appeals For The Eleventh Circuit

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ANSWER BRIEF OF APPELLANT/RESPONDENT VICTOR GINSBERG

Douglas H. Stein, Esq.
Maurice J. Baumgarten, Esq.
ANANIA, BANDKLAYDER, BLACKWELL, BAUMGARTEN & TORRICELLA
4300 NationsBank Tower
100 Southeast Second Street
Miami, Florida 33131-2144

Telephone: (305) 373-4900
Facsimile: (305) 373-6914

Counsel for Appellant/Respondent
Victor Ginsberg

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INTRODUCTION

Appellant/Respondent, Victor Ginsberg ("Ginsberg"), files this Answer Brief in reply to the Initial Brief ("I.B.") filed by Appellee/Movant Allstate Insurance Company ("Allstate").

Throughout this Answer Brief, all emphasis is added unless otherwise noted. All references to the Record on Appeal are made in the same format as used before the United States Court of Appeals for the Eleventh Circuit.

STATEMENT OF THE CERTIFIED QUESTIONS

1. Do pleadings of unwelcome conduct including touching in a sexual manner and sexually offensive comments state a cause of action for the Florida common law tort law claim of invasion of privacy?

2. Do allegations of unwelcome conduct including touching in a sexual manner and sexually offensive comments constitute an "occurrence" under Florida law for purposes of insurance coverage?

3. Do pleadings of unwelcome conduct including touching in a sexual manner and sexually offensive comments fall within the Business Exception to coverage when the alleged conduct occurred in the workplace in the context of an employer-employee relationship but did not pertain to the purpose of business?

4. Are allegations of intentional invasions of privacy excluded from coverage

by an intentional acts exception when the policy expressly provides coverage for invasions of privacy?

STATEMENT OF THE CASE

I. Course of the Proceedings Below

Allstate initiated these proceedings by filing its Complaint, later amended, and naming Ginsberg and Elaine Scarf ("Scarfo") as defendants. (Doc 1). In its Amended Complaint, Allstate sought a declaratory judgment that it was not obligated to provide a defense to, or indemnify, Ginsberg against claims which Scarfo had filed against Ginsberg in a federal action, Case No. 93-8918 CIV-MARCUS ("Federal Action"). (Doc 20). In that action, Scarfo asserted claims of unlawful sexual harassment under Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), and common law causes of action under Florida law for battery, intentional infliction of emotional distress and invasion of privacy. (Doc 20). Ginsberg filed his Answer and Affirmative Defenses asserting that Allstate was obligated to provide a defense and indemnity. (Doc 22). Among his affirmative defenses, Ginsberg asserted that Allstate was estopped to deny, and had waived any right to deny, its obligation to provide a defense to Ginsberg. (Doc 22 - Pg 6-7). The Federal Action ultimately was dismissed for lack of subject matter jurisdiction under Title VII. *Scarfo v. Ginsberg*, 175 F.3d 957 (11th Cir. 1999).

Following the District Court's dismissal of the Federal Action, Scarfo re-filed

her action in the Seventeenth Judicial Circuit in and for Broward County, Florida, Case No. 97-10803 ("State Action"). In the State Action, Scarfo again asserted common law causes of action for battery, intentional infliction of emotional distress and invasion of privacy. (Doc 38 - Pg 26-32). The State Action, including the invasion of privacy claim, was dismissed on statute of limitations grounds on November 29, 2000. An appeal of that dismissal is pending in the District Court of Appeal of Florida, Fourth District, Case No. 4D00-4621.

In the instant case, the parties agreed that, while the Federal Action and the State Action were pending, it would be premature for the District Court to consider whether Allstate has a duty to indemnify Ginsberg in the event he is found liable on the invasion of privacy claim which was pending in those actions. (Doc 62 - Pg 6-7). Allstate, acknowledging that the duty to defend was broader than the duty to indemnify, suggested, however, that notwithstanding the pendency of the Federal Action and the State Action (collectively "Liability Actions"), the District Court could decide whether Allstate had a duty to defend the Liability Actions. *Id.* Accordingly, at Allstate's suggestion, the District Court ordered the parties to simultaneously file cross-motions for summary judgment solely with respect to the duty to defend issue. (Doc 62 - Pg 21-23; Doc 38 - Pg 1 n.2; Doc 43 - Pg 1).

Allstate filed a Motion for Summary Judgment ("Allstate's Motion") seeking a determination that it was not obligated to provide a defense to and, accordingly was not obligated to indemnify, Ginsberg in the Federal Action or the State Action. (Doc 39, 40, 41). Ginsberg responded and argued, *inter alia*, that disputed issues of

material fact regarding his affirmative defenses of waiver and estoppel precluded the entry of Summary Judgment in favor of Allstate. (Doc 42). Ginsberg also filed his Motion for Summary Judgment ("Ginsberg's Motion") seeking a determination that Allstate was obligated to defend him in the Liability Actions. (Doc 38).[1]

The District Court entered its Order on Summary Judgment granting Allstate's Motion and denying Ginsberg's Motion. (Doc 52). Subsequently, Ginsberg filed his Motion to Alter or Amend Order on Motion for Summary Judgment. (Doc 53). The District Court entered its Omnibus Order, denying Ginsberg's motion, entering a Corrected Order on Summary Judgment which made grammatical changes to the Order on Summary Judgment, and staying its decision regarding Allstate's duty to defend pending the outcome of this appeal. (Doc 57, 58). Ginsberg sought appellate review in the United States Court of Appeals for the Eleventh Circuit by timely filing his Notice of Appeal. (Doc 59). Allstate, in turn, filed a Notice of Cross-Appeal. (Doc 61).

