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#L982-1093(d):10-18-84

IN THE SUPREME COURT OF FLORIDA

CASE NO: 65,888

JOELLA DEGRIO,

Petitioner,

vs.

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,

Respondent.

______________________________/

INITIAL BRIEF OF PETITIONER

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vs.

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,

Respondent.
_______________________________/

PETITIONER'S INITIAL BRIEF

I

PREAMBLE

This is a proceeding seeking review of a decision of the District Court of Appeal, Third District which reversed a final judgment, rendered after a non jury trial in favor of Petitioner, JOELLA DEGRIO. Petitioner, JOELLA DEGRIO, shall be referred to as the "Plaintiff". Respondent, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, shall be referred to as the "National Union". William Mudgett, a former Defendant below, but not a party to this proceeding, shall be referred to as "Mudgett". Together, Respondents, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES and WILLIAM MUDGETT, shall be jointly referred to as "Defendants". The Record on appeal shall be referred to by the letter "R". The transcript of the trial contained in Volumes VII-XI of the Record on appeal shall be referred to by the Letters "TR". All emphasis shall be that of the Petitioner unless otherwise indicated.

II

STATEMENT OF THE CASE

On April 13, 1978, Plaintiff filed an action for negligence against the National Union and William Mudgett (R. 1-3). Plaintiff alleged in her complaint that Mudgett was an agent of the National Union who acted in willful and wanton disregard of her rights by failing to appear at an administrative proceeding (R. 3). Mudgett was alleged to have acted within the course and scope of his employment with the National Union (R. 1). Defendants filed a motion to dismiss alleging a plethora of grounds, the most pertinent of which are: failure to join indispensable parties; absence of a legal duty owed to the Plaintiff by Defendants; and, lack of subject matter jurisdiction (R. 6-9). The Court, on August 31, 1978, granted the motion to dismiss as to Mudgett and denied the motion to dismiss as to the National Union and allowed Plaintiff leave to file an amended complaint (R. 56).

On September 21, 1978, the Plaintiff filed her first amended complaint (R. 62-65). In Count I, Plaintiff alleged that Mudgett was employed by the National Union as a national representative and that Mudgett failed to appear to represent Plaintiff at an administrative hearing after having knowledge of same (R. 63). In Count II of her first amended complaint, Plaintiff alleged that Mudgett was required, by the hearing examiner after his non appearance, to explain why he did not attend the hearing but that Mudgett failed to send in the appropriate letter (R. 4). Plaintiff alleged that Mudgett acted in willful and wanton disregard of the Plaintiff's rights and sought punitive damages (R. 64-65).

Defendants filed a second motion to dismiss. This motion, in essence, raised the same defenses previously raised (R. 67). The Court, on November 22, 1978, denied the Defendants' motion as to the National Union but granted the motion, with prejudice, as to William Mudgett (R. 127).

Defendants petitioned for a Writ of Prohibition from the District Court of Appeal, Third District on the ground that the trial Court lacked subject matter jurisdiction to proceed with the cause (R. 130-141). The District Court of Appeal, Third District, by Order entered November 30, 1978, held that the Petition for Writ stated a prima facia case and issued a Rule Nisi (R. 128-129). The Plaintiff filed a written response maintaining that the lawsuit was for common law negligence, not for breach of the duty of fair representation and that the cause was not preempted. After oral argument, the District Court of Appeal, Third District dismissed the Petition for Writ of Prohibition (R. 144). Mudgett vs. Gale, 366 So.2d 901 (Fla. 3 DCA), cert. den. 376 So.2d 74 (Fla. 1979), cert. den. 444 U.S. 1080 (1980).

On January 25, 1979, Plaintiff sought rehearing as to the dismissal of William Mudgett from the lawsuit (R. 142). The motion was denied. No appeal was ever taken by the Plaintiff from this Order and Mudgett is no longer involved in this cause as a party.

The National Union filed its answer and affirmative defenses on March 6, 1979 (R. 163-169). The National Union denied the material allegations of the complaint and set forth affirmative defenses of lack of subject matter jurisdiction, failure to join indispensible parties and that no legal wrong was shown by the

Plaintiff (R. 163-169). On May 6, 1980, the National Union filed an amended answer which included the additional defenses of lack of special damages and failure to mitigate damages (R. 239).

On September 2, 1980, the National Union moved for summary judgment or to dismiss the claim (R. 318-319). The National Union maintained that based upon the pleadings, discovery materials and affidavits, the proximate cause of Plaintiff's injury, was not the Defendant's failure to represent the Plaintiff at the administrative proceeding but actions committed by the Plaintiff (R. 318-319). The National Union also moved to strike the claim for punitive damages because such an award was contrary to the recent decision of the United States Supreme Court in International Brotherhood of Electrical Workers vs. Faust, 442 U.S. 42 (1979) (R. 326-327). The Court denied the motion for summary judgment but struck the claim for punitive damages (R. 362, 363).

On November 3, 1980, the National Union moved to dismiss the complaint for failure to join an indispensible party. In this motion, the National Union maintained that in cases involving breach of the duty of fair representation, the Employer and not the Union is liable for back pay (R. 393-394). Therefore, the National Union argued that the Employer was an indispensible party. The trial Court denied the motion but granted leave to bring in the United States (Plaintiff's Employer) as a third party defendant (R. 450). Defendants sought certiorari review, by the District Court of Appeal, Third District, of the trial couirt's denial of leave to amend. This petition was denied. Mudgett vs. Gale, 407 So.2d 1122 (Fla. 3 DCA 1981).

The National Union filed a third party complaint against the United States (R. 451-470). The United States removed the case to the Southern District of Florida (R. 474-601). On September 3, 1981, the Distict Court remanded the cause to the Circuit Court with instructions to dismiss the United States of America as a Third Party Defendant (R. 356-657).

The cause then came on for trial before the Circuit Court. At the close of the trial, each party was directed by the Circuit Court to prepare a written closing argument and a proposed final judgment (TR. 594). Both parties filed their written closing arguments and proposed findings of fact and conclusions of law on May 7, 1982 (R. 704-840).

The final judgment sought review was entered on June 9, 1982 (R. 882-895). The Court awarded the Plaintiff $250,000.00 compensatory damages and $150,000.00 punitive damages against the National Union. In allowing punitive damages, the Court found that this was a case for common law negligence and its previous reliance upon International Brotherhood of Electrical Workers vs. Faust, supra. decision was incorrect (R. 894-898).

The National Union moved for rehearing, to recalculate compensatory damages and to strike punitive damages (R. 841-864). This petition was denied by Order of the Circuit Court entered July 13, 1982 (R. 870-873). The National Union appealed the final judgment of the Circuit Court to the District Court of Appeal, Third District (R. 877-878).

