IN THE SUPREME COURT OF FLORIDA

CASE NO. 62-830

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

Petitioner,

v.

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

Respondents.

BRIEF OF RESPONDENTS, ROY LEE GRAY, JR. ET. AL, IN RESPONSE TO QUESTION POSED BY COURT IN ORDER OF JUNE 5, 1985

CERTIFIED FROM THE DISTRICT COURT OF APPEAL OF FLORIDA
FIFTH DISTRICT

FRANK C. McCLUNG, ESQUIRE
Post Office Box 877
Brooksville, Florida 33512
904/796-5128
Attorney for Petitioner

CHRIS W. ALTENBERND, ESQUIRE
Post Office Box 1438
Tampa, Florida 33601
Attorney for Respondent,
Florida Farm Bureau
Casualty Insurance Co.

GARY M. WITTERS, ESQUIRE
ALLEN, DELL, FRANK & TRINKLE
Post Office Box 2111
Tampa, Florida 33601
813/223-5351
Attorneys for Respondents,
Roy Lee Gray, Jr.,
Roy L. Gray,
Gladys Gray and
Dixie Insurance Co.

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QUESTION

Is the cause of action in this case derivative or direct?

ARGUMENT

THE NEW CAUSE OF ACTION CREATED BY THE COURT IN THIS CASE IS DERIVATIVE OF THE CLAIM OF THE IMPACTED PLAINTIFF.

There is a paucity of authority which directly concerns this particular issue. There obviously are no Florida decisions on point since this cause of action just was created by the Court. The cases decided in other jurisdictions regarding this question are few, and the Court already is familiar with these cases. See e.g. Tobin v. Grossman, 24 N.Y. 2d 609, 301 N.Y.S. 2d 554, 249 N.E. 2d 419 (N.Y. 1969); Dillon v. Legg, 68 Cal.2d 728, 69 Cal. Rptr. 72, 441 P.2d 912 (Cal. 1968); Stradler v. Cross, 295 N.W. 2d 552 (Minn. 1980); and Portee v. Jaffee, 84 N.Y. 88, 417 A.2d 521 (N.J. 1980) ("Portee").

The basic issue involved in this matter is whether the negligence of the impact plaintiff (i.e., the party physically injured by the defendant's direct actions) will be imputed to the non-impact plaintiff who suffered a psychic injury occasioned by the physical harm done to the impact plaintiff which manifested itself in a "causally connected clearly discernible physical impairment. . ." Champion v. Gray, Case No. 62-830, March 7, 1985 ("Opinion").

The doctrine of imputed negligence had its origin in considerations of public policy, convenience and justice, and has been developed and extended out of the necessity of changing social and economic conditions. This doctrine usually is invoked to limit or defeat liability to a plaintiff in a negligence action by charging him with the concurrent negligence of a third

person. See 58 Am. Jur. 2d, Negligence, §456, p. 16. This Court created and limited the scope of the subject "unusual and non-traditional cause of action" for reasons of public policy and, presumably, in deference to new and changed social or economic conditions. Opinion, p. 5.

The situations in which negligence is imputed to limit or bar recovery are when there is a close, familial relationship involved such as in: (i) actions by a husband for collateral damages suffered as a result of an injury to his wife; (ii) actions by a parent for collateral damages resulting from injuries to a child; and (iii) actions for wrongful death. That is, the same kind of "an especially close emotional attachment to the directly injured party" that this Court deemed appropriate to recognize in this case. Opinion, p. 5. In these kinds of circumstances, recovery is limited or barred because "the plaintiff's claim is derivative." See 58 Am. Jur. 2d, Negligence, §462, p. 24.

