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

REPLY BRIEF OF ALLSTATE INSURANCE COMPANY

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REPLY REGARDING CERTIFIED QUESTION NO. 1:

In her Answer Brief, Elaine Scarfo ("Scarfo") argues that states have the ability to fashion new tort remedies to confront new situations. Answer Brief at 15. This case is not about whether new tort remedies can or should be fashioned by this Court. Instead, it is about the interpretation of Allstate's policy which defines "personal injury" to include: "c) libel; slander; misrepresentation; humiliation; defamation of character; invasion of rights of privacy". The only issue presented is whether Scarfo's allegations of sexual assault and battery in a claim titled "invasion of privacy" fall within the terms "invasion of rights of privacy" in Allstate's policy. Allstate submits that the policy terms "invasion of rights of privacy" should not be read to include conduct that constitutes a sexual assault and battery.

The policy terms "invasion of rights of privacy" must be read by reference to the other terms accompanying them in definition (c). United Services Automobile Association v. Phillips, 740 So. 2d 1205, 1209 (Fla. 2nd DCA 1999)(words must be construed in context); Allstate Insurance Co. v. Russo, 641 A.2d 1304 (R.I. 1994) (applying principle to definition of "personal injury" in Allstate's umbrella policy). The terms "invasion of rights of privacy" are qualified and restricted by their association

with the other terms, i.e. "libel; slander; misrepresentation; humiliation; defamation of character". Those terms generally comprise claims based on the publication of information injurious to the victim. When read in association with the entire definition, the policy terms "invasion of rights of privacy" should not include allegations that Victor Ginsberg ("Ginsberg") sexually groped Scarfo and made sexual comments *to her* which were not published to others.

Even if the Court looks at the privacy tort rather than the policy language, this is not a new situation which needs a new remedy. The situation of battery, whether sexual or otherwise, has unfortunately existed in Florida for years but the common law battery tort has provided a remedy which is more than adequate.

Scarfo further argues that the Court should look at how the tort evolved in answering the first certified question. Answer Brief at 19. The tort was recognized to fill a gap in the common law – to protect rights which were not already protected. Cason v. Baskin, 20 So. 2d 243 (Fla. 1944)(created a distinct remedy for injury caused by defendant's publication of a book which included a biographical sketch and life history of plaintiff including an unflattering description of her work as a census taker). [1] Prosser and Keeton, The Law of Torts Section 117, pages 849-850 (5th Ed. 1984)

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[1] Although she discusses Cason at length in her Answer Brief, at 10-13, Scarfo ignores all discussion and analysis of the tort which shows that it was concerned with the individual's privacy rights versus publicity within the community. E.g. 20 So. 2d at 248 (this Court quoted early authors who "defined

(noting that its origin was an attempt to create a remedy upon a distinct ground essential to the protection of private individuals against the unjustifiable infliction of mental pain and distress). Given this *raison d'etre*, it makes no sense to allow the tort to "evolve" in such a way that it encompasses rights already protected by the tort of battery. If this "evolution" is permitted, the tort loses its status as a distinct claim and merely becomes a redundant claim. Cason, 20 So. 2d at 250 (the right of privacy is distinct in and of itself and not merely incidental to other rights).

Scarfo invites this Court to ignore or dismiss its description of the tort in Agency For Health Care Administration v. Associated Industries of Florida, Inc., 678 So.2d 1239, 1252 (Fla. 1996)(recognizing "intrusion" invasion of privacy as "physically or electronically intruding into one's private quarters"), cert. denied, 520 U. S. 1115 (1997). The Court should reject this invitation since such description is consistent with the fundamental purpose of the tort, as recognized in Cason, to protect private matters from being made public.

Scarfo spends considerable time discussing foreign case law. Answer Brief at

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the right of privacy, in substance, 'to be the right to be let alone, the right to live in a community without being held up to the public gaze if you don't want to be held up to the public gaze.'" and 248-8 (this Court quoted from the Restatement of the Law of Torts: "Interferences with privacy: A person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other.").

