IN THE SUPREME COURT OF THE STATE OF FLORIDA
TALLAHASSEE, FLORIDA

WALTON D. CHAMPION, as Personal Representative of the Estate of Joyce Caroline Champion, deceased,

Petitioner/Plaintiff,

vs.

SUPREME COURT CASE NO. 62,830

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

Respondents/Defendants.

ANSWER BRIEF OF RESPONDENT FLORIDA FARM BUREAU CASUALTY INSURANCE COMPANY

CHRIS W. ALTENBERND, ESQUIRE
FOWLER, WHITE, GILLEN, BOGGS, VILLAREAL & BANKER, P.A.
Post Office Box 1438
Tampa, Florida 33601
ATTORNEYS FOR RESPONDENT, FLORIDA FARM BUREAU CASUALTY INSURANCE COMPANY

TABLE OF AUTHORITIES

TABLE OF CONTENTS

STATEMENT OF THE CASE AND OF THE FACTS

The Respondent, Florida Farm Bureau Casualty Insurance Company, has no basic objection to the Statement of the Case or the Facts presented by the Petitioner, Walton D. Champion.[1]

In preparing this brief, the undersigned attorney did note one error within the Statement cf the Case provided by the Fifth District in its opinion. Champion v. Gray, 420 So.2d 348 (Fla. 5th DCA 1982). The opinion states that the lawsuit against the Defendants concerning the death of the daughter "continued". It is undisputed among the parties that the wrongful death action for damages caused by the death of Karen Renae Champion has been settled and released by a payment of the respective policy limits per person of the two insurance carriers involved in this case.

The basic facts in this case are not complex. Reduced to a nut shell, Mrs. Champion's estate seeks damages for her shock and grief, allegedly resulting in death, when she viewed the body of her deceased daughter at the scene of an automobile accident. Mrs. Champion was not

---

[1] The Petitioner/Appellant/Plaintiff, Walton D. Champion, as Personal Representative of the Estate of Joyce Carolyn Champion, will be referred to herein either as the Plaintiff or by specific name. The Defendant/Appellees/Respondents, Roy Lee Gray, Jr., Roy L. Gray, Gladys Gray, Dixie Insurance Company, and Florida Farm Bureau Casualty Insurance Company, will be referred to jointly as the Defendants or by specific name.

at the scene of the accident when it occurred and was not herself placed in any risk of physical injury.

QUESTION AS CERTIFIED BY THE FIFTH DISTRICT COURT OF APPEAL

SHOULD FLORIDA ABROGATE THE "IMPACT RULE" AND ALLOW RECOVERY FOR THE PHYSICAL CONSEQUENCES RESULTING FROM MENTAL OR EMOTIONAL STRESS CAUSED BY THE DEFENDANT'S NEGLIGENCE IN THE ABSENCE OF PHYSICAL IMPACT UPON THE PLAINTIFF?

Florida Farm Bureau believes that this question is unnecessarily broad and also believes that the question should be answered in the negative.

ARGUMENT

I. The Question Certified by the Fifth District Is Too Broad to Allow For an Accurate Answer in a System of Jurisprudence Based Upon The Case Method.

It is interesting to note that none of the parties to this proceeding requested the Fifth District to certify this question. Indeed, the briefing filed by the Plaintiff in both the Fifth District and in this Court attempts to create a minor exception to the impact doctrine as enunciated by this Court in Gilliam v. Stewart, 291 So.2d 593 (Fla. 1974). The Plaintiff does not cite in its briefing any of the extensive foreign case law which is cited by the Fifth District in its opinion.

In large part, the Fifth District's certified question is overly broad because the analysis in many of the foreign cases it relies upon is also overly broad. In our system of judicial process, a court is not encouraged to rule upon unnecessary issues nor should it create sweeping statements of law which are not governed by the facts of the case. State ex rel. Helseth v. Du Bose, 99 Fla. 812, 128 So. 4 (Fla. 1930); 13 Fla.Jur.2d, "Courts and Judges," §124, p. 249 (1979). Our common law system encourages specific questions of law to be determined when a court is confronted with specific facts which warrant and require careful consideration of the legal principles involved. In this case, the Fifth District and many of the foreign decisions

seem to concern themselves with two fundamentally different legal theories. Moreover, the analysis frequently seems to be based upon the type of injury, i.e. emotional distress, rather than upon the risk which results in the injury. Both errors are serious flaws in legal reasoning. Regardless of this Court's ultimate decision in this case, this Court should not be confused by either error.

(A.) The concept of "negligent infliction of emotional stress" accumulates at least two distinctly different legal theories.

Mrs. Champion was not at the scene of the accident at the time of the accident. She merely came to the scene after the accident had occurred. Her damages allegedly occurred when she saw the damage which had previously been inflicted upon her daughter. It is important to understand that Mrs. Champion's cause of action under these circumstances would be a derivative cause of action. It would exist because Mr. Gray had allegedly breached a duty owing to Mrs. Champion's daughter. If Mr. Gray breached no duty owing to Mrs. Champion's daughter, then Mrs. Champion could not recover. If Mrs. Champion's daugher was comparatively negligent, any recover which would be available to Mrs. Champion would be reduced by her daughter's comparative negligence. 25 Fla.Jur.2d "Family Law", §322, p. 385 (1981); see also, Faulkner v. Allstate Insurance Co., 333 So.2d 488 (Fla. 2d DCA 1976), aff'd. on this issue and

mod'd. on other issues, 367 So.2d 214 (Fla. 1979). In such a case, the duty is primarily owed to the child. Because the parent has damages which arise out of the child's injuries, a derivative or secondary duty is said to exist. In Florida, a surviving parent is entitled to receive damages for emotional suffering caused by the death of a child. Section 768.21(4), Florida Statutes. The award, however, for injuries to a child does not include damages for emotional injuries to the parents. Hillsborough County School Board v. Perez, 385 So.2d 177 (Fla. 2d DCA 1980); and Wilkie v. Roberts, 91 Fla. 1064, 109 So. 225 (1926)

A number of the cases cited by the Fifth District do involve this type of derivative claim. 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); Portee v. Jaffee, 84 N.J. 88, 417 A.2d 521 (N.J. 1980)(Child's comparative negligence does reduce damages); and Stadler v. Cross, 295 N.W.2d 552 (Minn. 1980).

