IN THE SUPREME COURT OF FLORIDA

CASE NO. 65,249

GERALD DOYLE and MARIE DOYLE,

Petitioners,

v.

THE PILLSBURY COMPANY, GREEN GIANT COMPANY, and PUBLIX SUPER MARKETS, INC.,

Respondents.

On Certification from the District Court of Appeals
Fifth District

ANSWER BRIEF OF RESPONDENTS

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PREFACE

Petitioners were the appellants and plaintiffs in the courts below; respondents were appellees as two of the three defendants. Herein the parties will be referred to as they stood in the trial court. The following symbol will be used for citation to the record on appeal: (R).

STATEMENT OF THE CASE AND OF THE FACTS

Respondents adopt Petitioners' Statement of the Case and of the Facts subject to the following areas of disagreement:

1. Marie Doyle did not open the can of peas. (R 2-3, 90-93, 94-95).

2. Defendants propounded interrogatories and document requests to plaintiff wife in December, 1982 and to plaintiff husband in January, 1983. Plaintiff wife responded to many of the interrogatories stating "specific allegations to be made by my attorney" and failed to answer other interrogatories. On February 28, 1983, defendants filed their motion to compel these answers and this motion was largely granted. (R 49-56). Plaintiff husband responded in the same way and in March, 1983, defendants moved to compel these answers. This motion, too, was largely granted.

3. Depositions of plaintiffs were scheduled several times but never taken. On January 11, 1983, Defendants noticed the deposition of plaintiff wife for February

8, 1983. On January 28, 1983, defendants re-noticed that deposition and noticed the deposition of plaintiff husband for February 9, 1983. (R 32-33). On February 4, 1983, at plaintiffs' request, defendants again served their re-notices of both plaintiffs' depositions for February 18, 1983. (R 36). Also in February, 1983, defendants filed their Motion for Compulsory Physical Examination of plaintiff wife. An agreed order was entered but defendant wife refused to appear. On February 16, 1983, plaintiffs served their motion for protective order as to both the depositions and physical examination on the ground that defendant Green Giant had previously moved for an extension of time to more fully respond to discovery and that Green Giant should have had to answer its discovery before plaintiffs complied. On February 28, 1983, defendants moved to compel the depositions and physical examination (R 47-48) and the Court granted defendants' motion.

4. Defendants filed their motion for summary judgment on February 14, 1983. (R 37). Plaintiffs hand-delivered their memorandum in opposition to summary judgment at the March 4, 1983 hearing although the certificate of service indicates otherwise. (R 57-62). This hearing was held before Judge Purdy to whom the case was reassigned. Plaintiffs raised "law of the case" for the first time at this hearing. Plaintiffs did not file any counter-affidavits or move for continuance of hearing.

Judge Purdy ordered the parties to file memoranda addressing law of the case regarding the pre-trial, interlocutory order previously entered on the motion to dismiss. (R 64). These memoranda were filed. (R 77-88, 97-107).

5. On March 23, 1983, almost three weeks after the hearing on summary judgment, plaintiffs filed their motion for leave to amend complaint to allege a "touching" of the can for the first time. (R 94-95). Almost three weeks after the hearing on summary judgment, specifically, nineteen days, and five days before trial, plaintiffs also filed a motion and affidavit alleging a "touching" in opposition to defendants' motion for summary judgment. (R 90-93).

ARGUMENT

I. THE TRIAL COURT CORRECTLY ENTERED SUMMARY JUDGMENT FOR DEFENDANTS IN AN ACTION BY PLAINTIFFS FOR PHYSICAL INJURY RESULTING FROM OBSERVING A DEAD INSECT ALLEGEDLY INDUCED BY DEFENDANTS' NEGLIGENT CONDUCT WHERE THERE WAS NO PHYSICAL IMPACT.

Summary judgment is proper in this case because there was no physical contact necessary to maintain a cause of action for physical injury as a result of emotional distress induced by alleged negligent conduct. It is axiomatic in Florida that to recover for physical injury caused by mental distress induced by another's alleged negligent conduct, there must be physical impact or conduct that exhibits wantonness, willfulness or malice. There is no genuine issue of material fact that no physical impact occurred here. Thus, plaintiff cannot recover for physical injuries caused by mental distress and summary judgment is proper.

