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.

# ANSWER BRIEF OF RESPONDENTS, ROY LEE GRAY, JR., et al.

CERTIFIED FROM THE DISTRICT COURT OF APPEAL OF FLORIDA
FIFTH DISTRICT

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## STATEMENT OF THE CASE

Respondents, Roy Lee Gray, Jr., Roy L. Gray, Gladys Gray, and Dixie Insurance Company ("Gray"), hereby adopt Petitioner's, Walton D. Champion ("Petitioner"), as Personal Representative of the Estate of Joyce Caroline Champion, deceased ("Decedent"), Statement of the Case in Petitioners' Brief on the Merits ("Brief").

## STATEMENT OF THE FACTS

Gray hereby adopts Petitioner's Statement of the Facts as contained in the Brief with the following provisos and/or clarifications:

1. All of the so-called "facts" merely are the allegations contained in Appellant's Second Amended Complaint.

2. The Decedent was not at the scene of the alleged accident at the time it occurred but purportedly arrived there afterwards. R.14 ("R"; Record of this case on appeal).

3. This case does not involve the wrongful death claim of Petitioner's daughter. That claim, together with the Decedent's claim as survivor, already has been amicably settled.

## ISSUES PRESENTED FOR REVIEW

Whether Petitioner has met his burden of persuasion in his attempt to have this Court overturn its existing decisions concerning the "impact rule"?

Whether the facts of this case are appropriate for the Court to revisit the "impact rule"?

## ARGUMENT

### I. THE RULE OF STARE DECISIS AND ITS UNDERLYING PRINCIPLE OF PREDICTABILITY OF THE CONSEQUENCES OF ACTIONS TAKEN DEMANDS THAT THE IMPACT RULE BE CONTINUED.

There is no real dispute[1] that the law of Florida, as enunciated by this Court, requires physical impact on a plaintiff such as the Petitioner who seeks to recover for the negligence of another. Gilliam v. Stewart, 291 So.2d 593 (Fla. 1974) ("Gilliam"). In order for the Petitioner to prevail in this case, the Court must overturn its previous decisions concerning the "impact rule." A necessary predicate to such a reversal of position by the Court is a showing of new and/or changed

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[1]Petitioner, in his Brief, still attempts to avoid the effect of this rule by referring the Court to its decisions in Crane v. Loftin, 70 So.2d 574 (Fla. 1954) ("Crane); Butchikas v. Travelers Indemnity Company, 343 So. 815 (Fla. 1977) ("Butchikas"); and Kirksey v. Jernigan, 45 So.2d 188 (Fla. 1950) ("Kirksey"). This is the same argument that Petitioner made to the trial Court and the Fifth District. Obviously, neither court was persuaded. A review of the holdings of the cases cited by Petitioner shows that the Court in Crane affirmed the dismissal of the plaintiff's complaint based on the "impact rule". The Court in Butchikas affirmed the district court's refusal to allow the plaintiff to recover under awards made by the jury for punitive damages and mental anguish. In Kirksey, the Court was faced with a case involving the grossly negligent handling of a dead body and, at best, the Court only "suggests the rule may not apply when there has been an entire lack of care on behalf of a defendant." Id at 190. The negligent handling of a corpse has long been recognized as one of the two exceptions to the impact rule. Langhenry, J., "Personal Injury Law and Emotional Distress", The Journal of Psychiatry and Law, p.105, n.27 ("Langhenry"). Thus, Kirksey has no precedential value in this instance.

circumstances[2] which would compel the conclusion that maintenance of the "impact rule" no longer is warranted.

The Brief of Academy of Florida Trial Lawyers, As Amicus Curiae, In Support of Position of Petitioner ("Amicus I") suggests the following reasons to the Court for its consideration:

A. "...the impact rule would result in a gross miscarriage of justice..." in this case (Amicus I, p.1);
B. "...35 states (not including the federal decisions)...have done away with the impact rule...[t]en of these decisions have come out since 1974..." (Amicus I, p.1);
C. "...Florida is way behind as regards the impact rule." (Amicus I, p.2); and
D. "...there are no logical policy reasons ...which would justify the denial of recovery to the plaintiff in the present case..." Amicus I, p. 3.

The Brief of Amicus Curiae, Joseph W. Little ("Amicus II"), does not admit of facile characterization. The basic position apparently taken by Amicus II is that since the Court has abrogated a few other "no duty" rules and since "a great number

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[2]See Old Plantation Corp. v. Maule Industries, 68 So.2d 180, 183 (Fla. 1953) ("Maule") ("Respect for the rule of stare decisis impels us to follow the precedents we find to have governed this question for so long. This is especially true where the argument to change is persuasive but not overwhelming"); Ripley v. Ewell, 61 So.2d 420, 424 (Fla. 1952) ("Ewell") ("[W]e should not by judicial fiat make changes in established law that will injuriously affect many persons who could not possibly forsee or anticipate such action on our part"). Accord Waller v. First Savings & Trust Co., 133 So. 780, 783 (Fla. 1931); State v. Dwyer, 332 So.2d 333, 335 (Fla. 1976). See also Morrison v. Thoelke, 155 So.2d 889, 904 (Fla. 2nd DCA 1963) (the court weighed the change in circumstances occasioned by "modern changes in effective long-distance communication," but still continued adherence to a rule of law that "although not entirely compatible with ordered, consistent and sometimes artificial principles...," was in accordance "...with the practical considerations and essential concepts of contract law.").

of American jurisdictions have jettisoned the impact rule", this Court should do likewise.[3]

The Fifth District Court of Appeal, in Champion v. Gray, 420 So.2d 348 (Fla. 5th DCA 1982) ("Certification"), opined that the "impact rule" should be abrogated for the following reasons:

