IN THE SUPREME COURT OF THE STATE OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO.: S.Ct. 03-368
4th DCA CASE NO.: 3D01-867

RODRIGO AGUILERA and PATRICIA AGUILERA, his wife,

Petitioners,

-vs-

INSERVICES, INC., f/d/a MANAGED CARE USA SERVICES, INC., a North Carolina corporation, MIPPY HEALTH, individually,

Respondents.
_____/

BRIEF OF AMICUS CURIAE ON BEHALF OF RODRIGO AGUILERA AND PATRICIA AGUILERA ON THE MERITS

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INTRODUCTION

The Academy of Florida Trial Lawyers ("Academy") is a voluntary state-wide association of more than 4,000 trial lawyers, concentrating on litigation in all areas of the law. The members of the Academy are pledged to the preservation of the American legal system, the protection of individual rights and liberties, the evolution of the common law, and the right of access to courts.

This case is of importance to the Academy because it involves the issue of workers' compensation immunity and denial of access to court. This issue is significant to the Academy since it involves individuals' rights and liberties, and will have a significant effect on the operation of the judicial system in Florida.

SUMMARY OF ARGUMENT

The Third District erred in ruling that the carrier had immunity for acts which occurred after the workplace injury, thereby improperly depriving Aguilera of his cause of action for Intentional Infliction of Emotional Distress. This is particularly true where the workers' compensation carrier has clearly committed an intentional tort, outside a purview of the traditional claims handling issues, thereby rendering the carrier liable in an intentional tort action.

Affording the carrier absolute immunity under §440.11, Fla.Stat. (1999) constitutes an improper denial of access to courts to Plaintiff, Aguilera, without providing an adequate alternative remedy. Indeed, the "hollow" remedies offered by the Workers' Compensation Act - - criminal penalties on the carrier, suspension of the carrier's license, penalties for late payments, attorney's fees, dispute resolution procedures, procedures to dispute I.M.E. requests, or to expedite a claim - - may punish the carrier or expedite a claim process, but those measures do not compensate Aguilera for the injuries he suffered as a result of the carrier's intentional wrongful acts. In short, a carrier is not "free to behave in any manner it desires," but on the contrary, should be held accountable and answerable for its outrageous conduct offending the sensibilities of a civilized society.

ARGUMENT

QUESTION PRESENTED

THE DISTRICT COURT'S CONSTRUCTION OF THE IMMUNITY PROVISION OF THE WORKERS' COMPENSATION STATUTE WOULD VIOLATE THE CONSTITUTIONAL RIGHT OF ACCESS TO COURTS, GUARANTEED BY ART. I §21, FLA. CONST., AS APPLIED TO THE FACTS ALLEGED.

The Third District's interpretation of the immunity provision of the workers' compensation statute, applied to bar the claims alleged in Mr. Aguilera's Complaint, would violate the constitutional right of access to courts guaranteed by Art. I, §21, Fla. Const. The Third District's decision would deny access to court for previously recognized causes of action, without providing an adequate alternative remedy, and without any overpowering public necessity.

"The common law right of recovery from third parties in tort should not be abridged unless specifically waived by the workmen's compensation statutes." Deen v. Quantum Resources, Inc., 750 So.2d 616, 621 (Fla. 1999), quoting Gulfstream Land & Development Corp. v. Wilkerson, 420 So.2d 587 (Fla. 1982).

The immunity provisions of the workers' compensation law must be strictly construed. Deen, supra. Strict construction of the workers' compensation immunity statute is not just the law in Florida, it is a constitutional necessity. [1] Article I, §21 of the Florida Constitution guarantees:

> The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

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[1] Thus, to the extent the Legislature, in §440.015, Fla.Stat., has purported to eliminate the requirement of strict construction, that provision is contrary to the constitution and cannot stand.

Under this constitutional mandate, where a right of access to courts for redress of a particular injury is a part of the common law of the state, the Legislature

> is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.

Kluger v. White, 281 So.2d 1, 4 (Fla. 1973).