On December 20, 2000, the Court of Appeals issued its opinion in which it certified four (4) questions for this Court's review, but stated that the phrasing of the questions was not intended to limit this Court's consideration of the issues presented in this case. *Allstate Insurance Co. v. Ginsberg*, 235 F.3d 1331, 1337 (11th Cir. 2000).

II. Statement of the Facts

[1]Because the duty to defend is broader than the duty to indemnify, Ginsberg did not address in his Motion whether Allstate had a duty to indemnify him in the Liability Actions, other than to acknowledge that if the District Court determined that Allstate had no duty to defend, it would obviously have no duty to indemnify him in the Liability Actions. (Doc 38 - Pg 1 n.2).

This action finds its genesis in October 1993, when Scarfo initiated the Federal Action against Ginsberg. (Doc 20 - Pg 64-72). In the Federal Action, Scarfo alleged that both **prior** to becoming an employee of Ginsberg, and after becoming an employee of Ginsberg, Ginsberg subjected her to unwelcome offensive conduct, including improper comments and unwelcome touching of her body. (Doc 20 - Pg 67). Among the causes of action which Scarfo asserted in the Federal Action were battery, intentional infliction of emotional distress, and invasion of privacy. (Doc 20). In the count for "Invasion of Privacy," Scarfo alleged that Ginsberg,

> invaded Plaintiff's privacy by intruding into Plaintiff's solitude in an offensive and objectionable manner...

(Doc 20 - Pg 70).

At the time the Federal Action was filed, Ginsberg was the named insured under a Personal Umbrella Policy, Form Number U9910-1 ("Policy") issued by Allstate. (Doc 20 - Pg 49-63). The Policy provides that it covers losses for "personal injury" caused by Ginsberg. (Doc 20 - Pg 53). The definition of "personal injury" provided in the Policy includes "invasion of rights of privacy":

> 7. **"Personal Injury"** - means:
>
> > a) bodily injury, sickness, disease or death of any person. Bodily injury includes disability, shock, mental anguish and mental injury;
> >
> > b) false arrest; false imprisonment; wrongful detention; wrongful entry; invasion of rights of occupancy; or malicious prosecution;
> >
> > c) libel; slander; misrepresentation; humiliation; defamation of character; **invasion of rights of privacy**; and

> d) discrimination and violation of civil rights, where recovery is permitted by law. Fines and penalties imposed by law are not included.

(Doc 20 - Pg 51).

The Policy does provide an exclusion for intentional acts, but that **exclusion** does **not** apply to "Personal Injury," and, accordingly, the intentional acts **exclusion** does **not** apply to a claim for "invasion of rights of privacy:"

> **General Exclusions - When This Policy Does Not Apply**
>
> This policy will not apply ... :
>
> 8. to any intentionally harmful act or omission of an insured ...
>
> **This exclusion does not apply to parts b), c), or d) of Definition 7. "Personal Injury."**

(Doc 20 - Pg 58).

Ginsberg tendered the defense of the Federal Action to Allstate, and demanded that Allstate indemnify him for any potential liability resulting therefrom. (Doc 38 - Pg 16-18). Allstate informed Ginsberg that it would provide a defense under a reservation of rights with respect to its duty to **indemnify** Ginsberg in the event he was found liable for damages. (Doc 38 - Pg 18). Ginsberg informed Allstate that its agreement to provide a defense under a reservation of rights was acceptable. (Doc 38 - Pg 19). Subsequently, Allstate confirmed its acceptance of the tender of defense, subject to the reservation of rights with respect to **indemnity**. (Doc 38 - Pg 20-25). When it did

so, however, Allstate failed to inform Ginsberg that its acceptance was subject to any alleged right of Allstate to withdraw its assumption of Ginsberg's defense at a later date. (Doc 38 - Pg 20-25). Following its unconditional acceptance of Ginsberg's defense, Allstate instituted the instant action seeking a declaratory judgment that it has no duty to defend (and, accordingly no duty to indemnify) Ginsberg in the Federal Action. (Doc 1).

On June 17, 1997, the court presiding over the Federal Action dismissed that action for lack of subject matter jurisdiction. (Doc 27, 38 - Pg 27). That court entered its dismissal without prejudice for Scarfo to re-file her common law causes of action in state court. (Doc 27, 38 - Pg 27). Scarfo did that, and again included a count for "Invasion of Privacy" in the State Action, specifically alleging that Ginsberg,

> invaded Plaintiff's privacy by intruding into Plaintiff's solitude in an offensive and objectionable manner...

