IN THE SUPREME COURT OF FLORIDA

WALTER D. CHAMPION, as Personal Representative of the Estate of JOYCE CAROLINE CHAMPION, deceased,

Petitioners,

vs.

ROY LEE GRAY, JR.: ROY L. GRAY; GLADYS GRAY; DIXIE INSURANCE CO., etc.,; and FLORIDA FARM BUREAU CASUALTY INSURANCE COMPANY, etc.,

Respondents,

Case No. 62, 830

CERTIFIED FROM THE
DISTRICT COURT OF APPEAL OF FLORIDA
FIFTH DISTRICT

BRIEF OF AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

Joseph W. Little
3731 N.W. 13th Place
Gainesville, FL 32605
(904) 392-2211

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INTEREST OF AMICUS CURIAE

The amicus curiae is a faculty member at the University of Florida College of Law where he teaches and studies the law of torts. Amicus curiae deems the resolution of the issue before the court to be of great importance to the proper development of the law in Florida and, hence, to the welfare of the people of the state. Amicus believes this brief may augment those of the parties in properly illuminating the issues addressed to this Court.

REQUESTED ORDER OF THE COURT

Amicus curiae respectfully requests this honorable court to answer the certified question in the affirmative: the "impact rule" should be abrogated and general principles of negligence should hereafter be applied to litigate courses of action arising out of negligent infliction of emotional distress. The following brief discusses practical policy restraints that might be imposed by the Court in its opinion.

Amicus curiae takes no position on the question as to whether the impact rule should be abrogated in the instant case.

STATEMENT OF THE CASE AND THE FACTS

Amicus curiae accepts the facts as reported in Champion v. Gray, 420 So.2d 348 (Fla. App. 1982).

Specifically, the issue posed to this Court is:

> Should Florida abrogate the "Impact Rule" and allow recovery for the physical consequences resulting from mental or emotional stress caused by defendant's negligence in the absence of physical impact upon the plaintiff?

ARGUMENT

THE IMPACT RULE REPRESENTS A RESTRAINT ON LIABILITY THAT PRIMARILY REFLECTS THE DOUBTS OF COURTS AS TO THE CAPACITY OF THE ADJUDICATIVE SYSTEM TO DISTINGUISH GENUINE FROM SHAM CLAIMS, TO ASSESS CAUSATION, AND TO COPE WITH A POTENTIALLY LARGE NUMBER OF LAWSUITS. IT DOES NOT REFLECT A FUNDAMENTAL DOCTRINAL BAR. TO IMPOSE LIABILITY FOR NEGLIGENTLY INFLICTED EMOTIONAL DISTRESS IS NOT OUT OF PROPORTION TO THE MORAL CULPABILITY OF NEGLIGENT BEHAVIOR. THERE IS NO EVIDENCE THAT THE FEARS EXPRESSED IN THE ADOPTION OF THE IMPACT RULE HAVE MATERIALIZED IN THOSE JURISDICTIONS THAT HAVE ABROGATED IT.

The law of negligence is relatively young, crystallizing from doctrines of trespass and trespass on the case in the mid-nineteenth century. It is now uniformly accepted that the elements of a plaintiff's cause of action are duty, breach, causation, including cause-in-fact and proximate causation, and damages. It is also uniformly agreed that the question of duty is always one of law to be decided by the judges; whereas the other questions are for the fact finders except where the evidence is so compelling that reasonable people could not disagree on the proper outcome.

Rules such as the "impact rule" may be referred to as no-duty rules. They cut off litigation at the outset: as soon as it becomes clear in the pleadings or evidence that a no-duty situation is involved the courts must dismiss the actions as a matter of law. Thus, no-duty rules are conservative; they prevent waste of judicial resources and they also avoid costs to the litigants. But no-duty rules are not necessarily just. Some preclude liability in circumstances wherein no strong ground can now be made for preclusion. For this reason, various no-duty rules have undergone steady erosion in Florida and elsewhere in recent years, impelling the law of torts toward a general duty posture that is more in keeping with the basic theory of requiring compensation for negligently inflicted wrongs. Among the no-duty rules that have been eroded or abrogated in Florida are:

no-duty as to the death of a person (abrogated by wrongful death statutes); no-duty as to harm caused by defective products in the absence of privity (abrogated in part by West v. Caterpillar Tractor Company, Inc., and other cases); no-duty as to negligent misrepresentation (eroded by Miles v. Kavanaugh and other cases); no duty as to harm done a fetus who is later born alive (abrogated by Stern v. Miller); and others. Gilliam v. Stewart's adherence to the "impact rule" is a notable exception to this trend.

