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 SMITHKLINE 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 FIFTH DISTRICT COURT OF APPEAL

ANSWER BRIEF ON THE MERITS OF RESPONDENT SMITHKLINE

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PRELIMINARY STATEMENT

Petitioners/plaintiffs/appellants, R. J. and P. J., will be referred to in this brief as "plaintiffs" or as "petitioners." Respondent/defendant/appellee Smithkline Beecham Clinical Laboratories, Inc., will be referred to as "Smithkline." Respondent/defendant/appellee Humana of Florida, Inc., will be referred to as "Humana," and Respondent/defendant/appellee William J. Robbins, M.D., as "Dr. Robbins." The trial judge in this case was the Honorable Emerson R. Thompson, Jr. The lower appellate court was the Fifth District Court of Appeal. Amicus curiae in support of plaintiffs' position before this Court, the Academy of Florida Trial Lawyers, will be referred to as "the Academy."

References to the record on appeal will be indicated as "R. ____." References to the transcript of the hearing at which plaintiffs' Second Amended Complaint was dismissed will be indicated as "Tr. ____." Petitioners' Initial Brief will be referred to as "P. Br. _____." The Academy of Florida Trial Lawyers Amicus Curiae Brief will be referred to as "Am. Br. ____."

All emphasis in quoted material is supplied unless otherwise noted.

QUESTION CERTIFIED BY FIFTH DISTRICT

Does the impact rule apply to a claim for damages from a negligent HIV diagnosis?

STATEMENT OF THE CASE AND FACTS

Plaintiffs' statements of the case and facts is incomplete in several material respects. Hence, this statement is provided by Smithkline.

Plaintiffs' original complaint was filed on November 4, 1991. It was dismissed without prejudice by the trial court on March 11, 1992, and plaintiffs were granted leave to amend. (R. 32-33). Their Amended Complaint was served on March 24, 1992 (R. 34-40), and defendants Humana and Smithkline each filed pleadings asserting that it failed to state a cause of action.[1/] Before a hearing was held on the legal sufficiency of that complaint, plaintiffs moved for leave to file a Second Amended Complaint. (R. 65-66). That motion was granted on August 27, 1992 and, by stipulation of the parties and order of the trial court, plaintiffs' Second Amended Complaint was considered to be the "operative complaint" before the court. (Tr. 4; R. 77-79).

At the August 27, 1992 hearing on Humana's motion to dismiss and Smithkline's First Affirmative Defense, the trial court ruled that the allegations of plaintiffs' Second Amended Complaint were not legally sufficient to avoid Florida's "impact rule" for

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[1/] Defendant Humana filed a motion to dismiss, which erroneously described the then pending Amended Complaint as plaintiffs' "Second Amended Complaint." (R. 84-86). Defendant Smithkline filed an answer, asserting as its First Affirmative Defense that the Amended Complaint failed to state a cause of action. (R. 46-49).

claims for emotional distress.[2/] (Tr. 11-14). Plaintiffs did not seek leave from the trial court to file any additional amendments to their complaint.

The trial court's written order of dismissal with prejudice was entered on September 8, 1992. (R. 77-79). No motion for rehearing was filed by plaintiffs, and no other relief was sought by them with respect to that order. Instead, plaintiffs appealed the final order of dismissal of their Second Amended Complaint to the Fifth District Court of Appeal. (R. 80-81). The Fifth District affirmed the dismissal, holding that the complaint did not satisfy the impact rule or any of its exceptions. R.J. v. Humana of Florida, Inc., 625 So. 2d 116 (Fla. 5th DCA 1993). In doing so, the Fifth District certified the following question to this Court as being one of great public importance:

> Does the impact rule apply to a claim for damages from a negligent HIV diagnosis?

[2/] At the hearing, Dr. Robbins orally requested that the complaint be dismissed as to him as well, and no objection was made by plaintiffs to that request. (Tr. 9).

SUMMARY OF ARGUMENT

This Court has repeatedly and unequivocally held that Florida follows the "impact rule," reiterating that principle as recently as December 1992. There is no doubt but that the impact rule bars the plaintiffs' claims in this case, as the trial court and the District Court correctly concluded.

Recognizing this fact, plaintiffs and their amicus nevertheless urge this Court to abandon or recede from the rule "as a matter of public policy." The "public policy" arguments advanced by plaintiffs and their amicus to support such an abrupt change in the law have been squarely rejected by this Court before, and they have no more merit now than they did then. This Court should not accept plaintiffs' invitation and should instead adhere to its controlling precedent upholding the impact rule.