On the other hand, there are another group of cases which create an independent tort. In these cases, the emotional injury is allegedly caused directly by a breach of duty which is not owed to another person, but allegedly is owed directly to the plaintiff. A child is frightened when he is in a home which suffers a gas explosion. Towns v. Anderson, 195 Col. 517, 579 P.2d 1163 (Col. 1978).

A person discovers a prophylactic in a carbonated beverage bottle. Wallace v. Coca-Cola Bottling Plants, 269 A.2d 117 Me. 1970. The zone of danger concept discussed in many of the cases and codified in Section 436, Restatement (Second) Torts conceptualizes an independent duty owing to the person who sustains emotional upset. When an independent duty exists, it cannot be reduced by another person's comparative negligence and it is not necessarily eliminated simply because it is determined that the Defendant did not breach a duty owing to another person.

Both of the above-described legal theories may be barred by the impact doctrine - - although Florida has made certain exceptions to the impact doctrine concerning specific legal theories which will be discussed later in this brief. It is important, however, to realize that the reasons and justifications for these duties are quite separate and distinct. The creation of a derivative cause of action under one set of circumstances is no legal justification for an independent cause of action under either similar or different circumstances.[2] Many of the foreign cases and the Fifth District's opinion create an independent cause

---

[2] It is perhaps significant to note that this case is the first type of case involving a derivative claim. On the other hand, Gilliam v. Stewart, 291 So.2d 593 (Fla. 1974) did not involve a derivative claim but rather involved a direct claim concerning a woman who apparently was not in the zone of danger.

of action of broad application where a narrow derivative action would be more applicable.

(B.) Negligent infliction of emotional distress is anomalous because it is a tort based upon the type of injury which results rather than upon the instrumentality of risk.

The Fifth District's opinion in this case while arguing for the elimination of the impact doctrine is also essentially arguing for the creation of a tort commonly referred to as negligent infliction of emotional distress. For example, one should look at the first foreign case cited by the Fifth District. Rickey v. Chicago Transit Authority, 101 Ill.App.3d 439, 57 Ill.Dec. 46, 428 N.E.2d 596 (Ill. 1st DCA 1981). This new tort is proposed to have three or more rather sophisticated issues. Relying upon the 1968 California decision in Dillon v. Legg, 68 Cal.2d 728, 69 Cal.Rptr. 72, 441 P.2d 912 (Cal. 1968), the Fifth District is requiring that: (1) the plaintiff have been near the scene of the accident (2) the shock be the result of direct emotional impact from observing the accident; and (3) the plaintiff be closely related to the victim. It appears that the Fifth District is also proposing a threshold somewhat similar to the no-fault threshold enunciated in Section 627.737, Florida Statutes (1982) because the plaintiff is required to prove a significant emotional harm which was a "painful mental experience with lasting

effects" and which "must be susceptible to some form of objective medical determination and proved through qualified medical witnesses." 420 So.2d at 553.[3]

All of this analysis is unusual because of its focus upon the nature of the plaintiff's injury. Typically, a duty of care is created under negligence standards because a particular human activity is recognized by society as creating general risks of bodily injury or property damage. Thus, we have a duty of care if we own or operate an automobile because it is a dangerous instrumentality which may result in bodily injury or property damage. Anderson v. Southern Cotton Oil Co., 73 Fla. 432, 74 So. 975 (Fla. 1917); Southern Cotton Oil Co. v. Anderson, 80 Fla. 441, 86 So. 629 (Fla. 1920) Land owners have varying duties of care because it is recognized that negligently maintained property may result in bodily injuries. Wood v. Camp, 284 So.2d 691 (Fla. 1973); Post v. Lanney, 261 So.2d 146 (Fla. 1972); and McNulty v. Hurley, 97 So.2d 185 (Fla. 1957) We have created stricter standards concerning manufacturers of products which are used and consumed by citizens. West v. Caterpillar Tractor Co., Inc., 336 So.2d 80 (Fla. 1976) We even have created different duties of care for medical physicians depending upon their extent of training. Section 768.45, Florida Statutes.

---

[3] These additional factors were adopted from a New Hampshire case. Corso v. Merrill, 119 N.H. 647, 406 A.2d 300 (N.H. 1979).

In this case, however, neither the Fifth District nor the many foreign cases upon which it relies focus upon a human activity which creates a risk, but rather they focus upon the resulting damage. These opinions do not seem to care whether the risk is associated with automobiles, e.g., Niderman v. Brodsky, 436 Pa. 401, 261 A.2d 84 (Pa. 1970); arises out of a defect in the premises, Rickey v. Chicago Transit Authority, 101 Ill.App.3d 439, 57 Ill.Dec. 46, 428 N.E.2d 596 (Ill. 1st DCA 1981); concerns product liability, Culbert v. Sampson's Supermarkets, Inc., 444 A.2d 433 (Me. 1982); or medical malpractice, Whetham v. Bismark Hospital, 197 N.W.2d 678 (N.D. 1972).

The emphasis on damages concerning this proposed tort probably results from the fact that the tort is an attempt to extend the doctrine allowing recovery for intentional infliction of emotional distress. See, Prosser, "Intentional Infliction of Mental Suffering: A New Tort," 37 Mich. L.Rev. 874 (1939). Intentional torts are oriented around the plaintiff's right which has been violated rather than around damages. Even concerning intentional infliction of mental distress, however, Florida has ruled that an independent cause of action does not exist. The right to recover damages is based upon the existence of a separate underlying tort. Gellert v. Eastern Airlines, Inc., 370 So.2d 802 (Fla. 3d DCA 1979), cert. den. 381 So.2d 766 (Fla. 1980).

