w/o o/a.

IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,533

FILED
SID J. WHITE
MAY 21 1984
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

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

Petitioners,

vs.

ANTONIO DOMINGUEZ,

Respondent.
_____/

ON APPEAL FROM THE
DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

PETITIONERS' INITIAL BRIEF ON THE MERITS

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INTRODUCTION

This case comes to the Court by discretionary jurisdiction to resolve a conflict of decisional law involving one count of a Complaint which seeks damages for severe emotional distress alleged to have been caused by outrageous conduct unconnected to any other identifiable tort. The trial court had dismissed the count with prejudice but that order was reversed by the District Court of Appeal of Florida, Third District.

Antonio Dominguez, the Plaintiff in the trial court, the Appellant before the District Court, and the Respondent herein, will be referred to as "Dominguez" or "Insured". Crawford and Company, and Millie Dirube, the Defendants in the trial court, Appellees before the District Court, and Petitioners herein, will be referred to as "Crawford" and "Dirube", respectively. Equitable Life Assurance Society, the third Defendant in the trial court, and nominal Appellee before the District Court, will be referred to as "Equitable" or "Insurer".

The symbol "A" will designate the Appendix being filed simultaneously herewith. The pages of the record on Appeal will be referred to by the symbol "R". All emphasis is supplied by counsel for the Petitioners unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Dominguez initially filed a four count Complaint against Crawford and Equitable. Count I alleged a breach of contract for stopping disability payments pursuant to an insurance contract that Dominguez had with Equitable; Count II concerned an action against Equitable for negligently handling the Insured's claim; Count III was for declaratory relief against Equitable; and Count IV was against Equitable and Crawford for allegedly acting in bad faith and violating a section of the Code of Ethics for Insurance Adjusters as set forth in the Florida Administrative Code. Crawford filed a Motion to Dismiss the Complaint and an Amended Complaint was filed by Dominguez (R:26-41). Ultimately, the trial court permitted Dominguez to amend the Complaint five times. A synopsis of the trial proceedings are indicated below:

1.	May 22, 1980	Complaint filed (R:1-5).
	June 19, 1980	Motion by Equitable and Crawford to dismiss the entire Complaint (R:19-20).
2.	July 21, 1980	Amended Complaint filed adding allegations of emotional distress in Count II (R:26-41).
	August 11, 1980	Motion to Dismiss/Strike Amended Complaint filed by Equitable (R:45-47).
	August 13, 1980	Motion to Dismiss filed by Crawford (R:48).

3.	August 25, 1980	Motion for Leave to Add Additional Party Defendant and Amend Amended Complaint by Interlineation. Dominguez sought to add Dirube as a party Defendant (R:52-53).
	September 2, 1980	Order Granting Plaintiff's Motion (R:59).
4.	September 22, 1980	Second Motion to Amend Amended Complaint by Interlineation (R:64-65). Dominguez sought to add new paragraph in Counts II and IV alleging Equitable, through its agent or employee, violated a Florida Statute concerning unfair claim settlement practices.
	October 30, 1980	Motion to Dismiss Amended Complaint. Essentially a reiteration of the earlier Motion to Dismiss filed by Crawford (R:70-71).
	November 19, 1980	Order of trial court denied Motion to Dismiss Count I of Dominguez' Amended Complaint; dismissed Counts II and III, but provided fifteen (15) days from date of Order within which to file a Second Amended Complaint (R:93).
5.	December 2, 1980	A Second Amended Complaint filed containing three Counts, with Count I against Equitable for breach of contract; Count II against Crawford, Dirube and Equitable seeking compensatory and punitive damages, attorney's fees and costs based upon a plethora of allegations concerning violations of administrative regulations and law, and misrepresentations which Dominguez claimed had caused him to suffer great emotional and mental pain and anguish. Count III against Equitable was for a declaratory action (R:110-128).

	December 23, 1980	Motion to Dismiss/Strike Second Amended Complaint filed by Equitable and incorporated by Crawford and Dirube (R:129-132).
	January 9, 1981	Joinder in Motion to Dismiss and Motion to Strike Second Amended Complaint filed by Crawford and Dirube (R:134).
6.	March 26, 1981	Motion to Amend Second Amended Complaint by Interlineation (R:168-169), adding additional paragraphs to Count I to further delineate Dominguez' claim for tortious breach of contract (R:168-169).
	April 23, 1981	Order entered granting Plaintiff's Motion to Amend (R:183).

The sixth and final version of the Complaint alleged that in June, 1973, Equitable issued disablity income insurance to Dominguez which provided for a monthly income in the amount of Five Hundred ($500.00) Dollars for the lifetime of the insured in the event of an accidental total disability (A:12-13; R:110-111). Subsequently, 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 fractures, rods in both legs, right arm and shoulder dislocated, 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 from the date of the accident (A:13; R:111).

