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.
_____/

PETITIONERS' REPLY BRIEF ON THE MERITS

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

JURISDICTION[1]

The Respondents, Inservices, Inc., a workers compensation carrier, and Mippy Heath, its case manager, urge that jurisdiction was improvidently granted because the district court's decision here is consistent with Sibley vs. Adjustco, Inc., 596 So. 2d 1048 (Fla. 1992) and Turner v. PCR, Inc., 754 So. 2d 683 (Fla. 2000) (A.B. p. 31), n. 7). That is **not** the case.

In determining that workers compensation immunity barred Aguilera's intentional infliction claim, the district court looked at §440.105, Fla. Stat. (2000), which criminalizes and imposes administrative penalties for lies regarding available benefits. (S. App. 7, n. 2). Respondents carry that argument forward here, urging "First, if a carrier "lies" regarding available benefits, sections 440.105(1)(a) and (b)(1-2) make such statement a criminal offense and subjects a carrier to penalties," (A.B. p. 9) and second, "Such a result hardly means workers compensation carriers are free to behave in any manner they desire. There are sanctions and penalties under the Act that serve to punish and deter claims handling misconduct." (A.B. p.40).

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[1] All references are to the Appendix (App. __), Supplemental Appendix (S. App. __), and the Respondents' Answer Brief. (A.B. p. __).

In Sibley v. Adjustco, supra, this Court held that section 440.37 "provides only an alternative cause of action rather than [an] exclusive cause of action ..." and this statutory provision is "not intended to bar recovery for intentional tortious conduct." Section 440.37, Fla.Stat. (1989) is the statutory precursor to section 440.105, which the district court construed in a manner directly conflicting with Sibley.

Likewise in Turner v. PCR, Inc., 754 So.2d 683, 689 (Fla. 2000), this Court held that "the workers compensation scheme was not intended to insulate employers from liability for intentional torts" or "to create a shield for employers to block intentional tort suits at the summary judgment phase." Reasoning from the district court's decision here, respondents argue that "[C]arrier immunity under the act **includes immunity for intentional conduct**." (A.B. p. 11, emphasis added). These cases could not be more in conflict. Aguilera would thus return to the merits of this appeal.

ARGUMENTS

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

Aguilera has spent a great deal of time analyzing the nature of an intentional infliction claim, its application to insurance

carriers in a wide variety of contexts, and how other jurisdictions have treated the issue. In response, the carrier argues that its "immunity under the Act includes immunity for **intentional** conduct" (A.B. p. 11), and this Court is powerless to act. (A.B. p. 10, 11). It writes, "Whether it meets the liking of employees, employers **or courts**, the legislature has stated in section 440.11(4) that the carrier shall have no liability for a compensation claimant other than as provided in the Act. (A.B. p. 10, emphasis added). Aguilera begs to differ.

The workers compensation statute provides compensation for injury **by accident**. §440.09(1), Fla. Stat. (1999) provides:

> The employer shall pay compensation or furnish benefits required by this chapter if the employee suffers an **accidental** injury or death arising out of work performed in the course or scope of employment... .

By limiting the definition of injury to "accident", the statute **excludes** an employer's intentional acts from coverage. See Turner v. PCR, 754 So. 2d 683, 689 (Fla. 2000); Fisher v. Shenandoah Gen. Const. Co., 498 So. 2d 882, 884-85 (Fla. 1986) (Adkins, J., dissenting) ("Obviously, an intentional tort is never accidental"). A carrier's immunity is co-extensive with and cannot be broader than an employer's, since §440.11(4), Fla. Stat. (1999) adds that "Notwithstanding the provisions of

§624.155, the liability of a carrier to an employee or to anyone entitled to bring suit in the name of the employee **shall be as provided in this chapter**, which shall be exclusive and in place of all other liability." (Emphasis added). The liability of a carrier provided in this chapter is for accidental injury, not its **own** intentional acts. This is also demonstrated by subsection (3), which protects a carrier "for assisting the employer in carrying out the employer's rights and responsibilities under this chapter." §440.11(3), Fla. Sta. (1999).