(Doc 38 - Pg 31).

Allstate filed its Motion for Summary Judgment in the instant action. (Doc 39, 40, 41). Among its contentions, Allstate argued that it had no duty to defend the Liability Actions because: 1) Scarfo's claims against Ginsberg arose from a "business activity;" 2) Scarfo's claims did not arise from an "occurrence" or "accident;" 3) Scarfo's claims arose from "intentional acts" excluded by the Policy; and 4) there is no coverage under Florida's "public policy." (Doc 40). Ginsberg responded to Allstate's Motion, and filed his own Motion for Summary Judgment in which he asserted that at least some of the claims made in the Liability Actions, *i.e.* those for

invasion of privacy, were covered by the Policy, and thus, Allstate was obligated to defend all of the claims in the Liability Actions. (Doc 38).

In granting Allstate's Motion and denying Ginsberg's Motion, the District Court rejected all of Allstate's arguments but one. The District Court acknowledged that: 1) under the Policy the "intentional acts" exclusion did **not** apply to claims for invasion of rights of privacy; 2) Scarfo's count for "Invasion of Privacy" was still pending in the State Action; and 3) it was unclear under the applicable case law whether Scarfo stated a cause of action for invasion of privacy under Florida law. However, the District Court, without construing the provisions of the Policy, determined that Scarfo, in fact, had not stated a cause of action for invasion of privacy under Florida law in the Liability Actions. (Doc 58 - Pg 6-8). Accordingly, the District Court ruled that Allstate had no duty to defend Ginsberg in either Action. (Doc 58 - Pg 9).

Subsequently, Ginsberg filed his Motion to Alter or Amend Order on Motion for Summary Judgment, and argued that the District Court had erred in, 1) denying Ginsberg's Motion based on its non-binding opinion that Scarfo had not stated a claim for invasion of privacy, and 2) entering Summary Judgment in favor of Allstate with respect to the duty to defend, without considering Ginsberg's affirmative defenses that Allstate was estopped from denying coverage and had waived any right to do so -- both being unresolved issues of material fact. (Doc 53). The District Court summarily denied that motion, but stayed its decision regarding Allstate's duty to defend pending the outcome of Ginsberg’s appeal to the Eleventh Circuit. (Doc 57).

SUMMARY OF THE ARGUMENT

1. The issue of whether allegations of unwelcome conduct, including touching in a sexual manner and sexually offensive comments, state a cause of action for the Florida common law tort law claim of invasion of privacy, is irrelevant to the determination of whether Allstate presently has a duty to defend Ginsberg.

The sole issue to be decided by the Eleventh Circuit Court of Appeals was whether Allstate presently has a duty to defend Ginsberg against Scarfo's claims asserted in the Liability Actions. In Florida, it is well-settled that: (a) where a complaint alleges causes of action, some of which fall within coverage and some of which fall outside of coverage, the insurer must defend the entire lawsuit; (b) so long as the complaint alleges facts that create potential coverage under an insurance policy, the insurer must defend the suit; (c) the allegations of the complaint govern the duty to defend even if they may be factually incorrect, without merit or legally unsound; and (d) any doubt about an insurer's duty to defend an insured against a claim must be resolved in favor of the insured.

Scarfo's Complaint in each of the Liability Actions contains a count for "Invasion of Privacy." The very fact that the Eleventh Circuit has certified to this

Court the issue of whether Scarfo states a claim of invasion of privacy absolutely demonstrates that doubt exists as to whether that claim falls within the coverage of the policy. For the purpose of determining Allstate's duty to defend, that doubt must be resolved in favor of the insured, Ginsberg.

Since Scarfo's claim, on its face, clearly is within the coverage of the Policy, and that claim is still pending, under Florida law, Allstate has a duty to defend against that claim and all other claims pending in the Liability Actions regardless of the ultimate merits of those claims.

2. Ginsberg's conduct, as alleged by Scarfo, qualifies as an "occurrence" under Allstate's policy, which provides that an "occurrence ... means an accident **or a continuous exposure to conditions.**" Indeed, the District Court specifically held that the acts alleged in the State Action complaint while not accidental, could constitute a continuous exposure to conditions .

Even if the definition of an "occurrence" was generally limited to an "accident," the Policy contains an express exception to the general limitation. The Policy provides that it covers losses for "personal injury" caused by Ginsberg. The definition of "personal injury" provided in the Policy in turn, specifically includes "invasion of rights of privacy." The Policy does provide an exclusion for intentional acts, but that **exclusion** does **not** apply to "personal injury," and, accordingly, the intentional acts **exclusion** does **not** apply to a claim for "invasion of rights of privacy:" Accordingly, the Policy does apply to an "invasion of the right to privacy" even if the invasion is intentional.

