IN THE SUPREME COURT OF FLORIDA

VICTOR GINSBERG and
ELAINE SCARFO,

Appellants,

vs.

CASE NO.: SC00-2614
L.T. CASE NO.: 99-10983

ALLSTATE INSURANCE COMPANY,

Appellee.

_____/

ON REVIEW OF CERTIFIED QUESTIONS FROM
THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

ANSWER BRIEF OF ELAINE SCARFO

MARTHA A. CHAPMAN
Florida Bar No. 4464

MARTHA A. CHAPMAN, P.A.
823 Irma Avenue
Orlando, Florida 32803
(407) 426-7188

(407) 426-9077 (fax)

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STATEMENT OF THE CASE

1. Nature of the Case

This case is before the Supreme Court of the State of Florida under discretionary jurisdiction to answer certified questions presented by the United States Court of Appeals for the Eleventh Circuit, pursuant to Article V, Section 3(b)(6) of the Florida Constitution and Rules 9.030(a)(2)(C) and 9.150 of the Florida Rules of Appellate Procedure. Allstate Insurance Co. v. Ginsberg, 235 F.3d 1331 (11th Cir. 2000).

2. Statement of the Facts and Procedural History[1]/

From November 1991 until September 1992, Elaine A. Scarfo was employed as a secretary for various Florida corporations owned by Victor Ginsberg. Prior to that time, from approximately November 1987 until November 1991, Scarfo worked for her husband without pay at Ginsberg's corporation. On September 18, 1992, Scarfo was terminated. In 1993, Scarfo filed a federal civil rights action against Ginsberg in the United States District Court for the Southern District of Florida, alleging that from approximately 1988 and throughout her employment, Ginsberg subjected her to unwelcome offensive conduct, including physical touching and comments of a sexual nature. In addition,

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[1]/ The fact section recites *verbatim* the facts set out in the Eleventh Circuit's decision. Allstate Insurance Co. v. Ginsberg, 235 F.3d 1331 (11th Cir. 2000).

Scarfo's complaint included common law tort claims for battery, intentional infliction of emotional distress, and invasion of privacy.

During the time of the actions alleged by Scarfo, Ginsberg was covered under a Personal Umbrella Policy issued by Allstate, which applies to an "occurrence" anywhere in the world while the insurance is in force. In 1995, Ginsberg tendered the defense of the action to Allstate, demanding that Allstate indemnify him for any potential liability.

Allstate, in providing a defense to the actions under a reservation of rights, filed a declaratory judgment action seeking a determination whether Allstate's policies cover the claims alleged by Scarfo against Ginsberg. In 1997, the district court dismissed Scarfo's federal civil rights action on jurisdictional grounds, and dismissed Scarfo's state law claims without prejudice. The Eleventh Circuit affirmed the dismissal in Scarfo v. Ginsberg, 175 F.3d 957 (11th Cir. 1999). Scarfo re-filed her claims against Ginsberg in the state court as common law torts.

The Personal Umbrella Policy provides as follows:

> Coverage - When we Pay
>
> Allstate will pay when an insured becomes legally obligated to pay for personal injury or property damage caused by an occurrence.

The policy defines "Personal Injury" as follows:

> (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; invasion 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.

(Emphasis added).

The parties filed cross motions for summary judgment, raising the question whether Scarfo properly alleged an invasion of privacy, thereby triggering Allstate's duty to defend. On April 21, 1999, the district court issued an order granting summary judgment in favor of Allstate. The district court concluded that Scarfo's allegations of unwelcome conduct did not state a cause of action for invasion of privacy under the relevant category of that tort identified by the Supreme Court of Florida as "intrusion-- physically or electronically intruding into one's private quarters." Agency for Health Care Admin. v. Assoc. Indus. Of Florida, Inc., 678 So.2d 1239, 1252 (Fla. 1996), cert. denied, 117 S. Ct. 1245 (1997).

Because the Supreme Court of Florida had never directly considered whether intrusion into "one's private quarters" included unwelcome conduct directed to one's physical person, the district court looked to the Florida intermediate courts for guidance and noted that the

intermediate courts appeared divided on that question. The district court concluded that the approach taken by Florida's Fourth District Court of Appeal was more in accord with the category of intrusion identified by the Supreme Court of Florida. Thus, based on the Fourth District's rationale in Guin v. City of Riviera Beach, 388 So.2d 604 (Fla. 4th D.C.A. 1980), the district court concluded that the invasion of privacy tort could not be "construed so broadly as to include a battery occurring in the workplace absent an intrusion into a place where the victim has a reasonable expectation of privacy." The district court held that Allstate had no duty defend, and granted summary judgment in favor of Allstate. [The Eleventh Circuit] appeal and cross-appeal followed.

3. Disposition in the Prior Tribunal

After all briefs were completed by the parties and oral argument was held, the Eleventh Circuit determined that it was unable to decide the issues in this case without resolving unsettled issues of state law which may be necessary to the outcome of the case. As a result, the Eleventh Circuit certified the following questions for determination by the Florida Supreme Court:

> (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 Claim of Invasion of Privacy?
>
> (2) Do 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?

(3) Do Pleadings of Unwelcome Conduct Including Touching in a Sexual Manner and Sexually Offensive Conduct 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?

(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?

SUMMARY OF THE ARGUMENT

Although no Florida Supreme Court case has further defined the tort of invasion of privacy in the nearly sixty years since the tort was first adopted in Cason v. Baskin, 155 Fla. 198, 20 So.2d 243 (Fla. 1944), the tort as adopted in Cason is sufficiently broad enough to include claims of intrusion based on sexual touching and invasive sexual comments.

The tort of intrusion is defined as:

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

Restatement (Second) of Torts, §652B. Persons have a reasonable expectation of privacy in their bodies and for their private sex lives. Unwanted touching of a person's body intrudes upon the solitude of the person's body. Invasive questions or comments about a person's sex life and other personal matters intrudes upon the solitude or seclusion of their private affairs or concerns. Both the physical invasion of the body and intrusive comments and questions would be highly offensive to the reasonable person.

