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 THE MERITS

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PREFACE

The parties will be referred to by their proper names. The following symbols will be used:

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ISSUE

SHOULD RECOVERY BE PERMITTED FOR THE WRONGFUL DEATH OF MRS. McCARSON WHERE THE EVIDENCE SHOWED THAT HER INSURER DELIBERATELY CUT OFF HOME NURSING BENEFITS, WITH KNOWLEDGE THAT THIS WOULD AFFECT HER HEALTH, AND WHICH ULTIMATELY RESULTED IN HER DEATH AS THE RESULT OF BEING RESTRAINED IN A NURSING HOME?

STATEMENT OF THE FACTS

The Fourth District has accurately summarized the facts in its opinion. The issue before this Court is whether, under those facts, Mr. McCarson can recover for the wrongful death of his wife. Rather than confine its argument to this issue, Metropolitan has set forth a totally one-sided, inaccurate and incomplete statement of facts. Since Metropolitan contends it is entitled to a directed verdict the facts must be reviewed in a light most favorable to the plaintiff, but Metropolitan has set forth the facts in a light most favorable to it.

MEDICARE

It is Metropolitan's position that since Metropolitan did not know whether Mrs. McCarson was eligible for Medicare, it was justified in stopping payments for her in-home nursing care until it could make that determination. Metropolitan's brief makes it appear that this entire case revolves around Medicare and that it conducted itself properly in stopping her payments until that question could be answered. Nothing could be further from the truth.

Mr. Caruso, a supervisor with Metropolitan, testified that on May 4, 1976, the McCarsons filed a claim with Metropolitan, in which the McCarsons were asked whether there was any other insurance or other coverage which would provide them benefits for hospital or medical care. The McCarsons answered "no". Thereupon Caruso testified:

> Q: Let me ask you, you, based upon experience, knew that meant Medicare as well as any other private plans, did you not?
>
> A: Yes, Sir. (T 169).

This was one year prior to Metropolitan cutting off benefits because of Medicare. Caruso admitted there was never any evidence of any nature in Mrs. McCarson's file to indicate she was eligible for Medicate (T 174). Mr. Caruso further admitted that this policy provided that if any expenses covered by the policy were also covered by Medicare, then

Metropolitan's benefits would be reduced (not eliminated) by the amount covered by Medicare (T 179). Mr. Caruso further admitted that even if Mrs. McCarson had been eligible for Medicare, she still would have been entitled to benefits "less whatever Medicare may have paid" (T 224). It was well known to Mr. Caruso and numerous other Metropolitan employees who were involved with this claim that Medicare does not pay for home nursing services anyway (T 224, 269, 298).

Mrs. Armatrout, Metropolitan's claims examiner on this case, knew by virtue of her training with Metropolitan that Medicare did not pay for in-home nursing services (T 268). She testified that Metropolitan had no reason not to pay this claim, since they knew Medicare does not pay for home nursing services (T 269).

Mrs. DeGregoria was also a claims supervisor and was involved with this claim (T 281). She knew Medicare does not pay for in-home nursing services (T 298). She testified that Metropolitan should have paid for these nursing services (T 318).

Some of Metropolitan's witnesses' testimony was preposterous. For instance, Mr. Essenfeld, manager of the claims

department, stated that it was not Metropolitan's position that she was eligible for Medicare and therefore barred from receiving benefits (T 373-374). He said his "real concern" was that perhaps she might have been qualified for Medicare back as early as January of 1974, that Metropolitan had already paid out substantial benefits in 1974 through 1976, and maybe they had overpaid (T 382-383). He took this position notwithstanding the fact that Metropolitan had, prior to this incident, previously denied benefits, and was sued and ordered by the court to reinstate the policy in 1976. Medicare had never been raised as an issue in that case.

Metropolitan argues on pages 7 and 8 that under the policy once a person becomes eligible for Medicare, coverage under the policy terminates, except for a person who is disabled. A disabled person continues to receive benefits for one year after the eligibility. Metropolitan suggests a hypothetical in which she might have become eligible for Medicare in June of 1975 and therefore would only be eligible to receive benefits for one year thereafter, terminating in June of 1976. Metropolitan acknowledges that in order to be eligible for Medicare Mrs. McCarson would have had to have been disabled for two and one-half years and also would have had to have worked five out of the ten years

preceding the disability. Metropolitan admits it had no knowledge whether either of these conditions were met. Metropolitan even admits on page 8 that there was testimony in the earlier lawsuit, in which Metropolitan had been ordered to pay benefits, that Mrs. McCarson had never worked. Metropolitan suggests that this deposition was only for use in litigation and not part of Metropolitan's claims file.