3. The "business pursuits" exclusion of the Policy does not apply to Ginsberg's alleged conduct. First, an employer who subjects an employee to unwelcome sexually oriented conduct such as kissing her, rubbing her shoulders and back, touching her breasts, and forcing her to touch his penis, is not engaged in any activity arising from, or related to, "business." Second, even if those alleged acts could somehow be related to Ginsberg's "business," Scarfo's Complaint specifically alleged that she was working for her husband, not Ginsberg, from 1987 through 1991, when a substantial portion of the alleged conduct took place. In addition, Scarfo alleged that a portion of the alleged conduct took place after working hours. Indeed, Scarfo sued Ginsberg in both his individual capacity, and in his capacity as an officer and director of his company. Clearly, at least a portion of the alleged conduct occurred at times when Scarfo was not engaged in a business relationship with Ginsberg. Since at least some of the alleged conduct cannot possibly be barred by the "business pursuits" exclusion of the Policy, Allstate is obligated to defend Ginsberg against the entire claim.

There is no public policy in the State of Florida which would preclude an insurer from providing a defense to a claim of invasion of privacy, even when that invasion of privacy is based on alleged sexual offensive conduct.

4. Allstate has waived any claim that an "intentional acts exclusion" in its Policy divests it of its obligation to provide a defense to Ginsberg, and has not answered this Certified Question. Accordingly, there is no argument to which to respond and, accordingly, Ginsberg refrains from doing so.

ARGUMENT

I. RESPONSE TO CERTIFIED QUESTION NUMBER 1: THE ISSUE OF WHETHER ALLEGATIONS OF UNWELCOME CONDUCT INCLUDING TOUCHING IN A SEXUAL MANNER AND SEXUALLY OFFENSIVE COMMENTS STATE A CAUSE OF ACTION FOR THE FLORIDA COMMON LAW TORT LAW CLAIM OF INVASION OF PRIVACY, IS IRRELEVANT TO THE DETERMINATION OF WHETHER ALLSTATE PRESENTLY HAS A DUTY TO DEFEND GINSBERG.

The sole issue before the Eleventh Circuit Court of Appeals was whether Allstate presently has a duty to defend Ginsberg against Scarfo's claims asserted in the Liability Actions. In Florida, it is well-settled that: (a) so long as the complaint alleges facts that create potential coverage under an insurance policy, the insurer must defend the suit, *Smith v. General Accident Ins. Co. of America*, 641 So 2d 123, 124 (Fla. 4th DCA 1994); (b) "[t]he allegations of the complaint govern the duty to defend even if they may be factually incorrect **or without merit** ...", *Sunshine Birds and Supplies, Inc. v. United States Fid. and Guar. Co.*, 696 So. 2d 907, 910 (Fla. 3d DCA 1997); and (c) any doubt about an insurer's duty to defend must be resolved in favor of the insured. *MCO Envtl., Inc. v. Agricultural Excess & Surplus Ins. Co.*, 689 So. 2d 1114 (Fla. 3d DCA 1997); *Baron Oil Co. v. Nationwide Mut. Fire Ins. Co.*,

470 So. 2d 810, 814 (Fla. 1st DCA 1985).

Additionally, where a complaint alleges causes of action, some of which fall within coverage and some of which fall outside of coverage, the insurer must defend the entire lawsuit. *Grissom v. Commercial Union Ins. Co.*, 610 So. 2d 1299, 1307 (Fla. 1st DCA 1992). Thus, in the instant case, if Scarfo's claim of "Invasion of Privacy" falls within the coverage provisions of the Policy, Allstate is obligated to defend all of the claims asserted by Scarfo in the Liability Actions.

Scarfo's Complaint in each of the Liability Actions contains a count for "Invasion of Privacy." In each Complaint, Scarfo alleges that Ginsberg,

> invaded Plaintiff's privacy by intruding into Plaintiff's solitude in an offensive and objectionable manner...

(Doc 20 - Pg 70; Doc 38 - Pg 31).

Pursuant to the well-established law of Florida, whether that claim has merit, factually or otherwise, is irrelevant to a determination of whether Allstate has a duty to defend against it. *Sunshine Birds*, 696 So. 2d at 910; *Kopelowitz v. Home Ins. Co.*, 977 F. Supp. 1179 (S.D. Fla. 1997). Rather, the sole factor dictating whether Allstate has a duty to defend is whether the allegations of the claim, notwithstanding their merits, fall within the coverage of the Policy. Florida law dictates that an insurer must defend a claim even if the claim is "factually incorrect" or "**legally unsound**." *Logozzo v. Kent Ins. Co.*, 464 So. 2d 605, 607 (Fla. 3d DCA 1985).

Whether Scarfo states a cause of action for invasion of privacy, is simply an issue which the lawyers, retained by Allstate on behalf of Ginsberg, may desire to

assert as part of Ginsberg's defense in the Liability Actions. However, the very fact that the Eleventh Circuit has certified that issue to this Court absolutely demonstrates that doubt exists as to whether the claim of invasion of privacy falls within the coverage of the policy. For the purpose of determining Allstate's duty to defend, that doubt must be resolved in favor of the insured, Mr. Ginsberg. *MCO Envtl., Inc. v. Agricultural Excess & Surplus Ins. Co.*, 689 So. 2d 1114 (Fla. 3d DCA 1997); *Baron Oil Co. v. Nationwide Mut. Fire Ins. Co.*, 470 So. 2d 810, 814 (Fla. 1st DCA 1985).