The vast majority of courts around the country have allowed invasion of privacy claims where a plaintiff has alleged physical intrusion of the body and/or intrusive questions and comments. Many of these cases involved sexual harassment claims with allegations similar

to those in the instant case.

This Court should follow the majority rule and answer the first certified question in the affirmative: Allegations of unwelcome conduct, including touching in a sexual manner and sexually offensive comments and questions, state a claim under Florida's common law tort of invasion of privacy.

ARGUMENT

I. PRELIMINARY STATEMENT

In this Brief, as in the other briefs filed by Scarfo in the underlying declaratory relief action, Scarfo limits her argument to the first certified issue, i.e., whether a cognizable claim for invasion of privacy is stated by allegations of unwelcome sexual touchings and sexually offensive comments. She leaves the insurer and its insured to debate the other certified questions regarding the interpretation of the insurance policy.

Scarfo contends that the Court should re-write the first certified question to address whether either sexual touchings or sexual comments alone could state a claim for invasion of privacy, under the right factual scenario. The distinction is important since Allstate claims that the touchings should simply be treated under a battery claim and that the comments alone would not give rise to an invasion of privacy claim. (Allstate's Initial Brief at pp. 10-11). Moreover, if the question is answered in the affirmative as framed by the Eleventh Circuit, then courts may subsequently find that both comments and touching are required to state an intrusion claim. The re-wording of the certified question would avoid confusion and would clarify the parameters of the tort of intrusion.

Furthermore, Scarfo recognizes that the instant certified question before this Court is not limited to whether Scarfo herself had

sufficiently alleged an invasion of privacy claim. Instead, this Court has been asked by the Eleventh Circuit to determine whether, under Florida law, the tort of intrusion extends to claims involving sexual touching and/or sexually offensive comments. Accordingly, unlike Allstate's Initial Brief,[2]/ Scarfo's Brief is limited to a discussion of the history of the tort of invasion of privacy, a survey of the applicable case law in Florida and other states, and an argument to support Scarfo's position that this Court should answer the first certified question in the affirmative.

II. ***RESPONSE TO CERTIFIED QUESTION NO. 1:***

ALLEGATIONS OF UNWELCOME CONDUCT INCLUDING TOUCHING IN A SEXUAL MANNER AND/OR SEXUALLY OFFENSIVE COMMENTS AND QUESTIONS, STATE A CAUSE OF ACTION FOR INTRUSIVE INVASION OF PRIVACY UNDER FLORIDA LAW

A. BASED ON FLORIDA PRECEDENT, INTRUSION FORM OF INVASION OF PRIVACY SHOULD INCLUDE INVASIVE SEXUAL CONDUCT AND/OR INTRUSIVE COMMENTS OF A SEXUAL OR HIGHLY PERSONAL NATURE

1. Florida Supreme Court Cases

Florida was among the first of the states to recognize the tort

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[2]/ On the first certified question, Allstate's Initial Brief is directed to whether Scarfo herself alleged an invasion of privacy, as opposed to whether *any* plaintiff can sustain an invasion of privacy claim based on allegations either of unwelcome sexual touching or comments. Moreover, Allstate made inappropriate and *ad hominem* remarks which Scarfo has sought to strike in a separate motion.

of invasion of privacy in Cason v. Baskin, 20 So.2d 243 (Fla. 1944).[3/] In that decision, this Court reviewed the historical basis of the tort, tracing its origins to a "very strong and convincing article" by Samuel D. Warren and Louis D. Brandeis in which the authors promoted the need for the common law tort to be recognized to provide to individuals "full protection in person and in property." Warren & Brandeis, *The Right to Privacy*, 4 Harv.L.Rev. 193 (1890). In that article, extensively quoted by the Florida Supreme Court in Cason, Warren and Brandeis discussed the English common law cases in which privacy rights were protected under the guise of property rights and other claims. Warren and Brandeis further argued that, with political, social and economic changes, the common law developed so that "the right to life has come to mean the right to enjoy life, ---the right to be let alone."

Adopting the reasoning set out in the article, the Florida Supreme

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[3/] In Cason, the Court quoted an article stating that courts of ten of the states had

> definitely adopted the view that there is a legally enforceable right of privacy, three others seem to be aligned in favor of the doctrine, and it has been favorably referred to by still another court. The right is affirmed by statutes in two states. Other courts have adverted to the right of privacy, but based their decisions upon other grounds.

Cason, 20 So.2d at 211, *quoting* 41 Am. Jur. 926.

Currently, all of the states save one (Wyoming) have adopted the tort, either by common law or by statute.

Court concluded that

> [t]hus Messrs. Warren and Brandeis endeavored to demonstrate, and quite successfully, that the right of privacy was inherent in the common law and had been protected, ... and that the time had come for a recognition of this right of privacy as an independent right of the individual.

Cason, 20 So.2d at 209. The Court then looked to various treatises to determine the definition of right of privacy, citing to, among other sources, 41 Am.Jur. 925, Prosser on Torts, 1941 ed., 1050, 138 A.L.R. 22-110, Eldredge, Modern Tort Problems, 77, and the Restatement of Torts §867. Adopting the definition at 138 A.L.R. 25, the Florida Supreme Court in Cason defined an actionable invasion of privacy as:

> `The unwarranted appropriation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or **the wrongful intrusion into one's private activities, in such a manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities.**'

Cason, 20 So.2d. at 948-49 [emphasis added].

The Court in Cason also cited with favor Pavesich v. New England Life Insurance Company, 122 Ga. 190, 50 S.E. 68 (Ga. 1905), "the very able opinion of the Georgia Supreme Court ... [which] is recognized as the leading case on the subject in this country." Cason, 20 So.2d at 249-50. Pavesich, the first state supreme court case in the country adopting the tort of invasion of privacy, engaged in a lengthy and scholarly discussion of the rights of privacy from ancient Roman law

and through the ages, stating:

> Among the absolute rights referred to by [Sir William Blackstone] is the right of personal security and the right of personal liberty. In the first is embraced a person's right to a `legal and **uninterrupted enjoyment of his life, his limbs, his body**, his health, and his reputation.'