Medicare had never been raised as an issue in the earlier lawsuit which culminated in a final judgment of March 2, 1976, ordering the company to reinstate the policy and pay benefits to date. The judgment also ordered Metropolitan to fulfill their contractual obligations in the future arising out of the policy (A 14).

It is thus clear that the Medicare issue is nothing more than a red herring dreamed up by Metropolitan to cover its deliberate refusal to pay the claim which three of its own claims examiners or supervisors, Caruso, Armatrout and DeGregoria, testified was totally unjustified.

CUTTING OFF NURSING SERVICES

Mr. Caruso, supervisor in the claim's division who sat through the first trial of this case when Metropolitan was

ordered to reinstate the policy, testified that Metropolitan received numerous requests from Redi-Nurse informing Metropolitan of the urgency of furnishing the nursing services to Mrs. McCarson (T 159). Caruso "knew her condition was severe" (T 162).

Mrs. Armatrout, Metropolitan's claims examiner, testified that Metropolitan received a letter on July 1, 1977, from Redi-Nurse, advising that nursing services would be terminated on June 3rd, if Metropolitan did not pay Redi-Nurse (T 238). Mrs. DeGregoria was also aware that Redi-Nurse was going to cancel (T 295).

Mr. Essenfeld, manager of the claims department, knew that Mrs. McCarson was "extremely ill" (T 382).

Ms. Pentek of Redi-Nurse was in communication with Metropolitan about payment for their services. Metropolitan always assured her that they would pay for the services, but the payment was never forthcoming (T 655). She advised Metropolitan that if they did not pay they would have to withdraw the nursing services (T 656). Mrs. Armatrout promised Redi-Nurse that they would pay and "...that there was no reason to not pay", but Metropolitan did not pay (T 657-658). When the money was still not forthcoming, she

again called Mrs. Armatrout, who said "well, I don't know, the claim should be paid" (T 667).

EVIDENCE THAT METROPOLITAN MALICIOUSLY WITHHELD PAYMENT

This was not the first time that Metropolitan had wrongfully refused to provide coverage under this policy. Previously, Metropolitan wrongfully terminated benefits, contending the McCarsons had made misrepresentations on the policy application, notwithstanding the fact that its own agent, Mr. Hubbard, who is still employed with Metropolitan, testified that they had submitted the correct information on the application to Metropolitan (T 922).

In that case, the court entered a final judgment in March 1976, reinstating the policy and providing that Metropolitan was "responsible for contractual obligations arising from the policy" (A 14). Following that judgment, Metropolitan's lawyer wrote them that he strongly objected to the court's language in the judgment and had so advised the court, and suggested to the company that they were not bound to that interpretation, even though the court had so provided in the judgment. (Pl. Ex. 38).

On April 29, 1977, McCarson's lawyer wrote Metropolitan advising them that any termination of coverage as to Mrs.

McCarson would be considered a malicious, intentional act by Metropolitan since coverage had previously been adjudicated (Def. Ex 15, A 21). On May 17, Metropolitan wrote the McCarson's lawyer a lengthy two-page letter discussing prior litigation, various policy provisions, continuation of coverage, etc. (A 23). It is this letter which Metropolitan claims inquired about Medicare eligibility. That letter contains six paragraphs, one of which was a follows:

> Additional policy provisions apply in this case. I refer you to policy exclusion G.4 on page D4 as well as exclusion F.4 on page G3. The substance of these exclusions is that coverage for a family member shall cease on the day preceeding [sic] eligibility for Medicare coverage. Given the nature of Mrs. McCarson's condition and the eligibility requirements for Medicare, it would appear that with the time that has now passed she has so qualified and would not be entitled to coverage under the policy whether or not renewal were to be permitted by the Company. Since the policy addresses itself only to eligibility and not to whether or not a person has availed him or herself of the coverage under Medicare it would appear that the policyholder needs to address this issue and furnish proof of ineligibility for Medicare benefits to avoid earlier termination of Mrs. McCarson's coverage than would normally originate through the Company's action of non-renewal. (Emphasis added)

The emphasized portion of the above quote is an outright false representation of Metropolitan calculated to cause the McCarsons to think that Mrs. McCarson was no longer entitled to benefits. As Metropolitan acknowledges

on page 8 of its brief, it knew from the testimony in the prior lawsuit that Mrs. McCarson had never worked and that fact in and of itself clearly shows that she could never be eligible for Medicare. Mr. Caruso testified that the claim form filed by the McCarsons in May of 1976 clearly showed that she was not eligible for Medicare (T 169).