The record indicates that plaintiff wife allegedly sustained injuries because she was "shocked, alarmed and repulsed" when she viewed a dead insect in a container. Thereafter plaintiffs alleged that this shock, alarm and repulsion caused her to jump back and fall over a chair. (R 2-3). Plaintiffs never alleged, nor is there any evidence of, actual physical impact upon plaintiff which resulted in these alleged injuries. Therefore, the trial court properly entered summary judgment because there was no gen-

uine issue of material fact that plaintiff did sustain any physical impact.

Plaintiffs' cause of action is barred by the Impact Rule, Gilliam v. Stewart, 291 So.2d 593 (Fla. 1974) and the trial court correctly followed the law declared by this Court. Hoffman v. Jones, 280 So.2d 431, 434 (Fla. 1973).

It is undisputed in Florida that damages for mental anguish are not available absent physical impact unless the conduct complained of clearly exhibits wantonness, willfuless or malice. Butchikas v. Travelers Indemnity Co., 343 So.2d 816, 819 (Fla. 1977); Herlong Aviation, Inc., v. Johnson, 291 So.2d 603, 604 (Fla. 1974); Gilliam v. Stewart, 291 So.2d 593, 595 (Fla. 1974); Butler v. Lomelo, 355 So.2d 1208, 1209 (Fla. 4th DCA 1977); Steiner and Munach v. Williams, 334 So.2d 39, 42 (Fla. 3d DCA 1976), Brooks v. South Broward Hospital District, 325 So.2d 479 (Fla. 4th DCA 1976). See also, Davis v. Sun First National Bank of Orlando, 408 So.2d 608, 609 (Fla. 5th DCA 1981); Moores v. Lucas, 405 So.2d 1022, 1026 (Fla. 5th DCA 1981); Claycomb v. Eichles, 399 So.2d 1050, 1051 (Fla. 2d DCA 1981); Selfe v. Smith, 397 So.2d 348, 350 (Fla. 1st DCA 1981).

The decisions of this State mandate affirmance of summary judgment because it is also the rule in Florida that plaintiffs cannot recover for physical injury resulting from emotional stress caused by the conduct of another in the absence of a physical impact upon the plaintiff and no genuine

issue of material fact exists otherwise here. Gilliam v. Stewart, 291 So.2d 593, 595 (Fla. 1974); Crane v. Loftin, 70 So.2d 574, (Fla. 1954); Claycomb v. Eichles, 399 So.2d 1050, 1051 (Fla. 2d DCA 1981). See also, Ellington v. United States, 404 F.Supp. 1165 (M.D.Fla. 1975). In the within action, plaintiffs' claim is barred because no impact occurred and a party cannot recover for physical injuries caused by mental stress in the absence of impact.

In Gilliam v. Stewart, 291 So.2d 593 (Fla. 1974), the plaintiff suffered fright and a subsequent heart attack when an automobile struck her house after a collision. The question certified to this Court was:

> Where a person suffers a definite and objective physical injury, i.e., heart attack, as a result of emotional stress, i.e., fright, induced by defendant's alleged conduct, may such person maintain an action against the defendant even though no physical impact from an external force was imposed upon the injured person?

Id. at 594 (emphasis added). This Court answered the certified question in the negative. In Crane v. Loftin, 70 So.2d 574 (Fla. 1954), plaintiff brought suit for personal injuries which resulted from fright and mental anguish caused by leaping from her car to avoid being struck by a locomotive. Because there was no direct physical impact, this Court denied recovery for plaintiff's personal injuries. Id. at 576. In Claycomb v. Eichles, 399 So.2d 1050 (Fla. 2d DCA 1981), plaintiffs sought damages for the alleged wrongful actions of

a policeman who took possession of their vehicle, impounded it and returned it to the original owner. Plaintiffs alleged that physical injury resulted from the emotional stress of the incident. The trial court gave instructions to the jury which permitted the award of damages for mental anguish upon a finding of negligence. The Second District Court of Appeal reversed and held that the jury instruction was contrary to the long-standing Florida rule that "damages may not be recovered for mental angish or physical injury resulting from emotional stress caused by the negligence of another, in the absence of a physical impact upon the plaintiff." Id. at 1051 (emphasis added).