This provision of the Declaration of Rights "is particularly applicable to [workers'] compensation cases." Blount v. State Road Department, 87 So.2d 507, 512 (Fla. 1956). This Court has relied on Kluger's interpretation of Article I, §21 both to uphold workers' compensation immunity in some circumstances, see, e.g., Martinez v. Scanlan, 582 So.2d 1167, 1171-72 (Fla. 1991); Iglesia v. Floran, 394 So.2d 994, 996(Fla. 1981); Eller v. Shova, 630 So.2d 537 (Fla. 1994); and to invalidate it in others. Sunspan Engineering and Construction Co. v. Spring-Lock Scaffolding Co., 310 So.2d 4 (Fla. 1975) (portion of the statute unconstitutional, because it abolished a third party's right to sue an employer, without providing the third party a reciprocal benefit).

Article I, §21 and Kluger require the courthouse doors to open wide to allow Mr. Aguilera access for redress of the grievances alleged in his Complaint.

Causes of Action Protected

The constitutional right of access to courts protects causes of action that existed under "the common law as it existed on November 5, 1968."[2] Eller v. Shova, 630 So.2d 537, 542 n. 4 (Fla. 1994). Therefore, if Mr. Aguilera's causes of action existed prior to November 5, 1968, the workers' compensation immunity provisions could not bar him from access to court without providing an adequate, reasonable alternative remedy, unless a compelling necessity, with no lesser alternative, were demonstrated.

In fact, Mr. Aguilera's causes of action did exist prior to November 5, 1968. Mr. Aguilera asserts three well established causes of action: Breach of Contract, Bad Faith, and Intentional Infliction of Emotional Distress.

This State has always recognized a cause of action against an insurance company for breach of contract. A cause of action for bad faith against an insurance company has been recognized in this State since at least 1938. Auto Mut. Indem. Co. v. Shaw, 184 So. 852 (Fla. 1938). Although this Court, in Baxter v. Royal Indemnity Co., 317 So.2d 725 (Fla. 1975), rejected a cause of action for first party bad faith by

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[2] "This is because the 1968 provision of section 21 differs significantly from its 1845 counterpart." Eller, 630 So.2d at 542 n. 4.

an insurance company, it expressly distinguished situations involving "bodily injury or property damage." 317 So.2d at 726. Here, Mr. Aguilera alleges that Inservices' bad faith – including requiring tests that were painful and contraindicated, while deliberately withholding treatment it knew was necessary – caused him actual physical injury.

Moreover, Florida cases that rejected a first party bad faith cause of action, prior to the enactment of §624.155, Florida Statutes, specifically did so with the caveat that "bad faith refusal to pay gives rise to a cause of action only if the facts involving the bad faith refusal amount to an *independent tort* such as fraud or intentional infliction of emotional distress" Industrial Fire & Cas. Ins. Co. v. Romer, 432 So.2d 66 (Fla. 4th DCA 1983) (emphasis added). The egregious facts described in the complaint plainly amount to independent torts. Even under restrictive cases such as Romer, a cause of action would have been recognized on these facts.

Finally, the tort of outrage, also referred to as intentional infliction of emotional distress, has been part of the law of this state since at least 1950. Kirksey v. Jernigan, 45 So.2d 188 (Fla. 1950) (recognizing a cause of action "purely in tort, where the wrongful act is such as to reasonably imply malice, or where, from the entire want of care of attention to duty, or great indifference to the persons, property or rights of others, such malice will be imputed as would justify the assessment of exemplary or punitive damages."). See also Korbin v. Berlin, 177 So.2d 551 (Fla. 3d DCA 1965).

These cases have recognized a claim even without the kind of grievous physical harm alleged here.

Failure to Provide Adequate Alternative Remedy

The workers' compensation statute was designed to benefit and protect ordinary working people like Mr. Aguilera:

> The act is designed to afford speedy and summary disposition of claims and we know the working man ordinarily cannot afford to wait indefinitely to receive compensation for himself and his family when he has been injured and forced to quit work.

Blount v. State Road Department, 87 So.2d 507, 512 (Fla. 1956).

