IN THE SUPREME COURT OF FLORIDA

Case No. 63,583

DCA Case No. 82-306

HARVEY BROWN, et al.,
Petitioners,

vs.

GENERAL MOTORS CORPORATION, et al.,
Respondents.

RESPONDENTS' ANSWER BRIEF

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I. STATEMENT OF THE CASE

Plaintiffs/Petitioners, Harvey and Gayl Brown, have appealed a decision of the Court of Appeal reversing a $1,500,000 jury award to Harvey Brown for his alleged mental anguish resulting from fatal injury to his mother and a $250,000 award to Gayl Brown for loss of consortium.

This case is fundamentally different from *Champion v. Gray,* (S. Ct. No. 62,830),[1] which is pending before this Court. Unlike Mrs. Champion, who was overcome with shock and died immediately after seeing her fatally injured child, Mr. Brown did not suffer any demonstrable physical injury resulting from alleged mental anguish. The Court of Appeal, which recognized that important distinction, limited the certified issue to "the rights of Florida litigants to secure damages for mental distress *when they have not suffered any impact or physical injury* from the alleged tort-feasor." *Cadillac Motor Car Division, etc., et al. v. Brown, etc., et al.,* 428 So.2d 301 (Fla. 3d DCA 1983) emphasis added.

II. STATEMENT OF THE FACTS

It is respectfully submitted that in this case, more than others, this Court's decision will turn upon the application of legal principles to a discrete factual situation. For that reason, Respondent offers the following Statement of Facts to provide a complete, accurate factual background.

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1. Plaintiffs admit the difference. Petitioners' Brief on Merits and Jurisdiction at 23 (hereafter "Pet. Br."). The claim by the Academy of Florida Trial Lawyers that "there is enough similarity in the facts of the two cases" that *Champion* will control is spurious. Brief of Academy of Florida Trial Lawyers at 1.

1. *The Accident*

On May 12, 1978, Plaintiff, Harvey Brown, Sr., his wife, his mother and his son, Harvey Brown, Jr., went to a relative's house for a birthday party. Harvey Brown, Jr., who had recently received his license, drove. When they arrived at the house, he had trouble parking his father's 1977 Cadillac Fleetwood. Apparently losing his patience, Harvey Brown, Sr. told everyone to get out and he stated that he would park the car. The mother, wife and son all got out of the car as requested. As his mother walked in front of the car, Harvey put the car in gear. The Cadillac moved forward and struck his mother, who fell to the ground bumping her head on the pavement. She developed edema or swelling of the brain and died in the hospital. This suit was brought to recover for the mother's funeral expenses, the "mental anguish" of Harvey Brown, Sr. and his wife's alleged resulting loss of consortium.

2. *Plaintiffs' Case*

The Plaintiffs alleged that the accident resulted because of a defectively designed accelerator pedal in the subject vehicle. This vehicle, as originally equipped, contained an accelerator pedal with a "flap" affixed to the end of it. The flap served two purposes: first, it prevented women's spiked high heel shoes from wedging between the gap between the accelerator pedal and the floor, and second, it prevented the pedal from bouncing when the driver operated the vehicle with cruise control and did not have his foot on the pedal.

The pedal flap had been in Cadillac Fleetwood models since 1971. In 1977, Cadillac redesigned the Fleetwood. The changes to the vehicle included increasing the height of the accelerator pedal from the floor. This change, it was later learned, permitted the rubber floormat to some-

times become wedged under the flap. If the mat became wedged under the flap and the operator depressed the accelerator pedal, the accelerator pedal might not fully return to idle. The high idle could result in unanticipated movement if the operator shifted into drive.[2] In 1979, General Motors Corporation recalled the 1977 Cadillac Fleetwood models for removal of the flap.

3. *Defendant's Proof*

Defendant, General Motors, introduced evidence to establish that the pedal flap was not on the vehicle at the time of the accident and that the circumstances of the accident as described by Plaintiff were inconsistent with the pedal flap problem. Defendant maintained that the accident occurred because of driver error, i.e., mistakenly pressing on the accelerator instead of the brake pedal or moving forward without realizing his mother was in front of the car.

The evidence established that Mr. Brown took the car into Hoyle Cadillac three days after the accident and that it was checked thoroughly for two hours. Nothing was found wrong with the car. (T. 231-234.) Moreover, Earnest Seyler, who was the service advisor at Hoyle Cadillac, and Jim McCarthy, the service director at the time, examined the automobile at the time it was brought in and both testified that the pedal flap had already been cut off prior to the accident. (T. 520; 537.)

Mr. Richard Maiers, a General Motors Staff Analysis Engineer, testified that the circumstances of the accident were inconsistent with the pedal flap problem. (T. 595-596.) If the mat prevented the accelerator pedal from

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2. Significantly, the brakes would prevent any such movement if the driver placed his foot on the brake pedal before he shifted into drive. (T. 238; 595; 604.)

returning to idle, then the engine would produce an audible "racing" sound while in park. (T. 595-596.) The roar of the motor would be so loud that it would be a warning to the driver not to put the car into gear. Neither Harvey Brown nor his son heard such a sound before Harvey shifted the car into drive. (T. 163; 203.) He further opined that the car would not have moved had Mr. Brown depressed the brake pedal before he shifted the car into drive. (T. 595; 604.) Finally, Mr. Maiers opined that the accident resulted because of driver error.

