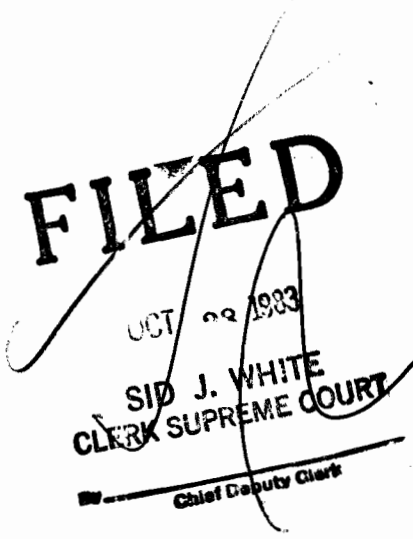
O|A 1-9-84

IN THE SUPREME COURT OF THE STATE OF FLORIDA

METROPOLITAN LIFE INSURANCE COMPANY, Petitioner, vs. ERNEST D. McCARSON, SR., etc., et al, Respondents.	)	CASE NO: 63,739

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

PETITIONER'S INITIAL BRIEF



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I. PROCEDURAL HISTORY

Following trial, Plaintiffs obtained a jury verdict for $2,940.17 health insurance benefits, $200,000 for intentional infliction of emotional distress upon Lucille McCarson, and $250,000 for wrongful death of Lucille McCarson. The jury determined that punitive damages were not allowable (R. 3330-3331).

Defendant moved for judgment in accordance with its motion for a directed verdict; for a new trial; and for remittiturs or in the alternative for a new trial. The trial Court granted Defendant's motions to the extent of striking the $200,000 emotional distress award but otherwise denied the motions. It entered judgment in the amount of $252,940.17. Plaintiff moved for imposition of attorney fees and costs. This motion was granted, and $16,452.59 was allowed (R. 3332-3334, 3339, 3432-3433, 3490).

Defendant appealed to the Fourth District Court of Appeal, and Plaintiff cross-appealed (R. 3491, 3496). That Court affirmed the trial Court. Metropolitan Life Insurance Co. v McCarson 429 So.(2d) 1287 (Fla. 4th D.C.A. 1983). The

Fourth District recognized that a wrongful death action required some other cause of action to have existed in favor of Lucille McCarson. It held that the existence of an action for intentional infliction of emotional distress satisfied this requirement (Appendix, hereinafter "App." 31-37). Thus if, in fact, no such action for intentional infliction of emotional distress existed in this case, the decision of the Fourth District with regard to wrongful death must be reversed.

Defendant requested this Court to exercise its discretionary jurisdiction, on the basis that the Fourth District's opinion acknowledged conflict with decisions of several other District Courts of Appeal. This Court did so.

II. ISSUES

The issues raised by the Petition to this Court relate to whether Lucille McCarson had, before her death, a cause of action for intentional infliction of emotional distress. As acknowledged by the Fourth District's opinion other District Courts of Appeal have not recognized all causes of action for intentional infliction of emotional distress resulting from breach of contract. Moreover, where the courts have recognized a cause of action for intentional infliction of emotional distress, conduct far more outrageous than any engaged in by Metropolitan has been required.

III. FACTS

A. The Insurance Coverage

On March 8, 1973, Metropolitan issued a health insurance policy to Mac's Paint and Body Shop, the employer of plaintiff Ernest McCarson. The policy insured him as an employee, and his wife, Lucille McCarson, as a covered dependent (App. 1-13).

In 1974, Metropolitan concluded that this policy was void due to misrepresentations of fact in the application for insurance. Accordingly, Metropolitan rescinded the insurance policy. The McCarsons sued, and following trial, obtained a judgment in their favor. The Court Order required Metropolitan to restore the policy and stated that Metropolitan would be liable "for contractual obligations arising from the policy...upon the payment of all back premiums" (App. 14).

Metropolitan contacted the employer (since the employer had taken out the policy and was paying premiums, T. 422-423, 440-441, 491-493) to see whether it wished to reinstate coverage on other employees. The employer was advised that back premiums on Mr. McCarson were $1,738.56 and that back premiums on all covered employees would be $3,815.98 (T.442). The employer advised Metropolitan that only Mr. McCarson was to be reinstated (T. 442-443, 492-493). This decision saved the employer the $2,077.42 difference in premiums.

Because of the employer's decision, restoral left the policy in force with only one employee being covered. Metropolitan's rules did not permit the renewal of this type of small group policy with only a single covered employee, under any circumstances (T. 430, 439-443, 493-494, 500-501). Had additional employees been added, renewal would have been allowed (T. 445-446); however, this was not done.

The policy specifically provided that at the end of any policy period Metropolitan could decline to renew the policy, provided that it gave at least 30 days written notice. Pursuant to this provision of the policy, and in accordance with its routine underwriting practices, Metropolitan notified Mr. McCarson by letter dated May 10, 1976 that the policy would not be renewed, and coverage would terminate as of March 31, 1977. This letter specifically advised that Mr. McCarson could maintain coverage after March 31 by exercising his right to convert the group policy into a policy of individual insurance without having to provide evidence of insurability (App. 16).

Thus, although unwilling to maintain a group policy with only a single covered employee, Metropolitan was perfectly willing to maintain coverage in an individual form more consistent with its practices (T. 195-196). For reasons best known to himself, Mr. McCarson never requested an individual policy (T. 195-198).

