SUPREME COURT OF FLORIDA

CASE NOS.: 76,476; 77-135; 77,192; 77,193

DISTRICT COURT CASE NO: 88-1419 & 87-2250

CIRCUIT COURT CASE NO: 85-52953

ARTHUR W. KUSH, M.D., ETC., ET AL.

PETITIONERS,

VS.

BRANDON DAVID LLOYD, A MINOR CHILD,
BY AND THROUGH HIS PARENTS,
ANTHONY D. LLOYD AND DIANE S. LLOYD,
AND ANTHONY D. LLOYD AND
DIANE S. LLOYD, INDIVIDUALLY,

RESPONDENTS.

INITIAL BRIEF ON THE MERITS OF PETITIONER, ARTHUR W. KUSH, M.D.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER CITATIONS

DUCTI

This brief is filed on behalf of Petitioner Arthur W. Kush, M.D., deceased, Appellee before the Third District Court of Appeal and Defendant in the trial court medical malpractice action. Respondents are Brandon David Lloyd, a minor child, by and through his parents Anthony D. Lloyd and Diane s. Lloyd, and Anthony D. Lloyd and Diane s. Lloyd individually. The Lloyds were Appellants before the Third District Court of Appeal, and Plaintiffs before the trial court. The remaining Defendants below were Appellees before the Third District Court of Appeal and are Petitioners before this Court. The parties will be referred to as Petitioners/Defendants and Respondents/Plaintiffs as well as by name,

The following symbols will be used for reference purposes:

"R" for references to the record on appeal.

Unless indicated to the contrary, all emphasis has been supplied by counsel.

STATEMENT OF THE CASE AND FACTS

This appeal arises out of a medical malpractice action in which Respondents are seeking to recover damages associated with Brandon David Lloyds' genetic birth defects. The allegations relied upon by the Lloyds are set forth in detail in their Third Amended Complaint. (R. 259-277)[1]

On March 5, 1976 Diane and Anthony Lloyd became the parents of Michael Anthony Lloyd. Michael Lloyd was born with severe mental and physical defects and deformities. Later that year the Lloyds' pediatrician, Dr. Pedro Diaz, referred the Lloyds to Dr. Arthur Maislen at the University of Miami for chromosome testing. The purpose of the referral was to determine whether Michael's condition was the result of an inheritable genetic defect or if it was an accident of nature, so that Mr. and Mrs. Lloyd could decide whether to have more children. (R.262)

Paul M. Tocci, Ph.D. of the Mailman Center Genetic Laboratory and cytogenetic technologists Jerrie Gilbert and Charles Norman performed the chromosome studies, which included both karyotyping and fluorescent banding studies. Dr. Maislen advised Dr. Diaz that the results of the karyotyping studies had been received and revealed no abnormalities. Dr. Maislen allegedly told Dr. Diaz

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[1] As the clerk's office of the Third District Court of Appeal has indicated that the Third Amended Complaint cannot be located for inclusion in the record, a copy has been attached to this brief for this Court's convenience.

that the results of the fluorescent banding studies had not yet been received, but that Dr. Diaz would be contacted when the results were received if they showed anything **more** than normal chromosomes. Subsequently Dr. Maislen left the University of Miami and was replaced by Dr. Juliet Hananian. For some **unknown** reason, the results of the fluorescent banding studies were never transmitted to Dr. Diaz or the Lloyds. (R.263)

The Lloyds allege that Dr. Diaz told them that Michael's condition was an accident of nature rather than an inheritable genetic defect and that they should have another child. The Lloyds received no further health care treatment from Dr. Diaz or the aforementioned individuals at the University of Miami/Mailman Center **after** December 31, 1978. (R.264-265)

Mrs. Lloyd became pregnant twice in 1982, but both pregnancies ended in miscarriages. By this time Mrs. Lloyd had come under the care of Petitioner Kush. Mrs. Lloyd became pregnant again in the spring of 1983, and on December 24, 1983 gave birth to Brandon David Lloyd. Brandon was born with essentially the same defects and deformities **as** was his brother Michael. **(R.265)**

Subsequent chromosome testing upon Brandon revealed that he has a genetic abnormality known as 10p trisomy. The Lloyds then obtained the raw data from the chromosome studies which had been performed upon Michael at the University of Miami and forwarded the data to the lab which had tested Brandon. Upon reviewing the data the Fuller Cytogenetics Laboratory determined that Michael has the same 10p trisomy genetic abnormality as does Brandon, and that bath

