IN THE SUPREME COURT OF FLORIDA

CASE NO: 64,533

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

Petitioners,

vs.

ANTONIO DOMINGUEZ,

Respondent.

PETITIONERS' BRIEF ON JURISDICTION

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TABLE OF AUTHORITIES

TABLE OF CONTENTS

JURISDICTIONAL STATEMENT

This proceeding has been instituted pursuant to the authorities contained in Article V, Section 3 (b)(3) of the Florida Constitution and Rule 9.030(a)(2) (A)(iv) because the decision of the District Court of Appeal, Fourth District expressly and directly conflicts with a decision of another District Court of Appeal.

More specifically, the decision of the District Court of Appeal, Third District which is sought to be reviewed, has recognized a cause of action for severe emotional distress alleged to be caused by outrageous conduct unconnected to any other identifiable tort. In approving of the cause of action the District Court admitted conflict with the Second District Court of Appeal which "has concluded otherwise" in Gmuer v. Garner, 426 So. 2d 972 (Fla. 2d DCA 1982).

It is noteworthy that the Supreme Court of Florida has recently accepted certiorari jurisdiction of the case styled Metropolitan Life Insurance Company v. McCarson, Case No. 63,739 which is also concerned with the identical issue. In that case the District Court of Appeal, Fourth District also recognized the cause of action of intentional infliction of emotional distress as a separate tort. Oral argument is scheduled for that case on January 9, 1984.

STATEMENT OF THE CASE AND FACTS

Antonio Dominguez ("Dominguez"), the Plaintiff/Appellant below, appealed from an Order which dismissed with prejudice Count II of his Complaint seeking damages for severe emotional distress alleged to have been caused by outrageous conduct unconnected to any other identifiable tort. The Defendants/Appellees below were Equitable Life Assurance Society of the United States ("Equitable")[1], Crawford and Company ("Crawford") and Millie Dirube ("Dirube"). In its decision, the District Court of Appeal, Third District, succinctly stated the pertinent facts of the case as follows:

> The complaint alleges that in 1973, Equitable issued Dominguez a disability income policy of insurance which, in pertinent part, provided for $500 per month income for accidental total disability for the insured's lifetime. Shortly after the policy issued, Dominguez was involved in an automobile accident which "caused severe injuries to his body and extremities, including both eyes being knocked out of their sockets, brain damage, multiple large scars, psychiatric problems, periodic incontinence, paralysis of nerve in eye and other physical and mental problems, and mental injuries as well, which resulted in his total disability." Equitable paid Dominguez the disability income through August 1979 and then stopped making payments.
>
> The heart of the complaint comes next:
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> "16. On or about April 21, 1980, the Defendant, EQUITABLE, sent an agent to the home of the Plaintiff in Miami, Florida. Said Agent was working either directly for the Defendant, EQUITABLE, or indirectly for the Defendant by working for Defendant CRAWFORD & COMPANY, which was hired by the Defendant EQUITABLE to work on this case. Said agent was Millie Dirube, who at all times

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1 Because there was another count of the Complaint which the District Court of Appeal, Third District, determined was interdependent with the facts upon which Count II was based, Equitable was dismissed as a party to the Appeal.

relevant hereto was acting for either or both Defendants, in the course and scope of her agency and employment. Said Millie Dirube falsely represented to Plaintiff that she had received a letter from the eye doctor saying that his eye(s) were OK now and that Plaintiff was no longer disabled and falsely represented to Plaintiff that he was no longer totally disabled, that he was no longer covered under the policy, that the policy was no longer in force, that he had to sign a paper agreeing that no further payments were due under the policy, that it no longer covered him, that he was no longer entitled to receive benefits under the policy and that he was giving up the policy voluntarily. At the time said Millie Dirube made said misrepresentation she knew them to be false and they were in fact false and she made them with the intention and expectation and intention that Plaintiff be deceived and defrauded thereby and that the [sic] sign said paper and surrender the subject policy. Defendants well knew that Plaintiff was suffering both physical and mental total disability and was entitled to benefits under the policy and that the representations of Millie Dirube were false. The foregoing acts were all in violation of their fiduciary relationship and duty of good faith and in an effort to use their superior knowledge skill and position to take advantage of this debilitated Plaintiff. A relative of Plaintiff overheard and intervened at the last minute and prevented Plaintiff from signing the paper and surrendering the policy.

. . . .

"21. Defendant, EQUITABLE'S, acts and omissions set forth in this Complaint were done intentionally in order to inflict emotional distress upon the Plaintiff and/or were done in reckless disregard of the probability of causing emotional distress, and said acts and omissions did in fact cause severe and extreme emotional distress to the Plaintiff." (Appendix 5-6).

After permitting Dominquez to amend the Complaint five times, the trial court finally dismissed Count II with prejudice. On appeal, the District Court of Appeal, Third District determined that the allegations of Count II in the Complaint stated a cause of action for intentional infliction of emotional distress although the conduct of Crawford and Dirube were unconnected to any other identifiable tort. To that end,

the Appellate Court reversed the trial court's Order dismissing Count II of the Complaint and remanded the cause back for further proceedings.

POINT INVOLVED

WHETHER THE THIRD DISTRICT COURT OF APPEAL DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL WHICH EITHER DO NOT RECOGNIZE A CAUSE OF ACTION FOR THE INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AS AN INDEPENDENT TORT OR RECOGNIZE A CAUSE OF ACTION FOR THE INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AS AN INDEPENDENT TORT BUT APPLY IT UNDER FAR MORE LIMITED CIRCUMSTANCES THAN THE THIRD DISTRICT COURT OF APPEAL?

