THE SUPREME COURT IN AND FOR THE
STATE OF FLORIDA

CASE NUMBER 65,249

GERALD DOYLE and MARIE DOYLE,

Petitioners,

-vs-

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

Respondents.

/

BRIEF on the Merits of Petitioners

GERALD DOYLE and MARIE DOYLE

ON APPEAL FROM THE DISTRICT COURT
OF APPEAL, FOURTH DISTRICT

Case No. 83-1199

KAHN & GUTTER
Robert M. Kahn, Esquire
Jeffrey D. Mickelson, Esquire
5950 W. Oakland Park Blvd. #200
Fort Lauderdale FL 33313
(305) 485-7000 (Broward)
949-0189 (Dade)

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PREFACE

The Petitioners were the Plaintiffs and Appellants in the lower court proceedings. The Respondents were the Defendants and Appellees in the lower court proceedings. The Petitioners, MARIE DOYLE and GERALD DOYLE, shall be referred to by name and/or as Plaintiffs. The Respondents, PILLSBURY COMPANY, GREEN GIANT COMPANY and PUBLIX SUPER MARKET, INC., shall be referred to as PILLSBURY, GREEN GIANT, and PUBLIX and/or Defendants. All citations to the record, either documentary or testimonial, shall be noted as (R).

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STATEMENT OF THE CASE AND OF THE FACTS

The plaintiff, MARIE DOYLE, sued the defendants in Circuit Court, Broward County, for negligence, breach of warranty and strict liability (R 1-8). GERALD DOYLE, her husband, joined the action alleging loss of services and consortium. The court entered an Order on October 4, 1982, granting PILLSBURY's Motion for Summary Judgment (R 20). (This Order is not the subject of plaintiffs' Appeal). On May 10, 1983, the court granted summary judgment for GREEN GIANT and PUBLIX, and entered a Final Judgment on their behalf (R 110-116). At the same time, plaintiff's Motion for Leave to Amend and Motion and Affidavit in Opposition to defendants' Motion for Summary Judgment were denied (R 115). Plaintiffs filed their Notice of Appeal on June 8, 1983 (R 117). On April 4, 1984, the District Court of Appeal, Fourth

District, affirmed the summary judgment entered on behalf of GREEN GIANT and PUBLIX (A 1-2). At the same time, the District Court of Appeal certified the following question as a matter of great public importance:

> SHOULD FLORIDA ABROGATE THE "IMPACT RULE" AND ALLOW RECOVERY FOR PHYSICAL INJURIES CAUSED BY A DEFENDANT'S NEGLIGENCE IN THE ABSENCE OF PHYSICAL IMPACT UPON THE PLAINTIFF?

The plaintiff, MARIE DOYLE, sued for personal injuries she sustained when, after opening a can of GREEN GIANT LE SEUER brand peas, she encountered and reacted to a dead insect floating atop the surface of the product. The incident was capsulized in paragraphs 9 and 10 of the complaint as follows:

> 9. Thereafter, as Plaintiff GERALD DOYLE removed the lid from the sealed container in the normal course, there became exposed to the full view of Plaintiffs, and each of them, a large dead cockroach, or insect of similar configuration, floating within the container on the surface above the PRODUCT packaged by Defendants PILLSBURY and/or GIANT and sold to Plaintiff MARIE DOYLE by Defendant PUBLIX.
>
> 10. Upon unexpectedly observing the insect as hereinabove indicated, Plaintiff MARIE DOYLE was suddenly shocked, alarmed and repulsed, causing her to jump back in alarm and to fall over a chair and thereupon suffer and sustain injuries as hereinafter set forth. (R 2-3).

The complaint set forth distinct theories of liability, each separately pled, with respect to negligence, breach of warranty and strict liability (R 1-8). On August 6, 1982, PILLSBURY filed a Motion for Summary Judgment and supporting affidavit alleging that only GREEN GIANT had placed the product into the stream of commerce and that the relationship between PILLSBURY and GREEN GIANT was far too remote to impute liability to PILLSBURY (R 16-17). The court granted

summary judgment in favor of PILLSBURY on October 4, 1982 (R 20), and said order was and is not the subject of plaintiffs' appeal.

