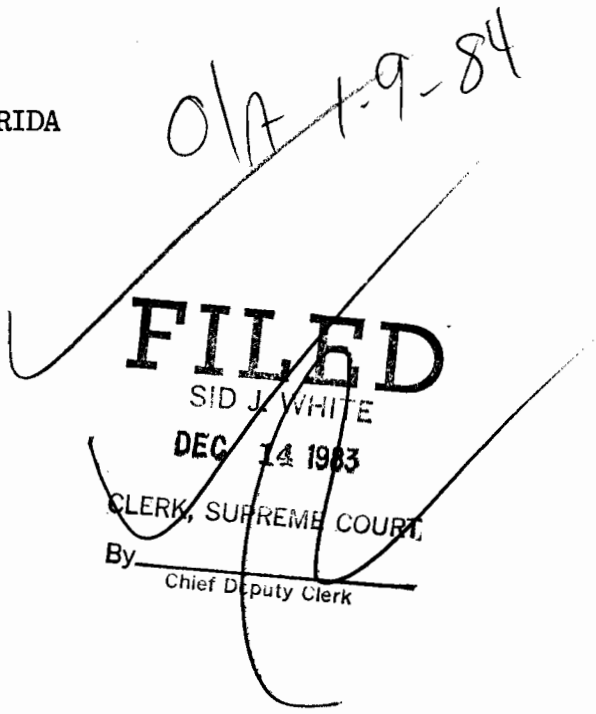
IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

Case No. 63,739



METROPOLITAN LIFE INSURANCE COMPANY,

Petitioner,

vs.

ERNEST D. McCarson, Sr., etc. et al,

Respondents.

PETITIONER'S REPLY BRIEF

DONALD J. SASSER
P. O. Box M
West Palm Beach, Fl. 33402

WILLIAM H. PRUITT
501 S. Flagler Drive
West Palm Beach, Fl. 33401

JOHN G. PARE'
Metropolitan Plaza
Tampa, Fl. 33607
(813) 871-3047

Attorneys for Petitioner
Metropolitan Life Insurance Company

TABLE OF CONTENTS

TABLE OF CITATIONS

CLARIFICATION OF FACTS[1]/

Metropolitan knows this Court is not primarily interested in factual disputes between litigants. Unfortunately, however, the Statements of the Facts in the McCarsons' brief and in the Fourth District's Opinion are incorrect in certain significant respects, even giving due deference to the rule that any dispute of fact must be resolved in favor of the McCarsons. Other statements are not supported by any evidence, and are simply wrong. Reluctantly, Metropolitan is compelled to set the record straight.

The alleged "real issue" under consideration in this case according to Appellees - whether recovery in Florida shall be allowed for intentional infliction of emotional distress - is not a simple, single issue. Rather, as all the literature carefully states, it is a kaleidoscope of factual variations and courts considering this aspect of tort law necessarily struggle with the factual boundaries of antisocial conduct so outrageous as to possibly warrant the imposition of pure tort liability. The importance of factual accuracy is paramount in this area of the law, particularly when a court is considering adoption of a new "rule of law."

In approaching this kaleidoscopic problem, this Court will need a precise formulation of the facts adduced at trial in this case. Since the McCarsons have misunderstood those facts, it is once more necessary for Metropolitan to correct the factual underpinnings of this Court's review.[2]/

1/ App. 1-2 to this brief contain a "Chronology" of significant events.

2/ Facts are set forth in a manner most favorable to the McCarsons when they are disputed, but the undisputed facts are set forth as they actually are.

A. MEDICARE PROVISIONS IN THE POLICY.

The main difficulty seems to stem from one critical fact, above all others, which has eluded the District Court and continues to bedevil the McCarsons' analysis. That fact is this: the insurance policy that links Metropolitan to Mr. McCarson has two provisions, not one, that bear on the continuation of coverage for a disabled covered person. One provision -- a so-called "continuation" clause -- obliged Metropolitan to pay one additional year's benefits, beyond cessation of regular insurance, to Mr. McCarson with respect to a covered person who was disabled at the time insurance coverage terminated (whether for nonpayment of premiums or for other reasons such as eligibility to apply for Medicare coverage). This provision is set forth in page 3 of the Appendix to this brief. The other provision states that when a person becomes eligible to apply for Medicare coverage, regular insurance ceases.[3]/ This provision is set forth in page 3 of the Appendix to this Brief. For ease of understanding, this latter provision can be called the "Medicare eligibility termination" provision. Thus, a person who becomes eligible for Medicare because of total disability is automatically entitled to one additional year of benefits under the "continuation" clause.