Michael and Brandon has inherited this condition fromtheir mother. (R.266)

The Lloyds' initial complaint for medical malpractice was filed December 24, 1985. The third amended complaint asserts claims for "wrongful life" on behalf of Brandon, and claims for "wrongful birth" on behalf of Diane and Anthony Lloyd. The Lloyds have sought recovery for the extraordinary expenses necessitated by Brandon's condition as well as damages for the mental anguish experienced by those involved. (R.1-20)

The lawsuit proceeded through discovery and various proceedings which are not of import to this appeal. While the Third Amended Complaint was pending a motion to strike Brandon's claim for wrongful life was filed. The Defendants also sought to strike Mr. and Mrs. Lloyd's claims for mental anguish. (R.333-345) The trial court granted the Defendants' motions and struck Brandon's entire claim as well as his parents' claim far mental anguish. (R.605-607)

The Plaintiffs appealed the order striking the claims to the Third District Court of Appeal. (R.617-618) The District Court determined that the ruling striking Mr. and Mrs. Lloyd's claim for mental anguish was not a final appealable order, and so could not be reviewed at that time. As the order striking Brandon's claim was a final appealable order, that appeal was allowed to proceed under case number 87-2250.

In the interim the Plaintiffs filed a Fourth Amended Complaint. (R.512-531) Dr. Diaz filed a motion for summary

judgment as to Mr. and Mrs. Lloyd's remaining claims, asserting that they were barred by the four year statute of repose provision contained within Section 95.11(4)(b) (1985), Florida Statutes. similar motions were filed by Defendants Dr. Tocci, Ms. Gilbert, Mr. Norman, the University of Miami, Dr. Maislen, Dr. Hananian, and by the North Broward Hospital District. (R.725-729, 751-754, **758-760,840-843)** No **such** motion was filed on behalf of Dr. Kush as Petitioner had rendered care and treatment to Brandon and Mrs. Lloyd within the four years preceding the filing of the lawsuit.

The trial court entered final summary judgment on behalf of the moving Defendants. **(R.1659-1660)** The Plaintiffs **appealed,** seeking review not only of the summary judgment on the statute of repose issue, but also of the interlocutory order striking Mr. and Mrs. Lloyd's claim for damages for mental anguish. (R.888-890) Mr. and Mrs. Lloyd's claim for wrongful birth, minus the claim for damages for mental anguish, remains pending in the trial court against Dr. Kush.

Diane and Anthony Lloyd's claims against Petitioner Kush as presently alleged in the Fourth Amended Complaint are that he was negligent in : failing to counsel Diane S. Lloyd against pregnancy until she had ruled out genetic abnormality as a cause for Michael's condition; failing to perform chromosomal studies on the products of gestation of Diane S. Lloyd's miscarriages; failing to perform amniocentesis when Diane **s**. Lloyd became pregnant under his care for the third time; failing to warn Diane S. Lloyd that her pregnancy with Brandon David Lloyd would probably result in a

child with the same condition as Michael A. Lloyd; and failing to exercise reasonable care under all of the surrounding circumstances. The claims against Dr. Kush were stayed during the pendency of the appeals before the Third District Court of Appeals.

The appeal filed by Brandon Lloyd in case number 87-2250 was consolidated with that filed by his parents in case number 88-1419. Oral argument in the consolidated appeals was held before the Third District Court of Appeals on June 8, 1989. The District Court issued its opinion on July 10, 1990. (R.1664-1675)

The court reversed the summary judgment entered in favor of Defendants on the statute of limitations argument. The court also reversed the trial court's order striking Mr. and Mrs. Lloyd's claim for mental anguish. The court concluded that the impact rule did not apply in this instance to bar the recovery of damages for mental anguish in the absence of a physical injury or manifestation, and that if the impact rule did apply, its requirements had been satisfied. The Third District certified that its ruling on this issue expressly and directly conflicts with the decision of the Fifth District Court of Appeals in MOORES v. LUCAS, 405 So.2d 1022 (Fla. 5th DCA 1981).

While the Third District held that Mr. and Mrs. Lloyd could recover compensatory damages for the special care expenses for Brandon as well as damages for their mental anguish, the court upheld the trial court's ruling striking all of Brandon's claims for wrongful life.

All of the Defendants except for Dr. Kush filed motions for rehearing directed in large part to the court's decision on the statute of limitations issue. Petitioner Kush timely filed a notice to invoke this Court's jurisdiction in order to seek review of the Third District's decision. This Court accepted jurisdiction of this case, but stayed the briefing schedule pending the disposition by the District Court of the outstanding motions for rehearing.