> A. the reasons underlying the impact rule are "...shallow, out-dated, (and) unrealistic ..." Id at 350-351 (parenthetical information added);
> B. "...the overwhelming majority of jurisdictions ...have abandoned the rule..." Id at 350; and
> C. "[t]echniques for diagnosing the causal connection between emotional states and physical injuries have been significantly refined since the impact rule was first announced...[d]ue to the advances of medical science in the field of psychic injuries...". Id at 350

With one exception, all of the "reasons" suggested to the Court in favor of abolishing the rule obviously were just as applicable when the Court refused to change the impact rule in its Gilliam decision. The only new and/or changed circumstance referred to by any of the persons involved thus far in the litigation of this case, is the assertion by the Fifth District that scientific advances, since the "impact rule was first

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[3]Amicus II thoughtfully acknowledges the pitfalls inherent in abolishing the impact rule, however, Amicus II does not suggest any adequate manner by which the Court could avoid those pitfalls. There are four reasons proferred by members of the House of Lords for "restraint" in this situation: (a) "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"; (b) "liability out of proportion to moral wrongdoing"; (c) "increased evidential difficulties and lengthen litigation"; and (d) "invasion of legislative perogative (sic)." Amicus II, p.6. It is tacitly acknowledged by Amicus II that, although some of these problems may be relatively inconsequential under the English system, they are matters of substantive concern for American jurisprudence. Amicus II, pp.7-8.

announced", mitigate toward abolition of the rule. It is submitted that the real question in this regard is what in psychiatry has changed since this Court decided the Gilliam case, not what have been the developments in that area since the "impact rule" first became the law of Florida.

This Court in Gilliam recognized that "...in this fast changing world the general welfare requires from time to time reconsideration of old concepts." Id at 594. It is clear that, since 1974, nothing of significance has changed concerning the diagnostic techniques used in the practice of forensic psychiatry, or in any aspect of the socio-economic milieu, or in the judicial system.[4]

The standard texts previously in use and those now in use at some of Florida's leading medical medical schools do not indicate any significant refinements in diagnostic techniques from 1974 to the present concerning psychotraumatic reactions. See, e.g. Slaby, Tancredi, and Lieb, Clinical Psychiatric Medicine, Harper & Row, Philadelphia, Pa., 1981 ("Slaby"); Holfing, Textbook of Psychiatry for Medical Practice, J.B. Lippincott Company, Third Edition, Philadelphia, Pa., 1975. See also Brady and Brodie, Controversy in Psychiatry, W.B. Saunders Company, Philadelphia, Pa., 1978 ("Brady").

In fact, the consensus view of the contributors to these texts is that there is a great need for refinement in the area of

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[4]The same judicial concepts of negligence (ie: duty, forseebility, proximate causation, etc...) and evidence still pertain in Florida, in the same fashion as was the case in 1974. The courts still are overcrowded, the plaintiffs still sue, and the defendants still seek to bar recovery by the plaintiffs.

diagnostic specificity since a diagnosis typically is based only upon "clinical impressions of the presence or absence of a certain minimum number of specific symptoms which may, in fact, not conform to the clustering of symptoms as they appear in nature". Absent such refinements, "...the specificity of existing diagnoses cannot help but continue to prove inadequate for demonstrating the efficacy of specific psychotherapies for specific conditions." See, e.g. Brady, p.581, quoting, Professor Ari Kiev, Cornell University Medical College. Cf. Brady, p.1018, quoting, Hugh C. Hendrie, Chairman of the Department of Psychiatry, Indiana University School of Medicine.

The viability of the recently revised Diagnostic and Statistical Manual (DSM III) of the American Psychiatric Association ("APA") which includes new sections concerning Post-Traumatic Stress Disorder (Acute; §308.30 and Chronic; §309.81), also has been seriously questioned. See, e.g., Brady, p.1028, quoting, Professor Leonard Krasner, State University of New York at Stoney Brook; Slaby, p.107.

There appears to have been a great deal of work done in the field of psychotraumatic reactions in recent years as evidenced by the new APA-DSMIII standards regarding Post-Traumatic Stress Disorder. However, this work deals with psychological conditions which arise after an injury to the patient. Even in these studies conducted which involve actual physical injury to the patient, there is a great divergence of views concerning the etiology of the resulting psychiatric problems. See, e.g., Robitscher, J., Compensation, Psychiatric Disability and

Rehabilitation, Charles C. Thomas, Springfield, Illinois, 1971 (Dr. Robitscher suggests that there is a condition known as "Compensation Neurosis" which involves the thesis that the patient's avarice plays the dominant role in bringing about posttraumatic symptomology); Wall, J. "The Problem of Compensation", The Practioner, Vol. 209, No. 251, Sept. 1972, p.311 (The view is expressed that "it is accepted by all concerned that the settlement of the claim is very likely to lead to complete resolution of the neurosis"). Cf Braverman, M., "Validity of Psychotraumatic Reactions", Journal of Forensic Sciences, Vol. 22, No. 3, July, 1977, pp.654-662, References, Notes 12-20 ("Braverman I"). Dr. Braverman does not agree with the concept of "Compensation Neurosis". His work in Braverman I, and subsequently in Braverman II (Braverman, M., "Onset of Psychotraumatic Reactions", Journal of Forensic Sciences, JFSCA, Vol. 25, No. 4, Oct. 1980, pp.821-825), attempted to prove the propositon that posttrauma psychological disorders were not caused by the patient's expectation of monetary gain.

In order to prove this thesis, Dr. Braverman traveled to Austria where, allegedly, "...the injured person very rarely has contact with an attorney regarding his injury" and "[t]here is reasonably strong evidence to indicate that posttraumatic psychiatric reactions occur independently of legal 'influence'". Braverman II, p.822. As a result of his study, Dr. Braverman reached a number of conclusions and made some interesting findings:

(A) Considerations of compensation and litigation do not cause posttraumatic reactions

but these factors do have "significant psychological effects on injured persons". Braverman I, p.659;

(B) If an injury occurs on a particular day of the week (Friday) or to a member of a particular ethnic group (Yugoslavians), there is an increased chance of resulting posttraumatic psychiatric reaction. Id at p.658,; and

(C) "As to the cause of the posttraumatic reaction, there does not appear at present to be a final, completely acceptable understanding". Id at p. 661 (emphasis added).