The fact pattern in the case sub judice is identical to the sequence of events leading to injury in Gilliam, Crane and Claycomb. Initially it is the alleged negligent conduct of defendant, unaccompanied by any physical impact, which causes plaintiff's mental stress. Then, this mental stress causes plaintiff to do some act, or results itself, in plaintiff's physical injury. The plaintiff in Gilliam v. Stewart, 291 So.2d 593 (Fla. 1974), (1) heard the thud and observed the vehicle against her house, and (2) suffered a resultant heart attack. This Court held that no damages were recoverable in such a case.

In this case, plaintiff wife alleges that she (1) observed the dead insect in a can, and (2) fell over a chair with resulting injuries. Based on plaintiffs' own

pleadings, there is no physical impact to plaintiff wife. (R 2-3). The summary judgment entered below and affirmed per curiam by the Fourth District Court of Appeal preserves the stare decisis of this State that a plaintiff cannot recover for physical injury caused by mental stress in the absence of impact.[1/]

In his Order granting summary judgment, Judge Purdy expressly stated that defendants' motion was "ripe for consideration [and] [t]he Motion For Summary Judgment and Memorandum in Support Thereof complied fully with Rule 1.510, Florida Rules of Civil Procedure, in that they state 'with particularity the grounds upon which it is based and the substantial matters of law to be argued.'" (R 112). Yet, surprisingly, plaintiffs would have this Court believe that defendants' motion for summary judgment was deficient, thereby obviating their need to respond. (Petitioners' Brief, pp. 14-16).

1/ Plaintiffs twice argued to the trial court that the order previously entered on the motion to dismiss constitutes "law of the case" and precluded the trial court from considering defendants' summary judgment motion. (R 57-62, 97-107). Now, as in their brief to the Fourth District, plaintiffs state that such order precluded their need to even respond to the motion for summary judgment. (Petitioners' Brief p. 17). Plaintiffs are incorrect on either ground because the doctrine of "law of the case" is not applicable here. An interim order, pre-trial and interlocutory in nature, is not the immutable law of the case, Stuco Corp. v. Gates, 145 So.2d 527, 530 (Fla. 2d DCA 1962), and did not bind the trial court. Petitioners conceded this point on oral argument before the Fourth District.

Plaintiffs propound an argument which flies in the face of reason and well-settled law. Although acknowledging that Florida Rule of Civil Procedure 1.510(c) allows a movant to rely on pleadings and discovery of record to support a claim for summary judgment, plaintiffs, in essence, claim that defendants should have been precluded from relying on plaintiffs' pleadings because there was no discovery of record which created a genuine issue of material fact. This argument, initially deficient in fact and law, becomes preposterous when one examines the efforts of the defendants to elicit facts through interrogatories which were met with the non sequitur "specific allegations to be made by my attorney", and through deposition notices which were stonewalled with a baseless motion for protective order.

On defendant's motion for summary judgment, the allegations of the complaint must be taken as true. White v. Pinellas County, 185 So.2d 468 (Fla. 1966). In fact, it is clearly established that at a hearing on motion for summary judgment, the issues to be considered are those raised by the pleadings. Holl v. Talcott, 191 So.2d 40 (Fla. 1966). If the contents of the file establish no issue of material fact, it becomes incumbent upon the opponent to demonstrate, by affidavit or otherwise, the existence of material fact. If those pleadings and record demonstrate that there is no genuine issue of material fact, and the movant is entitled to prevail as a matter of law on those facts, then the mo-

tion for summary final judgment must be granted. Connell v. Sledge, 306 So.2d 194, 196 (Fla. 1st DCA 1975), cert. dismissed, 336 So.2d 105 (Fla. 1976).