Metropolitan proved entirely willing to maintain even group coverage until the non-renewal date. Because of failure to pay premiums, the policy had lapsed as of January 1, 1977. Plaintiff applied for reinstatement on February 9, 1977 (T. 446-448). Metropolitan had every right to refuse to reinstate at all, or to demand evidence of insurability (T. 449). This would have been a perfectly legitimate way for it to terminate coverage on the McCarsons, had Metropolitan been looking for an excuse to do so. Instead, Metropolitan simply reinstated the policy without even investigating insurability (T. 449).

Mr. Thompson, the attorney for the McCarsons, had initially objected on May 17, 1976 to non-renewal of the policy, as well as to an increase in premiums (App. 17). Metropolitan replied on June 1, 1976 that the premium increase was companywide, not directed at the McCarsons, and that the non-renewal was specifically provided for by the policy (App. 19). He seemed to accept this reply, as no further action was taken and the premiums were paid without protest.

Suddenly, almost a year later, Mr. Thompson wrote again on April 29, 1977 (App. 21). This letter, written almost a month after the non-renewal, took the position that Metropolitan had to maintain the policy in force regardless of its provisions because of the earlier ruling that the contract was not

voided by misrepresentations (a position reflected in the Complaint in this case). At trial, however, plaintiffs' attorneys conceded that Metropolitan did retain its contractual rights after the first lawsuit (T. 96), and the trial Judge repeatedly ruled that the non-renewal had been proper (T. 484-486, 821, 968-969).

At the time this letter was written, it should be noted, Metropolitan was providing continuing coverage for Mrs. McCarson despite the non-renewal. The policy provided for up to one year's continued coverage of a person who was totally disabled at the time coverage would otherwise terminate (App. 12). Metropolitan accepted Mrs. McCarson as being disabled as of March 31, 1977, and continued coverage under this provision (T. 288). In fact, Mr. Thompson's letter acknowledged receipt of policy benefits. On May 2, 1977 Mr. Thompson wrote again, repeating his statements and acknowledging receipt of additional insurance benefits. (App. 22)

B. The Importance of Medicare Eligibility

Once disability was accepted, however, two other provisions of the policy became potentially crucial. One provided that if an insured became eligible for Medicare, coverage under the policy terminated (App. 9, 12). The other provided that if the insured person was disabled when insurance ceased, coverage

would continue for one year without premium payment. Since the existence of disability was one of the prerequisites for Medicare eligibility (for persons such as Mrs. McCarson who were under age 65), Metropolitan had reason to believe that Mrs. McCarson may have been eligible (T. 360-361).

The key question then became when (if at all) Mrs. McCarson became eligible for Medicare. If she became eligible in June 1975, for example, no coverage at all would have existed after June of 1976 (this being when the one year disability continuation would have expired) (T. 116-117, 177, 190, 224, 269, 316, 323, 366-367). Any payments made by Metropolitan for expenses incurred after the one year continuation would have been improper and an overpayment of benefits (T. 118, 267-269, 323, 382-383).

During the one year disability continuation of coverage benefits would have been payable notwithstanding eligibility for Medicare. Once the one-year period ended, however, no benefits would have been payable for any services whether covered by Medicare or not. Thus, Metropolitan could not simply assume that bills for services such as home nursing not covered by Medicare (T. 209-211, 313-316, 323, 366-367) were payable. It had to find out when the one-year continuation of coverage actually ended.

Medicare eligibility (for persons under age 65) required both two years and five months of total disability (the Social Security test, including

waiting period) (T.92-94, 369, 732), and having worked five out of the ten years preceding the disability (T. 732-733, 734). Metropolitan did not know if Mrs. McCarson had met these tests.

Metropolitan had indications that she may have been disabled as early as 1971 (T. 95, 189-190, 370). If so, she would have been eligible if she had worked 5 years since 1961. Eligibility would have been in 1973 or 1974 (after two years and five months), and insurance coverage would have ended one year later. (The unpaid Redi-Nurse bills that triggered this suit were incurred in April 1977.)

Metropolitan did not know if she was eligible. It knew she had been a housewife, but not for how long (T. 127, 325-327). Mr. McCarson stated at trial that his wife worked up until the 1940's, (T. 727-728, 890, 891), however, Metropolitan did not know the date she stopped working (a deposition at the prior trial, which contained the untrue sworn statement that she had never worked, was for use in litigation, and was not part of the claims file or reviewed by Metropolitan's claims personnel) (T. 388-340).

Metropolitan did know that she was not <u>receiving</u> Medicare benefits. Providers of medical services informed Metropolitan of this (T. 171-172, 346-347). This however, did not mean that she was not <u>eligible</u> for Medicare. It is not uncommon for people to be eligible, but simply not realize this and not apply for benefits

(T. 191-192, 324, 346-347). If she was eligible, although not receiving benefits, insurance coverage would still have terminated (T. 115, 172, 324, 343, 360, 380). Metropolitan had been told that she did not have other insurance (T.169, 387-388). This, however, likewise dealt with coverage, not eligibility (T. 389).

C. Metropolitan Attempts To Find Out Whether Mrs. McCarson Was Eligible, And The Failure To Respond.

Because Metropolitan could not be sure whether (and when) the disabled Mrs. McCarson had become eligible for Medicare, it wrote to the McCarsons' attorney to find out. Metropolitan's letter of May 17, 1977 (App. 23-24), responding to the attorney's April 29, 1977 letter, stated that proof of ineligibility for Medicare was needed. Metropolitan wrote to the attorney, not Mr. McCarson directly, because the attorney was already involved (T. 392) and because he had objected previously to contact with anyone but himself (T. 341). In addition, he had been Mrs. McCarson's Guardian ad litem in the initial action (T. 1068-1069). Metropolitan's decision to send this letter to the McCarsons' attorney was approved by the outside attorneys to whom Metropolitan referred it (T. 363-364, 376-377, 406).