Contrary to the approach taken by the Fifth

District and by many of the other foreign districts, Florida has properly recognized that emotional stress is primarily an issue which relates to damages rather than duty and breach of duty. Typically, the issue is not whether to create a new duty, but rather whether to allow monetary damages for symptoms of emotional stress after a duty has been breached. Thus, monetary damages for emotional stress are allowed concerning virtually all intentional torts without regard to whether a physical impact or injury has occurred. City of Deland v. Florida Transportation and Leasing Corp., 293 So.2d 800 (Fla. 1st DCA 1974); Margaret Ann Super Markets, Inc. v. Dent, 64 So.2d 291 (Fla. 1953). In an action against an insurance carrier for bad faith, emotional damages are typically not allowed, but they become allowable if the insurance carrier's conduct is so egregious that it can be said that the insurance carrier intentionally caused the emotional distress. Butchikas v. Traveler's Indemnity Company, 343 So.2d 816 (Fla. 1976). In other cases, Florida has also authorized damages for emotional distress concerning a pre-existing tort which typically does not allow for such damages. Ford Motor Credit Company v. Sheehan, 373 So.2d 956 (Fla. 1st DCA 1979), cert. dis'd. 379 So.2d 204 (Fla. 1980); Kirksey v. Jernigan, 45 So.2d 188 (Fla. 1950); and LaPorte v. Associated Independents, Inc., 163 So.2d 263 (Fla. 1964).

It is respectfully submitted that Florida has taken a proper and logical approach to the issue of monetary

damages for emotional distress. Rather than create a broad nebulous cause of action for generalized negligence as it relates to a specific element of damage, Florida should continue to examine the issue of duty as it relates to the forseeable risks associated with specific human activities and it should only analyze the availability of damages once the duty is established. This approach is controllable under a case law system and allows for careful, rational analysis of the differences among legal duties which is not clouded or confused by undue focus upon the specific resulting injuries.

With all due respect to the Fifth District, it has been tempted by a form of judicial legislation which became common during the liberal era of the late 1960's. The process involved a broad and sweeping change in the law with the hopes that juries and judges in the future could narrow the cause of action as needed. Leong v. Takasaki, 55 Ha. 398, 520 P.2d 758 (Ha. 1974); Dillon v. Legg, 68 Cal.2d 728, 69 Cal.Rptr. 72, 441 P.2d 912 (Cal. 1968). It is the function of a common law system of justice to narrowly expand the law as developments require the expansions. When a court takes major steps beyond those which are required for a specific case, it enters the arena of legal changes which should be performed by elected officials within the political process. Few people would dispute, for example, that a court should not enact a broad and complex legal rule such as the no-fault threshold contained

in Section 627.737, Florida Statutes (1982). Such broad decisions should be left to legislative process. Nevertheless, the proposals contained in the Fifth District's opinion are surprisingly similar to such legislation.[4]

---

4 The undersigned attorney does not disagree with the comment in Gilliam v. Stewart, 291 So.2d 593 (Fla. 1974) that this Court has the power to alter the impact rule. This Court probably had the power to create the no-fault doctrine. A court's decision to defer to the legislature concerning substantial substantive changes in the law is more a question of proper legal process than a question of judicial power.

II. The Legislature Has Specifically Considered And Created a Limited Derivative Cause of Action for Mental Anguish Caused By The Death of a Minor Child.

The Plaintiff has sued the defendants alleging that Mrs. Champion sustained severe emotional shock and grief when she came upon the body of her deceased child. Under the Florida Wrongful Death Act, Mrs. Champion did have a derivative claim for damages. Sections 768.16-768.27, Florida Statutes.

The legislature has specifically provided that a parent is entitled to receive damages for mental anguish caused by the death of a child. Section 768.21, Florida Statutes. This right to recovery, unlike the Fifth District's proposal, does not require substantial emotional harm or objective medical proof. This element of damage, however, does not survive Mrs. Champion's death. Section 768.24, Florida Statutes. The legislature has specifically provided that, if a survivor dies before final judgment in a wrongful death action, the survivor's recovery is limited to lost support and services through the date of death. This provision has been interpreted to require the elimination of all claims for pain and suffering upon the death of the survivor. Florida Clarklift, Inc. v. Reutimann, 323 So.2d 640 (Fla. 2d DCA 1975), cert. den., 336 So.2d 1181 (Fla. 1976). In so ruling, the Second District noted that this appeared to be the intention of the Florida Law Revision Commission.

323 So.2d at 642.

Wrongful death, of course, is not a common law claim and exists as a creature of the legislature. White v. Clayton, 323 So.2d 573 (Fla. 1975) In light of the legislature's specific decision on a survivor's claim for pain and suffering, this Court should not create a new derivative claim where the legislature has elected to forego such a claim.

The ramifications of the Fifth District's proposal concerning claims of pain and suffering for other survivors should not be underestimated. At the present time, there are strong limitations imposed by the legislature concerning damages for emotional stress caused by the death of an individual in Florida. Section 768.21, Florida Statutes. If the proposal of the Fifth District were substituted for the impact doctrine, numerous other persons could have claims for pain and suffering. As will be described later in this brief, many of the proposed limitations suggested by the Fifth District would have little limiting effect upon the claims for damages.

III. The Plaintiff's Proposed Cause of Action Is Unsupported by Florida or Foreign Case Law.

Curiously, the Plaintiff in this case has not filed a brief supporting the Fifth District's decision. Instead, the Plaintiff argues that his case falls within an exception to the rule announced in Gilliam v. Stewart, 291 So.2d 593 (Fla. 1974) and that this Court should adopt that position described in Justice Adkins' dissent in the Gilliam case. These issues will be considered in reverse order.