Only the former provision contains an offset of benefits from Metropolitan for certain Medicare payments. Only the former provision has any bearing

---

3/ The McCarsons do not contradict the undisputed fact that many persons are eligible for Medicare but do not become actually covered (T191-192, 324, 346-347). Thus an insurer must, and Metropolitan customarily does, address itself to Medicare eligibility even though it realizes that there is no actual Medicare coverage. (T198,272-273, 396, 404-405). Otherwise an insured could pick and choose, electing either Medicare coverage or insurance coverage, whichever is greater. This is not permitted by the insurance policy.

whatsoever on whether Medicare pays for nursing services (which Metropolitan has always known and agreed Medicare does not).

These policy provisions are not themselves in dispute, and never have been. Apparently, the coincidence of their both using the word "Medicare" has caused the District Court and the McCarsons to misunderstand what prompted Metropolitan's wholly-reasonable inquiry into Mrs. McCarson's work history and Medicare eligibility.[4]/

Let's see what has resulted from the confusion between the "continuation" clause itself and the provision on "Medicare eligibility termination". The McCarsons devote much of their brief to the issue of Medicare, underpinning their entire case on the conclusion that Metropolitan's delay in paying certain insurance claims must have been malicious, and intended to cause emotional distress, since the reason given for the delay was known at the time to Metropolitan to be invalid. But, if Metropolitan had reason to believe that the claims might not be payable at all because the "Medicare eligibility termination" had occurred and one year of additional benefits under the "continuation" clause had expired, the conclusion is unwarranted and plaintiffs are left with no more than a simple breach of contract action. None of the evidence on which the McCarsons rely supports their claim that Metropolitan knew - before they asked - that Mrs. McCarson was not eligible to apply for Medicare coverage.

4/ Medicare eligibility required two years and five months of disability, and employment for five of the ten years prior to the disability (T92-94, 369, 732-734). Mrs. McCarson may have been disabled as early as 1971 (T95, 189-190, 370). Mr. McCarson testified under oath that his wife had worked until the 1940's (T727-728, 890, 891). Metropolitan had no way of knowing when she stopped working. Under these circumstances, it was Metropolitan's normal practice, not directed personally at the McCarsons, to inquire. (T198, 272-273, 396, 404-405.)

The McCarsons' brief says that:

(1) Metropolitan knew that Mrs. McCarson had no Medicare coverage (meaning payments received or applied for) (T169). True, but irrelevant to "eligibility". A person must be eligible and apply to be covered (T735). If a person is not covered, it may be due to ineligibility or the fact the person did not apply.

(2) Nothing in Metropolitan's file showed that Mrs. McCarson was eligible for Medicare (T174). True, but again irrelevant because Metropolitan could not know Mrs. McCarson's work history. That's why it asked. Metropolitan's file did show that she was disabled, which is a major part of Medicare's eligibility requirement.

(3) During the 12 months after Mrs. McCarson became eligible for Medicare, Metropolitan would have paid insurance benefits, less what Medicare paid, if anything (T224). True under the terms of the policy, but beside the point because it would pay only if the one year "continuation" clause was still in effect and had not yet expired.

(4) Medicare does not pay for home nursing services, and Metropolitan knew this (T224, 268-269, 298). True, but again only relevant to determine payments owed under the "continuation" clause, if it was in effect.

(5) Metropolitan employees said that nursing services should have been paid. (T269,318). Not true. This statement is inaccurate and misleading. Mrs. Armatrout, the first witness cited, did not say that Metropolitan should have paid the claim. She was asked by counsel whether the claim should have been paid "if you knew this was continuation of coverage" (the 12-month continuation after termination of regular insurance). She answered that if "The policy was in force" the claim should have been paid (T269). Mrs. DeGregoria, the second witness cited, likewise did not say that the claim should have been

paid. She was asked by counsel whether the claim would have been payable "Under the continuation of coverage provision?" She said "Yes Sir." (T318). No one has ever denied that the claim should have been paid if the "continuation" clause was in force. (In fact the policy was nonrenewed as of 3/31/77 and benefits for expenses after that were paid. (App. 1-2 of this brief)) The McCarsons thus set up a straw man, and then demolish it.