19-29. However, foreign case law on this issue is mixed, e.g. Commercial Union Insurance Co. v. Sky, Inc., 810 F.Supp. 249, 255 (W.D. Ark. 1992)(claims of sexual harassment do not constitute "personal injury" which was defined by policy to include invasion of privacy); Roman Mosaic and Tile Co. v. Aetna Casualty and Surety Co., 704 A.2d 665 (Pa. Super. 1997)(court found that allegations of sexual harassment and gender discrimination did not constitute a "personal injury"), so this Court should follow the principles outlined in Cason and follow the description in Agency For Health Care Administration.

Scarfo also argues that it would be illogical not to allow invasion of privacy to cover the situation where a person touches another's body parts. Answer Brief at 29. However, the logic is that touching another's body parts is already actionable as a battery. A remedy already exists for the touching so the privacy tort need not be extended or "evolved" in this manner.

[2]

Amicus, National Employment Lawyers, argue against a "narrow" interpretation of the tort that "would fail to impose liability on those who sexually fondle their employees in the workplace." Amicus Brief at 6. This argument is apparently intended

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[2] The battery tort would not cover the situation, described by Scarfo, in which a person watched another person through a window with binoculars. Because of the limitations of the battery tort, it might be logical to allow this watching to be encompassed by a privacy tort.

to suggest that if the Court does not expand or "evolve" the tort, these evil harassers will not be punished. This is absolutely false. These harassers will continue to be sued under existing federal civil rights laws and applicable

common law claims such as battery. Neither Scarfo nor amicus have presented any evidence to this Court that the federal civil rights laws and battery claims are insufficient to remedy the problem. In addition, neither Scarfo nor amicus have presented any evidence as to an advantage or benefit the victim would gain by being able to bring an invasion of privacy claim *in addition to* the federal claims and a battery claim. In short, no one has explained any *need* for this Court to expand or "evolve" the privacy tort in the manner sought in this case.

Because the issue is presented here in the context of an insurance dispute, the Court should realize that expanding or "evolving" the tort will likely only benefit the harasser. By allowing invasion of privacy claims against the harasser, the possibility of insurance coverage under personal umbrella policies may arise. Protection of the harasser should not be a consideration. As this Court explained in Ranger Insurance Co. v. Bal Harbour Club, Inc., 549 So.2d 1005 (Fla. 1989), the public policy of Florida prohibits insurance for violations of civil rights laws. Id. at 1009. This Court based its interpretation of public policy on several principles including the fact that allowing insurance would be inconsistent with the goal of deterring violations of the civil rights laws. Id. at 1007-8. Further, this Court noted that the bulk of these cases are brought against commercial enterprises which have the financial ability to compensate victims so coverage is not necessary. Id. at 1009.

Applying this public policy to the first certified question results in the conclusion that the tort does not include sexual touching and comments. By limiting the claims against the harasser to federal civil rights claims and battery, the harasser and his company will be forced to provide the remedy. Placing the burden on the harasser and his company, and not the insurer, will also aid in the deterrence of sexual harassment.

In his Answer Brief, Ginsberg has chosen not to address the merits of the certified question: i.e. whether sexual touching and comments constitute an invasion of privacy. Instead, Ginsberg argues that Allstate has a duty to defend regardless of whether such conduct constitutes an invasion of privacy. Ginsberg's argument ignores the fundamental fact that the coverage of Allstate's policy is triggered only if Ginsberg is sued for invasion of rights of privacy. In a declaratory judgment action, the court must determine on what basis Ginsberg is being sued. Allstate is not asking for a determination of whether Ginsberg committed the conduct which has been alleged or whether he will be liable to Scarfo.

