Supreme Court of Florida

_____

No. SC00-2614

_____

ALLSTATE INSURANCE COMPANY and ALLSTATE INDEMNITY COMPANY,
Appellants,

vs.

VICTOR GINSBERG and ELAINE A. SCARFO,
Appellees.

[September 18, 2003]

PER CURIAM.

We have for consideration several issues of Florida law certified by the Eleventh Circuit Court of Appeals that are asserted to be determinative of a cause pending in that court and for which there appears to be no controlling precedent. We have jurisdiction. See art. V, § 3(b)(6), Fla. Const.

This case involves a declaratory decree action, which is proceeding in the federal court. The underlying tort action is proceeding in the state courts of

Florida. In Allstate Co. v. Ginsberg, 235 F.3d 1331, 1333 (11th Cir. 2000), the Eleventh Circuit reviewed a summary judgment holding that appellants Allstate Insurance Company and Allstate Indemnity Company (Allstate) had no duty to defend a state court complaint against its insured, appellee Victor Ginsberg, for invasion of privacy because the complaint failed to state a privacy claim. In its opinion, the Eleventh Circuit summarized the litigation history of this case:

> 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, 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 in this case 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, 520 U.S. 1115 (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 DCA 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 to defend, and granted summary judgment in favor of Allstate. This appeal and cross-appeal followed.

Id. at 1333-34 (footnote omitted).

In view of this Court not having ruled on the precise issue framed by the Eleventh Circuit, the Eleventh Circuit certified four questions to this Court. The questions certified are:

> [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?

Id. at 1337-38.[1] We assume for the purpose of answering the certified questions that the pleadings to which the first certified question refers are the allegations set forth in the complaint of appellee Elaine A. Scarfo:

> 6. On or about November 1991, Plaintiff began her employment with the corporate Defendants as a secretary and was employed in that position until her discharge on September 18, 1992.
>
> 7. From approximately 1988 and throughout her employment with the corporate Defendants which ended in September 1992, Plaintiff was subjected to ongoing and pervasive, sexually offensive, unwelcome conduct by Defendant GINSBERG, who was Plaintiff's

---

1. The parties have informed us that the state court action, in which Scarfo is pursuing tort claims against Ginsberg, was dismissed as having been filed beyond the statutory limitations period. The Fourth District Court of Appeal, however, subsequently reversed the trial court's dismissal of the case, holding that the statute of limitations period to file the state law claims was tolled during the pendency of the federal action. Scarfo v. Ginsberg, 817 So. 2d 919 (Fla. 4th DCA 2002). Scarfo was therefore permitted to pursue her state law claims in the trial court.

direct supervisor. These actions included the unwelcome touching of her body and being subjected to unwelcome sexually oriented comments and actions during and after working hours on an ongoing and repeated basis.

8. On repeated objections, Defendant GINSBERG physically touched Plaintiff in a sexually offensive and unwelcome manner, including kissing her, rubbing her shoulders and her back and touching her breasts, and forcing her to touch his penis.

9. Plaintiff repeatedly indicated to Defendant GINSBERG that such remarks and touching were not welcomed by her.

. . . .

CLAIMS FOR RELIEF

. . . .

C. THIRD CLAIM FOR RELIEF - INVASION OF PRIVACY

. . . .

24. Defendant GINSBERG, individually and in his capacity as President and Director of corporate Defendants and related corporations, invaded Plaintiff's privacy by intruding into Plaintiff's solitude in an offensive and objectionable manner which would cause mental distress and injury to a reasonable person having ordinary dealings and sensibilities.

25. As a direct and proximate cause of Defendant GINSBERG's actions, Plaintiff was injured and suffered great damages to both her physical and mental well-being.

We conclude that these pleadings do not state a cause of action for the common law tort claim of invasion of privacy under Florida law. In view of this conclusion, we decline to answer the remaining questions because those questions assume that the pleadings do state a cause of action under Florida law for invasion

of privacy.