Pavesich, 50 S.E. at 70, quoting 1 William Blackstone *129 [emphasis added].

In the nearly sixty years since Cason, this Court has not had a single occasion to further interpret the tort of invasion of privacy. In the two cases in which this Court has discussed the tort of invasion of privacy, neither of those cases directly implicated, interpreted, or applied the tort.

a. Forsberg Decision

In Forsberg v. Housing Authority of Miami Beach, 455 So.2d 373 (Fla. 1984), the tort of invasion of privacy was discussed in a concurring opinion by Justice Overton, in which he set out the tort and its history, citing with favor to Prosser and the Restatement of Torts, as part of a discussion about the various sources of law from which a party may claim a privacy right. In that case, public housing tenants had sought to enjoin the housing authority from allowing public access to personal information provided by the tenants and prospective tenants. Upholding the circuit court's decision to grant the housing authority's motion to dismiss, the majority ruled the claims were

unfounded due to Florida's stated policy that public records are open for public inspection and since no state or federal constitutional rights of disclosural privacy existed in this instance. The common law tort of invasion of privacy was not addressed at all in the majority's *per curiam* decision.

However, Justice Overton, while concurring in the result, rejected as inadequate the majority's analysis of the issues. Justice Overton identified the claims brought in Forsberg as seeking to protect disclosure of personal, intimate information such as detailed medical and financial information concerning the tenants. Id. at 375. The claims asserted in the complaint were: (1) violation of the right of privacy implicit in the Florida Constitution, Art. I, Sec. 2; (2) violation of the first, fourth, and fourteenth amendments to the United States Constitution "inasmuch as the information relates to private marital and family matters"; (3) public inspection of personal, intimate information absent showing of need is void as against public policy; and (4) violation of due process of law as guaranteed by fourteenth amendment to the United States Constitution.

In his concurring opinion, Justice Overton agreed with the majority that the complaint should be dismissed since there was no state or federal constitutional right to privacy or to exempt the information from review. However, since he found that it was important to more fully discuss the aspects of the claimed privacy rights and

balance them with the claimed governmental interests, Justice Overton, unlike the majority, discussed the right of privacy and its various origins and meanings:

> The term `right of privacy' applies to various personal rights which are not necessarily interrelated or derived from the same source. The term has three distinct meanings, depending upon the category of privacy law invoked: (1) the basis for an invasion of privacy civil action under tort law; (2) a federal constitutional right against governmental intrusion; and (3) a state constitutional or statutory right against either governmental or private intrusion.

Id. at 376. Justice Overton next briefly reviewed the historical context of the civil tort for the "wrongful invasion into the privacy of another," noting that the concept "originated with a phrase coined by Thomas M. Cooley: `The right to one's person may be said to be a right of complete immunity: *to be let alone*.'" Id. at 376, quoting T. Cooley, Law of Torts 29 (1880) [emphasis added in decision]. Further noting that the article by Warren and Brandeis "applied the phrase to existing legal principles and developed the concept of `the right of privacy,'" Justice Overton described the four interests protected by the tort of invasion of property as follows:

> (1) appropriation--the unauthorized use of a person's name or likeness to obtain some benefit; (2) intrusion--physically or electronically intruding into one's private quarters; (3) public disclosure of private facts--the dissemination of truthful private information which a reasonable person would find objectionable; and (4) false light in the public eye--publication of facts

> which place a person in a false light even though the facts themselves may not be defamatory.

Forsberg, 455 So.2d at 376, citing W. Prosser, Handbook of the Law of Torts §117, 802-18 (4th ed. 1971), and the Restatement (Second) of Torts §§652B-652E (1976).[4]/

Since the result of the Forsberg decision did not involve any application or interpretation of the common law tort of invasion of privacy, the decision does not control the parameters of the tort. Moreover, since the discussion about the tort of invasion of privacy was only in a concurring opinion, Justice Overton's decision has no precedential value and instead represents only the personal view of the concurring judge. Lendsay v. Cotton, 213 So.2d 745, 746 (Fla. 3d D.C.A. 1960).

However, as Justice Overton correctly noted, this Court, "**following the majority rule**, has expressly recognized a right to sue in tort for the civil wrong of `invasion of privacy.'" Forsberg, 455 So.2d at 376, citing Cason v. Baskin, 20 So.2d 243 (1944) [emphasis added]. As is discussed below, the vast majority of the courts faced with the question have also applied the tort to situations involving intrusive sexual touchings and invasive sexual comments. Accordingly,

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[4]/ The description of the tort as set out by Justice Overton in Forsberg was adopted *verbatim* by this Court in a later decision, Agency for Health Care Admin. v. Associated Indus. of Fla., Inc., 678 So.2d 1239, 1252 (Fla. 1996), *cert. denied*, 520 U.S. 1115, 117 S.Ct. 1245, 137 L.Ed.2d 327 (1997).

Scarfo urges that this Court continue to follow the majority rule in answering the first certified question in the affirmative.

b. AHCA Decision

No rights of privacy were involved in the only other Florida Supreme Court case which discussed the tort of invasion of privacy, Agency for Health Care Admin. v. Associated Indus. of Fla., Inc., 678 So.2d 1239 (Fla. 1996), *cert. denied*, 520 U.S. 1115, 117 S.Ct. 1245, 137 L.Ed.2d 327 (1997). Instead, this Court discussed the tort as one example of prior instances where the Court had recognized and created a cause of action and had limited the defenses available for the tort. Id. at 1252. Quoting *verbatim* from Justice Overton's concurring opinion in Forsberg, the Court in AHCA identified the four types of wrongful conduct that can be remedied under the tort of invasion of privacy as follows:

> (1) appropriation--the unauthorized use of a person's name or likeness to obtain some benefit; (2) intrusion--physically or electronically intruding into one's private quarters; (3) public dissemination of truthful private information which a reasonable person would find objectionable; and (4) false light in the public eye-- publication of facts which place a person in a false light even though the facts themselves may not be defamatory.

