IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,533

CRAWFORD AND COMPANY, a foreign corporation, and MILLIE DIRUBE,

Petitioners,

-vs-

ANTONIO DOMINGUEZ,

Respondent.
_____/

BRIEF OF RESPONDENT, ANTONIO DOMINGUEZ, IN OPPOSITION TO CERTIORARI JURISDICTION

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RESPONSE TO JURISDICTIONAL STATEMENT

It is recognized that CRAWFORD AND COMPANY and MILLIE DIRUBE seek to invoke certiorari jurisdiction predicated upon the "express and direct" conflict doctrine. However, the Respondent, ANTIONIO DOMINGUEZ, submits that the only decision relied upon for "conflict" is both legally and factually distinguishable from the case sought to be reviewed. The present case, unlike the decision upon which the Petitioners rely, involves the insurance industry and the utilization by an insurer of its position of economic power to physically enter the Respondent's home and perpetrate the conduct complained of directly upon ANTONIO DOMINGUEZ. Additionally, the present case involves conduct which is specifically prohibited by both statutes and administrative regulations. This case is in the category of deliberate, overt, dishonest, and direct behavior directly against ANTONIO DOMINGUEZ far beyond mere insulting words.

The only similarity between the present case and Metropolitan Life Ins. Co. v. McCarson, Case No. 63,739, the case by which the Petitioners seek to "bootstrap" themselves into jurisdiction, is that

insurance companies are involved in both cases. The present case goes far beyond mere discontinued insurance payments.

STATEMENT OF CASE AND FACT

The Petitioners, CRAWFORD AND COMPANY and MILLIE DIRUBE, were Defendants in the trial court, Appellants in the District Court of Appeal, Third District, and will be referred to herein as "CRAWFORD" and "DIRUBE" respectively.

The Respondent, ANTONIO DOMINGUEZ, was the Plaintiff in the trial court, the Appellee in the District Court of Appeal, and will be referred to herein as "DOMINGUEZ".

The following symbol will be utilized in this brief.

"A" --Appendix filed sumultaneously herewith.

All emphasis is supplied by counsel unless otherwise indicated.

The posture of this case before the District Court of Appeal, Third District, was a review of a dismissal with prejudice of an action filed by DOMINGUEZ against CRAWFORD and DIRUBE, which was contained in Count II of a Second Amended Complaint. (A. 1-10). Since the dismissal was at the pleading stage of the litigation, the facts as alleged by DOMINGUEZ were accepted as true for appellate purposes and established:

In June, 1973, DOMINGUEZ secured a disability income insurance policy from Equitable Life Assurance Society of the United States, which provided for a monthly income in the amount of $500 for the lifetime of DOMINGUEZ in the event of an accidental total disability. (A. 1-2). While the policy was in force, DOMINGUEZ was involved in an automobile accident which caused severe injuries to his body and extremities which included both eyes being knocked from their sockets, brain damage, multiple fractures, rods being placed in both legs, right arm and shoulder

dislocations, multiple large scarring, psychiatric problems, periodic incontinence, paralysis of a nerve in his eye, and other physical and mental problems and mental injuries which had resulted in DOMINGUEZ being totally disabled. (A. 2). Insurance benefits were paid for approximately six or seven years until September, 1979, at which time payments were discontinued. (A. 2).

On or about April 21, 1980, Equitable sent DIRUBE to DOMINGUEZ' home and DIRUBE was working either directly for Equitable or indirectly for Equitable by virtue of her employment with CRAWFORD, which had been hired by Equitable to work on this case. DIRUBE entered the home of DOMINGUEZ, falsely represented that (1) she had possession of a letter from the eye doctor stating that DOMINGUEZ' eyes were now satisfactory and no disability existed relating to his eyes; (2) DOMINGUEZ was no longer totally disabled; (3) DOMINGUEZ was not covered by the insurance policy issued by Equitable; (4) the policy issued by Equitable was no longer in force; (5) DOMINGUEZ was required to sign a document agreeing that no further payments were due him under the insurance policy; (6) DOMINGUEZ was not entitled to receive benefits under the insurance policy; (7) DOMINGUEZ was required to sign a document in which it was stated that DOMINGUEZ agreed that no further payments were due, that the policy no longer provided coverage, that DOMINGUEZ was no longer entitled to receive benefits, and that DOMINGUEZ was voluntarily surrendering the policy. (A. 3-4). DIRUBE concluded by demanding physical possession of the original insurance policy from DOMINGUEZ. (A. 4). DIRUBE engaged in such behavior even though she knew or should have known that DOMINGUEZ remained permanently and totally disabled as a result of the injuries he had sustained and/or due to medical records in her possession or available to her. (A. 3).