The Plaintiff suggests on page four of his brief that this Court should now adopt the position set forth by Justice Adkins in his dissent in Gilliam v. Stewart, 291 So.2d 593 (Fla. 1974). This is rather astounding because the plaintiffs are not entitled to recover under the theory of law proposed by Justice Adkins. Justice Adkins suggested that the impact doctrine should be replaced with the zone of danger concept. As his dissent states:

> "In rejecting the impact rule, there should be certain limitations for purposes of clarity and application in allowing recovery for physical injuries caused by fright in the absence of contemporaneous physical impact. There should be no recovery except by those who were within the area of physical risks (or "zone of danger") from defendant's negligent act. Other limitations should also be imposed."
>
> Gilliam v. Stewart, 291 So.2d 593, 602 (Fla. 1974) (dissent, J.Adkins).

As the Fifth District's opinion in this case notes, Mrs. Champion was not within the zone of danger, but rather came to the location of the accident after it had occurred. Thus, the adoption of a zone of danger test by this Court would require this Court to affirm the Circuit Court on alternative grounds and would require the dismissal of this lawsuit.[5]

Secondly, the plaintiff argues that his complaint states a cause of action because it alleges that Mr. Gray, the operator of his parents' motor vehicle was intoxicated. This intoxication is alleged to be wanton and reckless conduct. Under this Court's ruling in Ingram v. Pettit, 340 So.2d 922 (Fla. 1976) there is no doubt that these allegations would have been sufficient to warrant punitive damages in an action brought by Karen Champion's estate.

The plaintiff's novel approach to this case is an interesting twist concerning damages. Typically, it is held that one cannot be awarded punitive damages until one has established a cause of action for compensatory or nominal damages. American Motorcycle Institute, Inc. v. Mitchell, 380 So.2d 452 (Fla. 5th DCA 1980). In this case, although the plaintiff is not entitled to compensatory

---

[5] As indicated later in this brief, because the zone of danger test would not benefit the Plaintiff in this case and has not been proposed by the Fifth District, it is not truly an issue which this Court should consider at this time.

damages under the Gilliam case, he attempts to justify compensatory damages by adding allegations for punitive damages. This is particularly unusual because Mr. and Mrs. Gray as owners of the motor vehicle would not be liable for those punitive damages absent allegations of actual knowledge. Waldron v. Kirkland, 281 So.2d 70 (Fla. 2d DCA 1973); Mercury Motors Express, Inc. v. Smith, 393 So.2d 545 (Fla. 1981) Florida Farm Bureau, as an uninsured motorist carrier, would also not be liable for punitive damages. Suarez v. Aguiar, 351 So.2d 1086 (Fla. 3d DCA 1977). The plaintiff seems to have a tail that is wagging its dog.

The plaintiff's approach to this case, including his suggestion that the impact rule has "numerous identities" (Plaintiff's Brief, p. 3), demonstrates that the plaintiff is confusing the issue of whether mental anguish should be an element of damage with the issue of whether mental anguish alone should create a separate cause of action. As indicated earlier in this brief, this confusion has been shared by some of the foreign jurisdictions cited by the Fifth District.

In many of the Florida cases cited by the plaintiff, the issue was actually whether mental anguish is recoverable by a plaintiff as an element of damage concerning a cause of action which has already been sufficiently alleged. In Butchikas v. Travelers Indemnity Company, 343 So.2d 816 (Fla. 1976), for example, there was no question that

the plaintiff had a cause of action for bad faith against the liability insurance carrier. The only issue was whether mental anguish could be a proper element of damage in that case. Even in cases such as Claycomb v. Eichles, 399 So.2d 1050 (Fla. 2d DCA 1981); Selfe v. Smith, 397 So.2d 348 (Fla. 1st DCA 1981) and Butler v. Lomelo, 355 So.2d 1208 (Fla. 4th DCA 1977), the plaintiffs could all allege an independent cause of action which entitled them to some form of damage. Each case simply determines whether or not mental anguish could be an appropriate additional element of damage.

In Crane v. Loftin, 70 So.2d 574 (Fla. 1974) the plaintiff fled her car in order to avoid being struck by a locomotive. Presumably, Mrs. Crane did have a cause of action for property damage to her automobile. The question was whether she was also entitled to recover for her mental pain and suffering caused by the accident. This Court suggests that a cause of action might have been available if the plaintiff could have alleged willful and wanton behavior on the part of the railroad which caused her fear. Likewise, in La Porte v. Associated Independents,Inc., 163 So.2d 267 (Fla. 1964), this Court authorized pain and suffering for the owner of a dog when the garbagemen threw a garbage can on the dog, laughed at the plaintiff, and left without providing any help. It is clear that the willful and wanton behavior caused the mental anguish. The same is true in Kirksey v. Jernigan, 45 So.2d 188 (Fla. 1950) and Ford Motor Credit Company v. Sheehan, 373 So.2d 956 (Fla. 1st DCA

1979), cert. dis'd., 379 So.2d 204 (Fla. 1980).

A wife was not allowed to recover for insults directed at her husband in Habelow v. Travelers Insurance Co., 389 So.2d 218 (Fla. 5th DCA 1980). As the opinion states:

> "In all cases we have found in Florida recognizing the tort of intentional infliction of emotional distress, the plaintiff was the recipient of the insult cr abuse, or the message was clearly directed at the plaintiff through a third person." [cites omitted].
>
> 389 So.2d at 220.

In similar fashion a Federal District Court in Dyar v. Florida Farm Bureau Mutual Insurance Company, 496 F.Supp. 695 (N.D. Fla. 1980), refused to allow the plaintiff to recover for outrageous statements made by an insurance agent to the plaintiff's attorney outside the presence of the plaintiff.

As should be expected, all of the above-referenced cases authorizing damages for pain and suffering in the absence of impact are allowing those damages because the mental pain and suffering was caused either by a willful and wanton act or by an act which might now be regarded as intentional infliction of emotional distress. The damages for mental pain and suffering are authorized because the mental pain and suffering is caused by the willful and wanton behavior.

