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IN THE SUPREME COURT OF FLORIDA

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

Petitioners,

-vs-

CASE NO. 64,533

ANTONIO DOMINGUEZ,

Respondent.
_____/

BRIEF OF RESPONDENT, ANTONIO DOMINGUEZ, ON THE MERITS

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TABLE OF CONTENTS

	Page
STATEMENT OF CASE AND FACTS	
Introduction	1
Case and Facts	2
POINTS INVOLVED ON APPEAL	
Point I	7
ARGUMENT	
Point I	7
CONCLUSION	17
CERTIFICATE OF SERVICE	18

TABLE OF CITATIONS

	Page
Butchikas v. Travelers Indem. Co., 343 So.2d 816 (Fla. 1977)	11, 12, 17
Campbell v. Government Employees Ins. Co., 306 So.2d 525 (Fla. 1975)	10, 12, 17
Continental Cas. Co. v. Garrett, 161 So. 753 (Miss. 1935)	13
Dowling v. Blue Cross of Fla. Inc., 338 So.2d 88 (Fla. 1st DCA 1976)	16
Fletcher v. Western Nat. Life Ins. Co., 10 Cal.App.3d 376, 89 Cal. Rptr. 78 (1970)	12
Food Fair Inc. v. Anderson, 382 So.2d 150 (Fla. 5th DCA 1980)	16
Ford Motor Credit Co. v. Sheehan, 373 So.2d 956 (Fla. 1st DCA 1979) cert. dism., 379 So.2d 204 (Fla. 1979)	15
Gmuer v. Garner, 426 So.2d 972 (Fla. 2d DCA 1983)	16
Habelow v. Travelers Ins. Co., 389 So.2d 218 (Fla. 5th DCA 1980)	16
Interstate Life & Acc. Co. v. Brewer, 193 S.E. 458 (Ga. 1937)	12
Kirkpatrick v. Zitz, 401 So.2d 850 (Fla. 1st DCA 1981)	13
Lay v. Roux Labs. Inc., 379 So.2d 451 (Fla. 1st DCA 1980)	16
Metropolitan Life Ins. Co. v. McCarson, 429 So.2d 1287 (Fla. 4th DCA 1983)	15
Miller v. Mutual of Omaha Ins. Co., 235 So.2d 33 (Fla. 2d DCA 1970)	9
National Life & Acc. Ins. Co. v. Anderson, 102 P.2d 141 (Okla. 1940)	13

TABLE OF CITATIONS (continued)

	Page
Obad v. Allstate Ins. Co., 279 NY2d 128 (NY 1967)	13
Saltmarsh v. Detroit Auto. Int'l-Ins. Exchange, 344 So.2d 862 (Fla. 3d DCA 1977)	12
Stitz v. American Cas. Co., 368 So.2d 912 (Fla. 3d DCA 1979)	12
World Ins. Co. v. Wright, 308 So.2d 612 (Fla. 1st DCA 1975)	10, 11

Additional Authorities

Rules of Department of Ins., State of Florida	
Section IV-36.06	4
Section IV 36.07	4
Florida Statutes	
§ 626.941(9)(b)	4
§ 626.9541(9)(b)	13
§ 626.9631	14
Restatement Of The Law Torts Second	
Section 46	15

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BRIEF OF RESPONDENT, ANTONIO DOMINGUEZ, ON THE MERITS

STATEMENT OF CASE AND FACTS

Introduction

This case is before the court pursuant to discretionary certiorari review and involves consideration of a cause of action at the pleading stage based upon an insurance adjuster invading the privacy of a totally disabled insured's home and engaging in overt, deliberate, bad faith, and dishonest conduct which was in violation of the Florida Insurance Code and administrative regulations related thereto. The trial court dismissed the cause of action with prejudice and the dismissal was reversed by the District Court of Appeal of Florida, Third District.