After hearing oral argument, the District Court of Appeal on July 17, 1984, issued its opinion in this cause (R. 896-906). The Court held that subject matter jurisdiction was present as

this cause did not involve the duty of fair representation (R. 901). Consequently, the National Union owed a common law duty to the Plaintiff to act with reasonable care which the National Union breached (R. 902). The Court characterized Plaintiff's cause of action as the negligent infliction of emotional distress (R. 902). Overruling the trial Court's factual finding that malice was present sufficient to overcome the impact rule, the District Court of Appeal, Third District held the claim barred because no impact was present (R. 902-903). The Third District certified the following question to this Court:

> "Should Florida abrogate the "impact rule" and allow recovery for the physical consequences resulting from mental or emotional stress caused by a negligent ommission on the part of a defendant in the absence of both defendant in the absence of both physical impact upon the Plaintiff and malicious conduct by the defendant ?" (R. 904-905).

Plaintiff petitioned for rehearing arguing that regardless of the correctness vel non of the District Court of Appeal decision on impact, all of Plaintiff's damages were not based upon emotional distress since Plaintiff had lost her job as a result of the National Union petitioned for rehearing contending the Court lacked subject matter jurisdiction.

Both petitions were denied by Order dated September 7, 1984 (R. 906).

Plaintiff then filed a notice to invoke this Court's discretionary jurisdiction based upon the certified question of the District Court of Appeal. In conjunction with the notice, Plaintiff moved to stay the issuance of the Mandate by the Third Dis-

trict. On September 19, 1984, the Third District granted the motion to stay issuance of Mandate pending the decision of this cause by this Court.

On September 21, 1984, the National Union filed a cross notice to invoke discretionary jurisdiction on the grounds of conflict of decision.

III

STATEMENT OF THE FACTS

Plaintiff, as the prevailing party in the trial Court, is entitled to have the facts and all inferences taken therefrom assessed in a light most favorable to her. Plaintiff will review the facts in a light most favorable to the Plaintiff as the prevailing party.

Joe Albanese, at all times material to this cause, was president of Local 2447 of the American Federation of Government Employees (TR. 152). The bargaining unit was located at the Homestead Airforce Base (TR. 162-163). Plaintiff was not a member of the bargaining unit of Local 2447 (TR. 163, 319). Plaintiff was a member of the National Union (TR. 314). The Plaintiff was not under the Union contract with management (TR. 166). The Local collected dues from the Plaintiff (TR. 198, 220).

Albanese heard that Plaintiff was terminated from her job (TR. 168). He called Captain Bernstein, Plaintiff's immediate supervisor who initiated the termination order, and asked, unsuccessfully, for a meeting (TR. 168-169). Albanese then called Kenneth Blaylock, the vice president of the fifth district of the National Union (TR. 169). Blaylock told Albanese to have the

Plaintiff request a hearing and indicate that her representative was to be the National Union (TR. 170, 224). A letter was sent by the National Union appointing Mr. Mudgett as the Plaintiff's representative (TR. 316). Albanese gave Mudgett, a national representative of the American Federation of Employees, Mrs. Degrio's file (TR. 171-172, 226). Mudgett never asked anything of Albanese in this matter (TR. 226). Albanese did not know what was in Mrs. Degrio's file (TR. 200).

Albanese learned that Mudgett did not show up at the administrative hearing on Plaintiff's removal from federal service which occurred on September 9, 197? (TR. 174). Albanese sent a mailgram to the Administrative Law Judge who heard the case (TR. 175). He also contacted Jim DeLisle, another national representative (TR. 175). Albanese contacted Forest Wooten, Blaylock's successor as Fifth District vice president (TR. 175). He received two letters from Forest Wooton which were admitted into evidence as Plaintiff's Exhibits 13 and 14.

In November, 1977, Mudgett attended a meeting of Local 2447 (TR. 184). Various members of the Local were present (TR. 185, 257, 303-304). At this meeting, Mudgett stated that he knew about the hearing of September 9th but did not attend (TR. 186, 211). Mudgett told the Plaintiff that he was on vacation and had given the file to another representative (TR. 413). Mudgett claimed that he was never notified of the hearing (TR. 259, 278). Later Mudgett stated that he was on vacation and had turned it over to someone else (TR. 259, 280). Mudgett admitted knowing about the hearing (TR. 259). He told the group at the meeting that if he had been present, the Defendant would have won (TR.

210, 260). Mudgett stated that he would get the case reopened (TR. 210).

Mary Galloway saw Plaintiff soon after her termination. Plaintiff was distraught and consumed with the fact that Mr. Mudgett did not show up at the hearing (TR. 243). Eight days after the hearing, Plaintiff fell at home (TR. 273). Subsequent to the fall, Galloway visited the Plaintiff at Doctor's Hospital where the Plaintiff was hospitalized for a hemorrhage (TR. 244). Galloway observed that the Plaintiff had changed. Plaintiff's attention span was bad (TR. 244). Plaintiff could not finish sentences (TR. 245).

John Gustefson was the chief steward of Local 2447 (TR. 291-292). The Plaintiff was an associate member of the Local (TR. 294). As such a member, the Plaintiff received insurance and representation through the national representative (TR. 296). Gustefson was called by Plaintiff in June of 1976 and told that she had been fired by Armed Forces Entrance and Examination Station (TR. 300). Mr. Gustefson suggested that the Plaintiff contact the national office for assistance (TR. 300). The contact was made and Mudgett was appointed (TR. 301). Mudgett never discussed the Plaintiff's case with Gustefson nor did he ever ask Gustefson for assistance. Gustefson called Washington, D.C. prior to the hearing to find out what the National Union was going to do about representing the Plaintiff (TR. 318).

Joe Levy is the Plaintiff's husband (TR. 332). Prior to the September 9, 1976 hearing, the Plaintiff was very distraught by her dismissal from the Government (TR. 333). Prior to her dismissal, she was a conscientious woman who was proud of being a

civil service employee (TR. 333). Levy described the failure of Mudgett to show up at the hearing as the straw that broke the camel's back (TR. 334). Subsequent to the hearing, the Plaintiff was morose, did not feel well and was emotionally hurt (TR. 334--335). Plaintiff was hospitalized subsequent to Mudgett's failure to appear at her hearing. After her hospitalization, the Claimant's physical condition was poor (TR. 335). Her left hand was partially paralyzed (TR. 335). Her speech was impaired (TR. 336). Plaintiff could no longer pursue the same activities as she previously did (TR. 336).