In sum, the merits of Scarfo's invasion of privacy claim are irrelevant to the determination of Allstate's duty to defend Ginsberg against that claim. Since Scarfo's claim, on its face, clearly is within the coverage of the Policy, and that claim is still pending, under Florida law, Allstate has a duty to defend against that claim and all other claims pending in the Liability Actions regardless of the ultimate merits of those claims.

II. RESPONSE TO CERTIFIED QUESTION NUMBER 2: ALLEGATIONS OF INTENTIONAL UNWELCOME CONDUCT, INCLUDING TOUCHING IN A SEXUAL MANNER AND SEXUALLY OFFENSIVE COMMENTS, CONSTITUTE AN "OCCURRENCE" UNDER FLORIDA LAW FOR PURPOSES OF INSURANCE COVERAGE.

Ginsberg's conduct, as alleged by Scarfo, qualifies as an "occurrence" under Allstate's policy. Allstate argues there is no coverage for Scarfo's claim of invasion of privacy because an invasion of privacy is not an "occurrence." Allstate reasons that: (a) the insurance policy "only provides coverage for an 'occurrence' which is defined

as an accident"; (b) an invasion of privacy is not an "accident;" and (c) therefore an invasion of privacy cannot be covered. Allstate's reasoning fails for two independent reasons.

First, contrary to Allstate's false statement, an "occurrence" is not defined only as an "accident." Rather the policy provides that an "occurrence ... means an accident **or a continuous exposure to conditions.**" Indeed, the District Court specifically held that the "acts alleged in the [State Action] complaint while not accidental, could constitute a continuous exposure to conditions ..." (Doc 58 - Pg 6).

Even if the definition of an "occurrence" was generally limited to an "accident," the Policy contains an express exception to the general limitation. The Policy provides that it covers losses for "personal injury" caused by Ginsberg. The definition of "personal injury" provided in the Policy, in turn, includes "invasion of rights of privacy":

7. **"Personal Injury"** - means:

> a) bodily injury, sickness, disease or death of any person. Bodily injury includes disability, shock, mental anguish and mental injury;
>
> b) false arrest; false imprisonment; wrongful detention; wrongful entry; invasion of rights of occupancy; or malicious prosecution;
>
> c) libel; slander; misrepresentation; humiliation; defamation of character; **invasion of rights of privacy**; and
>
> d) discrimination and violation of civil rights, where recovery is permitted by law. Fines and penalties imposed by law are not included.

(Doc 20 - Pg 51).

The Policy does provide an exclusion for intentional acts, but that **exclusion** does **not** apply to "personal injury," and, accordingly, the intentional acts **exclusion** does **not** apply to a claim for "invasion of rights of privacy:"

> **General Exclusions - When This Policy Does Not Apply**
>
> This policy will not apply ... :
>
> 8. to any intentionally harmful act or omission of an insured ...
>
> **This exclusion does not apply to parts b), c), or d) of Definition 7. "Personal Injury."**

(Doc 20 - Pg 58).

Accordingly, the Policy does apply to an "invasion of the right to privacy" even if the invasion is intentional.

Allstate's contention that its Policy covers only negligent invasions of rights of privacy simply does not make sense. If the Policy was so limited, there would have been no need for Allstate to carve out invasions of rights of privacy from the intentional acts exclusion of the Policy.

Furthermore, in view of the fact that the Policy defines “personal injury” to include injuries resulting from intentional acts, such as invasion of rights of privacy, to read the Policy to exclude coverage for intentional invasion of privacy would create an inconsistency between the coverage provisions and the exclusion of coverage for

intentional acts. In *Purrelli v. State Farm Fire & Casualty Co.*, 698 So. 2d 618 (Fla. 2d DCA 1997), a case virtually identical to the instant case, the court held that a personal umbrella policy, which purported to limit coverage to "accidents," but which expressly provided coverage for intentional torts, such as invasion of privacy, was ambiguous and would be construed against the insurer in favor of coverage for a claim of invasion of privacy. Notwithstanding that *Purrelli* is in absolute accord with the well-settled law that any ambiguity in an insurance policy must be resolved liberally in favor of the insured, *Prudential Property & Casualty Insurance Co. v. Swindal*, 622 So. 2d 467, 472 (Fla. 1993), Allstate attempts to distinguish *Purrelli* on various grounds.

First, Allstate argues that *Purrelli* was incorrectly decided because there is such a thing as an actionable negligent invasion of privacy under Florida law. Allstate cites a sentence from the 44 year old case of *Jacova v. Southern Radio and Television Co.*, 83 So. 2d 34 (Fla. 1955) in support of that false proposition. In *Jacova*, the Court recognized that an actionable invasion of privacy can occur when a publisher publishes a photograph, and "should have known" that the publication would offend the sensibilities of a normal person. Allstate apparently believes that the Court's use of the phrase "should have known" somehow converts the invasion of privacy into a non-intentional act. That argument is fatally flawed. The act of publishing a photograph is an intentional one. Whether the publisher should have known that the subject of the photograph would be offended is merely a determination of whether the publisher foresaw the damaging consequences of the intentional act. Even if one who commits

an intentional act does not intend to cause the resulting damage, the character of the act remains intentional. *Aetna Cas. and Surety Co., Inc. v. Miller*, 550 So. 2d 29 (Fla. 3d DCA 1989). The *Purrelli* court was correct in its assessment of Florida law that an invasion of privacy always is an intentional tort.