Equitable paid the disability benefits of Five Hundred ($500.00) Dollars per month for about six or seven years but

stopped making the payments in September, 1979 (A:13; R:111).

Count II of the Complaint alleged that on April 21, 1980, Equitable sent Dirube, who was acting in the course and scope of her agency and/or employment for either Equitable or Crawford or both, to the home of Dominguez (A:14; R:112). Dirube falsely represented to Dominguez that (1) she had received a letter from the eye doctor saying that Dominguez' "eye(s) were okay now and that Plaintiff was no longer disabled"; (2) Dominguez "was no longer totally disabled"; (3) Dominguez "was no longer covered under the policy" issued by Equitable and it "was no longer in force"; (4) Dominguez "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" (A:14-15; R:112-113).

Dominguez alleged that Dirube demanded physical possession of the original policy from him (A:15; R:115). Dominguez further alleged that "he would have signed the paper and surrendered the original policy but at the last minute a relative of his overheard and interceded and prevented Plaintiff from doing so" (A:15; R:113).

Domniguez claimed that Dirube and Crawford violated the Code of Ethics for Insurance adjusters set forth in the rules of the Department of Insurance of the State of Florida, Chapter IV-36 of the Florida Administrative Code, specifically 4-36.06 concerning contacting incapacitated claimants:

> Adjusters shall not contact incapacited claimants following the occurence giving rise to the claim and conclude a settlement when such a settlement would be disadvantageous or to the detriment of the incapacitated claimant (A:15; R:113).

The other section of the Florida Administrative Code alleged to be violated by Dominguez in Count II concerned Section 4-36.07 advising claimant of claim rights:

> An adjuster shall not knowingly fail to advise the claimant of his claim right in accordance with the terms and conditions of the contract and of the applicable laws of this State (A:15; R:113).

Dominguez alleged that Equitable and Crawford through Dirube violated Florida Statute Section 626.9541(9)(b) which states that it is an unfair claim settlement practice when:

> A material misrepresentation is made to an insured or any other person having an interest in the proceeds payable under such contract or policy, for the purpose and with the intent of effecting settlement of such claims, loss or damage under said contract or policy on less favorable terms than those provided in, and contemplated by, such contract or policy (A:15; R:113)."

Finally, Dominguez alleged that the Defendants acted in bad faith in the handling of the claim and committed certain acts of omission and comission reflecting deliberate, overt and dishonest dealings on their part including active concealment and active misrepresentation of material facts to the insured:

> A. By deliberately and intentionally stopping payments on the disability insurance claim when due and payable and when Equitable knew Dominguez was entitled to the benefits under the terms of his insurance policy.

B. By failing to provide a reasonable explanation of the basis relied upon in relation to the applicable facts for the stoppage of Dominguez' disability insurance benefits.

C. By going to the Dominguez home and falsely representing that a letter was received from the eye doctor saying that the "Plaintiff's eye(s) were okay now and that the Plaintiff was no longer disabled", falsely representing to Dominguez that he was no longer totally disabled nor covered under the policy, and that the policy was no longer in force.

D. By Dirube going to Dominguez' home and "attempting to have the Plaintiff sign a paper agreeing that no further payments were due under the policy", that the policy no longer provided coverage, that he was no longer entitled to receive benefits under it, that he was surrendering the policy voluntarily, and in attempting to obtain the policy from Dominguez.

E. By making these statements and taking the action outlined above at a time when the Defendants knew such statements to be false and with the intention and expectation that the Plaintiff would act and rely thereon.

F. By contacting Dominguez while he was incapacitated when the Defendants knew, or should have known, of his condition and attempting to conclude a settlement with Dominguez which would be disadvantageous to him. Additionally by making a material misrepresentation to Dominguez for the purpose and with the intent of effecting settlement of Plaintiff's claim under his contract on less favorable terms than those provided in the insurance contract, and by knowingly failing to advise Dominguez of his claim rights in accordance with the terms and conditions of his contract and applicable law, all in violation of the Code of Ethics for Insurance Adjusters set forth in the Rules of the Department of of Insurance and Section 626.9541(9)(b) Florida Statutes (A:16-17; R:114-115).

Dominguez alleged that as a result of the foregoing wrongful acts of Defendants, he suffered great emotional pain and anguish, loss of credit and financial stress, personal and family disloca-

tion, and financial inability to obtain needed and necessary medical care as well as suffering physical and mental harm and pain (A:18; R:116). Consequently, Dominguez sought compensatory damages, punitive damages, attorney's fees and costs against Equitable, Crawford and Dirube (A:18; R:116).