Metropolitan assumed that it would readily receive an answer to this question from the attorney (T. 99, 102, 120-121, 348-349, 351, 365). Had the answer been that there was no eligibility due to lack of recent work experience, this would simply have been accepted. Benefits would have been paid (T. 383, 391-392, 405). The attorney, however, chose to completely ignore the inquiry (T. 165, 189, 319, 404).

While waiting for an answer Metropolitan deferred consideration of further claims, since Mrs. McCarson's evidence of disability indicated a substantial possibility that she had been eligible for Medicare (T. 339, 360-361). Claims were not denied since Metropolitan did not yet know the answer (T. 124, 197, 320-321, 373-374).

Such inquiry, and deferral of claims, was not peculiar to the McCarson claim but, in fact, was the customary procedure within the insurance industry (T. 982-983)(testimony of representative of other insurer). Metropolitan handled this claim in the same manner it would have handled other similar claims (T. 198, 272-273, 396, 404-405).

Although he did not inform Metropolitan, Mr. McCarson did know the answer. In or about May of 1977 he contacted Social Security and was informed that his wife was not eligible (T. 880-882, 906-907). He may have told his attorney

(who never informed Metropolitan), but in any event he never told Metropolitan, stating that his attorney never let him know about Metropolitan's inquiry (T. 906-907). When this lawsuit was commenced in July, 1977, plaintiff did not allege non-eligibility for Medicare.

After this lawsuit was commenced, as well as before, Metropolitan continued its efforts to obtain the Medicare information advising the attorney on several occasions that benefits could be paid, if this was provided (App. 26). In June, 1978, after Mrs. McCarson died, the attorney provided evidence of lack of eligibility for Social Security Death Benefits (T. 123-124, 192-198, 901-905) (App. 28, 29). Although this was not conclusive as to Medicare, Metropolitan accepted it as sufficient and tendered payment as to pending bills without prejudice or restriction (T. 123-125, 192-193) (App.30). This would have been done earlier had Metropolitan's inquiry been answered. In fact, the trial Judge stated that Mr. McCarson's attorney could have avoided the entire problem by simply telling Metropolitan that Mrs. McCarson was not eligible for Medicare (T. 217).

D. Mrs. McCarson's Medical Condition.

Since at least 1971 (T. 546-547) Mrs. McCarson had been suffering from a condition later diagnosed as Alzheimer's Disease (pre-senile dementia). She was treated in June, 1971 for nerves and an ulcer (T. 628-630). In October, 1971 she was treated for pain, vomiting, confusion and

disorientation (T. 631-632). Treatment continued and she was referred to various specialists (T. 636-638). A brain operation was performed in 1974, however this did not relieve her problems (T. 787-788, 1022-1023). As early as 1973 she was poorly oriented (T. 548-549) and could do little more than feed and dress herself (T. 1023). The diagnosis of Alzheimer's Disease was made in 1976 (T. 694, 1032).

Alzheimer's Disease is progressive and disabling. It steadily reduces mental function and has the effect of causing the patient to become senile at an early age. The patient does not know where she is, talks gibberish, loses control over bodily functions, becomes restless at times, and does not eat well. It is completely irreversible and there is no known treatment. All that can be done is to treat related infections and keep the patient from doing harm to herself (T. 546-548, 568, 694-695, 991-992, 1014-1017, 1023-1025). The disease causes a reduction of the patient's life expectancy (T. 547, 994, 1032, 1037).

Dr. Cheshire, a psychiatrist to whom she was referred, described Mrs. McCarson as agitated, hallucinating, psychotic, and speaking gibberish (T. 749). He said she needed custodial care (T. 754, 766). He said that she would act differently at home than in other places, being less readily subject to control there, and that she recognized her husband (T. 754-756). He did not see her after March 9, 1977, however (T. 756-757). He said that even at that time 24 hours-a-day care was

needed, and the husband, although he could help, could not take a nurse's place (T. 766-767). Dr. Artola, a treating general practitioner, testified that her condition had been stable while she was at home so far as he knew (T. 807, 848). He said, however, that he was seeing her infrequently at the time (T. 809).

E. Services Provided By Redi Nurse.

As a result of her condition Mrs. McCarson was given home nursing care on an 8 hours-a-day basis by Redi Nurse, commencing on March 14, 1977 (T. 519). During the remaining 16 hours she was left to the supervision of her family (T. 582-583, 595, 696, 788). The facts relating to Redi Nurse are of particular importance since plaintiffs' claim is that termination of their services was the proximate cause of death.

Redi Nurse service through June 3, 1977 resulted in bills to Metropolitan of $3,985.17 (T. 307). These bills represented 80% of the total charge, as Metropolitan did not provide coverage for the other 20% (T. 518-519). Initial payments of $444.80 and $101.76 were made to Mr. McCarson (through his attorney), as no assignment of benefits to Redi Nurse had been executed (T. 270-271, 277-278, 321-322, 536-537) (App. 21,22).