Once that is done, it is indisputable that plaintiffs' claims were properly dismissed. Plaintiffs have not alleged, nor have they subsequently been able to suggest on appeal, any physical trauma or injury sufficient to satisfy the impact rule. Further, the narrow exception to the impact rule drawn by this Court in Champion is simply not available to these plaintiffs, as a reading of the limitations placed on that exception makes clear.

This Court has consistently reaffirmed the continuing vitality of the impact rule in Florida. The law of Florida has long been settled on this point, and it should be followed in this case.

ARGUMENT

POINT ONE

The Impact Rule Is Firmly Established In Florida Law, And This Court Should Neither Abandon Nor Recede From That Rule In This Case.

Under this Court's long-settled precedent, Florida's impact rule applies to bar claims for emotional distress under the circumstances presented in this case. Both the trial court and the District Court correctly recognized this in dismissing plaintiffs' claims against Smithkline for emotional distress caused by its allegedly negligent report to defendant Humana that plaintiff R.J. had tested HIV positive. R.J. v. Humana of Florida, Inc., 625 So. 2d 116 (Fla. 5th DCA 1993).

In obvious recognition of this legal bar to their claims, plaintiffs urge this Court to abandon the impact rule altogether.[3/] They alternatively ask the Court to create an exception to the impact rule for their "medical malpractice" claims.[4/] However, plaintiffs' arguments present nothing that

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[3/] Plaintiffs thus seek a decision extending far beyond the scope of the certified question which is the constitutional basis of this Court's jurisdiction:

> Does the impact rule apply to a claim for damages from a negligent HIV diagnosis?

Humana, 625 So. 2d at 117.

[4/] While plaintiffs begin by asking for an exception to the impact rule for an HIV diagnosis, their brief makes clear that they seek an exception to the rule which would apply in all instances where a defendant provides any type of medical service. (See, e.g., P. Br. 5-7). Thus, once again, plaintiffs seek a decision extending far beyond the scope of the certified question which is the constitutional basis of this Court's jurisdiction.

this Court has not considered and rejected in its earlier, carefully reasoned decisions. Nor do plaintiffs demonstrate any principled justification for creating an exception to the impact rule for their particular claims. Indeed, to do as plaintiffs urge would allow such exceptions to swallow the impact rule and render it a legal nullity.

As we now show, the decisions of this Court requiring dismissal of plaintiffs' claims for emotional distress are eminently sound. They should be adhered to by the Court in this case.

1. Florida's impact rule.

Under Florida law, a plaintiff seeking to recover damages for "mental" or "emotional" distress must be able to fit within one of two factual scenarios. The first scenario occurs when the defendant causes the plaintiff to suffer a direct, physical injury which then gives rise to mental distress. Where this is the case, the plaintiff may recover damages for accompanying mental pain and anguish in addition to damages for the physical injury. See generally, 17 Fla. Jur. 2d Damages § 85 (1980). Absent an initial physical injury, however, compensatory damages for mental anguish are not recoverable. See, e.g., Butchikas v. Travelers Indemnity Co., 343 So. 2d 816, 817 (Fla. 1976); Stetz v. American Casualty Co., 368 So. 2d 912, 913 (Fla. 3d DCA), cert. denied, 378 So. 2d 349 (Fla. 1979).

The second scenario occurs when a party witnesses an event or experiences something which causes emotional distress. It has long been held in Florida that a plaintiff may not recover damages under those circumstances unless such negligent conduct directly inflicts a contemporaneous "physical impact" upon the plaintiff. See Gilliam v. Stewart, 291 So. 2d 593, 594-95 (Fla. 1974); Truesdell v. Proctor, 443 So. 2d 107, 108 (Fla. 1st DCA 1983), review denied, 453 So. 2d 1365 (Fla. 1984); Ellington v. United States, 404 F. Supp. 1165, 1167 (M.D. Fla. 1975).

That doctrine, commonly referred to as the "impact rule," requires a plaintiff to demonstrate that the defendant's negligent conduct inflicted a direct and injurious physical trauma on the plaintiff's person. See Champion v. Gray, 478 So. 2d 17, 19 n.1 (Fla. 1985); Brown v. Cadillac Motor Car Div., 468 So. 2d 903, 904 (Fla. 1985); Gilliam, 291 So. 2d at 594-95; Reynolds v. State Farm Mut. Auto. Ins. Co., 611 So. 2d 1294, 1296 (Fla. 4th DCA 1992), review denied, 623 So. 2d 494 (Fla. 1993). This requirement comports with the avowed public policy of this state to "compensate for physical injuries . . . [and the] physical and mental suffering which flow from the consequences of the physical injuries." Champion, 478 So. 2d at 20.