The Petitioners, MILLIE DIRUBE and CRAWFORD AND COMPANY, were the insurance adjuster and adjusting company respectively, Defendants in the trial court, Appellees in the district court of appeal, and will be referred to herein as "DIRUBE" and "CRAWFORD". The Respondent, ANTONIO DOMINGUEZ, was the insured Plaintiff in the trial court, the Appellant in the district court of appeal, and will be referred to in this brief as

"DOMINGUEZ".

The following symbols will be used in this brief:

"R" -- Record-on-Appeal

"A" -- Appendix filed simultaneously herewith

All emphasis is supplied by counsel unless otherwise indicated.

Case and Facts

With the posture of the present case being a dismissal at the pleading stage of the litigation, the facts alleged by DOMINGUEZ in the trial court were accepted as true for appellate purposes and established and demonstrated that:

DOMINGUEZ initiated this litigation on May 22, 1980, against CRAWFORD and Equitable Life Assurance Society of the United States. (R. 1-15). Thereafter, amendments to the complaint were made which were in the nature of adding an additional party Defendant and amendment by interlineation. (R. 52-53, 59, 64-65). The matters pertinent to this proceeding flow from the Second Amended Complaint (R. 110-128)(A. 1-10), and specifically Count II of the Second Amended Complaint.

Equitable Life Assurance Society of the United States had issued a disability income insurance policy to DOMINGUEZ in 1973 which provided for a monthly income of $500 for the lifetime of DOMINGUEZ in the event of an accidental total disability. (A. 1-2)(R. 110-111). Several years prior to 1980, DOMINGUEZ was involved in a motor vehicle accident which resulted in severe injuries and included: (1) both eyes being knocked from their sockets; (2) brain damage; (3) multiple fractures; (4) rods in both legs; (5) right arm and shoulder

dislocation; (6) multiple large scarring; (7) psychiatric problems; (8) periodic incontinence; (9) paralysis of a nerve in his eye; (10) other physical and mental problems, including mental injuries, all of which resulted in the total disability of DOMINGUEZ from the date of the motor vehicle accident and continued through the time the lawsuit was filed. Equitable made payments to DOMINGUEZ under the insurance policy until August of 1979. (A. 2)(R. 111).

On or about April 21, 1980, the insurance adjuster, DIRUBE, was specifically sent to the home of DOMINGUEZ while she was working for and acting within the course and scope of her agency and employment with CRAWFORD and Equitable Life Assurance Society of the United States. At that time Equitable and CRAWFORD knew that DOMINGUEZ was permanently and totally disabled, based upon medical information and medical records in their possession and available to them. (A. 3)(R. 112). Notwithstanding such information, DIRUBE falsely represented to DOMINGUEZ that: (1) a letter had been received from an eye specialist 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 not covered under the insurance policy issued by

Equitable; (8) DOMINGUEZ was required to sign a document in which it 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. Finally, DIRUBE demanded that DOMINGUEZ surrender physical possession of the policy to her immediately.

DIRUBE and CRAWFORD violated the code of ethics for insurance adjusters as set forth in the Rules of the Department of Insurance of the State of Florida, Chapter IV-36 of the Florida Administrative Code, which specifically provided in Section IV-36.06 CONTACTING INCAPACITATED CLAIMANTS:

> Adjuster's shall not contact incapacitated claimants following the occurrence giving rise to the claim and conclude a settlement when such a settledment would be disadvantageous or to the detriment of the incapitated claimant.

Additionally, SectionIV-36.07 ADVISING CLAIMANT OF CLAIM RIGHTS, specifically provides:

> An adjuster shall not knowingly fail to advise claimant of his claim rights in accordance with the terms and conditions of the contract and of the applicable laws of this state.