Defendants also attacked the complaint with a Motion to Dismiss, challenging the legal sufficiency of plaintiffs' position (R 18-19). They contended, inter alia, that the facts, as alleged in Count I of the complaint, did not meet the minimum criteria necessary to establish liability in view of the "Impact Rule" (R 10). The presiding trial judge, The Hon. Eugene Garrett, both granted and denied defendants' motion in part with a carefully delineated Order (R 18-19).

With respect to defendants' allegation that the Impact Rule barred the maintenance of a cause of action in negligence (Count I of the complaint), the court denied the applicability of such doctrine concerning the physical injuries pleaded while upholding its applicability as to emotional injuries (R 18). The court also upheld the breach of warranty claim outlined in Count II, the strict liability claim against GREEN GIANT only as contained in Count IV, and GERALD DOYLE's derivative action in Count V (R 18-19). Defendants' Motion to Strike Count III seeking punitive damages was granted, the latter not being the subject of this appeal (R 18).

Defendants filed an Answer and Affirmative Defenses (R 21-25), after which plaintiffs filed their Reply (R 26). Discovery followed, primarily in the form of interrogatories issued by each party, and depositions. The depositions of plaintiffs were not initially conducted because of plaintiffs' Motion for a Protective Order and thereafter due to the mutual scheduling conflicts of opposing

counsel (A 3-4). Defendants never filed any Request for Production or Admissions.

On February 14, 1983, PUBLIX and GREEN GIANT filed for summary judgment as to all claims, contending, once again, that plaintiff's injuries were the result of emotional stress induced in the absence of physical impact and were barred by Florida law (R 37). Plaintiffs opposed defendants' Motion for Summary Judgment by way of a Memorandum, noting that defendants' argument was a rehash of the points raised before Judge Garrett some months earlier by their Motion to Dismiss and that defendants had failed to discover any new information that would justify a change in the court's position (R 57-62). Plaintiffs raised, inter alia, the defense of the "Law of the Case", citing the trial court's ruling of October 4, 1982, which upheld that part of Count I alleging physical injuries. Plaintiffs also reconfirmed their claim for breach of warranty as to both defendants and strict liability as against GREEN GIANT only.

The Motion for Summary Judgment on behalf of GREEN GIANT and PUBLIX was heard on March 4, 1983, by Judge Mark Prudy, to whom the case had been reassigned as a result of administrative change. Although the issue of the "Law of the Case" had been argued and briefed by plaintiffs (R 57-59), defendants had not addressed this issue, and Judge Purdy thereupon issued an order asking the parties to elaborate upon the doctrine with additional memoranda (R 64). Each party filed memoranda pursuant to the court's directive (R 77-88; R 97-107), and plaintiffs also moved for leave to amend the complaint and for consideration of affidavit of GERALD DOYLE in opposition to defendants' Motion for Summary Judgment (R 90-96).

On March 28, 1983, plaintiffs' Motions came on tc be heard in conjunction with defendants' Motion for a Continuance of the jury trial scheduled to begin that week, at which time each party also elaborated upon defendants' Motion for Summary Judgment (R 137-151). Plaintiffs consented to the defendants' Motion for Continuance, which was granted at the hearing, and the court took under advisement defendants' Motion for Summary Judgment, plaintiffs' Motion to Amend the complaint, and plaintiffs' Motion to Consider the Affidavit of GERALD DOYLE (R 149-150).

The court entered an order on May 10, 1983, granting defendants' Motion for Summary Judgment and denying plaintiffs' two motions (R 110-115). The Final Judgment on defendants' behalf was also entered on May 10, 1983 (R 116). An appeal ensued to the District Court of Appeal, Fourth District which included that portion of Judge Garrett's order of October 4, 1982, (then an interlocutory order not subject to appeal until the final judgment was issued), granting defendants' Motion to Dismiss Count I of the complaint to the extent same was granted as to emotional injuries (R 18).

