IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,533

FILED
SID J. WHITE
JUL 3 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' REPLY BRIEF ON THE MERITS

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INTRODUCTION

The Petitioners' adopt and reincorporate the Introduction set forth in their Initial Brief on the Merits.

STATEMENT OF THE CASE AND FACTS

Petitioners' also adopt and reincorporate the Statement of the Case and Facts set forth on pages 2 through 11 of their Initial Brief on the Merits. No response is necessary with regard to the Respondent's Statement of the Case and Facts.

ISSUE

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

ARGUMENT

Dominguez attempts to distinguish the numerous types of factual contexts which have been considered by the Florida courts in emotional distress cases from those cases involving the "insurance arena". However, the insurance arena cases cited by Dominguez cover a wide spectrum of situations which are so factually dissimilar or arise out of such a different procedural context that they cannot be properly used as precedent for permitting a cause of action to stand for the intentional infliction of emotional distress in the case at bar.

Dominguez cites to Miller v. Mutual of Omaha Insurance Company, 235 So.2d 33 (Fla. 2d DCA 1970) as an analagous case in which the Court recognized a cause of action existing for the intentional infliction of mental distress. Although both the insurance adjuster in Miller, supra, and Dirube, the agent in the case at bar, visited the home of the insured all

similarities in the case end right there. While the adjuster in Miller was at the insured's home, he verbally berated, swore at the Plaintiff and generally abused her. In addition, he took the Plaintiff's policy and in its place left a check as a refund of the premium.

In the case at bar, no allegations of verbal abuse or beratement were alleged while the agent, Dirube, was visiting the insured's home. In addition, the insured never signed any release or gave up possession of his policy. Once Dirube left the insured's home, no allegations of subsequent visits or harassment by Dirube or Crawford were maintained by Dominguez. Consequently, the conduct of the insurance adjuster in Miller is distinguished as being far more aggravating and outrageous than in the case at bar.

Dominguez also cites to World Insurance Company v. Wright, 308 So.2d 612 (Fla. 1st DCA 1975). However, that case does not set forth all the facts for which damages for emotional distress were predicated. The only enumerated act of threatened and actual bad faith by the insurance company which was set forth in the opinion concerned attempts to "buy up" the insured's policy. Consequently, lack of factual analysis setting forth the totality of bad faith actions by the insurance company do not give a reasonable basis for comparison with the facts in the case at bar.

In discussing the award of punitive damages to an insured,

Dominguez has concentrated on those line of cases concerning "excess damage" suits against liability insurers, i.e., Campbell v. Government Employees Insurance Company, 306 So.2d 525 (Fla. 1975) and Butchikas v. Travelers Indemnity Company, 343 So.2d 816 (Fla. 1977). The excess damage suits concern situations where the insurer becomes obligated to defend the insured in an action brought against that insured for damages from a third party. A resulting fiduciary relationship comes into play.

Complete control of the litigation is vested in the insurer and the insured binds himself to cooperate fully with his insurer to neither negotiate nor settle the claim against him without the insurer's knowlege and consent. Because of this fiduciary relationship, the insurer thus owes a duty to its insured to exercise upmost good faith and reasonable discretion in evaluating the claim made against its insured in negotiating for a settlement of the claim within policy limits if such is possible. In this situation, the insurer can be liable for punitive damages for a bad faith refusal to settle.

However, as pointed out in the Petitioners' Initial Brief on the Merits, the relationship of the parties under a disbility policy is the very antithesis of the fiduciary relationship discussed above. Under these circumstances, the parties are in an adversarial relationship more akin to that of a creditor-debtor. Consequently, Dominguez's discussion of

Campbell and Butchikas, supra, are inapplicable because they concern a totally different legal context than found in the case at bar. In those cases cited by Dominguez where no fiduciary relationship existed, the punitive damage claims were disallowed by the courts. See Stetz v. American Casualty Company of Reading, Pennsylvania, 368 So.2d 912 (Fla. 3d DCA 1975); Saltmarsh v. Detroit Automobile Inter-Insurance Exchange, 344 So.2d 862 (Fla. 3d DCA 1977); Aetna Life Insurance Company v. Smith, 345 So.2d 784 (Fla. 4th DCA 1977). See also MacDonald v. Penn Mutual Life Insurance Company, 276 So.2d 232 (Fla. 2d DCA 1973) where the Court affirmed dismissal of a claim for intentional infliction of emotional distress as a result of alleged mishandling and a vexatious and deliberate refusal of the insurance company to pay claims to its insured over a long period of time.

Dominguez contends that in Butchikas v. Travelers Indemnity Company, 343 So.2d 816 (Fla. 1977), the Court specifically recognized World Insurance Company v. Wright, 308 So.2d 612 (Fla. 1st DCA 1975). However, although the Court did not expressly reject the validity or importance of that decision, neither did it accept its validity and importance.

Dominguez discusses Fletcher v. Western National Life Insurance Company, 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970) which was mentioned in passing by the Court in Campbell v. Government Employees Insurance Company, 306 So.2d 525 (Fla.

