CASE NO. SC05-168

IN THE
SUPREME COURT OF FLORIDA

VECTOR PRODUCTS, INC.
D/B/A VECTOR MANUFACTURING LTD.,

APPELLANT,

VS.

HARTFORD FIRE INSURANCE COMPANY,

APPELLEE.

ON CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF APPELLANT VECTOR PRODUCTS, INC.

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INTRODUCTION

Contrary to Hartford's representations, not once in Vector's opening brief, or in this brief, does Vector expressly or implicitly state that the duty to defend under Florida law should be determined by facts outside the four corners of the complaint, un-pled but potential claims, or hypothetical damages. Hartford's straw-man argument does not state Vector's position. The Court can determine Hartford's defense obligation by considering only Schumacher's complaint and the terms and exclusions of the Hartford policies.

Vector's position is clear, and consistent with principles of Florida law. If an alleged cause of action can result in liability regardless of whether knowing falsity or intentional conduct is proven, even if alleged, the knowledge of falsity and intent to injure exclusions do not relieve an insurer of its defense obligation. Because a § 43(a) Lanham Act claim does not ***require*** proof of knowing falsity or intentional misconduct there is a potential, under the claim ***as pled*** in the Schumacher complaint, that Vector could be liable for damages that do not fall within the subject exclusions. It is that potential – a potential duty to indemnify – that triggers an insurer's duty to defend. *Biltmore Constr. Co. v. Owners Ins. Co.*, 842 So.2d 947, 949 (Fla. 2d DCA 2003) ("an insurance company must defend if the complaint alleges facts that create potential coverage under the policy"). That is why Florida courts recognize that the duty to defend is broader than the duty to

indemnify. *Allstate Ins. Co. v. RJT Enters., Inc.*, 692 So.2d 142, 144 (Fla. 1997); *Wendy's of N.E. Florida, Inc. v. Vandergriff*, 865 So.2d 520, 522 (Fla. 1st DCA 2003).

The Lanham Act creates a strict liability cause of action for false advertising. *Vector Products, Inc. v. Hartford Fire Ins. Co.*, 397 F.3d 1316, 1319 (11th Cir. 2005). A plaintiff asserting a § 43(a) claim, like Schumacher, need not prove knowing falsity or intentional misconduct to prove its claim. *Id*. ("It is well-settled that no proof of intent or willfulness is required to establish a violation of Lanham Act § 43(a) for false advertising."). The fact that Schumacher pled knowledge of falsity or intentional misconduct does not change Schumacher's burden under federal law. Consequently, without any amendment to the complaint, Schumacher could receive an award of compensatory damages without proving knowing and intentional misconduct. That very real possibility, based on the cause of action pled, triggers Hartford's duty to defend.

ARGUMENT

I. Vector Does Not Contend That The Duty to Defend Should Be Determined By Facts Outside The Complaint, But Rather Upon Whether Vector Could Be Found Liable For Covered Damages Under the Complaint As Pled.

Hartford incorrectly states that Vector is attempting to overturn "the established test for determining the duty to defend" by asking the Court to consider facts beyond the four corners of the complaint, potential but un-pled claims, and

hypothetical damages. As evidenced by Vector's original brief, and Hartford's inability to identify the extra-complaint facts or theoretical claims upon which Vector purportedly relies, Hartford's straw-man argument and insinuations of dire consequences are incorrect.

The duty to defend is determined by the claims and allegations asserted in the complaint ***as pled***. *See, e.g., Lime Tree Village Community Club Ass'n v. State Farm Gen. Ins. Co.*, 980 F.2d 1402, 1405 (11th Cir. 1993) (stating Florida law); *Biltmore Constr. Co.*, 842 So.2d at 949. There is, however, a fundamental difference between Vector's and Hartford's approach to the duty to defend. Vector believes that Florida law determines the duty by asking whether there is any potential that a cause of action, as pled, and based on the elements necessary to sustain that claim, could result in covered damages. This approach does not require the Court to look beyond the four corners of the complaint. The focus is on the causes of action that are in fact alleged and the elements necessary to sustain those claims.

