THE FLORIDA SUPREME COURT

S. Ct. Case No.: SC03-368

CASE NO.: 3D01-867

RODRIGO AGUILERA and PATRICIA AGUILERA, his wife,

Petitioner,

vs.

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

Respondents.
_____/

PETITIONER'S BRIEF ON THE MERITS

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PREFACE

This Court has for review the Third District Court of Appeal's decision in Inservices, Inc. v. Aguilera, 837 So. 2d 464 (Fla. 3d DCA 2002), rev. granted, __ So. 2d __ (June 19, 2003) based on express, direct conflict with Turner v. PCR, Inc., 754 So. 2d 683 (Fla. 2000) and Sibley v. Adjustco, Inc., 596 So. 2d 1048 (Fla. 1992). Because the District Court misapplied two controlling decisions of this Court, its decision should, respectfully, be quashed, and the case remanded for further proceedings.

STATEMENT OF THE CASE AND FACTS

The issues before this Court arose from an order denying a motion to dismiss Aguilera's amended complaint, based on workers compensation immunity. Fla. R. App. Proc. 9.130(1)(3)(c)(v) (effective January 1, 2001).[1] For the purpose of the motion to dismiss, all facts set forth in Aguilera's "Amended Complaint for Intentional Infliction of Emotional Distress," are taken as true, and are detailed here.

On or about April 21, 1999, Plaintiff Rodrigo Aguilera was injured in a work-related accident. (App. 4). At the time of

[1] All references are to the respondent's appendix, filed as the record in this non-final appeal (App. 1-72), and the Supplemental Appendix submitted here which contains the District Court's two decisions. (S. App. 1-36).

the accident, Aguilera's employer had a contractual relationship with Managed Care USA Services, Inc. n/k/a Inservices, Inc. to provide workers compensation benefits to workers injured on the job. Plaintiff was an insured and/or intended third-party beneficiary of this contractual relationship, entitled by statute to receive the "quick and efficient delivery of ... medical benefits." §440.015, Fla. Stats. (1995) (App. 4).

Aguilera was injured at a Publix warehouse in North Miami when an electric fork lift operated by a Publix employee struck and pushed him into a pallet. He sustained immediate injuries to his back and right leg and was transported to Palmetto Hospital Emergency Room. Palmetto medical records reflected that, at the time, Plaintiff simply had blood in his urine. An emergency room physician diagnosed an infection and gave Plaintiff a prescription. On instruction of Defendant Inservices, which was supervising and controlling Plaintiff's medical care, Plaintiff was referred to a workers compensation clinic and, on May 12, 1999, was discharged to return to work with restrictions. (App. 5).

Aguilera subsequently began to complain of kidney and/or bladder pain. On May 24, 1999, Plaintiff's workers compensation attorney filed an initial "request for assistance," requesting Inservices' authorization for a board certified urologist to

examine and treat the Plaintiff. Aguilera's complaint alleged that, from that point forward, both Defendants did everything in their power to block medical treatment that it had actual notice he needed, recklessly endangered his life, and engaged in a pattern of action substantially certain to bring about his death. (App. 6).

Inservices first denied Aguilera any authorization for urological care, claiming this injury was not "work related." (App. 6). On June 17, 1999, Inservices was notified that Aguilera's urological care was an "emergency" because he was passing feces through his urine. On June 21, 1999, Aguilera was advised that his worker's compensation benefits were being **terminated** as of July 9, 1999, notwithstanding the report of two doctors, including Defendant's **own** doctor, that he should not be returned to work. On June 25, 1999, Inservices blocked Aguilera's receipt of the prescription medication prescribed to him at the hospital for his urinary tract infection. On June 30, 1999, the Defendant denied Aguilera's emergency request for urological care on the ostensible basis that it was not "medically necessary," even though Inservices had in its possession medical care information showing exactly the opposite. (App. 5-6).

On July 7, 1999, Inservices was again advised by Plaintiff's

treating physician that his need for a urological consult was "urgent" and that his condition was "deteriorating." On July 9, 1999, **Defendant's own doctor**, Alan Dansky, gave Aguilera prescriptions for various urinary tests to take place, and the appointments were scheduled by **Defendant's own nurse.** In response, on July 29, 1999, Defendant's adjuster unilaterally cancelled some of the medical testing. The medical testing which was performed (a retrograde urethrogram) reflected that Aguilera had a fistula or hole in his bladder. (App. 7).

On August 6, 1999, Defendant Mippy Heath introduced herself as Defendant's new "case manager". She was specifically advised **not** to deal with Plaintiff directly. Heath agreed **not** to perform on site management services directly or to interfere with Aguilera's health care. (App. 7).

On August 19, 1999, Aguilera alerted the Defendant's adjuster that Plaintiff needed a general surgeon to perform emergency surgery on the fistula. (App. 7). Heath refused to authorize the emergency surgery and insisted on a second opinion. (App. 7).

In violation of her agreement with Aguilera's counsel, on August 25, 1999, Heath showed up for Aguilera's urology appointment with Defendant's IME urologist. **Heath then advised the Plaintiff to lie to his own lawyer, and to falsely tell his**

lawyer that she was not at the doctor's office. (App. 8, emphasis added).

Defendants insisted on the administration of tests that were painful to Aguilera and contraindicated by his then-present medical condition. Defendants then used Aguilera's refusal to submit to these painful tests as a further excuse to refuse his now-critical surgical treatment. (App. 8, ¶22).

By November 4th 1999, Defendant's own case manager and nurse practitioner agreed that Plaintiff needed immediate hospitalization for surgery. (App. 8). Defendant's adjuster overruled its nurse because it ostensibly wanted a second opinion from a general surgeon. However, Defendant then sent Aguilera to a gastroenter-ologist, not a general surgeon. At this point, Aguilera had been urinating feces and blood for over six months. (App. 8).

Aguilera's surgery, diagnosed as an "emergency" in June of 1999, was not authorized by the Defendants or treated by surgery until March 22, 2000. By this time, Aguilera had been urinating feces and blood for over 10 months. By this time, at the Defendant carrier's insistence, Plaintiff had seen six doctors in addition to his initial treating physician. **All** who examined him concluded that Plaintiff's physical injuries were related to the accident and needed urgent surgical treatment. (App. 9).

Defendant's own selected physicians examined the Plaintiff and recommended emergency surgery. (App. 9). However, the Defendant refused the recommendations of their own physicians for some two months. The delay created substantially certain **additional** physical injury – well beyond that originally created in the workplace – and caused the Plaintiff to suffer extreme emotional distress. (App. 9).