Id. at 1252, n.20. Allstate argues that the above language limits the intrusion prong of the tort to instances where there is a physical or electronic intrusion into the private quarters, as in a residence.

(Allstate Initial Brief, pp. 11-13). However, the language in AHCA is not all-inclusive and was meant only to illustrate the point being made in the case at hand: that the Court had the power, through case law, to expand and contract the common law. Since no actual issue involving invasion of privacy was involved in AHCA, the definition of the tort does not have any impact on the current question, other than to illustrate the flexibility of the common law.

This Court and the United States Supreme Court have "recognized that states necessarily have the ability to fashion new tort remedies to confront new situations." AHCA, 678 So.2d at 1250. Indeed, in Cason, this Court recognized that

> [t]he common law has shown an amazing vitality and capacity for growth and development. This is so largely because **the great fundamental object and principle of the common law was the protection of the individual in the enjoyment of all his inherent and essential rights** and to afford him a legal remedy for their invasion.

Cason, 20 So.2d at 212 [emphasis added]. Moreover, this Court explained that "the common law has been and still is a living and growing thing" which allows the courts to "interpret the meaning and intent of the law and to give it due and proper application *to the facts of the individual cases* which come before them for protection." Cason, 20 So.2d at 251 [emphasis added].

2. Florida District Courts of Appeals Cases on Intrusion Tort

Indeed, the lower courts in Florida have further developed and

applied the tort to factual situations similar to the instant case, finding that a physical intrusion to the plaintiff's body is a form of the tort of invasion of privacy. See, State Farm Fire & Casualty Co. v. Compupay, Inc., 654 So.2d 944, 949 (Fla. 3d D.C.A. 1995) [recognizing tort of invasion of privacy can be met by a physical intrusion or touching of the plaintiff's person in an undesired or offensive manner] and Hennagan v. Department of Highway Safety and Motor Vehicles, 467 So.2d 748, 750 (Fla. 1st D.C.A. 1985) [holding that the facts alleged in the complaint regarding a physical intrusion consisting of touching the plaintiff's body and sexually molesting her were sufficient to state a claim of invasion of privacy].

Moreover, no court in Florida has **rejected** a physical intrusion of the body as a form of the invasion of privacy. Indeed, Guin v. City of Riviera Beach, 388 So.2d 604 (Fla. 4th D.C.A. 1980), the case on which the federal district court in the instant case relied for limiting the tort, does not actually create any such limitation on the tort nor does it create any conflict with any other decision, as incorrectly argued by Allstate. Instead, the court in Guin only looked to the tort as far as it needed to reach the question at issue in that case, namely, whether the trespass to real property could also be an invasion of privacy. A finding of this Court that touchings of a sexual nature and/or invasive sexual comments would constitute invasion of privacy would not conflict with the ruling in Guin or any other

Florida court opinion.

Rather, the Fourth District Court of Appeal, in a case decided just one year after Guin, characterized the intrusion category of invasion of privacy as "invading the plaintiff's physical solitude or seclusion," noting that Florida courts have accepted the four general categories of the tort of invasion of privacy recognized by Prosser in his Law of Torts, pp. 804-14 (4th ed. 1971). Loft v. Fuller, 408 So.2d 619, 622 (Fla. 4th D.C.A. 1981), *rev. den.* 419 So.2d 1198 (1982). The decision in Loft indicates an acceptance --not a rejection-- of claims such as Scarfo's, since Prosser takes a far broader view of the tort than the limited view imposed by the district court below. [See the discussion *infra* at pages 29-32 regarding Prosser's analysis of the extent of invasion of privacy claims.]

The state district court cases described above illustrate the vibrant nature of the tort and are proper extensions of the tort of intrusion since the conduct complained of was a "`wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities.'" Cason, 20 So.2d at 249, *quoting* 138 A.L.R. 25.

3. Federal District Court Decisions in Florida on Intrusion Tort

Similar to the state cases discussed above, federal district courts in Florida have repeatedly accepted and applied the intrusion tort to claims of sexual touching and intrusive sexual comments.

In Stockett v. Tolin, 791 F.Supp. 1536, 1556 (S.D. Fla. 1992), the court held that cumulative sexual harassment consisting of repeated groping and kissing, offensive touching and other physical abuse and attacks, combined with repeated verbal licentiousness, as well as following plaintiff into women's bathroom, comprised factual claims of the intrusive form of invasion of privacy.

In Vernon v. Medical Management Association, 912 F.Supp. 1549, 1559-63 (S.D. Fla. 1996), the Court found that allegations of pattern of persistent touching, squeezing, fondling, blowing and tickling of plaintiff's breasts, nipples, and buttocks, along with repeated lewd and vulgar remarks, were sufficient to withstand a motion to dismiss on an invasion of privacy claim, even if the actions occurred in a public place.

Allstate contends that this Court should ignore these federal district court decisions since they precede this Court's decision in AHCA and are inconsistent with AHCA. Allstate's argument is misguided for several reasons. First, Allstate is wrong when it argues that "[t]he Vernon opinion is dated January 16, 1996 so the court there did not have the benefit of this Court's opinion [in AHCA] which is dated June 27, 1996." The description of the tort of privacy found in AHCA, indeed the very language from AHCA which Allstate contends limits the tort, is **identical** to what Justice Overton wrote in 1984 in his concurring opinion in Forsberg --some twelve years prior to the Vernon

decision. Accordingly, the Vernon court in 1996 (as well as the Stockett court in 1992) had every opportunity to determine if that language limited the contours of the tort. Moreover, as Scarfo has argued throughout this Brief, neither Vernon nor Stockett is inconsistent with this Court's decision in AHCA since that case did not decide any issue regarding the tort. Simply put, AHCA has no precedential value to the issues in this case.