Equitable, Crawford and Dirube moved to dismiss on many grounds, including the following:

1. The Plaintiff lacks capacity to maintain this suit if the allegations contained therein are rendered true and correct inasmuch as it is contended that he is totally and permanently disabled, and therefore, this suit should be brought by his Estate or through a Guardian Ad Litem (R:19-20, 48, 70-71).

2. Count II fails to state a cause of action for fraud in that while alleging Dirube made certain misrepresentations with the intention to defraud the Plaintiff-Insured, it fails to allege that the Plaintiff suffered any damages as a result of the alleged representations (R:45, 129).

3. Count II fails to state a cause of action for Defendants' alleged violation of the Code of Ethics for Insurance Adjusters which was promulgated for the stated purpose of "educate[ing] adjusters concerning the ethical, legal and business principles which should govern their conduct". F.S. Section 626.878. The legislature has specifically provided for enforcement of the Code of Ethics in F.S. 626.611 by making willful failure to comply with the Code ground for compulsory refusal, suspension or revocation of an insurance license or permit [Section 626.611 (13)]. This is the sole manner of enforcement provided by the Legislature and there is absolutley no authority for the creation of a private right of action (R:46, 130).

4. Count II fails to state forth a cause of action for damages stemming from alleged "bad faith" and/or the intentional infliction of emotional distress. The Amended Complaint alleges a

breach of an insurance contract and nothing more (R:46, 130).

5. Count II fails to state the cause of action for punitive damages and none is cognizable under Florida law in the circumstances at bar (R:46, 130).

6. Count II fails to set forth a cause of action for recovery of attorney's fees in that the Complaint, on its face, alleges that the disability income policy upon which this action is brought, was issued in Puerto Rico, where the Plaintiff then resided. Under F.S. Section 627.401, the pertinent Section [627.428], which entitles an insured to recover his reasonable attorney's fees in an action upon a policy of insurance, is expressly inapplicable to policies or contracts issued for delivery in states other than Florida (R:45, 129).

After considering the allegations of the Complaint, the trial court dismissed Counts II and III with prejudice (R:195-196). Dominguez timely filed a Notice of Appeal but limited the scope of the appeal to the dismissal of Count II. No appeal was taken from the dismissal of Count III. Count I of the Second Amended Complaint remained pending against Equitable.

Equitable moved to dismiss itself as a party to the appeal on the basis that the pending Count I of the Complaint was interdependent with the facts upon which Count II was based. The District Court agreed and ultimately dismissed the appeal of Dominguez against Equitable. Consequently, the appeal remained pending solely against Crawford and Dirube.

The District Court considered the sole count on appeal to be for damages for severe emotional distress alleged to have been caused by outrageous conduct unconnected with any other identifiable tort. In reversing the dismissal of that count and remand-

ing it back to the trial court, the district court recognized that the opinion in the case at bar was in direct conflict with the Second District Court of Appeal's decision in Gmuer v. Garner, 426 So.2d 972 (Fla. 2d DCA 1982). The panel deciding this case also receded from the Third District Court's earlier decisions in Gellert v. Eastern Airlines, Inc., 370 So.2d 802 (Fla.3d DCA 1979), cert. denied, 381 So.2d 766 (Fla. 1980) and Sacco v. Eagle Finance Corp. of North Miami Beach, 234 So.2d 406 (Fla.3d DCA 1970). In those cases the District Court had held that a cause of action for emotional distress based on outrageous conduct would only lie where it was coupled with other recognizable tortious conduct.

Subsequent to the Appellate Court decision, Crawford and Dirube filed a timely Motion for Rehearing and Suggestion of Certification in which they first attempted to correct a factual error by the Court in footnote 6 of its opinion. This concerned the District Court's statement regarding the Defendant's failure to preserve before the trial court, their argument that the allegations of severe emotional distress were not sufficiently detailed in the Complaint so as to state a cause of action. Crawford and Dirube pointed to those sections of the record which revealed that Crawford and Dirube did raise that issue in their Motion to Dismiss (See R:20, 48, 71, 130 and 134).

In addition, Crawford and Dirube requested the Court to certify to the Supreme Court of Florida the following questions as being of great public importance within the meeting of Article V, Section 4(2) of the Florida Constitution:

1. May one recover damages for intentional infliction of severe mental distress which is not incidental to or consequent upon any separate tort or other actionable wrong?

2. If such damages are recoverable, is it appropriate for a trial judge to determine on the pleadings whether the conduct alleged is outrageous and thus actionable, or is it a question which must be determined by the factfinder?

On October 19, 1983, the District Court denied Crawford and Dirube's Motion for Rehearing and Suggestion of Certification. Thereafter, Crawford and Dirube timely petitioned this Court to exercise its discretionary jurisdiction on the basis that the Third District's opinion acknowledged conflict with a decision of another District Court of Appeal. This petition was granted when the Supreme Court entered its order accepting jurisdiction and dispensing with oral argument.