On December 18, 1990 the Third District entered an order denying the motions for rehearing. The court did, however, acknowledge that in interpreting the provisions of Florida Statutes, Section 95.11(4)(b) (1985) it was ruling upon a question of great public importance. (R.1676-1677) The remaining Defendants then filed notices to invoke this Court's jurisdiction. This Court has accepted jurisdiction of all of the cases, which have been consolidated.

SUMMARY OF ARGUMENT

The decision of the Third District Court of Appeal permitting Diane and Anthony Lloyd to seek recovery for the mental anguish they have experienced in connection with the birth of their genetically impaired son Brandon should be reversed. The court's ruling allowing the recovery of damages for mental anguish in a negligence case in the absence of a physical impact or manifestation violates the impact rule as set forth by the Florida Supreme Court.

The parameters of the impact rule are set forth in the decisions of CHAMPION **v. GRAY**, 478 So.2d 17 (Fla. 1985) and BROWN **v. CADILLAC MOTOR *CAR*** DIVISION, 468 So.2d 903 (Fla. 1985). The Court refused in CHAMPION to expand the impact rule to the point where an individual could recover for the purely subjective and speculative damages which arise **solely** from emotional trauma, due to the potential for fraudulent claims, and in order to maintain some form of limit on what are otherwise indefinable and unmeasurable psychic claims.

The impact rule has not been substantially modified since the BROWN and CHAMPION decisions. It clearly applies in this case to bar the claims of Mr. and Mrs. Lloyd for mental anguish. Yet the Third District Court of Appeal held that the impact rule did not **apply** to the facts of this case. It further held that if the impact rule was found to apply it had in fact been satisfied.

Neither of these conclusions is correct. Pursuant to BROWN and CHAMPION the impact rule does apply to Mr. and Mrs. Lloyd's claim for mental anguish. Moreover, the "impact" identified by the Third District is not sufficient to satisfy the rule.

The examples of "impact" identified by the Third District are not what has caused the Lloyds' mental anguish. The source of their emotional pain is not a physical injury to themselves; rather the source is genetic deformity experienced by their son Brandon. Brandon's physical condition does not satisfy the impact rule as to his parents. Additionally, Mr. and Mrs. Lloyd have not experienced a physical manifestation of their emotional distress so as to satisfy the rule.

As the claim of Diane and Anthony Lloyd for mental anguish is barred by the impact rule the decision of the Third District Court of appeal authorizing their recovery of such damages should be reversed.

ARGUMENT

THE TRIAL COURT DID NOT ERR IN STRIKING MR. AND MRS. LLOYD'S CLAIMS FOR MENTAL ANGUISH.

The Third District Court of Appeals has ruled that Mr. and Mrs. Lloyd are entitled to recover damages for mental anguish in addition to recovering extraordinary expenses associated with raising Brandon David Lloyd. While the Third District's holding with respect to the recovery of extraordinary expenses is in accordance with prevailing Florida law on that point, the court's ruling on the Lloyd's right to recover damages for mental anguish is in direct conflict with the holding of **MOORES** v. **LUCAS, 405** So.2d **1022** (Fla. 5th DCA 1981) and **PAZO V. UPJOHN COMPANY, 310** So.2d 30 (Fla. 2nd DCA 1975), as well as with this Court's decisions on the impact doctrine.

The law on the impact rule is set forth in this Court's decisions in **CHAMPION v. GRAY, 478** So.2d 17 (Fla. 1985) and **BROWN v. CADILLAC MOTOR CAR DIVISION, 468** So.2d **903** (Fla. 1985). Prior to the **CHAMPION** decision, one simply could not recover for emotional distress which had been caused by the negligence of another in the absence of physical impact. The **CHAMPION** court modified the impact rule in order to align it with the public policy of this state, i.e., to compensate for physical injury and the attendant lost wages and/or physical and mental suffering which flow from the consequences of a physical injury. Nevertheless, in **CHAMPION,** the Supreme **Court** refused to expand the impact rule to

the point where an individual could recover for the purely subjective and speculative damages which arise solely from emotional trauma, due to the potential for fraudulent claims, and in order to maintain some form of limit on what are otherwise indefinable and unreasonable psychic claims.