Plaintiffs have confused the burden of proof. Taken as true, the allegations of plaintiffs' complaint and answers to interrogatories affirmatively establish that there is no genuine issue of material fact as to impact. Defendants met their burden. Plaintiffs failed to present, let alone demonstrate, by affidavit or otherwise the existence of material fact. Plaintiffs cannot now be heard to cry that they failed to demonstrate the existence of material fact and, even more so, that defendants failed to help them. The record is resoundingly clear that there was no impact and summary judgment was correct.2/

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING PLAINTIFFS' AFFIDAVIT IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BECAUSE THE AFFIDAVIT WAS NOT FILED PRIOR TO THE DAY OF HEARING.

The trial court did not abuse its discretion when it denied plaintiffs' motion to submit affidavit in

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2/ Plaintiffs erroneously cite Samuels v. Magnum Realty Corp., 431 So.2d 241 (Fla. 1st DCA 1983) for the proposition that defendants seek to show absence of impact by negative inference rather than affirmative support. (Petitioners' Brief, p. 17). They are hoist on their own petard. In Samuels, the court found the movant's affidavit deficient because it was not based on personal knowledge and made conclusory statements without supporting particulars. In the case at bar, defendants relied upon the most affirmative support available--plaintiffs' own allegations and account of the incident.

opposition to motion for summary judgment because the affidavit was not filed prior to the day of hearing. An affidavit filed by plaintiffs almost three weeks after hearing on defendants' motion for summary judgment is not timely served in opposition to motion for summary judgment. Because the affidavit was not timely served, the trial court did not abuse its discretion in refusing to consider such affidavit.

Both the Florida Rules of Civil Procedure and cases interpreting these rules mandate that affidavits in opposition to motions for summary judgment be filed prior to the day of hearing. Fla. R. Civ. P. 1.510(c); Cleveland Trust Company v. Foster, 93 So.2d 112 (Fla. 1957); Coffman Realty, Inc. v. Tosohatchee Game Preserve, Inc., 381 So.2d 1164, 1167 (Fla. 5th DCA 1980), aff'd, 413 So.2d 1 (Fla. 1982); Henry Stiles, Inc. v. Evans, 208 So.2d 65 (Fla. 4th DCA 1968); Settecasi v. Board of Public Instruction of Pinellas County, 156 So.2d 652 (Fla. 2d DCA 1963). In the within action, plaintiffs did not file their counter-affidavit until nearly three weeks after the day of hearing. (R 90-91). Therefore, the trial court did not abuse its discretion in refusing to permit the affidavit.

That the trial court did not abuse its discretion in denying plaintiffs' affidavit is underscored by Coffman Realty, supra. The court there stated:

> We have not examined the affidavits to discover whether or not they create genuine issues of material fact because we are of the opinion that they were filed too late.

> Florida Rule of Civil Procedure 1.510(c) requires all counter-affidavits to be served on the day prior to the hearing, yet the instant counter-affidavits were not filed until eleven days after the hearing. Were we to hold that a trial judge never had discretion to refuse them, we would effectively destroy what little the Appellate Courts have left of the summary judgment procedure.

Id. at 1167.

The circumstances in this case are more glaring. Plaintiffs did not file their counter-affidavit until nineteen days after the hearing. (R 90-91). Where a counter-affidavit is not served prior to the day of hearing, the trial court has discretion to refuse to consider the affidavit. See, Auerbach v. Alto, 281 So.2d 567, 568 (Fla. 3d DCA 1973) (counter-affidavit proferred at hearing on motion for summary judgment properly refused); Henry Stiles, Inc. v. Evans, 206 So.2d 65 (Fla. 4th DCA 1968) (counter-affidavit filed with clerk of court at 4:52 p.m. on afternoon prior to summary judgment hearing and copy mailed to opposing counsel not timely). The trial court here certainly did not abuse its discretion in refusing to consider plaintiffs' affidavit.