DIRUBE violated the Florida Administrative Code Chapter IV-36 (4-36.06) and (4-36.07) by contacting the incapacitated claimant and attempting to conclude a settlement which would have been disadvantageous and detrimental to DOMINGUEZ and by failing to advise DOMINGUEZ of his rights in accordance with the terms and conditions of the insurance contract. (A. 4). Further, DIRUBE violated Florida Statutes Section 626.9541(9)(b) by making the material misrepresentations with the intent of procuring a settlement on less favorable terms than the benefits provided under the insurance policy. (A. 4). DIRUBE engaged in deliberate, overt, dishonest, and direct dealings as to DOMINGUEZ and all of such behavior was done intentionally to inflict emotional distress upon DOMINGUEZ and said behavior did in fact cause severe and extreme emotional distress to DOMINGUEZ, which had a profound effect upon his physical and mental condition. (A. 7).

Based upon the foregoing facts, the District Court of Appeal, Third District, determined that the complaint had alleged that CRAWFORD AND COMPANY and DIRUBE were in a position to affect DOMINGUEZ' interests and asserted their power by terminating payments without justification. The Court stated that it was obvious that CRAWFORD and DIRUBE were aware of DOMINGUEZ' disabilities and his susceptibility to emotional distress when they engaged in their behavior. It was a combination of the unjustified assertion of power and the impotence of the other which produced the outrageous behavior beyond a mere indignity, annoyance or petty oppression.

CRAWFORD and DIRUBE seek "conflict" jurisdiction based upon the foregoing factual situation and determination by the District Court of Appeal, Third District.

JURISDICTIONAL POINT INVOLVED ON APPEAL

WHETHER THE DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, IN A CASE INVOLVING ENTRY INTO AN INSURED'S HOME, DELIBERATE, OVERT, DISHONEST, DIRECT AND BAD FAITH DEALINGS BY AN INSURANCE REPRESENTATIVE IN VIOLATION OF STATUTE AND ADMINISTRATIVE REGULATIONS IS IN EXPRESS AND DIRECT CONFLICT WITH Gmuer v. Garner, 426 So.2d 972 (Fla. 2d DCA 1982).

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, IN A CASE INVOLVING ENTRY INTO AN INSURED'S HOME, DELIBERATE, OVERT, DISHONEST, DIRECT AND BAD FAITH DEALINGS BY AN INSURANCE REPRESENTATIVE IN VIOLATION OF STATUTE AND ADMINISTRATIVE REGULATIONS IS NOT IN EXPRESS AND DIRECT CONFLICT WITH Gmuer v. Garner, 426 So.2d 972 (Fla. 2d DCA 1982).

The historical development of the "express and direct conflict" concept was well articulated by this Court in Jenkins v. State, 385 So.2d 1356 (Fla. 1980). This Court expressed and outlined the unacceptable "certiorari concepts" which had developed prior to 1980, and upon which the 1980 conflict jurisdiction amendment was predicated. This Court amplified and reaffirmed a certiorari concept that requires a conflict of decisions, not a conflict of opinions or reasons, to provide this Court with jurisdiction for certiorari review. See, e.g. Gibson v. Maloney, 231 So.2d 823 (Fla. 1970).

It is submitted that the 1980 amendment to the certiorari jurisdictional provision was intended to limit rather than expand certiorari jurisdiction. It is submitted that this Court would have certainly been without jurisdiction prior to the 1980 amendment. This Court has previously stated that conflict jurisdiction does not exist when there are factors involved in a decision which distinguish the case upon which certiorari is sought. Toffel v. Baugher, 133 So.2d 240 (Fla. 1961). It is submitted that conflict jurisdiction has always been intended to review a

conflict in precedent and not as a vehicle to review specific factual determinations. See, e.g. Ansin v. Thurston, 101 So.2d 808 (Fla. 1958).