Significantly, Dr. Robert Adt, the plaintiffs' expert, when reminded on cross-examination that Plaintiffs did not hear a high idle sound, acknowledged that the facts of the accident were consistent with inadvertent depression of the accelerator pedal:

> Q. Now, sir let me ask you to assume the following facts: That Mr. Brown told his son that, I will take over, I will park the car, which is contained in the deposition.
>
> A. Yes, sir.
>
> Q. That he got into the car and that neither he nor his son nor his wife heard any unusual engine noise. The engine was not going fast or not making noise like it would be going in when it is cold, fast idle.
>
> A. Okay.
>
> Q. That he gets into the car and he may or may not be a little agitated with his son, that his wife gets out of the car and walks in front of the car and hears no unusual engine noise. She gets out of the path of the car and hears a roaring of the engine which causes her to turn around. Sir, isn't that consistent with somebody inadvertently putting their foot onto the accelerator when they put the car in gear?
>
> A. Yes, sir, it is. (T. 299-300.)

4. *Damages*

Mr. Brown sustained no physical injury as a result of the accident. His sole claim was for mental anguish resulting from the injury to and death of his mother.

The following discussion presents the evidence concerning Plaintiffs' damages.

a. *Plaintiff Harvey Brown, Sr.*

Although Plaintiff testified concerning the circumstances of the accident, he did not testify that he suffered any injury.

b. *Harvey Brown, Jr.*

Harvey Brown, Jr. testified that the accident did not affect his father other than resulting in normal sorrow over the death:

> Q. Now, during the period of time following your grandmother's death, can you tell us what, if anything, what if any changes happened within your family and the various parts of it, too. Don't leave out the uncles and various segments of this family and the cousins, and tell us if there has been any change.
>
> A. Well, our family is pretty tight. We are a pretty strong group. I didn't really notice any big change. The only thing I have ever personally felt was sadness every now and then when I think about it, but nobody was visibly affected even though I know for instance, I know my dad, I didn't bother with discussing it with him but I knew that was something difficult for him to cope with, as I guess one can assume, but there was nothing visibly, anybody visibly shaken as far as a year after, no.

Q. Today, this is coming up on the third year after, do the various parts of your family get together as often as they once did?

A. Oh, yes. We just got together this past Thanksgiving and it was basically the same people, my Grandmother Laymon, our whole family. It was the Perkins, it was Grandmother Perkins and some cousins from down south.

Q. Do you notice from your point of view, any change in the relationship between your father and mother and other adult members of your family unit?

A. No. (T. 156-157.)

c. *Mrs. Brown*

Mrs. Brown testified on direct examination that her husband was more anxious than he had been but that they still maintained the same lifestyle.

On cross-examination, she acknowledged that her husband continued to conduct his successful insurance business and had a normal social life. (T. 478-479.)

d. *Dr. Stillman*

The accident occurred on May 12, 1978, and the Complaint was filed two years later on May 7, 1980, alleging in paragraph 14 "the plaintiff also claims for medical and/or psychiatric expenses as a direct result of the accident," and stating in paragraph 21 that the accident "did in that instance caused physical and psychological damage." (R. 1-6.) On June 24, 1980, two years after the accident and six weeks after the suit was filed, Harvey Brown, Sr. for the first time visited a psychiatrist, Dr. Stillman, at the referral of his attorney. The psychiatrist then attempted to "confirm" the allegations in the Complaint of

"psychiatric expense" and "psychological damage." (T. 389-390.)

Plaintiff did not return for a second visit to the psychiatrist until four days before trial was scheduled on April 13, 1981. His third trip to the psychiatrist occurred on April 23, 1981, during the trial call period. (T. 389-390.) The trial was then rescheduled for September 28, 1981. He did not find it useful to visit the psychiatrist again for the next three and one-half months until August 21, 1981, one month before trial was reset. He subsequently visited the psychiatrist on September 15, 1981 and again in October 1981, shortly before the commencement of the trial.

At trial, Dr. Stillman testified that Mr. Brown was living his normal lifestyle, there was no visible change in him and he seemed happy. Dr. Stillman nevertheless tried to convince Plaintiff to go to therapy twice a week and daily to take two kinds of medicine. Harvey Brown refused to do either and instead chose to go normally about his life.

Dr. Stillman diagnosed Plaintiff's disorder as *a newly labeled condition,* "Post-traumatic stress disorder" (T. 367.) and stated that it occurred when someone encountered a traumatic situation. He compared it with shell shock. (T. 368.) It is interesting to note that Plaintiff had been in 60 combat missions during the war and never received shell shock. (T. 139.)