Remaining payments due for the period up to April 15, 1977 were $659.88. Payment of this amount was not made until June 6, 1977 (T. 520). The reason for this delay was that when Mr. McCarson's attorney wrote to Metropolitan on April 29, 1977, accusing Metropolitan of improper conduct for not having renewed the policy, the file was sent to another unit to reply. In this process this claim was simply overlooked (T. 130-131, 348-349).

Bills from after April 15 to June 3, 1977 from Redi Nurse totalled $2,618.90 (T. 242). These bills were not paid because Metropolitan was awaiting information concerning Medicare from Mr. McCarson's attorney. Unlike the $659.88 paid on June 6, 1977, this delay was not a mistake.

On various occasions Redi Nurse informed Metropolitan that home nursing services would be terminated on June 3, 1977 if bills were not paid by then (T. 295, 522-525, 656,668). Prior to the Medicare question being raised, Metropolitan had assured Redi Nurse that Mrs. McCarson was covered and bills would be paid (T. 522-524, 654-658, 665-667).

After the inquiry concerning Medicare, when it appeared as though there might be no insurance coverage, Metropolitan informed Redi Nurse that it was deferring payment until receipt of further information. Redi Nurse was told that, hopefully, Metropolitan would get a quick answer to its question and could resume benefit payments promptly if they were payable (T. 320-321,

351, 405, 524, 537-540, 656, 674-675). Unfortunately, the question was not answered by Mr. McCarson or his attorney, and on June 3, 1977 Redi Nurse did terminate their services (T 522).

As of June 3 three payments Metropolitan had made had not been received by Redi Nurse. Two represented checks totalling $545.76, which had been paid to Mr. McCarson but were held by his attorney who refused to use these payments to pay Redi Nurse's bills (T 536-537, 656-657). The third was the final Metropolitan payment of $659.88 which was not paid until June 6, 1977. The owner of Redi Nurse, testifying for plaintiffs, stated that in view of the total amount of bills outstanding, service would not have been continued if partial payment was received (T. 536-537). Thus, it is the non-payment of bills for services after April 15, that is relevant to this action.

F. Treatment In Medicana Nursing Home.

When Redi Nurse services were terminated, Mr. McCarson hired a replacement nurse. When she did not do an adequate job, Mrs. McCarson was placed in the Medicana Nursing Home (T. 885-888) on June 13, 1977 (T. 602).

The Director of Nurses at Medicana (testifying for Plaintiffs) said that at the time of admission Mrs. McCarson could not walk or communicate and that, in fact, she never saw Mrs. McCarson walk without help (T. 607). Mrs. McCarson was very childlike and non-communicative (T. 608), weak and not cooperative (T. 614), confused, bedridden, disoriented, did not recognize people and could not feed herself (T. 624). She did recognize her husband, who visited often (T. 608), but could not recognize other people (T. 624-625).

Medicana had 115 patients with one Registered Nurse, 16 Licensed Practical Nurses, and 6-14 Nurses Aides per shift. There were also Physical Therapists, Physical Therapy Assistants, Orderlies and Assistants who were registered nurses (T. 603-606). There was a recreational area where patients able to do so could walk (T. 621). Mrs. McCarson was initially placed in a room with one other person (T. 610).

Following admission Mrs. McCarson was very noisy, requiring transfer to a room with three other patients (T. 610-611). She was very restless (T. 790). She had to be fed, and could not control her urine and bowels (T. 790-791, 853). The doctor ordered intravenous feeding (T. 791, 804, 850) and use of a catheter (T. 791, 853). Use of restraints was necessary because otherwise she would interfere with the catheter and with the intravenous

feeding (T. 624, 854) as well as because of her restlessness. These restraints disturbed her (T. 890). Her condition got worse (T. 807-808). In August 1977 Mrs. McCarson was transferred to the John F. Kennedy Hospital due to abdominal pain (T. 850-851). On October 11, 1977, she died as a result of a heart attack (T. 622, App. 25), after being returned to Medicana.

It was agreed that good care was provided by Medicana. Mrs. McCarson's son said that Medicana was clean and functional, and his mother got good treatment (T. 929-930). Mr. McCarson said that he put his wife there because he was looking for a decent home (T. 888). The Nursing Director testified that the food and nursing quality were good and the patient got all care ordered by her doctor (T. 623).

ARGUMENT

I. THE JUDGMENT FOR PLAINTIFF MUST BE REVERSED IF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS IS NOT ESTABLISHED.

The judgment before this Court is for wrongful death, not intentional infliction of emotional distresss. Plaintiff's emotional distress recovery was set aside by the trial Court and the Court of Appeal affirmed this. Plaintiff has not appealed this decision.

Metropolitan's jurisdictional statement, and this brief, focus almost exclusively on the intentional infliction claim. This is because, as the Court of Appeal recognized, a finding that Metropolitan committed the tort of intentional infliction of emotional distress is an essential prerequisite to the wrongful death award. If Metropolitan did not commit such tort, the wrongful death award cannot stand, and must be reversed.

Under the wrongful death statute, an action can be brought only if death was caused by a tort or wrongful breach of contract that "would have enabled the person injured to maintain an action and recover damages if death had not ensued". Section 768.19 Fla. Stat. (1980 Supp.). Thus, a wrongful death lawsuit is treated as though "the injured person (had) not died and was suing to recover damages for the wrongful act." Gaboury v Flagler Hospital, Inc., 316 So. 2d 642 (Fla. 1st D.C.A. 1975).

