SUPREME COURT
STATE OF FLORIDA

CASE NO. 63,583

HARVEY L. BROWN, et al.,
Petitioners,

vs.

CADILLAC MOTOR CAR DIVISION, et al.,
Respondents.

AMICUS BRIEF OF THE FLORIDA DEFENSE LAWYERS ASSOCIATION

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TABLE OF CONTENTS

CITATIONS OF AUTHORITY

STATEMENT OF THE CASE AND FACTS

The Florida Defense Lawyers Association relies upon the Statement of the Case and Statement of the Facts set forth in the brief of respondent.

ISSUE

This brief is limited in its focus to the overriding issue of public importance presented by this appeal; namely, whether the impact rule should be retained in the State of Florida.

ARGUMENT

THE IMPACT RULE SHOULD BE RETAINED IN THE STATE OF FLORIDA

The law traditionally has sanctioned the recovery of damages for emotional distress resulting from bodily injury produced by physical trauma. Such damages were denominated "parasitic." 2 F. Harper & F. James, The Law of Torts 1032 (1956). The acceptance of parasitic damage was attributable to the belief that the elements of physical trauma and physical damage provided sufficient indices of reliability that mental injuries were not feigned. W. Prosser, The Law of Torts 330 (4th ed. 1971)

On the other hand, negligently induced emotional disturbance, in the absence of bodily injury, generally has not provided a basis for recovery.

> The reasons for the distinction, as they have usually been stated by the courts, have been three. One is that emotional disturbance which is not so severe and serious as to have physical consequences is normally in the realm of the trivial, and so falls within the maxim that the law does not concern itself with trifles. It is likely to be so temporary, so evanescent, and so relatively harmless and unimportant, that the task of compensating for it would unduly burden the courts and defendants. The second is that in the absence of the guarantee of genuineness provided by resulting bodily harm, such emotional disturbances may be too easily feigned, depending, as it must, very largely upon the subjective testimony of the plaintiff; and that to allow recovery for it might open too wide a door for false claimants who have

> suffered no real harm at all. The third is that where the defendant has been merely negligent, without any element of intent to do harm, his fault is not so great that he should be required to make good a purely mental disturbance.

Restatement (Second) of Torts §436A, Comment b. (1965).

These reasons for the adoption of the "impact rule" remain equally valid today. The court should reject petitioners' request to abandon summarily the wisdom of a rule forged upon the crucible of generations of experience. Petitioners, as the proponents of change, have the burden of establishing that the foundation for the impact rule no longer exists. This they have singularly failed to do.

In these days of increasingly congested court calendars, the judicial system is less equipped, and should be less inclined, than ever to deal with the trivial claims that would emerge if the requirements of physical impact and physical injury were waived. Similarly, the fraud potential absent physical impact and physical injury is as real today as ever before. In fact, the danger is even greater with the widespread advent of the expert of easy virtue. We realize it has become fashionable of late to dismiss the danger of fraudulent claims and leave it to the supposed sophistication of juries to ferret them out. Of course, it is of no concern to those who stand to profit from the fraud that it will be perpetrated, but the myth of the sophisticated

jury is small solace to those against whom the fraud will be practiced. Finally, the imposition of liability in excess of the culpability involved is unjustified in any age.

It is axiomatic that the scope of the defendant's liability should vary in accordance with the wrongfulness of his conduct. In this regard, it is significant that liability for the intentional infliction of emotional distress is confined to cases involving extreme and outrageous conduct exceeding all possible bounds of decency so as to be utterly intolerable in a civilized community. Restatement (Second) of Torts §46, Comment d. (1965). Furthermore, the defendant's conduct must be calculated to, and must actually, produce severe mental distress. Id., Comment j. Thus, even when the defendant's conduct is egregious, liability for mental distress is carefully limited in recognition of the fact that

> [c]omplete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is part of the price of living among people. The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it.

Id. If this is so in cases of aggravated misconduct, no lesser restrictions may be rationally imposed when the defendant is merely negligent. In cases involving the negligent infliction of emotional distress, recovery must be confined to those situations in which the circumstances

would reasonably be expected to, and actually do, produce severe mental distress. The impact rule would limit recovery to such cases.

Particular care should be taken in imposing liability for the negligent infliction of emotional distress in products liability cases. This is so because, in a products case, liability may be imposed in the absence of any wrongful conduct whatsoever. Since the scope of liability for mental distress diminishes as the wrongfulness of the defendant's conduct decreases, no liability for mental distress should be imposed if the jury merely finds a breach of implied warranty or strict products liability, since no fault on the part of the defendant would be implied by such a verdict. Obviously, there can be no recovery for the negligent infliction of emotional distress in the absence of any negligence.

Those who would profit from the ensuing upheaval have suggested that the scope of liability should be coextensive with the foreseeability of the harm. In this context, however, foreseeability is too broad a criterion: it is always foreseeable that a person will have some loved one who will suffer if he is subjected to harm or the spectre of imminent peril. This, in itself, does not justify recovery, since the scope of liability would be expanded unduly. This has even been recognized by liberal scholars. For instance, Dean Prosser observed:

> Yet it is equally obvious that if recovery is to be permitted there must be some limitation. It would be an entirely unreasonable burden, on all human activity if the defendant who has endangered one man were to be compelled to pay for the lacerated feelings of every other person disturbed by reason of it, including every bystander shocked at an accident, and every distant relative of the person injured, as well as his friends. And obviously the danger of fictitious claims, and the necessity of some guarantee of genuineness, are even greater here than before. It is no doubt such considerations that have made the law extremely cautious.