Additionally, DIRUBE and CRAWFORD violated the provisions of the Florida Insurance Code--VII UNFAIR INSURANCE TRADE PRACTICES, specifically, Florida Statutes Section 626.941(9)(b), which provided:

> (9) UNFAIR CLAIM SETTLEMENT PRACTICES
>
> ***
>
> (b) a material misrepresentation made to an insured or any other person having an interest in the pro-

> ceeds payable under such contract or policy for the purpose or with the intent of effecting settlement of such claims, loss or damage under such contract or policy on less favorable terms than those provided in and contemplated by such contract or policy.

DIRUBE and CRAWFORD had engaged in acts of misrepresentations as to the rights of DOMINGUEZ under his policy and engaged in a continued course of bad faith and dishonest dealings toward DOMINGUEZ. DIRUBE and CRAWFORD acted in bad faith, and committed acts of omission and commission which established bad faith, deliberate, overt and dishonest dealings on the part of DIRUBE and CRAWFORD, including active concealment and active misrepresentation of material facts which included:

1. Intentionally and deliberately stopping payments on the disability insurance policy, knowing that DOMINGUEZ was entitled to the benefits.

2. Failing to provide a reasonable explanation of the basis upon which they relied in relationship to the applicable facts for stopping payment.

3. Appearing at the home of DOMINGUEZ and falsely representing that an eye specialist had submitted a letter stating that DOMINGUEZ' eyes were satisfactory, that DOMINGUEZ was no longer disabled, no longer covered under the policy, and that the insurance policy was no longer in force.

4. Attempting to coerce DOMINGUEZ into signing a document which agreed that no further payments were due, that the policy no longer provided coverage, that DOMINGUEZ was no longer entitled to benefits, and that DOMINGUEZ was voluntarily surrendering the policy.

5. Knowing that all of the statements and activities were false with the intention and expectation that DOMINGUEZ would act and rely thereon.

6. Contacting DOMINGUEZ while he was incapacitated, having knowledge that he was so incapacitated, and attempting to conclude a settlement with him that was disadvantageous and detrimental to him. Further, DIRUBE and CRAWFORD made material misrepresentation to DOMINGUEZ for the purpose of and with the intent of procuring a settlement of his claims on less favorable terms than those provided for in the insurance contract. They failed to advise DOMINGUEZ of his claim rights under the insurance policy and applicable law and all of such conduct was in direct violation of the rules and regulations of the Department of Insurance and the applicable Florida statutes.

The bad faith, overt, deliberate and dishonest actions of DIRUBE and DOMINGUEZ were performed with malice and indifference to the health and welfare of DOMINGUEZ and were directly calculated to cause DOMINGUEZ severe emotional distress. All of the conduct was committed by DIRUBE and CRAWFORD while having medical information and medical records in their possession or available to them at the time they engaged in such conduct. The conduct was committed intentionally in order to inflict emotional distress upon DOMINGUEZ and was performed in reckless disregard of DOMINGUEZ' medical condition and situation. The conduct did, in fact, cause extreme emotional distress to DOMINGUEZ and has had a profound effect upon his physical and mental condition, he suffered great emotional and mental pain,

loss of credit, suffered financial stress, personal and family dislocation and financial inability to meet and obtain the needed and necessary medical care.

DIRUBE and CRAWFORD filed a motion to dismiss the cause of action contained in Count II of the Second Amended Complaint predicated upon the foregoing facts and, notwithstanding the requirement that the allegations be accepted as true for the purposes of the motion to dismiss, the trial court entered an "order on pending motions" which dismissed Count II of the complaint with prejudice. (R. 195-196).

DOMINGUEZ sought review of the dismissal in the District Court of Appeal, Third District, and the District Court of Appeal, Third District, in its opinion, along with a specially concurring opinion, filed August 30, 1983, reversed the dismissal. Post decision pleadings filed by DIRUBE and CRAWFORD were denied and the matter has now proceeded to this court.