Thus, even in the view of those who "hope that one day this condition (posttraumatic reaction) may be given the generally accepted diagnostic dignity it deserves..." ("Braverman I, p.661; parenthetical information added), there is no support for the proposition that there have been significant advances in diagnostic techniques in forensic psychiatry during recent times with regard to any alleged causal connection between emotional states and physical injury. Certainly, there have been no such advances with respect to the causal diagnosis of resulting psychological states where there has been no physical injury.

Furthermore, how would these illusory scientific advances make it more "...forseeable to the defendant that his negligence may cause another to suffer emotional distress". See Certification, 420 So.2d at 350 (emphasis added). Do these hypothetical defendants read the medical journals and treatises that the Fifth District failed to cite when rendering its opinion in this case? How "forseeable" is a resulting posttraumatic reaction whose occurence may depend on the day of the week the accident happened or the nationality of the plaintiff? See Braverman I, p.658.

It is submitted that, contrary to the Fifth District's assertion, the uncertainty of diagnosis in the field of psychiatry, even where there is an underlying physical injury, is more than a "mere difficulty" to be overlooked. Certification, 420 So.2d at 350. Thus, there is no valid basis for this Court to revisit the "impact rule" under the governing precepts of the doctrine of stare decisis. As this Court noted in its Maule decision:

> "It is, then, an established rule to abide by former precedents, stare decisis, where the same points come again in litigation, as well to keep the scales of justice steady, and not liable to waiver with every new judge's opinion..." Id at 183, citing, Broom's Legal Maxims, Seventh Edition, p.118.

## II. THE FACTS OF THIS PARTICULAR CASE, AS ALLEGED IN THE SECOND AMENDED COMPLAINT, DEMONSTRATE THAT THE PLAINTIFF WOULD BE DENIED RECOVERY UNDER THE CRITERIA APPLIED BY THE MAJORITY OF JURISDICTIONS WHICH HAVE ABROGATED THE IMPACT RULE AS AN ABSOLUTE BAR TO SUIT.

The Fifth District Court of Appeal cites some 40 cases from 35 jurisdictions in support of the proposition that:

> The majority of jurisdictions now allow recovery, absent impact, for the negligent infliction of emotional stress, particularly where physical injury is produced as a result of such stress. Certification, 420 So.2d at 349.

Many of these cases fairly can be cited for this proposi-

tion[5]. However, only a very small minority of the decisions relied on by the Fifth District even arguably would permit recovery under the facts of this case as alleged by the Petitioner[6]. Most of these cases, in fact would preclude liability when applied to the instant action, either because the

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[5]But see: Melton v. Allen, 580 P.2d 1019, 1022 (Or. 1978) (held: no recovery absent intentional acts of a flagrant character under most unusual facts and circumstances; outrageous conduct; or invasion of right to privacy); Stewart v. Arkansas Southern R.Co., 360 So.676 (La. 1904) (miscarriage caused in part by jolt and violent shock, with accompanying fright); Whitsel v. Watts, 159 P.401, 402 (Kan. 1916) (jury found that defendant acted with intention of injuring plaintiff); Belt v. St. Louis - San Francisco R.Co.,195 F.2d 241 (10th Cir. 1952) (injured person's pain, suffering, and medical shock from pre-existing physical injury was increased by considerable noise and vibration caused by operations of defendant railroad - case does not involve emotional distress.); Rasmussen v. Benson, 280 N.W. 890 (Neb. 1938) explained in Fournell v. Usher Pest Control Co., 305 N.W. 2d 605, 606 (Neb. 1981) (ruling is limited to conduct which is reckless and wanton to such a degree that it approaches intentional injury).

[6]Hunsley v. Giard, 553 P.2d 1069 (Wash. 1976) (under the modern trend, forseeability becomes a question of fact for the jury to resolve); Dziokonski v. Babineau, 380 N.E.2d 1295 (Mass. 1978) (plaintiff need not actually witness the accident which causes the stress); Corso v. Merril, 406 A.2d 300, 307 (N.H. 1979) (plaintiff need not actually witness the accident which causes the emotional harm, but plaintiff must contemporaneously perceive the accident); Archibald v. Braverman, 275 Cal.App.2d 253, 79 Cal.Rptr. 723 (1979) (plaintiff need not actually witness accident); Krause v. Graham, 19 Cal.3d 59, 137 Cal.Rptr. 863, 562 P.2d 1022 (1979) (visual perception of impact not required).