ANALYSIS

In Cason v. Baskin, 20 So. 2d 243 (Fla. 1944), this Court first recognized the tort of invasion of privacy as a distinct cause of action in Florida. In that case, the plaintiff, a private person who claimed that publicity was extremely distasteful to her, brought an invasion of privacy claim against a well-known author, Marjorie Kinnan Baskin (also known as Marjorie Kinnan Rawlings), who had published a book which contained a biographical sketch of the plaintiff. The plaintiff alleged that the book personally violated her right to privacy by exposing private facts about her to the public. Cason, 20 So. 2d at 245. This Court adopted the then recent reasoning of two legal scholars that allegations that the book published an intimate character sketch of the plaintiff could constitute a prima facie case of invasion of the plaintiff's right to privacy. Id. at 247. In so holding, this Court discussed invasion of privacy as a distinct and actionable tort.

> [T]he right of privacy was inherent in the common law and had been protected, as shown by a number of English cases, under the guise of property rights, etc., and . . . the time had come for a recognition of this right of privacy as an independent right of the individual. Eldredge in his very interesting and recent book on "Modern Tort Problems," at page 77, says that Warren and Brandeis defined the right to 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." [Samuel D. Warren and Louis D.

Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890)].

Id. at 248 (emphasis added). This Court noted that, at that time, relatively few states had considered the existence of the right to privacy. This Court nevertheless concluded that there was in fact a right to privacy in Florida, "distinct in and of itself and not merely incidental to some other recognized right, and for breach of which an action for damages will lie." Id. at 250. Plainly, the focus of the tort was the holding up of information about a person for "public gaze."

In 1980, the Fourth District Court of Appeal decided Guin v. City of Riviera Beach, 388 So. 2d 604 (Fla. 4th DCA 1980).[2] In its opinion, the district court commented upon the tort of invasion of privacy as it had been recognized in Florida law:

> The tort of invasion of privacy is ordinarily considered to encompass four categories, one of which consists of "intrusion upon the plaintiff's physical solitude or seclusion, as by invading his home. . . ." W. Prosser, Torts § 117, P. 807 (4th ed. 1971). Florida has recognized the tort of invasion of privacy, at least to this limited extent. Thompson v. City of Jacksonville, 130 So. 2d 105 (Fla. 1st DCA 1961).

Id. at 606.

Following Guin, in Loft v. Fuller, 408 So. 2d 619 (Fla. 4th DCA 1981), the

---

2. This is a case upon which United States District Court Judge Ferguson relies in his summary judgment order in this case. Allstate Ins. Co. v. Ginsberg, No. 96-8268-CIV-FERGUSON (S.D. Fla. order filed Apr. 19, 1999).

Fourth District Court of Appeal further explained the development of invasion of privacy since this Court's decision in Cason.

> Since [Cason,] Florida decisions have filled out the contours of this tort right to privacy by accepting the following four general categories recognized by Prosser in his Law of Torts, p. 804-14 (4th Ed. 1971): (1) Intrusion, i.e., invading plaintiffs' physical solitude or seclusion; (2) Public Disclosure of Private Facts; (3) False Light in the Public Eye, i.e., a privacy theory analogous to the law of defamation; and (4) Appropriation, i.e., commercial exploitation of the property value of one's name.

Loft, 408 So. 2d at 622.[3]

In 1985, the Second District Court of Appeal in Ponton v. Scarfone, 468 So. 2d 1009, 1010 (Fla. 2d DCA), review denied, 478 So. 2d 54 (Fla. 1985), rejected a claim that an employer's "utterances, designed to induce [the plaintiff] to join with

---

3. It is interesting that Professor Prosser's treatise noted that there had "been discussion of possible expansion at common law to include anything involving an "'affront to human dignity'—a concept sufficiently broad to include almost all personal torts, from assault and battery and false imprisonment through all insults, whether or not amounting to extreme outrage, defamation, and no doubt many others. Thus far, no such expansion has occurred . . . ." William L. Prosser, The Law of Torts § 117, at 816 (4th ed. 1971). We note here that, since Prosser's treatise was published, at least one state has expanded the tort of invasion of privacy in the intrusion context to include a sexual harassment claim. See Phillips v. Smalley Maint. Servs., Inc., 435 So. 2d 705, 711 (Ala. 1983). Alabama's definition of the tort of invasion of privacy as an intrusion was, however, initially created and defined differently than Florida's definition. Id. at 708 (indicating that Alabama adopted the definition of invasion of privacy set forth in Restatement of Torts § 867 (1939) and defined intrusion as "the wrongful intrusion into one's private activities in such manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities").

him in a sexual liaison, constituted a tortious incursion upon her privacy." The district court held that the alleged conduct was not conduct which the tort of invasion of privacy was designed to cover.