In enacting the workers' compensation law, the Florida Legislature took away the right of an employee to sue the employer in tort. In exchange, the employee got the right to recover benefits under the workers' compensation system. As this Court explained in Martinez v. Scanlan, supra., the workers' compensation immunity provision is constitutional because the workers' compensation law provides

> a reasonable alternative to tort litigation. It ... provide[s] injured workers with full medical care and wage-loss payments for total or partial disability regardless of fault and without the delay and uncertainty of tort litigation.

582 So.2d at 1171-72. Similarly, the Court emphasized in Mullarkey v. Florida Feed Mills, Inc., 268 So.2d 363, 366 (Fla. 1972), "the employee trades his tort remedies for

a system of compensation without contest, thus sparing him the cost, delay and uncertainty of a claim in litigation."

Mr. Aguilera got not only cost, delay and uncertainty, but cruel torment. The complaint alleges that the defendants purposefully set out to deprive him of needed benefits to which they knew he was entitled by lying, cheating, persecuting and physically abusing him. Instead of the emergency medical treatment he needed to help him, Mr. Aguilera was forced to suffer for months and ordered to undergo harmful, painful tests.

Although this Court often has found the workers' compensation statue to be an adequate alternative remedy, that holding has not been without limitation. The benefits to the employee were described in such cases as "substantial," Eller v. Shova, 630 So.2d at 542; or "adequate, sufficient and even preferable safeguards." Kluger v. White, 281 So.2d at 4. Compare Sunspan, supra, (immunity invalid where no alternative remedy for third party). See generally Smith v. Department of Insurance, 507 So.2d 1080, 1088 (Fla. 1987) (requiring "an alternative remedy and a *commensurate* benefit") (emphasis added).

The facts alleged here are far different from the cases in which this Court previously has upheld workers' compensation immunity against an access to court challenge. For example, in Martinez v. Scanlan, supra, the Court upheld the

constitutionality of an amendment to the statute even though it reduced some benefits because the statute "continue[d] to provide injured workers with full medical care and wage-loss payments for total or partial disability regardless of fault and without uncertainty of tort litigation." 582 So.2d at 1172. But here, Mr. Aguilera did not receive "full medical care" – he received, instead, only cruelty, contempt and abuse.

Nor does Mr. Aguilera receive any benefit from any hypothetical administrative or criminal prosecution of the defendants, as suggested by the court below.

"Although the same act may constitute both a crime and a tort, the crime is an offense against the public pursued by the sovereign, while the tort is a private injury which is redressed at the suit of the injured party." Shaw v. Fletcher, 188 So. 135 (Fla. 1939). Criminal or administrative prosecution might vindicate the State's interests, but they would do nothing for Mr. Aguilera. The ability to prosecute criminal or administrative proceedings is not within Mr. Aguilera's control, but in the control of the State.

Nor are the ordinary workers' compensation proceedings mentioned below, Inservices, Inc., v. Aguilera, 837 So.2d at 467 n.2, adequate. Those procedures certainly failed to work for Mr. Aguilera while he suffered for almost a year.

Where "commensurate benefits or procedural safeguards" are absent, a statute abolishing a common law right violates Article I, §21. Nationwide Mutual Fire Ins. Co.

v. Pinnacle Medical, Inc., 753 So.2d 55, 58-59 (Fla. 2000); Industrial Fire & Cas. Ins. Co. v. Kwechin, 447 So.2d 1337 (Fla. 1984).

In Pinnacle Medical, this Court held a statute limiting to arbitration the claims of medical providers who were PIP assignees unconstitutional under Article I, §21, because it did not provide a "reasonable alternative" to the right of access to courts. 753 So.2d at 59. Similarly, in Kwechin, the alternative remedy, a PIP policy with a deductible that approached the amount of the coverage, was inadequate. The remedies found inadequate in Pinnacle Medical and Kwechin were far more than Mr. Aguilera alleges he received from the defendants in this case.

To satisfy the constitutional requirement of access to courts, the benefits of a statute cannot travel a one-way street. One party cannot get immunity unless the opposing party gets a commensurate benefit. In Smith v. Department of Insurance, 507 So.2d 1080, 1088 (Fla. 1987), this Court invalidated a $450,000 cap on noneconomic damages because the benefits of the cap ran "in only one direction." Here, the defendants seek the benefits of the statute when they have denied any benefit to Mr. Aguilera.