The question presented for this Court is whether the allegations of Scarfo's complaint fall within the coverage of the policy by constituting an invasion of rights of privacy. Although Scarfo has titled her count "invasion of privacy" this does not mean that the factual allegations support this Court finding an invasion of rights of privacy. Indeed, as noted in the Initial Brief, the use of a title or buzzwords is insufficient to create

coverage if the factual allegations do not constitute a covered claim. Amerisure Insurance Co. v. Gold Coast Marine Distributors, Inc., 771 So. 2d 579, 582 (Fla. 4th DCA 2000)(court found no coverage for complaint generally alleging "defamation" against insured when the complaint does not contain allegations sufficient to state a cause of action for libel or slander). Thus, this Court needs to resolve the first question and decide whether allegations of sexual battery, although titled "invasion of privacy," constitute a covered claim within the context of Allstate's policy. That question should be answered in the negative.

REPLY REGARDING CERTIFIED QUESTION NO. 2:

Nowhere in his Answer Brief does Ginsberg suggest that the allegations against him in Scarfo's complaint constitute an accident. Such a suggestion could not be made with a straight face given the allegations: Scarfo specifically alleged that Ginsberg touched her "in a sexually offensive and unwelcomed manner, including kissing her, rubbing her shoulders and back and touching her breasts, and forcing her to touch his penis." (R.39, Exhibit "C" thereto at page C4, paragraph 9.)

Nonetheless, Ginsberg suggests that coverage can exist in this case because the definition of "occurrence" includes a continuous exposure to conditions.[3] However,

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[3] Ginsberg suggests that Allstate has made a "false statement" to the Court as to the policy's definition. Answer Brief at 14. In its Initial Brief at 5, Allstate set out the full definition of "occurrence." Moreover, Allstate anticipated the issue raised by Ginsberg and cited case law which holds that the

this must be read as accidental continued exposure to injurious conditions. Allstate Insurance Co. v. Belezos, 744 F. Supp. 992, 996 (D. Or. 1990) (court read Allstate's language "continuous exposure to conditions" to refer to "accidental repeated or continued exposure to injurious conditions"), affirmed, 951 F. 2d 358 (9th Cir. 1991). Thus, under the definition of "occurrence," Ginsberg must convince this Court that the allegations of sexual misconduct made against him constitute an accident.[4] Ginsberg cannot carry that burden. Commercial Union Insurance Co. v. Sky, Inc., 810 F.Supp. 249, 253 (W.D. Ark. 1992)(court found no "occurrence" and no coverage for claims of sexual harassment when policy definition included language "continuous or repeated exposures to substantially the same general harmful conditions"); Greenman v. Michigan Mutual Insurance Co., 433 N.W.2d 346, 349 (Mich. App. 1988)(court found no occurrence and no coverage for claims of sexual harassment when policy definition included language "injurious exposure to conditions, which result, during the policy term, in bodily injury or property damage").

Ginsberg further argues that the Court should ignore the accident requirement

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continuous exposure must also be accidental. Initial Brief at 17 n. 6. Ginsberg has chosen to ignore such case law. Ginsberg has cited no case law in support of his position.

[4] Pursuant to Florida law, a person seeking to recover on an insurance policy has the burden of proving a loss from causes within the terms of the policy. U.S. Liability Ins. Co. v. Bove, 347 So.2d 678 (Fla. 3rd DCA 1977). Consequently, in the instant action, Mr. Ginsberg bears the burden to establish that Ms. Scarfo's claim arises out of an "accident" or "occurrence".

and not apply it to invasion of privacy claims because Allstate's intentional injury exclusion does not apply to such claims. Ginsberg's argument is an attempt to rewrite the policy. Although the policy excepts claims of invasion of privacy from the exclusion, the policy does *not* except claims of invasion of privacy from the occurrence requirement. Instead, the policy clearly and expressly requires an occurrence before Allstate will defend an insured against any claim: "Allstate will defend an insured if sued as a result of an occurrence covered by this policy even if the suit is groundless, false or fraudulent." (R.39, Exhibit "B" thereto at page B9).

Because the occurrence requirement applies to the defense of any claim, including invasion of privacy claims, the Court must give effect to the policy. Excelsior Ins. Co. v. Pomona Park Bar & Package Store, 369 So.2d 938 (Fla. 1979) (an insurance policy must be read in its entirety, every provision and term should be given meaning and effect, and any apparent inconsistency should be reconciled if possible). The Court must give effect to the occurrence requirement and find that the allegations of intentional sexual harassment in this case do not trigger coverage under the policy.