Mrs. McCarson, the deceased, could not have recovered against Metropolitan for breach of contract, had she lived. Not only was she not a party to the insurance policy (which was between Metropolitan and her husband's employer, Mac's Paint and Body Shop), she was not even the insured under it.

The policy is set forth at Appendix pages 1 to 13. It specifies that the insured is E. D. McCarson (the deceased's husband) (App. 2). Claims for health insurance benefits must be made "by or in behalf of the Insured" to Metropolitan (Paragraph 14, App. 5). All health insurance "benefits of this policy are payable to the insured." (Paragraph 18, App. 5). Mrs. McCarson was merely a "covered family member" (App. 6). If she incurred certain expenses such as the home nursing services at issue in this case (App. 10), benefits were to be paid "to the Insured" (Paragraph 18, App. 5, supra). Thus, Mrs. McCarson had no right to sue for policy benefits. Only the insured, Mr. McCarson, had this right. See, e.g., New Mexico v Equitable Life Assurance Soc., 447 F. 2d 620 (10th Cir. 1971) (insurer's liability under the contract is to the insured employee, not to the covered dependent).

The only wrongful action that plaintiffs alleged was committed by Metropolitan against Mrs. McCarson was intentional infliction of emotional distress. Thus, this Court must determine whether such a tort was established by the facts of this case.

II. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS WAS NOT ESTABLISHED.

A. Recovery For Infliction Of Emotional Distress Is Permitted Only If Some Separate Tort Is Committed.

The mere infliction of emotional distress, without the commission of some other tort, is not actionable under Florida law. The Second District Court of Appeal recently reviewed the existing case law and affirmed that:

> there can be no recovery in Florida for the intentional infliction of severe mental distress when not incident to or predicated upon a separate actionable tortious wrong. Gmuer v Garner, 426 So.2d 972, 974 (Fla. 2nd D.C.A. 1982), quoting from Gellert v Eastern Air Lines Inc., 370 So.2d 802 (Fla. 3rd D.C.A. 1979).

The Court below cited Gmuer and Gellert, but disagreed with them on the basis that certain decisions of this Court "implicitly approve an action for intentional infliction of emotional distress". It cited Kirksey v Jernigan, 45 So. 2d 188 (Fla. 1950); Slocum v Food Fair Stores, 100 So.2d 396 (Fla. 1958); LaPorte v Associated Independents, Inc., 163 So.2d 267 (Fla. 1964); and Gilliam v Stewart, 291 So. 2d 593 (Fla. 1974).

The decision of the Court below is consistent with decisions by the First District Court of Appeal. See, e.g., Ford Motor Credit Co. v Sheehan, 373 So.2d 956 (Fla. 1st D.C.A. 1979). The Fifth District has dismissed several intentional infliction cases as not falling within the parameters of Sheehan, but has never actually allowed recovery or expressly stated that it would allow recovery if all of the Sheehan requirements were met.

See Habelow v Travelers Insurance Co., 389 So.2d 218 (Fla. 5th D.C.A. 1980); Boyles v Mid-Florida Television Corp., ___So.2d___, 8 Fla. L. Wk. 1127 (Fla. 5th D.C.A. Apr. 20, 1983); Food Fair, Inc. v Anderson, 382 So.2d 150 (Fla. 5th D.C.A. 1980). The Third District is split. Following Gellert a different panel disagreed and decided to follow Sheehan, however, no en banc review has determined what position the Third District will take. Domingues v Equitable Life Assurance Soc., ___So.2d___, 8 Fla. L. Wk. 2129 (Fla. 3rd D.C.A. Aug. 30, 1983).

A review of this Court's decision relied upon by the Court below as well as by Sheehan, shows that Gmuer and Gellert were correct and the Court below and Sheehan misread and misapplied those Supreme Court decisions.

Almost all discussions by the lower courts focus upon this Court's decision in Kirksey. There, an undertaker took the body of plaintiff's five year old child without her permission, refused to return it, and embalmed it, against her will. This Court held that damages for emotional distress were recoverable because plaintiff had alleged a valid tort claim for interference with a mother's "right to possession of the body of a deceased person for the purposes of sepulture or other lawful disposition." 45 So.2d at 189. This Court expressly held that "the invasion of such right by unlawful withholding of the body from the relative entitled thereto is an actionable wrong, for which substantial damages may be recovered." Id. at 190.

Defendant in the case at bar has no quarrel with the rule that one of the damages properly recoverable for the tort of unlawful withholding of a body is emotional distress suffered as a result. But it seems clear that the Kirksey holding (contrary to the view of the Court below) is that such damages are recoverable precisely because there was this separate tort, and in its absence such damages would not have been recoverable. Otherwise this Court need not have focused upon the separate tort at all.

In Slocum, this Court affirmed dismissal of an action for intentional infliction of emotional distress. It did so because the requirements for such an action, as set forth in Restatement of the Law of Torts Section 46, were not met (the alleged conduct was not sufficiently outrageous). The Court had no need to decide, and expressly refused to decide, whether intentional infliction could constitute a tort in the absence of some other separate tort. Thus, Slocum supports neither Gmuer and Gellert nor Sheehan and the Court below.

LaPorte involved the killing of plaintiff's pedigreed dog by a garbage man. As in Kirksey, damages for emotional distress were allowed because such killing constituted a separate tort. Gilliam was an accident case in which this Court reaffirmed the impact rule (no recovery for emotional distress

unless plaintiff was actually hit, not merely a witness). The Court noted that in certain circumstances recovery of damages for emotional distress "may be" permitted, but did not go into further detail.