Thus, absent a direct physical trauma or injury inflicted by the defendant's negligent act, the impact rule precludes a plaintiff's recovery for emotional distress, even if some derivative physical injury ultimately results from the negligently inflicted mental distress. See Gilliam, 291 So. 2d

at 594-95. Further, a plaintiff may generally only recover for mental distress resulting from the direct physical injury to themselves, not for distress caused by witnessing such injuries to another. Reynolds, 611 So. 2d at 1296; Ellington, 404 F. Supp. at 1167.

The impact rule was squarely adopted as the law of Florida in this Court's seminal decision in Gilliam. In that case, the defendants' cars collided and careened onto the plaintiff's property, one striking her house and the other striking a tree adjacent to the house. Plaintiff heard the various collisions and saw the aftermath. As a result of the mental distress of observing these events, she suffered a heart attack immediately thereafter. She brought suit against the defendants, claiming damages for her personal injuries. The trial court granted summary judgment for the defendant because of plaintiff's failure to demonstrate that the defendants' negligent acts inflicted any "impact" upon her person.

The Fourth District vacated the judgment, holding that the various rationales for the impact rule were no longer valid and that the rule must therefore be abandoned as the law of Florida. Stewart v. Gilliam, 271 So. 2d 466, 472-77 (Fla. 4th DCA 1972). This Court reversed, holding that "physical impact from an external force . . . imposed upon the injured person" is an absolute prerequisite to any recovery for mental distress.[5/]

[5/] On the same day, the Court also reversed the Second District's decision that the impact rule was no longer valid. Herlong Aviation, Inc. v. Johnson, 291 So. 2d 603 (Fla. 1974).

Gilliam, 291 So. 2d at 594. In overturning the Fourth District's rejection of the impact rule, this Court expressly declared that there was no "valid justification to recede from the long standing decisions of this Court" upholding and applying the impact rule. Id. at 595.

Eleven years after Gilliam, this Court carved out a limited exception to the impact rule. Under that exception, damages are recoverable for mental distress in the absence of a direct physical injury from the defendant's negligent act if:

> (1) the mental distress resulted from the plaintiff's direct involvement in an event which inflicted injury upon a close family member; and
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> (2) the mental distress caused the plaintiff to suffer contemporaneously a "significant discernible physical injury."

Champion, 478 So. 2d at 18-19, 20.[6/]

That exception clearly applied in Champion, where the mother heard the defendant's car strike her daughter, immediately went to the accident scene and, upon viewing her daughter's lifeless body, collapsed and died. Hence, the Court allowed the mother's estate to proceed with a claim for emotional distress. In so holding, however, this Court was careful to emphasize the requirement that there be "a causally connected clearly

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[6/] The Academy repeatedly, but erroneously, asserts that the Champion Court carved out an exception to the impact rule whenever a plaintiff suffers "death or significant discernible injury" from his or her mental distress. (See, e.g., Am. Br. 3-4, 16). The Court's holding was significantly more limited, however, requiring that such an injury result from the plaintiff's direct involvement in the event causing physical injury to a close family member -- a requirement that the Academy simply ignores. Champion, 478 So. 2d at 20.

discernible physical impairment," occurring instantaneously or within a very short time of the traumatic event giving rise to the emotional distress. Id. at 19, 20. Moreover, in Brown, this Court explicitly held that the emotional distress "must cause a demonstrable physical injury such as death, paralysis, muscular impairment, or similar objectively discernible physical impairment before a cause of action may exist." Brown, 468 So. 2d at 904.

There can be no question but that the impact rule remains the law of this state. The rule was expressly reaffirmed by this Court in Champion and Brown, with a narrow exception for factual circumstances not present here. The soundness of the rationales and public policy choices upon which the impact rule is based, which were fully set forth in Gilliam, was specifically confirmed in Champion. Gilliam, 291 So. 2d at 595; Champion, 478 So. 2d at 19-20. The rule was again adhered to by this Court in Eastern Airlines, Inc. v. King, 557 So. 2d 574 (Fla. 1990).

This Court has never overruled those decisions, and they constitute the law in Florida today. Indeed, although the Court recently held that "public policy requires that the impact doctrine not be applied within the context of wrongful birth claims," the Court's decision left no doubt that the impact rule otherwise remains the law of Florida. Kush v. Lloyd, 616 So. 2d 415, 423 (Fla. 1992).[7/]

[7/] The Academy mistakenly asserts that the Court declared in Kush that the impact rule was inapplicable to cases involving (continued...)