Plaintiff, a sixty (60) year old woman, is a high school graduate with no special schooling other than secretarial training (TR. 336). Plaintiff learned of her dismissal from the civil service, in June of 1976 when Captain Bernstein gave the Plaintiff the dismissal papers when Plaintiff was at a beauty parlor (TR. 389-390). Plaintiff received a satisfactory rating in 1973, 1974 and 1975 (TR. 392-393). After Plaintiff received the letter from Captain Bernstein she contacted Mrs. Galloway (TR. 394). Plaintiff knew that she could prove that the charges were not correct (TR. 394). Plaintiff notified the National Union of her dismissal. She then received a letter appointing Mr. Mudgett as her representative (TR. 397). Plaintiff wrote to Mr. Mudgett on July 19, 1976 giving him certain information about her case (TR. 398). Mudgett never contacted the Plaintiff before the hearing (TR. 398, 425). Plaintiff knew very little about the procedures before the administrative board which is why the Plaintiff needed representation before the administrative body (TR. 399).

At the hearing of September 9, 1976, the Plaintiff had her witnesses present (TR. 400-401). Plaintiff was going to testify and refute the charges (TR. 401). Mr. Mudgett never contacted the Plaintiff (TR. 402). Mudgett never showed up at the hearing (TR. 403). The hearing officer, Mr. Friedman, was not able to contact Mudgett (TR. 403). Friedman asked the Plaintiff if she wanted to go on with the case in the absence of Mudgett (TR. 404). Plaintiff did not wish to proceed as she was not capable of representing herself (TR. 404). Plaintiff decided not to go forward at that time without representation (TR. 411). The hearing examiner stated that Mudgett could write a letter to the hearing examiner explaining his absence (TR. 522). At a later time, Mudgett told Plaintiff that he had written such a letter (TR. 522). Plaintiff stated that her termination was the most upsetting event to occur in her life (TR. 528).

After the hearing, Plaintiff felt like her whole life had gone away from her (TR. 407). She was not able to sleep or eat (TR. 407). The whole world was against her (TR. 408). Her life was going down the drain (TR. 408).

Plaintiff fell eight days after the hearing in September of 1976 (TR. 503). Plaintiff does not remember where or how she fell (TR. 504). Plaintiff was subsequently hospitalized at Doctor's Hospital where she was operated on (TR. 408). Since her hospitalization, the Plaintiff has been unable to type. Her left hand is partially paralyzed (TR. 407). She developed hepatitas at the hospital from a transfusion of blood (TR. 409). She is much weaker since her hospitalization (TR. 410).

Mudgett started working for the American Federation of Government Employees in 1963 (TR. 562). He was employed as the national representative and his duties were to assist local unions with reports, actions, grievances and negotiations (TR. 572). Mudgett moved to Florida in 1970 and became the national representative in Florida (TR. 572-573). Prior to Mrs. Degrio's case Mudgett had been involved in adverse actions (TR. 574). An adverse action is the procedure where a person is fired (TR. 574). It is an important case (TR. 613). Mudgett stated that in adverse actions, the local union does the investigation and obtains witnesses (TR. 577). Mudgett testified that he got the Degrio file but never contacted Mrs. Degrio (TR. 608, 612).

Mudgett did not appear for the Plaintiff at the local level with respect to the agency (TR. 577). Mudgett never received any notification from the Civil Service Commission concerning his appointment as Plaintiff's representative (TR. 578). Mudgett received a letter from the Plaintiff but never informed her that she had to designate him as her representative (TR. 650, 652). Mudgett received the Plaintiffs file in July of 1976 (TR. 614). He received no information about a hearing date (TR. 578). He received nothing from the hearing examiner (TR. 579). Mudgett did receive a letter from vice-president Blaylock advising him to assist Local 2447 in the case (TR. 579). Mudgett never received any information or advice from either Plaintiff or the local union concerning when the hearing was to be held (TR. 582, 615). Mudgett stated that he did not recall receiving a letter from Mrs. Degrio on July 19, 1976 despite the presence of a return receipt attached to the letter which contained his signature (Plaintiff's Exhibit 6, TR. 582-583).

Mudgett was contacted, in Tampa, by Mr. Blaylock's office and told about the Plaintiff's hearing (TR. 579, 615). Mudgett then unsuccessfully attempted to contact Hearing Officer Friedman to request a hearing date (TR. 589). He then asked Blaylock's office to contact Friedman (TR. 589-590, 616). Mudgett tried to call Friedman twice with no success (TR. 616). In fact, Mudgett denied ever talking to Friedman although Friedman testified that he spoke to Mudgett (TR. 631). Mudgett never wrote a letter to Friedman (TR. 617). Mudgett felt that after he referred it back to Blaylock that Blaylock would take care of the matter (TR. 620). At the time of the referral, Mudgett still had the file (TR. 621).

Mudgett later attended a meeting of Local 2447 after being appointed Plaintiff's trustee (TR. 593). Mudgett did not recall being asked by anyone, at this meeting, why he wasn't at Mrs. Degrio's hearing (TR. 600). He denied saying that he personally had written a letter to Hearing Officer Friedman (TR. 601). Mudgett did say to the membership that the letters had been written on her behalf concerning the matter (TR. 622). He admitted that Hearing Examiner Friedman had the discretion to hold a hearing if a letter of explanation had been timely written by Mudgett (TR. 629-630).

Mudgett's position was that Plaintiff should have seen that a letter was written to the civil service designating him as her representative (TR. 625). However, a letter from Edward Passman indicated that the National Union admitted the failure of Mudgett to appear was beyond the control of the Plaintiff (Plaintiff's Exhibit 15, TR. 624). This letter also indicated, contrary to Mudgett's testimony, that Mudgett contacted Friedman (TR. 627).

The Federal Appeal tribunal affirmed Plaintiff's termination. The tribunal found that Mudgett was the Plaintiff's representative starting in July of 1976 and that Mudgett failed to appear on September 9, 1976 and failed to explain his absence (TR. 642).

Thomas Hartman was vice-president of Local 2447 and attended the administrative hearing (Plaintiff's Exhibit 20, P. 4-5). Plaintiff's representative did not appear at the hearing (Plaintiff's Exhibit 20, P.6). Hartman called the regional office and spoke to Kenneth Blaylock, the second vice-president, who told Hartman that Mudgett was supposed to represent the Plaintiff (Plaintiff's Exhibit 20, P.7). Blaylock told Hartman that Mudgett was tied up in Cocoa Beach (Plaintiff's Exhibit 20, P. 9). Blaylock was familiar with the Plaintiff's hearing (Plaintiff's Exhibit 20, P.9). Hartman was led to believe that Mudgett had been expected to represent the Plaintiff and had gotten tied up in Cocoa Beach (Plaintiff's Exhibit 20, Pp. 6, 16-17). Hartman later talked to Mudgett who confirmed that he was tied up in Cocoa Beach (Plaintiff's Exhibit 20, Pp. 13, 17). When Mudgett failed to appear, the Administrative Law Judge stated that he expected a letter from Mudgett explaining why he was not present (Plaintiff's Exhibit 20, P. 15). On the telephone, Friedman explained the procedures to Blaylock that had to be used to get another hearing (Plaintiff's Exhibit 20, Pp. 42, 44). Mudgett had to get a letter to his office explaining why he was not present (Plaintiff's Exhibit 20, P. 43).