Plaintiff filed the instant case against the Defendants for common law bad faith, intentional infliction of emotional distress and breach of contract. Aguilera sought *inter alia* damages for emotional distress and other harm caused by Defendants' intentional acts, and reckless indifference to Plaintiffs' plight during the investigation and the course of payment on Plaintiff's worker's compensation claim, **subsequent to and distinct from** Aguilera's original on-the-job physical injury. (App. 5). Aguilera asserted special damages, including the fact that his extreme emotional distress prevented his timely rehabilitation, and kept him from going back to work, destroyed his economic situation, and his credit. (App. 14, ¶37).

In Count V for declaratory judgment and supplemental relief, Aguilera sought a determination that, to the extent that the workers compensation statute, as amended in 1994, purports to

eliminate all common law claims against a workers compensation carrier, including claims when an injured worker is injured by the subsequent malfeasance of a carrier, §440.11(4), Fla. Stats. is unconstitutional under Article I, §22, Fla. Const. Plaintiff relied, for his analysis, on a recent Indiana case addressing the issue. See Sims v. U.S. Fidelity & Guar. Co., 730 N.E. 2d 232 (Ind. Ct. App. 2000)[2].

The Defendants moved to dismiss the complaint on various grounds, including the defense of workers compensation immunity. (App. 32-34). In a three page order, the trial court denied Defendants' motion to dismiss and reasoned as follows:

> In order for a Plaintiff to prevail in a tort claim which arises out of an injury at work, Plaintiff must show that there was a clear delay in medical help and payment and that the delay was outrageous, fraudulent, deceitful, or was an intentional infliction of emotional distress. Montes de Oca v. Orkin, 692 So. 2d 257 (Fla. 3d DCA 1997), rehearing denied 699 So. 2d 257.
>
> The Court applies the following facts to the law: the refusal for nearly a year to provide emergency surgery, the needless suffering of the Plaintiff, the Defendants insistence on tests for conditions which were not the problem, the lengthy delay causing further risk to Plaintiff's life. There is no question that there was an extended delay in emergency medical help for the Plaintiff. Additionally, the facts show

[2] Since reversed on appeal. Sims v. U.S. Fidelity & Guaranty Co., 782 N.E. 2d 345 (Ind. 2003).

> an outrageous denial of medical services which led to the intentional infliction of emotional distress over the continuous and debilitating physical health of Plaintiff.
>
> Florida has clung to the exclusivity of the Workers Compensation Statute with just reason in order to afford workers a simple method of payment for job related injuries. **However, this state has not said that outrageous conduct will not be treated in our system of justice in an evenhanded fashion. At some point, a workers compensation claim may escalate into a tort action for conduct that far exceeds standards of humanity. This is that case!**
>
> An additional factor must be considered. The Defendants, at one point in this lengthy fight for medical help, decided that the illness suffered by Plaintiff was not even work related. At another point, Plaintiff was notified that his workers compensation benefits were being cancelled. **A further reason to deny Defendant's motion to dismiss is that they alleged that this was not a workers compensation claim and that the Plaintiff was not entitled to those benefits.** (App. 64-66).

The Defendants appealed the denial of their motion to dismiss, claiming they were entitled to the defense of workers compensation immunity as a matter of law. (App. 1-2).

On October 31, 2001, the Third District Court of Appeals issued its first (split) decision. Writing for the majority, Judge Shevin quoted this Court's decision in Turner v. PCR, Inc., 754 So. 2d 683, 684 (Fla. 2000), which "reaffirm[ed] the existence of an intentional tort exception to an employer's

immunity, and h[e]ld that the conduct of the employer must be evaluated under an objective standard." Applying such standard, the facts, as alleged by Aguilera, "went beyond mere claims handling allegations" and asserted intentional tortious behavior by Inservices and its case manager "who went so far as to show up for Aguilera's urologist appointment and suggest that he lie to his attorney and say she was never there." (S. App. 25). These independent acts rose to the level of intentional torts and were not protected by worker's compensation immunity. (S. App. 25-26).

According to this panel, Defendants' conduct met the Turner test. It was substantially certain to cause serious injury or death – and involved a degree of deliberate and wilful indifference. (S. App. 27). The panel concluded, as a matter of law and public policy, that:

> Any alternative holding would require us to adopt Defendants' argument that once an employee files a claim, the employee has already been injured and the carrier is free to proceed and behave in any manner it desires. We cannot fathom that this was the intent of the legislature in creating the workers compensation scheme. We decline to so hold here. (S. App. 28).

Nor did it matter that this action was against the workers compensation carrier and its case manager, not Aguilera's employer. (S. App. 26). If the carrier is shielded by the same

immunity as the employer, the carrier is subject to the same exceptions for intentional torts. (S. App. 27).

The majority thus affirmed the denial of the Defendants' motion to dismiss the intentional infliction count, but reversed with directions to dismiss the remaining counts which did not rise to the level of actionable intentional torts. (S. App. 28). This included Aguilera's constitutionality claim. (App. 17-18; S. App. 28). Judge Gersten filed an extensive dissent, outlining ostensible "remedies" in the workers' compensation act that Aguilera could pursue. (S. App. 29-36).

The Defendants moved for rehearing, rehearing *en banc* and certification of a question of exceptional importance and, on December 26, 2002, the Court withdrew its prior opinion and adopted Judge Gersten's dissent as the new majority opinion. (S. App. 1-19, 29-36).[3]

The new panel majority recognized the trial court's finding that "intentional outrageous conduct on the part of the Defendants escalated th[is] workers compensation claim into a tort action." (S. App. 3-4). It also acknowledged that a workers' compensation carrier is **not** immune for all intentional torts. (S. App. 6). It recognized that Sibley v. Adjustco,

[3] Senior Judge Joseph Nesbitt was the swing vote on both panel's decisions.

Inc., 596 So. 2d 1048 (Fla. 1992) stands for the proposition that "an adjuster who fraudulently edited the statement of a claimant ... result[ing] in the denial of benefits constitutes an intentional act independent of the handling of a workers compensation claim," adding that "The workers compensation scheme does not immunize a compensation carrier from wrongdoing which occurs independent of claims handling." (S. App. 6). While it "empathize[d] with Aguilera's plight in resolving his medical problems," (App. 4) it concluded that Aguilera had no common law intentional tort claim because the "worker's compensation act "contain[ed] provisions addressing his allegations...". (App. 7).