ISSUE

DOES A COUNT OF A COMPLAINT WHICH SEEKS RECOVERY FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS BASED UPON VIOLATIONS OF LAW, VIOLATIONS OF ADMINISTRATIVE REGULATIONS AND DELIBERATE, OVERT AND DISHONEST DEALINGS ON THE PART OF AN INSURANCE ADJUSTER AND AN INSURANCE ADJUSTING COMPANY STATE A CAUSE OF ACTION?

ARGUMENT

Count II of the final version of Dominguez' Amended Complaint set forth a plethora of theories for recovery including misrepresentation and fraud, intentional infliction of emotional distress and violation of the Code of Ethics for Insurance Adjusters. Dominguez sought not only compensatory damages but punitive damages and attorney's fees as well. However, after liberally allowing five amendments to the original Complaint, the trial court dismissed Count II on the basis that Dominguex failed to plead a good and sufficient cause of action.

On appeal, the Third District focused on the allegations of Dominguez' Complaint which sought damages for severe emotional distress alleged to have been caused by outrageous conduct unconnected with any other identifiable tort as being sufficient to state a cause of action. In reaching its decision that the Count did state a cause of action for the independent tort of intentional infliction of emotional distress, the Court receded from its earlier decisions in Sacco v. Eagle Finance Corp. of North Miami Beach, 234 So.2d 406 (Fla. 3d DCA 1970) and Gellert v. Eastern Airlines, Inc., 370 So.2d 802 (Fla. 3d. DCA 1979), cert. denied, 381 So.2d 766 (Fla. 1980) and expressly acknowledged conflict with

the Second District Court of Appeal in Gmuer v. Garner, 426 So.2d 972 (Fla. 2d DCA 1982).

The procedural posture of this case is important. It should be noted that this case has come to the Court on the basis of a conflict of decisions. This case was not brought here as a certified question from the District Court asking whether Florida should adopt the tort of "intentional infliction of emotional distress" as set forth in Section 46 of the Restatement (Second) of Torts. The Court may very well decide to answer the question of whether a new independent tort should be adopted, but most importantly, the Court is being asked to resolve the contradictory precedents in this state with regard to the emotional distress issue.

In The Right to Minimim Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct, 82 Columbia L. Rev. 42 (1982), Professor Daniel Givelber points out the pitfalls determining the specific forms of behavior needed to characterize the outrageous conduct giving rise to the tort of intentional infliction of emotional distress:

> The tort of intentional infliction of emotional distress by outrageous conduct differs from traditional intentional torts in an important respect: it provides no definition of the prohibited conduct.... The term "outrageous" is neither value-free nor exacting. It does not objectively describe an act or series of acts; rather, it represents an evaluation of behavior. The concept thus fails to provide clear guidance either to those whose conduct it proports to regulate, or to those who must evaluate that conduct.
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> * * *

> In sum, we have a doctrine that defies consistent definition, and presents all the problems inherent in that lack of definition compounded by a prominent punitive proponent. Id at .51, 75.

Section 46 of the Restatement (Second) of Torts (1965), comment d, has attempted to provide some guidelines in determining the extreme degree that a defendant's conduct must reach in order to be considered severe enough to state a cause of action for intentional infliction of emotional distress:

> 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. 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 be regarded as atrocious, and utterly intolerable in a civilized community.

In light of the foregoing, a critical element of determining whether the tort has arisen is consideration of the facts of the case. Secondly, it is noteworthy that in many situations involving the claim of intentional infliction of emotional distress, the Plaintiff would be emotionally distressed even if the Defendent did not behave outrageously (i.e., the Plaintiff being physically disabled, financially ruined or struggling to get the proceeds of an insurance policy). In addition, the Defendant enjoys quite a bit of latitude in his or her dealings with the Plaintiff. Thus, once the suffering caused by the Defendants non-outrageous behavior and the Plaintiff's underlying situation is excluded, it may be that the suffering solely attributed to the outrageous behavior

can no longer be considered severe, leaving the Plaintiff without a cause of action. See Givelber, 82 Columbia L. Rev. 42(1982) at 49.

It is Petitioners' position that although the decisional law in Florida is divergent with regard to the establishment of intentional infliction of emotional distress (i.e., some courts permit recovery only if some separate tort is committed while others are recognizing recovery as an independent tort), the consideration of the facts as set forth by the allegations in Count II of the Complaint will indicate a failure to state a cause of action under either line of reasoning. An examination of the decisional law with particular regard to the facts of this case, supports Petitioner's contention.

A. Recovery for intentional infliction of emotional distress is permitted only if incident to or connected with an independent tort.