Immunity can also be **lost** based on an ostensibly immune party's conduct, including misrepresentations to the insured regarding coverage. See e.g. Quality Shell Homes & Supply Co. v. Roley, 186 So. 2d 837 (Fla. 1st DCA 1966); Francoeur v. Pipers, Inc., 560 So. 2d 244 (Fla. 3d DCA 1990). The trial court denied Defendants' motion to dismiss on this ground as well, reasoning that:

> An additional factor must be considered. The defendants, at one point in this lengthy fight for medical help, decided that the illness suffered by the 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 Plaintiff was not entitled to those

benefits. (App. 66).

Respondents concede that "Fraud is the type of conduct that typically might satisfy the [intentional tort] standard," and "Sibley involved fraud on the part of the claims adjuster." (A.B. p. 29). They argue, nonetheless, that "a plaintiff must allege that the carrier took actions beyond those that it was privileged to take under the policy in adjusting the claim" and that Aguilera only pled actions "Inservices was entitled to take." (A.B. p. 34). If this Court believes that Inservices' adjuster was "entitled" to show up at the office of plaintiff's urologist, for a scheduled appointment, despite an agreement not to do so, and was "entitled" to instruct the plaintiff to lie to his workers compensation lawyer to cover up her presence, then this Court **should** affirm. If this Court agrees with Aguilera that the carrier was **not** so entitled, respondents' argument must fail. There is no meaningful distinction between editing a plaintiff's statement of claim, and lying to the plaintiff directly, and respondents' point to none. With circular logic, they argue only that "fraud is an independent tort, the instant claim is not." (A.B. p. 30). This is a conclusion, **not** a distinction.[2]

[2] Respondents' argument further highlights the problem with the District Court's decision. If lying to claimants or

Respondents point to Connolly v. Maryland Cas. Co., 849 F. 2d 525 (11th Cir.), reh. den., 861 F. 2d 1233 (11th Cir. 1988), cert. den., 489 U.S. 1083, 109 S.Ct. 1539, 103 L.Ed.2d 843 (1989) as a case involving "egregious facts," i.e., delay in payment to a quadriplegic. Connolly merely highlights the need for **this** Court to clarify the law. Under the Erie doctrine, a federal court sitting in diversity is required to apply the law as determined by the highest court of the state. See Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938); Lockard v. Equifax, Inc., 163 F. 3d 1259, 1265 (11th Cir. 1998). In the absence of some controlling decision of this Court, federal courts look to the decision of intermediate appellate courts and try to decide what **this** court will do. See CSX Transp. Inc. v. Trism Specialized Carriers, Inc., 182 F. 3d 788, 790 (11th Cir. 1999); Silverberg v. Paine, Webber, Jackson & Curtis, Inc., 710 F.2d 678, 690 (1983). Thus, in Connolly v. Maryland Casualty Co., 849 F.2d at 526-527, the Eleventh Circuit took its cue from district court rulings, pointing out that:

> In Florida, the exclusiveness of remedy provision precludes an injured employee's

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coaching them to lie is within a carrier's "privilege," what is next? Falsifying workers compensation records? Coaching doctors to lie or distort medical records? Extorting doctors to withhold treatment? The District Court's decision leaves the carrier free to do **anything** it chooses.

> spouse from recovery also. *See* *Coney v. Int'l Minerals & Chem. Corp.*, 425 So. 2d 171, 172 (Fla. 3rd DCA 1983). The cases reflect the existing law of Florida, even though Florida does recognize a cause of action for intentional infliction of emotional distress, *Metropolitan Life Ins. Co. v. McCarson*, 467 So. 2d 277 (Fla.1985), and three out of seven justices on the Florida Supreme Court have expressed support for the proposition that the Act is *not* the exclusive remedy of an employee against an employer, and presumably against its compensation carrier, who commits an intentional tort within the scope of employment. *See* *Lawton v. Alpine Engineered Products, Inc.*, 498 So. 2d 879, 881-82 (Fla. 1986) (Atkins, J., dissenting); *Fisher v. Shenandoah Gen'l Const. Co.*, 498 So. 2d 882, 884-88 (Fla. 1986) (Atkins, J., dissenting).