B. FLORIDA SHOULD FOLLOW THE COURTS OF OTHER STATES WHICH HAVE APPLIED THE TORT OF INTRUSION TO SIMILAR CLAIMS OF PHYSICAL INVASION OF THE SOLITUDE OF THE BODY AND OF CLAIMS OF INTRUSIVE SEXUAL COMMENTS

This Court in Cason in following the majority rule, identified as its sources for the definition of the tort, the Restatement of Torts (1939), Prosser on Torts, 1941 ed., 41 Am.Jur. 925, 138 A.L.R. 22-110, and the Georgia Supreme Court decision in Pavesich, following the majority rule.[5]/ Accordingly, the parameters of the tort should be determined in a manner that is consistent with the cases using the same sources, as well as through examining the evolution of the tort as defined by later editions of those same sources. Below, Scarfo examines the various courts in other states which have found that the intrusion tort is applicable to situations where physical touching of

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[5]/ Similarly, in his concurring opinion in Forsberg, Justice Overton identified his sources for the description of the four types of wrongful conduct known as invasion of privacy as: W. Prosser, Handbook of the Law of Torts §117, pp. 802-18 (4th ed. 1971) and the Restatement (Second) of Torts §§652B-652E (1976).

the body and/or invasive sexual questions or comments have been made.

1. Alabama Has Found Tort of Intrusion to Apply Where Claims of Sexual Touchings and/or Intrusive Comments Have Been Made

In 1948, just four years after Florida recognized the tort of invasion of privacy, the Alabama Supreme Court similarly adopted the tort, noting favorably that Florida had done so in Cason. Smith v. Doss, 37 So.2d 118, 120 (Ala. 1948) ["Upon careful consideration we are satisfied that the right of privacy is supported by logic and the weight of authority."] Both the Florida Supreme Court in Cason and the Alabama Supreme Court in Smith based their determinations and the definitions of the tort on an article written in 1890 by Samuel D. Warren and Louis D. Brandeis, as well as the Restatement of Torts (1941) and analytical notes at 138 A.L.R. 22 and 41 Am.Jur. 925. Cason, 20 So.2d at 249-50; Smith, 37 So.2d at 120.

In the more than fifty years since both Florida and Alabama first recognized the tort, Alabama, unlike Florida, has had a slew of cases come before its Supreme Court and lower courts. Having adopted the tort around the same time and having based the definition of the tort on the same sources, it is significant to review how the Alabama decisions shaped the tort of invasion of privacy. Moreover, Alabama has had significantly more case law develop the intrusion tort than any other state.

Nearly twenty years ago, the Supreme Court of Alabama had to

decide the very issue set out in the instant first certified question. As in the instant case, the Eleventh Circuit had certified questions to the Alabama Supreme Court regarding the tort of intrusion. Phillips v. Smalley Maintenance Services, Inc., 435 So.2d 705 (Ala. 1983). In that case, the plaintiff had filed in federal court a Title VII sexual harassment claim, in addition to state law tort claims for battery and invasion of privacy. Phillips alleged that her employer had repeatedly asked her increasingly more personal questions about her marriage and sexual activities, made repeated sexual advances toward her, and had hit her one time "across the bottom" with the back of his hand. She got so upset by his sexual advances that she had trouble working and suffered from chronic anxiety. Her Title VII claims were tried by the judge to an advisory jury along with the tort claims of battery and invasion of privacy. The jury awarded Phillips $10 in nominal damages on the battery claim and compensatory damages of $25,000 for the invasion of privacy claim.

On appeal to the Eleventh Circuit, the employer challenged: (1) whether Alabama recognized the intrusion tort; (2) whether the defendant had to acquire information from his questions about the plaintiff's private activities to fall under the tort; (3) whether the tort required that the defendant communicate private information about plaintiff to a third party; (4) whether the attempted acquisition of information must be done surreptitiously; and (5) whether an invasion

of the psychological solitude alone is sufficient under the tort.

The Eleventh Circuit certified each of those issues to the Alabama Supreme Court which held that: (1) the state had recognized the tort of intrusion since its 1948 decision Smith v. Doss; (2) acquisition of information is not a requisite element of the tort of invasion; (3) publication or communication to a third party is not a required element of the tort of intrusion, as specifically set out in the comments to the Restatement; (4) neither "surreptitious" nor "clandestine" activities are necessary elements of the intrusion tort; and (5) intrusion need not be upon a physical place, such as a trespass, since "one's emotional sanctum is certainly due the same expectations of privacy as one's physical environment." Phillips, 435 So.2d at 709-11.

In the cases since Phillips, Alabama has established that asking a co-employee for a date and making sexual propositions usually will not constitute an invasion of privacy, McIsaac v. WZEW-FM Corp., 495 So.2d 649, 651 (Ala. 1986), while several lewd comments and looking up a woman's skirt more than once constitutes an invasion of privacy, Ex parte Atmore Community Hospital, 719 So.2d 1190 (Ala. 1998). In Higgins v. Cunningham, 533 So.2d 525 (Ala. 1988), the Alabama Supreme Court elaborated on a wrongful intrusion claim:

> [T]here must be something in the nature of prying or intrusion and the intrusion must be something which would be offensive or objectionable to a reasonable person. The thing into which there is intrusion or prying must be, and be entitled to be, private. Two primary factors are considered in determining whether or not an intrusion which

> effects access to private information is actionable. The first is the means used. The second is the defendant's purpose for obtaining the information.

Id. at 531 (citations and internal quotations omitted). Applying that analysis in Busby v. Truswal Systems Corporation, 551 So.2d 322 (Ala. 1989), the Alabama Supreme Court found that summary judgment was precluded by extreme and outrageous sexual harassment based on more than seventeen separately listed instances of lewd comments, touching, and gestures to constitute evidence to support an intrusion tort.