ARGUMENT

POINTS ON APPEAL

FLORIDA SHOULD ABROGATE THE IMPACT RULE AND ALLOW RECOVERY FOR PHYSICAL INJURIES CAUSED BY THE DEFENDANTS' NEGLIGENCE IN THE ABSENCE OF IMPACT UPON THE PLAINTIFF.

The impact rule was initially created by the courts as a means of protecting against fraudulent and voluminous claims,

limitless liability and difficult determinations of causation resulting from imprecise medical knowledge. Commentary, Torts: The Impact Rule - Nuisance or Necessity, 25 U. Fla. L. Rev. 368 (1973). As the underlying rationale for the rule began to erode, a majority of jurisdictions came to realize that the effect of the impact requirement served a greater injustice upon legitimate plaintiffs than it did to prevent inappropriate and burdensome litigation. The result has been a widespread abrogation of the rule, with only a small minority of states still requiring impact upon the plaintiff prior to allowing recovery for physical injuries caused by the defendant's negligence[1].

Florida remains one of the few states which still adheres to the impact rule, although several past and recent decisions have seriously questioned its effectiveness. In Champion v. Gray, 429 So.2d 348 (Fla. 5th DCA 1982), the court painstakingly examined the impact requirement and the traditional principles relied upon to support its application. In Champion, a mother died from the shock of seeing her young daughter lying killed in a roadway after she was struck by a drunken driver. Mrs. Champion's husband sought to recover for his wife's death, alleging that the driver's negligence in killing the child was the proximate result of the mother's death. The trial court denied Mr. Champion's claim, based on a lack of impact, and the ruling was affirmed, albeit reluctantly, by the District Court of Appeal.

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[1] In 1973, only ten states, including Florida, adhered to the impact rule. In 1983 alone, three of those states abandoned the impact requirement. See, Torts: The Impact Rule: Nuisance or Necessity, 25 U. Fla. L. Rev. 368, 369 (1973); Schultz v. Barberton Glass Company, 447 N.E.2d 109 (Ohio 1983); Hubbard v. United Press International, Inc., 330 N.W. 2d 428 (Minn. 1983); Bass v. Noeney Company, 646 S.W.2d 765 (Mo. 1983).

In proclaiming the need for Florida to abrogate the impact rule, which was categorized "as unjust and illogical", the Fifth District Court of Appeal emphasized the inapplicability of those theories previously relied upon to support the rule. Id. at 350. The court remarked about the obvious and significant improvement in medical techniques which would allow for earlier and more accurate diagnosis of the causal connection between mental stress and the resulting physical injuries.

More importantly, the Champion opinion exposed the unjustified concern over close determinations of causation involving impact, or a lack thereof. Id. at 350. Causation is a necessary element of all personal injury disputes. A potential litigant should therefore not be denied his or her day in court if a difficult question of proof involving impact, or otherwise, is presented. Stewart v. Gilliam, 271 So.2d 466 (Fla. 4th DCA 1973), quashed, 291 So.2d 593 (Fla. 1974).

The court in Champion also addressed the belief that the elimination of the impact rule would subject the judiciary to a flood of litigation. It was accurately and commendably stated that the judicial system cannot deny certain litigants access to the courts for fear that to do so would create an extra burden on an already over-crowded judiciary. "The basic purpose of our court system is to provide a remedy to those who are injured by the fault of others." Id. at 350. This argument, while appropriate, is essentially unnecessary since the greater volume of litigation has not occurred in those area which have abrogated the impact rule but has occurred in those jurisdictions which still require impact. Note, Negligent Infliction of

Emotional Distress - Should the Florida Supreme Court Replace the Impact Rule With a Foreseeability Analysis?, 11 Fla. St. L. Rev. 229,234 (Spr./1983).