Additionally, if a tort of negligent invasion of privacy did exist under Florida law, it would be all the more reason for finding that Allstate has a duty to defend Ginsberg since, potentially, there could be a determination in the State Action, based on the same facts which are alleged in support of Scarfo's intentional invasion of privacy claim, that Ginsberg negligently, rather than intentionally, invaded Scarfo's privacy, which, according to Allstate, would be covered under the Policy. In other words, either (1) the tort of invasion of privacy only may be committed intentionally, in which case the "occurrence" requirement of the Policy does not preclude coverage because the Policy specifically includes coverage for an intentional invasion of privacy, or (2) invasion of privacy also may be committed unintentionally, in which case Allstate has a duty to defend the State Action because of the potential of a determination that Ginsberg negligently, rather than intentionally, invaded Scarfo's privacy. In either case, the definition of "occurrence" in the Policy does not relieve Allstate of its duty to defend.

Second, Allstate argues that *Purrelli* is not good law because it somehow conflicts with *Ladas v. Aetna Insurance Co.*, 416 So. 2d 21 (Fla. 3d DCA 1982), *pet. for rev. denied*, 429 So. 2d 6 (Fla. 1983); *Federal Insurance Co. v. Applestein*, 377 So. 2d 229 (Fla. 3d DCA 1979); *Employers Commercial Union Insurance Co. of*

America v. Kottmeier, 323 So. 2d 605 (Fla. 2d DCA 1975); and *Aromin v. State Farm Fire & Casualty Co.*, 908 F.2d 812 (11th Cir. 1990). As recognized in *Purrelli*, however, those cases did not involve an insurance policy such as Allstate's. In each of those cases, the policy contained an exclusion for intentional acts. However, unlike Allstate's policy, those policies did not contain a provision which explicitly provides coverage for the specified intentional tort of invasion of privacy. In the instant case, even assuming *arguendo* that the Policy limits coverage to "accidents," the Policy contains a contradictory provision which specifically provides coverage for intentional torts, such as invasion of privacy.

Allstate also relies on *State Farm Fire & Casualty Co. v. Compupay, Inc.*, 654 So. 2d 944 (Fla. 3d DCA), *rev. denied*, 662 So. 2d 341 (Fla. 1995), where the court held that under the specific provisions of the insurance policy at issue in that case, there was no coverage for a claim of invasion of privacy as that claim was alleged in the pleadings. However, like the other cases cited by Allstate, *Compupay* is wholly distinguishable from the instant case. There, the insurance policy: (1)did not define an occurrence as "a continuous exposure to conditions;" (2) did not expressly provide coverage for "invasions to rights of privacy," and (3) did not specifically excise "invasions to rights of privacy" from the intentional act exclusion.[2]

Invasions of privacy fall squarely within the definition of "occurrence."

[2] Indeed, since the definition of "occurrence" in the instant Policy encompasses much more than an "accident," the cases relied upon by Allstate from Arkansas, New Mexico, California, New York, Georgia and North Carolina regarding how those States define the word "accident" as used in an insurance policy(A.B. 19-20), are all irrelevant.

Allstate's request that this Court ignore the plain language of the Policy should be summarily rejected.

III. RESPONSE TO CERTIFIED QUESTION NUMBER 3: ALLEGATIONS OF UNWELCOME CONDUCT, INCLUDING TOUCHING IN A SEXUAL MANNER AND SEXUALLY OFFENSIVE CONDUCT, DO NOT FALL WITHIN THE BUSINESS EXCEPTION TO COVERAGE WHEN THE ALLEGED CONDUCT OCCURRED IN THE WORKPLACE IN THE CONTEXT OF AN EMPLOYER-EMPLOYEE RELATIONSHIP BUT DID NOT PERTAIN TO THE PURPOSE OF THE BUSINESS.

Allstate contends that because the Policy contains a provision which excludes coverage for occurrences arising out of Ginsberg's business activities ("business pursuits exclusion"), it has no duty to defend Ginsberg against Scarfo's claims. That contention ignores both the allegations of Scarfo's State Action Complaint, and all applicable law.

The coverage provisions of the Policy provide that,

> Activities related to any **business** or **business property** of an **insured** are not covered.

(Doc 20 - Pg 53).

The Policy also contains an exclusion which provides:

This Policy Will Not Apply:

> 1) to any act, or failure to act, of any person in performing functions of that person's business.
>
> 2) to any **occurrence** arising out of a **business** or **business property.**

(Doc 20 - Pg 56).

