

IN THE SUPREME COURT OF FLORIDA

**FILED**

WALTON D. CHAMPION, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 ROY LEE GRAY, JR., et al., )  
 )  
 Respondents. )

NOV 24 1982  
 SID J. WHITE  
 CLERK SUPREME COURT  
 Chief Deputy Clerk

CASE NO. 62,8

PETITIONER'S BRIEF ON THE MERITS

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FORWARD

This is a question of great public importance certified to this Court by the Fifth District Court of Appeal.

The Petitioner, WALTON D. CHAMPION, will be referred to herein as Appellant and Roy Lee Gray, Jr., Roy L. Gray, Gladys Gray, Dixie Insurance Company, etc., and Florida Farm Bureau Casualty Insurance Company, etc., will be referred to jointly as Appellees. Appellant will use the symbol "R" in reference to the Record on Appeal.

STATEMENT OF THE CASE

Appellant, as Personal Representative for the Estate of Joyce Caroline Champion, filed a Complaint against Appellees pursuant to F.S. §768.16 et seq, the Florida Wrongful Death Act, seeking compensatory and punitive damages in excess of \$5,000.00 resulting from the death of Joyce Caroline Champion (R. 1-3). Appellant amended the Complaint (R. 4-6), Appellees moved to dismiss the Amended Complaint (R. 7-8, 11-12), and Appellant filed a Second Amended Complaint (R. 13-15). Appellees moved to dismiss the Second Amended Complaint with prejudice (R. 18, 19-20), and the Circuit Court dismissed same with prejudice on September 10, 1981 (R. 21).

An appeal ensued to the Fifth District Court of Appeal. The Fifth District Court of Appeal affirmed the decision of dismissal by the trial court. However, in reluctantly doing so they certified to this court the following question:

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?

This question was certified to the Florida Supreme Court as a matter of great public importance.

### STATEMENT OF THE FACTS

There was no testimony taken in that the trial court dismissed the Second Amended Complaint with prejudice. Therefore, the Statement of the Facts is derived from the allegations in Appellant's Second Amended Complaint. (R.13-15)

On August 31, 1980, at approximately 12:30 a.m., Appellee, Roy Lee Gray, Jr., was involved in an accident in which the automobile he was driving struck and killed Karen Renae Champion, who had been standing beside the roadway. (R. 13-14) Karen Renae Champion was the daughter of Appellant and Joyce Caroline Champion. (R. 13-14) Appellee, Roy Lee Gray, Jr., was allegedly legally intoxicated at the time of the collision. Shortly after impact, Joyce Caroline Champion arrived at the accident scene, was overcome with shock and grief at the sight of and death of her daughter, and immediately collapsed and died. (R.14)

Appellant, as personal representative of the estate of his wife, Joyce Caroline Champion, filed suit pursuant to Florida's Wrongful Death Act against Appellee, Roy Lee Gray, Jr., Appellees, Roy L. Gray, and Galdys Gray, the owners of the automobile which struck Karen Renae Champion, Appellee, Dixie Insurance Company, which provided a policy of automobile liability insurance for the Grays and Appellee, Florida Farm Bureau Casualty Insurance Company, which provided a policy of

uninsured/underinsured motorist coverage to the Champions. The trial Court dismissed the Second Amended Complaint with prejudice on September 10, 1981, because there was no physical contact between Joyce Caroline Champion and the vehicle operated by Appellee, Roy Lee Gray, Jr. (R. 21)

The Fifth District Court of Appeal reluctantly affirmed the trial court's action, but certified the question as quoted in the Appellant's Statement of the Case.

QUESTION ON 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?



ARGUMENT

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?

Appellee, Roy Lee Gray, Jr., operated his automobile in a reckless and grossly negligent manner and caused it to collide with Karen Renae Champion, the daughter of Appellant and his wife, Joyce Caroline Champion, while she was standing beside the road. Roy Lee Gray, Jr., was allegedly intoxicated at the time of the collision. Joyce Caroline Champion ran to the accident scene, observed the body of her dead daughter, had a heart attack, collapsed and died (R. 13-15). The Circuit Court subsequently dismissed the wrongful death action brought by Appellant because there was no direct, physical impact between the automobile involved and Joyce Caroline Champion (R. 21). The trial Judge relied on Gilliam v. Stewart, 291 So. 2d 593 (Fla. 1974) and Claycomb v. Eichles, 399 So. 2d 1050 (2d D.C.A. Fla. 1981) to support his decision.

"It has been recognized in this jurisdiction that where the facts giving rise to an action in tort for personal injuries are such as to reasonably imply malice, or where, from the entire want of care or attention to duty, or great indifference to the persons, property or rights of other, such malice will be imputed as would justify the assessment of exemplary and punitive damages, recovery for mental pain and anguish unconnected with direct physical impact or trauma may be authorized." Crane v. Loftin, 70 So. 2d 574, 575 (Fla. 1954)

The Crane plaintiff sought damages for physical injuries sustained as a result of fright caused by the operation of Defendant's train at a high rate of speed. The Florida Supreme Court rejected the complaint because the Crane Plaintiff failed to allege ultimate facts supporting her contention that the Defendants had acted with gross negligence. The Crane Court apparently accepted the principal that a Plaintiff could recover for physical injuries resulting from shock or mental anguish under certain circumstances. See Crane, id.

