SUPREME COURT OF FLORIDA

S. Ct. Case No.: SC03-368

RODRIGO AGUILERA and PATRICIA AGUILERA, his wife,

Petitioners,

vs.

INSERVICES, INC. f/k/a MANAGED CARE USA SERVICES, INC., a North Carolina Corporation, and MIPPY HEATH, individually,

Respondents,
_____/

BRIEF OF FLORIDA WORKERS' ADVOCATES AS AMICUS CURIAE

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SUMMARY OF ARGUMENT

Under Florida's Workers' Compensation Act, and case law interpreting it, a workers' compensation carrier and case manager are not immune from liability for injury caused by their intentional outrageous misconduct. The grant of statutory immunity is not unlimited, and does not extend to intentional torts of employers and carriers or their representatives. Holding a carrier responsible for its actions and the injuries inflicted will promote more careful adherence to the legislative intent of prompt delivery of benefits to an injured worker and will deter egregious conduct.

The Workers' Compensation Act does not provide a remedy for emotional distress or additional injuries inflicted by a workers' compensation carrier or representative, and therefore a tort action is appropriate. The "remedies" cited by the District Court of Appeal in this case do not compensate or benefit an injured employee, and the current Workers' Compensation Act does not authorize damages for bad faith handling of a claim. To grant immunity to a carrier for outrageous acts in the administration of a claim such as occurred in this case will condone wrongful behavior, in effect allow carriers to insure themselves against their own intentional misconduct, frustrate the intent of the workers' compensation system, and leave an injured employee at the mercy of a ruthless carrier with no legal recourse to receive compensation for his injuries. Florida Workers' Advocates, on behalf of the state's injured employees, suggests that the legislature did not intend such a result and the

decision of the Third District Court of Appeal should be quashed.

Argument

A WORKERS' COMPENSATION CARRIER AND CASE MANAGER ARE NOT IMMUNE FROM LIABILITY TO AN INJURED EMPLOYEE FOR INTENTIONAL OUTRAGEOUS MISCONDUCT WHICH CAUSES INJURY.

In failing to acknowledge that Aguilera has stated a cognizable claim for intentional infliction of emotional distress, the District Court of Appeal has effectively condoned outrageous misconduct by insurance carrier and case manager, leaving an injured worker without recourse for the debilitating injuries inflicted. Florida Workers' Advocates suggests respectfully that the court has misinterpreted the applicable statutory and case law, resulting in a decision which is not only erroneous but violative of public policy.

The fundamental purpose of workers' compensation legislation is to relieve society of the burden of caring for an injured employee by placing the burden on the industry involved. Florida Erection Services, Inc. v. McDonald, 395 So.2d 203, 209 (Fla. 1st DCA 1981). Employers are provided a liability that is limited and determinative, and employees are provided a remedy that is expeditious and independent of proof of fault. Id. This Court has recognized that "under this no-fault system, the employee gives up a right to a common-law action for negligence in exchange for strict liability and the rapid recovery of benefits", while employers are

immune from common-law negligence suits. Turner v. PCR, Inc., 754 So.2d 683, 686 (Fla. 2000). The immunity from suit, however, is not unlimited. This Court, as well as many other jurisdictions, have held that workers' compensation immunity does not protect an employer from liability for an intentional tort against an employee. Id. at 687. An employer is liable in tort for conduct found to be substantially certain to result in injury or death to the employee. Id. In addition, immunity does not extend to fellow employees who act with willful and wanton disregard or gross negligence, and it does not apply to acts of co-employees who are assigned primarily to unrelated works. Sec. 440.11(1), Fla. Stat. (1999); Holmes County School Board v. Duffell, 651 So.2d 1176 (Fla. 1995). This Court has held that a parent company is not immune from a negligence suit by an employee of a wholly owned subsidiary covered by the same workers' compensation policy. Gulfstream Land & Development Corp. v. Wilkerson, 420 So.2d 587 (Fla. 1982). An employer may also be estopped from claiming immunity, and subject to suit, after misinforming an employee about workers' compensation benefits. Francoeur v. Pipers, Inc., 560 So.2d 244 (Fla. 3d DCA 1990); Quality Shell Homes & Supply Co. v. Roley, 186 So.2d 837 (Fla. 1st DCA 1966). Thus, the statute and case law recognize that immunity is not absolute and certain wrongful conduct is not limited to the exclusive remedy of workers' compensation.