It is the allegations of Scarfo's State Action Complaint which determine Allstate's duty to defend Ginsberg, *Sunshine Birds and Supplies, Inc. v. United States Fidelity and Guar. Co.*, 696 So. 2d 907, 910 (Fla. 3d DCA 1997). A review of those allegations demonstrates that Allstate may not rely on the business pursuits exclusion as a basis for refusing to provide a defense to Ginsberg.

First, the type of conduct in which Ginsberg is alleged to have engaged is not business related. Simply stated, an employer who allegedly subjects an employee to unwelcome sexually oriented conduct such as kissing her, rubbing her shoulders and back, touching her breasts, and forcing her to touch his penis, is not engaged in any activity arising from, or related to, business.

This case is virtually identical to *Scheer v. State Farm Fire & Casualty Co.*, 708 So. 2d 312 (Fla. 4th DCA), *rev. denied*, 719 So. 2d 893 (Fla. 1998). There, an action for sexual harassment, battery and invasion of privacy was initiated by employees against a doctor. The employees alleged that the doctor had touched their breasts and buttocks, and made sexually offensive remarks. The doctor's insurer filed a declaratory judgment action seeking a determination that the business pursuits exclusion of the policy excluded coverage for the alleged conduct. In reversing a summary judgment entered for the insurer, the Florida court held that the mere fact that the conduct occurred at the work place did not bring the conduct within the exclusion. The court further held that "the acts alleged against Dr. Scheer, which included touching co-employee's breasts and buttocks, did not arise out of his profession." *Id.* at 313.

That holding applies here. The same conduct which was held in *Scheer* to not fall within the business pursuits exclusion of the insurance policy, was alleged by Scarfo in the instant case. Allstate attempts to distinguish *Scheer* on the basis that the instant Policy does not cover activities "related to" Ginsberg's business. Allstate, of course, does not even attempt to explain how forcing a female to touch one's penis can "relate to" a business activity. In any event, the *Scheer* court specifically held that "Dr. Scheer's actions were **not related to** his profession." *Id.* at 313. Thus, *Scheer* applies to the instant Policy.

Allstate further tries to discredit *Scheer* by claiming that the case conflicts with two other decisions of the Florida courts. That argument is false. Neither of those cases concerns allegations of sexual misconduct. Rather, each concerns claims of assault and battery arising from arguments relating to the manner in which employment duties were performed.

First, in *Liberty Mutual Insurance Co. v. Miller*, 549 So. 2d 1200 (Fla. 3d DCA 1989), during an argument as to how treat a mutual patient, one doctor jerked on the stethoscope of another doctor, causing injury. The court held that the business pursuits exclusion applied because the assault arose out of a professional dispute relating to patient care. In the instant case, Ginsberg's alleged misconduct, *i.e.*, touching Scarfo's buttocks and breasts and forcing her to touch his penis, simply does not relate to business.

The second case referenced by Allstate is *Santos v. State Farm Mutual Automobile Insurance Co.*, 707 So. 2d 1181 (Fla. 2d DCA 1998). There, it was the

plaintiff's duty as an employee of a University to take the minutes of department meetings. At a particular department meeting, the defendant attended as a department member, and, on behalf of the department, instructed the plaintiff to take the minutes of the meeting. When the meeting was adjourned, the plaintiff attempted to leave with her tape recorder, and the defendant jumped on her in an attempt to wrestle the tape recorder away. The court held that the defendant's participation at the meeting brought his conduct within the business pursuits exclusion. In the instant case, there is no allegation whatsoever, that Ginsberg or Scarfo were engaged in any employment duties at the time of the alleged conduct.[3]

Even if the acts of offensively touching another's breasts and buttocks, and forcing another to touch one's penis can somehow be considered to be related to, or arising from a business, the business pursuits exclusion still does not divest Allstate of its duty to defend Ginsberg. In the Complaint, Scarfo alleged that Ginsberg's alleged tortious conduct commenced in 1988 and continued through the termination of her employment in September 1992. However, as Scarfo alleged, she was not employed by Ginsberg until November 1991. From November 1987 to November 1991, she "worked for her husband without pay at defendant Ginsberg's corporations." At most, one could infer that, from 1987 through 1991, Scarfo assisted her husband at the location of Ginsberg's corporations. There is no allegation whatsoever that while she was working for her husband, Scarfo had any business

[3] Since the law in Florida is clear, there is no reason to rely on cases from Michigan, Georgia, New York and Ohio, as Allstate does (I.B. 32), to resolve this issue.

relationship with Ginsberg at all. Further, there is no allegation that any of the tortious conduct in which Ginsberg allegedly engaged from November 1987 to November 1991, took place at Ginsberg's place of business.[4] Indeed, when pleading her cause of action for "Invasion of Privacy," Scarfo specifically and expressly alleged that, aside from his capacity as "President and Director" of his corporations, Ginsberg had acted in his "individual" capacity.

