IN THE SUPREME COURT OF THE STATE OF FLORIDA

R.J. and P.J.

Petitioners,

vs.

HUMANA OF FLORIDA, INC., d/b/a HUMANA HOSPITAL - LUCERNE, a Florida corporation, SMITHKLINE BEECHAM CLINICAL LABORATORIES, INC., f/k/a SMITHLINE BIO-SCIENCE LABORATORIES, LTD., INC., a foreign corporation and WILLIAM J. ROBBINS, M.D.

Respondents.

_____/

CASE NO. 82,743

District Court of Appeal,
5th District - No. 92-02333

ON THE CERTIFIED QUESTION FROM
THE 5TH DISTRICT COURT OF APPEAL

AMICUS CURIAE BRIEF OF FLORIDA DEFENSE LAWYERS ASSOCIATION ON BEHALF OF RESPONDENTS SMITHKLINE

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CERTIFIED QUESTION BY FIFTH DISTRICT

Does the Impact Rule apply to claims for damages from a negligent HIV diagnosis?

STATEMENT OF THE CASE AND FACTS

Amicus Curiae, the Florida Defense Lawyers Association, adopts and incorporates by reference the statement of the case and facts proposed by Respondent Smithkline.

SUMMARY OF ARGUMENT

The Impact Rule should not be receded from in whole or in part because of the significant negative repercussions which it will cause not only the medical profession but those being treated as well. Petitioners argue that the Impact Rule should be set aside in cases such as the instant one where it is alleged that the patient has been told that he is HIV positive when in actuality he is not, and he sustains only mental injuries as a result. The creation of such an exception would create a serious negative incentive to the early diagnosis of HIV, cancer, and similar type diseases which are more easily cured or curtailed by early detection and disclosure.

In Florida, medical negligence will lie for failure to diagnose cancer in a timely manner because medical research to date indicates that most cancers are cured or substantially mitigated by early detection and treatment. Thus, a medical negligence action for the failure to properly and timely diagnose and disclose a malignant cancer inspires the medical profession to take those reasonably necessary steps to make such an early diagnosis. If Petitioners were to prevail, the early disclosure and diagnosis of a disease such as cancer would also lead to liability for the mental anguish which may be sustained by the plaintiff when the disease is not actually present, or is present in a more benign form.

Diagnosing health care providers will be left a Hobson's choice in which they will be liable for medical negligence for the early detection and diagnosis when it is later learned that the disease is not as severe or is not present, and also liable for the failure to diagnose and disclose at an early date.

Diseases such as cancer and AIDS are the subject of millions of dollars of research annually. Because there is still no known cause or cure for these types of diseases, medicine must be perceived much more as an art than a science. There are so many unknowns about these diseases that health care providers cannot be held to an exact standard and should be encouraged to take the conservative precautionary measures based on the information which they do have to date. It is therefore in the best interest of the public that health care providers give as much information as possible to the patient at an early stage. If that information involves the preliminary diagnosis that a patient is HIV positive, which later through good fortune turns out to be untrue, the court should not be asked to find liability and negligence because that diagnosis was wrong and only mental harm results. Clearly, the health care provider will be faced with a lawsuit if there is a failure to properly diagnose such a condition at the earliest possible stage.

Petitioners further argue that the Impact Rule has been abolished by many other jurisdictions and contend that it should be abrogated in its entirety in Florida as well. When applied to a medical negligence action such as the instant one, the dissolution

of the Impact Rule in Florida would only add, or rekindle, what the Florida Legislature has characterized as a "malpractice crisis" in our state. Florida leads many other jurisdictions in the amount and type of statutory regulation of medical malpractice actions in an attempt to stem the malpractice claims, to require them to be negotiated at an earlier stage, and to shorten the time frames within which they may be brought. The abrogation of the Impact Rule in a medical malpractice case will reverse the policies and trends set by the Florida Legislature to closely govern these actions. Because of the Legislature's continued involvement in this area, it may be best left to the Legislature to decide if a cause of action should exist for only psychological injuries in a medical negligence case. The dismissal of the Amended Complaint filed herein should therefore be upheld and the Impact Rule left intact.

ARGUMENT

THE IMPACT RULE SHOULD BE REAFFIRMED UNDER THE FACTS OF THIS CASE DUE TO THE NEGATIVE REPERCUSSIONS WHICH THE ABROGATION OF THE RULE WOULD HAVE ON THE HEATH CARE SYSTEM BOTH FOR PATIENTS AND PROVIDERS.

Although Petitioners contend that the Impact Rule does not apply to this case, a fair reading of this Court's opinion in Gilliam v. Stewart, 291 So.2d 593 (Fla. 1974) when compared to the exception carved out by the court in Champion v. Gray, 478 So.2d 17 (Fla. 1985) demonstrates that the Impact Rule does apply to the instant facts. In Champion, the court described the dichotomy between "two distinct emotional circumstances" distinguishing the case involving fear for one's own safety as portrayed in Gilliam, and the case involving anxiety or stress for the injury or death of another, as in Champion. See Champion, 478 So.2d at 19-20. Only in the latter circumstances may a plaintiff avoid the application of the Impact Rule. The Petitioners here seek damages for mental stress incurred by the Petitioner and not for a closely related relative with whom the Respondents had actual impact. Therefore, the Impact Rule does apply and no exception currently exists to the Impact Rule's application to this case.