Kenneth Friedman was the hearing officer. On the day of the hearing, Friedman was advised by Hartman that Mudgett was sup-

posed to be there (Plaintiff's Exhibit 19, P. 21). Hartman tried to reach Mudgett without success (Plaintiff's Exhibit 19, Pp. 22, 24). Friedman stated that he would need a letter from Mudgett explaining his absence (Plaintiff's Exhibit 19, P. 24). If a satisfactory explanation was received, Friedman would recommend another hearing (Plaintiff's Exhibit 19, P. 25). Mudgett never wrote the letter but did contact Friedman personally (Plaintiff's Exhibit 19, Pp. 25-26). Mudgett told Friedman, during the conversation, that there was a lack of communication between himself and the Local, and he had not been contacted until the date of the hearing (Plaintiff's Exhibit 19, P. 27). Friedman could not remember if Mudgett explained why he hadn't written to Friedman (Plaintiff's Exhibit 19, P. 28). Friedman's decision removing the Plaintiff from federal service was based upon the information contained in the file (Plaintiff's Exhibit 19, P. 28). No live testimony was taken (Plaintiff's Exhibit 19, P. 29).

With regard to the medical issues, to prevent duplication, Plaintiff will save discussion until the argument portion of the brief.

IV

POINTS INVOLVED ON APPEAL

POINT ONE

WHETHER FLORIDA SHOULD ABBROGATE THE IMPACT RULE AND ALLOW RECOVERY FOR THE PHYSICAL CONSEQUENCES RESULTING FROM MENTAL OR EMOTIONAL DISTRESS CAUSED BY A NEGLIGENT OMISSION ON THE PART OF A DEFENDANT IN THE ABSENCE OF BOTH PHYSICAL IMPACT UPON THE PLAINTIFF AND MALICIOUS CONDUCT BY THE DEFENDANT.

POINT TWO

WHETHER THE DISTRICT COURT OF APPEAL IMPERMISSABLY REWEIGHED THE EVIDENCE IN HOLDING THAT MALICE SUFFICIENT TO OVERCOME THE IMPACT RULE HAD NOT BEEN SHOWN.

POINT THREE

WHETHER, ASSUMING THE IMPACT RULE IS STILL VALID IN THIS STATE, THE DISTRICT COURT OF APPEAL ERRED IN DETERMINING THAT ALL OF PLAINTIFF'S DAMAGES WERE CAUSED BY THE NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS AND THEREFORE BARRED UNDER THE IMPACT RULE.

V

ARGUMENT

POINT I

FLORIDA SHOULD ABROGATE THE IMPACT RULE AND ALLOW RECOVERY FOR THE PHYSICAL CONSEQUENCES RESULTING FROM MENTAL OR EMOTIONAL DISTRESS CAUSED BY A NEGLIGENT OMISSION ON THE PART A DEFENDANT IN THE ABSENCE OF BOTH PHYSICAL IMPACT UPON THE PLAINTIFF AND MALICIOUS CONDUCT BY THE DEFENDANT.

This Court's last decision on the subject of the impact rule is Gilliam vs. Stewart, 291 So.2d 593 (Fla. 1974). There, this Court chose not to abandon the established rule that physical impact is necessary before recovery can be had for negligently caused emotional distress. The Gilliam decision was characterized by the Court in First National Bank vs. Langley, 314 So.2d 324, 334 (Miss. 1975), as the only recent case refusing to repudiate the impact rule.

Exactly what the law in Florida is, with regard to the relationship between negligently caused emotional distress and physical impact is not clear. In Butchikas vs. Travelers Indemnity Company, 343 So.2d 816 (Fla. 1976), this Court held that being absent physical injury, a Plaintiff can recover damages for mental distress only where it is shown that the Defendant acted with malice. See also, Butler vs. Lomelo, 355 So.2d 1208 (Fla. 4 DCA 1977). This is not a distinction without difference. In Hunsley vs. Giard, 87 Wash.2d 424, 553 Pac.2d 1096 (1976)(en banc), damages for emotional distress or injury was approved where the emotional distress is accompanied by physical injury. The Court viewed its decision as a departure

from the impact rule. See also, Hughes vs. Moore, 214 Va. 27, 197 S.E.2d 214 (1973). Therefore, it cannot be definitively stated what is the present state of the impact rule in Florida. See, Russo, Malicious, Intentional and Negligent Mental Distress in Florida, 11 F.S.U. L.Rev. 339 (1983).

The impact rule has remained a potent subject for critisism by the District Courts of Appeal in this state since the Gilliam decision. In Champion vs. Gray, 420 So.2d 348 (Fla. 5 DCA 1982), the Fifth District Court of Appeal certified the question of whether the impact rule should be abrogated as one of great public importance.[1] The Fifth District, in its Champion decision noted that the majority of jurisdictions now allow recovery absent impact for the negligent infliction of emotional distress particularly where physical injury is caused by the distress. The Court noted that times have changed and the traditional reasons barring recovery due to the impact rule are no longer valid. Advances in medical science in the field of psychic injury have made the question of emotional injury a question of proof for the Plaintiff. The impact rule has also been questioned by the Third District Court of Appeal.[2] National Car Rental Systems, Inc. vs. Bostic, 423 So.2d 915 (Fla. 3 DCA 1982)(Pearson, J., concurring); Rivera vs. Randall Eastern Ambulance Service, Inc., 446 So.2d 200 (Fla. 3 DCA 1984).

The present cause involves the following facts as found by

1. This Court accepted jurisdiction on Champion but has not yet ruled.

2. The Third District Court of Appeal has certified the vitality of the impact rule in Cadillac Motor Car Division vs. Brown, 428 So.2d 301 (Fla. 3 DCA 1983).

the trial Court.[3] Plaintiff was terminated from her job with the Federal Government on charges brought by her supervisor that were trumped up, ill founded and untrue (R. 883-884). Plaintiff took an administrative appeal, known as an adverse action, which is an adversary proceeding held before an Administrative Law Judge (R. 885). Plaintiff designated the National Union to serve as her representative and Mudgett was designated to represent her (R. 885). In July of 1976, Mudgett picked up the Plaintiff's file (R. 885). The hearing was held on September 8, 1976 (R. 885). Mudgett did not attend although the Plaintiff was present with her witnesses ready to proceed to trail (R. 885). The Administrative Law Judge, Kenneth Friedman, required that Mudgett send a letter explaining his absence before a decision would be made on whether to hold a hearing (R. 886). Mudgett made no phone calls nor contacted the Administrative Law Judge until after the time for contacting the Administrative Law Judge with an explanation for his absence had expired (R. 886). As a result of the non appearance of Mudgett, the Plaintiff became extremely distraught and upset (R. 888). With her whole career on the line, Mudgett did not show and Plaintiff was reluctant to proceed at her adverse action without representation (R. 888). The Court found that Mudgett's failure to attend was the most upsetting event of the Plaintiff's life (R. 888). She was unable to eat, drink or sleep (R. 889). Petitioner then suffered an epileptic seizure at her home on September 17, 1976 (R. 889). As a result of the seizure, Plaintiff fell striking her head (R. 889).