Dr. Stillman listed the symptoms of "Post-traumatic stress disorder" even though most of the symptoms did not apply to Plaintiff. According to Dr. Stillman, one symptom Harvey Brown had was depression. Dr. Stillman testified that a person could be depressed without know-

ing it, and that Harvey Brown "controlled" his depression by being "a little too happy." (T. 370-371; 385-386; 391.)

5. *The Decision of the Court of Appeal*

The Court of Appeal unanimously reversed the verdict and directed the trial court to dismiss the causes of actions. The Court reversed because "there was no impact upon which damages for mental distress could be awarded." 428 So.2d 301. The Court also decided that Mr. Brown "suffered no compensatory loss and the award was purely speculative." *Id.* Finally, the Court certified "that this cause presents a question of great public importance pertaining to rights of Florida litigants to secure damages for mental distress *when they have not suffered any impact or physical injury* from the alleged tort-feasor." The appeal by plaintiffs followed.

III. QUESTIONS PRESENTED

1. Whether Harvey Brown, who did not receive any impact or bodily injury, can recover for alleged mental anguish under Florida law?
2. Whether the jury award was excessive, speculative and contrary to the trial court's instructions?

IV. ARGUMENT

A. UNDER FLORIDA LAW, THE COURT OF APPEAL CORRECTLY RULED THAT PLAINTIFF, WHO DID NOT RECEIVE ANY IMPACT OR BODILY INJURY, COULD NOT RECOVER FOR ALLEGED MENTAL ANGUISH

Plaintiff Harvey Brown sought damages for alleged mental anguish resulting from a fatal injury to his mother. His wife sought damages for loss of consortium. Plaintiffs neither introduced evidence of nor sought recovery for bodily impact or injury to themselves. Defendant argued that the impact rule therefore barred recovery of damages for mental anguish. The trial court nevertheless permitted Plaintiffs to recover $1,750,000 for the alleged mental anguish and loss of consortium. The Court of Appeal correctly reversed "because there was no impact upon which damages for mental distress could be awarded."

(1) Plaintiff Cannot Recover for Alleged Mental Distress Because He Did Not Sustain an Impact.

This Court has consistently and unequivocally ruled that absent physical impact upon the plaintiff, damages may not be recovered for either mental anguish or physical injury resulting from mental anguish. *Gilliam v. Stewart,* 291 So.2d 593 (Fla. 1974); *Herlong Aviation, Inc. v. Johnson,* 291 So.2d 603 (Fla. 1974); *Crane v. Loftin,* 70 So.2d 574 (Fla. 1954).

This Court rejected an attempt to abrogate the impact rule in *Gilliam v. Stewart.* Unlike Mr. Brown, Mrs. Stewart suffered a demonstrable and objective physical

injury, a heart attack, when an automobile collided into her house. The Court nevertheless held that plaintiff could not recover because the damages did not result from an impact to her:

> We do not agree that, especially under the facts in this case, there is any valid justification to recede from the long standing decisions of this Court in this area. There may be circumstances under which one may recover for emotional or mental injuries, as when there has been a physical impact or when they are produced as a result of a deliberate and calculated act performed with the intention of producing such an injury by one knowing that such act would probably—and most likely—produce such an injury, but those are not the facts in this case. 291 So.2d at 595.

There was no evidence that Harvey Brown sustained an impact in the accident. There was no claim that his injuries were "produced as a result of a deliberate and calculated act" by Defendant. Therefore, the Court of Appeal correctly held that the impact rule barred recovery for Mr. Brown's alleged mental anguish.[3]

Plaintiffs assert that they satisfied the impact rule because of the collision between "Mr. Brown's vehicle operated by him which struck his mother and/or his striking his head during the collision." (Pet. Br. at 16.) The former assertion is a transparent fiction unsupported by the law.[4] The latter assertion is unsupported by the evidence.

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3. The derivative claim for loss of consortium perforce is also barred. *White Construction Co., Inc. v. Dupont*, 430 So.2d 915 (Fla. 1st DCA 1983); *Albritton v. State Farm Mutual Automobile Ins. Co.*, 382 So.2d 1267 (Fla. 2d DCA 1980).

4. Moreover, it has not been certified as an issue on appeal and was not presented to the Third District Court of Appeal. Regardless of its merit, Plaintiffs have waived consideration by this Court of that point.

Plaintiffs attempt to mislead this Court when they assert that Mr. Brown received a "bump on the head in the collision." (Pet. Br. at 3, 4, and 16.) Mr. Brown never testified that he received an impact. The psychiatrist vaguely suggested that Mr. Brown bumped his head after the accident.[5] (T. 370.) At trial, Plaintiff's counsel was fully aware of the impact rule. Undoubtedly, if he could have elicited credible testimony from Mr. Brown to satisfy the rule he would have done so.

Plaintiffs also attempt to rewrite the impact rule. They argue that the impact rule cases do not apply because they "have always dealt with a bystander and/or with events where the party seeking recovery was not directly involved as a participant in the event." (Pet. Br. at 8.) This assertion is spurious as demonstrated below.