Plaintiffs take the position in their brief that the trial court may consider an affidavit opposing summary judgment filed delinquently if "compelling reasons or exigent circumstances" exist to justify acceptance of the affidavit. (Petitioners' Brief, p. 18). While that is a correct statement of the law as applied to a motion for rehearing, it is

wholly inapplicable to the facts of this case. Plaintiffs offered their grounds for the first time on appeal and, incredibly, justify them by stating that "Judge Purdy had already exercised similar discretion in favor of defendants by permitting them to file memorandum of law after the hearing on their Motion for Summary Judgment." (Petitioners' Brief, p. 18). In fact, Judge Purdy ordered memoranda which both parties filed but such an order is certainly not what the courts contemplate as an excuse for delinquent affidavits. See, Willis v. L.W. Foster Sportswear Co., 352 So.2d 922, 924 (Fla. 2d DCA 1977), where the court stated:

> An example of [exigencies] might be where, through no fault or lack of diligence by the nonmoving party, proof may not become available until after the motion for summary judgment is heard. However, such a case would be the exception and not the rule, and the trial judge should require a convincing showing of exigent circumstances.

The "proof" offered in plaintiffs' counteraffidavit was certainly available nine months earlier when they filed their complaint and three weeks prior at the hearing on summary judgment. Additionally, plaintiffs never offered any alleged exigent circumstance to the trial court and never moved for continuance of the hearing or for rehearing. Gulewicz v. Cziesla, 366 So.2d 507, 508 (Fla. 2d DCA 1979); Fuller v. General Motors Corp., 353 So.2d 1236, 1237 (Fla.

2d DCA 1978); Steiner v. Ciba-Geigy, Corp., 364 So.2d 47, 53 (Fla. 3d DCA 1978).[3/]

Admittedly, Willis addressed an affidavit filed with motion for rehearing, as did Lennertz v. Dorsey, 421 So.2d 820, 821 (Fla. 4th DCA 1982) which plaintiffs cited but squarely supports defendants' position in that the trial court did not abuse its discretion in refusing to consider late affidavits filed by plaintiffs in the absence of compelling reasons or exigent circumstances.[4/]

The Willis court commented:

> It is one thing for a court to receive an amended or supplementary affidavit on a motion for rehearing; it is quite another to allow a nonmovant to initially create an issue of fact at this late stage. To permit the latter would allow a nonmoving party to sit back, review the entire proceedings, and not attempt to negate the nonexistence of a material issue of fact until rehearing. Such a procedure certainly is not sanctioned by the rules and is

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3/ This ground should not now be considered on appeal. Dober v. Worell, 401 So.2d 1322, 1324 (Fla. 1981); Loranger v. State of Florida, Department of Transportation, _____ So.2d _____ (Fla. 4th DCA 1984), Vol. 9 FLW 1078.

4/ Willage v. Law Offices of Wallace & Breslow, P.A., 415 So.2d 767 (FLa. 3d DCA 1982), cited by plaintiffs, has no bearing on the case sub judice. The court there held that the first affidavit of an expert witness timely filed by a party opposing summary judgment may be subsequently explained by him in a second affidavit as long as the explanation is credible and not inconsistent with his previous sworn testimony. The only affidavit filed here was untimely and offered no explanation of anything.

> not conducive to the orderly administration of justice.

Willis, 352 So.2d at 924.

The ratio decedendi applied in Willis is equally applicable to the plaintiffs here. The plaintiffs' affidavit must be refused because it was not timely filed. The only issue is whether the trial court properly exercised its discretion in refusing to consider a counter-affidavit not filed until nearly three weeks after the day of hearing. The court properly exercised its discretion.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO PERMIT PLAINTIFFS TO AMEND COMPLAINT BECAUSE A PARTY CANNOT ALTER ITS PREVIOUS POSITION FOR THE PURPOSE OF DEFEATING SUMMARY JUDGMENT.

The trial court did not abuse its discretion in refusing plaintiffs' motion for leave to amend complaint after hearing on summary judgment because the amendment altered the previous position asserted by plaintiffs by alleging a touching of the can. A party who opposes summary judgment is not permitted to alter its previously asserted position to defeat a summary judgment. Since the proffered amendment altered plaintiffs' previous position, the trial court did not abuse its discretion in denying Plaintiffs' motion for leave to amend.

Plaintiffs filed their complaint in June, 1982 and, as heretofore stated, alleged no physical impact or

touching. (R 1-8). After a motion to dismiss was partially granted on the basis that plaintiffs did not allege impact, plaintiffs did not choose to file an amended complaint. Plaintiffs also failed to allege impact in subsequent discovery. Yet, nine months after plaintiffs filed their complaint and nearly three weeks after the hearing on defendants' motion for summary judgment which was based on the absence of impact, plaintiffs moved for leave to amend to allege a touching. This amendment was clearly an attempt to alter the previous position by plaintiffs and was properly refused.