As anticipated, Ginsberg relies on Purrelli v. State Farm Fire and Casualty Co., 698 So. 2d 618 (Fla. 2nd DCA 1997). Allstate respectfully submits that this Court should not follow Purrelli for the reasons stated in the Initial Brief at 23. Moreover,

Ginsberg has not shown that an invasion of privacy claim must always be intentional, which is the fundamental premise of Purrelli. In fact, Ginsberg ignores Thompson v. City of Jacksonville, 130 So. 2d 105 (Fla. 1st DCA 1961), review denied, 147 So. 2d 530 (Fla. 1962), in which the court clearly held that a complaint alleging that city policy officers negligently broke into and searched premises with negligent disregard for plaintiff's right to privacy stated a cause of action.

Ginsberg then changes tack and argues that, if there is a negligent invasion of privacy, Allstate should be required to provide a defense for this "negligence" claim. Answer Brief at 17-18. However, Ginsberg's argument ignores the specific allegations made by Scarfo against him. Scarfo does not allege a negligent invasion of privacy, nor does she allege in the alternative a negligent or intentional invasion. Scarfo alleges only an intentional invasion. For this reason, the Court should find no occurrence and no coverage.

REPLY REGARDING CERTIFIED QUESTION NO. 3:

Ginsberg argues that the business exclusions do not apply because his alleged conduct is not "business related." Answer Brief at 20. Ginsberg's argument ignores the specific language of Allstate's policy. Although Allstate's policy has an exclusion (number 1) for "any act…of any person in performing functions of that person's business" (R.39, Exhibit "B" thereto at page B10), Allstate's policy has an additional

exclusion (number 2) for "any occurrence arising out of a business or business property." (R.39, Exhibit "B" thereto at page B10). Exclusion 2 is intended to broaden and strengthen the exclusion of business-related claims. The language of exclusion 2 is inconsistent with a finding that Allstate's policy only excludes claims involving an insured's conduct which is "business related."

As anticipated, Ginsberg relies on Scheer v. State Farm Fire and Casualty Co., 708 So. 2d 312 (Fla. 4th DCA), review denied, 719 So. 2d 893 (Fla. 1998). Allstate respectfully submits that this Court should not and need not follow that case because it involves materially different policy language, misreads earlier precedent from this Court, and is inconsistent with numerous other cases. Initial Brief at 27-30.

Despite Ginsberg's argument to the contrary, Answer Brief at 22, the decisions in Santos v. State Farm Mutual Automobile Insurance Co., 707 So. 2d 1181 (Fla. 2nd DCA 1998), and Liberty Mutual Insurance Co. v. Miller, 549 So. 2d 1200 (Fla. 3rd DCA 1989), conflict with Scheer. Although these decisions do not involve claims of sexual harassment, they conflict with Scheer by showing the analysis which should be applied in determining whether business exclusions apply. In both cases, the insured was sued as a result of injurious conduct which was not a function of the insured's business. Miller, 549 So. 2d at 1200 (doctor pulled on another doctor's stethoscope); Santos, 707 So. 2d at 1181 (professor grabbed a secretary). Even though the insured's

conduct was not a function of his business in either case, the courts found no coverage because the claims arose from the business.

In this case, Allstate does not argue that Ginsberg's sexual harassment was a function of his business. Nonetheless, the claims are not covered since they arose from the business. See also Landis v. Allstate Insurance Co., 546 So. 2d 1051 (Fla. 1989)(this Court found no coverage for insureds who were sued for sexually molesting children they were supervising at their day-care business despite argument that their acts of molesting the children are "activities normally considered non-business"). This is demonstrated by the fact that Scarfo has brought an EEOC charge against Ginsberg and has sued him under Title VII of the Civil Rights Act – allegations which are incorporated and realleged in the "invasion of privacy" count.