3. As noted by the District Court of Appeal, the findings of the trial Court are supported by competent substantial evidence.

Within a reasonable degree of medical probability, her seizure precipitated her fall (R. 889).

A. HISTORY OF THE IMPACT RULE

The impact rule has its origin in Victorian Railways Commissioners vs. Coultas, 13 App.Cas. 222 (Eng. 1888). There, the Court concerned about causal relationship between "nervous injuries", negligent acts and the probability of imaginary claims, adopted the impact rule and required physical impact before compensation for mental distress could be awarded:

> "Not only in such a case as the present, but in every case where an accident caused by negligence had given a person a serious nervous shock, there might be a claim for damages on account of mental injury. The difficulty which now often exists in cases of alleged physical injuries of determining whether they were caused by the negligent act would be greatly increased and a wide field open for imaginary claims".
>
> 13 App.Cas. at 225-226.

This view was adopted by the New York Court of Appeals in Mitchell vs. Rochester Railway Company, 151 N.Y. 107, 45 N.E. 354 (1896). While the rule was abrogated in 1901 in England, Dulieu vs. White and Sons, 2 K.B. 669 (1901), the rule became entrenched in the United States.[4] Nelson vs. Crawford, 122 Mich. 466, 81 N.W. 335 (1899); Herrick vs. Eveining Express Publishing Company, 120 Me. 138, 113 A. 16 (1921); Consolidated Traction Company vs. Lambertson, 16 N.J.L. 457, 38 A. 683 (1897). In the ninety (90) years since the Mitchell decision, judicial hostility

4. Mitchell was overruled by the New York Court of Appeals in Battalla vs. State, 10 N.Y.2nd 237, 176 N.E.2nd 729 (1961).

to the impact rule has increased, leading to a partial or total abandonment of the impact rule.

The impact rule is rather harsh in application because it acts as a complete bar to a claim made solely for emotional distress, in much the same manner as contributory negligence is a complete bar to a negligence claim. To alleviate the harshness, the "zone of danger" theory appeared. This theory approved the recovery of damages for mental distress alone, so long as the Plaintiff was in the "zone of danger" of the Defendant's act, thereby placing a foreseeability imprimitur upon the Court's inquiry. The zone of danger exists where the Plaintiff is in physical danger of impact because of the direction of the negligent force against them. See, Culbert vs. Sampson's Supermarkets, Inc., 444 A.2d 433 (Me. 1982); Simone vs. Rhode Island Company, 28 R.I. 186, 66 A. 202 (1907). The next phase of the change in the impact rule is the rejection of the zone of danger theory in favor of one of reasonable foreseeability. See, Caputzal vs. The Lindsay Company, 48 N.J. 69, 222 A.2d 513 (1966). Some Courts require physical injury to occur simultaneously with emotional injury if recovery is to be allowed. Hughes vs. Moore, supra.. The majority of the states have abrogated the impact rule in favor of one of the foregoing substitutes.

B. REASONS GIVEN TO SUPPORT THE IMPACT RULE

In Champion vs. Gray, supra., the Court acknowledged the state of the law with regard to the impact rule but recommended that this Court change the law and abrogate the impact rule. The Fifth District Court of Appeal, in its analysis, considered

several reasons traditionally used to justify the impact rule. Prosser, in his treatise on torts, sets forth five (5) arguments in favor of the impact rule. Prosser, Torts, Section 54, (Fourth Edition 1971). Petitioner will consider each argument separately.

1. CAUSAL RELATIONSHIP

Medical Science has evolved since the adoption of the English rule in 1888 and the American rule in 1896. The Courts have noted that medical science is now able to establish emotional injury or mental disturbance without any claim that the mental disturbance is intangible, untrustworthy, illusury, and speculative. Sinn vs. Bind, 486 Pa. 146, 404 A.2d 672 (1979); D'Ambri vs. United States, 114 R.I. 643, 338 A.2d 524 (1975), (Kelleher, J. concurring). In Sinn, the Court noted that advancements in modern science indicate that psychic injury is capable of being proven in the absence of physical damage. See also, Culbert vs. Sampsons Supermarkets, Inc., supra.. Many Courts have recognized the advancement of medical science as a basis for abrogating the strict standard of the impact rule. Wallace vs. Coca Cola Bottling Plants, Inc., 269 A.2d 117 (Me. 1970); Hughes vs. Moore, 214 Va. 271, 197 S.E.2d 214 (1973). As noted by the New York Court of Appeals, in overruling the Mitchell case in Battalla vs. State, 10 N.Y.2d 237, 176 N.E.2d 729 (1961):

> "[The Court] must rely, to an extent, on the contemporary sophistication of the medical profession and the ability of the Court and jury to weed out dishonest claims."

The issue of causal relationship is one of medical evidence not

judicial presumption. Falzone vs. Busch, 45 N.J. 559, 214 A.2d 12 (1965); Porte vs. Jaffee, 84 N.J. 88, 417 A.2d 521 (1980); See also, Robb vs. Pennsylvania Railroad Company, 210 A.2d 709 (Del. 1965). The basis of the Court's changing view on causal relation is best summed up by the opinion in Monteleone vs. Co'Operative Transit Company, 128 W.Va. 340, 36 S.E.2d 475, 478 (W.Va. 1945):

> "The principles illustrate a phase of the perpetual evolution of the common law in its effort to keep abreast of development and progress.".

Psychiatric medicine has grown by leaps and bounds since the Mitchell decision in 1896. There is no basis, at this time, to differentiate with regard to medical proof for nonobjective (soft tissue) physical injuries and emotional trauma. While psychiatry and psychiatry are not an exact sciences, they can provide reliable information on causation. Towns vs. Anderson, 195 Colo. 517, 579 P.2d 1163 (1978)(en banc). As noted by the District Court of Appeal in Champion vs. Gray, supra., quoting the overruled opinion of Judge Mager, writing for the Fourth District Court of Appeal in Stwart vs. Gillian, 271 So.2d 466, 473 (Fla. 4 DCA 1973), quashed 291 So.2d 593 (Fla. 1974), causation is not peculiar to cases involving impact; it is an ingredient in all litigation. Causal relationship is no longer a valid ground for denying an action for emotional distress.