While there are other "justifications" for maintaining the impact rule, all of which have been refuted, the most compelling indictment of the impact requirement and its effectiveness is the successful management of personal injury litigation in non-impact jurisdictions. Combined with the abvious and well-founded dissatisfaction expressed by many courts in Florida,[2] it becomes clear that this antiquated rule of law should be eliminated.

Assuming the impact requirement is abandoned, any entry of Summary Judgment against the plaintiffs would be improper. It is obvious that fright and disgust are reasonable and anticipated reactions after viewing a bug in a can of peas. Jumping back is also a logical extension of that reaction. Since the factual allegations as pled were sufficient to substantiate liability on behalf of the defendants or to raise questions as to foreseeability, any refusal to allow this cause to go to a jury would be reversible error. Crislip v. Holland, 401 So.2d 1115 (Fla. 4th DCA 1981).

> The proper test in determining foreseeability is not whether the initial tortfeasor is able to foresee the exact nature or extent of the injuries or precise manner in which the injuries occurred. Rather, all that is necessary in order for liability to arise is that the tort feasor be able to foresee that some injury would likely result in some manner as a consequence of this negligent act. Atwood v. Rowland Truck Equipment, Inc., 408 So.2d 590, 591 (Fla. 3rd DCA 1981). See, also, Stahl v. Metropolitan Dade County, 438 So.2d 14, (Fla. 3rd DCA 1983).

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[2] The question of the legitimacy of the impact rule has now been certified to the Florida Supreme Court on four occasions involving three Districts.

THE TRIAL COURT IMPROPERLY APPLIED THE IMPACT RULE AND ERRED BY GRANTING DEFENDANTS' SUMMARY JUDGMENT IN THE PRESENCE OF DISTINCTLY-PLEADED ISSUES OF BREACH OF WARRANTY AND STRICT LIABILITY.

In the presence of plaintiffs' contention that the impact requirement should be abrogated, it is important to consider the diversity of application of the impact rule in Florida. The rule which has been cited in numerous cases operates to preclude recovery for mere emotional injuries absent physical impact. "(A) person may not recover for mental pain and anguish in absence of impact." Pazo v. Upjohn Company, 310 So.2d 30, 31 (Fla. 2nd DCA 1975), (Emphasis added).

When Judge Garrett ruled on defendants' Motion to Dismiss, he distinguished plaintiffs' claim for mental damages, striking same, and physical injury, allowing the latter, just as the afore-mentioned application definition of the impact rule contemplates. In fact, a review of the decisions relying on this definition of the impact rule shows that the courts have denied recovery for mental pain and suffering in the absence of impact but have indicated no inclination to deny recovery for physical injuries of the type suffered by MARIE DOYLE. Herlong Aviation, Inc. v. Johnson, 291 So.2d 603 (Fla. 1974); Steiner and Munach, P.A. v. Williams, 334 So.2d 39 (Fla. 3rd DCA 1976); Brooks v. South Broward Hospital District, 325 So.2d 479 (Fla. 4th DCA 1975).

In Gilliam v. Stewart, 291 So.2d 593 (Fla. 1974), the impact rule was defined somewhat differently, stating essentially that no cause of action would exist "where a person suffers a definite physical injury, i.e. heart attack, as a result of emotional distress i.e.,

heart attack, as a result of emotional distress i.e., fright, induced by a defendant's alleged negligent conduct....." Id. at 594. The Supreme Court's concern was that the emotional stress would manifest itself in the form of some physical injury. This was not the case with MARIE DOYLE. Her reaction to the insect resulted in an understandable reflex movement which directly caused a distinct physical injury. It was not as if MARIE DOYLE saw the bug, became nervous, and the resulting tension manifested itself into a back injury, similar to a heart attack resulting from fright. This was a distinct and separate physical injury, the proximate cause of which was attributable to the presence of the bug in the packaging produced by defendants. Accordingly, no impact was necessary and this matter should have been presented to a jury to determine if plaintiff's injuries were the foreseeable consquence of defendants' actions.