The rule in Florida is that a party who opposes summary judgment will not be permitted to alter a previously asserted position to defeat summary judgment. Ellison v. Anderson, 74 So.2d 680 (Fla. 1954). Accord, Inman v. Club of Sailboat Key, Inc., 342 So.2d 1069 (Fla. 3d DCA 1977); Home Loan Co., Inc. of Boston v. Sloane Co., of Sarasota, 240 So.2d 526 (Fla. 2d DCA 1970). In Ellison, plaintiff bus passenger brought a suit in negligence for personal injuries resulting from an intersectional collision of the bus and another vehicle. Plaintiff, at her deposition, largely absolved the bus driver of negligence. When defendant moved for summary judgment, plaintiff produced her own affidavit which sought to repudiate a portion of her deposition. Plaintiff also produced an affidavit by the driver of the other vehicle involved in the collision. Based sole-

ly on the latter affidavit, the Court reversed the summary judgment entered by the trial court. As to plaintiff's affidavit, however, this Court agreed with the trial court that "a party when met by a Motion for Summary Judgment should not be permitted by his own affidavit ... to baldly repudiate his previous deposition so as to create a jury issue...." Id. at 681. Clearly, plaintiffs here may not be allowed after hearing on summary judgment to seek to amend their complaint to avoid an adverse judgment.

Furthermore, wide discretion is allowed trial courts in refusing or permitting amendments to pleadings and their actions will not be disturbed where no settled rule of law or procedure was plainly violated or sound judicial discretion abused. See, Joseph T. Miller Construction Co. v. Borak, 82 So.2d 147 (Fla. 1955); Hollingsworth v. Arcadia Citrus Growers, 18 So.2d 159, 154 Fla. 399 (Fla. 1944); Allett v. Hill, 422 So.2d 1047, 1050 (Fla. 4th DCA 1982); Versen v. Versen, 347 So.2d 1047, 1050 (Fla. 4th DCA 1977). When plaintiffs in this case sought by amendment to repudiate their previous position to defeat a motion for summary judgment, the trial court did not abuse his discretion in refusing such amendment.5/

5/ Plaintiffs misplace reliance on several cases for the position that they should have been allowed the opportunity to amend their complaint after hearing on motion for summary judgment. Plyser v. Hados, 388 So.2d 1284, 1285 (Fla. 3d DCA 1980); Jones v. City of Homestead, 408 So.2d 618 (Fla. 3d DCA 1981) (per

IV. EVEN ASSUMING THE AFFIDAVIT WAS TIMELY OR THE AMENDMENT WAS PERMITTED, SUMMARY JUDGMENT WAS CORRECT BECAUSE THERE WAS NO INJURY CAUSED BY PHYSICAL IMPACT.

The maxim in Florida, as discussed in Part I, supra, is that there can be no recovery for emotional distress or physical injury resulting from that distress in the absence of physical impact. Plaintiffs contend in their brief that touching the can constituted impact. (Petitioners' Brief, p. 10)[6/]

An allegation of "touching" is futile because this incidental touching of the can was wholly unrelated to any actual physical impact by defendants upon plaintiff or any resulting injuries. See, Ellington v. United States, 404

Footnote 5 cont'd.

curiam); Hartman v. Opelika Machine & Welding Co., 414 So.2d 1105 (Fla. 1st DCA 1982); Dorset House Association, Inc. v. Dorset, Inc., 371 So.2d 541 (Fla. 3d DCA 1979); (Petitioners' Brief, pp. 19-20). Those cases addressed insufficient pleadings except for Hartman where amendment of the complaint was not an issue on appeal. Not one of these cases is on point for the issue before this Court -- whether the trial court abused its discretion in denying an amendment filed nineteen days after hearing on summary judgment by the opponents of summary judgment which altered plaintiffs' previous position.