In *Crane v. Loftin,* for example, the plaintiff was certainly a participant. She drove upon and was crossing railroad tracks when a locomotive ran into her automobile, causing her to "leap and flee." This Court rejected plaintiff's claim for damages resulting from fright and mental anguish because "there was no direct physical impact or trauma." 70 So.2d 574 at 576 (Fla. 1954).[6]

In *Herlong Aviation, Inc. v. Johnson,* 291 So.2d 603 (Fla. 1974), the plaintiff was also a participant. This Court reversed the Court of Appeal, which had permitted plaintiff to recover for mental anguish resulting from traveling

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5. The psychiatrist testified that Mr. Brown turned off the motor of the car, rushed out to his mother, arranged for an ambulance and "in the process bumped his head. He didn't even take note of that, but there was a bump on his head." (T. 370.)

6. This decision also illustrates that an impact after the accident, e.g., when plaintiff leaped from the vehicle, does not satisfy the impact rule.

in an airplane that developed "severe vibrations and other difficulties." The Court ruled that recovery for mental anguish was barred by the impact rule.

Similarly, in *Selfe v. Smith,* 397 So.2d 348 (Fla. 1st DCA 1981), which Petitioners concede is analogous and controlling, the plaintiff was involved in an automobile accident. Plaintiff and her child suffered bodily injuries. Plaintiff sought recovery for her mental distress over the child's injury. The Defendants, as in the instant case, urged that the Plaintiff's own negligence caused or contributed to both injuries. The Court of Appeal ruled that she could not recover for such mental distress. Inexplicably, Petitioners have concluded from *Selfe* that "The recurrent theme . . . best phrased by the *Selfe* Court seems to be that if one is a participant, recovery will be allowed." (Pet. Br. at 16.) *Selfe,* of course, stands for just the opposite, holding that participation does not modify the impact rule—recovery is permitted only for mental anguish resulting from the plaintiff's impact, not another's.

Another case in which a participant was denied recovery is *Woodman v. Dever,* 367 So.2d 1061 (Fla. 1st DCA 1979). Plaintiff was in a motel room with her daughter when someone broke in and sexually assaulted and robbed the mother. The mother sought to recover not only for her own damages but also for the emotional distress of the daughter as a result of witnessing the attack. The Court of Appeal held the action was barred by the impact doctrine.

Similarly, in *Hollie v. Radcliffe,* 200 So.2d 616 (Fla. 1st DCA 1967), plaintiff had Parkinson's disease and was unable to work. Over a period of time, his symptoms seemed to have improved, and his doctor expressed hope that the plaintiff would be able to return to work in the

near future. Unfortunately, the plaintiff was involved in an automobile accident in which the car he was driving was struck on the driver's side. The symptoms of his Parkinson's disease increased noticeably afterward, leaving him unable to return to work as hoped. In reaching its decision, the First District Court of Appeal of Florida obviously used its common sense in determining that an automobile accident occurring in early 1965 which caused $500.00 property damage to the driver's side of the automobile would be of sufficient severity to infer an "impact" to the person of the plaintiff.

Finally, *National Car Rental System, Inc. v. Bostic,* 423 So.2d 915 (Fla. 3d DCA 1982), upon which Petitioners strongly rely, actually undermines their argument. The plaintiff was driving a vehicle involved in a head-on collision. He suffered fractured ribs, a contused lung and a cervical and low back sprain. His mother, a passenger, died at the scene. He sought recovery for mental anguish. The evidence established that plaintiff's "emotional problem was caused by his inability to render aid and comfort to his mother because of the injuries and impact suffered by [plaintiff] which had rendered him physically unable to come to her aid." 423 So.2d at 917. The Court of Appeal upheld his claim for mental anguish because "the instant case falls clearly within the [impact] rule." 423 So.2d at 915. The *Bostic* case is fundamentally different from the instant case because the mental distress was directly related to the plaintiff's own physcial impact and bodily injuries.

Thus, the arguments advanced by Plaintiff are unsupported by the law. This Court has consistently enforced the impact rule, which prevents precisely the kind of speculative psychiatric testimony and damages awarded in this case.

(2) Plaintiff Cannot Recover for Mental Distress Resulting From Injury to Another.

In *Selfe v. Smith,* the Court of Appeal barred Plaintiff from recovery for mental anguish for viewing her child's injuries, notwithstanding that Plaintiff herself suffered physical injuries in the accident. The Court ruled that "satisfying the 'impact rule' . . . until now has gained plaintiff damages for only that mental distress which is due to plaintiff's own injury or to the traumatic event considered in relation to the plaintiff alone." 397 So.2d at 350.

Petitioners now argue that the "traumatic event considered in relation to the plaintiff alone" phrase allows them to recover absent impact. They claim that they sought damages for mental distress due to the traumatic event considered in relation to the plaintiff alone. Plaintiffs' argument is without merit.

Petitioners overlook that *Selfe* requires an impact "satisfying the 'impact rule' . . ." before recovery is permitted for mental distress due "to the traumatic event considered in relation to plaintiff alone. . . ."

Moreover, even assuming that Plaintiff introduced evidence of an impact and did not seek recovery for mental distress over the injury to his mother but sought recovery for the mental distress due to the traumatic event in relation to Petitioner alone, he did not offer evidence of such mental distress.