Among other things, the panel pointed to §440.104, Fla. Stats. (2000), which criminalizes "lies" regarding available benefits and subjects a workers compensation carrier to penalties. (App. 7, n.2). However, all of the allegations, including lying to Aguilera about existing benefits and instructing him to lie to his own lawyer, could not be deemed truly "independent" intentional torts. (S. App. 8-9).

The new panel majority likewise concluded that Turner v. PCR, Inc., 754 So. 2d 683 (Fla. 2000) had no application to this case, reasoning that:

> [I]nservices had no part in causing Aguilera's injuries. Aguilera would have

> needed medical care with or without Inservices' alleged misconduct. Thus, there is no separate act, independent from Inservices handling of the claim, which injured or "to a substantial certainty" would have caused Aguilera's injuries.... (S. App. 8).

It reiterated, once again, that "other remedies for Aguilera's claims are provided for by the Act." (S. App. 8). The new majority opinion may no mention and *sub silentio* required dismissal of Aguilera's constitutionality claim. (S. App. 1-8).

In a vigorous dissent, Judge Shevin disagreed, noting that "The majority opinion ignores the impact of Turner, and apparently agrees with the defendants' argument that once an employee files a claim, the employee has already been injured, and the carrier is free to behave in any manner it desires." (S. App. 19). Judge Shevin "[could] not fathom that this was the intent of the legislature in creating the workers compensation scheme" and "decline[d] to say so here." (S. App. 19). Judge Shevin wrote that Aguilera's facts, evaluated under the appropriate Turner standard, went well beyond "mere claims handling allegations" and asserted an actionable intentional tort, which fell outside the scope of worker's compensation immunity. (S. App. 11, 16). This included intentional tortious behavior by Inservices, and its case manager "who went so far as

to show up at Aguilera's urologist appointment and suggest that he lie to his attorney and say she was never there." (S. App. 16).

Judge Shevin also concluded that the "remedies" outlined by the majority did not compensate Aguilera for the injuries he sustained at the carrier's hands, (S. App. 18-19) and that "here, as in Sibley, the independent tort should not be blocked by the improper application of the immunity." (S. App. 19).

STATEMENT OF JURISDICTION

This Court has discretionary jurisdiction to review a District Court decision which expressly and directly conflicts with a decision of this Court on the same issue of law. Fla. Const. art. V. §3(b)(3). Decisional conflict may be created by a conflict in legal principles appearing on the face of the decision OR the misapplication of a specific holding previously announced by this Court. See Rosen v. Florida Ins. Guar. Ass'n, 802 So. 2d 291, 292 (Fla. 2001); Vest v. Travelers Ins. Co., 753 So. 2d 1270, 1272 (Fla. 2000); Arab Termite and Pest Control of Florida, Inc. v. Jenkins, 409 So. 2d 1039, 1040 (Fla. 1982) (district court's misapplication of this Court's holding created conflict jurisdiction).

Section 440.105(4)(b), Fla. Stat. (2000) makes it unlawful for any person to knowingly make false statements for the

purpose of denying workers compensation benefits. However, that remedy is **not** exclusive and does not preclude a common law intentional tort action. See Sibley v. Adjustco, Inc., 596 So. 2d at 1051 (interpreting predecessor statute §440.37, Fla. Stat. (1989)). There can be no meaningful distinction between editing a claimant's statement to leave out material facts, and lying to the claimant directly about the benefits he has available. Both constitute independent, intentional torts.

This Court has recognized an intentional tort exception to workers compensation immunity. Turner v. PCR, Inc., 754 So. 2d 683, 686-87 (Fla. 2000). Based on the facts as alleged, the intentional tort exception applies. The impact of the District Court's decision cannot be minimized – it authorizes torture in the state of Florida, because it leaves the carrier "free to behave in any manner it desires." (S. App. 19). This cannot be the legislature's intent in creating the workers compensation scheme.

The Third District's misapplication of Turner and Sibley creates express, direct conflict and warrants the further exercise of this court's jurisdiction here.

SUMMARY OF THE ARGUMENTS

Florida's workers compensation scheme was designed to assure the quick and efficient delivery of medical and disability

benefits to an injured worker, and facilitate the workers' speedy return to work, at a reasonable cost to his employer. In exchange for such benefits, **both** the employer and its workers compensation carrier are protected by immunity. However, neither are protected by immunity for their **intentional** torts. In Turner v. PCR, Inc., 754 So. 2d 683 (Fla. 2000), this Court squarely held that an employee plaintiff should **not** be held to a higher standard than any other plaintiff in a non-work related intentional tort case. The District Court, in this intentional tort case, did precisely that. The District Court's dismissal of this tort count flies in the face of Turner and should be quashed.

Nor can the result reached by the District Court be justified by resort to "other remedies" in the workers compensation act. Section 440.105, Fla. Stat. (2000) is the statutory successor to §440.37, Fla. Stat. which this Court construed in Sibley v. Adjustco, Inc., 596 So. 2d 1048 (Fla. 1992). In Sibley, this Court concluded that §440.37 "provides only an alternative cause of action" and not an exclusive cause of action, and that the workers compensation statutory provisions were not intended to bar recovery for intentional tortious conduct. Id. at 1051. The Third District's decision follows the analysis this Court **rejected** in Sibley. Once again,

the district court looked to the worker's compensation act as providing an exclusive remedy for misconduct in the rendition of medical care. Once again, the district court looked to a criminal statute as a sole basis for recourse where a carrier lied to and abused a claimant. Once again, the district court was incorrect, and its decision should be quashed.

There can be no meaningful distinction between editing a claimant's statement to leave out material facts so he can be deprived of benefits, and lying to the claimant directly or instructing him to lie. Both use false and fraudulent means to deprive the claimant of necessary medical care.

In 1985, Florida recognized the tort of intentional infliction of emotional distress – a tort which has long been applied to outrageous conduct by insurance carriers. "The combination of the unjustified assertion of power by one party," coupled with impotence on the part of the other "is one which should be viewed by a civilized community as outrageous," and **not** "as an indignity, annoyance or petty oppression for which the law affords no relief." Dominguez v. Equitable Life Assurance Society of U.S., 438 So. 2d 58, 59 (Fla. 3d DCA 1983), approved sub nom, Crawford & Co. v. Dominguez, 467 So. 2d 281 (Fla. 1985). The trial court, and Judge Shevin's dissent were both right in concluding that the Defendants outrageous conduct

here “far exceeds standards of humanity.”

