IN THE SUPREME COURT OF FLORIDA
Case No. SC07-2266

LIBERTY MUTUAL INSURANCE COMPANY
and NORMA J. PEELE,

Petitioners,

vs.

COLLEEN M. STEADMAN,

Respondent.

On Review from the Second District Court of Appeal
Case No. 2D04-1428

RESPONDENT'S BRIEF ON JURISDICTION

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SUMMARY OF ARGUMENT

The Second District Court's decision in *Liberty Mutual Insurance Co. v. Steadman*, 968 So. 2d 592 (Fla. 2d DCA 2007), is an accurate application of the law developed by this Court in *Aguilera v. Inservices, Inc.*, 905 So. 2d 84 (Fla. 2005). Because *Steadman* does not expressly and directly conflict with *Aguilera* or decisions out of the district courts, the Court should deny Petitioners' request for the Court to exercise jurisdiction in this case.

ARGUMENT OPPOSING THE EXERCISE OF JURISDICTION

Petitioners seek discretionary review of the Second District Court's decision in *Liberty Mutual Insurance Co. v. Steadman*, 968 So. 2d 592 (Fla. 2d DCA 2007), on the ground that it expressly and directly conflicts with this Court's opinion in *Aguilera v. Inservices, Inc.*, 905 So. 2d 84 (Fla. 2005), as well as decisions of the Third and Fourth District Courts. *See* Fla. R. App. P. 9.030(a)(2)(A)(iv). As the *Steadman* decision is actually an application of the law developed in *Aguilera* and completely consistent with that opinion, the Court should deny Petitioners' request for the Court to exercise jurisdiction in this case.

Upon remand from this Court, the Second District Court found that the conduct alleged in Plaintiff-Respondent Steadman's complaint is so outrageous in character that it states a cause of action for intentional infliction of emotional distress and, therefore, affirmed the trial court's denial of Defendants-Petitioners'

motion to dismiss the complaint. The heart of the Second District Court's opinion is as follows:

> Steadman's complaint lists an assortment of acts she contends were "intentional and outrageous," but the primary focus of her complaint is that Liberty Mutual and Peele delayed authorizing a double lung transplant even after the JCC had ordered Liberty Mutual to pay for it. Steadman alleges that Peele and Liberty Mutual's actions were "predicated on the fact that [Steadman] would die from her condition in a short time and the problem would go away" and that Peele and Liberty Mutual knew based on physician testimony that Steadman was not expected to survive until the following year. Steadman contends that based on that knowledge, Liberty Mutual intentionally denied and delayed payment for treatment in an effort to speed up her demise, to induce stress that it knew would be detrimental to her health, and to inflict emotional distress. Steadman alleges she suffered severe emotional distress and that the distress caused her physical condition to deteriorate.
>
> The real issue in this case is not whether Steadman's complaint contains all the elements of a claim for intentional infliction of emotional distress-it does-but whether the "pleaded facts ... ascend, or perhaps descend, to a level permitting us to say that the benchmarks enunciated in *Metropolitan* [*Life Insurance Co. v. McCarson*, 467 So. 2d 277 (Fla. 1985),] have been met." *Ponton* [*v. Scarfone*], 468 So. 2d [1009, 1011 (Fla. 2d DCA 1985)]. In making that evaluation, we find comment "f" to section 46 of the Restatement (Second) of Torts instructive because it explains how knowledge of a person's particular susceptibility to emotional distress is relevant to determining whether the conduct is sufficiently extreme and outrageous to constitute intentional infliction of emotional distress:
>
> f. The extreme and outrageous character of the conduct may arise from the actor's knowledge that the other is peculiarly susceptible to emotional distress, by reason of some physical or mental condition or peculiarity. The conduct may become heartless, flagrant, and outrageous when the actor proceeds in the face of such knowledge, where it would not be so if he did not know. It must be emphasized again, however, that major outrage is essential to the tort; and the

mere fact that the actor knows that the other will regard the conduct as insulting, or will have his feelings hurt, is not enough.