The right to prompt, adequate compensation without regard to fault is the *quid pro quo* for the immunity from tort litigation. Where the employer/carrier goes beyond

merely delaying compensation, and purposely hurts the employee to coerce him to forego that right, there is no *quid pro quo*, and there can be no immunity.

Where, as is alleged here, the employer/carrier not only withholds payment, but lies, cheats and tortures the worker, there is no "full medical care ... regardless of fault ... without delay and uncertainty." Cf. Martinez, supra. Consequently, in the circumstances described by Mr. Aguilera, the workers' compensation law does not provide a reasonable alternative to tort litigation.

In exchange for his last right to sue, Mr. Aguilera did not get "full medical care." He got, instead, not only callous disregard for his needs, but sadistic schemes to deny benefits by requiring painful testing contraindicated by his condition.[3]

No Overpowering Public Necessity

There can be no overpowering public necessity that would justify what the defendants are alleged to have inflicted on Mr. Aguilera. Their actions are antithetical to fundamental American values.

Mr. Aguilera's mistreatment is hauntingly reminiscent of to the mistreatment of some prisoners decried in Estelle v. Gamble, 429 U.S. 97, 97 S. Ct. 285 (1976). Like an incarcerated prisoner, Mr. Aguilera could not get medical care elsewhere. As

[3] Not to mention interference with his relationship with his attorney.

acknowledged in Blount, he could not afford to wait for treatment. Mr. Aguilera was not unlike a prisoner of the workers' compensation system. Like the prison guards described in Estelle, those who controlled Mr. Aguilera's care were callously indifferent to his needs.

In Estelle, the United States Supreme Court held that "callous indifference" to a person's needs by the authorities on whom he must rely for medical treatment, resulting in "unnecessary and wanton infliction of pain," violates "broad and idealistic concepts of dignity, civilized standards, humanity and decency." 97 S.Ct. at 103 (citations omitted). If such authorities fail to meet their obligations, "those needs will not be met. In the worst cases, such a failure may actually produce 'physical torture or a lingering death.' . . . The infliction of such unnecessary suffering is inconsistent with contemporary standards of decency . . . ." Id. The Court held that such "deliberate indifference to serious medical needs" , 97 S. Ct. at 106, violates the federal constitutional prohibition against cruel and unusual punishment, in part because it does not "serve any penological purpose." 97 S.Ct. at 103.

Just as the deliberate indifference described in Estelle served no legitimate purpose, the deliberate indifference and, indeed, deliberate infliction of pain described in Mr. Aguilera's Complaint can serve no legitimate public purpose here. There is no public policy, no rational reason to protect the overwhelming cruelty described in the

complaint. No public purpose could ever be served by immunizing such purposeful abuse. That is why, this Court has held that intentional torts are not protected by workers' compensation immunity, or for that matter, by any other form of insurance. See, e.g., Turner v. PCR, Inc., 754 So.2d 683 (Fla. 2000); see generally Ranger Ins. Co. v. Bal Harbour Club, Inc. 549 So.2d 1005 (Fla. 1989) (public policy prohibits insurance coverage for intentional act of religious discrimination); U.S. Concrete Pipe Co. v. Bould, 437 So.2d 1061 (Fla. 1983) (public policy prohibits insurance coverage for punitive damages based on insured's own wrongdoing).

The conduct alleged in the complaint serves no public purpose. It violates public policy and all standards of decency and humanity. The defendants could not insure against it. They should not be immunized against being held responsible for it.

CONCLUSION

For the reasons stated above, the decision of the Third District Court of Appeal should be quashed, and the case remanded back to the Trial Court for further proceedings.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was furnished to: Lauri Waldman Ross, Esq., LAURI WALDMAN ROSS, P.A., Two Datran Center, Suite 1612, 9130 S. Dadeland Boulevard, Miami, FL 33156; and M. Stephen Smith, Esquire, and Joshua Lerner, Esquire, RUMBERGER, KIRK & CALDWELL, P.A., Brickell Bayview Centre, Suite 3000, 80 S.W. 8th Street, Miami FL 33130-3047 , by mail, on July 21, 2003.

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