Moreover, a lower court in Alabama upheld claims including the intrusion tort where the individual defendant frequently rubbed the plaintiff's shoulders, repeatedly made lewd and suggestive comments to her, and stuck his tongue in her ear. Cunningham v. Dabbs, 703 So. 2d 979 (Ala. Civ. App. 1997).[6]/

These cases have established that the tort of intrusion is a viable claim where allegations of unwelcome sexual touching and/or intrusive sexual comments or questions are made.

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[6]/ Federal district courts in Alabama have also applied the tort of intrusion in sexual harassment cases. See e.g., Kelly v. Troy State Univ., 923 F.Supp. 1494, 1502 (M.D. Ala. 1996) (denying motion to dismiss an invasion of privacy claim where defendant made sexually explicit remarks, jokes, and degrading comments about women and struck plaintiff several times); Patterson v. Augat Wiring Systems, Inc., 944 F.Supp. 1509, 1522 (M.D. Ala. 1996) ("allegations of sexual harassment are sufficient to state a claim of invasion of privacy"); and Portera v. Winn Dixie of Montgomery, Inc., 996 F.Supp. 1418 (M.D. Ala. 1998) (accepting that the tort of intrusion could apply where employee claimed sexual harassment, but rejected intrusion tort under the facts of the case on summary judgment).

2. Courts in Other States Have Also Applied Intrusion Tort to Sexual Touchings and/or Sexually Intrusive Comments

Additionally, in states other than Alabama and Florida, in all state courts where allegations were made similar to those by Scarfo, those courts have looked at the invasion of privacy claims to see if the facts alleged were sufficient to state a claim. Moreover, most of the federal courts have also generally accepted the concept that a physical intrusion into the solitude of the person, into the body, meets the requirements of the tort.

Nearly all other courts addressing the issue have determined that the intrusion tort is implicated, as long as the facts are sufficient to sustain the claim. Most of the cases reported involve summary judgment stage; in some of those cases, the courts have approved of the tort of intrusion in sexual harassment cases, but have rejected the particular case based upon the facts of that case. A survey of the most relevant of these cases is contained in the following section of this Brief, although Scarfo recognizes that none are binding authority on this Court.

a. Connecticut

In Bonanno v. Dan Perkins Chevrolet, 26 Conn. L. Rptr. 368, 2000 WL 192933 *1-2 (Conn. Super.), citing the comment to the Restatement (Second) of Torts, § 652B (1977), the court found that a sufficient claim for an unreasonable intrusion upon the seclusion of another was presented by factual scenarios in which the plaintiff was subjected to

both offensive verbal comments as well as unwanted physical contact.

Similarly, citing Bonanno and the Restatement (Second) of Torts, the court in Barnett v. Woods, 27 Conn. L. Rptr. 596, 2000 WL 1196354 *2 (Conn. Super.) held that sexual harassment allegations of "both offensive verbal comments and a physical touching [were] sufficient to sustain a cause of action for an invasion of privacy."

b. Indiana

In Garus v. Rose Acre Farms, Inc., 839 F.Supp. 563, 570 (N.D. Ind. 1993), the federal district court denied a motion to dismiss an intrusion claim in a sexual harassment case. Relying on the Alabama Supreme Court's decision in Phillips, the Restatement of Torts, Prosser on Torts, and applying an Indiana Supreme Court decision approving of intrusion upon solitude or seclusion where a person came into the home uninvited and threatened another with a gun,[7]/, the court in Garus held that allegations of being the "victim of continuous, repeated, degenerative cycle and pattern of sexual harassment" were sufficient to state a claim under the intrusion tort.

Moreover, citing the Garus case and Prosser and Keeton on Torts, in Van Jelgerhuis v. Mercury Finance Company, 940 F.Supp. 1344, 1368 (S.D. Ind. 1996), the court held that an invasion of privacy claim was made by the plaintiffs' sexual harassment claims that the employer

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[7]/ Cullison v. Medley, 570 N.E.2d 27 (Ind. 1991). The Indiana Supreme Court in Cullison also cited Prosser and Keeton on Torts as a source for the tort. Cullison, 570 N.E.2d at 31.

would talk about sexual dreams, made numerous references to the plaintiffs' "fat asses" and the size of their breasts, often asked about plaintiffs' sex lives, repeatedly and inappropriately commented on the plaintiffs' attire.

c. Kansas

The Kansas Supreme Court held that allegations that a doctor sexually fondled the plaintiff's breasts and other body parts during an examination for a hurt neck were sufficient to state a claim for invasion of privacy and assault and battery. Smith v. Welch, 265 Kan. 868, 967 P.2d 727 (Kan. 1998).

Citing with approval to the Alabama Supreme Court's decision in Phillips, a federal court in Kansas approved of the intrusive form of the tort of invasion of privacy but rejected its application to the facts at hand where the comments and touching were not intrusive or coercive sexual demands nor did they intrude into her private concerns. Haehn v. City of Hoisington, 702 F.Supp. 1526 (D. Kan. 1988).

d. Louisiana

A federal district court denied summary judgment on an invasion of privacy claim where sexual harassment was alleged involving touching a breast and putting an airhose between the plaintiff's legs. Waltman v. Int'l Paper Co., 47 F.E.P. Cas. 671, 1988 WL 235862 (W.D. La.).

e. Tennessee

Stating "[t]here was obviously an invasion of Mrs. Pease's

privacy," a federal district court found that invasion of privacy claim was made where the employer subjected a female employee to touching, fondling, and stroking of her breasts, thighs, hair, neck, shoulders, and buttocks. Pease v. Alford Photo Indus., Inc., 667 F.Supp. 1188, 1203 (W.D. Tenn. 1987).

f. Texas

In Cornhill Ins. PLC v. Valsamis, Inc., 106 F.3d 80, 85 (5th Cir. 1997), the plaintiff had alleged that her supervisor made sexual remarks to her, touched her offensively, exposed himself to her, made threatening and obscene gestures to her, and attempted to force himself upon her in a supply room. When she tried to report her supervisor's conduct, the president of the corporation tried to kiss her, asked her out, and arranged to meet her alone under the pretense of work. Rejecting the claim of invasion of privacy, the court held that the tort required physical invasion of a person's property or eavesdropping on another's conversation with aid of wiretaps. Allstate's reliance on this case is misplaced, however, since Cornhill has been rejected by every federal and state court in Texas facing similar allegations and is essentially no longer good law.