Once this Court has jurisdiction, it may, if it so chooses, consider any other item affecting the case. Here, the District Court *sub silentio* dismissed Aguilera’s declaratory judgment act count. This was a constitutional attack on the statute itself, as unconstitutionally applied. It could not be barred by worker’s compensation immunity.

The District Court’s decision on the intentional infliction and declaratory judgment courts should be quashed, and the case remanded for further proceedings.

ARGUMENTS

I. A WORKERS COMPENSATION CARRIER AND ITS ADJUSTER ARE NOT IMMUNE FROM SUIT UNDER TURNER AND SIBLEY FOR INTENTIONAL, OUTRAGEOUS CONDUCT, THAT EXCEEDS THE STANDARDS OF DECENCY.

A. The History and Nature of the Tort

This Court first recognized the tort of intentional infliction of emotional distress, otherwise known as “outrage,” in Metropolitan Life Ins. Co. v. McCarson, 467 So. 2d 277 (Fla. 1985). McCarson and his dependent wife were insured under a group medical insurance policy with MetLife taken out by his employer. The following year, when Mrs. McCarson became incapacitated by Alzheimer’s disease, MetLife stopped paying benefits, claiming that her condition was preexisting. In the

ensuing coverage suit, MetLife was found liable for breach of contract and ordered to provide benefits until the policy lapsed or Mrs. McCarson became eligible for Medicare. It subsequently became necessary for Mrs. McCarson to receive round-the-clock nursing, but nursing care ceased when MetLife once again cutoff benefits, because it received no proof that Mrs. McCarson was ineligible for Medicare. As a result, Mrs. McCarson was removed from her home and placed in a total nursing care facility where her condition markedly deteriorated, and she died a few months later from a heart attack. Medical testing indicated that the heart attack was probably brought on by the stress of her new surroundings.

McCarson, as personal representative, sued MetLife for wrongful death, "on the theory [*inter alia*] that MetLife's failure to fulfill the terms of the contract had been a willful infliction of emotional distress upon Ms. McCarson which had thereby caused her death." Id. at 277. A jury awarded McCarson some $200,000 for his wife's emotional distress, as well as other damages, but the trial court struck the emotional distress award. The Fourth District Court of Appeal reinstated the award, and this Court accepted review to reconcile conflicting decisions of the various courts of appeal on the application and analysis of an intentional infliction claim under Restatement

(2d) of Torts, §46 (1965).

Section 46, of the Restatement (2d) "is concerned only with emotion distress which is inflicted intentionally or recklessly." Rest. (2d) of Torts, §46, Comment a. Entitled "Outrageous Conduct Causing Severe Emotional Distress" it provides that:

> One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

Rest. (2d) of Torts §46(1).

The comments to the section add that it does not extend to mere insults, or petty indignities. Instead:

> The cases thus far decided have found liability only where the Defendant's conduct has been extreme and outrageous. 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 when 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. Generally, the case is one in which the recitation of facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim**

> **"Outrageous!"**. (Id. at Comment d, emphasis added).

In McCarson, this Court readily accepted the tort and its Restatement definition. However, it deemed the facts insufficient to support the tort because the "insurance company according to the terms of the policy had the right to demand proof of ineligibility for Medicare." Metropolitan Life Ins. Co. v. McCarson, 467 So. 2d at 279.[4]

The same day that Metropolitan Life Ins. Co. v. McCarson, was decided, this Court also approved the Third District's decision in Dominguez v. Equitable Life Assurance Soc. of U.S., 438 So. 2d 58 (Fla. 3d DCA 1983), approved, 467 So. 2d 281 (Fla. 1985). Dominguez alleged that he obtained a disability policy from the Equitable in 1973,which was to provide $500. per month income during his lifetime, in the event of accidental total disability. Shortly after the policy issued, Dominguez was involved in an automobile accident, which caused him severe physical injuries, including eye injuries, and met the "total disability" definition of the policy. Equitable made disability

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[4] Justice Shaw dissented from the result, and would have approved the district court decision in its entirety. Recognizing that the question of whether MetLife's conduct rose to the level of outrage was fraught with difficulty, he concluded that "a jury, a trial judge, and a district court believed it did," and he would not substitute this Court's judgment for theirs. Id. at 280 (Shaw, J., concurring in part and dissenting in part).

payments for several years, but in August 1979, stopped making payments.

In April 1980 (or after the initial injury), the insurer sent an agent to Dominguez' home who "falsely represented to the Plaintiff that she had received a letter from the eye doctor saying that his eyes were okay now and that plaintiff was no longer disabled...." The agent attempted to coerce him into surrendering the policy. Dominguez v. Equitable Life Assurance Society, 438 So. 2d at 61. The insurer knew, at the time, that Dominguez was suffering from physical and mental disability. A relative of the plaintiff fortunately overheard the agent's conversation and successfully intervened to prevent the policy's surrender.

Dominguez sued his disability carrier for intentional infliction of emotional distress, but the trial court dismissed his complaint. The Third District reversed, recognizing that the tort "essentially involves the deliberate or reckless infliction of mental suffering on another, **even if unconnected to any other actionable wrong**." Id. at 59 (emphasis supplied). It added that "a cause of action for emotional distress brought about by outrageous conduct **lies notwithstanding the absence of another tort**." Id. at 60 (emphasis supplied). In language equally applicable here, Judge Daniel Pearson observed:

> The complaint alleges the L.L. Defendants to be not only in a position to affect the L.L. Plaintiff's interests, but actually having asserted their power by cutting off the plaintiff's disability payments without justification. It alleges further that the defendants were, as is obvious, aware of the plaintiff's disabilities and thus his susceptibility to emotional distress when they acted. This combination of the unjustified assertion of power by one party, and impotence of the other, **would, we think, be viewed by a civilized community as outrageous and not as an indignity, annoyance or petty oppression for which the law affords no relief...** Id. at 62. (emphasis added).

This Court had no hesitation in agreeing. See Crawford and Co. v. Dominguez, 467 So. 2d 281 (Fla. 1985).