ARGUMENT

THE THIRD DISTRICT COURT OF APPEAL DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL WHICH EITHER DO NOT RECOGNIZE A CAUSE OF ACTION FOR THE INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AS AN INDEPENDENT TORT OR RECOGNIZE A CAUSE OF ACTION FOR THE INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AS A SEPARATE INDEPENDENT TORT BUT APPLY IT UNDER FAR MORE LIMITED CIRCUMSTANCES THAN THE THIRD DISTRICT COURT OF APPEAL.

Cases Declining to Recognize the Tort of Intentional Infliction of Emotional Distress.

In reviewing Florida law with regard to the existance of a cause of action for intentional infliction of emotional distress, the Third District Court of Appeal expressly acknowledged that its opinion conflicted with the decision of the Second District Court of Appeal in Gmuer v. Garner, 426 So. 2d 972 (Fla. 2d DCA 1982). Gmuer, supra, dealt with the dismissal of the Plaintiff's Complaint founded upon allegations of sexually suggestive invitations to the female Plaintiff by the President of a community college where she was employed. Plaintiff's declination of the propositions were alleged to have resulted in the loss of her job and she filed suit for intentional infliction of emotional distress. The Second

District Court of Appeal noted that there was a conflict between Districts but took the position that intentional infliction of emotional distress was not actionable when not incident to or connected with an independent tort. Clearly, the decision in Gmuer v. Garner is in direct conflict with the decision of the Third District Court of Appeal in the case at bar so that discretionary jurisdiction of the Supreme Court is vested to review the instant decision.

Cases Applying a Far More Limited Standard.

After determining that the Third District would now recognize a cause of action for the intentional infliction of emotional distress, the Court concluded that in the case at bar, the alleged conduct of Crawford and Dirube was sufficiently outrageous to support the independent tort. However, this determination conflicts with decisions from other District Courts of Appeal which although recognizing the tort, have applied it under far more limited circumstances.

In Food Fair, Inc. v. Anderson, 382 So. 2d 150 (Fla. 5th DCA 1980), the Plaintiff was allegedly forced to take a lie detector test, told that she must admit (wrongly) to prior thefts or be fired, did admit this (while crying) because she needed the job, was falsely told that she had failed the lie detector test, was told to again admit (wrongly) to other thefts, did so, and then was fired despite having promised that

she would not be fired if she admitted the thefts. The Fifth District held that these facts were not sufficiently outrageous as to constitute the tort of intential infliction of emotional distress. In quoting from comment d of Section 46 of the Restatement (Second) of Torts, the Court stated:

> "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 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 (Emphasis added by Court).

This clearly conflicts with the instant case where under far less egregious facts, the Plaintiff was exposed to a short visit by the Defendant Dirube, but did not sign a paper agreeing that no payments were due under the policy nor did he have his policy taken from him, as contrasted with the Plaintiff in Food Fair v. Anderson who was forced to lie on a polygraph test and then suffered the additional consequences of being fired as a result of her answers to the polygraph test.

In Dowling v. Blue Cross of Florida, Inc., 388 So. 2d 88 (Fla. 1st DCA 1976), the First District Court of Appeal, although recognizing the tort of intentional infliction of emotional distress, held that the Complaint failed to state a

cause of action as the acts alleged lacked the outrageous character upon which to predicate a suit for this tort. In Dowling, the gravamen of the Complaint was that the two female employees were fired on a false accusation that they had sexual relations with one another in the ladies' lounge of the Defendant employer's building, that the accusations were made without benefit of a reasonable investigation which would have revealed that no such act had taken place, and that as a result, the Plaintiff's were caused to suffer severe emotional distress.

Similarly, the First District in a later decision of Lay v. Roux Laboratories, Inc., 379 So. 2d 451 (Fla. 1st DCA 1980) held also as insufficient as a matter of law a count of the Plaintiff's Complaint which alleged that the Defendant threatened the Plaintiff with loss of her job, began using humiliating language, vicious verbal attacks, racial epithets, and called the Plaintiff a "nigger". Although the First District found the alleged conduct to be extremely reprehensible, it did not find the alleged conduct to reach the level of outrageousness and atrociousness needed to state a cause of action for intentional infliction of emotional distress.

CONCLUSION

Based upon the cases set forth in this Jurisdictional Brief, it is respectfully submitted that the Supreme Court of Florida exercise its discretionary jurisdiction in this case to resolve the conflicts between the Districts, which the opinion below itself expressly recognizes, and if possible, to permit this case to be considered as a companion case to Metropolitan Life Insurance Company v. McCarson, Case No. 63,739. In the alternative, it is respectfully requested that the Supreme Court of Florida stay determination of this case until after Metropolitan Life Insurance Company vs. McCarson is decided.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing brief was mailed this 23rd day of November, 1983 to R. FRED LEWIS, ESQUIRE, Magill, Reid, Kuvin & Lewis, 730 Ingraham Building, 25 SE Second Avenue, Miami, Florida 33131, BERNARD P. GOLDFARB, ESQUIRE, 2748 SW 87th Avenue, Miami, Florida 33165 and KAREN H. CURTIS, ESQUIRE, 10th Floor, Southeast First National Bank Building, Miami, Florida 33131.

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