IN THE SUPREME COURT OF THE STATE OF FLORIDA

METROPOLITAN LIFE INSURANCE COMPANY,

Petitioner,

vs.

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

Respondent.

CASE NO: 63,739

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

# PETITIONER'S JURISDICTIONAL BRIEF

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## STATEMENT

Petitioner, Metropolitan Life Insurance Company ("Metropolitan") respectfully requests this Court to exercise its discretionary jurisdiction with respect to this case. Metropolitan's request is based upon Rule 9.030(a)(2)(A)(iv) because the decision of the District Court of Appeal, Fourth District, expressly and directly conflicts with decisions of other District Courts of Appeal, and with decisions of this Court.

## HISTORY OF THE CASE

Plaintiffs Ernest and Lucille McCarson sued Metropolitan in 1977, seeking recovery of damages resulting from denial of a claim for health insurance benefits. They sought, among other things, damages for intentional infliction of emotional distress. After Lucille McCarson died, a wrongful death claim was added. At trial, plaintiffs obtained a jury verdict for $250,000 for wrongful death, and $200,000 for intentional infliction of emotional distress. The trial court granted Metropolitan's motion for judgment with respect to the intentional infliction claim, but denied such motion (as well as a new trial motion) with respect to the wrongful death claim. Cross-appeals resulted. The Fourth District affirmed.

## THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL

The D.C.A. decision said the tort that formed the predicate for the wrongful death action was intentional infliction of emotional distress.

The decision held that Metropolitan's refusal to pay medical expense benefits constituted the tort of intentional infliction of emotional distress. It said the jury could have concluded that Metropolitan's refusal to pay was to spite the McCarsons.

The decision recognized intentional infliction of emotional distress as separate tort similar to other intentional torts such as assault. It established the test for it as "purposely harmful conduct" (Appendix, page 5, last sentence). In so doing the Court said:

> (W)e acknowledge our conflict with Gmuer and Gellert.

## THE FOURTH DISTRICT COURT OF APPEALS DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF OTHER D.C.A.'s

There are two grounds for conflict:

The Fourth District recognized a cause of action for the intentional infliction of emotional distress as a separate independent tort and two other D.C.A.'s do not.

The D.C.A. decisions that do not reject the tort apply it under far more limited circumstances than the Fourth D.C.A.

A. Cases Declining to Recognize The Alleged Tort of Intentional Infliction of Emotional Distress.

This need not be discussed at great length, as the Fourth District's opinion expressly acknowledged that its opinion conflicts with decisions of the Second and Third District Courts of Appeal.

In Gellert v. Eastern Air Lines, Inc., 370 So.2d 802 (Fla. 3rd D.C.A. 1979), the Third District dealt with allegations that plaintiff had been fired wrongfully, and with the intention of causing severe emotional distress. Thus Gellert, as in the instant case, dealt with breach of contract intended (allegedly) to cause emotional distress. The Third District stated that:

> under the law of Florida intentional infliction of mental distress is not actionable when not incident to or connected with an independent tort. Such has been the uniform holding, and this rule appears to be one that is founded on sound policy. Id. at 805, citing authorities.

The Third District analyzed many prior cases, concluding that "if the plaintiff had any basis for relief it was for breach of contract or upon a claim of unfair labor practices." Id., at 807. It stated that recovery for mental distress was alleged

only if such distress was "intentionally caused by or incident to a separate actionable tort", and that "in practical effect the damages which are awarded for the mental distress are consequential damages for the independent tort." Id. at 807 (final emphasis in original, initial emphasis added).

The Second District's decision was Gmuer v. Garner, 426 So.2d 972 (Fla. 2d D.C.A. 1982)(questions certified to Supreme Court by the Second District, but case settled by the parties prior to decision).

In Gmuer, the court dealt with alleged sexual propositions made to a female employee. The Second District noted that there was a conflict between the Districts (Id. at 973) and aligned itself with Gellert. It stated "The reasoning of the Gellert court and the earlier cases undergirdling it impress this Court as expressive of the soundest and best rule". Id.

Since this memorandum does not discuss whether Gellert and Gmuer are right or wrong, it will not discuss here any decisions that take the opposite approach.

B. Cases Applying A Far More Limited Standard.

The Fourth District affirmed because it found that Metropolitan's denial could have been found by the jury to have been motivated by spite (opinion, page 6, top paragraph). They also held that

a sufficient basis for the tort of intentional infliction of emotional distress was "purposely harmful conduct" or "intentional harmful conduct".

In Food Fair, Inc., v. Anderson, 382 So.2d 150(Fla. 5th D.C.A. 1980), the Fifth District had a case in which plaintiff was allegedly forced to take a lie detector test, told that she must either admit (wrongly) to prior thefts or be fired, did admit this (while crying) because she needed the job, was falsely told that she failed the lie detector test, was told to again admit (wrongly) to other thefts or be fired, did so, and was then fired despite having been promised that she would not be fired if she admitted the thefts.

The Fifth District did not expressly state whether it recognized the tort. Instead, it held that the facts set forth above were not sufficiently outrageous as to constitute the tort. The court said:

> 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 punitive damages (sic) for another tort. Liability has been found only where the conduct has been 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.

Id. at 153, quoting a comment to the Restatement Second of Torts.

This clearly conflicts with the instant case, where (at worst) far less egregious facts, without any personal contact between Metropolitan and Mrs. McCarson (merely a denial of benefits to her husband, which indirectly affected her as his dependent under the insurance policy) has now been held to be sufficient. The Fifth District's case of Habelow v. Travelers Insurance Co., 389 So.2d 218 (5th D.C.A. 1980), also conflicts with the instant case. There, as here, insurance benefits were delivered by the insurer. There, as here, the insurer allegedly acted "with malicious intent to inflict mental anguish." Id. at 219. There, as here, it was alleged that the insurance benefits were, in fact, payable. Going beyond the instant case, specific insult and personal abuse was alleged. The Fifth District held as a matter of law that no cause of action was alleged, the court stating that it existed "only in the most outrageous circumstances." Id. at 220. Similarly the First District, in a case that came after it recognized the tort, decided Lay v. Roux Laboratories, Inc., 379 So.2d 451 (Fla. 1st DCA 1980). There, defendant "began to threaten (plaintiff) with loss of her job, then said defendant began using humiliating language, vicious verbal attacks, racial epithets and called plaintiff a 'nigger'". Id. at 452. This was held to be insufficient as a matter

of law. The First District approvingly cited its case of Dowling v. Blue Cross, 338 So.2d 88(Fla. 1st D.C.A. 1976) in which wrongfully firing two employees and falsely accusing them of having had lesbian relations in the ladies' lounge was held insufficient as a matter of law.

## CONCLUSION

This Court should exercise its discretionary jurisdiction to resolve the conflict between the Districts, which the Opinion below itself expressly recognized.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Larry Klein, Esq., 501 South Flagler Drive, West Palm Beach, Fl. 33401 Samuel D. Phillips, Esq., Flagler Court Building, West Palm Beach, Fl. 33401, and M. Lee Thompson, Esq., 2642 Forest Hill Boulevard, West Palm Beach, Fl. 33406 by mail this 6th day of June, 1983.

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