Conversely, Hartford contends that the duty should be determined by assuming the truth of all factual allegations in the complaint and irrespective of whether the factual allegations are necessary for the causes of action alleged. This approach does not consider all of the potential outcomes that could occur based on the claims asserted. If factual allegations are not necessary for a claim, the insured

may ultimately be liable for the claim even if the factual allegations are not proven. It is non-sensical to consider blindly that all factual allegations will be proven, when all the allegations need not be proven to establish liability.[1]

Vector's approach is consistent with Florida principles concerning the duty to defend, and is in fact the standard used in virtually every jurisdiction.[2] If an insured could potentially be found liable for covered damages under a cause of action alleged, then the insurer must provide a defense. To determine the circumstances under which an insured may be found liable, it is necessary to consider not only the factual allegations but also the causes of action alleged and the elements necessary to sustain those causes of action. If the elements necessary to sustain a claim, if proven, would result in damages that are covered, then there certainly is the potential that the cause of action could result in covered damages. That potential for indemnity compels a duty to defend.

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[1] For example, under Hartford's approach, if a negligence count included an allegation of malice for the purpose of obtaining punitive damages, Hartford would claim that, even though it generally owes coverage for negligence claims, it has no duty to defend the particular claim because of the allegation regarding malicious conduct. That precise count, however, could result in a verdict that the insured is liable for negligence, but not punitive damages because malice was not proven. Such a verdict would trigger Hartford's indemnity obligation. Hartford's approach, therefore, could allow for the duty to indemnify to be broader than the duty to defend – a result completely inconsistent with longstanding Florida law.

[2] *See* cases cited in Vector's opening brief at 15-17, 21-23.

II. The Lanham Act Does Not Provide For Separate And Distinct Causes Of Action For False Advertising.

Hartford also incorrectly states that there are two distinct causes of action under § 43(a) of the Lanham Act (1) a claim for knowing and intentional false advertising, and (2) a claim for unintentional false advertising. Hartford compounds its error by incorrectly claiming that Schumacher pled only the former. Hartford's error results in a fatal flaw in the foundation of its argument.

The Lanham Act does not provide for distinct causes of action for "unintentional false advertising" and "intentional false advertising." Instead, the Lanham Act creates only "a strict liability tort cause of action" for false advertising. *Vector Products, Inc.*, 397 F.3d at 1319.[3] It is well-settled that in ***all*** Lanham Act false advertising cases, a plaintiff must prove ***only*** the following elements in order to collect damages:

> (1) the defendant made false or misleading statements about its product in an advertisement; (2) the advertisement actually deceived, or had the tendency to deceive, the targeted audience; (3) the deception is material; (4) the defendant's advertised product traveled in interstate commerce; and (5) the plaintiff has been or is likely to be injured as a result of the false or misleading advertisements.

[3] *See also Spotless Enterprises, Inc. v. Carlisle Plastics, Inc.*, 56 F. Supp. 2d 274, 278 (E.D.N.Y. 1999) ("The Lanham Act has created a regime of strict liability with regard to false advertising claims."); 4 Thomas J. McCarthy, *McCarthy on Trademarks and Unfair Competition* § 27:51 (4th ed. 2005) ("It was one of the purposes of the drafters of the Lanham Act that § 43(a) remove the requirement of willfulness and intent to deceive contained in the predecessor 1920 Act.").

Hyman v. National Mut. Fire Ins. Co., 304 F.3d 1179, 1195 n.13 (11th Cir. 2002). In setting forth these elements, the courts do not make a distinction between "intentional false advertising" and "unintentional false advertising."

Indeed, evidence of intent or willfulness is not required to prove a § 43(a) violation. *Vector Products, Inc.*, 397 F.3d at 1319 ("It is well-settled that no proof of intent or willfulness is required to establish a violation of Lanham Act § 43(a) for false advertising."); *id*. at 1320 ("intent allegation in the case *sub judice* was superfluous on the issue of liability"). As intent is not an element of the claim, there cannot be distinct causes of action depending upon whether intent is or is not alleged in the pleading. Tellingly, Hartford cites no cases to suggest otherwise.

Nevertheless, a plaintiff ***may*** plead knowing or intentional misconduct when asserting a § 43(a) Lanham Act claim; but the purpose is to provide an opportunity to receive treble damages. *Spotless Enterprises, Inc. v. Carlisle Plastics, Inc.*, 56 F. Supp. 2d 274, 277 (E.D.N.Y. 1999) ("Importantly, although intent is relevant on the issue of damages, intent to deceive or bad faith is not a necessary element of a Lanham Act claim."). Such allegations do not create a distinct cause of action, they merely afford the opportunity, if proven, to recover an additional type of damages.