Further argument from Petitioners claims a new exception should be created by the Court based on the nature of the facts involved as alleged in the Amended Complaint. Petitioners claim that the type of injury sustained here is so compelling that the Impact Rule should be abrogated to provide a remedy. While, if true, the facts as alleged are certainly unfortunate, they are no more compelling than other cases in which this Court and other

Florida appellate courts have rejected the same argument. See, e.g., Doyle v. Pillsbury Co., 476 So.2d 1271 (Fla. 1985)(no recovery due to lack of impact where plaintiff observed large insect in can of peas she had opened and fell backwards over a chair in fright); Crenshaw v. Sarasota County Public Hospital Bd., 466 So.2d 427 (Fla. 2nd DCA 1985)(no cause of action for mother whose stillborn baby was inadvertently placed with hospital's laundry and mutilated due to absence of physical impact upon the mother); Davis v. Sun First National Bank of Orlando, 408 So.2d 608 (Fla. 5th DCA 1981)(act of robber in handing bank teller hold up note did not constitute physical impact and could not satisfy impact requirement to afford teller action for negligent infliction of emotional distress), rev. denied, 413 So.2d 875 (Fla. 1982).

Justice Ehrlich expressed the appropriate rationale for continuing the imposition of the Impact Rule for negligent infliction of emotional harm when there is no physical impact and only emotional damages as a result. Eastern Airlines, Inc. v. King, 557 So.2d 574, 579 (Fla. 1990)(J. Ehrlich, specially concurring). Justice Ehrlich began by pointing out that the Impact Rule does not apply to intentional tort situations because the Restatement (Second) of Torts requires the showing of "sufficiently extreme and outrageous" conduct in order for the plaintiff to prevail. He went on to state, "where the psychic injury is based on simple negligence, proof of impact or objective physical manifestation affords a guarantee that the mental distress is genuine." Id. at 579. Petitioner here argues that it can be well

expected that mental anguish will follow the diagnosis of HIV positive. The same argument could be made by the petitioner in Eastern Airlines who was allegedly faced with a life and death situation while aboard an airborn Eastern Airlines' aircraft with three failed jet engines. Nevertheless, this Court properly reaffirmed the Impact Rule absent a showing of intentional tortious acts on the part of the defendants.

Current medical literature suggests that a diagnosis of HIV positive will highten the changes that the patient will later contract AIDS. AIDS, like many forms of cancer, is life threatening and often fatal. Florida law recognizes a cause of action for failure to timely diagnose cancer. See, e.g., Swain v. Curry, 595 So.2d 168 (Fla. 1st DCA 1992). The medical community seems to agree that early diagnosis and detection of cancer generally leads to more favorable and successful results in the care and treatment of the patient. In Swain v. Curry, the health care providers were sued for medical negligence as a result of failure to diagnose a breast cancer after a mammogram result was negative. The trial court dismissed the complaint because the plaintiff would have had to undergo the same surgical and chemotherapeutical treatment regardless of the time of the diagnosis, and she could not show that she had a reduced life expectancy or increased risk of cancer as a result of the diagnosis.

The First District Court of Appeal reversed, holding that cause of action existed for the failure to timely diagnose cancer

at an earlier stage, and opined that the plaintiff did not have to wait until a reoccurrence of cancer to file suit. Therefore, Florida health care providers have a demonstrable incentive to detect and diagnose cancer early.

Because the detection and diagnosis of cancer is an inexact science, there may certainly be instances where cells which are preliminarily determined to be malignant, later are characterized as benign. If the Court abrogates the Impact Rule exclusion to the tort of negligence infliction of emotional harm, a new wave of claimants will automatically be created when a patient is told he has cancer. This will not include those patients who actually undergo unnecessary treatment for cancer as they will have an "impact."

The Florida Legislature has taken an aggressive role in limiting the remedies available to medical malpractice claimants because of the "crisis" which has been created by the number of filings and the amount of the verdicts rendered. In this way, the Legislature has established the prevailing policy of safeguarding against another crisis which ultimately affects everyone who utilizes the health care system. The abolishment of the Impact Rule to allow for psychological injuries in a medical negligence suit would only serve to counter those efforts by the Legislature to regulate against another "crisis." It is perhaps better left to the Legislature to address the request of the Petitioners to provide such a remedy after reviewing all of the ramifications such a new

cause would have on the entire health care system as administered in Florida.

CONCLUSION

For all of the reasons stated herein, the trial court's dismissal of the instant claim should be affirmed and the Impact Rule should be ratified to exclude causes for negligent infliction of emotional harm when there is no physical impact.

Respectfully submitted,

/ Kimberly A. Ashby

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to **Sylvia H. Walbolt**, CARLTON, FIELDS, WARD, EMMANUEL, SMITH & CUTLER, P.A., One Harbour Place, P.O. Box 3329, Tampa, Florida 33601; **Roy B. Dalton, Jr.**, MARTINEZ & DALTON, P.A., 719 Vassar Street, Orlando, Florida 32804; **Marcia K. Lippincott**, 1235 N. Orange Avenue, Suite 201, Orlando, Florida 32804; **Shelley Leinicke**, P.O. Box 14460, One East Broward Blvd., Fort Lauderdale, Florida 33302; **Robert Hannah and Michael Tyson**, P.O. Box 536487, Orlando, Florida 32853-6487; and **Scott A. Mager and Carl A. Cascio**, Barnett Bank Tower, 7th Floor, One East Broward Blvd., Fort Lauderdale, Florida 33301, on this 18th day of January, 1994.

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