2. The impact rule should continue to be followed under principles of stare decisis.

Although invited to abandon the impact rule on numerous occasions, this Court has consistently refused to do so. It has carved out narrow exceptions to the rule for certain discrete types of cases, but has steadfastly applied the impact rule to negligence claims such as those asserted against Smithkline.

In doing so, this Court has remained true to the guiding judicial principle of stare decisis. Stare decisis dictates that a court should not lightly overrule its past decisions, thereby ensuring that "the law will not merely change erratically, but will develop in a principled and intelligible fashion." Vasquez v. Hillery, 474 U.S. 254, 265 (1986). This doctrine serves a variety of important purposes, all of which are implicated in the instant case.

First, adherence to stare decisis acknowledges the necessity that the law furnish a clear guide to individuals, allowing them to plan their conduct without fear of unfair surprise. Bonner v. City of Pritchard, 661 F.2d 1206, 1209-10 (11th Cir. 1981); see Vazquez, 474 U.S. at 265-66; Strazzulla v. Hendrick, 177 So. 2d 1, 3 (Fla. 1965). In light of the abundant precedent upholding the impact rule against repeated assaults, parties such as

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[7/](...continued)
negligent medical advice. (See, e.g., Am. Br. 3, 16). As this Court made perfectly clear, its opinion in Kush was specifically limited to finding a public policy exception to the impact rule for "wrongful birth" claims. Kush, 616 So. 2d at 423 ("public policy requires that the impact doctrine not be applied within the context of wrongful birth claims.").

Smithkline are clearly entitled to rely on the impact rule as an established legal limitation of liability.

This is especially important here because, as this Court has long recognized, the extent of liability for mental distress claims is wholly unpredictable. Champion, 478 So. 2d at 20. Consequently, the necessity of clear judicial guidelines for such claims is all the more critical. Abandonment of the impact rule or the creation of the broad exception sought by plaintiffs in this case would inevitably introduce confusion into this area of the law, making it impossible for professionals and businesses in the health care field to predict the future consequences of their alleged negligence and thus be able to price their services to take those costs into account.[8/]

Second, stare decisis furthers the judiciary's interest in fair and expeditious adjudication by dispensing with the need to relitigate every relevant proposition in every case. Bonner, 661 F.2d at 1209-10; see Strazzulla, 177 So. 2d at 3. As recognized by the District Court, this Court's binding precedent plainly

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[8/] A fundamental consideration in imposing tort liability is the ability of a party, through prices, insurance, etc., "to distribute to the public at large the risks and losses which are inevitable in a complex civilization." W. Page Keeton et al., Prosser and Keeton on The Law of Torts § 4, at 24-25 (5th ed. 1984). Under the established precedent of this Court, Smithkline was clearly not subject to liability for claims like those in the instant case. Hence, at the very least, it would be more equitable to make any such abrupt and dramatic change in the law prospective only. International Studio Apartment Ass'n, Inc. v. Lockwood, 421 So. 2d 1119, 1120-23 (Fla. 4th DCA 1982), review denied, 430 So. 2d 451 (Fla.), cert. denied, 464 U.S. 895 (1983); Department of Revenue v. Anderson, 389 So. 2d 1034, 1037-38 (Fla. 1st DCA 1980), review denied, 399 So. 2d 1141 (Fla. 1981).

bars plaintiffs' claim for emotional distress damages. Plaintiffs' effort to seek an exception to the impact rule for their particular circumstances constitutes exactly the type of re-litigation of settled questions that stare decisis is intended to prevent. By the same token, a decision modifying the rule for this case would inevitably spawn state-wide efforts to obtain exceptions for other types of negligence claims, thereby eliminating the objective certainty the rule is intended provide and profoundly impacting this Court's interest in the fair and expeditious adjudication of litigation.

Third, stare decisis recognizes that the necessary public confidence in the judiciary can only be maintained through the consistently reasoned and impersonal judgments of courts. Bonner, 661 F.2d at 1209-10; see Vasquez, 474 U.S. at 265-66; Strazzulla, 177 So. 2d at 3. While the adage "hard facts make bad law" is often invoked to explain incongruous judicial decisions, stare decisis "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals." Vasquez, 474 U.S at 265. The societal benefit derived from judicial consistency in the application of legal principles and from the perceived integrity of the judicial process cannot be overstated. Any judicial decision based on a charitable search for episodic justice, rather than on the well-reasoned application of universal legal principles, undermines the public trust and confidence upon which the judiciary, and ultimately society, depend.

Although it has carved out narrow exceptions for certain discrete types of cases involving circumstances very different from these, this Court has steadfastly applied the "impact" rule to bar negligence claims like those asserted by plaintiffs against Smithkline.[9/] It should not abandon or recede from that rule in this case.