Similarly, as Hartford suggests, evidence of intent can assist a plaintiff in establishing some of the elements of a Lanham Act claim. For example, evidence

of intent to deceive can lead to the presumption that consumers were actually deceived by the advertisement. *Porous Media Corp. v. Pall Corp.*, 110 F.3d 1329, 1333 (8th Cir. 1997). In addition, in comparative advertising cases, evidence of intent to deceive can lead to a presumption of damages. *Balance Dynamics v. Schmitt Industries*, 204 F.3d 683, 694 (6th Cir. 2000). But, the fact remains that although evidence of intent may assist a Lanham Act plaintiff in establishing certain elements of its claim, the evidence is not necessary for any of the elements.[4]

Consequently, by alleging knowledge of falsity and/or intent in a § 43(a) claim, a plaintiff is doing each of the following: (a) asserting a strict liability claim for compensatory damages, (b) affording itself an opportunity to recover treble damages, and (c) affording itself an opportunity to be entitled to certain presumptions. Each of those points is inherently subsumed in one count asserting a claim under § 43(a) that includes allegations of knowing and intentional misconduct. In federal litigation, "a plaintiff may plead two or more statements of a claim, even within the same count, regardless of consistency." *Henry v. Daytop Village, Inc.*, 42 F.3d 89, 95 (2nd Cir. 1994) (citing Fed. R. Civ. Pro. 8(e)(2)). As

[4] In any event, at least one of the evidentiary presumptions cited by Hartford is inapplicable to Schumacher's allegations. When a statement is actually false, as opposed to literally true but misleading, the plaintiff need not show that the statement actually deceived consumers. *Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d 813, 820 (7th Cir. 1999). Schumacher's complaint asserts Vector's statements were false, not literally true but misleading. (App. 3-4; 17-22). Thus, Schumacher would have had no occasion to rely on a presumption of deception based on evidence of intent.

a result, Schumacher's § 43(a) claim, as actually pled, gives rise to the potential that Vector could be liable for compensatory damages under a strict liability standard without there being any finding of knowing or intentional misconduct. That potential triggered Hartford's duty to defend.

Hartford cites no authority to support its theory that, because Schumacher alleged knowing falsity and intent, the jury could return a verdict in Schumacher's favor only if Schumacher proved the allegations of knowing falsity and intent. Indeed, case law demonstrates that Hartford is incorrect. For example, in *Balance Dynamics Corp.*, 204 F.3d 683 (6th Cir. 2000), although a Lanham Act plaintiff alleged defendant made false statements "with deliberate intent and bad faith," *id*. at 693, the trial court did not instruct the jury that it had to find the defendant made the false statements with deliberate intent and bad faith in order to return a verdict for plaintiff. Instead, the court instructed the jury that in order to find for the plaintiff it would have to find that the defendant made "a literally false or misleading statement of fact regarding plaintiff's product." *Id*. at 697. Similarly, in *Porous Media Corp.*, 110 F.3d 1329, although a Lanham Act plaintiff alleged that the defendant made false statements with intent to injure the plaintiff, *id*. at 1331-32, the trial court did not instruct the jury that in order to find for the plaintiff it had to find that the defendant made the false statements with intent to injure. Instead, the court instructed the jury that it had only to find that the defendant

"made false or misleading statements of fact." *Id*. at 1332. Just like the trial courts in these two cases, the trial court in the Schumacher action would have instructed the jury that it could find for Schumacher if it found that Vector made false or misleading statements of fact, and the court would not have required the jury to find intent or knowledge of falsity in order to return a verdict for Schumacher.