Numerous Florida decisions have determined that intentional infliction of mental distress is not actionable when not incident to or connected with an independent tort. Gilliam v. Stewart, 291 So.2d 593 (Fla. 1974); Slocum v. Food Fair Stores of Florida, Inc., 100 So.2d 396 (Fla. 1958); Kirksey v. Jernigan, 45 So.2d 188 (Fla. 1950); Gmuer v. Garner, 426 So.2d 972 (Fla. 2d DCA 1982); Knowles Animal Hospital, Inc. v. Wills, 360 So.2d 37 (Fla. 3d DCA 1978); Henry Morrison Flagler Museum v. Lee, 268 So.2d 434 (Fla. 4th DCA 1972); Sacco v. Eagle Finance Corporation of North

Miami Beach, 234 So.2d 406 (Fla. 3d DCA 1970); Korbin v. Berlin, 177 So.2d 551 (Fla. 3d DCA 1965); and LaPorte v. Associated Independents, Inc., 163 So.2d 267 (Fla. 1964).

Applying this line of reasoning to the case at bar requires that Dominguez plead the elements of another tort from which the damages of intentional infliction of emotional distress can flow. The allegations in Count II of the Complaint which set forth misrepresentations and fraudulent conduct by Dirube as agent or in the employ of Crawford are insufficient to sustain an action for fraud and deceit. To sustain such an action, relief may be granted only where the following elements are present:

1. A false statement concerning immaterial facts;
2. The representor's knowledge that the representation is false;
3. An intention that the representation induced another to act on it; and
4. Consequent injury by the party acting in reliance on the representation.

Kutner v. Kalish, 173 So.2d 763 (Fla. 3d DCA 1965); 27 Fla. Jur. 2d Fraud and Deceit, Section 7.

Actual damage for injury is an essential element of the claim for fraud without which there is no legal wrong. National Equipment Rental, Ltd. v. Little Italy Restaurant and Delicatessan, 362 So.2d 338 (Fla. 4th DCA 1978). It is the very essence of an action of fraud that it must be accompanied by damage. Damnum absque injuria nor injuria absque damnum by itself constitutes a good cause of action. Stokes v. Victory Land Co., 99 Fla. 795, 128 So.408 (Fla. 1930).

In a written memorandum of law to the trial court, Dominguez explicitly conceded that Count II of his Complaint failed to state a cause of action for fraud and deceit (R:175). Dominguez candidly admitted that "the only reason that these fraudulent actions do not constitute a valid cause of action for fraud is because the claimant did not rely thereon to his detriment and in fact did not sign the paper saying he was entitled to no further benefits and did not surrender the insurance policy itself to the insurance company" (R:175).

Consequently, Count II wholly fails to allege any damage or injury to Dominguez caused by the alleged false representations of Dirube in an attempt to have Dominguez sign a paper agreeing that no further payments were due under the insurance policy, that he was no longer being provided with coverage, and that he was no longer entitled to receive benefits under the policy. Dominguez, therefore, has "incurred no significant change in position sufficient to find injury which would make [his claim] of fraud operative". George Hunt, Inc. v. Wash-Bowl, Inc., 348 So.2d 910, 913 (Fla. 2d DCA 1977). Since the essential element of damage was wanting, Count II failed to state a cause of action for fraud and deceit as a result of the alleged misrepresentations by Dirube.

No independent tort was stated by Dominguez for any alleged violation of administrative regulations or law. More specifically, Count II alleged violations of the Code of Ethics for Insurance Adjusters. This is purely regulatory in nature and has never been construed to give rise to a private right of action for its

alleged violation. The Code of Ethics was promulgated by the Florida Department of Insurance pursuant to the specific authority granted in Section 624.308 and 627.878 Fla. Stat. (1983).

Section 624.308 authorizes the Department to adopt "reasonable rules to effect any of the statutory duties of the department". Additionally, it provides that "willful violation of any such rule shall subject the violator to such suspension or revocation of certificate of authority or license as may be applicable under this code".

Section 626.878 empowers the Department to adopt "such reasonable rules as may be necessary for the proper administration of [Part V of this Chapter]" which concerns insurance adjusters. See Section 626.851 Fla. Stat. (1983). The rules and regulations authorized by Section 626.878 specifically include the ability to adopt "a code of ethics to foster the education of adjusters concerning the ethical, legal and business principles which should govern their conduct".

Enforcement of these regulations is entrusted solely to the Department of Insurance by means of its regulatory authority to suspend or revoke the license of those who violate the law. Suspension or revocation is compulsory under Section 626.611(13) Fla. Stat. (1983) for a "(w)illful failure to comply with, or willful violation of, any proper order or rule of the department or willful violation of any provision of this code". In addition, the Department may, in its discretion, suspend or revoke the license of any nonwillful violator of its rules and regulations, pursuant

to Section 626.621(3) Fla. Stat. (1983). If Dirube and Crawford have violated any provision of the Code of Ethics, as alleged in Count II, the Department of Insurance has the power and the duty to take appropriate action.