Since a carrier stands in the shoes of the employer for purposes of discharging the employer's liability under the Workers' Compensation Act (Sec. 440.41 Fla. Stat.),

the principles of immunity and the intentional tort exception apply to workers' compensation carriers as well. See Sullivan v. Liberty Mutual Insurance Company, 367 So.2d 658, 661 (Fla. 4th DCA 1979), cert. denied 378 So.2d 350 (Fla. 1979). To hold otherwise would allow a carrier to behave in any manner it desires after an employee has been injured which, as noted in Judge Shevin's dissent, cannot have been the intent of the legislature in creating the workers' compensation scheme. Inservices Inc. v. Aguilera, 837 So.2d 464, 472 (Fla. 3d DCA 2002). In this case, it was the actions of the managed care organization and case manager which caused Aguilera's emotional distress and additional injuries. In keeping with the statutory scheme, their outrageous conduct should not be shielded by immunity.

The intent of the Workers' Compensation Act is to "assure the quick and efficient delivery of disability and medical benefits to an injured worker." Sec.440.015, Fla. Stat. (1999). When an employer or carrier frustrates this legislative purpose by intentional tortious conduct, causing additional injury, there is no basis for immunity; the tortfeasor must be held responsible for its actions and the injured employee must be afforded a remedy. Any concern about such a holding leading to increased litigation or a multiplicity of lawsuits is unfounded. As noted in Petitioner's Brief on the Merits, the tort of intentional infliction of emotional distress involves only conduct which is extreme and outrageous, and the trial court acts as the gatekeeper in determining the sufficiency of allegations. The District Court of Appeal expresses fear

of an "effective stripping of all immunity because a carrier must necessarily act in the adjustment of a claim after an injury has already occurred." Inservices, Inc., 837 So.2d 464, 468, n.4 (Fla 3d DCA 2002). Petitioner does not take the position that a carrier is subject to suit for all claims handling actions, only those which rise to the level of intentional egregious harmful conduct such as occurred in this case. Holding a carrier responsible for its actions and the injuries inflicted, rather than the shield of immunity allowing the carrier and its representative to behave in any manner they desire, will promote more careful adherence to the legislative intent of prompt delivery of benefits to the injured worker and deter egregious conduct.

The District Court of Appeal relies erroneously on Old Republic Insurance Co. v. Whitworth, 442 So.2d 1078 (Fla. 3d DCA 1983) to support its holding that Aguilera's claim is barred because his injuries are covered by the Workers' Compensation Act. Old Republic involved only a delay in the injured workers' receipt of disability benefit payments for which he had already been compensated by an award of penalties and attorney's fees. Cases involving claims of intentional infliction of emotional distress must be analyzed individually based on the specific facts and circumstances alleged. The instant case does not involve a mere delay in payment, but instead asserts deceptive, harmful conduct by the carrier and case manager which resulted in injuries separate and distinct from those caused by the initial work injury. The Workers' Compensation Act does not provide a remedy for these subsequent

injuries. Sec. 440.09(1)(a), Fla. Stat. (1994) which was enacted as part of sweeping changes to the workers' compensation law during a special session of the legislature in 1993, states that "(t)his chapter does not require any compensation or benefits for any subsequent injury the employee suffers as a result of an original injury arising out of and in the course of employment unless the original injury is the major contributing cause of the subsequent injury." (emphasis added). Clearly, the original work injury would not be considered the major contributing cause of emotional distress or additional injuries resulting from the carrier's deprivation of necessary medical care. This Court has recognized that in situations where an employee does not have a remedy under the Workers' Compensation Act, tort litigation is a viable alternative. Martinez v. Scanlan, 582 So.2d 1167, 1172 (Fla. 1991).