Viewed in isolation, the conduct Steadman has alleged with respect to the lung transplant is not so outrageous that it qualifies as "'atrocious, and utterly intolerable in a civilized community.'" *See Metropolitan*, 467 So. 2d at 279 (quoting Restatement (Second) of Torts, § 46 cmt. d). However, paired with her specific allegation that Liberty Mutual and Peele knew, based on testimony from Steadman's physicians, that she had a very limited life expectancy, and further considering that Steadman was well aware that the clock was ticking and that the additional emotional distress caused by the delay could well hasten her demise, we conclude that the conduct falls within the ambit of comment "f" of section 46. Further, comment "e" explains that the unequal position of the parties in a relationship, where one asserts and has the power to affect the interests of the other, may also supply the heightened degree of outrageousness required for a claim of intentional infliction of emotional distress. *See* Restatement (Second) of Torts, § 46 cmt. e. Liberty Mutual was in such a position in relation to Steadman. Finally, accepting the allegations in the complaint as true, Liberty Mutual's delay was wholly unjustified because the issue of Steadman's entitlement to the lung transplant had been litigated, and the JCC had ordered Liberty Mutual to authorize the transplant. *See* [*Dependable Life Ins. Co. v.*] *Harris*, 510 So. 2d [985, 989 (Fla. 5th DCA 1987)] (holding that the insured sufficiently alleged a cause of action for intentional infliction of emotional distress where the insurer rejected the insured's claim for disability payments without any justification and where coverage had been previously determined to exist). *Compare Metropolitan*, 467 So. 2d at 279 (holding that the insured failed to allege a cause of action for intentional infliction of emotional distress where the insurer asserted its "legal rights in a legally permissible way" by withholding benefits until the insured provided certain information in accordance with the policy).

Accordingly, we conclude that the conduct alleged in Steadman's complaint is "'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency'" and thus meets the standard adopted in *Metropolitan*, 467 So. 2d at 278-79 (quoting Restatement (Second) of Torts, § 46 cmt. d). We affirm the trial

> court's denial of Liberty Mutual and Peele's motion to dismiss Steadman's complaint, and we remand for further proceedings.

Liberty Mut. Ins. Co. v. Steadman, 968 So. 2d 592, 595-96 (Fla. 2d DCA 2007).

This decision is completely in line with this Court's opinion in *Aguilera v. Inservices, Inc.*, 905 So. 2d 84, 93 (Fla. 2005), which "reaffirm[ed] that the workers' compensation legislation does immunize an insurance carrier for mere negligent conduct, simple bad faith, and minor delays in payment, but does not afford blanket immunity for all conduct during the claim process, particularly the insurance carrier's intentional tortious conduct. . . ." According to Petitioners, however, this Court held in *Aguilera* that "mere allegations that the carrier had intentionally delayed payment [do] not state a tort independent of the claims handling process, even if the complaint characterize[s] the delay as outrageous, intentional, and in bad faith." (Petitioners' Brief on Jurisdiction, p. 1). Petitioners ask the Court to accept review in this case so that it may make clear that *Aguilera* requires that "some sort of affirmative misconduct beyond the mere denial or delay of medical benefits must be alleged to overcome the statutory immunity." (Petitioners' Brief on Jurisdiction, p. 9).

Contrary to Petitioners' assertions, a close reading of *Aguilera* demonstrates that while a *mere* or *minor* delay in payment or claims handling does not rise to the level of an independent tort falling outside of the immunity provided by the workers' compensation statute, *see* 905 So. 2d at 91 ("[m]inor delays in payments,

and conduct amounting to simple bad faith in claim handling procedures"); *id*. ("mere delay of payments or simple bad faith"); *id*. at 92 ("employees are not permitted to simply transform a simple delay in payments into an actionable tort"); *id*. at 93 ("simple bad faith, and minor delays in payment"), behavior, including delays that are more than minor, that amounts to conduct that actually exacerbates the situation of the insured by causing injury in addition to that incurred at the workplace does fall outside the statutory immunity. *See id*. at 97; *see also id*. at 93-94 ("[I]f an insurance carrier engages in outrageous actions and conduct that constitutes an intentional tortious act while processing the claim beyond mere short delays in payment and simple bad faith, the carrier is not cloaked with a shield of immunity flowing from the workers' compensation provisions."); *id*. at 92 ("complaint specifically alleges harm caused subsequent to and distinct from the original workplace injury"); *id*. at 97 ("the allegations reflect individuals using the power of the insurance carrier and its position of authority to affirmatively inflict damage upon [Plaintiff] separate from and in addition to the initial workplace injury").