Thus there was ample evidence from which the jury could find:

(1) Metropolitan, having once lost a lawsuit to the McCarsons, maliciously and without justification withheld payment of benefits which its own employees testified were absolutely payable.

(2) Metropolitan knew of Mrs. McCarson's serious condition, her need for home nursing services, and that the withholding of payment would result in a termination of those services.

PROXIMATE CASUAL RELATIONSHIP BETWEEN METROPOLITAN'S CUTTING OFF BENEFITS AND MRS. McCARSON'S DEATH

Mr. McCarson, after the nursing service refused to continue without being paid, was unable to obtain adequate home care for his wife (T 887). He thereupon put her into a nursing home (T 888). He testified that his wife was doing very well while she was at home and being cared for by the nursing service. After the nursing services were terminated, she took a drastic turn for the worse (T 889).

She was restrained in her bed in the nursing home which would cause her to "howl". She was trying to get the restraints removed, but was unable to express herself, and simply made animal noises (T 890). She died of a heart attack in October of 1977, a few months after being placed in the nursing home (T 622).

Dr. French was McCarson's family physician. He treated Mrs. McCarson 19 times after 1976, and also referred her to a psychiatrist (T 693, 695). Dr. French testified that within reasonable medical probability or certainty termination of the home nursing services for Mrs. McCarson and the placement of her into a nursing home caused her premature death (T 697-698).

Dr. Cheshire, a psychiatrist who treated Mrs. McCarson on referral from Dr. French, testified that being placed in a nursing home was not the proper treatment for this patient and was damaging to her (T 759). He stated:

> A: Well, a restraint creates in people anxiety. It causes them to be under greater strain than they would be not restrained, and this lady would have benefitted from care that did not require restraint. And in the lady's ability to determine her nest, so to speak, and a nest that is not hers, this would be a strange place and having something done with her which certainly could not be comprehended of being any value to her, I would say it was damaging to her.

* * *

Q: You have an opinion you can state with reasonable medical probability whether or not this would shorten Lucille McCarson's life?

A: Yes, sir.

Q: What is that opinion?

A: In the sense of all stress of a traumatic nature can shorten any of our lives. I would say in all reasonably medical probability this should shorten and probably did shorten this lady's life.

Q: Could you given the jury an estimate of how much it shortened her life?

A: I can't. It may be one day, tow weeks, one year, or whatever. But, we human beings can handle so much stress. Our ability to cope is limited. Each of us has a limit to our ability to cope, and that last straw that breaks the camel's back can be reached. And in this lady she had little coping ability left. So, it stands to reason in all medical probability this lady's life probably was shortened as a result of not having proper nursing care in her home (T 759, 769, 761).

Dr. Artola, another family physician of the McCarsons, who treated Mrs. McCarson before and after she entered the nursing home, testified that after she went into the nursing home her condition became drastically worse (T 806). He further testified that unquestionably her life expectancy was shortened by her transfer to the nursing home (T 791-792).

Even Dr. Saiontz, Metropolitan's expert, testified that the stress of Mrs. McCarson having to be restrained when she was in the nursing home could have caused the heart attack which killed her (T 1034). He also testified that, had she remained at home, it would not have been necessary for her to be restrained (T 1038).

Mrs. Johnson, a registered nurse who cared for Mrs. McCarson in their home prior to nursing services being terminated, testified that she never had to be restrained, that her condition was not deteriorating, that she was happier if could be up walking about, and that Mrs. McCarson was comfortable and seemed to realize that she was at home (T 593-580). Another registered nurse, Ms. Cobb, testified that Mrs. McCarson recognized her husband, that he was affectionate with her, and that she never had to be restrained at home (T 589-590).

ARGUMENT

ISSUE

SHOULD RECOVERY BE PERMITTED FOR THE WRONGFUL DEATH OF MRS. McCARSON WHERE THE EVIDENCE SHOWED THAT HER INSURER DELIBERATELY CUT OFF HOME NURSING BENEFITS, WITH KNOWLEDGE THAT THIS WOULD AFFECT HER HEALTH, AND WHICH ULTIMATELY RESULTED IN HER DEATH AS THE RESULT OF BEING RESTRAINED IN A NURSING HOME?