The question from the beginning was whether the "continuation" clause was in force at all. If it was not in force because Mrs. McCarson had become eligible for Medicare more than one year before, there would clearly be no insurance coverage whatever.5/

B. THE PRIOR TRIAL.

Another factual error relates to a prior trial on the policy. That factual mistake underpins the first, for the McCarsons would have the Court believe that the policy provisions are not really germane to their "tort" suit. Not so, since the tort they seek to create is based merely on Metropolitan's attempt to determine its rights and duties under the policy.

5/ The McCarsons, unfortunately, have never explained why Metropolitan's letter asking about Medicare eligibility was not answered. It does not contradict the repeatedly stated, and not disputed fact that if a reply was sent (saying, for instance, that Mrs. McCarson was not eligible for Medicare because she had not worked recently enough) the claim would have been paid. We know, of course, that after Metropolitan's inquiry, Mr. McCarson did contact Social Security, and he determined that his wife was not eligible for Medicare (T880-882, 906-907). But Metropolitan was never told of this. And although Metropolitan repeatedly advised that it would pay benefits if the question was answered, the McCarsons chose to ignore it until June of 1978. The claim was then paid. Indeed, the trial judge, who heard the evidence, stated that the entire problem could have been avoided if the question had been answered (T217).

The McCarsons state that they had obtained a judgment that obligated Metropolitan to pay "contractual obligations arising from the policy." True indeed, but they conceded at trial, and the trial judge held, that the prior trial did not preclude Metropolitan from enforcing the policy in accordance with its terms and, hence, raising defenses based upon the policy language (T96, 484-486, 821, 968-969). Thus, the letter inquiring about Medicare coverage can under no characteristization be seen as "spiteful." Rather, it was absolutely routine. (See footnote 3 and 4.)

C. PROXIMATE CAUSE.

The factual foundation for causation seems equally elusive to the McCarsons.[6] Had Dr. French testified as the McCarsons' brief indicates - that placement of Mrs. McCarson in a nursing home caused her premature death - this certainly would have resolved any question as to causation (although not as to foreseeability)[7]. His actual testimony, however, was quite different. He said only that placement in a nursing home "would reduce her life expectancy" (T697). There was no testimony whatever that Mrs. McCarson's actual heart attack was caused by being in the nursing home.

6/ Metropolitan, in its initial brief, chose not to raise the question of proximate cause, preferring to focus its attention on other issues. Thus, its brief in this Court contained none of the detailed discussion of this issue contained in its prior briefs below. Should this Court so desire, Metropolitan will submit a supplemental memorandum on this point or a copy of its earlier brief.

7/ If Mrs. McCarson's death was a foreseeable result of Metropolitan's actions, as is now in retrospect claimed, why did Mr. McCarson and his attorney totally disregard Metropolitan's inquiry concerning Medicare? Why did they not use the $545.76 of benefit payments that Mr. McCarson had already received from Metropolitan to pay home nursing bills for this purpose? Was it in the hope of hastening Mrs. McCarson's death and thereby "setting up Metropolitan" for a punitive damage lawsuit? Surely this was not the case, and Metropolitan would never imply that it was. But the McCarsons' own argument could, if accepted, lead the Court to this ridiculous conclusion.

D. THE FOURTH DISTRICT IMPROPERLY CHARACTERIZED METROPOLITAN'S CONDUCT.

As earlier discussed, the Fourth District's misunderstanding of Metropolitan's contract provisions produced a finding of "spite" which was without support in the record. Although Metropolitan knew that Mrs. McCarson had no Medicare coverage, it had no way to know whether she had been eligible to apply for such coverage. Thus, its inquiry of Mr. McCarson's attorney was not a mere pretext for a claims denial. Had the Fourth District not confused coverage with eligibility, it would have had no basis on which to impute "spite".8/

Of equal importance is the fact that there was no communication from Metropolitan to Mrs. McCarson (who was not even the insured under the policy). There were no threats, nastiness, foul language, or the like. There was simply a polite inquiry to her husband's attorney about facts relevant to the claim. There is no evidence in this record to indicate any intent on Metropolitan's part to inflict severe emotional distress on anyone. Coupled with the fact that Mrs. McCarson personally had no claim against Metropolitan, or any form of contract with Metropolitan, it follows that Metropolitan's conduct was not remotely tortious with respect to her in terms of a Restatement section 46 tort.

8/ Indeed Metropolitan had, a few months before, voluntarily continued Mr. McCarson's policy after he let it lapse when Metropolitan had a perfect excuse to cut off coverage. (App. 1-2 of this brief.)