The only "traumatic event" that can be considered in relation to Mr. Brown alone is the claimed unexpected or unwanted acceleration of his automobile. In other words, to satisfy the plaintiffs' interpretation of *Selfe,* Mr. Brown would have to prove that he was mortified when his automobile suddenly accelerated, that this unwanted accelera-

tion in and of itself so disturbed and upset him that he had suffered mental distress from that traumatic event. Petitioners, however, did not even attempt to show that Harvey Brown was frightened, nervous or worried by the fact that his automobile allegedly accelerated in an unexpected or unwanted fashion. Rather, they concentrated not on the plaintiff alone, but rather on the relationship between the plaintiff and his mother.

There is no support in Florida law for recovery for mental anguish over another's injury. Therefore, Petitioners cannot recover for the mental anguish resulting from the injury to Petitioner Harvey Brown's mother.

(3) Plaintiff Cannot Recover for Mental Distress Under the Wrongful Death Act.

The Florida Wrongful Death Act, FSA 768.16 et seq. specifies the situations in which a relative of the decedent can recover for "mental pain and suffering." The Act does not permit an adult son to recover for the mental pain and suffering for the loss of his mother.

(4) Conclusion.

It is undisputed that there was no claim for mental anguish resulting from any physical impact to Plaintiffs. The impact rule and the Wrongful Death Act bar Plaintiff from recovery of damages for mental anguish resulting from injury to the mother. The law recognizes that recovery of damages for such anguish would be wholly speculative. The speculative testimony by the psychiatrist about the mental anguish and the shockingly excessive damage award in this case provide forceful evidence of the need to enforce the rule.

B. EVEN IF THE IMPACT RULE IS ABANDONED, HARVEY BROWN CANNOT RECOVER FOR ALLEGED MENTAL DISTRESS BECAUSE IT DID NOT RESULT IN A PHYSICAL INJURY.

Petitioners have argued that this Court should overrule *Gilliam v. Stewart.* (Pet. Br. at 17.) Respondent submits that the impact rule should be retained. As an expression of established public policy, the impact rule serves several purposes. First, the requirement of an impact is some minimum assurance that an injury worthy of compensation has been received by the plaintiffs and to that extent, the rule acts as a limit on the presentation of potentially fraudulent claims. Second, consistency and predictability of the outcome of cases, a goal not lightly to be discarded, is greatly enhanced by the impact rule. Third, as a tool used in the administration of justice, the impact rule limits the number of cases presented to our courts, permitting swift yet considered evaluation of only those claims which our state recognizes as meriting compensation.

This Court should not abandon precedent without a compelling reason to do so. The principal "reason" suggested by plaintiffs, refinements of psychological and psychiatric arts to an objective science, is not supported by the record on appeal or by any empirical study offered by plaintiffs or any other source. Plaintiffs also suggest that there is no longer a need for the impact rule since today's juries are "sophisticated." Apparently, plaintiffs have misconstrued the impact rule as though it were concerned with matters of evidence, as opposed to being an expression of public policy limiting liability and recovery.

If this Court nevertheless decides to recede from the impact rule and adopt the legal authorities relied on by Plaintiffs, those authorities make clear that plaintiffs could not recover because the alleged mental distress did not

result in an objective, demonstrable physical injury. *Stewart v. Gilliam,* 271 So.2d 466 (Fla. 4th DCA 1972) and *Champion v. Gray,* 420 So.2d 348 (Fla. 5th DCA 1982).

In *Stewart v. Gilliam,* the Court of Appeal receded from the impact rule in a case where the mental distress caused a demonstrable physical injury:

> As a preliminary observation, it should be pointed out that the case sub judice concerns the right of a plaintiff to maintain an action and submit her case to a jury where it is alleged that a defendant's negligent act, although involving no physical impact, has caused a mental or emotional disturbance resulting in bodily injury or illness. This factual circumstance is to be distinguished from a case where a plaintiff seeks to maintain a cause of action for an emotional disturbance without physical effect. *In other words, we are not herein concerned with any action for recovery for mental or emotional disturbance unconnected with a resulting physical injury. Arcia v. Altagracia Corporation,* Fla. App. 1972, 264 So.2d 865. *Instead, we are concerned with a defendant's wrongful act without direct physical impact but which occasions a mental disturbance that operates internally to produce physical injuries of a definite objective and ascertainable nature.* 271 So.2d at 472. (Emphasis added)

Similarly, the dissenting opinion of Justice Adkins in *Gilliam v. Stewart* would have allowed recovery because plaintiff suffered a physical injury:

> In my opinion, 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. *In applying this principle, I refer only to a situation in which a defendant's wrongful act, absent any physical impact, causes a mental disturbance which operates internally to produce definite and objective physical injuries of an ascertainable nature. It does not apply to an action for recovery for mental or emotional disturbance unconnected with a resulting physical injury.*

291 So.2d at 596. The physical injury would have "to be substantial." 291 So.2d at 603[7] Moreover, Justice Adkins limited liability to those who were within the "zone of danger" or area of physical danger. 291 So.2d at 602.