Intentional infliction claims have long been applied to insurance carriers, in a wide variety of contexts. See e.g. Miller v. Mutual of Omaha Ins. Co., 235 So. 2d 33 (Fla. 1st DCA), cert. den., 238 So. 2d 428 (Fla. 1970) (where insurance agent obtained original policy from Plaintiff under false pretenses, when she was already ill, accused her of fraud, and she was worried sick and forced to return to the hospital, insurer's conduct was for the jury); World Ins. Co. v. Wright, 308 So. 2d 612 (Fla. 1st DCA 1975) (same for intentional infliction case based on disability insurer's threats and attempts to "buy up"

the policy)[5]; Estate of Morton v. U.S. Fidelity & Guar. Co., 460 So. 2d 526 (Fla. 4th DCA 1984) (Barkett, J.) ("This court has recognized that a cause of action can exist for outrageous conduct causing severe emotional distress arising from an insurer's failure to pay benefits"); Kaufman v. Mutual of Omaha Ins. Co., 681 So. 2d 747 (Fla. 3d DCA 1996) (insurer's act of rescinding child's major medical policy after incontestability period, based on alleged misrepresentations in pre-existing condition, when policy contained no definition of condition company claimed was pre-existing); Lubin v. Provident Life and Accident Ins. Co., 681 So. 2d 753 (Fla. 3d DCA 1996) (same); Dependable Life Ins. Co. v. Harris, 510 So. 2d 985 (Fla. 5th DCA 1987) (plaintiff was permanently disabled with a degenerative disease, and new claims representative told plaintiff he was a cheat and a fraud, and threatened to use her contacts at the social security administration to come after him for repayment, and to use its battery of attorneys to outlast any attorney he might hire to press his claims).

In **all** of these instances, a carrier used extraordinary measures, including misrepresentations, coercion and threats, in an unjustified assertion of power over an individual who was

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[5] *Cf.* Industrial Fire & Casualty Ins. Co. v. Romer, 432 So. 2d 66 (Fla. 4th DCA 1983), rev. den., 441 So. 2d 633 (Fla. 1983).

already ill – and ill-equipped to fight such measures. In **all** of these instances, the plaintiff stated a cognizable claim for the tort of intentional infliction of emotional distress or outrage.

B. The Tort in the Context of Workers Compensation Claims

Florida's Workers Compensation was intended to provide "a quick and efficient delivery of disability and medical benefits to an injured worker and to facilitate the worker's return to gainful re-employment at a reasonable cost to the employer." §440.015, Fla. Stat. (1999). Section 440.09(1), Fla. Stat. (1997) requires an employer to pay compensation or furnish benefits "if the employee suffers an accidental injury or death arising out of work performed in the course and scope of employment." In exchange for affording employees those benefits, an employer is shielded by statutory immunity from suit. §440.11, Fla. Stat. (1999). However, this Court "has recognized an intentional tort exception to the workers compensation statutory scheme .... [W]orkers compensation law does not protect an employer from liability for an intentional tort against an employer." Turner v. PCR, Inc., 754 So. 2d 683, 686-87 (Fla. 2000). Workers compensation immunity was never intended to shield a party from immunity for its own intentional

acts. Id. at 686-687; Byrd v. Richardson-Greenshields Securities, Inc., 552 So. 2d 1099 (Fla. 1989) (immunity rule did not bar claims for assault and battery, or intentional infliction of emotional distress arising out of sexual harassment).[6] The statute was likewise never intended to immunize workers compensation carriers for intentional tortious conduct **after** an accidental injury.

In Sibley v. Adjustco, Inc., 596 So. 2d 1048 (Fla. 1992), a case on point, Sibley was hospitalized from a heart attack, caused by unloading his truck. When Sibley was heavily sedated, an adjustor for Sibley's workers compensation carrier took a statement from him. Sibley sought and received benefits in a workers compensation proceeding when an Industrial claims judge ruled his injury was work-related. After reviewing the statement taken by the adjuster, the industrial claims judge then made a finding that it was not credible because Sibley was in weakened physical condition and unaware of his surroundings at the time. Moreover, the adjuster appeared to have edited the

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[6] For purposes of worker's compensation immunity, our courts have treated "employer and insurer" and "employer and carrier" interchangeably. See Carroll v. Zurich Ins. Co., 286 So. 2d 21, 22 (Fla. 1st DCA 1973), appeal dism., 297 So. 2d 568 (Fla. 1974); Sullivan v. Liberty Mut. Ins. Co., 367 So. 2d 658, 660 (Fla. 4th DCA), cert. den., 378 So. 2d 350 (Fla. 1979) ("the immunity from tort liability of an employer and its carrier are virtually identical").

statement to leave out all of the facts and circumstances giving rise to Sibley's heart attack.

Sibley subsequently sued the workers compensation carrier in circuit court for the acts of its adjuster, claiming that his statement was fraudulently edited to deprive him workers compensation benefits. The trial court dismissed Sibley's action, based on workers compensation immunity. The Second District affirmed, concluding that §440.37, Fla. Stat. provided Sibley's sole and exclusive remedy. Section 440.37 made it a third degree felony for any person to make false or misleading statements for the purpose of obtaining or denying workers compensation benefits, and *inter alia* prohibited the preparation of a statement containing false or misleading information material to the claim. This Court disagreed, holding that the interlocking provisions of the workers compensation act, including §440.37 "were not intended to bar the recovery for intentional tortious conduct...." Id. at 1050. Instead, "the legislature was providing an alternative cause of action and not eliminating a common law right of action for an intentional tort." Id. at 1051.

Section 440.105, Fla. Stat. (2001) enacted in 1994, is the statutory successor to section 440.37, repealed effective January 1, 1994. Ch. 93-4, §109 Laws of Florida. **Neither**

version of the statute is exclusive. Instead, the statute merely provides alternatives to available common law intentional tort remedies. Sibley v. Adjustco, Inc., 596 So. 2d at 1051.[7]

The Third District's Aguilera decision follows the analysis this Court discredited in Sibley, 596 So. 2d at 1050-51. Once again, the district court looked to the workers compensation act as providing a claimant's "exclusive remedy for misconduct in the rendition of medical care...". (S. App. 5). Once again, the district court looked to a criminal statute as the sole basis of recourse where the carrier lied to a claimant regarding available benefits, i.e., §440.105, Fla. Stats. (2000). (S. App. 7, n.2).

There can be no meaningful distinction between editing a claimant's statements, to leave out material facts, so that he can be deprived of benefits, Id. at 1049-51, and lying to the claimant directly about the benefits he has available. (S. App. 7). Both are "independent torts," not mere claims management decisions. Both use false and fraudulent means to deprive the claimant of necessary medical care, and concomitant medical

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[7] The difference between the statutes is that §440.37 authorized a private statutory cause of action, eliminated in §440.105, Fla. Stat. (2000). Sibley did not turn on the private right of action in §440.37, however, but on the litigant's retention of his right to sue at common law for intentional torts. (i.e., fraud).

benefits.