The Eleventh Circuit thus recognized that: (1) Florida recognizes a cause of action for intentional infliction of emotional distress; and (2) pre-Turner, justices of this Court had split over the application of workers compensation immunity to an intentional infliction claim. In the absence of a definitive decision from this Court, the Eleventh Circuit was duty-bound to apply district court decisions.

The carrier also heavily relies on HTP, Ltd. v. Lineas Aereas Costarricenses, S.A., 685 So. 2d 1238 (Fla. 1996), a case involving the "economic loss" rule. The "economic loss" rule has no application here. See e.g. Moransais v. Heathman, 744 So. 2d 973 (Fla. 1999). The doctrine is court created and

prohibits the extension of tort recovery where a product damages only itself, and there is **no personal injury** or other property damage. Id. at 980. Casa Clara Condominium Ass'n, Inc. v. Charley Toppino and Sons, Inc., 620 So. 2d 1244 (Fla. 1993) (same). Here, Plaintiff is suing for the intentional infliction of emotional distress and personal injury is at the heart of his claim.

The carrier also argues that "Neither allegations of fraud nor of an intent to coerce a settlement or otherwise deprive benefits are present at bar." (A.B. p. 29). Respondents ignore the procedural posture of this case, which arose when they appealed a non-final order **denying** their motion to dismiss the complaint. Fla.R.App.Proc. 9.130(a)(3)(c)(v).

Respondents would have this Court rule that Aguilera has **less** rights because he prevailed in the trial court. In the event Aguilera's complaint had been dismissed, he would have been allowed to amend to cure technical deficiencies, particularly where – as here – the facts support such allegations. See e.g., Fla.R.Civ.Proc. 1.190(a); Torrey v. Leesburg Regional Medical Center, 769 So. 2d 1040, 1044 n. 4 (Fla. 2000) (leave to amend should be liberally granted unless amendment privileged has been abused, there is prejudice to the opposing party or amendment would be futile); Adams v. Knabb

Turpentine Co., Inc., 435 So. 2d 944, 946 (Fla. 1st DCA 1983) (public policy of this state freely allows amendments to pleadings so causes may be resolved upon their merits). Based upon the facts, as detailed here, Aguilera could have easily and accurately amended his complaint to allege that the carrier's adjuster instructed him to lie in order to deprive him of benefits. Aguilera could have likewise explained that the carrier "blocked" his access to medication by phoning the pharmacy, and cancelling the prescriptions his doctors ordered. Such allegations neither "change the basic issue in the case" nor "materially vary the originally asserted grounds for relief." See Odom v. Canal Ins. Co., 582 So. 2d 1203, 1205 (Fla. 1st DCA 1991).

Respondents' real argument is not that Aguilera failed to state a cause of action, but that Aguilera could **never** state a cause of action. It urges that any claims against a carrier in a work related context be deemed "mere claims handling decisions" for which there is no redress. (A.B. pp. 25, 26, 29, 31). Long ago, this Court observed that, "The law guarantees every person a remedy when he has been wronged." Florida Public Utilities Co. v. Wester, 150 Fla. 378, 7 So. 2d 788, 790 (Fla. 1942). Aguilera submits that **his** remedy is an action for an "intentional tort" – the intentional infliction of emotional

distress.

II. THE DECLARATORY JUDGMENT COUNT, ATTACKING CONSTITUTIONALITY OF THE WORKERS COMPENSATION ACT, AS APPLIED, WAS NOT BARRED BY WORKERS COMPENSATION IMMUNITY.