POINTS INVOLVED ON APPEAL

Point I

WHETHER AND INSURED STATES A CAUSE OF ACTION FOR THE RECOVERY OF DAMAGES BASED UPON AN INSURANCE ADJUSTER INTENTIONALLY INVADING THE PRIVACY OF A TOTALLY DISABLED INSURED'S HOME TO INTENTIONALLY ENGAGE IN CONDUCT PROHIBITED BY THE FLORIDA INSURANCE CODE AND ADMINISTRATIVE REGULATIONS, AND PERFORMING OVERT, BAD FAITH, DELIBERATE AND DISHONEST ACTIVITIES CALCULATED AND DESIGNED TO INFLICT SEVERE EMOTIONAL DISTRESS UPON AN INSURED KNOWN TO BE SUFFERING FROM PHYSICAL AND MENTAL INCAPACITIES?

ARGUMENT

Point I

AN INSURED STATES A CAUSE OF ACTION FOR THE RECOVERY OF DAMAGES BASED UPON AN INSURANCE ADJUSTER INTEN-

TIONALLY INVADING THE PRIVACY OF A TOTALLY DISABLED INSURED'S HOME TO INTENTIONALLY ENGAGE IN CONDUCT PROHIBITED BY THE FLORIDA INSURANCE CODE AND ADMINISTRATIVE REGULATIONS, AND PERFORMING OVERT, BAD FAITH, DELIBERATE AND DISHONEST ACTIVITIES CALCULATED AND DESIGNED TO INFLICT SEVERE EMOTIONAL DISTRESS UPON AN INSURED KNOWN TO BE SUFFERING FROM PHYSICAL AND MENTAL INCAPACITIES.

The substance or "bottom line" of the present case is whether Florida law provides a remedy to a totally disabled insured for the recovery of damages, including emotional and mental damages and torment intentionally inflicted and suffered from the powerful sword of an insurance adjuster when the events occur within the sanctity of an insured's home and the conduct is in direct violation of Florida law and administrative requirements. It is important to recognize at the inception that this case does not involve arms-length interaction between two healthy individuals, does not involve friction involving in an employment setting, does not involve mere "name calling", does not involve notorious "cat and mouse" sexual advances, nor does it involve an unavoidable or inevitable "clash" between strangers thrown together by fate. This case is in the very separate and distinct category of situations involving bad faith, overt, deliberate and dishonest conduct in the insurance arena, in violation of both statutes and administrative regulations, for which a cause of action for damages, both compensatory and punitive, has been recognized by not only this court but other district courts of appeal. The issue interwoven or superimposed upon the underlying cause of action presents the question as to the elements of damage recoverable and, specifically, whether mental and emotional damages are

compensable within the basic action.

Both the cause of action and recovery for the intentional infliction of mental distress was considered in Miller v. Mutual of Omaha Ins. Co., 235 So.2d 33 (Fla. 2d DCA 1970). In Miller the mental and emotional injury arose from circumstances and abuses involving an insurance company representative appearing at the home of an insured to obtain the underlying insurance contract from its insured. The facts in Miller reveal that in March of 1965, an insured purchased a medical benefits policy and shortly thereafter, in August of the same year, discovered that she had Addison's Disease. Shortly thereafter, a representative of the insurance company appeared at the home of the insured, advised that the insurance company would not pay benefits, inferred that the insured had prior knowledge of the adverse medical condition, suggested that the insured was trying to "pull something" and removed the insured's policy from her without permission.

In Miller the jury returned a verdict favorable to the insured, which was set aside by the trial court. The District Court of Appeal, Second District, in reversing the trial court held that there was a question of fact to be submitted to the jury as to whether there was liability for both the removal of the policy and the mistreatment of the insured when the insurance representative appeared at the insured's home. The court clearly recognized that a cause of action existed based upon such factual situation and that damages for the intentional infliction of mental distress were recoverable in the action.