C. The Law in Other Jurisdictions

Other jurisdictions have split over whether the tort of outrage is barred by workers compensation immunity. In Coleman v. American Universal Ins. Co., 86 Wis. 2d 615, 273 N.W. 2d 220 (Wis. 1979), the insured sued its workers compensation carrier for bad faith, refusal to pay the claim and intentional infliction of emotional distress. The Wisconsin Supreme Court held that the intentional actions on the part of the carrier arose **after** the work related injury, and from a different relationship, between insurer and insured and was **not** barred by workers compensation exclusivity. As it observed, in language equally applicable here:

> [t]he event the alleged intentional and malicious withholding of compensation payments which caused the injury did not arise out of the employment but occurred long after the employment had ceased and **had its genesis in conduct by the insurer that arose not out of the employment but out of the contractual obligation of the insurer to pay**.
>
> **The injury for which remedy is sought in the instant case is the emotional distress and other harm caused by the Defendants intentional acts during the investigation** and course of payment of the claim. **This claimed injury was distinct in time and place from the original on the job physical injury which was subject to the compensation Act.** The injury for which recovery is

> sought in the present actions did not occur while the Plaintiff was employed or while he was performing services or growing out of an incidental to his employment. **As the Plaintiff repeatedly and correctly stresses in his brief, this action is not based on the original work-related injury, but on a second and separate injury resulting from the intentional acts of the insurer and its agents while investigating and paying the claim. The Act does not cover the alleged injury, and the exclusivity provision does not bar the claim.** Id. at 622-23 (emphasis added).

See also Hollman v. Liberty Mut. Ins. Co., 712 F.2d 1259, 1262 (8th Cir. 1983) (interpreting South Dakota law to allow a worker covered by the state worker's compensation action to assert a separate claim against the carrier for intentional torts committed during the processing and payment of the claim because "The weight of the case law clearly supports causes of action for such intentional torts and does not recognize exclusivity provisions of workers compensation statutes to be a bar to the action."); Reed v. Hartford Acc. & Indem. Co., 367 F. Supp. 134 (E.D. Pa. 1973) (carrier's action after agreement to pay benefits by *inter alia* filing false and fraudulent petition to terminate was not immunized by act); Carpentino v. Transport Ins. Co., 609 F. Supp. 556, 562 (D.Conn. 1985) ("[T]he Act should not be an impervious barrier, insulating a wrongdoer from the payment of just and fair damages for intentional tortious

acts only very tenuously related to workplace accidents."); Stafford v. Westchester Fire Ins. Co., 526 P. 2d 37, 43 (Alaska 1974), overruled on other grounds, Cooper v. Argonaut Ins. Co., 556 P.2d 525 (Alaska 1976); Travelers Ins. Co. v. Savio, 706 P. 2d 1258 (Colo. 1985); Pierce v. International Ins. Co. of Illinois, 671 A.2d 1361 (Del. 1996); Catron v. Tokio Marine Management, Inc., 90 Hawaii 407, 978 P.2d 845 (Hawaii 1999) (cause of action did not arise under workers compensation chapter, and was not immunized where, after carrier agreed to pay benefits arising out of work-related claim, Plaintiff received 87 harassing phone calls emanating from carrier); Senesac v. Employer's Vocational Resources Inc., 324 Ill. App. 3d 380, 754 N.E.2d. 363 (Ill. Ct. App. 2001); Tallman v. Hanssen, 427 N.W. 2d 868, 870 (Iowa 1988) (exclusivity principle "is limited to matters surrounding a job related injury and does not extend to subsequent dealings during which a tort may arise by reason of bad faith on the part of the insurer"); Gibson v. National Ben Franklin Ins. Co., 387 A. 2d 220 (Me. 1978) (complaint stated cause of action because serious mental injury was not caused by work-related injury, but by carrier's tortious acts after the fact); Southern Farm Bureau Cas. Ins. Co. v. Holland, 469 So. 2d 55 (Miss. 1984) (recognizing "majority view" permitting action for independent tort against carrier when it

intentionally refuses payment of a legitimate claim to force the plaintiff to buckle under from economic pressure); Broaddus v. Ferndale Fastner Division, 84 Mich. App. 593, 269 N.W. 2d 689, 692 (Mich. Ct. App. 1978) (cause of action lies where Plaintiff was seeking emotional injury damages as a result of carrier's action and not from original work-related physical injuries); Kaluza v. Home Ins. Co., 403 N.W. 2d 230, 236 (Minn. 1987) (Tort claims against insurer were not barred where the injuries claimed or damages sought did not arise out of and in the course of employment); Johnson v. First Union Corp., 128 N.C. App. 450, 496 S.E. 2d 1 (N.Ca. Ct. App. 1998); In re Certification of a Question of Law, 399 N.W. 2d 320 (S.Da. 1987) (exclusivity provision of workers compensation statute, did not immunize carrier for injuries from carriers' failure to pay claim without reasonable basis, after the fact); Aranda v. Insurance Co. of N. America, 748 S.W. 2d 210 (Tex. 1988) (based on special relationship between insured and workers compensation carrier); Anderson v. Continental Ins. Co., 85 Wis. 2d 675, 271 N.W. 2d 368 (Wis. 1978) (bad faith claim). *Cf*. See e.g. Deem v. Treadaway & Sons Painting & Wallcovering, Inc., 142 N.C. App. 472, 543 S.E. 2d 209 (N. Ca. Ct. App. 2001); Kuykendall v. Gulfstream Aerospace Technologies, Inc., 2000 OK 96, 66 P. 3d 374 (Okla. 2002); see also Annot, 8 A.L.R. 4th 902 (1981 & 2000

Supp.).