2. FRAUDULENT CLAIMS

One of the concerns which lead to the imposition of the impact rule was the failure of a claim for mental injuries to be substantiated, thereby opening the Courthouse doors to fraudulent

claims. This view has been virtually unanimously rejected at the present time. For example, the Delaware Supreme Court in Robb vs. Pennsylvania Railroad Company, 58 Del. 454, 210 A.2d 709, 713 (1965) stated:

> "The argument from mere expediency cannot command itself to a Court of Justice, resulting in the denial of a logical legal right and remedy in all cases because in some a fictituous injury may be purged as a real one".

Juries are now capable of assessing whether a claim is concocted or fictituous in consideration of the information provided by psychiatrists and psychologists on causation. Towns vs. Anderson 195 Col. 517, 579 P.2d 1163 (1978). The responsibility of weeding out fraudulent claims on a case by case basis rests on the Court, juries and the adversary system. Dillon vs. Legg, 68 Cal.2d 728, 441 P.2d 912 (1968); Barnhill vs. Davis, 300 N.W. 2nd 104 (Iowa 1981). As in all civil cases, the baselessness vel non of the claim is for the adversary system to determine.

The rules of civil procedure and practice in general have undergone a substantial evolution since the time of the Mitchell decision. There exists in day civil practice the opportunity to ferret out frivolous or concocted claims through pretrial discovery and the use of summary judgment procedure. In Florida, meritless claims are dismissed by the Circuit Courts of the State every day through the entry of summary judgments. Furthermore, the Florida Legislature in promulgating Fla. Stat. 57.105 has recognized that frivolous claims are a problem that occurs in all fields of civil litigation and do not occur solely in cases involving emotional injury. Therefore, the contention that the

relaxation of the impact rule will result in fraudulent claims being filed is no longer a valid basis to justify the impact rule.

3. AVALANCHE OF CASES

A change in the impact rule was viewed as causing an increase in the number of cases handled by the court system to a deluge. Two responses to this contention shown the baselessness of this contention. First, there are decisions which hold that Courts should not shirk their duty becuase of the propensity of increase in litigation. Hughes vs. Moore, 214 Va. 27, 197 S.E. 2d 214 (1973); Okrina vs. Midwestern Corporation, 282 Minn. 400, 165 N.W.2d 259 (1969). If increased litigation does result, the Court's must willingly cope with the task. Robb vs. Pennsylvania Railroad Company, 58 Del. 454, 210 A.2d 709 (1965). The fear of the expansion of litigation should not deter Courts from granting relief in meritorious cases. Stewart vs. Gilliam, supra.. Second, statistics in those states where the impact rule has been abrogated, statistics failed to establish a flood of cases being filed based solely upon emotional distress without impact. Hughes vs. Moore, supra.,; Champion vs. Gray, supra.. The projected avalanche of cases has simply not materialized.

Article I, Section 21 of the Florida Constitution states:

> "The Court shall be open to every person for redress of any injury and justice shall be administered without sale, denial, or delay.
>
> (emphasis added)

As noted by this Court in Holland for the Use and Benefit of Williams vs. Mayes, 155 Fla. 129, 19 So.2d 709 (1944), the purpose of Article I, Section 21 of the Florida Constitution is

to give vitality to the maxim that for every wrong there is a remedy. Individuals with genuine emotional distress caused by non traumatic means have gone without remedy for too long. Consistent with the Florida Constitution, Article I, Section 21, the Courthouse door should now be open for these claims should now be allowed.

4. BYSTANDER RECOVERY WILL BURDEN THE DEFENDANT WITH UNDUE LIABILITY

The most distinct answer to this argument is put forth by the Supreme Court of Pennsylvania in Sinn vs. Bird, 486 Pa. 146, 404 A.2d 672, 683 (1979) and quoted with approval by the Supreme Court of Maine in Culbert vs. Sampson's Supermarkets, Inc., 444 A.2d 433, 437 (Me. 1982):

> "The conduct which is offered as supporting the liability - i.e., in this case the negligent operation of the vehicle - is of the kind which has traditionally been held to have been actionable by Plaintiffs who have sustained proveable damages. The departure that is being urged is as to the scope of damages that will be recognized as flowing from that conduct. In this context, we are satisfied that the developments in the fields of medical science and psychiatry do provide the impetus for expanding our legal recognition of the consequences of the negligent act. To arbitrarily refuse to recognize a now demonstrative injury flowing from a negligent act would be wholly indefensible".

(emphasis in original)

5. LIABILITY CANNOT BE UNREASONABLY LIMITED ONCE BYSTANDER'S RECOVERY IS GRANTED

This argument, is now thoroughly reputiated. Foreseeability is to be considered in the determination of liability for

negligence. The emotional injuries sustained by a Plaintiff must be reasonably foreseeable to the Defendant. Wallace vs. Coca Cola Bottling Plants, Inc., 269 A.2d 117, 121 (Me. 1970). Indeed, the Supreme Court of Florida has only recently reaffirmed the role of foreseeability in negligence law. Gibson vs. Avis Rent-A-Car, 386 So.2d 520 (Fla. 1980). To affix liability for negligence, the risk of harm must be foreseeable. Stevens vs. Jefferson, 436 So.2d 33 (Fla. 1983). See, Crislip vs. Holland, 401 So.2d 1115 (Fla. 4DCA. 1981. As noted in Palsgraf vs. Long Island Railroad Company, 248 N.Y. 339, 162 N.E. 99 (1928), a negligent defendant is only liable for reasonably foreseeable injury to others. As recognized by the Court in Hunsley vs. Giard, 87 Wash.2d 424, 553 P.2d 1096 (1976)(en banc), negligence necessarily involves a foreseeable risk for without a reasonably foreseeable injury, there is no liability. See also, First National Bank vs. Langley, 314 So.2d 324 (Miss. 1975); Okriana vs. Midwestern Corporation, 282 Minn. 400, 165 N.W. 2d 259 (1969). The use of foreseeability with regard to emotional injury, as in any negligence case, will prevent the imposition of undue liability upon the defendant. Corso vs. Merrill, 119 N.H. 647, 406 A.2d 300 (1979). Three factors: Proximity of time; Place; and, relationship, are relevant with regard to whether an injury is foreseeable. Id: Dillon vs. Legg, 68 Cal.2d 728, 441 P.2d 912 (1968); Dziokonski vs. Babineau, 375 Mass. 555, 380 N.E.2d 1295 (1978). Culbert vs. Sampson's Supermarkets, Inc., supra.. In short, negilently caused emotional injuries should be treated no differently from negligently called physical injuries. If an emotional injury is unforeseeable then no recovery should

objection to the abrogation of the impact rule is also invalid.