6/ Plaintiffs' reliance on Hoitt v. Lee's Propane Gas Service, Inc., 182 So.2d 58 (Fla. 2d DCA 1966), cert. denied, 188 So. 2d 816 (Fla. 1966) is wholly without merit because plaintiff there did not seek to recover for injuries caused by fright. In the case sub judice, plaintiffs' claim for physical injury is predicated on their claim for fright which was dismissed with prejudice below.

F.Supp. 1165, 1167 (M.D.Fla. 1975)(construing Florida law); Cadillac Motor Car Division v. Brown, 428 So.2d 301 (Fla. 3d DCA 1983); Saltmarsh v. Detroit Automobile Inter-Ins. Exchange, 344 So. 2d 862 (Fla. 3d DCA 1977); Steiner and Munach v. Williams, 408 So.2d 608 (Fla. 3d DCA 1976); Accord, Davis v. Sun First National Bank of Orlando, 408 So.2d 608 (Fla. 5th DCA 1981). Plaintiffs' position, original or amended, bars their claim. A "touching" plainly does not constitute impact. Davis, supra at 609-610, (touching of hold up note does not constitute physical impact); Saltmarsh, supra, (no physical injury in the receipt of an unlawful cancellation of an insurance notice); Steiner and Munach, supra at 41-42, (no physical impact in the receipt of a copy of an unexecuted claim for nonpayment of medical services). Thus, summary judgment was proper because there is no genuine issue of material fact that no physical occurred in this case.

V. SOUND POLICY AND STARE DECISIS MANDATE UPHOLDING THE IMPACT RULE.

Sound policy dictates that the threshold of impact continues to insure a reasonable delineation of rights and duties between the parties. The Impact Rule is a good sensible rule that protects the courts and the public, particularly the business community, from being inundated with high-

ly speculative and groundless lawsuits.[7/] A good example of the trivial claims that Florida courts can expect in the absence of the Impact Rule is found in Culbert v. Sampson's Supermarkets, Inc., 444 A.2d 433 (Me. 1982) where plaintiff sued for emotional distress suffered from observing her child, when eating baby food supplied by the defendants, choke, gag and spit up a hard substance. That this Court recognizes the efficacy of such a guiding principle as the Impact Rule is to be applauded, not abhorred.

The only grounds for this Court to reverse the result below is to change the law. The doctrine of stare decisis impels this Court to adhere to the Impact Rule in the absence of changed circumstances. The rule of stare

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7/ The narrow issue before this Court is whether there existed a genuine issue of material fact that plaintiff wife did not sustain impact. Plaintiffs attempt to divert this Court from the real issue by talking about foreseeability. (Petitioners' Brief, pp. 13-14). The issue here is not forseeability vel non, it is absence of impact. Foreseeability is a red herring because there is no foreseeability in the absence of impact. In fact, the Impact Rule is a limit on foreseeability as a matter of law. C.f. Ellington v. United States, 404 F.Supp. 1165 (M.D.Fla. 1975); Selfe v. Smith, 397 So.2d 348 (Fla. 1st DCA 1981); Stewart v. Gilliam, 271 So.2d 466, 477 (Fla. 4th DCA 1972), quashed, 291 So.2d 593 (Fla. 1974). Plaintiffs further misdirect the Court by citing the dissent in Atwood v. Rowland Truck Equipment, Inc., 408 So.2d 590, 591 (Fla. 3d DCA 1981) as the majority opinion. (Petitioners' Brief, p. 8). Plaintiffs state that causation is an element of intentional torts and no impact is required therein. (Petitioners' Brief, pp. 11-12). This argument begs the question in that plaintiffs have not in this action alleged any intentional tort.

decisis eliminates the need to relitigate every pertinent proposition in every case. It provides predictable parameters that enable people to know the potential merit or lack of merit in instituting suit. See, Bonner v. City of Prichard, Alabama, 661 F.2d 1206, 1209-1210 (11th Cir. 1981)

One year before this Court recognized the Impact Rule, this Court stated in Old Plantation v. Maule Industries, 68 So.2d 180, 183 (Fla. 1953), citing Broom's Legal Maxims, 7th Ed., p. 118:

> 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.
>
> . . . .
>
> 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 scale of justice steady, and not liable to waver with every new judge's opinion. . . .