This administrative enforcement is the exclusive remedy provided for violation of the regulations. Neither the enabling statutes nor the Code of Ethics itself expressly creates the private right of action in an insured or in any other private party for the alleged violations thereof. There exists no authority whatever for the implication of the private right of action for violation of the code. This point was conceded by Dominguez in a written memorandum before the trial court where he stated that "the manner for enforcement of the Code of Ethics provided by the legislature does not provide for a civil remedy on behalf of the insureds harmed by said violations..." (R:176). Consequently, no cause of action was stated for violation of administrative regulations and law from which could result damages for intentional infliction of emotional distress.

The various independent torts discussed above, necessary to a revovery for emotional distress, were all insufficient to state causes of action. This may very well have been the reason that the District Court categorized Count II of Dominguez' Complaint as seeking damages for severe emotional distress alleged to have been caused by outrageous conduct unconnected with any other identifiable tort. Thus, an examination of the line of cases permitting recovery for intentional infliction of emotional distress standing

alone is necessary in order to determine whether the facts of this case fall within those decisional parameters.

B. Recovery for intentional infliction of emotional distress permitted as an independent tort.

The District Court in the case at bar, after receding from previous decisions requiring a connection to another actionable wrong in order to sustain damages for an intentional infliction of emotional distress, has now aligned itself with the First, Fourth and Fifth Districts which have, in some of their decisions, recognized the independent tort of intentional infliction of emotional distress. See Lay v. Roux Laboratories, Inc., 379 So.2d 451 (Fla. 1st DCA 1980) - (Where verbal abuse, racial slurs and a job termination threat were directed at the Plaintiff by her employer, found insufficient to state cause of action.); Ford Motor Credit Co. v. Sheehan, 373 So.2d 956 (Fla. 1st DCA 1979) - (Cause of action stated against creditor where Plaintiff's address was obtained by creditor so that his car could be reposessed, by method of a telephone call which falsely represented that the caller wanted to reach Plaintiff because his children had been in a serious auto accident.); Dowling v. Blue Cross of Florida, Inc., 338 So.2d 88 (Fla. 1st DCA 1976); Fletcher v. Florida Publishing Company, 319 So.2d 100 (Fla. 1st DCA 1975) quashed on other grounds 340 So.2d 914 (Fla. 1976) - (Where plaintiff first learned of a family tragedy when she saw a picture in defendant's newspaper showing a silhouette of her daughter's body after a fire; found

insufficient to state cause of action); Anderson v. Rossman & Baumberger, P.A., 440 So.2d 591 (Fla. 4th DCA 1983) - (No cause of action stated where one lawyer sought damages against other lawyers for the distress caused by defamatory statements made in lawsuit pleadings); (Fla. 4th DCA 1983); Harrington v. Pages, 440 So.2d 521 (Fla. 4th DCA 1983) - (Where a former spouse unsuccessfully sought derivative Section 46 damages for conduct against his former spouse); Metropolitan Life Insurance Co. v. McCarson, 429 So.2d 1287 (Fla. 4th DCA 1983) - (Verdict permitting recovery for wrongful death predicated on the finding of intentional infliction of emotional distress affirmed); Boyles v. Mid-Florida Television Corp., 431 So.2d 627 (Fla. 5th DCA 1983) - (Alleged outrageous conduct on the part of the television station and its reporter in falsely broadcasting a news report about plaintiff was considered part of defamation claim and did not give rise to an independent action for intentional infliction of emotional distress); and Food Fair, Inc. v. Anderson, 382 So.2d 150 (Fla. 5th DCA 1980).

The elements of this cause of action are: (1) the wrongdoers conduct was intentional and reckless, that is he intended his behavior when he knew or should have known that emotional distress would likely result; (2) the conduct was outrageous, that is to go beyond all bounds of decency, and to be regarded as odious and utterly intolerable in a civilized community; (3) the conduct caused the emotional distress; and (4) the emotional distress was severe. See Dominguez v. Equitable Life Assurance Society, 438 So.2d 58 (Fla. 3d DCA 1983) (A:2).

As previously pointed out, the conduct to be considered so outrageous as to come within the confines of the tort of intentional infliction of emotional distress, must be more aggravated than a defendant acting with intent which is tortious or even criminal, malicious, and past that degree of aggravation which would entitle the Plaintiff to punitive damages for another tort. See Comment d of the Restatement (Second) of Torts, Section 46 (1965). Thus, the facts of the case are of critical importance.