ARGUMENT

A. FLORIDA DOES NOT RECOGNIZE AN INDEPENDENT TORT OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

The McCarsons cite Champion v Gray, Case No. 62,830, as raising a similar issue. That case, however, is totally different from this case with respect to the important issues. There, the question is whether, if defendant commits a tort, emotional distress can be recovered as an element of damages (without physical impact). Here, the question is whether, if defendant engages in conduct that is not, under existing law, a tort, plaintiff can recover damages by virtue of the judicial creation of a new tort.

Even if this Court resolves Champion v Gray by allowing expanded recovery for the acknowledged tort at issue there, that is not reason to create a totally new tort here. Indeed, this Court could then readily refuse to do so, on the ground that there is no pressing need to recognize a new tort if existing law allows recovery in tort for emotional distress.

B. THIS COURT CANNOT SIMPLY DISREGARD WHAT WOULD BE REQUIRED UNDER A NEW TORT, IF ADOPTED.

The McCarsons say this Court should not consider the nature and content of the new tort if it is adopted. Their position is disingenuous. If they are correct that creation of a wholly new tort in Florida is the "real

issue" in this case, a definition of that tort is clearly critical to the Court's concerns. The McCarsons quite properly worry that the Court will find Metropolitan's conduct factually inappropriate as a foundation for the bold new doctrine that has been presented for adoption.

The minimum parameters of the new doctrine are plainly as important as its adoption in concept. Indeed, those boundaries were an integral part of the jurisdictional brief, just as was the decisional conflict between the Fourth District's opinion on this point and the decisions of other districts.

C. THE TORT, IF RECOGNIZED, DOES NOT APPLY TO BREACH OF CONTRACT, EVEN IF WRONGFUL.

Subsequent to this Court's decision in Gilliam v Stewart, 291 So.2d 593 (Fla. 1974), relied upon by the Court below, and subsequent to some of the Court of Appeal decisions relied upon by the Court below, this Court decided DeMarco v Publix Supermarkets, Inc., 384 So.2d 1253 (Fla. 1980). DeMarco makes clear that even if the tort of intentional infliction of emotional distress is recognized, it does not apply to breach of contract, however wrongful.

In DeMarco (and the McCarson's brief did not even make an attempt to distinguish or argue it away) this Court held that allegations of deliberate, illegal and malicious breach of contract did not permit a cause of action for emotional distress unless this constituted an independent tort. Two years later, this Court ruled that an independent tort was not created by a breach of contract engaged in "intentionally, willfully and outrageously." No such tort exists, this Court held, even where "the defendant flagrantly unjustifiably and oppressively breaches a contract." Lewis v Guthartz, 428 So.2d 222 (Fla. 1982).

Thus, even if those Court of Appeal decisions that recognize a tort of intentional infliction of emotional distress are correct, this Court's recent decisions establish that the tort must be more than a breach of contract. Many other cases, involving denials of claims for insurance benefits, cited in Metropolitan's initial brief, have reached the same result.

This makes great sense. The drafters of Restatement (Second) of Torts Section 46 (1965), which is the genesis of the tort, did not have breach of contract in mind. Their comments and illustrations dealt with cruel practical jokes, threats of harm, extreme insult, and infliction of harm. Out of 22 illustrations, and other comments, none involves breach of contract. Similarly the leading Florida case, Ford Motor Credit Co. v Sheehan, 373 So.2d 956 (Fla. 1st D.C.A. 1979), dealt not with breach of contract but an intentional, false, highly damaging statement that plaintiff's children had been seriously injured. On the other hand, several District Courts of Appeal have dismissed, as a matter of law, claims partly arising out of contractual (employment) relationships. Dowling v Blue Cross, 338 So.2d 88 (Fla. 1st D.C.A. 1976); Food Fair, Inc. v Anderson, 382 So.2d 150 (Fla. 1st D.C.A. 1980).

A contrary result would improperly "introduce uncertainty and confusion into business transactions." Lewis v Guthartz, supra, at 428 So.2d 223. It would allow plaintiffs, by inferring malice ("Why would anyone breach a contract that seemed perfectly clear, if not to hurt plaintiff?") to interject emotional distress into every case, clogging the courts and impeding realistic settlements based upon contractual damages.