Decedent was not within the zone of risk[7] or because the

[7]Whetham v. Bismarck Hospital, 197 N.W.2d 678 (N.D. 1972) (no recovery where mother suffered emotional shock from seeing hospital employee drop her newborn baby on its head); Fournell v. Usher Pest Control, 305 N.W.2d 605 (Neb.1981) (plaintiff must at least be within the zone of danger or actually put in fear for own safety); Ver Hagen v. Gibbons, 177 N.W.2d 83 (Wis. 1970) (plaintiff must be within the range of ordinary peril and in fear of own safety); Strazza v. McKittrick, 156 A.2d 149 (Conn. 1959) (injured party may recover for fear of injury to self if within the range of ordinary physical danger, but may not recover for fear of threatened injury to her child); Hughes v. Moore, 197 S.E.2d 214, 219-220 (Va. 1973) (court expressly limits holding, stating that it does not apply to injuries occasioned by negligence toward a third person, or caused by seeing the injury resulting to a third person); Mack v. South-Bound R.Co., 29 S.E. 905 (S.C. 1898) (plaintiff was nearly run over by train); Trent v. Barrows, 55 Tenn.App. 182, 397 SW2d 409, 411 (1965) (car crashed into occupied house, court notes Tennessee rule prohibiting recovery for physical injuries allegedly sustained as a result of witnessing injury to child); Robb v. Penn. R.Co., 210 A.2d 709, 714 (Del.Sup.1965)(injured party must be in the immediate area of physical danger); Savard v. Cody 234 A.2d 656, 660 (Vt. 1967) (injured person must have reasonable fear of immediate personal injury); Kelly v. Lowney & Williams, Inc., 126 P.2d 486 (Mont. 1942) (car crashed into occupied home); Alabama Fuel & Iron Co. v. Baladoni, 15 Ala.App. 316, 73 So.205, 208 (1916) (woman miscarried after defendant shot a dog a few feet from where she was standing, court noted that the shot likely could inflict physical injury upon woman); Sternhagen v. Kozel, 167 N.W. 8 (N.D. 1918) (plaintiff suffered severe fright due to a tort committed against her); Okrina v. Midwestern Corp., 165 N.W. 2d 259 (Minn. 1969) (wall collapsed, plaintiff permitted to recover for injuries caused by fear for her own personal safety); Daley v. Croix, 179 N.W.2d 390 (Mich.1970) (explosion case, court in a footnote distinguishes situations involving fear of injury to others or shock from witnessing such injury); Towns v. Anderson, 579 P.2d 1163, 1165 (Colo. 1978) (court specifically limits opinion to plaintiffs who are themselves subjected to an unreasonable risk of bodily harm).

Decedent did not contemporaneously witness the accident[8].

The Second Amended Complaint avers that the Decedent "...came to the shoulder of the roadway immediately after the accident." Petitioner's Appendix, p.12, para. 4; Brief, p.iv. ("...[s]hortly after impact..."; R.14) Thus, even under the "standards" suggested by the Fifth District[9] and Amicus

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[8]Culbert v. Sampson's Supermarket, 444 A.2d 433, 438 (Me. 1982) (plaintiff must be present at scene of accident and observe it); Landreth v. Reed, 570 S.W.2d 486, 490 (Tex.Civ.App., 6th Dist. 1978) (court notes that no recovery is permitted for merely seeing dead body of loved one); Sahuc v. U.S. Fidelity and Guaranty Co., 320 F.2d 18 21 (5th Cir. 1963) (must be present and involved in accident); Haight v. McEwen, 43 Misc.2d 582, 251 N.Y.S.2d 839, 842 (1964) (plaintiff-mother was actually present and witnessed killing of her son); Portee v. Jaffee, 417 A.2d 521, 527 (N.J. 1980) (adopts rule that plaintiff must observe the accident to recover); D'Ambra v. United States, 338 A.2d 524, 531 (R.I. 1975) (plaintiff must actually witness the accident); Sinn v. Burd, 404 A.2d 672, 683, n.15 (Pa. 1979) (the court expressly limited its holding to cases in which the plaintiff alleges injury as a result of actually witnessing the defendant's negligent act); Rickey v. Chicago Transit Authority, 428 N.W.2d 596, 599 (Ill.App.1st Dist. 1981) (plaintiff must be located near scene of accident, and alleged injury must result from sensory and contemporaneous observance of the accident); Dillon v. Legg, 441 P.2d 912, 920 (Cal. 1968) (plaintiff must be located near the scene of the accident, and alleged injury must result from sensory and contemporaneous observance of the accident); Leong v. Takasaki, 520 P.2d 758 (Hawaii 1974) (plaintiff witnessed the accident from several feet away); Barnhill v. Davis, 300 N.W.2d 104 (Iowa 1981) (plaintiff must be located near scene of accident and suffer emotional distress from sensory and contemporaneous observance of the accident).

[9]See Certification, 420 So.2d at 353 (no. 2 - "...sensory and contemporaneous observance of the accident...").

II[10], Petitioner is barred from recovering in this action.

The Petitioner's Brief, Amicus I, Amicus II, and the Fifth District's Certification all assert that it was "reasonably" forseeable for Gray to have known as he was driving down the road: (1) that he would swerve off the road into a ditch, hit and kill a young girl; and (2) that the girl's mother (Decedent) would be "nearby," would rush to the scene of the tragedy, and would react to the horror so violently that she herself would die. Now, if this Court changes the impact rule, a third element which Gray "reasonably" could have forseen will be added. That is, the reversal of a longstanding tort doctrine which previously had established that the second "forseeable" item referred to above was not "reasonably" forseeable and, further, that the criteria applicable in most other states (which still would relieve Gray

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[10] See Amicus II, p.4, no.2. ("...sensory and contemporaneous observance of the accident..."). The Fifth District and Amicus II, in somewhat different ways, try to avoid the zone of risk and sensory/contemporaneous observance preclusions of recovery in this case. The Fifth District does it by reference to the Dillon v. Legg nebulous contrasts, e.g., "near" versus "a distance away"; "sensory and contemporaneous observance" versus "learning of the accident from others after its occurence." Certification, 420 So.2d at 353. Amicus II engages in similar "fudging" (see p.9, no.2) but goes on to add that the enunciated limitations should not be controlling "...in the presence of a clearly articulable factual basis to make the injury reasonably forseeable" (p.9, no.3). Similarly, Amicus II proffers an exception to the sensory/contemporaneous obsevation requirements for "...parents, spouses, and co-employees..." who allegedly are "reasonably" forseeable as coming upon the "aftermath." (p.9, no.2). However, it is submitted, if the Court adopts either of these set of "standards" as a rule of law in Florida, the Court simply would be throwing its hands up and, in effect, saying that any case goes to the jury on forseeability/proximate causation. Only four (4) jurisdictions have taken this approach. (See n.6, supra), the rest of the courts have opted for "hard and fast" rules that limit recovery to particular sets of circumstances which the Petitioner in this case has not brought himself within.

of liability) would not be utilized by this Court. This post hoc imputation of knowledge, it is submitted, would be a gross departure from the essential requirements of the law. Thus, the Court should affirm the decision of the Fifth District that the Second Amended Complaint does not state a cause of action upon which relief may be granted.