C. THE PRESENT STATE OF FLORIDA LAW

Despite, this Court's steadfast support of the impact rule, under certain factual circumstances leaks in the dike have occurred. In Hoitt vs. Lee's Propane Gas Service, Inc., 182 So.2d 58 (Fla.2DCA 1966), although lip service was paid to the impact rule, recovery was allowed to an individual who collided with a third person due to an explosion that was the fault of the Defendant. The Court decided the case based upon foreseeability. In Lopez vs. Life Insurance Company of America, 406 So.2d 1155 (Fla. 4DCA 1981), impact was found where the complaint alleged:

> "that appellant was tied up in the back of a truck while whiskey was poured down his throat."

This was determined to be sufficient impact to allow for a cause of action against the insurance company, although the individuals that performed the act were unrelated to the Defendant insurance company. See Generally, Russo, Malicious, Intentional and Negligent Mental Distress in Florida, 11 F.S.U.L.Rev. 339 (1983). The Courts of this state have already recognized the applicability of the doctrine of reasonable foreseeability when applied to the negligent infliction of emotional distress.

D. THE PRESENT CASE

The District Court of Appeal characterized Petitioner's cause of action as based upon the National Union's negligent infliction of emotional distress (R. 902). The Court recognizing that Petitioner could not recover damages for mental anguish or for physical injuries resulting from emotional distress barred

all damages awarded Plaintiff (R. 904). This represented a strict application of the impact rule. In so holding, Plaintiff contends that the appellate Court erred.

As previously noted, it is not at all clear whether Florida bars a claim if there is no impact or if there is no physical injury. Here, Plaintiff had physical injury result from her emotional distress. If the test is physical injury, Plaintiff satisfied that test and is entitled to the damages awarded by the trial court.

Dr. Rafael Good, a psychiatrist, was of the opinion that Plaintiff's emotional upset concerning the nonappearance of the Union representative at Plaintiff's hearing, was the straw that broke the camel's back with regard to her mental state (Plaintiff's Exhibit 31, pages 25-27). The doctor indicated that as a result of the nonappearance, Plaintiff believed that she has been unfairly treated (Plaintiff's Exhibit 31, page 29). From the Plaintiff's vantage point, the failure of the representative to show at the hearing, indicates to the Plaintiff that no one cares about her and that everyone is against her (Petitioner's Exhibit 31, page 32, 59). Dr. Good stated, within a reasonable degree of medical probability, that the events which culminated the nonappearance of the Union representative resulted in the Plaintiff suffering a seizure which caused her to fall at home (Plaintiff's Exhibit 31, pages 34-37). He indicated this stressful emotional event was related to her fall (Plaintiff's Exhibit 31, page 48).

Dr. Howard Wallach, first saw the Plaintiff on September 17, 1976, after her fall (Plaintiff's Exhibit 28, page 4). In his

opinion, within a reasonable degree of medical probability, Plaintiff had a seizure episode which caused her to become unconscious and fall causing injury to the back of her head (Plaintiff's Exhibit 28, pages 8, 21, 22).

Dr. Donald Dooley operated on Plaintiff and observed a torn cortical artery which was bleeding (Plaintiff's Exhibit 33, page 7). He believed that the torn artery was related to Plaintiff's fall at home which in turn caused a subdural hematoma (Plaintiff's Exhibit 33, pages 8-9, 12). The record thus reveals emotional distress and physical injury. Under Butchikas vs. Travelers Indemnity Company, 343 So.2d 816 (Fla. 1976), and Butler vs. Lomelo, 355 So.2d 1208 (Fla. 4DCA 1977), such is sufficient to satisfy the requirements to allow for the recovery of damages for emotional distress in this state.

The present case is different from the classic impact case concerning bystander liability, such as where a mother sees her daughter die. In such cases the principal argument concerns the foreseeability of harm whether the basis of recovery is the "zone of danger" or reasonable foreseeability. Here, foreseeability is not a problem because the acts of the National Union were done directly to the Petitioner. Petitioner alleged in her pleadings, proved by the evidence, which finding was affirmed on appeal that the National Union was negligent in failing to perform the actions conducted on her behalf by the National Union with reasonable care (R. 902). Since the improper handling of the case was done with knowledge that it was Plaintiff's case (and not a bystander watching the mishandling of Plaintiff's case), it is reasonably foreseeable that she would sustain emotional

distress due to the mishandling of the case, which the trial court found, resulted in claimant losing her job.

The testimony of Dr. Raphael Good, established that Claimant had a psychiatric disability and that she sustained emotional damage causally related to the negligence of the National Union as did the testimony of the other physicians in this case. The trial Court found, in its opinion, that her emotional distress was related to the incident. In short, there is no reason to deny Mrs. Degrio her recovery based on the impact rule in this cause.

E. The Law which This Court should Adopt

The present case is a good example of the unfairness which the impact rule imposes on injured victims. Plaintiff believes that the rule should be abrogated and the rule of reasonable foreseeability, employed in all other types of negligence cases, be applicable to cases involving solely emotional injury. This is the conclusion that most of the Courts of the country have arrived at and Florida should not be out of step in this regard. However, Plaintiff agrees that the psychiatric injury must be substantiated so that the usual amounts of emotional distress with which all of us deal with every day, not become an element of compensible damage in such actions. For all the reasons advanced in the many cases that we have cited in this brief, the impact rule should be laid to rest.

POINT II

THE DISTRICT COURT OF APPEAL IMPERMISSABLY REWEIGHED THE EVIDENCE IN HOLDING THAT MALICE SUFFICIENT TO OVERCOME THE IMPACT RULE HAD NOT BEEN SHOWN.

It is a well settled proposition of law that an appellate Court may not substitute its judgment for the trial Court by reevaluation of the evidence in the case. Shaw vs. Shaw, 334 So.2d 13 (Fla. 1976); Westerman vs. Shell City, Inc., 265 So.2d 43 (Fla. 1972); Crain and Crouse, Inc. vs. Palm Bay Towers Corporation, 326 So.2d 182 (Fla. 1976). The Third District's opinion violates this basic principle.