While the Lloyds have undoubtedly suffered emotional distress as a result of their son's condition, this emotional distress cannot be considered as a result of any physical injury to the Lloyds; nor has their emotional distress manifested itself in a physical injury. As was noted in **BROWN** and CHAMPION, supra, psychological trauma must cause a demonstrable physical injury such as death, paralysis, muscular impairment, or some other form of similar, objectively discernible physical impairment before a cause of action may exist, where the psychological trauma was caused by simple negligence, rather than some sort of intentional tort.

The parents' right to recover for mental pain and suffering which is allegedly sustained as the result of the birth of a deformed child was specifically rejected on the basis of the impact doctrine in **PAZO v. UPJOHN** COMPANY, supra, The Pazos maintained that a drug which had been manufactured by the Upjohn Company and which had been prescribed to Mrs. Pazo during her pregnancy resulted in birth defects to their child. The trial court struck the Pazos' claim for mental pain and suffering, finding that there was no **"impact"** between the drug and the parents. The appellate court affirmed the trial court's ruling on the basis of the impact doctrine.

The same result was reached in MOORES v. LUCAS, supra. There the court observed:

> On the issue of damages, we agree with the defendants that the claim for physical pain and suffering and mental anguish of Linda Moores arising from her pregnancy and giving birth was properly stricken, since Linda Moores wanted to become pregnant and bear a child, and the pregnancy and delivery in connection with Justi were no more difficult or painful than if he had been normal. The claim for past and future emotional pain and suffering were properly stricken on the basis of the impact doctrine. (Citations omitted.) 405 So.2d at 1026.

In the instant case, the Lloyds are not seeking emotional damages because Mrs. Lloyd unintentionally became pregnant. To the contrary, the evidence demonstrated that Mrs. Lloyd wanted to become pregnant and give birth, albeit to a healthy child. The record also does not demonstrate that the actual birth was any more difficult because of Brandon's deformities.

Presumably, the only emotional damage which is reflected by the record relates to the difficulties that are inherent in any attempt to raise a handicapped child. While Petitioner certainly comprehends the considerable stress and anxiety which accompanies that process, nevertheless, those "damages" are not **cornpensable.**

The Third District rejected the application of the impact rule, relying primarily on Prosser & Keeton on The Law of Torts, Sec. 54 at 361 (1984), while essentially ignoring this Court's decisions in CHAMPION and BROWN. While Prosser and Keeton may be interpreted as supporting the Third District's decision to a limited extent, the same cannot be said of CHAMPION and BROWN.

The issue of Mr. and Mrs. Lloyd's entitlement to recover damages for their emotional anguish should have been resolved simply by reference to this Court's observation in CHAMPION that:

> We reiterate that a claim for psychic trauma unaccompanied by discernible bodily injury, when caused by injuries to another and not otherwise specifically provided for by statute, remains nonexistent. 478 So.2d at 20, ftnte. 4.

When Respondents' claim is stripped of its rhetoric and closely examined it is evident that the Lloyds are claiming mental anguish not because of any physical injury to themselves, but rather because of the deformities experienced by their son. Under CHAMPION and BROWN these damages are simply not recoverable.

The Third District's interpretation and application of the impact rule goes far beyond the modifications this Court authorized in CHAMPION. The District Court ignored the Court's requirement of a discernible bodily injury and instead extended the scope of recovery to include damages for mental anguish *so* long as there has been "an injury to the parents' legally protected interest, for which the parents are entitled to compensatory damages...." This expansion of the impact rule is both unauthorized by the law established by this Court and unwise. The very reasons which the Court cited in CHAMPION for refusing to expand the impact rule further are still viable today.

While the Third District initially stated that the impact rule does not apply to Mr. and Mrs. Lloyd's claims, it then tempered this statement somewhat, stating that if the impact rule does apply

it has been satisfied in this instance. The impact noted by the court was that "Mr. and Mrs. Lloyd submitted to physical testing after Michael's birth and on the basis of the medical advice, Mrs. Lloyd proceeded through two unsuccessful pregnancies, as well as the birth of **Brandon."** These events, or at least certain of them, arguably had some physical involvement on the part of the Lloyds. However, this physical involvement is not sufficient to satisfy the impact rule.

According to this Court's pronouncements on the impact rule the mental anguish must either be the result of a physical injury to the plaintiff or must be such as to manifest itself in a discernible bodily injury. The examples cited by **the** Third District satisfy neither option.