Somewhat later the District Court of Appeal, First District, in World Ins. Co. v. Wright, 308 So.2d 612 (Fla. 1st DCA 1975), affirmed a substantial compensatory damage award for the intentional infliction of emotional distress with facts far less aggravating than those presented in the present case. In World Ins. an insurance company had threatened and engaged in bad faith, which included attempts to "buy up" a disability policy. In affirming the substantial award in favor of the insured, the court stated and held:

> It is well settled that damages for emotional or mental distress may be recovered from one whose conduct is tortious despite the fact that the conduct also involves a breach of contract. (citation omitted) Here, the appellant's threatened an actual bad faith (including attempts to 'buy up' the policy) justified an action for damages for the intentional infliction of mental distress, and we think the testimony concerning appellee's ordeal was sufficient to support the verdict of $40,000. Id. at 612.

It is important to note that this court has at least impliedly recognized that insurance companies and their active representatives have liability and responsibility to insureds when they engage in bad faith, deliberate, overt and dishonest dealings with an insured. Most assuredly, the factual situation occurs more frequently in first party benefit factual situations but this court has apparently extended such right of recovery even when first party benefits are not involved. In Campbell v. Government Employees Ins. Co., 306 So.2d 525 (Fla. 1975), an insurance company had failed to utilize good faith in protecting the rights of an insured under the liability coverage of an insurance policy. In holding that the issue of punitive damages should be determined by a jury, the court

stated:

> It appears that the trial judge was not in error in concluding the course of conduct of the insurer with the policyholder was such that the question of punitive damages should be decided by the jury. And the jury found from the recited facts that the policyholder was entitled to punitive damages. We cannot as a matter of law gainsay them. There was involved the elements of concealment and misrepresentation--a continued course of dishonest dealings on the part of the insurer toward insured. Id. at 532.

This court in Butchikas v. Travelers Ind. Co., 343 So.2d 816 (Fla. 1977), if not specifically, most certainly impliedly, recognized at least three very important aspects which are involved in the present case. First, this court specifically recognized a separate and distinct category of cases in the insurance context which involved deliberate, overt, and dishonest dealings. This category of cases would support both a cause of action and the imposition of punitive damages when insurance representatives act in bad faith, deliberately, overtly, and dishonestly with an insured. This applies directly and specifically in the present case.

Second, this court specifically recognized the World Ins. Co. v. Wright, 308 So.2d 612 (Fla. 1st DCA 1975), cert. denied, 322 So.2d 913 (Fla. 1975), decision and authority but merely made a factual and procedural distinction rather than rejecting the validity or importance of the decision itself. Third, in footnote 9, this court specifically addressed and, at least impliedly, recognized and ratified the validity of the recovery of punitive damages and damages for mental anguish available under a tort theory based upon wrongful conduct implying malice, want of care, or great indifference.

The dual punitive damage--emotional distress recovery concepts suggested in Butchikas were recognized as separate and distinct in both Saltmarsh v. Detroit Auto. Int'l-Ins. Exchange, 344 So.2d 862 (Fla. 3d DCA 1977), and Stetz v. American Cas. Co., 368 So.2d 912 (Fla. 3d DCA 1979). Even though the facts in Saltmarsh and Stetz did not justify application of either the separate punitive damage or emotional distress recovery doctrines, the court most certainly recognized the specific existence of the actions.

The courts of this state have consistently prohibited and imposed sanctions upon methods or business practices by which individuals or companies attempt to place themselves beyond the bounds of propriety and the law. Conduct which is unethical, at best, has never been condoned and sactions are available to discourage such activity. It is interesting to note that this court in Campbell v. Government Employees Ins. Co., 306 So.2d 525 (Fla. 1975), specifically recognized the California decision of Fletcher v. Western Nat. Life Ins. Co., 10 Cal.App.3d 376, 89 Cal. Rptr. 78 (1970), as authoritative in the area of unethical insurance practices. In Fletcher, an insurance adjuster engaged in conduct similar to that presented in the present case. The Fletcher court held, in affirming an award of substantial compensatory and punitive damages, that the conduct complained of was not privileged and did not constitute fair settlement negotiations. Public policy simply does not favor an attempt by an insurance representative to coerce the settlement of a non-existent dispute by outrageous means. See also, Interstate Life & Acc. Co. v. Brewer, 193 S.E. 458 (Ga.