On page 3 of its opinion the Fourth District, after setting forth the facts, found sufficient evidence to sustain the verdict under the claim for intentional infliction of emotional distress. The court stated that there was no need to discuss alternative theories such as breach of contract or bad faith. The Fourth District then discussed and summarized the Florida cases involving intentional infliction of emotional distress and concluded that the tort had been recognized in Florida in Ford Motor Credit Company v. Sheehan, 373 So.2d 956 (Fla. 1st DCA 1979), and Food Fair, Inc. v. Anderson, 382 So.2d 150 (Fla. 5th DCA 1980). The court stated that the Third District had appeared to reject it in Gellert v. Eastern Air Lines, Inc., 370 So.2d 802 (Fla. 3d DCA 1979), as had the Second District in Gmuer v. Garner, 426 So.2d 972 (Fla. 2d DCA 1982).

This case is presently before this Court because of a conflict in those decisions. The issue is not, therefore,

whether the evidence in this case is sufficient to constitute the intentional infliction of emotional distress, but rather whether a plaintiff may recover for the tort of intentional infliction of emotional distress in Florida.

Since Metropolitan has argued the facts at length, we felt compelled to set forth those facts on which the Fourth District based its summary on pages 2 and 3 of the opinion:

> Early in 1977 Mrs. McCarson's condition required her to have private nursing care in her home. Metropolitan was fully aware of this requirement and initially authorized the employment of a private nursing service. Metropolitan was also aware that the McCarsons had no other means to secure this nursing care. Metropolitan had direct dealings with the nursing service involved and paid claims for such services until April 5, 1977. Metropolitan thereafter withheld all monies due, claiming that there was a question of Mrs. McCarson's eligibility for Medicare which would in turn affect Metropolitan's obligation to pay for nursing services. During this same time, however, Metropolitan continued to accept premiums, and evidence was presented that Metropolitan knew that Mrs. McCarson was not eligible for Medicare and that Medicare did not cover home nursing services.
>
> Metropolitan was repeatedly advised by the nursing service that unless payments were made the services would be terminated. Although Metropolitan continued to assure the nursing service that payments would be forthcoming, no such payments were made and, ultimately, on June 3, 1977, Mrs. McCarson's nursing services were terminated. Although Mr. McCarson initially attempted to care for her at home by himself and with the aid of non-professionals, Mrs. McCarson's condition worsened and she was placed in a nursing home. At the nursing home her condition deteriorated

> dramatically. At home Lucille McCarson had recognized her husband and was able to walk with assistance, while at the nursing home she no longer walked at all or recognized her husband or her surroundings. Finally, she had to be placed in restraints to prevent her from removing medical devices attached to her body to sustain her well-being.
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> * * *
>
> . . . 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. Although not identical to a situation where required medical services are intentionally withheld we believe the circumstances here, including evidence of Metropolitan's awareness that the McCarsons would be unable to continue the nursing services without the insurance payments therefor, negate any substantial practical difference between the two situations. . . .

The Fourth District thus found that the conduct of Metropolitan in the present case was, as a practical matter, no different from the deliberate withholding of medical care necessary to sustain the life of a person, resulting in premature death. The Fourth District found ample evidence to support the tort of intentional infliction of emotional distress and the evidence which we detailed in our statement of facts confirms that. We shall not belabor that issue

further, but shall proceed to the real issue on this appeal, which is whether recovery is to be permitted to Florida for intentional infliction of emotional distress.

A similar issue has already been briefed and argued before this Court in the case of Champion v. Gray, Case No. 62,830. In that case the issue is whether recovery will be permitted for negligent infliction of emotional disturbance in the absence of physical impact. In that case the husband brought a wrongful death action for the death of his wife, whose death resulted when she collapsed upon arriving at the scene of an accident and found a drunk driver had killed her daughter. The Fifth District certified the question in Champion v. Gray, 420 So.2d 348 (Fla. 5th DCA 1982), and cited in the opinion all of the decisions from the majority of jurisdictions which allow recovery for negligent infliction of emotional distress. It is clear from the opinion that the Fifth District believes that the time has come for this Court to allow such a recovery. If this Court so holds in Champion v. Gray, there would be no logical basis to distinguish the present case. If recovery can be had for negligent infliction of emotional distress, certainly recovery must be permitted for the deliberate outrageous conduct which occurred in the present case. Even if this Court determines that there cannot be recovery in Champion v.