As stated above, the decisions of this Court relied upon by the Court below support the contrary Gmuer-Gellert rule instead. If Defendant's conduct does not rise to the level of some separate tort recognized under Florida law, damages may not be recovered for emotional distress resulting from the conduct.

Even if this Court disagrees with Gmuer and Gellert, it should still reverse the decision of the Court below. Allowing recovery for outrageous conduct directed at a Plaintiff independently of any contractual relationship (Sheehan) is one thing. Allowing such recovery in a breach of contract action simply because of the Court's characterization of the motive underlying the breach (this case) is something entirely different. As stated in the next section of this brief, many decisions of this Court and of the District Courts of Appeal have held that such recovery is simply not allowed.

B. Even If Recovery Is Allowed For Intentional Infliction Of Emotional Distress, Such Recovery Is Not Allowed Where The Conduct In Question Consists Of Breach Of Contract.

The Court below concluded that Metropolitan had breached its contract not by inadvertence or mistake but "to 'spite' the McCarsons" (App.36). This was the basis of its conclusion that intentional infliction of emotional distress was established. While Metropolitan emphatically disagrees with the factual conclusion reached (as discussed in later sections of this brief), this really shouldn't matter. Even intentional, malicious, flagrant breach of contract does not permit recovery of damages for emotional distress.

In DeMarco v Publix Supermarkets, Inc., 384 So.2d 1253 (Fla. 1980), this Court affirmed on the basis of the reasoning in the Court of Appeal's decision. The District Court of Appeal had held that allegations that plaintiff deliberately, illegally and maliciously breached his contract did not establish a claim for "intentional infliction of emotional distress." 360 So.2d 134 (Fla. 3rd D.C.A. 1978). The Court stated that:

> there can be no recovery for mental pain and anguish resulting from the breach unless some breach amounts to an independent, willful tort. Id. at 136 (emphasis added).

The dissent in this Court expressly agreed with the majority on this point -- that there was no "cause of action for emotional distress." 384 So.2d at 1254.

The requirement of an independent tort, underlined in the quotation above, was discussed in more detail by this Court last year in Lewis v Guthartz,

428 So.2d 222 (Fla. 1982). There, the trial Court found Defendant guilty of "Flagrant, wilful and intentional" breach of contract, and assessed $1 million in punitive damages. The District Court of Appeal reversed. This Court affirmed and stated that:

> The fact that the trial court found that the Landlord acted intentionally, willfully and outrageously as to the breach of contract does not by itself create a tort where a tort otherwise does not exist. Id. 15 224.

This Court held that "an accompanying independent tort" is necessary to support a punitive damages recovery even where "the defendant flagrantly, unjustifiably and oppressively breaches a contract." Id. at 223.

Of course, conduct that is not an "independent tort" under Lewis could hardly be transformed into an "independent tort" for DeMarco purposes.

DeMarco and Lewis merely reaffirm a rule, repeatedly applied by the Florida courts, in cases involving denial of insurance benefits as well as other cases. Thus, in Allstate Insurance Co. v Gibbs, 340 So.2d 1202 (Fla. 4th D.C.A. 1976), the Court held that "An insurer's bad faith refusal to settle a claim of its insured is not per se a willful and independent tort giving rise to a claim for damages." In Baxter v Royal Indemnity Co., 285 So.2d 652, 657 (Fla. 1st D.C.A. 1973), the Court stated that:

> It would be a strange quirk in the law to hold that each time a debtor fails or refuses to pay demands made upon it by a creditor, the debtor would be liable for compensatory and punitive damages even though the failure or refusal to pay was motivated by spite, malice or bad faith. (emphasis added).

In MacDonald v Penn Mutual Life Insurance Co., 276 So.2d 232 (Fla. 2nd D.C.A. 1973), the Court stated that:

> alleged mishandling and refusal to pay (medical expense insurance) claims or delay in paying claims due under the contract is not an independent tort, allowing recovery of damages for emotional distress.

In the case at bar, allegations that a breach of contract was outrageous do not establish a cause of action for emotional distress. A contrary result would fly in the face of this Court's "unwillingness to introduce uncertainty and confusion into business transactions." Lewis, supra, 428 So.2d at 223.

It may be noted in any event that the only factual finding by the Court below to support its decision (that Metropolitan acted for "spite") used the same term as that used by the Baxter court, supra in denying recovery (refusal, due to "spite, malice or bad faith", to pay insurance benefits does not allow recovery of emotional distress.)

C. This Rule Does Not Leave Purchasers Of Insurance Without Protection.

The Court below felt that existing law did not adequately "control intentionally harmful conduct which would otherwise go unpunished". (App. 35) Its concern was misplaced.

The Legislature has adopted several remedies for failure to pay insurance claims. Attorney fees are allowed when payable claims are denied. Section 627.428 Fla. Stat. (1972). Indeed, in this very case the trial Court awarded over $16,000 in such fees and expenses for denial of under $3,000 in claims. This is a strong incentive for insurers to pay valid claims promptly to avoid the risk of litigation.

More recently the Legislature enacted Section 624.155 (1) Fla. Stat. (Supp. 1982), permitting civil actions against insurers (in addition to a breach of contract action) for various things, including:

> Not attempting in good faith to settle claims when, under all the circumstances, it could and should have done so had it acted fairly and honestly towards its insured and with due regard for his interests. Id. (b)(1).