In this case, the plaintiffs have not alleged that Mr. Gray's intoxication had anything to do with Mrs. Champion's

emotional shock. There is no suggestion that Mrs. Champion was ever aware that Mr. Gray was intoxicated. The plaintiff is trying to create a cause of action by alleging willful activity which has no proximate relationship to the alleged damages. This would be similar to a rule which eliminated the issue of proximate cause in cases involving the violation of a statute. In earlier cases, a violation of a statute prohibiting hunting on Sunday was held to be a breach of duty allowing for damages without regard to proximate causation. White v. Levarne, 93 Vt. 218, 108 A. 564 (Vt. 1917). In Florida, however, it is well established that the doctrine of negligence per se does not eliminate the proximate cause element. Absent a proximate relationship between the breach of duty and the injuries there is no cause of action. deJesus v. Seaboard Coastline Railroad Company, 281 So.2d 198 (Fla. 1973). See also, Memorial Park, Inc. v. Spinelli, 342 So.2d 829 (Fla. 2d DCA 1977), cert. den., 354 So.2d 986 (Fla. 1978).

Thus, the plaintiff's theory is novel, but it ignores the fundamental rules of proximate causation. It does not concern the exception for willful and wanton behavior which this Court contemplated in Gilliam v. Stewart, 291 So.2d 593 (Fla. 1974). Accordingly, the plaintiff's proposal should be rejected.

IV. The New Independent Cause of Action Suggested By the Fifth District Presents Substantial Difficulties Which Outweigh Its Perceived Value.

The Fifth District's opinion both in the body of the opinion and in the first two footnotes contain citations to many foreign cases. It should be emphasized that many of those cases reject the legal theory proposed by the Fifth District today. 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); Melton v. Allen, 282 Or. 731, 580 P.2d 1019 (Or. 1978); Whetham v. Bismarck Hospital, 197 N.W.2d 678 (N.D. 1972). Additionally, many of the cases contained vigorous and thorough dissents. See, e.g., Corso v. Merrill, 119 N.H. 647, 406 A.2d 300 (N.H. 1979), Niederman v. Brodsky, 436 Pa. 401, 261 A.2d 84 (Pa. 1970); and Dillon v. Legg, 68 Cal.2d 728, 69 Cal.Rptr. 72, 441 P.2d 912 (Cal. 1968). There are, of course, other decisions which are not cited by the Fifth District whose discussions are worthy of consideration. See, e.g., Stadler v. Cross, 295 N.W.2d 552 (Minn. 1980); Vaillancort v. Medical Center Hospital, 425 A.2d 92 (Vt. 1980). The great majority of these cases are contained in the following annotations: "Anno.: Damages-Shock-Witnessing Injury," 18 A.L.R.2d 220 (1951); "Anno.: Torts-Emotional Disturbances," 64 A.L.R.2d 100 (1959); "Anno: Damages-Shock-Witnessing Injury," 29

A.L.R.3d 1337 (1970). All of these cases, as well as much of the work contained within the treatises, may be helpful to this Court. The undersigned attorney, however, does not believe that a detailed analysis of this case law within this briefing would be of great assistance to this Court. Many of the problems discussed below, however, are discussed within these cases.

This brief also does not contain any significant argument concerning the so-called traditional justifications for the impact doctrine. It is true that the impact doctrine does prevent some fraudulent claims. It is also true that it prevents a significant increase in litigation. The undersigned attorney believes that these reasons are support to continue the impact doctrine - - but are not the primary reasons for its retention. In reading through the many foreign cases cited in the Fifth District's opinion, one develops the sense that these so-called traditional justifications for the impact doctrine are emphasized in an effort to avoid serious discussion of the real problems that surround the proposed substitute doctrines.

(A.) The Fifth District's Proposal Allows The Jury to Make Many Arbitrary Rulings.

The impact doctrine is sometimes criticized as being an arbitrary doctrine. By that criticism, most legal commentators seem to mean that although the doctrine eliminates a great many cases which should be eliminated, it also

eliminates a few which the commentators believe to be actionable. In this sense, most rules of law which allow for legal decisions by the Court as compared to factual decisions by the jury are "arbitrary". A statute of limitations is "arbitrary" in this sense and certainly prevents a few lawsuits from being brought which should be brought. It nevertheless is a valid legal doctrine because it allows the Court to eliminate many stale claims which should be eliminated. The no-fault system for automobile accidents is also such a system. Section 627.736-627.737, Florida Statutes.

Dictionaries tend to define "arbitrary" as "uncertain", "capricious", or "discretionary". The impact doctrine is none of these things. It allows litigants and judges to rule upon a question with certainty and without the judge or the jury being able to utilize improper discretion or capriciousness. What then of the Fifth District's proposal? Does it allow for predictability and certainty within the law or does it allow for juries to be unpredictable and capricious?

First, the Fifth District's suggestion would allow for an independent cause of action only if the plaintiff sustained a significant emotional harm with lasting effects which are susceptible to some form of objective medical determination. That is obviously a question of fact to be decided by the jury. See, e.g., Hunsley v. Girard, 87 Wash.2d 424, 553 P.2d 1096 (Wash. 1976). What will constitute such an injury? Will gastric problems suffice? See, e.g.,

Krouse v. Graham, 19 Cal.3d 59, 137 Cal.Rptr. 863, 562 P.2d 1022 (Cal. 1977). What about difficulty in sleeping or loss of weight? Landreth v. Reed, 570 S.W.2d 486 (Tex. 6th DCA 1978). The problem is that different juries can analyze essentially identical injuries and reach different conclusions. Even the no-fault threshold which many plaintiffs attorneys regard as arbitrary is far more definite than this test.

The Fifth District's opinion will also require that the plaintiff be located "near the scene of the accident". Is near five feet or five miles? Again, different juries will be permitted to reach different results on essentially identical facts.