## III. THERE ARE SIGNIFICANT POLICY CONSIDERATIONS IN FAVOR OF MAINTIANING THE IMPACT RULE WHICH OUTWEIGH THE ARGUMENTS IN FAVOR OF CHANGING THE RULE

When the totality of the equation consisting of the reasons for changing the "impact rule" are balanced together with the arguments against changing the rule, the resulting differential is much in favor of maintaining the rule.

### A. ARGUMENTS FOR CHANGING THE IMPACT RULE.

The basic reasons proffered in support of abrogating the "impact rule" are that: (1) it is an unjust rule; and (2) a lot of other states have done away with the rule. The Fifth District's assertion concerning medical advances in diagnostic techniques is not substantiated. The argument that there are no good reasons for keeping the rule is addressed in the following Subsection (III.B).

The "injustice" contentions clearly are only limited to plaintiffs. What may be "just" from a defendant's perspective is ignored. How just is it for a person driving a car to be held liable for the extreme emotional reactions of persons not directly involved in an accident? How just is it for those persons who are bereaved because an accident struck down one of

their loved ones to have their characters implicity brought into question because they reacted in a less violent, but no less caring, way than some other persons similiarly situated? That is, why did they not suffer from observeable physical or emotional distress when their loved one was severely injured or killed? How just is it for the judicial system to compensate nonimpact plaintiffs who suffer in observeable ways and deny recovery to those who bear their grief solely in the recesses of their hearts and minds?

The old maxim that "justice is a two edged sword" which cuts on both sides of its blade is applicable. The right of a nonimpact plaintiff to recover for his/her grief denies a defendant the right to be held responsible only for those actions which can be expected to cause injury, and also denigrates the right of bereaved individuals to suffer in silence without the taint of implied criticism.

A defendant, when driving a car, knows that he/she can cause physical injury to another person or persons. The law also implies the knowledge of a defendant that because people react differently to physical impact, he/she may injure some persons more severely than others by the same force. The law further implies the knowledge of a defendant that when you hit and hurt someone, there very well may be emotional and psychological consequences attendant upon that injury. A number of jurisdictions, those that have done away with the total bar of the impact rule, have taken the process of imputation of knowledge to a defendant one step further. If someone is at the

scene of an accident, and it is only by chance that the defendant missed injuring that person, the law implies knowledge to the defendant that those persons in the zone of physical danger very well may be closely enough related to the person(s) injured so that severe emotional reactions on their part might be expected.

Those in favor of changing the impact rule in this case would have the Court go even further in implying knowledge to a defendant. That is, if you are driving down the road, you not only can expect to hit some person(s) and cause physical and emotional damage to that/those person(s), you also can be expected to "know" that the person(s) you hit are so situated in life that there are other persons in the world who, upon hearing of or seeing the results of an accident - although not involved themselves - will react so violently to the results of the accident that they will suffer observeable physical manifestations of their underlying shock and grief.

The net result is that the liability of a defendant to a nonimpact plaintiff will depend upon: (1) whether the injured party is alone in the world or is part of a familial circle and/or a circle of close and loving friends; (2) whether the persons in those circles have such deep affection for the injured party that they will suffer grief and anguish at his/her misfortune; (3) whether the physical condition of that circle of relatives and/or friends will be such that their assumed grief will cause an observeable physical reaction; and/or (4) whether the psychological condition of those relatives and/or friends is such that their suffering will manifest itself in an objective, physical fashion.

It is submitted that such contingencies are not "reasonably" forseeable and, therefore, may not "justly" be implied as within the scope of a defendant's knowledge.

The other argument to the effect that everyone else is doing away with the "impact rule" and, thus, so should Florida, is a non sequitur. It also is not a reason for this Court to change the impact rule. Rather, at best, it is a reason for the Court to review its stance concerning the impact rule. It gives the Court a chance to look at the rule anew to see what of substance has changed since the last time it had occasion to address the rule. Since it is submitted that nothing has changed since 1974 (see Argument I, supra), the decisions of other jurisdictions to change the rule is not a substantial reason for this Court to play "follow the leader." If "keeping up with the Joneses" was a precept worthy of judicial consideration, this Court simply could adopt by reference any rule of law that is the subject of a judicial trend, at the time when more than half of the other jurisdictions have adopted the new rule of law.

It is submitted that this Court would not be following its Constitutional mandate to "review" the decisions and orders of inferior courts if it refrained from excercising its independent judgment in this matter. See Florida Constitution (1980), Article V, Sections 3(b), 4(b), and 5(b). See also Fla.R.App.P. 9.030(a)(1) and (2). This is exactly what this argument made by those in favor of abrogating the impact rule would have the Court do. These proponents have not really petitioned the Court to evaluate the impact rule itself. Rather, they have assumed that

the Court, in fact, will abrogate the rule and that the only thing left for the Court to determine is the nature of those restrictions if there are to be restrictions on the assumed right on nonimpact plaintiffs to recover.

Therefore, under the Court's own line of stare decisis cases, it is clear that the proponents of changing the impact rule have not provided the Court with the required "overwhelming" reasons to do so. See Maule, 68 So.2d at 183; Note 2, supra. In fact, it is submitted that not even "persuasive" reasons for changing the rule have been proffered to the Court. Id at 183. Thus, since any change in the impact rule "...will injuriously affect many persons who could not possibly forsee or anticipate such action..." on the Court's part, the rule should be continued. See Ewell, 61 So.2d at 429.