III. Hartford's Attempts To Distinguish The Numerous Cases Cited By Vector Are Unavailing.

In its opening brief, Vector cited numerous Lanham Act and non-Lanham Act cases demonstrating that where a complaint, *as pled*, could result in a judgment for the plaintiff even absent a finding of intent or knowledge of falsity, allegations of intent or knowledge of falsity do not trigger the intent to injure or knowledge of falsity exclusions. In response, Hartford implies that the courts in those cases looked at allegations outside of the complaint in order to find a duty to defend. That is simply not true. *See, e.g.*, *Central Mutual Ins. Co. v. Stunfence, Inc.*, 292 F. Supp. 2d 1072, 1076 (N.D. Ill. 2003) (court looked "to the allegations of [the] third party's underlying pleading to determine whether [the] insurer has a duty to defend its insured against that third party's action."); *Amerisure Ins. Co. v. Laserage Tech. Co.*, 2 F. Supp. 2d 296, 304 (W.D.N.Y. 1998) (the "policies issued

by [the insured] do provide coverage for the acts alleged in the underlying complaint").[5]

Hartford also contends that some of the cases cited by Vector are unpersuasive because those cases involved allegations of both intentional and non-intentional conduct. Hartford (again) misses the point. In those cases, the courts determined that the insurers owed a duty to defend because the plaintiffs' complaints, *as pled*, could have resulted in a judgment for the plaintiff even absent a finding of intent or knowledge of falsity. *See, e.g.*, *Adolfo House Distrib. Co. v. Travelers Prop. & Cas. Ins. Co.*, 165 F. Supp. 2d 1332, 1341 (S.D. Fla. 2001). As previously discussed, the Schumacher complaint, *as pled*, could have resulted in a judgment against Vector even absent a finding of intent or knowledge of falsity.

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[5] *See also Cincinnati Ins. Co. v. Eastern Atl. Ins. Co.*, 260 F.3d 742, 745-46 (7th Cir. 2001) (finding a duty to defend because the "the allegations of the [third party's] counterclaim" did not bring the case within policy exclusions); *Utica Mutual Ins. Co. v. David Agency Ins., Inc.*, 327 F. Supp. 2d 922, 927 (N.D. Ill. 2004) (finding a duty to defend based on "the allegations of the underlying complaint"); *Park Place Entm't Corp. v. Transcon. Ins. Co.*, 225 F. Supp. 2d 406, 412 (S.D.N.Y. 2002) (court ruled that even excluding evidence outside of the complaint, insurer would have duty to defend complaint as pled); *ECKO Group, Inc. v. Travelers Indem. Co. of Ill.*, 2000 WL 1752829, ** 1, 2, 5, 6 (D.N.H. Nov. 29, 2000) (court recounted several allegations from complaint and rendered coverage decision based on the "underlying complaint"), *rev'd on other grounds*, 273 F.3d 409 (1st Cir. 2001); *Union Ins. Co. v. Knife Co., Inc.*, 897 F. Supp. 1213, 1214 (W.D. Ark. 1995) (determining the duty to defend "by comparing the allegations in the underlying complaint to the scope of the coverage provided by the insurance policy"); *Ferguson v. Birmingham Fire Ins. Co.*, 460 P.2d 342, 347 (Or. 1969) (defendant had a duty to defend because the complaint put it on notice of possible liability covered under the policy).

Finally, Hartford incorrectly contends that the court in *Wackenhut Services, Inc. v. National Union Fire Ins., Co.*, 15 F. Supp. 2d 1314 (S.D. Fla. 1998), held that because each claim in the underlying complaint contained allegations of intentional conduct, there was no duty to defend even though some of the underlying claims did not require proof of intent. That is not true. In the underlying case in *Wackenhut*, the insurer defended the insured until the court dismissed those claims that did not require proof of intent. The *Wackenhut* court emphasized the importance of the insurer waiting until all causes of action that *did not require* a finding of knowing misconduct were dismissed:

> [L]ine-by-line review of [the complaint] discloses a successful effort by Essex to allege, unambiguously and exclusively, only intentional misconduct resulting in the intended injury to Essex. Indeed, Count I for Intentional Interference, Count III for fraud, and Count V for Civil Conspiracy, **are claims that constitute, by definition, intentional misconduct.** Moreover, the general allegations that precede the separate counts, as well as the allegations of the counts themselves, exclusively allege intentional misconduct.
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> * * *
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> Count II for Unfair Competition, Count IV for Unfair Trade Practices, and Count VI for Restitution were dismissed by the district court on September 13, 1995. **It was only *after* that dismissal - sought and obtained by counsel for Wackenhut (not National Union) - that National Union withdrew its defense of the Essex suit. Because the potentially covered claims were no longer part of the case, National Union's withdrawal was proper.**

Id. at 1322-23 (bold emphasis added; italics in original).