As found by the Second District, the facts alleged by Respondent Steadman go far beyond the *mere* delay of medical benefits or *minor* delay in the claims process. Mrs. Steadman alleged that Petitioners failed to authorize that she receive a double lung transplant until nine months after it was court-ordered to provide the

surgery, *Liberty Mut. Ins. Co. v. Steadman*, 895 So. 2d 434, 435 (Fla. 2d DCA 2005), and that Petitioners, who "knew based on physician testimony that Steadman was not expected to survive until the following year," acted with the intention that Mrs. Steadman's health would deteriorate during this period and that she would die, eliminating the need for the expensive surgery. *Liberty Mut. Ins. Co. v. Steadman*, 968 So. 2d 592, 595 (Fla. 2d DCA 2007) (emphasis added).

The Second District determined that this calculated delay, combined with Mrs. Steadman's fragile emotional and physical condition, of which Petitioners were intimately aware, and the unequal position of the parties were enough to make the Petitioners' alleged conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency." *Id*. at 596. Clearly, this is not a case of mere delay in the claims process as Petitioners have tried to paint it. The Second District recognized as much when it denied Petitioners' motion to certify a question of great public importance, which Petitioners' based on this same "mere delay" argument. Petitioners' actions in failing to authorize the medically-necessary lung transplant for nearly a year after being court-ordered to do so, when it knew that Mrs. Steadman's life depended on the surgery, caused Mrs. Steadman injuries subsequent to and distinct from the workplace injuries she sustained and amounted to much more than a short delay in payment or simple bad faith—Petitioners' alleged conduct constitutes the tort of intentional infliction of

emotional distress. In fact, this conduct is very similar to what this Court found to be intentional misconduct in *Aguilera*:

> Aguilera specifically alleged in his amended complaint that the insurance carrier "did everything in [its] power to block medical treatment that it had actual notice [Aguilera] needed, and by doing so recklessly endangered [Aguilera's] life, and *engaged in a pattern of action substantially certain to bring about his death*. . . ." Aguilera's allegations clearly do not involve a mere delay in payments or simple bad faith, but, at a minimum, allege intentional misconduct that was substantially certain to harm Aguilera. The conduct alleged by Aguilera is, most certainly, sufficient to establish an independent tort.

Aguilera, 905 So. 2d at 96.

Petitioners contend that if the Second District's decision in *Steadman* is allowed to stand, then it will be "a simple matter in every case to circumvent . . . immunity by alleging that the denial of healthcare was intentionally designed to harm the plaintiff" thereby "rendering meaningless the immunity conferred by statute." (Petitioners' Brief on Jurisdiction, p. 2). Not only does Petitioners' contention minimize the allegations made in Mrs. Steadman's complaint, which, as demonstrated above, clearly rise to the level of an intentional tort, it minimizes the ability of Florida courts to intelligently review such allegations. This Court rejected a similar argument in *Aguilera* when it stated that it is "confident that Florida courts have been and will continue to be able to analyze an employee's allegations and ascertain whether the allegations amount to a mere delay in

payments, simple bad faith, or truly rise to the level of a separate and independent intentional tort." 905 So. 2d at 92.