Relying on Crane, id., the Florida Supreme Court held in Butchikas v. Traveler's Indemnity Company, 343 So.2d 816 (Fla. 1977) that:

"the rule in Florida has been that absent a physical injury a plaintiff can recover damages for mental anguish only where it is shown the the defendant acted with such malice that punitive damages would be justified." (emphasis supplied) Butchikas, Id. at 819.

Appellant alleged a serious physical injury to Joyce Caroline Champion, stating that the shock she underwent as a result of Roy Lee Gray, Jr.'s actions caused her death, thus bringing her outside the scope of the exclusion set out in Butchikas. Appellant also plead ultimate facts, which if proven, tend to show gross negligence and willful disregard for the rights of others, alleging that Roy Lee Gray, Jr. was legally intoxicated at the time he caused the accident in question. Clearly, under the Crane and Butchikas holdings the Second Amended Complaint in the case sub judice is sufficient to go to a jury.

Claycomb, supra., relied on by the trial Judge, restated that principle which has come to be known as the "impact rule" as follows:

"The rule in Florida is that damages may not be recovered for mental anguish or physical injury resulting from emotional stress caused by the negligence of another, in the absence of a physical impact upon the plaintiff." Claycomb, id., at 1051.

A review of pertinent precedent indicates that the "impact rule" had become a creature of numerous identities, subtly altered and restated from case to case. For example, Claycomb, id. and Gilliam v. Stewart, supra, bar recovery by a Plaintiff for 1) physical injury resulting from, 2) emotional stress when, 3) no physical impact from an external force was imposed upon the injured person, (see Gilliam v. Stewart, supra.) and admittedly, Appellant's claim would appear to be prohibited under this theory. However, the Florida Supreme Court put the rule in somewhat different perspective in Kirksey v. Jernigan, 45 So. 2d 188 (Fla. 1950):

"This court is committed to the rule, and we reaffirm it herein, that there can be no recovery for mental pain and anguish unconnected with physical injury in an action arising out of the negligent breach of a contract whereby simple negligence is involved... But we do not feel constrained to extend this rule to cases founded purely in tort, where the wrongful act is such as to reasonably imply malice, or where, from the entire want of care of attention to duty, or great indifference to the persons, property or rights of others, such malice will be imputed as will justify the assessment of exemplary or punitive damages." Kirksey v. Jernigan, Id., at 189.

Kirksey does not extend the impact rule to cases founded in tort, as is the instant case, and suggests the rule may not apply when there has been an entire lack of care on behalf of a defendant. See also Clark v. Choctawhatchee Electric Co-operative, 107 So.2d 609 (Fla. 1958) and Ford Motor Credit v. Sheehan, 373 So.2d 956 (1st D.C.A Fla. 1979).

It is unquestionable that Joyce Caroline Champion suffered the ultimate demonstrable physical injury of death for which her estate should be permitted to recover.

Appellant contends that the facts in the instant case can be reconciled with the various decisions of the Florida Supreme Court on this issue and further suggests that as a matter of justice and practicality that the proposition set forth by Justice Adkins in his dissent in Gilliam, supra, that:

"...where a definite and objective physical injury is produced as a result of emotional distress proximately caused by defendant's negligent conduct, a plaintiff should be allowed to maintain an action and recover damages for such physical consequences to himself regardless of the absence of any physical impact."

should be the holding of this Court.

The dissent of Justice Adkins in Gilliam, supra., comports with the spirit and intent of the Florida Constitution, Article I, Section 21, which reads as follows:

"The courts shall be open to every person for redress of any injury, and justice shall


be administered without sale, denial  
or delay." (emphasis supplied)

Surely the Defendant's vehicle killed the mother as it did  
the daughter.

CONCLUSION

There can be no doubt that Joyce Caroline Champion suffered a demonstrable physical injury as a result of the grossly negligent actions of Appellee, Roy Lee Gray, Jr., and that Appellant has a right to recover for the estate of Joyce Caroline Champion under the Florida Wrongful Death Act. The complaint is legally sufficient and the Appellant respectfully requests that the trial court's order of dismissal be reversed with the cause being remanded to the lower court for trial.

Respectfully submitted,

  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellant's Initial Brief has been furnished to CHRIS W. ALTENBERND, ESQUIRE, Post Office Box 1438, Tampa, Florida 33601, and GARY M. WITTERS, ESQUIRE, Post Office Box 2111, Tampa, Florida 33601, by U.S. Mail this 22nd day of November, 1982.

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