In 1985, the First District Court of Appeal decided Hennagan v. Department of Highway Safety & Motor Vehicles, 467 So. 2d 748 (Fla. 1st DCA 1985). The appellees contend that this is a case in which a Florida court recognized that the tort of invasion of privacy includes a physical intrusion to the plaintiff's body. It is correct that in Hennagan, count four of the complaint alleged an invasion of privacy based on an unlawful touching, and that the district court remanded the case for further proceedings on that count. However, the district court's opinion does not discuss whether the allegations in the complaint stated a cause of action for the common law tort of invasion of privacy. The focus of the district court's opinion was whether the alleged acts could state a cause of action as being within the scope of the employment of the defendant's employee who was alleged to have committed the acts.

In 1995, the Third District Court of Appeal decided State Farm Fire & Casualty Co. v. Compupay, Inc., 654 So. 2d 944 (Fla. 3d DCA 1995). The appellees also contend that this is a case in which a Florida court explicitly recognized that the tort of invasion of privacy includes a physical intrusion to the

plaintiff's body. We again find that Compupay is not a decision directly addressing the issue of whether 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. First, we note that in Compupay, the district court, basing its decision on the specific language of the insurance policy at issue in that case, found that the policy did not cover causes of action under the broad umbrella of invasion of privacy torts. Second, we do acknowledge that in a discussion of Florida's common law tort of invasion of privacy, the district court made the following statements: "Claims based on this tort require the allegation and proof of publication to a third person of personal matter. Recently, an exception has been created in cases where the plaintiff's person has been touched in an undesired or offensive manner." Id. at 949 (citations omitted). As authority for the stated exception, the district court cited to Stoddard v. Wolfhart, 573 So. 2d 1060 (Fla. 5th DCA 1991), and Stockett v. Tolin, 791 F. Supp. 1536 (S.D. Fla. 1992). These cases, however, simply state that an unwarranted touching can be an invasion of privacy without any analysis or authority.

In 1996, this Court set forth what was included within the common law tort of invasion of privacy, adopting the four categories which had been set forth in

1980 by the Fourth District Court of Appeal's decision in Loft. As recognized in Agency for Health Care Administration v. Associated Industries of Florida, Inc., 678 So. 2d 1239, 1252 n.20 (Fla. 1996) (hereinafter AHCA), the four categories are:

> (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.

It is correct, as the appellees argue, that this Court set out the categories of the tort of invasion of privacy for the purpose of illustrating a point, not to directly address the point of what alleged facts state a cause of action for the tort of invasion of privacy. But we here affirm that the statement in AHCA does correctly state what is included in Florida's tort of invasion of privacy.

The appellees next contend that accepting the AHCA statement as what constitutes the tort of invasion of privacy (i.e., "(2) intrusion—physically or electronically intruding into one's private quarters," id.) is broad enough to include unwelcome conduct including touching in a sexual manner and sexually offensive comments. We disagree. The intrusion to which this refers is into a "place" in

which there is a reasonable expectation of privacy and is not referring to a body part. As we noted at the time we first recognized this tort in Cason, the tort of invasion of privacy was not intended to be duplicative of some other tort. Rather, this is a tort in which the focus is the right of a private person to be free from public gaze. We agree with United States District Court Judge Ferguson's determination in the summary judgment order in this case that the allegations of the complaint do not amount to an invasion of privacy.

CONCLUSION

Accordingly, we answer the Eleventh Circuit's first certified question in the negative. We decline to answer the remaining three certified questions because we conclude that our answer to the first certified question renders these questions moot. We return this case to the Eleventh Circuit having only answered the first certified question.

It is so ordered.

WELLS and BELL, JJ., and SHAW, Senior Justice, concur.
ANSTEAD, C.J., concurs in part and dissents in part with an opinion, in which PARIENTE and QUINCE, JJ., concur.
LEWIS, J., concurs in part and dissents in part with an opinion.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

ANSTEAD, C.J., concurring in part and dissenting in part.