Alabama, which has a workers compensation immunity provision similar to Florida's,[8] adopted the tort of "outrage" in 1980, and applied it to workers compensation carriers in 1983. Garvin v. Shewbart, 442 So. 2d 80 (Ala. 1983). Noting that its workers compensation act was "designed to compensate those who are injured on the job and provides immunity from common law suits for those employers and carriers who come within the Act," the Alabama Supreme Court nevertheless concluded that:

> A suit seeking recovery under the tort of outrageous conduct does not seek compensation nor medical benefits for the original on-the-job injury. The connection with the physical injury that gave rise to the original worker's compensation claim is tenuous. The conduct giving rise to the tort of outrageous conduct in the context of this kind of case can be more accurately characterized as mental assault than as failure to pay compensation or medical benefits even though it may rise in a failure to pay context. **Conduct constituting the tort of outrageous conduct cannot reasonably be considered to be within the scope of the Act. When the employer or carrier's conduct crosses the line between mere failure to pay and intent to cause severe emotional distress, the cloak of immunity is removed.** Id. at 83 (emphasis added).[9]

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[8] See Ala. Code 1975, §25-5-53, amended Ala. Acts. 1992, No. 92-537, §13.

[9] Alabama adhered to immunity for **other** intentional torts, including fraud against workers compensation carriers, until

Alabama has allowed egregious cases to proceed against workers compensation carriers who claimed immunity. In Continental Cas. Ins. Co. v. McDonald, 567 So. 2d 1208 (Ala. 1990), a case on point, McDonald sustained a work related back injury in 1976. He filed a workers compensation action in 1978 against CNA. The disability portion of McDonald's claim was settled, and CNA remained liable for his medical expenses. All together, McDonald had five separate surgeries on has back. McDonald ultimately sued CNA for the tort of outrage, based on the following. McDonald asserted that to coerce him into settling for a fraction of his medical claim, CNA delayed payments to doctors, hospitals and pharmacists for unreasonable lengths of time, causing the hospital to threaten collection action and a pharmacy to refuse to provide further pain medication. McDonald "introduced a great deal of evidence from which the jury could have concluded that CNA engaged in a pattern of delays in order to cause distress to McDonald and pressure him into accepting a settlement." Id. at 1212. This included documentary evidence from CNA's own files.

A jury awarded McDonald $750,000 on his intentional

1989. See e.g. Waldon v. Hartford Ins. Group, 435 So. 2d 1271 (Ala. 1983); Garvin, supra; Moore v. Liberty Mutual Ins. Co., 468 So. 2d 122 (Ala. 1985). In 1989, these cases were **overruled**, and fraud actions allowed to proceed. See Lowman v. Piedmont Executive Shirt Mfg. Co., 547 So. 2d 90 (Ala. 1989).

infliction claim, and CNA appealed. On appeal, CNA argued *inter alia* that its handling of the claim did not amount to outrageous conduct, under §46 of the Restatement (2nd) of Torts. In contrast, McDonald urged comments e & f of the Restatement. McDonald asserted that CNA abused its power to affect his interests, and knew and took advantage of the fact that he was peculiarly susceptible to emotional distress because of his constant pain and his dependency on CNA for treatment.

The Alabama Supreme Court first addressed its affirmance of a summary judgment for the carrier in Garvin v. Shewbart, supra, noting that "there is clearly a threshold beyond which an insurance company's recalcitrance must go before it crosses into outrageous conduct." Continental Casualty Ins. Co. v. McDonald, 567 So. 2d at 1216. The Court then addressed the points made about CNA's power to affect McDonald's interest and his dependent condition.

Citing the "pervasive nature of the delays, the lack of any reasonable explanation for most of them," and the documentary evidence **from CNA's own records** that its goal was to coerce him to settle, the Supreme Court affirmed the judgment. Id. at 1220. It wrote:

> The jury was entitled to believe that CNA engaged in a deliberate effort to cause McDonald to suffer severe emotional distress

> in order to coerce him into accepting an unreasonably low lump-sum settlement that would drastically reduce CNA's liability for his medical expenses. The evidence supports a finding that CNA systematically withheld payments in order to cause McDonald anguish over the possibility of the cessation of medical treatments for his pain and thereby to cause him to accept a method of payment that would not subject him to CNA's "aggravation," as he called it. A jury could reasonably find from the evidence that such conduct was "beyond all possible bounds of decency, ... atrocious [c] and utterly intolerable in the civilized society." Inmon, at 365. Therefore the denial of CNA's motion for directed verdict and its post-trial motions was not error.

Id. at 1221. See Travelers Indemnity Co. of Illinois v. Griner, 809 So. 2d 808 (Ala. 2001) (tort of outrage against workers compensation carrier authorized $300,000 in compensatory and $200,000 in punitive damages, affirmed); but see ITT Speciality Risk Services, Inc. v. Barr, 842 So. 2d 638 (Ala. 2002) (refusal to authorize pain management specialist **alone** did not reach the threshold of "outrage" claim).

D. "Mere Delay" after Turner

In Sullivan v. Liberty Mutual Ins. Co., 367 So. 2d 658 (Fla. 4th DCA), cert. den., 378 So. 2d 350 (Fla. 1979), plaintiffs alleged that Mr. Sullivan sustained a work-related injury, and Liberty Mutual wrongfully withdrew its authorization for medical treatment. As a result, Sullivan eventually had his foot

amputated and sustained other injuries.

Sullivan filed suit against the workers compensation carrier "for wrongful failure to authorize necessary medical treatment." The trial court dismissed the action based on workers compensation immunity. In affirming, Judge (now Chief Justice) Anstead, was concerned that allowing the claim to proceed would undermine the defense, but concluded that "[i]t would appear ... the immunity granted under the statute was **not** intended to cover instances where a carrier intentionally harms the employee." However, in Sullivan "nowhere [was] it alleged that Liberty Mutual intentionally injured Sullivan." Id. at 660.

The Third District has since relied on Sullivan to bar all tort claims – even **intentional** tort claims – no matter how egregious. See e.g. Montes de Oca v. Orkin Exterminating Co., 692 So. 2d 257 (Fla. 3d DCA), rev. den., 699 So. 2d 1374 (Fla. 1997); Sheraton Key Largo v. Roca, 710 So. 2d 1016 (Fla. 3d DCA 1998). This point was not missed on Judge Cope, the author of Montes de Oca and Sheraton Key Largo. Subsequently, he felt compelled to observe that:

> [T]his writer does not agree with the assertion in Sheraton Key Largo (this court's earlier opinion regarding the codefendants) that the allegations in this case are purely an effort "to transmogrify a [garden variety] workers' compensation claim into an intentional tort...." 710 So. 2d at

> 1017. **Accepting for present purposes the Plaintiff's account, the allegations are that the defendant-selected physicians examined plaintiff and recommended emergency surgery; that the defendants wrongfully refused to authorize it for 13 months; that this refusal persisted for two months after the judge of compensation claims had ordered it; that the plaintiff suffered needlessly for months and the delay created a risk of further physical injury; and that as a result, plaintiff became clinically depressed, and was diagnosed as such. These facts, if established, would take the matter well beyond an ordinary coverage dispute**. 25 Fla. D157a.