1937); Continental Cas. Co. v. Garrett, 161 So. 753 (Miss. 1935); Obad v. Allstate Ins. Co., 279 NYS2d 128 (NY 1967); National Life & Acc. Ins. Co. v. Anderson, 102 P.2d 141 (Okla. 1940).

As to an action for the intentional infliction of emotional distress, one finds Kirkpatrick v. Zitz, 401 So.2d 850 (Fla. 1st DCA 1981), to be most interesting. Even though there was no direct contact between insurance representatives and the complaining party, the court held that a complaint stated a cause of action for intentional infliction of emotional distress where the insurance representatives merely directed an insured to withhold information from a claimant. It is submitted that the invasion of the home of DOMINGUEZ and the conduct which occurred therein was more outrageous than the mere failure to provide information.

An evaluation and analysis of the conduct perpetrated in the present case can be viewed in terms of Florida statutes and administrative regulations. It has apparently become so common in the insurance industry for this type of situation to occur that both the legislature and the department of insurance have attempted to correct the abuses. First, Florida Statutes Section 626.951 sets forth that unfair claims settlement practices are considered "unfair methods of competition and unfair or deceptive acts or practices". Specifically,

> Section 626.9541(9)(b) A material misrepresentation made to an insured or any person having an interest under such contract or policy, for the purpose or with the intent of effecting settlement of such

> claims, loss or damage under such contract or policy on less favorable terms as those provided in or contemplated by such contract or policy.

Additionally, Florida Statutes Section 626.9611 provided the Department of Insurance, State of Florida, the power and authority to establish rules and regulations to identify prohibited conduct. Pursuant to such power, the Department of Insurance, State of Florida, established:

> IV-36.06 Contacting Incapacitated Claimants: Adjusters shall not contact incapacitated claimants following the occurrence giving rise to the claim and conclude a settlement when such a settlement would be disadvantageous or to the detriment of the incapacitated claimant.
>
> IV-36.07 Advising Claimant of Claim Rights: Adjusters shall not knowingly fail to advise claimant of his claim rights in accordance with the terms and conditions of the contract and of the applicable laws of this state.

While DIRUBE and CRAWFORD suggest, with absolutely no authority in support thereof, that some type of administrative remedy is the exclusive remedy in connection with violations, it is respectfully submitted that based upon Florida Statutes Section 626.9631, there is no exclusive remedy type doctrine available. Florida Statutes Section 626.9631 specifically provides:

> 626.9631--Civil Liability The provisions of this part are cumulative to the rights under the general civil and common law and no action of the Department shall abrogate such rights to damages or other relief in any court.

Thus, the conduct in the present case, when evaluated not only in terms of decency and ethics but in terms of specific statutory requirements, it is submitted that the outrageousness of the conduct complained of becomes enhanced.

In addition to the existing case law with regard to both the concept of punitive damages and damages for the intentional infliction of mental distress and the statutory and administrative prohibitations, one may look to Restatement Of The Law Torts Second for guidance, if necessary. Restatement of The Law Torts Second §46 specifically provides:

> Section 46. Outrageous Conduct Causing Severe Emotional Distress
>
> (1) one who by extreme and by outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

It is important to specifically note coments e. and f. with regard to the position or relationship of the persons involved in the incident, as well as the actors' knowledge as to one's peculiar suscptibilities due to physical or mental conditions. It is submitted that the concept expressed in Section 46 and comments e. and f. are directly applicable in the present case, as was determined by the District Court of Appeal, Fourth District, in the factual situation presented in Metropolitan Life Ins. Co. v. McCarson, 429 So.2d 1287 (Fla. 4th DCA 1983).