Assuming impact was necessary, same was present as is evidenced in GERALD DOYLE's affidavit (R 92-93). The trial court was thus incorrect in ruling that the touching of the can was insufficient to satisfy the impact rule. The courts have often determined that a slight touching was sufficient to satisfy the impact requirement. Garod, Recovery of Negligently Inflicted Intangible Damages, Fla B.J. 708 (Oct. 1982). See also, Hoite v. Lee's Propane Gas Service, Inc. 182 So.2d 58 (Fla. 2d DCA 1966); Morton v. Stack 170 N.E. 869 (Ohio 1930). At worst, the determination of the sufficiency of the touching was a jury question which was improperly avoided by the court's order granting summary judgment.

The trial court also chose to ignore the apparent abandonment of the impact requirement in disputes involving food contamination. In Way v. Tampa Coca Cola Bottling Company, 260 So.2d 288 (Fla. 2nd DCA 1972), the plaintiff was drinking a bottle of Coca-Cola when he noticed what appeared to be a rat inside the container. While he did not injest or make contact with the rodent, the sight of this foreign object caused the plaintiff to vomit and thereafter avoid consuming dark colored drinks.

In allowing recovery in the absence of impact, the court emphasized the need for consumer protection. Id. at 290. By adopting standard foreseeability principles, the court reasoned that the presence of the rat could reasonably lead to the plaintiff's emotional and physical reactions and that recovery should be allowed.

In the court's order entering summary judgment on behalf of GREEN GIANT and PUBLIX, the trial judge statesthat recovery for breach of warranty and strict liability must be barred by the impact rule because causation is an element of both theories (R 113). This ruling flies in the face of prior decisions which have dismissed negligence counts but have preserved claims based on breach of warranty and/or strict liability, essentially differentiating the impact doctrine and its application to each theory of recovery.

In Estate of Harper v. Orlando Funeral Home, Inc. 366 So.2d 126 (Fla. 1st DCA 1979), the children and personal representative of the estate of Essie Harper brought suit against the funeral home after the decedent's casket began falling apart during

the burial ceremony. Recovery was sought for tortious interference with a dead body, intentional infliction of emotional distress, breach of implied warranty of merchantability and fitness, and strict liability. Defendants sought to dismiss the complaint in its entirety and the trial court accommodated.

The appellate court, while recognizing that the impact doctrine was an ineffective rule of law which should be eliminated, upheld the trial court's ruling, denying plaintiff's recovery for mental pain and suffering due to the absence of physical impact or injury. However, the counts seeking damages for tortious interference with the rights of a dead body and breach of implied warranty of merchantability and fitness were upheld, with the court opining that the complaint was sufficient to allow the plaintiffs "an opportunity to adduce appropriate proof of at least the sums paid for the defective casket and any other damages other than pain and suffering, related thereto." Id. at 129 (emphasis added).

The fact that causation is an element of breach of warranty and strict liability is not in and of itself determinative of the application of the impact rule. By way of analogy, one of the elements of intentional infliction of emotional distress is that the outrageous conduct of the defendant caused the resulting emotional distress. Metropolitan Life Insurance Company v. McCarson, 429 So.2d 1287 (Fla. 4th DCA 1983). However, the courts have expressly stated that the impact rule is not applicable to actions for intentional infliction of emotional distress. Dominguez v. Equitable Life Assurance Society of the United States,438 So.2d 58 (Fla. 3rd DCA 1983)

Accordingly, the trial judge improperly distinguished these theories of recovery on the basis of causation, and the entry of summary judgment concerning strict liability and breach of warranty was reversible error.

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON BEHALF OF DEFENDANTS IN THE ABSENCE OF CONCLUSIVE PROOF OF THE NON-EXISTENCE OF GENUINE ISSUES OF MATERIAL FACT.