1975) with regard to cases in California underscoring the point of insurance companies being vulnerable to punitive damage suits when attempting to deal unethically with its insureds. Dominguez inaccurately states that the insurance adjuster in Fletcher, supra, engaged in conduct similar to that presented in the case at bar. Moreover, the Supreme Court implicitly disavowed this line of California cases in nonfiduciary relationships between the insurer and insured, such as fully discussed in Baxter v. Royal Indemnity Company, 317 So.2d 725 (Fla. 1975). Even if Florida recognized an independent cause of action for intentional infliction of emotional distress, the case sub judice cannot be viewed as being controlled by the principles in Fletcher because the conduct of the insurer was of such a more severe and heinous character.

The other nonjurisdictional cases cited by Dominguez also fail to reflect Florida law. For example, in Interstate Life and Accident Co. v. Brewer, 193 S.E. 458 (Ga. 1937); Continental Casualty Co. v. Garrett, 161 So. 753 (Miss. 1935); and National Life and Accident Ins. Co. v. Anderson, 102 P.2d 141 (Okla. 1940), the courts permitted recovery for intentional infliction of emotional distress based upon insulting language uttered by the Defendant to the Plaintiff. However, Florida courts have found that using humiliating language and viscious verbal attacks do not reach such levels of outrageousness to serve as a predicate for an independent tort. Lay v. Roux

Laboratories, Inc., 379 So.2d 451 (Fla. 1st DCA 1980); Slocum v. Food Fair Stores of Florida, 100 So.2d 396 (Fla. 1958).

Dominguez incorrectly contends that the withholding of information by the insurer in Kirpatrick v. Zitz, 401 So.2d 850 (Fla. 1st DCA 1981) was much less outrageous than the actions of the agent in Dominguez. In Dominguez, the visit to the Claimant's home by Dirube where alleged false representations were made in an attempt to obtain a signed release and surrendering of the policy cannot compare with the outrageous conduct of an insurer which withheld crucial life threatening information from the Claimant in Kirpatrick v. Zitz, supra.

In that case, the pet store owner sold a skunk after it bit the Claimant. The skunk was then lost prior to the incubation period necessary to determine whether the animal had rabies. The insurer intentionally exposed the Claimant to death by directing that the pet store owner keep this information from her, thereby possibly exposing her to a fatal disease. It is submitted that the outrageousness in placing the Claimant in such a life-threatening situation is far more serious and aggravated than the actions of the insurance adjuster in the case at bar.

Dominguez takes an inconsistent position from his former admission 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). Moreover, Dominguez has cited no cases where violations of the code of ethics for insurance adjusters has given rise to a private right of action.

Finally, Dominguez directs the Court's attention to the Restatement (Second) of Torts, Section 46, and the decisions which recognize the cause of action for intentional infliction of emotional distress as a viable and independent tort. Those cited cases were generally discussed in Subsection B of Petitioners' Initial Brief. It is noteworthy that none of the cases cited by Dominguez in this category reached the necessary level of outrageousness required to be recognized as a viable cause of action for intentional infliction of emotional distress.

Dominguez has stressed the sanctity of the insured's home and its invasion by the "powerful sword" of an insurance adjuster as a basis for permitting a cause of action to stand for the intentional infliction of emotional distress against Crawford and Dirube. However, in the six attempts to state a cause of action before the trial court, Dominguez never set forth with particularity any allegations directed to abusive treatment, verbal beratement or any pattern of continued harassment by the insurance adjuster or adjusting company. On the contrary, the sole visit by Dirube during which alleged false representations were made in an attempt to obtain the surrender of the insured's policy as well as a release of liability from

Dominguez failed miserably as the adjuster left without policy or signed statement.

These actions did not come within the outrageousness necessary to set forth a cause of action for intentional infliction of emotional distress. As pointed out by Section 46 of the Restatement (Second) of Torts (1965), Comment (d), in an attempt to provide guidelines for determining what conduct is considered severe enough to state a cause of action:

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

Dominguez has had ample opportunity to plead an action for intentional infliction of emotional distress. See Florida Gas v. Arkla Air Conditioning Company, 260 So.2d 220 (Fla. 1st DCA 1972). However, he has still failed to show conduct which reaches the extreme degree of outrageousness as set forth by the guidelines in the Restatement (Second) of Torts or by the case law for those decisions recognizing the independent tort of intentional infliction of emotional distress. Moreover, Dominguez has failed to connect his claim for intentional infliction of emotional distress with another recognizable inde-

pendent tort. Consequently, under either theory, the District Court of Appeal erred in its determination that the trial court improperly dismissed Count II of Dominguez' Complaint with prejudice.

CONCLUSION

Based upon the authorities and arguments set forth herein, it is respectfully 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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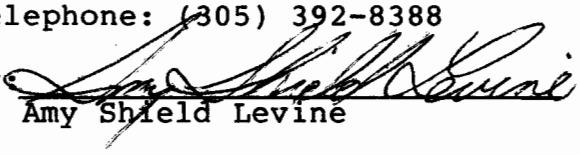
By: 
Amy Shield Levine

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to R. Fred Lewis, Esquire, MAGILL, REID, KUVIN & LEWIS, 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, SHUTTS & BOWEN, 1500 Edward Ball Building, 100 Chopin Plaza, Miami, Florida 33131, this 29th of June, 1984.

Amy Shield Levine