Even before this, of course, the Insurance Department had, (and still has) the power to punish insurers for improper conduct by fining them, suspending their licenses to do business, or even revoking such licenses outright. Reversal of the Court below, pursuant to the long established holdings of this Court and the District Courts of Appeal, will by no means permit insurers to deny claims without good reason for doing so.

D. Metropolitan's Conduct Was Not Outrageous.

Even if this Court rules that an "outrageous" breach of contract now can constitute a tort, Metropolitan could not be liable in this case, since its conduct did not even approach this level. In Sheehan, the leading case permitting recovery for intentional infliction of emotional distress, a creditor who was trying to locate the debtor told his sister that his children had been involved in a serious automobile accident. This untrue statement resulted in severe emotional distress. The Court held that, as required under Restatement Section 46, this conduct was:

> so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. 373 So.2d at 959 quoting Restatement (Second) of Torts Section 46, comment j. (This Restatement section is acknowledged by the Court below to be the basis for the tort).

Thus, liability was affirmed.

Both before and after Sheehan the First District Court of Appeal has dismissed, as a matter of law, claims that do not meet this admittedly strict standard.

In Dowling v Blue Cross, 338 So. 2d 88 (Fla. 1st D.C.A. 1976), the Court held that falsely accusing female employees of engaging in lesbian sex in the ladies room, and then firing them because of this false charge did not meet this standard. Plaintiffs were not allowed to get to a jury. And in Lay v Roux Laboratories, Inc., 379 So. 2d 451 (Fla. 1st D.C.A. 1980), threats, humiliation, vicious verbal attacks, and racial epithets were held to be insufficient as a matter of law.

Similarly the Fifth District Court of Appeal held that telling an employee to take a lie detector test and confess to thefts, threatening to fire her if she did not comply but promising not to if she did, and then lying to her about the lie detector test results and firing her (despite the prior promise) on the basis of the phony results did not constitute sufficiently outrageous conduct. Food Fair, Inc. v Anderson, 382 So.2d 150 (Fla. 5th D.C.A. 1980). Quoting Comment d to Restatement Section 46 the Court said that to allow recovery:

> It has not been enough that the defendant has acted with an intent which is tortious or even criminal or that he has intended to inflict emotional distress,or even that his conduct has been characterized by 'malice' or a degree of aggravation which would entitle the plaintiff(sic) punitive damages for another tort. Id. at 153, (emphasis in original.)

In the case at bar the trial Court submitted the question of punitive damages to the jury and they refused to award punitive damages. This is significant because the trial Court's instruction to the jury permits an award of punitive damages for less outrageous conduct than the Florida Courts require for the tort of intentional infliction of emotional distress. The trial Court instructed the jury that it could award punitive damages if the jury found that Metropolitan had:

> acted with malice, moral turpitude, wantonness, willfulness or reckless indifference to the rights of others (T. 1246).

Then the trial Court went on to further dilute the degree of outrageousness by instructing that:

> Malice...does not necessarily mean the defendant acted in anger or had malevolent or vindictive feelings toward the plaintiff, nor does the alleged act need to have been done with the purpose of doing a wrong to the plaintiff. It is sufficient if the defendant's conduct shows an entire want of care or attention to duty or great indifference to persons, property or rights of others(T. 1246).

If the emotional distress cases cited above are compared with the case at bar it is clear that the strict standard for recovery is not met. The most that the Court below said was that Metropolitan denied a payable claim to "spite" the McCarsons. There are no allegations of insult, abuse, threats, attacks, or, indeed, any communications from Metropolitan to Mrs. McCarson, directly or indirectly, other than a letter (App. 23, 24) about the claims in question that was sent to the McCarson's attorney asking, in effect, whether Mrs. McCarson was eligible for Medicare.

The Court below was clearly wrong, even as to this "spite". Concededly neither the attorney nor the McCarsons replied to Metropolitan's letter. The trial Judge specifically stated that had they answered the letter and told Metropolitan she was not eligible, the entire problem would have been avoided (T. 217). The claim was not paid because the inquiry was ignored. Plaintiffs did not, and could not, contradict the testimony that Metropolitan acted in accord with industry standards, and that its outside attorneys (whose good faith was not in question) approved the letter. Plaintiffs conceded that Metropolitan shortly before the non-payment of claims had <u>voluntarily</u> reinstated the insurance policy after it had lapsed. Whether the claim should have been paid or not, these are not signs of personal ill will or "spite".

The Court below held that a jury might infer "spite", despite the foregoing, since "Metropolitan had already been judicially determined

to be responsible for Mrs. McCarson's medical care claims" and since "there was no merit to the Medicare issue." (App.36) The latter statement presumably is based on the "fact" that "Metropolitan knew that Mrs. McCarson was not eligible for Medicare and that Medicare did not cover home nursing services." (App. 32)

This Court need not extensively review the record to determine that the Court below labored under several basic misapprehensions. The statement that Metropolitan had been judicially determined to be responsible for the claims is, unsupportable. The trial Court repeatedly ruled that the prior Court Order (App. 14)(holding the policy to be validly issued) permitted Metropolitan to assert defenses based on the policy provisions, and did not require payment of all future claims. Plaintiffs conceded this at trial. (T. 96,484-486, 821, 968-969.)

The statements as to Medicare reflects a failure to understand the difference between Medicare coverage and Medicare eligibility; and also the one year continuation of coverage if the covered person was disabled when insurance would otherwise cease.