The decision of the Court of Appeal in *Champion v. Gray* would also bar recovery. In dicta the Court of Appeal addressed the issue "whether the concept of duty in tort should be extended to third persons, who do not sustain any physical impact in the accident or fear for their own safety." 420 So.2d at 351. The members of the Court said they would permit recovery when mental distress results in a substantial physical injury. The Court suggested the adoption of the analysis in *Dzioniski v. Babineau,* 375 Mass. 555, 380 N.E.2d 1295 (1978), another case upon which Petitioners rely. *Dzioniski* requires proof of "a substantial physical injury and proof that the injury was caused by the defendant's negligence." 380 N.E.2d at 1302 *quoted in Champion* at 353.

There is no claim that Harvey Brown suffered any physical injury because of the mental distress. Moreover, there is no claim that he was within the "zone of danger"

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7. Justice Adkins relied on *Falzone v. Busch,* 45 N.J. 559, 214 A.2d 12 (1965), which held that "where fright does not cause substantial bodily injury or sickness, it is to be regarded as too lacking in seriousness and too speculative to warrant recovery."

or area of physical risk. Petitioners cannot reasonably argue that Harvey Brown was endangered by the alleged pedal flap phenomenon. The vehicle would not have moved if he had applied the brakes. Indeed, he was able to stop the vehicle immediately after the accident. Therefore, Petitioners cannot satisfy the requirements prescribed by Justice Adkins and cannot recover for the alleged mental distress.

Defendant, for the reasons discussed in the Brief of Respondents in *Champion* and above urges this Court to retain the impact rule. If the Court decides to recede from the impact rule, Defendant submits that Plaintiffs are nevertheless barred.

C. THE SHOCKINGLY EXCESSIVE JURY AWARD WAS PURELY SPECULATIVE AND CONTRARY TO THE TRIAL COURT'S INSTRUCTION.

Respondent respectfully requests this court to carefully note the fact that the plaintiffs have failed to call into question that portion of the Third District Court of Appeal's ruling which found that Harvey Brown suffered no compensable injury. In essence, plaintiffs have accepted the propriety of that portion of the district court's opinion and have *waived* further review on that issue by failing to preserve the issue within their initial brief to this Court. *See Tyus v. Apalachicola Northern Railroad Co.*, 130 So.2d 580 at 585 (Fla. 1961) acknowledging that the scope of Supreme Court review extended beyond the certified issue found to be in conflict or of great public importance, but implied that the scope of review was limited to those points raised by proper assignments of error. Although Respondent respectfully submits that plaintiffs' waiver of that issue constitutes a sufficient basis

upon which this court could decide to discharge the writ of certiorari, these defendants will nevertheless address the merits of that issue.

(1) Plaintiffs Suffered No Compensable Injury Therefore the Award Was Speculative and Unsupported by the Evidence.

The Court of Appeal unanimously and correctly held that there was no competent, substantial evidence presented to show that Petitioners suffered either physical or psychological injury.

Mr. Brown sought no recovery for any physical injury to himself. There is no evidence that Dr. Stillman treated any physical injury or any psychological injury resulting from a physical injury. Therefore, the only "injury" that could conceivably be compensable would be the alleged mental distress of Mr. Brown as a result of the fatal injury to his mother.

Mr. Brown did not testify about any mental distress. His son testified that he had noticed no changes in his father, in the relationship between his father and mother, and in the family's overall relationship and social functioning. (T. 156-7.) The brief testimony of Gayl Brown describes a totally functioning, feeling, concerned adult who, as he approaches his early fifties, is perhaps less of a daredevil than he was as a younger man. (T. 474-5; 478-9.)

Dr. Stillman testified that Mr. Brown visited him at the referral of an attorney. The first visit was one month after suit was filed, more than two years after the accident occurred. The next three visits were within a month period when trial was scheduled and the last three visits were in a short span when the trial was reset.

Dr. Stillman also testified that although Mr. Brown was living his normal lifestyle, and there was no visible change in him, he seemed "a little too happy." Dr. Stillman tried to convince Mr. Brown to go to therapy twice a week and daily to take two kinds of medicine. Mr. Brown refused to do either and instead chose to go normally about his life. Mr. Brown continued to conduct a very successful insurance agency, regularly went to work, and carried out all of his duties with the agency. (T. 478-479.)

There was absolutely no testimony from any witness that Mr. Brown had suffered a loss of income or earning capacity. The only testimony regarding a financial expense or loss was given by Dr. Stillman, the phsychiatrist, who stated that his total bill for services rendered was $600.