The reasons the no-duty rules developed in the law of negligence are varied. In England doctrinal considerations were most prominent. Frequently, the fact that no such recovery had ever before been permitted was cited as a reason to deny recovery. Once a court decided a case on that grounds, that case itself became precedent for the no-duty rule. Another reason often stated was remoteness in the sense that the injury complained of was too tenuous or farfetched to have been foreseen. A third reason was to protect a competing status interests. This supports the rule that occupiers of land have no duty to trespassers. Still another reason was the belief that a non-negligence cause of action occupied the field. Thus, the law of deceit squeezed out recovery for negligent misrepresentation for a century or more. In general, the older the basis for the no-duty rule and the closer tied to some competing status interest, the longer it has endured in English law.

By contrast, except where American courts merely imported English common law, American no-duty rules are more often supported by policy considerations having to do with fair administration of justice. Thus, concern about fraudulent and sham claims, inability to ascertain causation, and fear of an avalanche of claims all influenced American courts much more than did doctrinal concerns.

The impact no-duty rule is one of the most recent in the law and has no attachment to a competing property interest. Its origin is frequently laid to Victoria Railways Commissioner v. Coultas an 1888 decision of the Privy Council. The reasons given for rejecting liability were somewhat unusual for an English court in that they relied primarily on policy, including fear of imaginary claims and belief that the injury was simply too remote to be reasonably foreseeable. In the United States, although there was some precedent against throwing up a no-duty rule as to emotional injury, Mitchell v. Rochester Ry Co. an 1896 opinion of the New York Court of Appeal, turned the law to the conservative "no-duty" mold upon recitation of the various policy concerns mentioned above. Thus, the emotional injury without physical impact no-duty rule was imported into American law.

Almost as soon as it was announced, this no-duty rule began to erode in England. In the 1901, Dulieu v. White & Sons adopted the rule referred to in some American jurisdictions as the "zone of danger" rule. One could recover for emotional distress without impact if one were within the zone of danger. In 1935 the Wisconsin case of Waube v. Warrington adopted the zone of danger rule and it thereafter became a credible thread in American law. Finally in 1968, the California supreme court in Dillion v. Legg wholly repudiated the rule and held that ordinary principles of negligence should apply, subject only to the following guidelines to be employed by a court in deciding whether a duty was owed on a particular set of facts.

> (1) Whether the plaintiff was located near the scene of the accident as contrasted with one who was far away from it. (2) Whether the shock resulted from a direct emotional impact upon plaintiff from sensory and contemporaneous observance of the accident, as contrasted with learning from others after its occurence. (3) Whether the plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.

Dillion v. Legg, 441 P.2d at 920.

Since, Dillion a great number of American jurisdictions have jettisoned the impact rule. Florida is perhaps the only state to reaffirm it.

The primary purpose of this brief is to call to the mind of the Court developments in England, the home of the no-duty rule. Except for Mount Isa Mines Ltd. v. Pusey, I will omit reference to the dozen or so cases in England and in Commonwealth nations that had gradually whittled away at the rule. In Mount Isa, a 1970 case, the High Court of Australia, held simply that recovery for negligently inflicted emotional harm depended upon the foreseeability of harm of that sort. This is pure negligence principle with no holds barred. Although the Dillion v. Legg was more influential in the judgments, Mount Isa afforded a Commonwealth platform for the giant step taken by the Judicial Committee of the House of Lords in the 1982 case of McLoughlin v. O'Brian & Others.

In McLoughlin a mother learned of an automobile crash suffered by her family an hour or two after it occurred. She rushed to a hospital and found her husband and two children in grievous condition and a third child dead. She brought an action for the emotional injury suffered by herself, but the trial judge and a majority of the Court of Appeal judges deemed the facts to be outside the scope of duty acknowledged in English law.

A majority of three of the House of Lords completely abrogated the no-duty rule, holding that the general principles of negligence should be applied on a case by case basis to determine whether duty existed. According to the majority, various guidelines such as those of Dillion v. Legg might be considered by the judges in deciding the duty question but they must not be used to "freeze" the law in a new rigid posture, as would be done if the guidelines were deemed to be the absolute limit of

liability. Also rejected was the idea that to hold a defendant liable for emotional distress without impact extended beyond the scope of moral responsibility. If this were so, the same argument would deny recovery for emotional distress when there was impact, which was permitted in the law. Lord Bridge of Harwich summed up the majority approach, when he said,"... if asked where (liability) is to stop, I should answer, in an adaptation of the language of Lord Wright and Stephenson, L.J., 'where in the particular case the good sense of the judge, enlightened by progressive awareness of mental illness, decides'." This is pure negligence principle.

