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IN THE FLORIDA SUPREME COURT
TALLAHASSEE, FLORIDA

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

Petitioner,

vs.

CASE NO. 62,836

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

Respondents.

SUPPLEMENTAL BRIEF OF FLORIDA FARM BUREAU
IN RESPONSE TO QUESTION POSED BY COURT

ON PETITION FOR DISCRETIONARY REVIEW OF A DECISION OF THE FIFTH DISTRICT COURT OF APPEAL

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TABLE OF CONTENTS

TABLE OF CITATIONS

COURT'S QUESTION

IS THE CAUSE OF ACTION IN THIS CASE DERIVATIVE OR DIRECT?

ARGUMENT

The Cause Of Action Created By The Court In This Case Is Derivative Of The Claim Of The Impacted Plaintiff.

For purposes of brevity, Florida Farm Bureau is attaching its Motion for Rehearing and excerpts of its Initial Briefing which discuss this issue and the issues which are necessarily related to this issue. (Appendix "A", "B", and "C") Additionally, Farm Bureau will adopt the brief filed by the Respondents, Roy Lee Gray, Jr., Roy L. Gray, Gladys Gray, and Dixie Insurance Company.

This Court's opinion correctly distinguishes between two different types of cases involving emotional distress. There are cases in which a plaintiff sustains emotional distress and accompanying physical injury out of a fear for her own safety. These cases involve the "zone of danger" concept as described in Section 436, Restatement (Second) of Torts. This Court has correctly observed that Mrs. Champion's claim is not such a claim.

The second type of claim involves emotional distress and accompanying physical injury caused by anxiety from the injury of another person. This case is limited to this second legal theory.

In a zone of danger case, it is probably sensible to create a direct cause of action. The creation of a duty is dependent upon foreseeability. Under the well-established guidelines of Palsgraf v. Long Island R.Co., 248 N.Y. 339, 162

N.E. 99 (N.Y. 1928), a defendant can reasonably foresee injury to a person in the near vicinity of his breach of duty. On the other hand, foreseeability does not exist to predicate a direct duty when the person is distant.

When the cause of action is based upon anxiety from the injury of another, it is clear that the cause of action is dependent upon a breach of duty to the other person. In this case, for example, if Mr. Gray were not negligent and the teenager had simply darted out into his path, there would be no logical reason to find that Mr. Gray was liable to the Estate of Mrs. Champion. Without a breach of duty to the teenager, there is no foreseeability of injury to Mrs. Champion.

It is helpful in this case to remind ourselves that foreseeability has two applications. First, there is the foreseeability which creates a duty. This is the foreseeability discussed in Palsgraf. Secondly, there is the foreseeability associated with proximate causation. In this case, the duty exists because it is foreseeable that negligent operation of a motor vehicle will result in injury to the teenager. The additional damages awarded to Mrs. Champion are based upon an extension of the foreseeability related to proximate causation. It is reasonably foreseeable for purposes of proximate causation

that a breach of duty to the child will proximately cause emotional upset to the mother.[1]

This extension of proximate causation is similar to the extension of proximate causation which is the basis for a consortium claim or a traditional parental claim for medical bills and lost services arising out of an injury to a child. Florida Standard Jury Instruction 6.2(c),(e),(f). These damages are reduced by the comparative negligence of the primary plaintiff. Likewise, the claims of survivors in a wrongful death claim are reduced by the negligence of the decedent. Whorley v. Brewer, 315 So.2d 511 (Fla. 4th DCA 1975).

The fact that this cause of action should be derivative is reinforced by the results if the cause of action were direct. If the cause of action were direct, this Court would be holding that there is a general duty owed to exercise reasonable care so that family members do not sustain psychically-induced injury in connection with the injury of another family member. Such a cause of action would seem inconsistent with this Court's recent adoption of a very restricted tort of intentional infliction of emotional distress. Metropolitan Life Insurance Co. v. McCarson, ___ So.2d ___ (Fla. 1985), [10 FLW - 154 3/8/85]. More importantly, such a duty would greatly expand inter-family lawsuits. In the presence of insurance coverage, family immunity

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[1] Farm Bureau has argued before and continues to believe that it is only reasonably forseeable that the mother will sustain emotional upset. This new cause of action is limited to the unforseeable event created by a hyper-sensitive secondary plaintiff.

is no longer a bar to lawsuits. Ard v. Ard, 414 So.2d 1066 (Fla. 1982). Logically, a direct cause of action would allow a mother to sue her child for psychically-induced physical injuries if the trauma which caused the injuries was based upon the negligence of the child. Likewise, a child could sue his parents under such a theory.

In the common situation where the emotional trauma is caused both by the negligence of a family member and some other tortfeasor, the Uniform Contribution Act would allow the non-family tortfeasor to seek contribution from the family-member tortfeasor. Joseph v. Quest, 414 So.2d 1063 (Fla. 1982).

This Court has determined that the public policies behind Gilliam v. Stewart, 291 So.2d 593 (Fla. 1974) do not justify a complete prohibition against a family member suing for psychically-induced physical injuries caused by the negligent injury of another family member. Neither Farm Bureau nor the undersigned attorney believe that the public policy of this state would be improved by a new tort which encouraged a substantial increase in inter-family litigation. The family unit is sufficiently stressed in the last quarter of the twentieth century without adding this additional trauma.

As explained in the motion for rehearing, Farm Bureau would actually be helped in this case if the cause of action is direct. If a contribution claim can be made against the Estate of Mrs. Champion's daughter, this lawsuit should not be underinsured and Farm Bureau, as an uninsured motorist carrier,

will probably have no liability. Neither Farm Bureau nor the undersigned attorney, however, believe that a beneficial result to them in this isolated case is a reason to argue for a direct cause of action which would ignore the concepts of foreseeability in the Palsgraf decision and would be harmful to the family unit.

Respectfully submitted,

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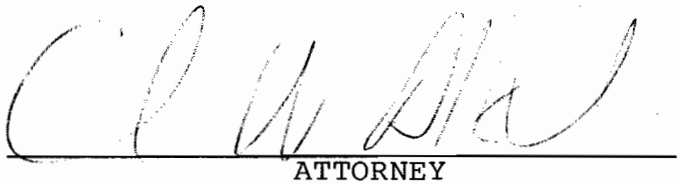
By: _____
CHRIS W. ALTENBERND, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 14th day of June, 1985 to Frank C. McClung, Esquire, Post Office Box 877, Brooksville, Florida 33512; Gary M. Witters, Esquire, Post Office Box 211, Tampa, Florida 33601; Larry Klein, Esquire, Suite 201, Flagler Center, 501 South Flagler Drive, West Palm Beach, Florida 33401; Joseph W. Little, Esquire, 3731 N.W. 13th Place, Gainesville, Florida 32605.



ATTORNEY