Gray, there are far more compelling reasons why recovery should be permitted in the present case since the tort was intentional and malicious in the present case.

Since the decision of the Fourth District in the present case, the Third District has retreated from Gellert and allowed recovery in Dominguez v. Equitable Life Assurance Society of the United States, ___So.2d___ (Fla. 3d DCA, Case No. 81-1064, opin. filed August 30, 1983) [8 FLW 2129]. In Dominguez an insurer was making payments under a disability policy and terminated them, falsely representing to the insured that they had received medical information to the effect that he was no longer disabled, that he was no longer covered under the policy and that these representations were false and made with the expectation that the insured would surrender the policy, which caused the insured severe emotional distress. The Third District held that these facts constituted a cause of action, the elements of which it defined as follows:

> A cause of action for intentional infliction of severe mental or emotional distress, more appropriately called outrageous conduct causing severe emotional distress, essentially involves the deliberate or reckless infliction of mental suffering on another, even if unconnected to any other actionable wrong. Restatement (Second) of Torts § 46 (1965). The elements of this cause of action are (1) the wrongdoer's conduct was intentional or reckless, that is, he intended his behavior when he knew or should have known that emotional

> distress would likely result; (2) the conduct was outrageous, that is, as to go beyond all bounds of decency, and to be regarded as odious and utterly intolerable in a civilized community; (3) the conduct caused the emotional distress; and (4) the emotional distress was severe.

The Third District cited previous Florida cases on this subject, and noted that while there may have been some confusion arising out of its earlier decision in Gellert v. Eastern Air Lines, Inc., 370 So.2d 802 (Fla. 3d DCA 1979), the Third District was following the First, Fourth (citing the present case) and Fifth Districts, which ". . . joining the majority view in this country, have concluded that the cause of action exists."

There is little we can add to the comprehensive opinions of the Fourth District in the present case and the Third District in Dominguez, which comprehensively analyze Florida law and conclude that Florida does and should recognize the existence of this type of tort.

A clear majority of the jurisdictions in this country have adopted the tort defined by § 46, Restatement (Second) of Torts (1965), which is set forth on page 5 of the opinion of the Fourth District. These cases are collected in Givelber, The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Inflictions of Emotional

Distress by Outrageous Conduct, 82 Columbia L. Rev. 42 (1982). See also 1 Damages in Tort Actions, §§ 6.00-.20 (Matthew Bender & Co. 1982).

In the present case the Fourth District emphasized that its decision was "greatly influenced" by this Court's statement in Gilliam v. Stewart, 291 So.2d 593 (Fla. 1974), 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 producting 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.

The approach Metropolitan has taken in its brief is to argue about issues other than the real issue, which is whether Florida should permit recovery for intentional infliction of emotional distress. Since four out of five district courts of appeal in Florida have adopted the rule along with a majority of other jurisdictions, perhaps Metropolitan sees the handwriting on the wall.

Some of the issues which Metropolitan raises are so absurd as to require no response. We shall, however, briefly respond to some of the other points advanced.

Metropolitan argues beginning on page 23 that recovery cannot be had for intentional infliction of emotional distress for mere breach of contract. The facts in this case are far more outrageous than mere breach of contract, and the Fourth District specifically so found, stating on page 3 that the breach of contract issue was irrelevant.

On page 35 Metropolitan argues error in the jury instructions but fails to point out how this error, which is being argued for the first time, was preserved either in the trial court or the Fourth District. The only error alleged with regard to the jury instructions on the appeal to the Fourth District was that the court refused to instruct the jury as to foreseeability, an instruction which Metropolitan never requested. Nor do our standard instructions have a separate instruction on foreseeability. The argument now advanced by Metropolitan before this Court on the jury instructions was not advanced in the trial court nor before the Fourth District. Moreover, Metropolitan's representation that the jury was never instructed as to the elements of intentional infliction of emotional distress is absolutely not true. On page 1243 of the transcript the court clearly instructed the jury that there had to be "outrageous conduct", that defendant had to have acted intentionally or

willfully and wantonly, and that the emotional distress had to be proximately caused by the outrageous conduct.

CONCLUSION

The opinion of the Fourth District should be affirmed.

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