The ability of Florida courts to aptly conduct this analysis is demonstrated by the district court opinions cited by Petitioners, none of which are in express and direct conflict with *Steadman*. For instance, in *Ingraham v. Travelers Indemnity Co.*, 925 So. 2d 377, 378 (Fla. 3d DCA 2006), the plaintiff was suffering from laryngitis, which he claimed to have contracted as a result of his job-related duty to respond to customer telephone inquiries. He filed an action for bad faith, in which he failed to make any allegations of outrageous conduct on behalf of the insurer, much less claim that he suffered an injury separate and apart from the original workplace injury as a result of the insurer's conduct. *See id*. at 378-79. Clearly, the facts alleged in *Ingraham* do not rise to the level of the allegations made by the Respondent here to support her claim for intentional infliction of emotional distress, the viability of which "is highly fact-dependent and turns on the sum of the allegations in the specific case at bar." *Johnson v. Thigpen*, 788 So. 2d 410, 413 (Fla. 1st DCA 2001) (citing *Watson v. Bally Mfg. Corp.*, 844 F. Supp. 1533, 1537 (S.D. Fla. 1993)).

In *Protegrity Services, Inc. v. Vaccaro*, 909 So. 2d 445, 447-48 (Fla. 4th DCA 2005), on the other hand, the court found the plaintiff "claim[ed] that the insurance carrier intentionally injured her in the process of administering benefits

[and] specifically allege[d] harm caused subsequent to and distinct from the original workplace injury." While the plaintiff's allegations did include some acts of misconduct by the insurer that went beyond the denial or delay of medical benefits, the court did not ignore plaintiff's allegations regarding delay and denial or state that such allegations in and of themselves would have been insufficient to take the insurer's conduct outside the statutory immunity. *See id*. at 446-47. The court in that case did what every court must do in this type of case—examine the facts as alleged in the complaint and determine whether the sum of the allegations, taken as true and viewed in the light most favorable to the plaintiff, are sufficient to state an action for a separate and independent intentional tort *See id*. at 448; *Aguilera*, 905 So. 2d at 92. And this is exactly what the Second District did in *Steadman*.

In asking the Court to exercise discretionary review in this case, Petitioners are seeking a ruling that no matter how long or egregious the delay in the provision of medical benefits or in the claims process, and no matter the effect of the delay, that such delay will never amount to an independent action that falls outside the statutory workers' compensation immunity. This is not the law enunciated by this Court in *Aguilera* or any other court in Florida. In fact, this view was essentially rejected by this Court in *Aguilera* when it stated, "we reject the notion and premise of the Third District . . . that an independent tort in this context can never exist

within the claims administration process and that for an independent claim to have validity, it must be an act totally separate and apart from the process itself." *Aguilera*, 905 So. 2d at 93.

As Petitioners have failed to demonstrate that the Second District's *Steadman* decision is in express and direct conflict with this Court's opinion in *Aguilera v. Inservices, Inc.*, 905 So. 2d 84 (Fla. 2005), or the decisions Petitioners cite out of the Third and Fourth District Courts, this Court should decline to exercise jurisdiction in this case.

CONCLUSION

Petitioners have failed to demonstrate that the Second District's decision in *Liberty Mutual Insurance Co. v. Steadman*, 968 So. 2d 592, 595 (Fla. 2d DCA 2007), is in express and direct conflict with this Court's opinion in *Aguilera v. Inservices, Inc.*, 905 So. 2d 84 (Fla. 2005), or the decisions Petitioners cite out of the Third and Fourth District Courts. This Court should, therefore, decline to exercise jurisdiction in this case.

Dated: January 14, 2008

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the foregoing Respondent's Brief on Jurisdiction were served by US Mail, postage prepaid, this 14th day of January, 2008, upon: Matthew D. Valdes, Esq., Matthew D. Valdes, P.A., P.O. Box 746, Windermere, Florida, 34786; Steven L. Brannock and Maegen P. Luka, Holland & Knight, LLP, P.O. Box 1288, Tampa, FL 33601-1288; and Chris N. Kolos, Holland & Knight, LLP, P.O. Box 1526, Orlando, FL 32802-1526.

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CERTIFICATE OF TYPEFACE COMPLIANCE

The undersigned hereby certifies that Respondent's Brief on Jurisdiction is typed in 14 point Times New Roman font in compliance with Florida Rule of Appellate Procedure 9.210.

By:_____
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