In Food Fair, Inc. v. Anderson, 382 So.2d 150 (Fla. 5th DCA 1980), a security officer who was investigating a suspected theft by employees told the employee/Plaintiff who reported to submit to a polygraph test, that it was company policy to have the employees admit to prior thefts and that she would be terminated as untrustworthy if she denied past thefts. The employee was thereafter coerced into signing a statement admitting to the theft of One Hundred Fifty ($150.00) Dollars and later a theft of Five Hundred ($500.00) Dollars of which she had never taken part. The employee was then terminated because of her admission of misappropriating company cash. Yet the District Court determined that this did not establish a course of conduct on the part of the security supervisor and employer that was so outrageous as to constitute a prima facia case of intentional infliction of mental distress.

In Dowling v. Blue Cross of Florida, Inc., 338 So.2d 88 (Fla. 1st DCA 1976), the District Court held that allegations that two women were discharged from their employment on the basis of false accusations that they had sexual relations with one another in a

ladies lounge, that the accusations were made without benefit of reasonable investigation which would have revealed that no such act had taken place, and that as a result the women were caused to suffer severe emotional distress, lacked the outrageous character of the employer's acts upon which to form a predicate for a suit for intentional infliction of emotional distress.

In his concurring opinion in the instant case, Judge Schwartz discussed Miller v. Mutual of Omaha Insurance Company, 235 So.2d 33 (Fla. 1st DCA 1970) as an example of conduct that was sufficiently outrageous to warrant recovery for infliction of emotional distress. However, the fact pattern in Miller, supra., is far more outrageous than in the case at bar. In that case the company had refused to pay any of the plaintiff/insured's medical bills after she had been hospitalized with Addison's Disease. The agent visited the home of the insured and verbally berated and abused her. Additionally, the agent, under false pretenses, obtained the insured's original policy of insurance and wrongfully took it without her permission and at the time of suit had still refused to tender or furnish the insured with her original policy. Upon taking the insured's policy, the agent also threw a check representing a refund of premium on the insured's table before leaving her home. Thus, the insured was left without her original policy and in its place a refund of premium. The result of the agent's conduct would, of course, greatly add to the severity of the emotional distress suffered by an insured.

Numerous courts from other jurisdictions have considered the

issue of whether a cause of action for intentional infliction of emotional distress has been stated in the Complaint and have not hesitated to dismiss the cases against the Plaintiff on the pleadings. See e.g., Cluff v. Farmer's Insurance Exchange, 10 Ariz. App. 560, 460 P.2d 666 (1969) - (Complaint alleging overreaching by insurance adjuster in attempting settlement of claim for wrongful death of plaintiff's son); Lester v. Columbia Mutual Ins. Co., 624 S.W.2d 890 (Mo.App. 1981) - (Although subject to criticism from an ethical standpoint, the actions of liability insurance adjuster's unsuccessful efforts which included threatening and cajoling plaintiff to accept a certain settlement of plaintiffs' claim for death of their daughter during the plaintiffs' period of mourning did not constitute extreme and outrageous conduct); Steadman v. South Central Bell Telephone Company, 362 So.2d 1144 (La. 1978) - (Where plaintiff became disabled after working for defendant for nineteen years and was unable to continue her job, defendant arbitrarily ceased paying disability benefits to her approximately two and a half months thereafter; and upon being repeatedly warned by her doctors and attorney not to contact the plaintiff under any circumstances, defendants visited her home to acquire a key card and identification card belonging to the employer, the result of which caused the plaintiff to be hospitalized for intensive treatment for approximately two weeks); Public Finance Corporation v. Davis, 66 Ill. 2d 85, 360 N.E. 2d 765 (1976) - (Complaint alleged overreaching in effort to collect debt); Jones v. Nissenbaum, Rudolph and Seidner, 244 Pa. Super.

377, 368 A.2d 770 (1976) - (Complaint alleged that attorneys for creditors threatened that debtors house would be sold when attorneys knew this could not be done); Swallows v. Western Electric Co., 543 S.W.2d 581 (Tenn. 1976) - (Complaint alleged that defendants, plaintiff's superiors, hired a private investigator to investigate plaintiff and did everything possible to make his life miserable for six months); Dean v. Chapman, 556 P.2d 257 (Okla. 1976) - (Complaint alleged that defendent coroner performed a public open-air autopsy on plaintiff's deceased father in order to create publicity); Warren v. June's Mobile Home Village and Sales, Inc., 66 Mich.App. 386, 239 N.W.2d 380 (1976) - (Complaint alleged retalitory actions of owners of mobile home village in which plaintiffs had mobile home); See also Mundy v. Southern Bell Telephone & Telegraph Company, 676 F.2d.503 (CA 11 1982) - (Summary Judgment affirmed in favor of telephone company where former telephone company employee suffered severe emotional/mental distress and eventually resigned his position due to the harassment supervisory employees subjected him to after he refused to continue his participation in a scheme to falsify expense vouchers); and Jones v. Harris, 35 Md.App. 556, 371 A.2d 1104 (1977) affirmed Harris v. Jones, 380 A.2d 611 (Md. 1977) - (Supervisors actions in mimicking the stuttering speech pattern of the plaintiff employee over a period of five months were found to be intentional and outrageous, but verdict for plaintiff reversed where evidence insufficient to show severe emotional distress or any causal connection).