As a third factor, the Fifth District's opinion requires that the shock result "from a direct emotional impact upon the plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence." 420 So.2d at 353. Why this factor is important, is very difficult to justify. If you assume that it is legally forseeable that a mother will die when seeing her daughter at the scene of an accident, it should also be legally forseeable that she would die upon identifying her daughter at the morgue or discovering her death in the hospital. Certainly, there must be cases in which parents have died when they were notified over the telephone by a police officer of their child's death. The undersigned attorney does not accept the

proposition that these rare occurrences result in legal forseeability and regards them merely as non-actionable human possibilitites. Nevertheless, if you accept that one is legally forseeable, why should the others be unforseeable?

If one assumes the validity of this element, it too allows the jury to be arbitrary. What is necessary for the shock to create direct as compared to indirect emotional impact? What constitutes "sensory and contemporaneous observance of the accident." Is it enough to hear the accident without seeing it? It is unclear in this case whether Mrs. Champion heard the accident, but she did not observe the occurrence of the accident as compared to the accident scene. Again, this factor will cause a jury difficulty and is apt to lead to differing results on comparable facts.

As a final factor, the Fifth District's opinion requires that the plaintiff and the victim be "closely related" rather than having a "distant relationship". The opinion does not specify that the relationship needs to be a family relationship. Arguably, the dance instructor of a young prodigy might have a closer relationship with the child than an aunt, grandparent, or even sibling. What relationship will be close enough? Again, the jury can be arbitrary.

It is significant to note that this element of the independent cause of action seems to be a recognition that the cause of action should actually be derivative in

nature. It also is an element which has no bearing upon cases in which the emotional impact is caused directly to the plaintiff without an intervening person. For example, this element is inapplicable under the facts of Gilliam v. Stewart, 291 So.2d 593 (Fla. 1974), because there was no "victim" other than the plaintiff herself.

Although the undersigned attorney has great faith in the jury system, he does not believe that the jury system should be unreasonably taxed. Courts have an obligation to determine the law and to create specific causes of action. It is the primary function of a jury to determine the facts and to apply the law to the facts. The cause of action proposed by the Fifth District simply fails to define the parameters of the law and thus allows the jury to take the law into their own hands. Juries should be encouraged to act rationally and objectively. When a cause of action is ill-defined and unnecessarily complex, however, a jury is only human. A jury will attempt to reach a simpler process for decision-making. That simpler process will undoubtedly involve factors of emotion, sympathy, prejudice, and other subjective matters which no court would place within a cause of action.

(B.) The Fifth District's Proposal Creates a Cause of Action Based upon the Plaintiff's Hypersensitivity.

The dissent in Niederman v. Brodsky, 436 Pa. 401, 261 A.2d 84 (Pa. 1970) begins with a comment that "an emotional-

appealing or heart-rending claim often produces bad law and sets dangerous precedent." 261 A.2d at 90. There can be little doubt that the facts in this case are emotionally appealing and heart-rending. It should be recognized, however, that the Fifth District's proposal would be applicable in a great number of cases that lack the emotionality of this case. This Court should not allow emotion to rule the day on issues which strike at the very foundation of negligence law.

In reviewing this case and many of the cases from foreign jurisdictions, there appears to be a substantial risk that the courts are creating a complex cause of action based upon the Plaintiff's hypersensitivity. Virtually all of us at some point in our lifetime must deal closesly with death and serious personal injuries. A great many of us hear or see accidents involving close friends and relatives. The Fifth District's reasonsing would seem to apply in a case where the victim is neither killed nor seriously hurt, so long as the plaintiff believed the victim to be in great danger. See, e.g., Barnhill v. Davis, 300 N.W.2d 104 (Iowa 1981). Virtually all of us will experience that event more than once during our lifetime.

Despite the fact that these experiences are common, it is extremely rare that a human actually sustains death or a severe personal injury as a result. Although this case is at the pleadings stage, one must suspect that

Mrs. Champion's heart was unusually weak. One suspects that her death and the injuries described in many of the cases from foreign jurisdictions would have occurred from some other shock or excitement in the general time period of the accident even if the accident had not occurred. In a sense, we are dealing with a group of potential plaintiffs who are accidents-waiting-to-happen.

This matter involves two separate but interrelated issues. First, it is generally recognized that a defendant is responsible for all damages - - up to some point of remoteness - - which flow from breach of a duty concerning a plaintiff. On the other hand, the mere existence of an injury does not create a duty which is breached. The concept of "damnum absque injuria" has long existed in the law of negligence.

It has long been the law that a tort feasor takes his victim as he finds him. Thus, if an accident which would typically result in minor injuries results in major injuries because the plaintiff has the proverbial glass jaw, the defendant must pay for the additional damages because it was reasonably forseeable that the plaintiff would sustain some damage. On the other hand, the ordinary reasonable person does not need to go through life assuming that everyone he meets on the street has a glass jaw, suffers from hemophilia, is deaf, or has a severe mental or cardiac weakness. Absent knowledge that someone falls within a

special category, the defendant is free to assume that they have the strengths and conditions of the typical human being. It is clear that the overwhelming majority of us do not suffer severe personal injuries because of the emotional shock caused by viewing an accident. To create an independent cause of action based upon the hypersensitive plaintiff is simply not to test a defendant's actions by the well-established test of forseeability.

In the foreign cases, the courts seemed to be creating a duty of care requiring one to assume that all persons are hypersensitive. Many of the cases cite to Palsgraf v. Long Island R. Co., 248 N.Y. 339, 162 N.E. 99 (N.Y. 1928) and the famous quote: "The risk reasonably to be perceived defines the duty to be obeyed and the risk imports relations; it is risk to another or to others within the range of apprehension." 162 N.E. at 100. In Palsgraf, of course, the plaintiff was a woman who was struck by a falling set of scales. The scales had apparently fallen over when fire crackers were accidentally exploded a considerable distance away. The plaintiff was not allowed to recover because the risk of injury concerning her was not forseeable. One wonders whether the Fifth District and the foreign jurisdictions would now allow Mrs. Palsgraf to recover if she had sustained a heart attack because of the fireworks rather the injury she sustained.