B. ARGUMENTS AGAINST CHANGING THE IMPACT RULE.

Although Gray submits that the Petitioner and his adherents have not carried their heavy burden of persuasion in this instance, there are a number of substantive policy reasons which inveigh against changing the impact rule in any fashion or, alternatively, only abrogating the impact rule under clearly delineated terms and conditions.

The arguments, already discussed, against changing the impact rule at all are: (1) the doctrine of stare decisis; (2) the resulting injustice to defendants because of the lack of "reasonable" forseeability and the denigration of the persons affected by an accident who do not observeably react to the

trauma; (3) the "facts" alleged in this particular case are neither sufficient to, nor appropriate for, use as a basis for revisiting the impact rule; and (4) the reasons for "restraint" offered by several members of the House of Lords which are particularly important in the American system of jurisprudence. See Note 3, supra. A fifth reason not previously discussed is that existing theories of recovery in tort adequately compensate the Petitioner in this case and those similarly situated in other cases.

There is a continuum, based on the severity of the actions engaged in by a particular defendant, of recovery for potential plaintiffs. The simple negligence of a defendant will give rise to compensation to the injured plaintiff for both physical and mental distress[11]. Likewise, in cases of wrongful death, those closest to the decedent will be compensated for their out-of-pocket expenses as well as for their emotional distress[12].

Gross negligence and/or willful and wanton misconduct on the part of defendant will give rise to the recovery of punitive damages by the injured plaintiff and/or any wrongful death

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[11] See, e.g., Miami Paper Co. v. Johnston, 58 So.2d 869, 871 (Fla. 1952).

[12] Under the Florida Wrongful Death Act (Sections 768.16, et. seq., Fla. Stat.), the surviving spouse, surviving minor children, and each of the parents of a deceased minor child may recover for pain and suffering damages as well as for direct economic loss. See Section 768.21, Fla. Stat. Obviously, a nonimpact plaintiff who also is a wrongful death survivor should not be allowed double recovery for emotional distress and/or pain and suffering. However, such would be the situation without appropriate action by a trial court.

plaintiffs[13]. Although not legally established, as a practical matter an award of punitive damages will duplicate the recovery of damages for emotional distress that a prospective nonimpact plaintiff might seek to recover[14].

In situations involving intentional misconduct, that is, intentional infliction of emotional distress, there is no requirement of impact and persons who only are psychologically or emotionally injured are permitted to recover under Florida law[15].

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[13] See 17 Fla.Jur.2d, Damages, §§109-125.

[14] If the injured plaintiff survived, the jury reasonably can be expected to take into account, when assessing punitive damages, the impact of the grief caused by the defendant to those closest to the plaintiff. The testimony of the parents or spouse concerning the circumstances surrounding the accident, including their reaction to it if they were present, clearly would be admissible and just as clearly would be offered into evidence by a competent lawyer. If the accident victim did not survive, the wrongful death plaintiffs would introduce much the same kind of evidence which the jury would likely convert into punitive damages. See, e.g. National Car Rental System v. Bostic, Case No. 81-2130 (Fla. 3rd DCA, October 26, 1982) ("Bostic").

[15] See, e.g., World Insurance Co. v. Wright, 308 So.2d 612 (Fla. 1st DCA 1975); Slocum v. Food Fair Stores, Inc., 100 So.2d 396 (Fla. 1958).

Thus, the Court is being asked to create a new form of liability in a simple negligence case[16]. Such action by this Court, it is submitted, would be contrary to the intent of the Legislature when it promulgated the survivor's Wrongful Death Statute (see Section 768.21, Fla. Stat.) and would be compensating a "loss" which is better left, as a matter of public policy, either uncompensated for or as a matter for individual medical insurance coverage.

Another reason for not disturbing the impact rule is provided by the proponents of abolition of the rule themselves. That is, unless the Court comes up with "hard and fast rules" in this area:

> "[A] pattern could develop in which some (trial court judges) 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". Amicus II, p.7 (parenthetical information added).

Those who advocate the demise of the impact rule, including Amicus II, have not suggested any governing criteria which would

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[16]The instant action is not one involving gross negligence and/or intentional misconduct sufficient to give rise to an award of punitive damages. See Ingram v. Pettit, 340 So.2d 922, 924 (Fla. 1977) (the defendant must be "drunk," not merely "under the influence of intoxicating liquors"). See also Second Amended Complaint, para.2; Petitioner's Appendix, p.11; R.14 ("while being in an intoxicated condition, having an unlawful blood alcohol level of .10...").

assist the Court with the task of defining workable limits for nonimpact plaintiff cases[17].

Petitioner and Amicus I do not suggest any guidelines whatsoever. Those offered by Amicus II (p.9) are based on "forseeability" without any accompanying standards which would suggest what, in fact, is reasonably "forseeable." Amicus II further dilutes the precondition of "forseeability" by offering an "aftermath" exception for parents, spouses, and co-employees; that is, those persons would not even have to be in whatever area may be defined by the imprecise phrase "close proximity to the disaster." (p.9). Presumably, the bigger the "disaster," the larger the area of "close proximity." Similarly, none of the foregoing "limitations" would apply when there is a "...clearly articulable factual basis to make the injury reasonably forseeable in the particular case." (p.9). However, Amicus II graciously directs that "juries still might be permitted to find no proximate causation on the facts of a particular case." (p.9; emphasis added).

When these two statements are read in conjunction, their purport becomes clear. Everything, in fact, will be submitted to the jury as being "reasonably forseeable" under the facts of the "particular case." In essence, Amicus II provides no standards

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[17] See, e.g., Langhenry, pp.99-100, 102-103, which details the "incongruous results" reached by the post Dillon v. Legg California courts on their way to their present evolution, contrary to Dillon v. Legg, toward "reliance upon pure negligence principles in the evaluation of suits for the negligent infliction of emotional distress."

for application by a trial court in a nonimpact case...the very evil Amicus II previously had denounced. (pp.7-8).