This case comes to us from a declaratory decree action in the federal court in which the central issue involves Allstate's duty to defend its insured, Victor Ginsberg, in Elaine Scarfo's state court invasion of privacy action against him. Allstate's policy explicitly provides coverage to Ginsberg for claims of "invasion of rights of privacy." Hence, the initial coverage issue appears to turn on whether Scarfo's allegations state a cause of action for invasion of privacy under Florida law.[4] I would hold that a cause of action has been properly alleged, and I concur only in the majority's conclusion that the other questions posed appear to have been rendered moot by the majority's decision to reject the cause of action alleged here.

INVASION OF PRIVACY

In this case the appellees assert that Scarfo's state tort action states a cause of action for invasion of privacy because she alleges that Ginsberg physically

---

4. As we explained in Allstate Insurance Co. v. RJT Enterprises, Inc., 692 So. 2d 142, 144 (Fla. 1997), the insurer's duty to indemnify an insured is distinct from its duty to defend. An insurer's duty to defend is broader than the duty to pay or indemnify and it involves distinct responsibilities beyond the coverage issues. Id. at 144-45. We have consistently held that the allegations contained within the complaint govern the insurer's duty to defend. See Nat'l Union Fire Ins. Co. v. Lenox Liquors, Inc., 358 So. 2d 533, 536 (Fla. 1977). I also agree with the First District's observation that "[i]f the complaint alleges facts partially within and partially outside the coverage of the policy, the insurer is obligated to defend the entire suit." Grissom v. Commercial Union Ins. Co., 610 So. 2d 1299, 1307 (Fla. 1st DCA 1992).

intruded upon her "private quarters" by touching private parts of her body without her consent and over her repeated objections. In her complaint, Scarfo alleged:

> 8. On repeated occasions, Defendant GINSBERG physically touched Plaintiff in a sexually offensive and unwelcome manner, including kissing her, rubbing her shoulders and her back and touching her breasts, and forcing her to touch his penis.
>
> 9. Plaintiff repeatedly indicated to Defendant GINSBERG that such remarks and touching were not welcomed by her.

I would find these allegations sufficient to state a cause of action for invasion of privacy in Florida.

In Cason v. Baskin, 20 So. 2d 243 (Fla. 1944), this Court first acknowledged invasion of privacy as an actionable common law tort in Florida. Since that time, we have identified at least four categories of invasion of privacy claims that have been discussed in the case law or by legal commentators. For example, in Agency for Health Care Administration v. Associated Industries of Florida, Inc., 678 So. 2d 1239, 1252 n.20 (Fla. 1996), we explained:

> The four types of wrongful conduct that can all be remedied with resort to an invasion of privacy action are: (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.

Although we provided a broad framework in Cason and Agency for Health Care Administration for certain categories of the tort of invasion of privacy, we made no attempt to definitively limit the potential situations that may give rise to a cause of action. Rather, we were simply providing some organizational structure to the various kinds of claims that had already been identified by the case law or other legal authorities.

The federal trial court relied upon the case of Guin v. City of Riviera Beach, 388 So. 2d 604 (Fla. 4th DCA 1980), in concluding that no invasion of privacy was properly alleged here. Allstate Ins. Co. v. Ginsberg, 235 F.3d 1331, 1334 (11th Cir. 2000). However, that case is inapposite, since, in contrast to the allegations here, the Guin case involved trespass upon private property. In addition, the Fourth District in Guin affirmatively concluded that there was both a trespass and an invasion of privacy when the police illegally searched the appellant's residence. Guin, 388 So. 2d at 606. It makes little sense to rely on a holding affirmatively recognizing a cause of action under the circumstances presented as authority for the proposition that a cause of action does not exist in a totally different factual setting. If anything, the Guin case simply strengthens the concept of invasion of

privacy in Florida. However, I would find the Guin case to be inapposite and of little help in resolving the issue presented here.