If any risk is forseeable concerning emotional shock following an accident, it is the risk of minor and temporary emotional upset. The Fifth District and virtually all of the foreign jurisdictions agree that such a claim is not actionable. Instead, the claim which becomes actionable is not the risk of damage reasonably to be perceived but the risk of damage which is rare, unexpected, and dependent upon the plaintiff's hypersensitivity.[6]

(C.) Substantial and Permanent Physical Injuries Are Not a Legally Forseeable Risk Which Creates a Legal Duty.

The concept of "forseeability" for purposes of proximate cause and for the legal process of determining the existence of a duty are very intertwined. Certainly the Palsgraf decision and all discussions of that decision thereafter are proof of that fact. The question of forseeability as it relates to the creation of a duty is a legal question for the court, whereas forseeability as a matter of proximate cause is typically a factual question for the jury. See, Gibson v. Avis Rent-A-Car System, Inc., 386 So.2d 520 (Fla. 1980). Despite the different decision-makers involved, the questions are still interrelated. In Florida it is well established that consequences must be "natural and probable" to be forseeable.

---

[6] At least one case has held that the plaintiff must prove the physical harm is the natural result of the fright and perhaps that hypersensitivity is an affirmative defense. Daley v. LaCroix, 384 Mich. 4, 179 N.W.2d 390 (Mich. 1970) It seems strange to so rule when the natural result of such fright is the temporary response of shock. The substantial permanent injury is the unnatural result which is based upon the plaintiff's unusual sensitivity.

> "'Possible' consequences are those which happen so infrequently from the commission of a particular act, that in the field of human experience they are not expected as likely to happen again from the commission of the same act."
>
> Cone v. Inter-County Telephone & Telegraph Co., 40 So.2d 148, 149 (Fla. 1949)

This test is an objective rather than a subjective test. Pinkerton-Hayes Lumber Company v. Pope, 127 So.2d 441 (Fla. 1961). Thus in Bryant v. Jax Liquors, 352 So.2d 542 (Fla. 1st DCA 1977), the Court considered a case in which minors, other than the minors to whom alcohol had been illegally sold, sustained injuries while intoxicated. In ruling that forseeability did not exist, the First District concluded its opinion with the often-quoted language:

> "Possible 'yes'. Probable 'no'."
> 352 So.2d at 544.

See also, Rio v. Minton, 291 So.2d 214 (Fla. 2d DCA 1974).

A similar analysis occurred in Memorial Park, Inc. v. Spinelli, 342 So.2d 829 (Fla. 2d DCA 1977), cert. den. 354 So.2d 986 (Fla. 1978) which held that a cemetary was not liable for an automobile accident allegedly caused by a distracting roadside sign. In Jolly v. Insurance Company of North America, 331 So.2d 368 (Fla. 3d DCA 1976), the Court held that a homeowner's collapse and subsequent death following a fire in her home was not the foreseeable result of the water authority's failure to provide water.

As discussed in the preceeding section of this

brief, the Fifth District is expecting defendants to act as if a particular plaintiff's rare response to emotional stress is probable. Such an occurrence is at best possible if not highly improbable. This Court should not create a new duty under such circumstances.

(D.) The Consequences of a Broad New Cause of Action Such as that Proposed by the Fifth District are Difficult to Envision.

Previous sections of this brief have argued that this Court should not create a ruling any broader than is essential to resolve the issues presented by a particular case. In this case the Fifth District has asked this Court to take such an approach. Many of the dissents in the foreign cases cited by the Fifth District are concerned with the extent to which the new cause of action will grow and will not be controllable. The undersigned attorney doubts that he can forsee the many potential consequences. Will plaintiffs be able to sue when the "victim" sustained no injury? If the plaintiff reasonably thought that the "victim" would be hurt, why should that not justify a cause of action under the Fifth District's guidelines.

What about the "victim"? If the victim is partially or entirely at fault for placing himself into a position of danger, a defendant such as Mr. Gray should be able to sue the "victim" for contribution. Likewise, under this Court's recent ruling in Ard v. Ard, 414 So.2d

1066 (Fla. 1982), even in family situations the plaintiff should be able to sue the victim if the victim is partially or entirely at fault for his predicament. If anything, the cause of action is easier to establish against the victim because he is more apt to know that he has close relations in the vicinity who would be upset if he were endangered.

Under the facts of some of the foreign cases, this doctrine essentially extends the rescue doctrine so that a person is entitled to recover not from injuries resulting from an attempted rescue, but rather from the worry caused by the recognition that a rescue is necessary. Cf. Rose v. Peters, 82 So.2d 585 (Fla. 1955); Ryder Truck Rental, Inc. v. Korte, 357 So.2d 228 (Fla. 4th DCA 1978). Is such an extension a sound judicial development based upon truly probable and forseeable risks?

(E.) The Impact Doctrine is Still a Workable Solution to the Problem of Forseeability Presented by This Area of Law.

After reading the case law and other authorities cited by the Fifth District's opinion from other jurisdictions, it cannot be denied that the impact doctrine is not as well accepted today as it was fifty years ago. Nevertheless, one has the sense that many people who reject the impact doctrine do so without a full consideration of its merits and without a reasoned decision that a new alternative is

better. No legal theory is perfect. That is not a justification to change a legal theory. One only changes a legal theory when one becomes convinced that a better legal theory now exists. As demonstrated above, the Fifth District's proposal is not a better theory.

The impact doctrine is based upon the proposition that, although emotional upset is possible without physical injury or impact, it becomes probable with physical injury or impact. In this state we have modified the impact doctrine so that it does not apply in cases where the defendant intends to cause emotional upset. Butchikas v. Travelers Indemnity Company, 343 So.2d 816 (Fla. 1976). Other minor alterations have occurred as described earlier in this brief. The result is a system in which the overwhelming majority of cases which should be brought - - may be brought. The impact doctrine not only weeds out fraudulent claims and unnecessary claims, more importantly it weeds out many claims involving risks that are sufficiently unforseeable that our court system should not allow them to proceed. The plaintiff's bar occasionally forgets that defendants have rights and that those rights must be given as much consideration by the courts as the plaintiff's rights.