Florida courts have steadfastly upheld the general rule of law prohibiting the granting of summary judgment in the presence of genuine issues of material fact. In adopting this principle, the courts have insisted that the movant conclusively demonstrate a complete absence of factual issues before summary judgment can be entered, a burden that must be met with all facts and inferences being interpreted to the non-movant's advantage. Smith v. Smith, 413 So.2d 773 (Fla. 1st DCA 1982). "If the existence of such issues or the possibility of their existence is reflected in the record, or the record raises the slightest doubt in this respect, a summary judgment must be reversed." Braun v. Ryder Systems, Inc, 430 So.2d 567, (Fla. 3rd DCA 1983), (emphasis added).

This aversion to the granting of summary judgment is especially evident in tort actions. Since negligence cases present varied factual settings which result in difficult and close determinations of liability, the courts have been reluctant to remove these questions from the province of a jury. Holmes v. Forty-Five Twenty-Five, Inc., 133 So.2d 651 (Fla. 3rd DCA 1961). Even when the facts are undisputed but reasonable inferences can be drawn on the question of negligence, the jury should not be precluded from exercising its

function in deciding whether a particular party was or was not at fault. Mason v. Remick, 107 So.2d 38 (Fla. 2nd DCA 1968).

More specifically, the courts have been particularly reluctant to remove determinations of causation from a jury through the granting of summary judgment. This is again the result of a commitment on the part of the judiciary to assure that any close calls relating to fault, liability, and causation "always be resolved in favor of a jury trial". McCabe v. Walt Disney World Company, 357 So.2d 814, 815 (Fla. 4th DCA 1977).

Plaintiffs insist that the award of summary judgment on behalf of GREEN GIANT and PUBLIX was improper in that defendants had not met their burden of conclusively proving a complete absence of factual issues. Indeed, the court had already ruled in plaintiffs' favor on the precise issue for which defendants were seeking summary judgment. Since the trial court had previously decided that the complaint pled the minimum requirements to establish a cause of action for jury consideration on the issues of fault, causation and foreseeability (R 18-19), summary judgment should not have been subsequently entered in the absence of new or contradictory evidence.

Florida Rule of Civil Procedure 1.510(c) allows the movant to rely on pleadings, discovery and/or affidavits to support any claim for summary judgment. Similarly, the non-moving party, when confronted with a viable Motion for Summary Judgment, is entitled to respond to the movant's allegations and supportive documentation with its own affidavits and discovery, as provided in Florida Rule of Civil Procedure 1.510(e). However, the non-moving party need not

supply affidavits when the cause is so apparently unripe for resolution in favor of the movant. Where the movant has so clearly failed to negate the presence of a jury issue, the non-movant is justified in relying upon the expectation that the trial court will deny the motion.

The leading Florida Supreme Court case of Holl v. Talcott, 191 So.2d 40 (Fla. 1966) espouses that the movant must prove an absence of genuine issues of material fact.

> Until it is determined that the movant has successfully met the burden, the opposing party is under no obligation to show that issues do remain to be tried.... This means that before it becomes necessary to determine the legal sufficiency of the affidavits or other evidence submitted by the party moved against, it must first be determined that the movant has successfully met his burden of proving a negative, i.e, the non-existence of a genuine issue of material fact. He must prove this negative conclusively. The proof must be such as to overcome all reasonable inferences which may be drawn in favor of the opposing party. Id. at 43 (citing additional cases) (emphasis added).

In the case at hand, PUBLIX and GREEN GIANT moved for summary judgment and in support thereof stated only that plaintiffs' pleadings, and more specifically paragraphs 9 and 10 of the complaint, failed to satisfy the impact requirement of this State. Defendants alleged that, since there were insufficient facts pled in the complaint, no genuine issues of material fact existed and they were entitled to summary judgment as a matter of law (R 37-44).

This argument misses the point in that Florida recognizes ultimate fact notice pleading and the court had already ruled that the plaintiffs had satisfied their pleading burden. Thus, while there were additional facts favoring plaintiffs' case (such as, but

not limited to, those set forth in GERALD DOYLE's affidavit) such additional facts were not required to have been pleaded and were, therefore, not a part of the record as of the time the Motion for Summary Judgment was made.