Where, under the extant law, societal or technological developments leave persons unprotected, the argument for change may be said to be overwhelming. Such overwhelming reasons may be found by the advent of home video tape recorders, Sony Corporation v. Universal City Studios, _____ U.S. _____, 104 S.Ct. 774, 782-783, 78 L.Ed.2d 574, 585 & n.11 (1984) ("[T]he law of copyright has developed in response to significant changes in technology. Indeed, it was the invention of a new form of copying equipment -- the printing

press -- that gave rise to the original need for copyright protection."); artificial insemination, Peoples v. Sorenson, 68 Cal.2d 280, 437 P.2d 495 (1968) (in bank); the increase in abortion, Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); and, as recently recognized by this Court, living wills occasioned by the existence of extraordinary life support systems, John F. Kennedy Memorial Hospital, Inc. v. Bludworth, _____ So.2d _____, Vol. 9 FLW 196, 197 ("It is now possible to hold [brain dead] persons on the threshold of death for an indeterminate period of time by utilizing extraordinary mechanical or other artificial means to sustain their vital bodily functions.") Surely, this is not such a case. No change in society or technology suggests a valid reason to depart from the Impact Rule.

The arguments for abrogating the Impact Rule existed before this Court's decision in Gilliam, where the plaintiff heard the thud and observed the vehicle against her house, suffering a resultant heart attack. In response to such arguments, this Court stated:

> 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 (emphasis added).

The uncontroverted facts in this case establish that plaintiff observed a dead cockroach in a can of peas, became "shocked, alarmed and repulsed" and fell over a chair, allegedly sustaining injuries. (R 2-3) Under the facts in this case, too, there can be no valid justification to recede from the longstanding decisions of this Court.

To abrogate the Impact Rule in a case such as these facts would be tantamount to holding that any person could maintain a cause of action by virtue of mere anxiety; indeed, abrogation of the Impact Rule in our litigious society would encourage such suits. The imagination runs vivid with potential causes of action: a puritanical woman watches cable TV in prime time when an engineer mistakenly pushes the wrong button causing the viewer to observe a violent scene in a movie; her shock, alarm and repulsion cause her to jump back and fall over a chair. Consider a patron in a restaurant who, upon returning from the men's room, sees a plate of salad at his place setting with a dead insect laying there. His shock, alarm and repulsion cause him to jump back and fall over a chair, sustaining injuries to himself. These scenarios make apparent the wisdom of a rule whereby a physical <u>impact</u> upon a plaintiff must cause the fear to be compensable.

Summary judgment in this case takes cognizance of the policy underlying the Impact Rule. The rationale for

preserving the Impact Rule was ably stated in the dissenting district court opinion in Stewart v. Gilliam, 271 So.2d 466 (Fla. 4th DCA 1973), quashed, 291 So.2d 593 (Fla. 1974), which was adopted by this Court. Therein, Chief Judge Reed reasoned:

> The impact doctrine gives practical recognition to the thought that not every injury which one person may by his negligence inflict upon another should be compensated in money damages. There must be some level of harm which one should absorb without recompense as the price he pays for living in an organized society.

Stewart v. Gilliam, 271 So.2d at 477 (Reed, C.J., dissenting). The undisputed facts in this case provide fertile ground upon which this Court should reaffirm its adherence to the impact doctrine; it should not hesitate to do so.

CONCLUSION

The certified question should be answered in the negative.

The trial court's entry of final judgment granting defendants' motion for summary judgment was correct because there was no genuine issue of material fact that no physical impact occurred. The trial court did not abuse its discretion in denying (1) plaintiffs' motion to amend complaint, because it altered plaintiffs' previous position for the purpose of defeating summary judgment, and (2) plaintiffs'

motion and affidavit in opposition to summary judgment because it was not filed prior to the day of hearing.

The trial Court's order should be affirmed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Respondents' Answer Brief has been furnished by mail this 18th day of June, 1984 to Kahn & Gutter, Attorneys for Petitioners, Robert M. Kahn, Esquire, 5950 W. Oakland Park Boulevard, #200, Fort Lauderdale, Florida 33313.

_____
Of Counsel

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