It is respectfully submitted that the reasoning, thoughts and concepts expressed by numerous appellate courts of this state as to the existence and identity of an independent action for the deliberate infliction of severe emotional distress should be adopted and ratified by this court. See, e.g., Ford Motor Credit Co. v. Sheehan, 373 So.2d 956 (Fla. 1st DCA 1979), cert. dism., 379 So.2d 204 (Fla. 1979). Further, a majority of

the Florida decisions at least recognize the action as viable and independent even if the particular facts are insufficient to set forth the necessary level of outrageousness required. See, e.g., Lay v. Roux Labs. Inc., 379 So.2d 451 (Fla. 1st DCA 1980); Dowling v. Blue Cross of Fla. Inc., 338 So.2d 88 (Fla. 1st DCA 1976); Habelow v. Travelers Ins. Co., 389 So.2d 218 (Fla. 5th DCA 1980); Food Fair Inc. v. Anderson, 382 So.2d 150 (Fla. 5th DCA 1980).

Further, the present case is vastly different from the factual situation presented in Gmuer v. Garner, 426 So.2d 972 (Fla. 2d DCA 1983), and this case should not be painted with the same brush as Gmuer. In Gmuer the court was faced with allegations of sexually seductive invitations and an ultimate termination of employment because an employee would not "play ball" with the boss. The present case involves a totally disabled individual, oppressive tactics by an insurance adjuster having direct power over DOMINGUEZ, a reprehensible invasion of the privacy of one's home without justification, and conduct that is condemned not only by statute but should be condemned by any acceptable standard of decency. If an insured has no recourse under such circumstances a license to abuse incapacitated insureds will have been granted to all representatives in this state. The present case is not a minor "clash" which is inevitable as one conducts his daily activities, and DIRUBE and CRAWFORD paint the picture of the present factual situation being insufficient to reach the level of outrageousness. While DIRUBE and CRAWFORD subtly suggest that the type of conduct involved in this case falls short of

legal prohibition or sanctions, it is the position of DOMINGUEZ that this is precisely the type of conduct which must be both prohibited and sanctioned severely by our legal system.

Finally, the argument submitted by DIRUBE and CRAWFORD with regard to the availability of punitive damages fails to consider and overlooks the line of cases which impose punitive damages upon the insurance industry for bad faith, overt, deliberate, and dishonest dealings to the detriment of an insured. See, e.g., Campbell v. Government Employees Ins. Co., 306 So.2d 525 (Fla. 1975); Butchikas v. Travelers Indem. Co., 343 So.2d 816 (Fla. 1977).

CONCLUSION

The Respondent submits that Count II of the Second Amended Complaint which was dismissed by the trial court appropriately sets forth and states a cause of action for the recovery of both punitive damages and the recovery of damages for emotional distress. In the alternative, Count II most certainly states a cause of action amounting to a separate and independent tort for which punitive damages may be awarded based upon the bad faith, deliberate, overt, and dishonest dealings on the part of the insurance representative as he invaded the sanctity of a totally disabled insured's home and engaged in activities which are not only in violation of statutes and administrative regulations, but should be condemned by the courts as well.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 6th day of June, 1984, to: Amy Shield Levine, Esq., LEVINE & LEVINE, Attorneys for Petitioners, Suite 380, 900 North Federal Highway, Boca Raton, FL 33432; GEORGE, HARTZ, BURT & LUNDEEN, Attorneys for Petitioners, Suite 1111, Ingraham Building, 25 S.E. Second Avenue, Miami, FL 33131; Bernard P. Goldfarb, Esq., BERNARD P. GOLDFARB & ASSOCIATES, P.A., Attorneys for Plaintiff, 2748 S.W. 87th Avenue, Miami, FL 33165; and to Karen Curtis, Esq., SHUTTS & BOWEN, 1500 Edward Ball Building--Miami Center, 100 Chopin Plaza, Miami, FL 33131.

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