On the other hand, in Vernon v. Medical Management Associates of Margate, Inc., 912 F. Supp. 1549, 1561 (S.D. Fla. 1996), the district court held that the plaintiff's invasion of privacy claim, alleging "a pattern of persistent touching, squeezing, fondling, hugging, blowing and tickling, along with the repetition of lewd and vulgar sexual remarks" should have survived a motion to dismiss. In Vernon, the district court explained that an increasing number of courts have recognized that allegations of offensive and undesired touchings of a sexual nature state a cause of action for invasion of privacy:

> In Stockett, for example, this Court held that "the repeated and offensive touching of the most private parts of Plaintiff's body . . . constitutes an intrusion into [the plaintiff's] physical solicitude" amounting to invasion of privacy under Florida law. 791 F. Supp. at 1556. See also State Farm Fire & Caves. Co. v. Compupay, Inc., 654 So. 2d 944, 948 (Fla. 3d Dist. Ct. App.) (noting that some Florida courts have recognized an actionable "intrusion" where the plaintiff's person has been touched in an undesired or offensive manner), rev. denied, 662 So. 2d 341 (Fla. 1995); cf. Hennagan v. Department of Hwy. Safety & Motor Vehicles, 467 So. 2d 748, 750-51 (Fla. 1st Dist. Ct. App.1985) (reversing the trial court's dismissal of an invasion of privacy claim based on an "unlawful touching" by a police officer who sexually assaulted a minor after stopping her on the pretext that she was under suspicion for theft). Florida courts also have acknowledged that, at least under some circumstances, even comments of a sexual nature made by an employer can be actionable on an invasion of privacy theory. See Steele, 867 F.2d at 1315 (noting

> that Florida law does not preclude an invasion of privacy action for sexually related comments when the comments are accompanied by publication to a large number of people); compare Ponton, 468 So. 2d at 1010 (rejecting invasion of privacy claim where an employer's verbal attempts to seduce the plaintiff lacked sufficient publication). Courts in other jurisdictions have agreed that allegations of sexual harassment involving touching or verbal abuse can form the basis for an invasion of privacy claim. See, e.g., Rogers v. Loews L'Enfant Plaza Hotel, 526 F. Supp. 523, 528 (D.D.C.1981) (finding that the plaintiff stated a claim for invasion of privacy by alleging that her supervisor had repeatedly called her at home and at work in order to make lewd comments about her sex life).

Id. See also Kelley v. Worley, 29 F. Supp. 2d 1304, 1311 (M.D. Ala. 1998) (holding that the plaintiff's invasion of privacy claim, alleging that defendant committed sexually harassing acts of physical contact at work, should have survived the defendant's summary judgment motion). These cases, of course, are directly on point, and represent a good sense and straightforward analysis of the protection afforded to persons in recognizing a right of privacy, a right commonly referred to as a right to be left alone. Here, the alleged victim was obviously not "left alone" and her privacy was violated in the most personal and intimate way. In good sense terms resolution of the issue should not even be a close call.

I can see no rational basis for distinguishing, for instance, between a situation where a defendant is alleged to have secretly, and without consent, visually spied upon another person in a state of undress and in a private place, from the situation

presented here where a person's "private parts" are touched without permission and over objection. I feel confident that the former situation, unwanted spying, would constitute an invasion of privacy under our analysis in Cason, and can see no good policy reasons for not extending the same analysis to a physical intrusion of the most private parts of one's person. Indeed, the intrusion of privacy and personal security would appear to be even greater and more offensive where physical intrusion takes place.

As with most common law torts, courts must be careful to allow for some evolution in the law as circumstances may dictate. Upon reflection, and in keeping with Cason, I would find the unwelcome sexual touching of a person's body does intrude upon a person's physical solitude and seclusion, and, accordingly, conclude allegations of such intrusions do state a cause of action for invasion of privacy as a physical intrusion into one's personal and private quarters. Accordingly, I would answer the first certified question in the affirmative.

PARIENTE and QUINCE, JJ., concur.

LEWIS, J., concurring in part and dissenting in part.

While I concur with the majority's conclusion with regard to the first question certified to this Court by the Eleventh Circuit, and agree that the

allegations contained within Elaine Scarfo's complaint against Victor Ginsberg do not constitute an invasion of privacy under Florida law, I believe the Court prematurely ends the analysis without addressing whether the accusations implicate conduct otherwise covered by Ginsberg's personal liability policy. In my view, the complaint in the instant case alleges torts that fall within the scope of the policy and, thus, trigger Allstate's duty to defend. Consequently, I believe the Court is remiss in failing to address, and answer in the affirmative, the second certified question, which pertains to whether allegations of unwelcome sexual touching and offensive sexual comments constitute an "occurrence" under Florida law for purposes of insurance coverage. Accordingly, I dissent from the majority's opinion.