Two minority judges would extend coverage to include Mrs. McLaughlin but differed from the majority in that they would impose hard and fast policy restraints. Four reasons were offered in support of restraint: first, fear of proliferation of claims, fraud, and "the establishment of an industry of lawyers and psychiatrists who will formulate a claim for nervous shock damages" in many highway crash claims; liability out of proportion to moral wrongdoing; increased evidential difficulties and lengthen litigation; and, invasion of legislative prerogatives. To avoid these pitfalls, Lords Wilberforce and Edmund-Davies would impose guidelines such as those in Dillion v. Legg as absolute limits. No liability ever would be permitted upon merely hearing of a disaster; and, liability would be limited to those who actually saw or heard the disaster, except for those who could reasonably be expected to come upon the "aftermath," such as a parent or spouse.

The remarkable point about McLoughlin is that no judge would have applied either the impact rule or the zone of danger rule. The only question was whether policy considerations such as those enunciated in Dillion v. Legg should operate as firm limits to duty or merely as

factors to consider in ascertaining duty in a particular case. It is respectfully submitted that this, too, is the only issue seriously to be considered by this honorable Court. The day has come to repudiate the impact rule and supplant it with one or the other of the positions advocated by the two sides in McLoughlin.

The Court should be mindful of several factors that may make the minority position of Lord Wilberforce and Edmund-Davis more needed in Florida than it is in England. First, in England juries are not used in negligence cases. Therefore, there is less concern that cases that go to trial will result in damages out of proportion to the wrong done. Second, and in the same vein, in England the quantum of general damages is more constrained by convention and judicial control than in this country. Third, in England, contrary to here, lawyer fees can be taxed customarily as a part of the costs of the prevailing party. Thus, the temptation of litigants to bring an improbable action is more muted than in this country. Fourth, trial judges in England are appointed, unlike those in Florida, and have a greater history of detachment from the hue and cry and attachment to the law. Therefore, it seems possible that English judges without a firm restraint will be more prone to decide on particular facts that no-duty is owed than would Florida counterparts. Without a uniformly firm approach by trial court judges a pattern could develop in which some would be willing to dismiss unmeritorious claims on no-duty grounds whereas their more timorous brethren might permit juries to make the decisions on proximate causation grounds. This, of course, would raise difficult issues of the appropriate scope of judicial review.

In sum, amicus curiae submits that the minority position of McLoughlin be adopted with the following addition. If other factors present in a particular case strongly indicate that emotional injury to the particular plaintiff was reasonably foreseeable, then the trial judge might find a duty was owed despite the fact that the McLoughlin criteria were not satisfied. Trial court judges should be admonished to describe the factors with care and be reminded that a jury might still find an absence of proximate causation upon consideration of the same facts.

CONCLUSION

A. Amicus Curiae respectfully prays this honorable Court to enter an order

1. Answering the certified question in the affirmative, thereby repudiating Gilliam v. Stewart.
2. Holding that general principles of negligence hereafter apply to negligently inflicted emotional distress. The fundamental criterion should be that the particular emotional injury was foreseeable, with the limitation that the plaintiff must have been in such close proximity to the disaster that caused the emotional distress, as to have seen or heard it, except for people who might reasonably be foreseen to come upon the "aftermath," such as parents, spouses and co-employees (the latter referring to the facts of Mount Isa Mines).
3. That the limitation in 2 is not controlling in the presence of a clearly articulable factual basis to make the injury reasonably foreseeable in the particular case.
4. That juries might still be permitted to find no proximate causation on the facts of a particular case.

B. Amicus curiae takes no position on whether the new rule should be applied in the instant case.

Respectfully submitted:

Joseph W. Little
Attorney for Amicus Curiae
3731 N.W. 13th Place
Gainesville, Florida 32605

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing motion and brief was served by mail this 3rd day of December, 1982, upon the following:

Frank McClung, Esq.
P.O. Box 877
Brooksville, FL 33512

Chris W. Altenbernd, Esq.
P.O. Box 1438
Tampa, FL 33601

Gary M. Witter, Esq.
P.O. Box 2111
Tampa, FL 33601

Joseph W. Little
Attorney for Amicus Curiae
3731 N.W. 13th Place
Gainesville, FL 32605
904 - 392-2211