The carrier cannot and does not urge that Aguilera's declaratory judgment claim (Count V) is barred by workers compensation immunity. (AB pp. 41-45). Instead, it asserts that Aguilera failed to mention Fla. Const. art. I, §21 in his complaint, (A.B. p. 43, n. 12), that he had little interest in litigating this issue, (I.B. p. 41), and that, in any event, the Worker's Compensation Act, §440.01, Fla. Stat. ***et. seq.*** has repeatedly been held constitutional. (A.B. p. 43).

These arguments miss the mark. First, contrary to suggestion, Aguilera's complaint specifically alleged that he was deprived of his right of access to the Courts. In Count V, Aguilera quoted directly from Fla. Const. article I, §21, which states that our courts "shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." (App. 17, ¶42). The carrier's entire argument is built on a typographical error, since Aguilera's complaint erroneously attributed the quote to Fla. Const. article I, section **22** – rather than article I, section 21 – the correct constitutional provision. In his very next paragraph,

Aguilera **also** cited his right to jury trial, protected by separate section 22, of the same constitutional article.[3] (App. 17, ¶43).

The balance of Aguilera's Count V likewise made it abundantly clear, moreover, that his constitutional claim was based *inter alia* on his deprivation of access to the courts. Aguilera asserted that:

> To the extent that the workers compensation statute purports to eliminate all common law claims against a workers compensation carrier, without providing any alternative, the provision of the statute is unconstitutional and violative of Plaintiff's foregoing constitutional rights. The result is to deprive injured workers such as Plaintiff a complete tort remedy where they have been harmed by subsequent malfeasance of an insurer.... (App. 17-18, ¶47).

Respondents also assert that "In their answer brief in the court below, Plaintiffs did not even cite the Florida Constitution, or make argument based upon the count in the amended complaint seeking a declaration that workers

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[3] Respondents were more candid with the district court, noting that "The allegations in Count V of Plaintiff's amended complaint **are somewhat confused.** He cites to Article I, section 22 of the Florida constitution. That provision deals with the right to jury trial." (Defendants I.B. p. 17, n.3, 3D01-687, emphasis added). Since the complaint also quoted Article I, section 21 *verbatim*, respondents clearly knew they were dealing with a typographical error.

compensation immunity is unconstitutional in this case." (I.B. p. 42). This ignores the procedural posture of this case, once again, and the fact that, as appellants in the court below, respondents raised appellate issues, while Aguilera, as appellee, merely responded to their arguments.

The record reflects that respondents served a motion to dismiss which attacked several counts of the Amended Complaint for failure to state a cause of action. Count V or the declaratory judgment count, was **not** one of these. (App. 26-29). Instead, respondents merely alleged, in blanket fashion, that **all** counts of the amended complaint were barred by workers compensation immunity (App. 26, ¶1) and the trial court denied the motion outright. (App. 64-65).

On appeal to the District Court, respondents claimed that **all** counts of the amended complaint were inextricably intertwined, but still made no argument that Count V failed to state a cause of action. (Initial Brief pp. 4-5, 17, 3D01-867). Aguilera contested the district court's jurisdiction to review the order refusing to dismiss Count V, and urged that the issue was premature. (Answer Brief pp. 8-9, 11). The District Court threw out the baby with the bath water when it ruled that this count was barred by "immunity" when, in fact, it raised an entirely separate constitutional issue.

Aguilera will not rehash the merits of his constitutional attack, which was treated at length in the amicus' brief. Suffice it to say, nonetheless, that in Kluger v. White, 281 So. 2d 1, 4 (Fla. 1973), this Court held that the legislature was "without power" to abolish a right for redress of a particular injury, without providing a reasonable alternative absent "an overpowering public necessity." While the workers compensation act has previously been deemed constitutional, it has been amended multiple times, most recently, effective on October 1, 2003. It was error to dismiss this count of Aguilera's complaint on appeal from an order denying a motion to dismiss, where Count V's sufficiency was never at issue, and the trial court did not rule on the merits.

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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