The Lloyds are not claiming mental anguish because they had to undergo genetic testing or because Mrs. Lloyd experienced two miscarriages. Nor is Mrs. Lloyd seeking recovery for mental anguish as the result of the physical experience of giving birth to Brandon. Rather, the Lloyds are seeking to recover for "the horror of **...** giving birth to a child with abnormal facies and severe psychomotor retardation" and "the mental anguish of symbolically watching the death of his [her] child everyday for the rest of his [her] life." These simply are not the injuries which the Third District identified as satisfying the impact rule.

The horror of giving birth to a deformed child and of **"symbolically** watching the death of a child" are not physical injuries. There are no allegations in the record that the

resulting horror and mental anguish have manifested in any discernible bodily injury. The requirements of the impact rule have clearly not been met, and so recovery of damages for mental anguish should not be permitted. The opinion of the Third District permitting Mr. and Mrs. Lloyd to seek damages for the mental anguish arising out of the birth of their son Brandon is inconsistent with its holding that Brandon does not have a cause of action for wrongful life. Although the court was not explicit in its explanation as to why Brandon does not have a cause of action it does appear that the Third District agrees with the reasoning of the Fifth District in MOORES, at least on this issue.

The MOORES court held in part that a cause of action for wrongful life should not be recognized because of the impossibility of determining whether it is preferable to be born in an impaired state or not to be born at all. By allowing the Lloyds to seek damages for their mental anguish the District Court is placing a jury in the equally untenable position of determining whether Mr. and Mrs. Lloyd suffered more mental anguish as a result of becoming parents to Brandon than they would have experienced had they been told they should never have any more children because of the possibility that they would have a similar defect.

It is entirely possible and preferable for this Court to allow Diane and Anthony Lloyd to recover for the extraordinary expenses associated with raising Brandon while denying them recovery for their mental anguish. Such a result would preserve the integrity of the impact rule while ensuring that Brandon's special needs

would be met. It would, however, avoid placing a judge or jury in the impossible position of having to determine if Mr. and Mrs. Lloyd would have been better off had Brandon never been born, as that is exactly the decision the trier of fact would have to make in resolving the claim for mental anguish.

Courts of several other jurisdictions which have faced these issues have found it entirely consistent and equitable to allow the parents to recover for the extraordinary expenses associated with raising a handicapped child, while denying recovery to the parents for their mental distress and holding that the child himself does not have a cause of action. *See,* e.g., BECKER V. SCHWARTZ, 386 N.E.2d 807, 46 N.Y.2d 40 (N.Y. Ct. App., 1978). The BECKER court observed:

> To be sure, parents of a deformed infant will suffer the anguish that only parents can experience upon the birth of a child in an impaired state. However, notwithstanding the birth of a child afflicted with an abnormality, and certainly dependent upon the extent of the affliction, parents may yet experience a love that even an abnormality cannot fully dampen. To assess damages for emotional harm endured by the parent of such a child, would in all fairness, require consideration of this factor in mitigation of the parents emotional injuries. (Citation Omitted). Unlike the case in Johnson where the element of mitigation was not involved, and unlike plaintiffs' causes of action for pecuniary loss in the instant cases, calculation of damages for plaintiffs' emotional injuries remains too speculative to permit recovery notwithstanding the breach of a duty flowing from defendants to themselves.

As was **discussed** previously, the speculative nature of damages for emotional **anguish** was one **of** the reasons **enunciated** by this Court for the impact doctrine.

Recently a Georgia court of appeals has **refused** to allow recovery for the parents' mental anguish over the birth of an impaired child in **ATLANTA** OBSTETRICS & **GYNECOLOGY GROUP P.A. V. ABELSON, 392 S.E.2d 916, 195 Ga.** App. **274** (GA. Ct. **App.** 1990). Similar conclusions were reached by the Supreme Court of Delaware in **GARRISON V. THE MEDICAL CENTER OF DELAWARE, INC., 571** A.2d **786 (Del.** 1988), and by courts in Texas and other states. See, e.g., **JACOBS V. TWEIMER, 519 S.W.2d 846** (Tex. Sup. Ct., 1975). This Court should rule similarly, and hold that Mr. and Mrs. Lloyd cannot recover for the mental anguish associated with the condition of their son Brandon Lloyd.

CONCLUSION

For the aforementioned reasons, the Petitioner ARTHUR W.KUSH, M.D., deceased, respectfully requests that this Court reverse the decision of the Third District Court of Appeal, and hold that as a matter of law Respondents DIANE and ANTHONY LLOYD cannot recover damages for mental anguish arising out of the birth of their son, BRANDON DAVID LLOYD.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail this ____ day of February, 1991, to: all counsel of record on attached service list.

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