D. THE TORT, IF RECOGNIZED, REQUIRES OUTRAGEOUS CONDUCT DIRECTED AT MRS. McCARSON.

As the McCarsons seem to concede, by their brief's eloquent silence, Mr. McCarson was the insured, Mr. McCarson had the only right to make a claim, and Mr. McCarson was the one to whom any payment should have been made. No one at Metropolitan spoke to Mrs. McCarson in any way whatsoever. Even if, arguendo, Metropolitan had acted to inflict emotional distress on Mr. McCarson, that would not give his wife the cause of action necessary. The Fifth District has dismissed a wife's claim for this reason. Habelow v Travelers Insurance Co., 389 So.2d 218 (Fla. 5th D.C.A. 1980). See also Harrington v Pages, ___So.2d___ (Fla. 4th D.C.A. Nov. 16, 1983) Case No. 83-375, 8 F.L.W. 2730. This decision is set forth on pages 4 and 5 of the Appendix to this brief.

E. THE TORT, IF RECOGNIZED, REQUIRES EXTREME CONDUCT.

To create liability, defendant's conduct must be

> 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.

Restatement Comment, quoted in Sheehan, supra.

> 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 to punitive damages for another tort.

Id, quoted in Food Fair, Inc. v Anderson, 382 So.2d 150 (Fla. 5th D.C.A.1980) See also Anderson v Rossman, ___So.2d___ (Fla.4th D.C.A. Oct. 26, 1983) Case No. 82-2397, 8 F.L.W. 2600 (App. 6-7 of this brief); Harrington v Pages, ___So.2d___ (Fla. 4th D.C.A. Nov.16, 1983) Case No. 83-375, 8 F.L.W. 2730.

The Fourth District's conclusion that Metropolitan breached its contract for "spite" does not come close to meeting this standard, even if the conclusion was correct (which it is not).

With some regularity, parties to contracts feel that the other parties are not fully complying with the contract. Even if a jury is persuaded that "spite" motivated the breach, this hardly elevates the conduct into actions that go beyond the tortious or criminal, and that goes beyond what is needed for punitive damages (which the jury in this case refused to award).

The remedy for breach of an insurance contract is recovery of contractual damages, attorney fees, and possible Insurance Department sanctions, including possible loss of license. It does not call for, and should not result in, tort action, for the extreme tort of intentional infliction of emotional distress.

F. JURY INSTRUCTIONS.

The McCarsons erroneously state that the issue of improper jury instructions was not raised below by Metropolitan. It was. See Metropolitan's reply brief below at pages 22-23. (App. 8-9 of this brief.)

The McCarsons' defense of the trial Court's instruction to the jury is clearly unfounded. They refer to T 1243 (the trial Court's instructions requiring outrageous conduct, conduct that was intentional or with disregard for the probability of emotional distress, severe emotional distress, proximately resulting). But this instruction hardly comports with the tests set forth by the case law they would now have this Court adopt, to wit, conduct that

1. Goes beyond all possible bounds of decency;

2. Is to be regarded as atrocious and utterly intolerable in a civilized community;

3. Is more than merely tortious, criminal and malicious to a degree entitling plaintiff to punitive damages; and,

4. Is directed at Mrs. McCarson, not Mr. McCarson (the trial Court neglected this distinction).

The instructions which were given clearly did not give the jury any idea of the extreme nature of the conduct necessary to constitute intentional infliction of emotional distress.

Respondent's brief also states that the trial Court failed to instruct as to foreseeability. The guilty flee where none pursue - this point was not raised in this Court by Metropolitan. Apparently it should have been. The absence of a standard jury instruction is hardly reason to fail totally to instruct as to a key element of any wrongful death cause of action. This Court has held that "the key to proximate cause... is foreseeability." Hendeles v Sanford Auto Auction, Inc., 364 So.2d 467, 468 (Fla. 1978). Metropolitan had requested an instruction requiring that death be a result "fairly and reasonably to be considered ... arising naturally, i.e. according to the usual course of things from such breach of contract..." R 3309-3329 request 9. This was refused. (T65-66).

CONCLUSION

The decision of the Fourth District affirming the wrongful death award should be reversed.

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 12th day of December, 1983.

JOHN G. PARE'
Metropolitan Plaza
Tampa, Fl. 33607
(813)871-3047

DONALD J. SASSER, ESQUIRE
Johnston, Sasser & Randolph
310 Okeechobee Boulevard
West Palm Beach, Fl. 33402

WILLIAM H. PRUITT, ESQUIRE
501 South Flagler Drive
West Palm Beach, Fl. 33402

Attorneys for Petitioner
Metropolitan Life Insurance Company