W. Prosser, The Law of Torts 334 (4th ed. 1971).

The impact rule strikes a harmonious balance between the competing goals of allowing deserving claims without unduly expanding liability. Any lesser standard would be unworkable and arbitrary. For instance, some courts have substituted a zone of danger rule for impact. Under this test, a mother carrying her baby in her arms could recover for her mental distress from a negligent motorist who nearly collided with them. On the other hand, a mother who watched from her window as a negligent motorist struck and injured her child would be barred from recovery although she would have greater reason to experience distress. The impact rule would avoid these anomalous results.

Other courts, recognizing that some limitation on the scope of liability is necessary, have limited recovery to close relatives; but how close is close and how rational is this limitation? Is the relationship of grandparent and

grandchild sufficient? What of the aunt who raises her niece? And, as the circle of qualifying relatives expands, how can one rationally bar the claims of the fiance, dedicated friend, or ardent admirer.

The scope of liability must be limited in some fashion, and any criterion short of impact is illogical. Referring to lesser measures, Dean Prosser wrote:

> Admittedly such restrictions are quite arbitrary, have no reason in themselves, and would be imposed only in order to draw a line somewhere short of undue liability; but they may be necessary in order not to "leave the liability of a negligent defendant open to undue extension by the verdict of sympathetic juries, who under our system must define and apply any general rule to the facts of the case before them." [Footnote omitted]

W. Prosser, The Law of Torts 335 (4th ed. 1971)

In contrast, the impact rule possesses the virtues of bearing a rational relationship to its expressed goals, predictability of result, judicial economy, and eliminating the cost to society of administering and paying for an unduly expanded class of claims. Change, in itself, is not a virtue, and the court should be cautious in discarding a rule of law that has served the vast majority of the citizens of our State reliably and well. Not every misfortune in life should be accompanied by an award of money damages. Society could not tolerate the burden of such an unforgiving philosophy, and our courts should not be reduced to instruments of judicial socialism.

The instant case provides a useful frame of reference for evaluating the desirability of the impact rule. Initially, one should consider what evil the manufacturer committed to warrant the harsh verdict returned in this case, which bears an unspoken component of punitive damages. Simply on the basis of its size, this verdict would necessarily have been discarded even if the plaintiff had been a minor child suing for mental pain and suffering because of the wrongful death of his mother.

Returning though to the magnitude of the defendant's misconduct, it should be recognized that this was not a manufacturer who knowingly failed to incorporate a necessary safety device in order to save a few cents: this was a conscientious manufacturer who, at additional cost, incorporated a safety device that malfunctioned. Certainly, the manufacturer did nothing to justify the condemnation inherent in the verdict or the unduly expanded scope of liability which it entailed.

Even if Mr. Brown had sued for the intentional infliction of emotional distress, he would not have been entitled to recover because the defendant's conduct was not outrageous and the distress suffered was not severe. Therefore, recovery for the mere negligent infliction of emotional distress was unquestionably barred. Accordingly, the verdict in this

case is hardly calculated to inspire confidence in the sophistication of juries. Rather, it is one that points to the need to protect against unbridled sympathy and fiscal irresponsibility. It also bespeaks a need for a rule that would limit the scope of liability in proportion to the degree of culpability involved. In fact, this case is a testament to the desirability of, and continued need for, the impact rule.

Recognition of claims such as the present one would occlude the judicial system with countless trivial claims. It would invite fraud and unprincipled "expert" testimony. It would promote liability of such breadth that it would be totally out of proportion to the wrong involved. In short, it would wreak all the evils the impact rule was designed to prevent and should be retained to allay.

If Mr. Brown were allowed to recover, liability would not be confined to his claim. Inevitably, his success would spawn a new generation of lawsuits by his wife and son and an ever broadening class of plaintiffs. Yet the public policy of the State would deny recovery even to Mr. Brown. The Wrongful Death Act permits only minor children to recover damages for mental pain and suffering occasioned by the wrongful death of a parent. Moreover, even a minor child may not recover damages for nonfatal injuries to a parent inasmuch as Florida does not recognize a cause of action for loss of parental consortium. In cases in which recovery for

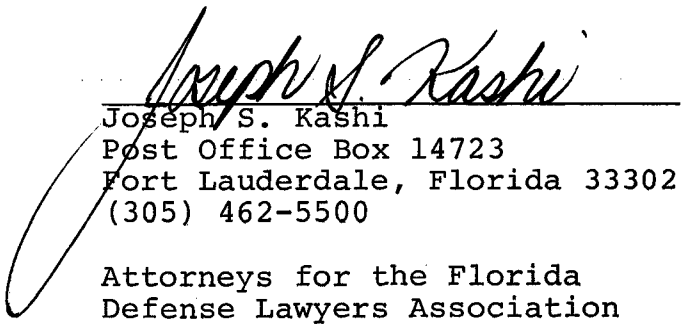
mental pain and suffering as a result of injury to a family member is justified by the public policy, the present framework of the law provides a sufficient means of redress. The system should not be contorted to expand liability beyond the dictates of public policy to the detriment of society as a whole.

CONCLUSION

For these reasons, we urge the court to retain the impact rule.

Respectfully submitted,

CONRAD, SCHERER & JAMES



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CERTIFICATE OF SERVICE

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