The plaintiffs therefore had no opportunity or obligation to come forth with those facts prior to trial other than in response to specific discovery propounded by defendants. In fact, no such discovery had ever occurred. From the time the complaint was filed until the time defendants moved for summary judgment, defendants never questioned MARIE DOYLE as to whether she had touched the product container. Rather, defendants erroneously assumed that she had not done so.

The Interrogatories filed by defendants never asked any questions designed to support their incorrect and unsupported conclusion that there was no impact which produced MARIE DOYLE's physical injuries. No Request for Admissions to this effect was ever filed by the Defendants. While several depositions of the party plaintiffs were set, they were not held for a variety of reasons, most notably to facilitate scheduling conflicts of the attorneys, and there was never a conscious effort to prohibit the taking of these depositions. Defendants thereafter made no legitimate effort to conclusively resolve their misconception as to impact. Their failure to do so should preclude the entry of Summary Judgment on their behalf.

THE TRIAL COURT ABUSED ITS DISCRETION BY REFUSING TO ALLOW PLAINTIFFS TO AMEND THEIR PLEADINGS AND BY FAILING TO CONSIDER PLAINTIFF'S AFFIDAVIT IN OPPOSITION TO SUMMARY JUDGMENT, BOTH OF WHICH WERE FILED TO SUBSTANTIATE A POSITION PREVIOUSLY VALIDATED BY THE TRIAL COURT.

As previously stated, the party seeking Summary Judgment must prove an absence of genuine issues of material fact, with all facts or inferences to be interpreted in the non-movant's favor. Until the movant meets its burden, a responsive affidavit need not be considered by the lower court. Holl v. Talcott, Supra. In fact, under these circumstances, a responsive affidavit orother supporting documentation is not required. Connell v. Sledge , 306 So.2d 194 (Fla. 1st DCA 1975). If the movant fails to meet its burden, which is clearly the case herein in that defendants seek to show a lack of impact by negative inference rather than affirmative support, the motion must be denied. Samuels v. Magnum Realty Corporation, 431 So.2d 241 (Fla. 1st DCA 1983).

The denial of defendants' Motion for Summary Judgment is particularly appropriate in light of the first trial judge's ruling concerning the legal sufficiency of the complaint. Defendants' Motion to Dismiss was based primarily, if not exclusively, on the lack of showing of physical impact in Paragraphs 9 and 10 of the complaint. The trial judge specifically rejected this argument and properly stated in his order of October 4, 1982, that a cause of action was stated for physical injuries. Since the merits of plaintiffs' claim had previously been ruled upon in their favor, and defendants presented no new evidence which could have altered the prior ruling, plaintiffs had a right to rely on the decision of the trial court to refute defendants' motion, thereby precluding any need to file an affidavit or response to defendants' Motion for Summary Judgment. Holl v. Talcott,

supra. To insist that the plaintiffs file a responsive affdiavit or pleading to defendants' Motion for Summary Judgment, which was no different from their Motion to Dismiss that was rejected by the court, would be placing the burden on the non-movant to prove an unresolved issue which defendants had the responsibility to substantiate.

Nevertheless, assuming that a counter-affidavit was necessary in response to defendants' Motion for Summary Judgment (a contention which plaintiffs adamantly reject), the trial judge's failure to accept GERALD DOYLE's affidavit (R 92-93) was an abuse of discretion. (This affidavit shed additional light on the facts though such light was obviouslyunnecessary to sustain what Judge Garrett deemed a minimally sufficient claim.)

A trial judge has the authority to consider an affidavit in opposition to summary judgment filed after the time period prescribed by Florida Rule of Civil Procedure 1.510(c) if there are compelling reasons or exigent circumstances to justify acceptance of the affidavit. Lennertz v. Dorsey, 421 So.2d 830 (Fla. 4th DCA 1982). In this case, 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. Moreover, at the time appellants sought leave to amend their complaint and/or introduce GERALD DOYLE's affidavit, the court had not yet even ruled on the Motion for Summary Judgment.