The law of Florida is much the same as it is in other jurisdictions concerning this issue. See e.g. Hamm v. City of Milton, 358 So.2d 121, 123 (Fla. 1st DCA 1978) (wife injured in automobile accident; husband's claim for damages resulting from medical expenses incurred and loss of wife's services is reduced by comparative negligence of wife -- "The husband's claim for damage was entirely a derivative claim"). Cf Answer Brief of Respondent, Florida Farm Bureau Casualty Insurance Company ("Brief"), pp. 5-6 and 33-34, citing, 25 Fla. Jur. 2d, Family Law, §322, p. 385 (1981); Faulkner v. Allstate Insurance Co., 333 So.2d 488

(Fla. 2d DCA 1976), aff'd. on this issue and mod. on other issues, 367 So.2d 214 (Fla. 1979); Section 768.21(4), Fla. Stat.; and Ard v. Ard, 414 So.2d 1066 (Fla. 1982); Joint Motion for Rehearing ("Motion"), p. 3, citing, Section 768.31, Fla. Stat.; and Joseph v. Quest, 414 So.2d 1063 (Fla. 1982).

The basic argument contained in the Brief, Motion and this pleading is that the subject plaintiff's recovery should be limited or barred by the negligence, if any, of the impact plaintiff since: (i) the Court has created this cause of action where the now compensable injury "is caused by psychic trauma resulting from negligent injury imposed on another. . ." (Opinion, p. 6; emphasis added); (ii) a necessary element of this new tort is the plaintiff's "relationship to the injured party . . ." (Opinion, p. 6); and (iii) this kind of circumstance historically has been the type of relationship where, including under Florida law, the claim is deemed to be derivative so that negligence properly may be imputed from one party to another.

The most succinct and persuasive statement of Respondent's position in this regard was made by the Supreme Court of New Jersey in its Portee opinion. The Portee case involved the mental and emotional distress claim of a mother who watched, for an extended period of time, while there was an unsuccessful attempt to rescue her son who had become trapped between the doors of an elevator and the elevator shaft wall, and was dragged up the elevator shaft.

The Portee court previously had abrogated the impact rule and, in that decision, extended the limits of permissible

recovery for non-impact plaintiffs from the zone of danger to contemporaneous observation of the incident.

The Portee court, after this ruling, was faced with the same question this Court is pondering. That is, ". . . the effect of the injured party's own negligence on plaintiff's right to recover." Portee, 417 A.2d at 528. The New Jersey Supreme Court opined that:

> "To allow a plaintiff seeking damages for emotional injuries to recover a greater proportion than the injured party would surely create liability in excess of the defendant's fault. We therefore hold that any recovery for emotional harm resulting from perceiving the death or serious injury to another shall be reduced by the proportion of the injured party's negligence, as well as, of course, any contributing negligence of the plaintiff himself." Id. at 528.

CONCLUSION

This claim logically is a derivative one since its necessary predicate is that the plaintiff became distressed because he/she witnessed something disturbing happen to another person with whom the plaintiff had a close relationship. Under these circumstances, the applicable legal authorities hold that the plaintiff's claim should be considered in the context of, and reduced by, the negligence, if any, of the person whose injury was the genesis of the derivative cause of action. If the Court does not so rule, it well can formulate its own series of hypothetical

situations where the gross negligence or willful misconduct of the injured party would be ignored, and manifest injustice to the defendant would result.

Respectfully submitted,

ALLEN, DELL, FRANK & TRINKLE
Post Office Box 2111
Tampa, Florida 33601
813/223-5351
Attorneys for Respondents,
Roy Lee Gray, Jr., Roy L. Gray, Gladys Gray and Dixie Insurance Co.

By: _____
GARY M. WITTERS, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to FRANK C. McCLUNG, ESQUIRE, Post Office Box 877, Brooksville, Florida 33512, Attorney for Petitioner, and to CHRIS W. ALTENBERND, ESQUIRE, Post Office Box 1438, Tampa, Florida 33601, Attorney for Respondent, Florida Farm Bureau Casualty Insurance Co., and to LARRY KLEIN, ESQUIRE, Suite 201, Flagler Center, 501 South Flagler Drive, West Palm Beach, Florida 33401, and to JOSEPH W. LITTLE, 3731 N.W. 13th Place, Gainesville, Florida 32605, this 13th day of June, 1985.

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GARY M. WITTERS, ESQUIRE