Although Dr. Stillman recommended that Harvey Brown should have therapy, this recommendation cannot form a basis for an award of future medical expenses, particularly when the evidence clearly established that Mr. Brown rejected the recommendation and had no intent to pursue therapy. Petitioners nevertheless offer future medical expense as the basis for the jury award of $1,500,000 to Mr. Brown. (Pet. Br. at 36.) Petitioners argument is ludicrous. Using the figures offered by Dr. Stillman, Mr. Brown's past medical expenses are $600 and the future medicals which Dr. Stillman recommended would cost $23,400.[8] When this figure, $24,000, is subtracted from Harvey Brown's total award of $1,500,000, it leaves the amount of $1,476,000 totally unexplained and unsupported. The

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8. The computation for these "future" medical expenses is: [52 (weeks/year) x 2 (sessions per week) = 104 (sessions per year) x 3 (years) = 312 (total sessions recomended by Stillman) x $75.00 (Stillman's normal charge) = $23,400].

loss of consortium award is similarly unsupported by the evidence.

The law of Florida on this point is well settled. "In every case, plaintiff must afford a basis for a reasonable estimate of the amount of his loss and only medical expenses which are *reasonably certain* to be *incurred* in the future are recoverable." *Loftin v. Wilson,* 67 So.2d 185 at 188 (Fla. 1953) (emphasis added). It is respectfully submitted that the award of $1.5 million to Harvey Brown was not compensatory in nature, but rather was the punishment sought by counsel for the plaintiffs in their impassioned, inflammatory closing argument. (T. 699, 702-703, 706, 709-712.)

Thus, it is clear that Harvey Brown has failed to satisfy that certainty of proof required for a verdict to stand as to the alleged element of loss which is most capable of definition and certainty. Therefore, the Court of Appeal correctly held that the damages were totally speculative and unsupported by the evidence.

(2) The Jury's Award Was Shockingly Excessive.

The damages in this case were shockingly excessive. There is no precedent for an award of this size for the remote injuries involved here. The cases illustrate instead that speculative awards must be set aside or remitted. *See, e.g., University Community Hospital v. Martin,* 328 So.2d 858 (Fla. 2d DCA 1976); *Fordham v. Carriers Ins. Co.,* 370 So.2d 1197 (Fla. 4th DCA 1979); *Washwell v. Morejon,* 294 So.2d 30 (Fla. 3d DCA 1974).

Plaintiffs rely upon *Malandris v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.,* 31 F.R. Serv. 233 (10th Cir. 1981), which they claim is "analogous." *Malandris* involved an action for intentional infliction of emo-

tional distress. The evidence established outrageous, intentional or reckless conduct that resulted in severe emotional distress. The plaintiff "was non-functioning and 'almost paralyzed in her depression, in her religious mania . . . dead to the earth, dead to this life . . .'" *Id.* at 243. According to the trial court, the emotional injury that plaintiff sustained "destroyed her ability to function as a human being." *Id.* at 249.

Malandris is inapposite because the present action did not include a claim for intentional infliction of mental distress. Moreover, the alleged injuries sustained by Mr. Brown certainly did not destroy his ability to function as a human being. Although Petitioners assert that Mr. Brown sustained a "severe emotional trauma," (Pet. Br. at 26) the evidence is to the contrary. Plaintiffs presented no evidence to demonstrate any intangible loss, harm or damage to Harvey Brown. On the other hand, both his son and wife described a normal adult experiencing grief over the death of his mother. His work life, family life, and social life were unchanged by the accident. (T. 156-157; 478-479.)

There was absolutely no testimony from any witness to the effect that Harvey Brown had suffered a loss of income or earning capacity. Quite to the contrary, Mrs. Brown testified that Harvey was still engaged in running a successful insurance agency, regularly going to work, and carrying out all his duties associated with the agency. (T. 478-79.)

In dealing with Mrs. Brown's award, the Respondent will, *arguendo,* assume that she has passed the threshold for consortium, *i.e.,* that her husband had sustained compensable injuries, recognizing that this assumption is contrary to the Third District's ruling in this case. *See also White*

Construction Co., Inc. v. Dupont, 430 So.2d 915 (Fla. 1st DCA 1983) and *Albritton v. State Farm Mut. Automobile Ins. Co.,* 382 So.2d 1267 at 1268 (Fla. 2d DCA 1980). In considering what type of evidence must be presented to support an award for loss of consortium, the two accepted elements of a consortium claim should be considered. "The *tangible* elements include support and services provided by the other spouse, while *intangible* elements encompass such items as love, companionship, affection, society, sexual relations, comfort and solace." *White Construction Co. v. Dupont, supra,* at 916, emphasis in original. The $250,000 loss of consortium award to Gayl Brown certainly cannot be thought of as compensation for a loss concerning the *tangible* elements since there was absolutely no testimony presented concerning her loss of the support and services provided by Harvey Brown prior to the accident. Not surprisingly, Gayl Brown likewise failed to present any testimony whatsoever concerning the reasonable value of services customarily performed by her husband prior to the accident.