In Aguinaga v. Sanmina Corp., 1998 WL 241260 (N.D. Tex.), the federal district court denied summary judgment on plaintiff's invasion of privacy claims where a supervisor forced the plaintiff to engage in sexual acts with him including intercourse, oral sex, and the insertion

of a banana into her vagina. Rejecting Cornhill, the Court held that Texas does not limit the tort of intrusion to a physical invasion of another's property or some form of eavesdropping, citing to Donnel v. Lara, 703 S.W.2d 257, 259 (Tex. App.--San Antonio 1985) (superseded on other grounds) in which the state court had approved of an action for invasion of privacy for conduct that constituted "telephone harassment". In Aguinaga, the court noted that "claims for intrusion on one's privacy are not limited to any particular type of conduct," contrary to the holding in Cornhill, since

> [t]he Texas Court of Appeals [in Donnel] stated that just because the plaintiffs' allegations `do not fall within the confines of the more familiar fact situations involving the tort of intrusion' does not mean that the plaintiffs have failed to allege a cause of action. The court found that wiretaps, microphones, and spying may be the more common situations in which a person intrudes on one's privacy, but such means are not `all inclusive.'

Aguinaga, 1998 WL 241260 at *6. Moreover, the court in Aguinaga also held that the Cornhill case did not apply since the alleged conduct included more than the offensive comments and inappropriate advances that existed in Cornhill. Id. The court also noted that, "[a]lthough the Texas courts have not clearly defined the parameters of the tort of intrusion into one's private affairs, they do not seem to exclude situations of sexual misconduct from falling within the scope of this claim." Id. at *7, citing Boyles v. Kerr, 806 S.W.2d 255 (Tex. App.--Texarkana 1991) (affirming a verdict against a boyfriend who secretly videotaped a sexual encounter with his girlfriend and showed the tape

to others, and recognizing that `sexual relations are recognized generally as entirely private matters') [reversed and remanded on other grounds]. Additionally, citing to Prosser and Keaton on Torts, the Aguinaga court held that the defendant's intrusive questions about the sexual activities between the plaintiff and her husband were highly personal questions and demands that would be highly offensive to a reasonable person and were an additional basis for a claim of invasion of privacy. Id. at *7.

Similarly, in Perez v. Living Centers, 963 S.W.2d 870 (Tex. App. San Antonio 1998), the court allowed an invasion of privacy claim where sexual harassment was alleged, consisting of physical, sexual and emotional abuse.

In Nichols v. Apartment Temporaries, Inc., 2001 WL 182701 (N.D. Tex.), the federal district court allowed an invasion of privacy claim to go forward where the supervisor had pulled down the female employee's skirt. Citing Perez and the cases and articles cited therein, the court held that "Texas courts and other authority have recognized the viability of an invasion of privacy claim brought in the context of sexual harassment allegations."

C. THE RESTATEMENT OF TORTS, PROSSER ON TORTS, AND OTHER AUTHORITATIVE SOURCE MATERIAL FIND TORT OF INTRUSION TO INCLUDE CLAIMS OF PHYSICAL INVASION OF THE BODY AND INTRUSIVE SEXUAL COMMENTS OR QUESTIONS

None of the authoritative treatises on torts or invasion of

privacy, upon which the cases discussed above have relied, supports limiting the tort by excluding either invasions of a person's body or intrusive sexual comments. The Restatement (Second) of Torts, §652B, "Intrusion upon Seclusion," defines the tort as follows:

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

Id. §652B. Nothing in that definition limits the tort in the manner suggested by Allstate or as applied by the federal district court in the instant action. The solitude or seclusion of a person or private affairs or concerns would seem to include acts of invasive sexual touching and intrusive sexual comments such as those involved in the instant case. Under Allstate's illogical formulation of the tort, it would be an actionable invasion of privacy for a person to look at another person through a window with binoculars but would not be an invasion of privacy to forcibly touch another's private body parts; it would be a unreconcilable contradiction for a court to find an invasion of privacy where one uses electronic means to watch a person undress, but to hold that privacy interests are not affected when a person pushes aside another's clothing and touches their private body parts.

Moreover, Allstate, in its Initial Brief, states that the tort is limited only to "unwanted publicity." (Allstate Initial Brief, p. 10)

Allstate's position is at odds with the Restatement and with almost every case decided regarding the elements of an intrusion claim.[8]/ Prosser has further defined the tort to include physical intrusions:

> An obviously different form of invasion [of privacy] consists of an unreasonable and highly offensive intrusion upon the seclusion of another. This is said to consist of intentional interference with another's interest in solitude or seclusion, either as to his person or to his private affairs or concerns. One form of invasion consists of intrusion upon the plaintiff's physical solitude or seclusion, as by invading his home or other quarters, or an illegal search of his shopping bag. ... It is clear, however, that there must be something in the nature of prying or intrusion ... It is also clear that the intrusion must be offensive or objectionable to a reasonable person ... It is clear also that the thing into which there is intrusion or prying must be, and be entitled to be, private.

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[8]/ Allstate disingenuously cites to only one case from a federal court in Kentucky while ignoring the host of cases holding the opposite. Allstate's Initial Brief at p. 10, n.1, cites to Stewart v. The Pantry, Inc., 715 F.Supp. 1361, 1368 (W.D. Ky. 1988) as rejecting intrusions into one's person as an invasion of privacy as well as duplicating a battery claim. As shown above by the survey of cases discussed, the overwhelming majority of the cases find that the intrusion prong of invasion of privacy applies in situations where the plaintiff claims to have been physically touched and/or where intrusive highly personal questions or comments have been made.