Metropolitan did know that Mrs. McCarson had no Medicare coverage and that Medicare did not pay for home nursing. Metropolitan did not know whether she was eligible to apply for Medicare coverage.

The insurance policy provided that insurance of a covered person terminated on the day he or she "becomes eligible for" Medicare (Paragraph 4, App 12) (emphasis added). If, at that time, the covered person was disabled, (as was Mrs. McCarson) the insurance continued for up to one year without premium payment, Id Section G, even though the person was eligible for Medicare. During this one year continuation of "free" insurance, Metropolitan would not pay for services covered by Medicare, but would pay for other services (such as home nursing). However, at the end of the one year continuation of coverage all insurance ceased and this could have occurred before the Redi Nurse services were terminated depending on when Mrs. McCarson first became eligible for Medicare.

The Medicare eligibility exclusion (as distinguished from a less broad Medicare coverage exclusion) is important because without it Metropolitan would have to pay full benefits if the insured elected not to apply for Medicare and this would impact on the premiums Metropolitan would have to charge on this coverage.

Metropolitan did not know, and no one has ever claimed that it did know, that Mrs. McCarson had never been eligible for Medicare because of lack of sufficient time working in covered jobs (of course, she did meet Medicare's disability requirement). In view of the uncontradicted

testimony that many people who are eligible for Medicare do not apply for coverage, and thus are not covered by Medicare, evidence of lack of coverage is not evidence of eligibility. Metropolitan's letter (never answered) to the McCarson's attorney (App. 23) specifically referred to Medicare eligibility and discussed Medicare coverage as a separate question entirely. The Court below had no basis whatever to flatly state, as it did, that Metropolitan knew Mrs. McCarson was not eligible for Medicare.

In any event, even accepting the statements of the Court below as accurate, no more than a deliberate breach of contract is established. This falls short of the conduct alleged in Dowling and Anderson where there was intentional improper conduct and direct harassment, lies, and false accusations. Yet the Dowling and Anderson claims were dismissed.

E. Metropolitan's Conduct Was Not Directed At Mrs. McCarson.

For it to be liable for wrongful death in connection with Mrs. McCarson, Metropolitan must have committed intentional infliction of emotional distress on her. But in this case the insured was her husband, it was her husband who was entitled to any payment of claims, and Metropolitan did nothing directed to her. The Fifth District Court of Appeal has held that denial of a husband's medical expense claims does not constitute

intentional infliction of emotional distress on the wife. Habelow v Travelers Insurance Co., 389 So.2d 218 (Fla. 5th D.C.A., 1980). In the absence of some evidence, non-existent in this case, of conduct directed at Mrs. McCarson personally, this claim must fail.

III. OTHER ISSUES.

As reflected in Metropolitan's briefs below, other errors in the judgment could result in its reversal. To a large extent these involve sufficiency of the evidence to support the judgment. Metropolitan does not waive any such errors, but acknowledges this Court's disinclination to re-review the record in detail in order to second guess such factual findings of the District Court of Appeal. State v Hedstram, 401 So.2d 1343 (Fla. 1981). Accordingly, such errors will not be discussed.

One issue, however, does not require detailed review of the record, and is intimately connected with the issues upon which the other sections of this brief focus. This is the wholly inadequate jury instruction.

The trial Court never instructed the jury as to the elements of intentional infliction of emotional distress. The jury was never told that a tort was needed (as opposed to breach of contract), that the conduct of

defendant must be atrocious and intolerable, that the conduct must be directed at Mrs. McCarson, etc. Thus, the jury verdict reflects a determination as to an amount of liability only, rather than a finding that Metropolitan committed the tort of intentional infliction of emotional distress.

The Court below held that Metropolitan waived the error, even though Metropolitan had objected to the jury instructions. Presumably the Court felt that Metropolitan's objections were insufficiently detailed. But that disregards the rule that even failure to object at all (much less mere failure to be sufficiently specific) does not waive fundamental error.

Fundamental error is "error which goes to the foundation of the case or goes to the merits of the cause of action." Sanford v Rubin, 237 So.2d 134 (Fla. 1970). It requires a failure to charge that "could reasonably have misled the jury to (appellants') detriment." Johnson v Lasher Milling Co. 379 So.2d 1048 (Fla. 1st D.C.A. 1980); Jefferson v West Palm Beach, 233 So.2d 206 (Fla. 4th D.C.A. 1970).

It is difficult to imagine a more fundamental error, in connection with jury instructions, than the failure to get at any of the basic elements of the alleged cause of action. If this Court overrules prior authority

and permits recovery for intentional infliction of emotional distress under the facts of this case, it should remand for a new trial to determine whether the tort (however defined by this Court) was committed in the first place. Such determination has never been made.

CONCLUSION

The decision of the Court below was wrong for the reasons specified in this brief. It should be reversed and plaintiff's wrongful death claim dismissed. Alternatively, it should be reversed and this case remanded for a proper trial as to whether Metropolitan committed the tort of intentional infliction of emotional distress (a necessary pre-condition to liability for wrongful death).

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Larry Klein, Esquire, 501 South Flagler Drive, West Palm Beach, Fl. 33401, Samuel D. Phillips, Esquire, Flagler Court Building, West Palm Beach, Fl. 33401, and M. Lee Thompson, Esquire, 2642 Forest Hill Boulevard, West Palm Beach, Fl. 33406 by mail this 27th day of October, 1983.

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