There was certainly no competent, substantial evidence presented by plaintiffs to the jury concerning any loss of the *intangible* elements of a consortium claim. No testimony was given to show a diminution in the love, companionship, affection, society, sexual relations, comfort and solace shared between Harvey Brown and his wife, Gayl Brown. Likewise, a comparison of Gayl Brown's award with other awards for loss of consortium shows the excessive and speculative nature of it. *See,* for example, *Rodriguez v. McDonnell Corp.,* 87 Cal. App. 3d 626, 654-55, 151 Cal. Rptr. 399, 414 (1978); *General Electric Co. v. Bush,* 498 P.2d 366, 88 Nev. 360 (1972); and *City of Tamarac v. Garchar,* 398 So.2d 889 (Fla. 4th DCA 1981). Therefore, Plaintiffs failed to present competent, substantial evidence

to support either award, and the Court of Appeal correctly reversed and dismissed the claims.

(3) The Verdict Was Contrary to the Court's Instructions on the Law.

The standard or scope of review to be observed by a court in passing upon a request for new trial is set forth in this Court's opinion in *Wackenhut Corp. v. Canty,* 359 So.2d 430 (Fla. 1978). "Before such an alternative order [for new trial] may be entered either [a] the record must affirmatively show the impropriety of the verdict or [b] there must be an independent determination that the jury was influenced by considerations outside the record." *Id.* at 436-437. While the latter test might easily be satisfied, the former can be demonstrated with such certainty that it, alone, will be discussed.

The analysis to be employed is suggested when the test is restated in the following manner—whether a jury of reasonable men could properly have rendered the verdict based upon the evidence presented and the instructions of law given. An affirmative answer suggests a *prima facia* proper verdict. A negative answer demonstrates the impropriety of the verdict.

A review of the evidence and the instructions demonstrates that the jury could not have reasonably rendered the verdict in this case. With regard to the elements of damage for which Harvey Brown could recover, Judge Levy gave the following charge:

> * * * You shall consider the following elements: Any bodily injury sustained by Harvey Brown and any *resulting* pain and suffering, disability, mental anguish and loss of capacity for the enjoyment of life experienced in the past or to be experienced in the

> future. There is no exact standard for measuring such damage. The amount should be fair and just in light of the evidence.
>
> Any earnings or working time lost in the past and any loss of ability to earn money in the future. (T. 475.) (Emphasis added)

Plaintiffs did not seek recovery for "any bodily injury sustained by Harvey Brown." Furthermore, no testimony was presented to the jury as to any consequence of any bodily injury. Not one witness attributed any pain and suffering or mental anguish to a physical impact. No attempt was made to connect any disability or loss of capacity for the enjoyment of life to an impact whenever it was received. Thus, the verdict was contrary to the Court's instruction, which permitted an award for these consequential elements *only* if they *resulted* from the "bodily injury sustained by Harvey Brown." Therefore, the jury could not properly have awarded Mr. Brown $1,500,000 for receiving a bump on the head.

The only other element of damage for Harvey Brown that the jury was instructed on was for loss of earnings or earning capacity. Implicit in this instruction is that such a loss, like the other consequential damages discussed above, must flow from the bodily injury or resulting disability sustained in the accident. In the first place, no testimony was presented to the jury that he suffered such a loss. In fact, the only such testimony demonstrated that he continued his successful insurance business:

> Q. He is still engaged in running an insurance agency?
>
> A. [Gayl Brown] Yes, he is.
>
> Q. He regularly goes to work?

A. Yes, he does.

Q. And carries out his job there?

A. Yes. (T. 478.)

Second, there was no testimony presented to the jury to establish a causal connection between any bodily injury and any loss of earnings or earning capacity.

In summary, the district court did not sit as a seventh juror with veto power as suggested by plaintiffs, but rather employed the appropriate standard and scope of review. On one point defendants will agree with plaintiffs, and that is that the questions of liability and damages in this case are "part and parcel". Thus, if a new trial is ordered, then it should be on all issues. (Pet. Br. 30.)

V. CONCLUSION

The Court of Appeal correctly ruled that Petitioners, who did not receive any impact or bodily injury, could not recover for alleged mental anguish under present Florida law. This Court is requested to adhere to the impact rule and to affirm the Court of Appeal's dismissal of Petitioners' claim.

Even if this Court abandons the impact rule and adopts an alternative, Petitioners still cannot recover because (1) any alleged mental distress suffered by Mr. Brown did not result in a substantial, demonstrable physical injury and (2) Mr. Brown was not in the zone of danger or area of physical risk. Therefore, Respondent requests this Court to affirm the Court of Appeal's dismissal of Plaintiffs' claims even if the impact rule is abandoned.

Alternatively, under either the impact rule or any other rule of liability, the jury's verdict cannot stand.

The Court of Appeal correctly ruled that Petitioners suffered no compensatory loss demonstrating the failure of proof on an essential element of the Plaintiffs' case, entitling Defendant to a judgment notwithstanding the verdict in its favor. The verdict was also purely speculative and shockingly excessive in its nature, requiring either vacation of the award or a remittitur. Finally, the jury's verdict was contrary to and evidenced disregard of the instructions of law given by the trial court. The remedy requested from this Court is to affirm the vacation of the award and to order a new trial as to all issues, as suggested by Petitioners in their brief (Pet. Br. at 30), or, at least, to order a new trial on the issue of damages alone.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Respondents' Answer Brief has been furnished by mail this 5th day of July, 1983, to:

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