The trial Court found this cause as follows:

> "48. Subsequent to the hearing of September 8, 1976, the evidence establishes a nine day period, between September 8, 1976 and September 17, 1976, when the Plaintiff underwent severe and excrutiating mental distress. The Defendant's position is that there can be no recovery from mental distress absent impact. Stewart vs. Gillian, 291 So.2d 593 (Fla. 1974). However, whereas in this case, the conduct complained of constitutes a great indifference to the rights of the Plaintiff, mental pain and suffering may be considered. Knowles Animal Hospital, Inc. vs. Wills, 367 So.2d 37 (Fla. 3 DCA 1978), cert. den. 368 So.2d 1369 (Fla. 1979). Stated slightly differently, the Courts have held that a Plaintiff can recover damages for mental distress, absent physical impact, where defendant acts with such malice that punitive damages would be justified. Kirksey vs. Jernigan, 45 So.2d 189 (Fla. 1950); Stetz vs. American Casualty Company of Reading, Pennsylvania, 368 So.2d 912 (Fla. 3 DCA), cert. den. 378 So.2d 349 (Fla. 1979). The Court finds that the defendant's willful and wanton conduct towards the Plaintiff is such that malice can be implied as such contact evidence is a total and complete disregard of duty. Therefore, the Court finds, in this case, that the Plaintiff's mental distress is a compensable element of her damages (R. 893)."

With regard to the factual findings that support the above conclusion, the Court found:

> "16. The events which occurred at the hearing of September 9, 1976, are not in dispute and the transcript of the hearing was introduced into evidence (Plaintiff's Exhibit 1). . . . At the hearing, Friedman, required that Mudgett send him a letter explaining the reasons why he was not present at the hearing before he would make a decision as to whether or not another full hearing would be made. No letter was ever written by Mudgett to Friedman. The only phone calls that were made by Mudgett to Friedman occurred after the time period for corresponding with Friedman had lapsed. Mudgett failed to receive an answer or get through to Friedman he never tried to call again. . . .
>
> 19. Mudgett's failure to attend the hearing, failure to timely keep track of the file, failure to timely communicate with the Hearing Examiner, Friedman, subsequent to the hearing and DiLisle's failure to submit any documentary proof, shows a total and callous disregard for the Plaintiff's rights. . . .
>
> 23. . . . Furthermore, this Court gives great weight to the Hearing Examiner's decision of December 9, 1976, which indicates that Mudgett knew about the hearing and failed to attend. Even more damaging to the Defendant, in this Court's opinion, is the appellate Order of January 11, 1977, affirming the Hearing Examiner's decision which states that Mudgett was aware of the hearing date and designation, but gave no indication of his inability to appear and after the hearing provided no basis for the rescheduling of the hearing. In other words, Mudgett did nothing to protect Plaintiff's interest. (R. 887-888).[5]

There is evidence to support each and every finding of the learned Circuit Judge.[6] In reaching the conclusion that the

5. For this Court's convenience the entire Circuit Court Judgment is included as an appendix to this brief.

6. To prevent needless duplication, please see the statement of the facts on pages 7-15 of this brief.

foregoing does not constitute a sufficient predicate for a finding of malice, the Third District has reweighed the evidence.

This case amounts to a gross disregard by the National Union of the rights of the Plaintiff. There exists an intentional disregard of her case from the time Mudgett first picked up her file in July of 1976 until DeLisle failed to submit any written material at the end of the National's handling of the case. This disregard to evidence not by an occasional act of negligence but by many repeated acts which taken together are sufficient to impute gross negligence and allow for an award of punitive damages. The District Court of Appeal could not find a factually similar case and therefore denied recovery (R. 903). Merely because a case was not present that is factually similar, is not a sufficient basis to deny recovery. The District Court should be reversed on the issue of the presence of malice sufficient to overcome the impact rule.[7]

POINT III

ASSUMING THE IMPACT RULE IS STILL VALID IN THIS STATE, THE DISTRICT COURT OF APPEAL ERRED IN DETERMINING THAT ALL OF PLAINTIFF'S DAMAGES WERE CAUSED BY THE NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS AND THEREFORE BARRED UNDER THE IMPACT RULE.

This point need only be reached if this Court decides in its wisdom, that the impact rule shall remain the law of Florida.

The District Court of Appeal, based upon its determination that all damages awarded by the trial court were attributable to emotional distress, barred all damages awarded by the trial court

7. Of course, if this Court abrogates the rule, than the argument contained in this point on malice becomes immaterial.

and reversed the trial court's award of damages en toto. However, the District Court of Appeal overlooked that the award of damages by the trial court included damages for the loss of Plaintiff's employment due to the negligence of the National Union. At the pre-trial conference, Plaintiff's attorney stated:

> "(By Mr. Nachwalter) ...So that the plaintiff or the party shows up and does not have any representation. She did not have any representation and we are claiming she was denied due process.
>
> We are also claiming that she lost a job. **We are claiming loss of income** and so forth as a result of the failure to represent.
>
> (Emphasis Ours)
>
> (Tr. 62)

At trial, testimony was elicited from Harold Dunsky, a vocational expert, concerning Plaintiff's vocation loss. The National Union did not object at trial to Mr. Dunsky being allowed to testify on this issue. In fact, the National Union, retained the services of Dr. Manfred H. Ledofr to testify at the trial of this cause on the issue of claimant's vocational loss. There is evidence in this record to support an award of damages for the loss of Plaintiff's job. This is separate and apart from any damage sustained by Plaintiff for emotional distress.

The District Court of Appeal in its opinion found that the following common law duty was breached by the National Union:

> "The record, however, does support the trial court's finding that the AFGE gratuitously undertook the obligation of representing DeGrio at her job termination hearing. In so doing, the AFGE assumed a common law duty to exercise due care in that representation."

(R. 902).

Since Plaintiff did lose her job as a result of the National Union's failure to represent her in a non-negligent manner, it follows that as a proximate result of the negligence of the National Union, Plaintiff suffered damages due to the loss of her job. The trial court found in the final judgment:

> "Plaintiff is entitled to be made whole **for the loss of her job.** This economic damage was caused by the Plaintiff's failure to retain her job due to the negligence of the Defendant in callously and grossly disregarding its duty to properly represent the Plaintiff."

The District Court of Appeal erred in failing to allow the Plaintiff any of the damages awarded by the trial court to compensate Plaintiff for her vocational loss. Alternatively, the District Court of Appeal erred in failing to remand for a determination of those damages sustained by the Plaintiff and caused by the loss of her job.

VI

CONCLUSION

Based upon the foregoing cases, statutes, arguments and other authorities, Petitioner, JOELLA DEGRIO, respectfully requests that this Court abrogate the impact rule in favor of the doctrine of reasonable foreseeability with regard to emotional injury, reverse the decision of the Third District Court of Appeal and reinstate the trial Court's Final Judgment.

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BY:____________________
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VII

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing INITIAL BRIEF OF PETITIONER was mailed this 18th day of October, 1984 to: HAROLD D. SMITH, ESQUIRE, Attorney for Respondent, P.O. Box 1780, Hollywood, Florida 33022 and to ARTHUR J. ENGLAND, JR., ESQUIRE, FINE, JACOBSON, BLOCK, ENGLAND, et al., Co-counsel for Respondent, 2401 Douglas Road, Miami, Florida 33134.

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Attorneys for Petitioner