Roca v. Sheraton Key Largo Resort, 25 Fla. D157A, 2000 WL 27539, n.1 (Fla. 3d DCA 2000) (voluntarily dismissed March 8th, 2000). He found "force to the plaintiffs arguments" that "the courts must fashion meaningful relief where there is a bad faith refusal to pay benefits," but was bound by his court's prior decisions. Id. at 27539.

In Turner v. PCR, Inc., 754 So. 2d at 689, this Court concluded that:

> Since the workers' compensation scheme is not intended to insulate employers from liability for intentional torts, and is not to be construed in favor of either the employer or the employee, **workers compensation should not affect the pleading or proof of an intentional tort. Therefore, an employee-plaintiff should not be held to a higher standard than any other plaintiff in a non-work-related intentional tort case**. (Emphasis added).

To recap the divergent lines of cases, including Florida cases, if the facts are egregious enough: (1) there is a cause of action for intentional infliction of emotional distress even against a workers compensation carrier; (2) an intentional infliction cause of action may lie even in the absence of another tort; and (3) worker's compensation "immunity" is not a bar to such action. After Turner, workers compensation immunity does not and "should not affect the pleading and proof of an intentional tort," including intentional infliction of emotional distress – the tort of outrage. The real issue, in this context, is whether the allegations and proof meet the burden of §46 of the Restatement (2nd) governing "extreme and outrageous" conduct, or merely consists of petty annoyances. In each and every instance, the trial court acts as the gatekeeper. See Restatement (2d) of Torts, §46, Comment h. "It is for the court to determine in the first instance, whether defendant's conduct may be reasonably regarded as so extreme and outrageous as to permit recovery." The trial court ably rose to the challenge here and determined that this case "far exceeds standards of humanity." (App. 64-66). The trial court was correct.

In the instant case, Aguilera has alleged that his initial work-related injuries hurt his back. However, **after** he was returned to work, and his workers compensation attorney sought

legal assistance, the Defendants engaged in a pattern of behavior which tortured the Plaintiff, and was done for no other purpose but the intentional one of inflicting injury. Plaintiff did **not** sustain emotional injury from his original work-related injuries – but from the carrier's **subsequent** actions. Succinctly stated, Defendants were notified on June 17, 1999 that Aguilera's health care was an emergency, because his urine had begun to smell like feces. Two doctors, including Defendant's own, reported that he would not return to work. Defendants' response was to cut off the Plaintiff's benefits, and prevent him from obtaining prescription medication. This was by no means a minor injury, but a major one requiring immediate emergent care. For ten months, feces ran through the Plaintiff's bladder, with infection unchecked by medication. Plaintiff's surgery, diagnosed as an emergency in June, 1999, was not authorized by Defendants until March 2000 -- some ten months later. By this time, at the Defendant's insistence, he had seen six separate doctors, including doctors in areas **outside** his area of complaint, had undergone a battery of painful tests specifically contraindicated by his condition, and the Defendant's adjuster had overruled its own medical staff's requests for critical treatment. That same medical staff even instructed the Plaintiff to lie to his attorney, who was working

to get him this treatment.

In the instant case, the trial court ruled that Aguilera met the hurdle and that defendants' conduct was outrageous. This Court should quash the Third District's decision. The Restatement, commentators and courts agree that outrageousness is more likely to be found where some relationship exists that gives the defendant actual or apparent authority over another to affect his interests. Lashley v. Bowman, 561 So. 2d 406, 409-10 (Fla. 5th DCA 1990). The combination of unjustified power and economic strength by Inservices, the impotence of Aguilera on the other, and the abuse of that relationship by Inservices at a time when Aguilera was in weakened physical condition should be viewed by a civilized society as outrageous. Dominguez v. Equitable Life Assur. Soc. of U.S., 438 So. 2d 58 (Fla. 3d DCA 1983), approved sub. nom, Crawford and Co. v. Dominguez, 467 So. 2d 281 (Fla. 1985); Dependable Life Ins. Co. v. Harris, 510 So. 2d 985, 988 (Fla. 5th DCA 1987).

In sum, the original panel majority, and Judge Shevin's dissent, got it right as a matter of law and sound public policy. Any alternative holding leaves the carrier "free to proceed and behave in any manner it desires." This cannot be the intent of the legislature.

II. THE DECLARATORY JUDGMENT COUNT, ATTACKING CONSTITUTIONALITY OF THE WORKER'S

COMPENSATION ACT, AS APPLIED, WAS NOT BARRED BY WORKERS COMPENSATION IMMUNITY

Once this Court has jurisdiction, it may, if it deems necessary to do so, consider any other issue that may affect the case. Trushin v. State, 425 So. 2d 1126, 1130 (Fla. 1982); Miami Garden's, Inc. v. Conway, 102 So. 2d 622 (Fla. 1958); Vance v. Bliss Properties, 109 Fla. 388, 149 So. 370 (Fla. 1933). This includes both preserved issues, Tillman v. State, 471 So. 2d 32, 34 (Fla. 1985), and issues which were not presented but which are fundamental to the case's resolution. Trushin v. State, 425 So. 2d at 1130.

In the instant case, Aguilera sought a declaratory judgment that the worker's compensation statute, as amended in 1994, was unconstitutional. Because the trial court denied defendants' motion to dismiss, it never considered the merits of Aguilera's claim. The district court's decision *sub silentio*, dismisses the constitutional attack. This cannot be justified by resort to worker's compensation immunity, because the essence of the claim is that the immunity statute is unconstitutional. This court has repeatedly held the act constitutional. See e.g. Mullarkey v. Florida Feed Mills, Inc., 268 So. 2d 363 (Fla. 1972), appeal dism., 411 U.S. 944, 93 S.Ct. 1923, 36 L.Ed. 2d 406 (1973). However, the statute has been amended multiple

times. Aguilera should have been left free to mount a constitutional attack.

CONCLUSION

The Third District's decision directing dismissal of the intentional infliction and constitutional claim should be quashed, and the case remanded to the trial court for further proceedings.

CERTIFICATE OF TYPE SIZE AND STYLE

Undersigned counsel certifies that the size and style of type used in this brief is 12 pt. Courier New.

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