IN THE SUPREME COURT OF FLORIDA

Tallahassee, Florida

CASE NO. 63,739

METROPOLITAN LIFE INSURANCE COMPANY,

Petitioner,

vs.

ERNEST D. McCARSON, SR., etc., et al.,

Respondent.

_____/

RESPONDENT'S BRIEF ON JURISDICTION

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PREFACE

The parties will be referred to as Metropolitan and the insured.

STATEMENT OF THE CASE AND FACTS

The facts were summarized by the Fourth District as follows:

> . . . In our view, the jury could have concluded that Metropolitan's conduct was more than a mere failure to honor a contractual commitment and more than mere negligence in handling a claim. Such a conclusion is supported by the evidence of "bad blood" between the parties that considerably predated the termination of Mrs. McCarson's nursing services, including the fact that there was no merit to the Medicare issue and that Metropolitan had already been judicially determined to be responsible for Mrs. McCarson's medical care claims. Upon consideration of this evidence, the jury could have concluded that Metropolitan, although fully aware of the serious condition of Mrs. McCarson and of its obligations to her, discontinued the nursing services to "spite" the McCarsons notwithstanding the potentially devastating consequences to her.
>
> In addition, whether or not it was foreseeable that the decedent would die after nursing services were terminated, we believe it was reasonably foreseeable that some harm would occur. See Railway Express Agency v. Brabham, 62 So.2d 713 (Fla. 1952). We have already discussed the evidence of Metropolitan's awareness of Mrs. McCarson's need for the nursing services and the potentially adverse consequences to her from the loss of such services. Several physicians testified to the adverse consequences to Mrs. McCarson of being deprived of home nursing services and opined that there was a causal relationship between the loss of expert home care and Mrs.

> McCarson's premature death. This evidence, along with the graphic evidence of Mrs. McCarson's dramatic deterioration upon termination of the home care, was sufficient in our view to demonstrate a causal relationship between Metropolitan's actions and Mrs. McCarson's death. . . .

The evidence in the present case was such that the jury could have concluded that Metropolitan deliberately, and without justification, withheld payments which it knew could cause the patient's medical condition to drastically worsen and cause her death.

ISSUE

DOES THE DECISION OF THE FOURTH DISTRICT CREATE CONFLICT?

We submit that on careful reading of the opinion of the Fourth District, and the two decisions which Metropolitan says create conflict, Gellert v. Eastern Air Lines, Inc., 370 So.2d 802 (Fla. 3d DCA 1979), and Gmuer v. Garner, 426 So.2d 972 (Fla. 2d DCA 1982), there is no real conflict which this Court need resolve.

In Gellert the Third District, while holding that the actions of Eastern Air Lines towards one of its pilots did

not constitute an action for which there could be recovery for intentional infliction of emotional distress, recognized on page 807, after discussing this Court's decision of Gilliam v. Stewart, 291 So.2d 593 (Fla. 1974), that ". . . there are circumstances where recovery can be had for intentionally caused severe mental distress."

In Gilliam v. Stewart, 291 So.2d 593 (Fla. 1974), this Court stated on page 595:

> . . . There may be circumstances under which one may recover for emotional or mental injuries, as when there has been a physical impact or when they are produced as a result of a deliberate and calculated act performed with the intention of producing such an injury by one knowing that such act would probably -- and most likely -- produce such an injury, but those are not the facts in this case.

In the present case the Fourth District quoted the above language of this Court in Gilliam and relied on that language in holding that the facts of the present case do create such a cause of action. The facts in Gellert, in which the Third District denied recovery, simply did not constitute a cause of action under the language of this Court in Gilliam or Section 46 of the Restatement (Second) of Torts (1965), which is:

> §46. Outrageous Conduct Causing Severe Emotional Distress
>
> (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

Gellert does not present a conflict with the present case for two reasons:

1. The Gellert court recognized that there are factual situations in which there could be recovery for intentional infliction of emotional distress; and

2. The facts of the two cases are so different that the holdings are not in express and direct conflict.

The other case relied on for conflict, Gmuer v. Garner, 426 So.2d 972 (Fla. 2d DCA 1982), involved a situation in which it was alleged that an employee of a college was propositioned by the president of the college, although there was no touching or any form of battery. It was strictly words. In holding that this conduct did not create a cause of action for intentional infliction of emotion distress, the court noted that the plaintiff may have a Federal remedy for sexual harassment. The court also noted that the employee had no cause of action for the mere non-renewal of her employment contract. While we do not condone sexual harassment on the job, certainly mere words

would not constitute the type of conduct described by this Court in Gilliam or Section 46 of the Restatement. Thus no conflict is created between the present case and Gmuer.

CONCLUSION

The Fourth District has not certified a question of great public interest, nor has it certified that there is a direct conflict. There is no real conflict which need be resolved by this Court and accordingly review should be denied.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copy hereof has been furnished, by mail, this 15th day of June, 1983, to:

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