The Fifth District's approach concerning factors to be considered when determining "forseeability" is to make the Dillon v. Legg juxtaposition of indefinite concepts. Certification, 420 So.2d at 353. This approach did not work in California and it will not be practicable in Florida. See Note 17, supra.

For example, how "near" is near and how far is a "distance away"? Does "near" mean in the zone of physical danger or does it mean within five minutes traveling time from the accident scene? Does "sensory and contemporaneous observence" mean that you actually saw the accident; or does it mean that you were at the scene and within seconds or minutes of the accident you saw the immediate "aftermath"; or does it mean that you heard the accident occur and immediately came out of the house (ie: not at the scene itself) and saw the aftermath? Does "hearing of the accident from others" prohibit recovery by one parent who was told by the other parent that their child had been injured when both were "near" the scene of the accident and only one saw it; or does it preclude recovery when a witness to the accident screams, you hear it, and come running to the scene; or does it preclude recovery only when you learn about the tragedy from a friend, relative, the hospital, etc. and you are a "distance away" from the accident scene? How close is "closely related" and what qualitative or logical difference does it make, as far as the concept of "forseeability" is concerned, whether the person who is aggrieved by the injury to a loved one is a parent,

spouse, lover, best friend, longtime coworker, or even a casual acquaintence who reacts drastically to the thought of injury to another?

This recitation of variations on this theme is presented only to highlight the extreme difficulty that trial courts actually have had in attempting to decide what is "forseeable."[18] In a certain sense this argument supports the position tacitly taken by Amicus I and necessarily suggested by the "criterion" offered by Amicus II. That is, no "hard and fast rules" should be made by the Court. However, it also reinforces the notion that, by abolishing the impact rule and by promulgating "rules" along the lines suggested by the Fifth District and Amicus II, the Court either will be substituting a number of arbitrary, unenforceable rules for one easily enforceable, allegedly arbitrary one; or the Court will, in effect, be allowing all nonimpact cases to go to the jury for its

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[18] See Langhenry, pp.97-100.

determination of "forseeability". This, it is submitted, is not an acceptable alternative for the Court to take.[19]

If the Court does decide to revisit the impact rule and abolish it as an absolute bar to recovery, it is submitted that the Court only should do so with the proviso that certain terms and conditions will be required in nonimpact cases. Some random thoughts are provided to the Court for its consideration.

A. Kind of Underlying Injury: The Court might require as a precondition to recovery, the actual, immediate death of the loved one in full view of the plaintiff or, at a minimum, injuries of such magnitude that the plaintiff when viewing the aftermath necessarily would believe that the loved one thus injured never would survive the accident. This proviso would recognize that only the death of a loved one, that is, the total loss of that person's companionship, is a grievous enough psychic trauma to warrant a severe, observeable reaction. Anything less than such total loss (or the reasonable expectation of same) would seem to be the kind of experience all who live in this life must be expected to bear without undue effect.

B. Class of Nonimpact Plaintffs: Those who can be expected to grieve deeply over the loss of a loved one and who also may be expected to exhibit "long-term observeable effects" of such grief, would seem to be limited to parents concerning their minor children, minor children concerning their parents, and spouses inter se. These are the only types of relationships that the State formally acknowledge either by its laws on custody and adoption, or those regarding marriage and divorce, or in its Wrongful Death Act as to emotional

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[19]This would be contrary not only to the approach taken by the vast majority of courts but also would be contrary to the dissenting opinion in the Gilliam case (zone of danger test suggested; 291 So.2d at 602-603, Adkins, J.) and the position of the Restatement. See Restatement (2d) of Torts, §313 (Supp. 1982). As the court in Tobin v. Grossman, 249 N.E.2d 419, 423 (N.Y., 1969) stated: "If forseeability be the sole test, then once liability is extended the logic of the principle would not and could not remain confined." The California experience demonstrates that the New York Court of Appeal's assertion in 1969 indeed was prophetic. See Note 17, supra.

distress damages. See Section 768.21, Fla. Stat. Recovery further should be limited to those nonimpact plaintiffs who were residing in the same household as the injured party at the time of the accident. Nonimpact plaintiff/spouses also should be limited to those who were legally married at the time of the accident. These residence requirements would acknowledge the loss that occurs when someone who is an integral part of your everyday life is taken from you in an absolute fashion, but would not similarly recognize (and compensate) less severe traumas. Also, since as a matter of public policy the Legislature has limited emotional distress recovery to the aforementioned class of wrongful death survivors, a similar circumscription of the class of eligible beneficiaries would seem warranted in the instant circumstances.

C. Type of Resulting Injury: The Court might require that a nonimpact plaintiff have an observeable physical reaction immediately after the accident or, alternatively, within a short, prescribed period of time thereafter.[20] This observeable, physical manifestation should also be accompanied by the nonimpact plaintiff's resort to medical attention during that initial period of time after the accident. This type of restriction would serve two purposes. First, it would differentiate between those individuals who simply are going through the "normal" process of grieving for a loved one from those individuals whose reaction truly is severe and directly caused by the accident itself. Second, this limitation will cull out those situations where an agrieved individual will be "living with" his/her grief, without any overly severe reaction at the outset and then over time develop neurotic/depressive symptoms. Such a condition is not susceptible to objective proof and should be distinguished from the immediate, demonstrable reactions of others. In the latter situation, if treatment is sought, the symptoms may be equally subjective in nature but they then would be marked by an objective indicator, i.e., seeking professional help right after the accident. Basically, the introduction of this sort of criterion would compensate only those conditions that are beyond the range of normal reactions and are proximately related in time, in a demonstrable way, to the accident. The chances for "building a case" thus would be reduced dramati-

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[20] See Braverman II, pp.824-825 (Posttraumatic reactions typically occur within two weeks to two months of the accident). In this nonimpact situation, it is submitted that a much less extended time frame should be prescribed.

cally.

