

April, 2008

RE: Surveillance and the Tort of Intrusion Upon Seclusion

This letter comes in response to a number of inquiries that we have received lately regarding the potential liability of an insurer and an insured for conducting surveillance upon a claimant. A recent Fourth District Appellate opinion is instructive in this regard.

In Burns v. Masterbrand Cabinets, Inc., 369 Ill.App.3d. 1006, 874 N.E. 3d, 72 (2007) 4th Dist., the plaintiff had filed a workers compensation claim against Masterbrand for an alleged injury to his thoracic spine. Masterbrand retained the services of co-defendant Gallagher Bassett Services, Inc., to adjust the claim and manage the workers compensation case. Gallagher in turn, retained the services of co-defendant Metro Private Investigations, Inc., to perform personal surveillance of the plaintiff. An operative of Metro, John Kennedy, approached the plaintiff's mobile home and sought entry into his home under the false pretense that he was looking for a missing juvenile. Once inside, he asked the plaintiff questions about the alleged missing juvenile. Kennedy was wearing a camera that was hidden in a fanny pack. Kennedy did not record the conversation but the camera did capture the visual interaction.

Burns filed an action in the trial court stating a claim for "intrusion upon seclusion" against Masterbrand, Gallagher Bassett Services, Metro Private Investigations and Kennedy. He alleged that the unauthorized intrusion or prying into his seclusion was offensive and objectionable to a reasonable man and that the matter upon which the intrusion occurred was private and caused Burns anguish and suffering.

The trial court granted the motions to dismiss of Gallagher, Metro and Kennedy. The trial court noted that the Illinois Supreme Court had never specifically recognized the cause of action for intrusion upon seclusion although other Appellate Districts had. The trial court's opinion noted that the Fourth District was the only district which did not recognize this branch of privacy law and as such, the trial court was compelled to follow the rulings of the Fourth District Appellate Court.

The appellate court noted that in the prior case of Bureau of Credit Control v. Scott , Ill.App.3d 1006, 345 N.E.2d 37 the Fourth District refused to recognize a cause of action of intrusion upon seclusion. However, since that time, the other four remaining Appellate districts had recognized that cause of action. Consequently, in keeping with the other districts, the Fourth Appellate District held that it would now recognize the tort of intrusion upon seclusion as actionable in Illinois.

The Fourth District Court relied on the Restatement of Torts (2nd) definition which states, "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." The court noted that the complaint filed in the underlying case alleged the four elements of the tort as follows:

- 1.) An unauthorized intrusion or prying into the plaintiff's seclusion;
- 2.) The intrusion must be offensive or objectionable to a reasonable man;
- 3.) The matter upon which the intrusion occurs must be private and
- 4.) The intrusion causes anguish and suffering.

The Illinois Supreme Court has previously declined to rule on the issue of whether intrusion upon seclusion is actionable. In Lovegren v. Citizens First National Bank of Princeton 126 Ill. 2d 411, 534 N.E. 2d 987 (1989) , however, our Supreme Court expressly stated its discussion of intrusion upon seclusion did not imply the court's recognition that the tort constitutes a cause of action in Illinois. Nevertheless, until the Illinois Supreme Court weighs in on the issue it would appear that all appellate districts now will recognize a tort for intrusion upon seclusion. Intentional infliction of emotional distress also still remains a viable cause of action for any such outrageous behavior. Intrusion upon seclusion however is easier to prove than intentional infliction of emotional distress, as the latter requires outrageous behavior as opposed to "offensive or objectionable" behavior.

Insurers who obtain surveillance video either through their special investigations unit or through independent contractors will be well advised to instruct their operatives to refrain from obtaining any video surveillance of any claimant in an area where the claimant would have a reasonable expectation of privacy. Entering a claimant's dwelling under false pretenses and obtaining video surveillance is certainly actionable in Illinois. Moreover, setting up any surveillance equipment outside of the claimant's dwelling so that video surveillance can be obtained through an open window is a closer question.

Should you have any questions regarding this opinion, please contact the undersigned.

Very truly yours,

BUSSE, BUSSE & GRASSÉ, P.C.

C. William Busse, Jr.