Moreover, Scarfo specifically alleged that she was employed by Mr. Ginsberg and his companies from approximately November of 1991 until September 18, 1992. She alleged that from approximately November of 1987 until November 1991 she worked for her husband at Ginsberg's corporations. Her husband worked for Ginsberg's corporations. Despite Ginsberg's argument to the contrary, Answer Brief at 23, these allegations demonstrate that Scarfo had a business relationship with Ginsberg and his corporations during the entirety of the alleged sexual harassment.

Scarfo alleged that "from approximately 1988 and throughout her employment

... [she] was subjected to ... sexually offensive, unwelcome conduct by Defendant Ginsberg, who was Plaintiff's direct supervisor." She alleged that his conduct created an intimidating, hostile and offensive work environment. Scarfo's further alleged that Ginsberg acted "individually and in his capacity as President and Director of corporate Defendants." (R.39, Exhibit "C" thereto at page C7, paragraph 26). The allegation is not in the alternative. Instead, all of Ginsberg's alleged actions were taken "as President and Director of the corporate Defendants." Claims based on Ginsberg's actions taken "as President and Director of the corporate Defendants" arise from his business and are not covered. Further, Scarfo seeks damages against all defendants including Ginsberg's corporate defendants. (R.39, Exhibit "C" thereto at page C8, paragraph 29). Such damages could be recovered against the corporate defendants only if Ginsberg was acting for the corporations. The fact that damages are sought against the corporations further supports the conclusion that these are business related claims.

Ginsberg seeks to find coverage for some of the claims by arguing that some did not occur during business hours and some "may" not have occurred at the place of business.[5] Such facts are not determinative of whether the business exclusions apply. Hain v. Allstate Insurance Co., 471 S.E.2d 521, 522 (Ga. App. 1996) (no

[5] Scarfo never alleged that the harassment occurred at a different place.

coverage under homeowner policy and personal umbrella policy for claims of assault

and battery and intentional infliction of emotional distress stemming from a pattern of sexual harassment even though the wrongful conduct was not restricted to the office environment and also occurred at places away from work such as at her home and various restaurants); Board of Education v. Continental Insurance Co., 604 N.Y.S.2d 399 (N.Y. App. Div. 1993) (no coverage under the liability policy when insured was sued for sexual harassment and retaliatory discharge arising from conduct by a school principal even though some of the principal's conduct occurred away from the school).

Public policy concerns do exist and apply to the instant case. Ginsberg should not be able to insure against claims that he touched Scarfo "in a sexually offensive and unwelcomed manner, including kissing her, rubbing her shoulders and back and touching her breasts, and forcing her to touch his penis." Allowing coverage, even a duty to defend, would be inconsistent with the goal of deterring this behavior. See Bal Harbour, 549 So.2d at 1009 (primary purpose of Title VII of federal Civil Rights Act of 1964 is to eliminate discrimination in employment). Ginsberg should not be insulated from the consequences of his sexual harassment even to the extent of being defended by Allstate. Moreover, Florida's public policy should not be ignored simply because the claims of sexual harassment are styled as "invasion of privacy" in addition to violations of Title VII.

CONCLUSION

For the above reasons, Allstate Insurance Company respectfully submits that the Court should: (1) Answer the first certified question in the negative and find that the allegations do not constitute an invasion of rights of privacy; (2) Answer the second certified question in the negative and find that the allegations do not constitute an occurrence; and (3) Answer the third certified question in the affirmative and find that the allegations fall within the business exclusions.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by U.S. Mail to Maurice Baumgarten, One International Place, 100 S.E. Second St., Ste. #3300, Miami, Florida 33131-2144; Martha A. Chapman, 823 Irma Avenue, Orlando, FL 32803, Richard E. Johnson, 314 West Jefferson St., Tallahassee, FL 32301 and Carol Swanson, 801 N. Magnolia, Ste. 418, Orlando, FL 32803 this _____ day of May, 2001.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.210(a)(2), I hereby certify that this brief was prepared using Times New Roman 14-point font.

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