D. Zone of Risk/Danger (Physical): The Fifth District and Amicus II both suggest rejection of the zone of danger test that is used by most courts. See Note 8, supra. Instead of using the near the accident criterion propounded by the Fifth District and Amicus II, it is suggested that the Court impose the requirement that the nonimpact plaintiff him/herself be at the scene of the accident and also have a reasonable fear of danger to him/herself. This restriction also would accomplish two purposes. First, it would make a severe psychological reaction by a nonimpact plaintiff more "reasonably forseeable." That is, the plaintiff's truama because of a near miss logically would fall more within the "normal" range. Thus, a defendant's implied knowledge of what consequences could be expected to flow from his/her actions would be more directly and proximately linked with the accident itself.

E. Sensory and Contemporaneous Observance (Zone of Emotional Risk/Danger): This restriction on recovery is less rigorous than the zone of danger rule. The nonimpact plaintiff does not have to be in physical danger. He/she simply has to witness the accident, thus, he/she would be present in the zone of emotional danger from seeing the accident. The specific requirements would be that the nonimpact plaintiff not only would have to be at the accident scene but also would have to view the accident itself. Implicit in this criterion is that the "injury" done to the nonimpact plaintiff would have to arise from the nonimpact plaintiff's reaction to the occurence of the accident. This restriction again would bring "reasonable" forseeability back to the core occurence; i.e., the accident itself. Also, it would differentiate a nonimpact plaintiff's reaction to the occurence and/or immediate aftermath of a negligent activity of a defendant from those situations brought under the aegis of intentional infliction of emotional distress involving mutilated corpses or the handling of dead bodies.

F. Types of Conduct Engaged in by Defendant: The Court might wish to consider limiting the right of a nonimpact plaintiff to recover to situations involving willful and wanton misconduct and/or gross negligence. That is, the middle range of the spectrum ranging from simple negligence to intentional infliction of emotional distress. This limitation similarly would more closely track the notion of "reasonable" forseeability. If a particular defendant has engaged in more egregious types of misconduct, that defendant may fairly be said

to have thrown caution to the winds. Therefore, that defendant should expect to be held responsible for a larger range of consequences that conceivably could flow from his/her activities.

G. Evidentiary and/or Procedural Matters: The Court might consider the manner in which a nonimpact case likely would be presented to a finder of fact and whether certain types of assumed evidence and procedures are inimical to the end result envisioned by the Court if it decides to abrogate the impact rule.

(i) Would a defendant, where the only damage alleged is psychological (ie: the observeable physical manifestation is psychosomatic in nature), be given the right to have a plaintiff submit to a comprehensive psycological examination including extensive psychological testing? If not, would a treating psychiatrist/psychologist who is testifying as to the existence of a plaintiff's resulting psychological disabilities be permitted thus to opine without having subjected the plaintiff to comprehensive examination or testing, or would the subjective complaints of a plaintiff be a sufficient basis for such expert testimony?

(ii) Would the expert testimony in a nonimpact case be restricted to evidence concerning objective manifestations of psychological injury that can be directly and proximately related to the specific occurence because of a pre-existing medical condition of the plaintiff or would testimony concerning subjective complaints occuring after the accident in question due to a resulting depression be admissible?

(iii) Would the doctrines of comparative negligence and assumption of the risk apply to nonimpact plaintiffs either by ilk or their own activities or by the imputation to such plaintiffs of the fault of others? For example, would a plaintiff who ran to an accident scene with knowledge of the likely nature of the aftermath, be deemed to have assumed the risk of harm to him/herself or would this be evidence of comparative negligence? Would either of these doctrines apply if the plaintiff had a known pre-existing physical or psychological condition that forseeably could be exacerbated

> by viewing the "aftermath"? What if the plaintiff had a known physical and/or mental disability that the plaintiff had not sought treatment for, would that be evidence of comparative negligence? If the injured party has contributed to the occurrence of the accident either in whole or in part, would this be imputed to the plaintiff in his/her separate cause of action or would the joinder of the injured party as a co-plaintiff and/or involuntary defendant be required as an indispensible party to the litigation?

All of these matters may or may not be subjects that the Court would wish to consider if it revisits the impact rule. Certainly most, if not all, of these items will arise during the trial of a nonimpact case. If the Court decides to await the development of these subjects during the litigation of a number of nonimpact cases, the Court should be prepared to rule on numerous, conflicting decisions concerning what trial and inferior appellate courts consider reasonably forseeable, probative evidence, and proper procedures in such cases. The California experience (see Note 17, supra) shows that this process could be a painful one.

## IV. CONCLUSION:

At the present time, it seems as though only the Fifth District Court of Appeal finds the impact rule "shallow, out-dated, (and) unrealistic" Certification, 420 So.2d at 350-351. But see Selfe v. Smith, 397 So.2d 348 (Fla. 1st DCA 1981); Claycomb v. ichles, 399 So.2d 1050 (Fla. 2nd DCA 1981); Bostic, supra. Therefore the hue and cry about the injustice of the

impact rule is not general but, rather, is limited in scope. The problems inherent in abolishing the impact rule are multitudinous but are nugatory when the task of fashioning comprehensive and clearcut standards to govern nonimpact cases is considered.

The Fifth District's opinion ends with the recitation of an apt, from its point of view, bromide of Alexander Pope's to the effect that: "Be not the first by whom the new are tried, nor yet the last to lay the old aside." Certification, 420 So.2d at 354. (Emphasis in original). Gray submits that a more pertinent and compelling maxim can be found in this Court's decision in Maule:

We think the greatest good will be achieved and the greatest stability in the law maintained by adhering to the weight of authority instead of plowing new ground..." Id at 183.

Respectfully submitted,

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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, and to Chris W. Altenbernd, Esquire, Post Office Box 1438, Tampa, Florida 33601, 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 4th day of January, 1983.

GARY M. WITTERS, ESQUIRE