In rendering its determination without fully analyzing whether the alleged actions fall under Ginsberg's policy, the majority ignores well-accepted principles of insurance contract interpretation. Long ago, this Court determined that "[t]he allegations of the complaint govern the duty of the insurer to defend." Nat'l Union Fire Ins. Co. v. Lenox Liquors, Inc., 358 So. 2d 533, 536 (Fla. 1977). "Accordingly, if the complaint, fairly read, contains any allegations which could fall within the scope of coverage, the insurer is obliged to defend the entire action." Psychiatric Assocs. v. St. Paul Fire & Marine Ins. Co., 647 So. 2d 134, 137 (Fla.

1st DCA 1994). This duty applies regardless of whether an inartfully drafted complaint buries or convolutes the harms alleged, see Psychiatric Assocs., 647 So. 2d at 138, or includes allegations that fall outside the scope of coverage. See Tropical Park, Inc., v. United States Fidelity & Guar. Co., 357 So. 2d 253, 256 (Fla. 3d DCA 1978) ("Where the complaint contains allegations partially within and partially outside the scope of coverage, the insurance carrier is required to defend the entire suit."). Any dispute regarding an insurer's duty to defend must be resolved in favor of the insured. See Psychiatric Assocs., 647 So. 2d at 137.

Applying these well-settled principles to the instant case, it is, in my view, beyond dispute that Scarfo's complaint alleges injuries that are within the definitions of coverage under Ginsberg's personal liability policy. As explained in the majority's opinion, the underlying complaint alleged that Scarfo was subjected to "ongoing and pervasive" offensive and unwelcome conduct, including inappropriate touching of a sexual nature. The conduct and alleged harm suffered by Scarfo as a result of this behavior surely constitutes an "occurrence," which under the wording of the Allstate policy includes "a continuous exposure to conditions." The policy further provides that an "occurrence" can include a "personal injury," a category comprised of a number of possible harms, including mental anguish and injury, humiliation, and discrimination. These are precisely the

types of harms alleged in Scarfo's complaint. Thus, from the perspective of a pure coverage analysis, without reference to exclusionary provisions, the matters alleged fall within the definition of "coverage."

Once it is established that the alleged events fall under the coverage definition, the focus must shift to whether any of the policy's exclusionary provisions would ultimately preclude indemnity. As indicated by the third and fourth questions certified by the Eleventh Circuit, the instant factual scenario may implicate two exclusions in Ginsberg's personal liability policy—the business and intentional acts exclusions. However, a reviewing court cannot summarily determine whether these exclusions do, in fact, apply. To the contrary, especially with regard to the intentional acts exclusion, such a decision requires a substantial fact-based analysis most properly conducted at the trial court level. Yet, as a result of the majority's truncated analysis of the scope of coverage in the instant case, the Eleventh Circuit will not have the information pertaining to Florida law it needs to meaningfully review the district court's grant of summary judgment in favor of Allstate, and to decide whether the action should proceed to trial.

Clearly, the parameters of "personal injury" covered by the policy include more than the tort of invasion of privacy which the majority has deemed—correctly in my opinion—inapplicable to the instant case. However, a fair reading of the

allegations in the complaint inescapably leads to the conclusion that the matters fall under the policy's coverage definitions. By ending the analysis without addressing alternative existing bases within the coverage definitional parameters, the majority's decision unnecessarily obfuscates the coverage analysis in the instant case and jeopardizes the continued viability of established principles of policy interpretation in this state. For these reasons, I dissent.

Certified Question of Law from the United States Court of Appeals for the Eleventh Circuit - Case No. 99-10983

Lori J. Caldwell and David B. Shelton of Rumberger, Kirk & Caldwell, P.A., Orlando, Florida,

for Appellant

Douglas H. Stein and Maurice J. Baumgarten of Anania, Bandklayder, Blackwell, Baumgarten & Torricella, Miami, Florida; and Martha A. Chapman, Orlando, Florida,

for Appellees

Richard E. Johnson, Tallahassee, Florida; and Carol Swanson, Orlando, Florida,

for the National Employment Lawyers Association, Florida Chapter, Amicus Curiae