In the instant case, the trial court opined that GERALD DOYLE's affidavit was unacceptable because it allegedly changed

the prior position of plaintiffs. This rationale is somewhat confusing in that the issue of actual touching, or a lack thereof, was never confronted or substantiated by defendants through discovery or otherwise. Their failure to meet this burden precluded any need for plaintiff's affidavit at all. In fact, the purpose of the affidavit was to affirmatively attempt to clarify plaintiffs' position on an issue which defendants had reached summary conclusions without basis. The court, therefore, abused its discretion by refusing to consider same. Willage v. Law Offices of Wallace & Breslow, P.A. 415 So.2d 767 (Fla. 3rd DCA 1982).

Even if it were the plaintiff's burden to further enunciate specific allegations of impact, despite the earlier ruling upholding their complaint as sufficient (which ruling constituted the law of the case, at least until further factual development merited otherwise), the granting of summary judgment with prejudice is clearly an abuse of discretion in light of the lieberal admentment policy of Florida Rule of Civil Procedure 1.190. "Where the record indicates that a plaintiff may have a viable claim if properly pleaded, the plaintiff is to be afforded an opportunity to amend the complaint." Plyser v. Hados, 388 So.2d 1284, 1285 (Fla. 3rd DCA 1980).

In the important case of Jones v. City of Homestead, 408 So.2d 618 (Fla. 3rd DCA 1981), the trial court refused to allow plaintiff to amend his complaint after summary judgment was entered against him because of a failure to state a cause of action against the defendant. The appellate court overturned this ruling, stating that "it was reversible error for the trial court to deny the plaintiff an opportunity to cure this pleading defect by filing an amended complaint."

Id. at 618. In fact, multiple opportunity to amend is commonplace. See, for example, Hartman v. Opelika Machine & Welding Company, 414 So.2d 1105 (Fla. 1st DCA 1982), in which plaintiffs had been allowed to serve a fifth amended complaint.

All that defendants have alleged, in effect, is that the complaint did not state with requisite specificity whether impact had occurred, thereby warranting the entry of summary judgment. In the absence of further substantiation by defendants, plaintiffs should at least be allowed to amend their complaint to clarify the issue of impact, which defendants have failed to do, so that the complaint would be sufficient in light of the new rulings of the lower court.

A plaintiff's right to amend his pleadings should not be adversely affected by the entry of summary judgment. If summary judgment is justified but it is clear that plaintiffs have a cause of action that was not properly pled in their intial complaint, leave to amend should be granted. Dorset House Association, Inc. v. Dorset, Inc., 371 So.2d 541 (Fla. 3rd DCA 1979). The trial court's failure to allow amendment in the presence of sufficient facts which would have stated a cause of action was an abuse of discretion.

CONCLUSION

Florida should abrogate the Impact Rule to allow this plaintiff, and others similarly denied their day in court, to prove her entitlement to damages for physical and/or emotional injuries caused by defendants' negligence in the absence of physical impact.

The final judmgnet granting defendants summary judgment and dismissing the action with prejudice should therefore be reversed with instructions to the court to allow this cause to proceed to trial. In the alternative, if the impact rule is upheld, the trial court should be instructed to accept plaintiffs' affidavit and to allow for the amendment of plaintiffs' complaint and/or to allow thiscause to proceed to trial due to the inapplicability of the Impact Rule to this particular cause.

Respectfully submitted,

KAHN & GUTTER
5950 W. Oakland Park Blvd. #200
Fort Lauderdale FL 33313
(305) 485-7000 (Broward)
949-0189 (Dade)

For Robert Kahn by
ROBERT M. KAHN

Jeffrey D. Mickelson
JEFFREY D. MICKELSON

CERTIFICATE OF SERVICE

I hereby certify that a copy hereof has been furnished to EDMUND T. HENRY, III, ESQUIRE, Shutts & Bowen, 1500 Edward Ball Building, Miami Center, 100 Chopin Plaza, Miami, FL 33131, by mail, this 25th day of May, 1984.

Jeffrey D. Mickelson
JEFFREY D. MICKELSON