The District Court of Appeal justifies its dismissal of Aguilera's complaint by asserting that he has remedies for the carrier's misconduct under the Workers' Compensation Act. It must be pointed out respectfully that none of the alleged "remedies" cited by the court compensates an injured employee for injuries inflicted by a carrier. The complaint in this case asserts that the carrier and case manager lied to Aguilera, his counsel, and his doctors regarding benefits and his medical condition. In addition, the case manager instructed Aguilera to lie to his attorney. The fact that such statements are a criminal offense and may subject the carrier to penalties is not a remedy to Aguilera for the carrier's misconduct. The District Court of Appeal states

incorrectly that "(d)adages for bad faith are also authorized by the Act." Inservices, Inc. v. Aguilera, 837 so.2d 464, 467, n.2 (Fla. 3d DCA 2002)(citing Florida Erection Services, Inc. v. McDonald, 395 So.2d 203 (Fla. 1st DCA 1981). The Florida Workers' Compensation Act does not provide damages for bad faith. The Florida Erection Services case dealt with a provision in the 1979 Workers' Compensation Act which held a carrier responsible for payment of an injured employee's attorney's fees if a workers' compensation judge found that the carrier acted in bad faith in handling the claim. This fee provision was deleted from the Act in 1989 and has no applicability to the instant case. The current Act has no remedies or provision for damages based on a carrier's bad faith in the handling of a claim.

In addressing alleged remedies under the Workers' Compensation Act, the District Court of Appeal cites Section 440.20, Fla. Stat. (2000) regarding deadlines and penalties for late payments. This provision deals only with compensation (disability) benefits; the Act includes no penalties or remedies for delayed medical treatment and provides no benefits for emotional injuries caused by the intentional acts of those managing the employee's medical care.

The Workers' Compensation Act is intended to be efficient and self-executing, providing quick and efficient delivery of disability and medical benefits to an injured worker. Sec. 440.015, Fla. Stat. Unfortunately, the system does not always operate in the manner intended. To grant immunity to a carrier for outrageous acts in the

administration of a claim such as occurred in this case will condone wrongful behavior, in effect allow carriers to insure themselves against their own intentional misconduct, frustrate the purpose of the workers' compensation system, and leave an injured employee at te mercy of a ruthless carrier with no legal recourse to receive compensation for his injuries. Florida Workers' Advocates suggests that the legislature did not intend such a result. As noted in Petitioner's Brief on the Merits, the case law in Florida, persuasive authority from other jurisdictions, as well as public policy, dictate that a workers' compensation carrier and case manager are not immune from suit for intentional outrageous conduct characterized by deliberate and will ful indifference to an injured employee.

CONCLUSION

Based upon the argument and legal authority set forth above, as well as in Petitioner's Brief on the Merits, the decision of the Third District Court of Appeal directing dismissal of the claim for intentional infliction of emotional distress and the declaratory judgement count should be quashed, and the case remanded to the trial court for further proceedings.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of Florida Workers' Advocates As Amicus Curiae was mailed this 17th day of July, 2003 to Friedman & Friedman, Esquire, 2600 Douglas Road #1011, Coral Gables, FL 33134 and Lauri Waldman Ross, Esquire, 9130 S. Dadeland Blvd. #1612, Miami, FL 33156, Counsel for Petitioners; Joshua Lerner, Esquire, and Rebecca A. Brownell, Esquire, Counsel for Respondents, 80 SW 8th Street, Miami, FL 33130-3047.

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CERTIFICATE OF TYPE SIZE AND STYLE

Undersigned counsel hereby certifies that the type size and style of the Answer Brief is Times New Roman #14.

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