Petitioners submit that the conduct of Dirube and Crawford do not reach the levels of outrageousness necessary to sustain a cause of action for the intentional infliction of emotional distress. As stated by the Court and in Cluff v. Farmer's Insurance Exchange, 10 Ariz.App. 560, 460 P.2d 666 (1969) and reiterated in Lester v. Columbia Mutual Insurance Co., 624 S.W.2d 890, 893 (Mo.App. 1981):

> The course of human conduct, even in our 'civilized community' has amply shown that selfseeking and inconsideration are a common trait in man's relationship with man.... While defendant's actions may be subject to criticism from an ethical standpoint, we do not believe the conduct alleged in plaintiff's complaint was extreme or outrageous in the context of general social acceptability.

C. Punitive Damages.

If no cause of action is found for intentional infliction of emotional distress against Dirube and Crawford, Dominguez would of course be unable to maintain an action for punitive actions. Moreover, the relationship of the parties under a disability policy is the very antithesis of the situation that this Court pronounced in Baxter v. Royal Indemnity Company, 317 So.2d 725 (Fla. 1975) when it recognized that the determination of whether a fiduciary relationship exists between the insured and its insurer is crucial to a finding of whether the insurer is liable for punitive damages. As in Baxter, Supra., the parties in the case at bar occupy a contractual adversary position toward each other and there-

fore, no basis for a fiduciary relationship between the parties exists. Under these circumstances, the parties are more in the nature of a debtor-creditor or adversary relationship than a fiduciary relationship. Shupeck v. Allstate Insurance Company, 367 So.2d 1103 (Fla. 3d DCA 1979). See Midwest Mutual Insurance Company v. Brasecker, 311 So.2d 817 (Fla. 3d DCA 1975).

D. Summary.

Petitioners advocate the adoption of the decisional case law advanced by the Second District Court of Appeal in Gmuer v. Garner, 426 So.2d 972 (Fla. 2d DCA 1982) and the earlier decisions of the Third District Court of Appeal in Gellert v. Eastern Airlines, Inc., 370 So.2d 802 (Fla. 3d DCA 1979) and Sacco v. Eagle Finance Corp. of North Miami Beach, 234 So.2d 406 (Fla. 3d DCA 1970). The difficulty in obtaining a consistent definition of the prohibited conduct comprising outrageousness is compounded by its essential punitive feature. Thus, the coupling of emotional distress with another actionable tort appears to be the most sensible approach. As concluded by the well reasoned opinion in Gellert v. Eastern Airlines, Inc., 370 So.2d 802, 807 (Fla. 3d DCA 1979):

> The import of the rule under discussion is that when recovery is allowed for mental distress intentionally caused by or incident to a separate actionable tort or as a reasonably foreseeable consequence of such tort, in practical

> effect the damages which are awarded for the mental distress are consequential damages for the independent tort. To prevent recovery of such damages in absence of any connected, separate tortious conduct would be legally impractical, as recognized in the application of the "impact rule", incident to which in Butchikas v. Travellers Indemnity Company, 343 So.2d 816, 819 (Fla. 1977), the Court said: "It would be far-reaching indeed to expand that notion to permit financial recovery for all of the emotional and mental strains which modern society inflicts on an individual by reason of its inevitable clashes".

In the case at bar, Count II of Dominguez' Complaint fails to state a cause of action under the line of authority requiring a connection with another tort in order to obtain damages for intentional infliction of emotional distress because there is no other independent tort alleged from which mental distress can flow as an additional element of damage. Should the Court recognize the line of cases which permit an action for emotional distress unconnected with any other identifiable tort, Count II still fails to state a cause of action because the Complaint does not reach the necessary level of outrageousness.

CONCLUSION

Based upon the authorities and arguments set forth herein, it is respctfully submitted that the decision of the District Court of Appeal of Florida, Third District be reversed and Count II of Dominguez' Complaint be dismissed as so ordered by the trial court.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to R. Fred Louis, Esquire, MAGILL, REID, KUVIN & LOUIS, 730 Ingraham Building, 25 Southeast 2nd Avenue, Miami, Florida 33131; Bernard P. Goldfarb, Esquire, 2748 Southwest 87th Avenue, Miami, Florida 33165; and Karen Curtis, Esquire, SCHUTTS & BOWEN, 1500 Edward Ball Building, 100 Chopin Plaza, Miami, Florida 33131, this 17th day of May, 1984.

Amy Shield Levine