Many of the "modern" cases suggests that everything is a question of forseeability which should be submitted to the jury. Admittedly, the Plasgraf case and the other

Florida cases involving forseeability described earlier in this brief could be submitted to a jury for determination. A jury would probably make the right legal decision concerning forseeability in many of those cases. But this process abdicates legal decisions to a jury system that has never been designed to handle more than factual decisions. It is unfair to a plaintiff when a judge misuses the rules authorizing summary judgments because the judge decides factual issues which should be submitted to a jury. It is no fairer to the defendant for the courts to abdicate their responsibility to decide legal questions concerning the forseeability required to create a legal duty.

(F.) No Decision Concerning the Zone of Danger Test Should Be Made in This Case.

Justice Adkins has earlier indicated his preference for the zone of danger test. That test is certainly more defensible than the test proposed by the Fifth District in this case. It is not, however, a test which would allow the plaintiff in this case to prevail. As a result, the undersigned attorney has no need to argue its strengths or weaknesses. The plaintiff has no rational basis to argue for that test because it provides him no assistance. Since the propriety of that test has not been presented to this Court in any adversarial fashion and a ruling on it is not necessary to resolve this case, it would be inappropriate for this Court to consider that rule in this case.

(G.) Stare Decisis.

Many of the dissenting opinions from the foreign jurisdictions discuss the importance of stare decisis. See, e.g., Niederman v. Brodsky, 436 Pa. 401 261 A.2d 84 (Pa. 1970); Dillon v. Legg, 68 Cal.2d 728, 69 Cal.Rptr. 72, 441 P.2d 912 (Cal. 1968). Certainly, the concept that the law should provide stability for society and should not be constantly changing is a strong and healthy aspect of cur common law system. Stare decisis is not a reason to keep bad law. It is not a reason to deny that society changes and undergoes modifications over time. Thus, the undersigned attorney encourages this Court to apply the rule of stare decisis only because there have been no serious changes in Florida society since Gilliam v. Stewart, 291 So.2d 593 (Fla. 1974) was decided and because the Fifth District's proposal is not a better solution to the problem.

A few days before the decision was rendered by the Fifth District in this case, an article appeared in the Florida Bar Journal. "Recovery for Negligently Inflicted Ingantible Damages," Florida Bar Journal, Vol. LVI, Number 9, October, 1982, p. 708. In that article the author notes that only two justices who were on the bench at the time the Gilliam decision was decided are still on the bench. There is a clear suggestion that the law of Florida can now change because the justices have changed. It is respectfully

suggested that the law of Florida is not and should not be the collective opinion of seven black-robed individuals in Tallahassee at any given time period. The continuity of the law should be respected both by the bar and the bench as well as the citizens of Florida. If the law is to be changed, it should be changed because of something that has occurred in the fabric of society in Florida since 1974. It should not be changed because the men sitting beneath the fabric of the black robes have different names.

Despite all the cases which are cited in the Fifth District's opinion, it is significant to note that the basic groundwork for the differing legal opinions was presented by the California courts in Dillon v. Legg, 68 Cal.2d 728, 69 Cal.Rptr. 72, 441 P.2d 912 (Cal. 1968) and by New York in Tobin v. Grossman, 24 N.Y.2d 609, 301 N.Y.Supp.2d 554, 249 N.E.2d 419 (N.Y. 1969). Both of those cases existed long before this Court's decision in Gilliam. Many of the other decisions cited by the Fifth District also predate the Gilliam decision. Some of those decisions are discussed either by Justice Adkins in his dissent in the Gilliam case or by the Fourth District Court of Appeal in the underlying opinion. The legal arguments being presented to this Court today have all been presented to this Court within the last decade. Only the names of the parties, the names of the attorneys, and the names of the judges have changed. Under the common law

doctrine of stare decisis, those changes do not justify a different result under Florida law.

CONCLUSION

Although the Fifth District's certified question is overly broad it should be answered by this Court in the negative. No legal doctrine including the impact doctrine achieves perfection. The impact doctrine, however, is a better doctrine than the modern proposal of the Fifth District. The Fifth District's proposal would allow the jury to decide numerous issues in an arbitrary fashion without adequate legal guidance. It does not recognize the proper role of forseeability in the creation of a duty and, instead, creates a duty predicated upon the rare plaintiff's hypersensitivity. The lower court's dismissal with prejudice should be affirmed.

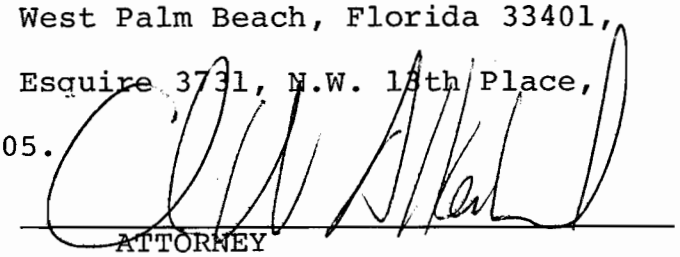
Respectfully submitted,

FOWLER, WHITE, GILLEN, BOGGS,
VILLAREAL & BANKER, P.A.
Post Office Box 1438
Tampa, Florida 33601
(813) 228-7411
ATTORNEYS FOR RESPONDENT,
FLORIDA FARM BUREAU

By: _____
CHRIS W. ALTENBERND

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail this 3rd day of January, 1983 to Frank McClung, Esquire, Post Office Box 877, Brooksville, Florida 33512 and Gary M. Witters, Esquire, Post Office Box 2111, Tampa, Florida 33601, Larry Klein, Esquire, Suite 201, Flagler Center, 501 South Flagler Drive, West Palm Beach, Florida 33401, and to Joseph W. Little, Esquire 3731, N.W. 18th Place, Gainesville, Florida 32605.



ATTORNEY