Thus, even if some of Ginsberg's alleged tortious conduct as pleaded by Scarfo can be viewed as having been related to Ginsberg's business, at least some, if not most, of it clearly was not. The law in Florida is well-settled that where some of the allegations of a complaint fall within coverage, and some fall outside of coverage, the insurer must defend the entire lawsuit. *Grissom v. Commercial Union Ins. Co.*, 610 So. 2d 1299, 1307 (Fla. 1st DCA 1992).

Allstate argues that to allow insurance coverage for an invasion of privacy based on sexually offensive conduct would be contrary to the public policy of Florida. That argument finds no support in the law or logic. Allstate cannot deny that its Policy expressly provides coverage for “invasions of rights to privacy,” and, undoubtedly, charges a premium for that coverage. Yet, now when called upon to perform under the policy, and provide a defense for a claim which falls specifically within the coverage of the Policy, Allstate claims that the coverage it provided is against the public policy of Florida. Allstate cites no authority whatsoever, and none exists, for its absurd

[4] Scarfo alleged that even during her employment with Ginsberg, an undefined amount of Ginsberg's alleged tortious conduct occurred "after working hours." (Doc 20 - Pg 66-67; Doc 38 - Pg 28).

proposition. Rather, Allstate cites to *Ranger Insurance Co. v. Bal Harbour Club, Inc.*, 549 So. 2d 1005, 1009 (Fla. 1989) where the Court held "that the public policy of Florida prohibits an insured from being indemnified for a loss resulting from an intentional act of **religious discrimination**" -- a claim which, of course is not at issue in this case.

The Court held further that it was "the unique nature of intentional discrimination" which gave rise to this public policy. *Id.* at 1008. The Court noted that Florida has "numerous" anti-discrimination statutes, and even the Florida Constitution prohibits discrimination based on religion. *Id.* at 1008-09.

Allstate has cited no case, statute or other law, which even suggests that Florida has a public policy against insuring claims of invasions of rights of privacy.

Additionally, aside from the fact that Allstate does not cite any case which holds that it is against public policy to **indemnify** an insured for losses resulting from sexual harassment claims, Allstate ignores the fact that the issue here is not whether Allstate is obligated to indemnify Ginsberg for any liability that may be imposed against him in the State Action. Rather, the issue is whether Allstate is obligated to **defend** Ginsberg against Scarfo's allegations of improper conduct. Obviously, there is no public policy that would prohibit Allstate from providing Ginsberg with a defense of the allegation that Scarfo has asserted against him in the State Action, and it would be absurd for Allstate to contend otherwise. Allstate's argument that it should be relieved of its duty to defend Ginsberg because to do so would violate some non-existent public policy, should be given short-shrift.

IV. RESPONSE TO CERTIFIED QUESTION NUMBER 4: THE ISSUE OF WHETHER ALLEGATIONS OF INTENTIONAL INVASIONS OF PRIVACY ARE EXCLUDED FROM COVERAGE BY AN INTENTIONAL ACTS EXCEPTION WHEN THE POLICY EXPRESSLY PROVIDES COVERAGE FOR INVASIONS OF PRIVACY HAS BEEN WAIVED BY ALLSTATE.

Allstate has waived any claim that an "intentional acts exclusion" in its Policy divests it of its obligation to provide a defense to Ginsberg, and has not answered this Certified Question. Thus, there is no argument to which to respond and, accordingly, Ginsberg refrains from doing so.

CONCLUSION

Based on the foregoing arguments and authorities, this Court should:

1) Decline to answer the first certified question because it is irrelevant to the issue of whether Allstate presently has a duty to defend Ginsberg;

2) Declare that Allstate presently has a duty to defend Ginsberg because there is legal and factual doubt surrounding Scarfo's claim for invasion of privacy;

3) Affirmatively answer the second certified question finding that the allegations do constitute an "occurrence" under Allstate's Policy;

4) Negatively answer the third certified question finding that the allegations do

not fall within the "business exclusions" provisions of Allstate's Policy; and

5) Decline to answer the fourth certified question because any argument in regard thereto has been waived by Allstate.

Respectfully submitted,

ANANIA, BANDKLAYDER, BLACKWELL, BAUMGARTEN & TORRICELLA
Attorneys for Appellant/Respondent Victor Ginsberg
4300 NationsBank Tower
100 Southeast Second Street
Miami, Florida 33131-2144
Telephone: (305) 373-4900
Facsimile: (305) 373-6914

By:_____
Douglas H. Stein
Florida Bar No. 355283
Maurice J. Baumgarten
Florida Bar No. 525324

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the Answer Brief was forwarded via U.S. Mail this 27th day of March, 2001 to: David B. Shelton, Esq., Attorney for Appellee, Rumberger, Kirk & Caldwell, P.O. Box 1873, Orlando, Florida

32802, and Martha Chapman, Esq., Attorney for Elaine Scarfo, 823 Irma Avenue, Orlando, Florida 32803.

By:_____
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Douglas H. Stein, Esq.

CERTIFICATE OF TYPE SIZE

In accordance with Florida Rule of Appellate Procedure 9.210(a)(2), this Answer Brief of Appellant/Respondent Ginsberg has been prepared using Times New Roman 14 point font.

By:_____
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Douglas H. Stein, Esq.