Contrasting *Wackenhut* with this case illustrates that *Wackenhut* does not support Hartford's position. Even after the non-intentional claims had been

dismissed in *Wackenhut*, the insured tried to avoid the knowledge of falsity exclusion by arguing that the plaintiff in the underlying suit *could* allege a claim for negligent misrepresentation. *Id.* at 1321-22. Because the plaintiff had not made this claim in its suit, the court properly rejected this argument. *Id.* at 1321-23. Whereas fraud and negligent misrepresentation are separate causes of action, the Lanham Act creates only one cause of action for which proof of knowing conduct is not necessary on the issue of liability. Vector does not contend that Schumacher *could have* alleged a cause of action covered under the policies; Schumacher *did* allege a cause of action covered under the policies – false advertising under the Lanham Act.

IV. This Court Should Decline To Address Hartford's Alternative Arguments. In Any Event, Those Arguments Are Without Merit.

Hartford asks this Court to affirm the decision of the federal district court based on issues the Eleventh Circuit did not certify. Although the Court has discretion to consider such issues, "this discretion should be exercised only when the other issues have been properly briefed and argued and are dispositive of the case." *Warner v. City of Boca Raton*, 887 So.2d 1023, 1035 (Fla. 2004). Because reply briefs are limited to 15 pages, *see* Fla. R. App. Pro. 9.210(a)(5), Vector does not have the opportunity to brief properly these additional issues and the Court should therefore decline to address them.

If the Court chooses to address these arguments, the Court should reject them. Neither the trial court nor the Eleventh Circuit even addressed Hartford's public policy argument. And, the Eleventh Circuit found Hartford's "advertising injury" argument "unconvincing." *Vector Products, Inc.*, 397 F.3d at 1319.[6] Indeed, Hartford concedes that the definition of "advertising injury" in the Hartford policies includes "oral or written publication of material that . . . disparages a person's or organization's goods or services." (Hartford Br. at 31). But, without citing any authority, Hartford claims that "product disparagement" can occur only when a competitor is identified *by name*. There is nothing in the Hartford policies to indicate that this is the case. And, disparagement can occur without identifying the subject by name if those familiar with the subject can recognize that the alleged disparaging communication refers to the subject. *See, e.g., Knoll Pharmaceutical Co. v. Auto Ins. Co. of Hartford*, 152 F. Supp. 2d 1026, 1038 (N.D. Ill. 2001) (insured's advertisement stating that its drug was superior to all other drugs that treat thyroid problems was disparaging to other manufacturers of thyroid drugs despite the fact that advertisement did not name other manufacturers); *Zerpol Corp. v. DMP Corp.*, 561 F. Supp. 404, 410 (E.D. Pa.

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[6] Hartford asserts a third "alternative argument" – that coverage is excluded in this case under the intent to injure exclusion. But, this issue was encompassed in the issue certified to the Court by the Eleventh Circuit, *see Vector Products, Inc.*, 397 F.3d at 1321, and Vector has already fully addressed this issue in its opening brief and this reply brief.

1983) ("Of course, it is not dispositive of Zerpol's defamation or disparagement claim that the advertisements make no mention of Zerpol or its products.").[7] As the Eleventh Circuit noted, *see Vector Products, Inc.*, 397 F.3d at 1317, 1318, Schumacher's brief alleged that Vector made false comparisons between Vector's battery charger and the "leading traditional battery charger," and that Schumacher was a "leading" manufacturer of battery chargers. *See also* Complaint at ¶¶ 2, 13(b) (App. 1, 3). Such allegations sufficiently state a claim of disparagement of Schumacher's goods.

CONCLUSION

For the reasons discussed above, and in its opening brief, Vector asks this Court to answer the certified question in the negative and rule that Schumacher's Lanham Act claim, as pled, triggers neither the intent to injure nor the knowledge of falsity exclusions in the Hartford policies.

[7] *See also Granada Biosciences, Inc. v. Forbes, Inc.*, 49 S.W.3d 610, 616 (Tex. App. 2001) (in business disparagement claim, it is not necessary that plaintiff be named in defendant's allegedly false statement if those who knew plaintiff understood that the defendant's statement referred to plaintiff), *rev'd on other grounds*, 124 S.W.3d 167 (Tex. 2003).

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