Moreover, the fact that the same factual allegations may support an additional claim --trespass, battery or false imprisonment, for example-- has not precluded plaintiffs from stating an invasion of privacy claim. See e.g., Guin v. City of Riviera Beach, 388 So.2d 604, 606 (Fla. 4th D.C.A. 1980) (allowing claims for **both** trespass and invasion of privacy on same facts). See also, Stockett v. Tolin, 791 F.Supp. 1536, 1555-56 (S.D. Fla. 1992) ("Tolin's groping and kissing of Stockett constituted both an offensive and unwelcome touching (i.e., battery) and an invasion of her physical solitude (invasion of privacy). Tolin's battery of Plaintiff--the repeated and offensive touching of the most private parts of Plaintiff's body--constitutes an intrusion into her physical solitude. In addition, the act of pinning Plaintiff against the wall and refusing to allow her to escape, even though only done for a short period of time, was false imprisonment.")

> ... And, even in a public place, there can be some things which are still private, so that a woman who is photographed with her dress unexpectedly blown up in a `fun house' has a right of action.

W. Prosser, Handbook on the Law of Torts, §117, pp. 854-56 (4th ed. 1971)[9]/. Nothing in that description precludes the sexual touching or invasive sexual comments alleged in the instant case. Indeed, it is difficult to conceive how the personal integrity and solitude of one's private body parts and one's personal sex life would be delegated less protection under the tort than one's shopping bag. Moreover, Prosser and Keeton maintain that "highly personal questions or demands by a person in authority may be regarded as an intrusion on the psychological solitude or integrity and hence an invasion of privacy." W. Prosser and J. Keeton, Prosser on Torts, §117 (Supp. 1988).

The descriptions contained within the Restatement and by Prosser extend the intrusion tort beyond the limits suggested by Allstate and by the federal district court in this case. Under the case law and treatises referred to above regarding the tort of invasion of privacy, factual allegations of sexual touching and/or comments are sufficient to state an invasion of privacy claim. Therefore, the answer to the first certified question should be in the affirmative: Allegations of frequent and repeated unwelcome acts of sexual conduct, including touching in a sexual manner and/or sexually offensive questions, state

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[9]/ The Fourth District Court of Appeals similarly cited Prosser's Handbook on Torts with favor in Loft, 408 So. 2d at 622.

a cause of action for the Florida common law tort of invasion of privacy.

CONCLUSION

> **Personal dignity is the fine flower of civilization, and the more of it there is in a community, the better off the community is. ... But without privacy, its cultivation or preservation is hardly possible.**[10]/

The right to be let alone, to be allowed to live without the intrusion by others into private matters, has been protected by the common law throughout the last century. The tort of invasion of privacy has evolved with society: "Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society." Warren and Brandeis, *The Right to Privacy*, 4 Harv.L.Rev. 193 (1890).

While the specific question in this case has not been raised in this Court before, it is not a new problem requiring a new solution. Instead, this Court need only look to the tort of intrusion upon seclusion as it has been defined in Florida and elsewhere, and then apply it in a manner consistent with prior precedent and with the majority of courts around the country. It can hardly be said that it is a new thought that it is an intrusion upon the solitude of a person to touch their private body parts (or other parts of their bodies)

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[10]/ G.L. Godkin, *The Rights of the Citizen*, Scribner's, July 1890, at 58, 65-66.

without their consent. Nor has it ever been inoffensive or acceptable to make unwelcome comments or to ask intrusive questions about a person's sexual activities or other private matters. These are among the "fairly well-defined areas of privacy" which "must have the protection of law if the quality of life is to continue to be reasonably acceptable." Id.

This Court should answer the first certified question in the affirmative: the Florida common law tort of invasion of privacy extends to claims of frequent and repeated unwelcome acts of sexual conduct, including touching in a sexual manner and/or sexually offensive comments or questions.

Respectfully Submitted,

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MARTHA A. CHAPMAN
Florida Bar No. 4464

MARTHA A. CHAPMAN, P.A.
823 Irma Avenue
Orlando, Florida 32803
(407) 426-7188
(407) 426-9077 (fax)

ATTORNEYS FOR APPELLANT SCARFO

DATE: March 27, 2001

CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief was prepared in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure. This Brief was prepared in Courier New 12 point font.

Respectfully Submitted,

_____

MARTHA A. CHAPMAN
Florida Bar No. 4464

MARTHA A. CHAPMAN, P.A.
823 Irma Avenue
Orlando, Florida 32803
(407) 426-7188
(407) 426-9077 (fax)

ATTORNEYS FOR APPELLANT SCARFO

IN THE SUPREME COURT OF FLORIDA

VICTOR GINSBERG and
ELAINE SCARFO,

Appellants,

CASE NO.: SC00-2614
vs. L.T. CASE NO.: 99-10983

ALLSTATE INSURANCE COMPANY,

Appellee.

_____/

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of **Appellant Scarfo's Answer Brief** was served by regular mail to the following counsel of record: Maurice Baumgarten and Douglas H. Stein, Attorneys for Appellant Ginsberg, ANANIA, BANDKLAYDER, BLACKWELL & BAUMGARTEN, 100 S.E. Second Street, Suite #4300, Miami, Florida 33131-2144, and David B. Shelton, Attorney for Appellees, RUMBERGER, KIRK & CALDWELL, P.O. Box 1873, Orlando, FL 32802, on this the 27th day of March, 2001.

Respectfully Submitted,

_____
MARTHA A. CHAPMAN
Florida Bar No. 4464

MARTHA A. CHAPMAN, P.A.
823 Irma Avenue
Orlando, Florida 32803
(407) 426-7188
(407) 426-9077 (fax)

ATTORNEYS FOR APPELLANT SCARFO