The only decision upon which CRAWFORD and DIRUBE rely for conflict jurisdiction, Gmuer v. Garner, 426 So.2d 972 (Fla. 2d DCA 1983), involved a totally different factual situation. In Gmuer each and every complaint voiced was based upon allegations of sexually seductive invitations from a defendant to a plaintiff. The conduct did not involve the entry into one's home, did not involve deliberate, overt, dishonest, direct and bad faith dealings on the part of an insurance representative in violation of both statute and administrative regulation, and did not involve one in the position of possessing and utilizing power over a totally disabled individual.

It is submitted that the decision of the District Court of Appeal, Third District, sought to be reviewed is totally consistent with decisions of other District Courts of Appeal and is also consistent with statements of this Court. For example, in Miller v. Mutual of Omaha Ins. Co., 235 So.2d 33 (Fla. 2d DCA 1970), an insured sought recovery for an intentional infliction of distress arising from the circumstances and abuses when an insurance company representative removed an insurance policy from an insured. The facts in Miller reveal that an insured purchased a medical benefit policy and, shortly thereafter, discovered a serious medical condition. A representative of the insurance company appeared at the home of the insured, advised that no benefits would be paid, inferred that the insured had prior knowledge of the serious medical condition, suggested that the insured was trying to "pull something" and removed the insured's policy without permission. After the jury had returned a verdict favorable to the insured, the Trial Court set the

verdict aside. The District Court of Appeal, Second District, reversed the Trial Court's actions and held that there was a question of fact to be submitted to the jury as to whether there was liability for the removal of the policy and the mistreatment of the insured when the insurance representative appeared at the insured's home.

A substantial compensatory damage award for the intentional infliction of emotional distress was affirmed in World Ins. Co. v. Wright, 308 So.2d 612 (Fla. 1st DCA 1975), in which an insurance company threatened and engaged in bad faith which included attempts to "buy up" a disability policy. The Court clearly held that the threatened and actual bad faith justified an action for damages for the intentional infliction of mental distress.

This Court has recognized the insurance context as being separate and apart from other factual situations. Factual situations which involved elements of concealment, misrepresentation, a continued course of dishonest dealings, deliberate, overt, and bad faith conduct fall into a separate category for which recovery and relief is available. Campbell v. Government Employees Ins. Co., 306 So.2d 525 (Fla. 1975); Butchikas v. Travelers Indem. Co., 343 So.2d 816 (Fla. 1977).

The suggestion by CRAWFORD and DIRUBE that the conduct in this case is not outrageous defies logic. Each and every decision upon which CRAWFORD and DIRUBE rely for such proposition are foreign to the insurance context. Further, none of the decisions involve an intrusion into one's home nor do they involve a totally disabled individual at the mercy of one wielding economic power to the extent that the individual's very survival is dependent upon the one wielding such power. Further, none of the decisions upon which CRAWFORD and DIRUBE rely involve conduct which is

specifically prohibited by both statute and administrative regulation. It is clear that insurance practices are vested with a public concern which has been specifically addressed by the Florida Legislature and the outrageous behavior in this case extends far beyond verbal confrontations in the work place.

CONCLUSION

It is respectfully submitted that based upon the authorities, reasoning, and argument set forth herein, this Honorable Court should decline full review in this case. Further, it is submitted that the present case involves a totally different factual situation than is involved in Metropolitan Life Ins. Co. v. McCarson, Case No. 63,739, and such case is not necessarily controlling in the present case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 13 day of December, 1983, to: Amy Shield Levine, Esq., LEVINE & LEVINE, Suite 380, 900 North Federal Highway, Boca Raton, FL 33432; GEORGE, HARTZ, BURT & LUNDEEN, Suite 1101, Ingraham Building, 25 S.E. Second Avenue, Miami, FL 33131; and to Bernard P. Goldfarb, Esq., BERNARD P. GOLDFARB & ASSOCIATES, P.A., 2748 S.W. 87th Avenue, Miami, FL 33165.

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