3. Plaintiffs have shown no principled basis why this Court should either abandon or recede from the impact rule in this case.

Departure from the established precedent of this Court "demands special justification." Arizona v. Rumsey, 467 U.S. 203, 212 (1984). Thus, plaintiffs bear a "heavy burden of persuading the Court that changes in society or in the law dictate that the values served by stare decisis yield in favor of a greater objective." Vasquez, 474 U.S. at 266. Plaintiffs have failed to carry this heavy burden and provide any adequate justification for this Court to abandon or create new exceptions to its established precedent upholding the integrity of the impact rule. To the contrary, they have done nothing more than reiterate arguments that this Court has time and again considered but rejected. It should do so again.

[9/] In the only decision to directly address the "impact" rule since Kush, the Fourth District made it clear that Florida's "long-standing" impact rule continues to be the law of Florida except to the "very limited extent" it was modified in Champion. Reynolds v. State Farm Mt. Auto. Ins. Co., 611 So. 2d 1294, 1295-96 (Fla. 4th DCA 1992), review denied, 623 So. 2d 494 (Fla. 1993).

a. This Court has long recognized the policy underpinnings for the impact rule and expressly rejected arguments such as plaintiffs advance here.

Both in adopting the impact rule and in creating certain narrow exceptions to the rule, this Court has emphasized that the primary purpose of the impact rule is to guarantee the genuineness of recoverable mental distress and to insure that any injury flowing from such distress is the foreseeable result of the negligent act. Champion at 19-20; Eastern Airlines, Inc. v. King, 557 So. 2d 574, 579 (Fla. 1990) (Ehrlich, C.J., specially concurring). By their very nature, mental distress damages are highly subjective and speculative, leading this Court to respond to the necessity of placing some boundaries on "indefinable and unmeasurable psychic claims.[10/] Champion, 478 So. 2d at 20. Indeed, the difficulty in quantifying the value of such psychic injuries was specifically cited by this Court as grounds for rejecting a "wrongful life" claim. Kush, 616 So. 2d at 423. Simply put, the impact rule recognizes that unlimited liability for subjective psychic damages threatens defendants with exposure for damages out of all proportion to their culpability.

In addition, the impact rule recognizes that awarding compensation for any injury imposes costs not only upon the

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[10/] The impact rule also responds to the fact that there are obvious differences between the various types of intangible harm -- such as mental distress or physical pain and suffering -- and the ability of money damages to compensate for such harms. Richard N. Pearson, Liability for Negligently Inflicted Psychic Harm: A Response to Professor Bell, 36 Fla. L. Rev. 413, 423-26 (1984).

defendant, but upon society as a whole. As a matter of policy, there are some injuries for which no compensation may be had or for which any remedy must be severely limited.

For example, while a person may recover for witnessing the grievous injury of a close family member under the Champion exception to the impact rule, that person may not recover for witnessing the same injuries inflicted upon an intimate friend. Reynolds, 611 So. 2d at 1296-1297 (long-time girlfriend could not recover for mental distress resulting from observing death of her boyfriend in auto accident). Yet it is clear that any person who witnesses an accident which produces horrific and catastrophic injuries obviously experiences a very real and keen mental distress, whether related to the victim or not. Allowing such expanding circles of recovery, however, could potentially multiply the pool of plaintiffs to include all witnesses to an accident and its aftermath, a result society has decided it cannot afford to countenance. By limiting potential liability for mental distress damages, society insures that it can afford to "compensate for physical injuries . . . and the physical and mental suffering which flow from the consequences of the physical injuries." See Champion, 478 So. 2d at 20.

It goes without saying that all members of our society suffer daily assaults on our "psychic well-being" that are entirely without remedy. As this Court put it, the impact rule:

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

Stewart v. Gilliam, 271 So. 2d 466, 477 (Fla. 4th DCA 1972) (Reed, J., dissenting), adopted, 291 So. 2d 593, 595 (Fla. 1974); Champion, 478 So. 2d at 18 (quoting same language with approval). Consequently, while the law stands ready to penalize an individual who intentionally or maliciously inflicts serious emotional distress on another, the impact rule reflects a policy choice that such liability should only extend to a negligent actor under sharply limited circumstances.

For all these reasons, this Court has repeatedly rejected arguments such as those urged by plaintiffs which seek to disparage the impact rule and the policy choices underlying it. While plaintiffs argue that the impact rule serves no "legitimate reason or public policy" (P. Br. 9), this Court has consistently held otherwise. See Champion, 478 So. 2d at 18-20; Gilliam, 291 So. 2d at 595. Indeed, the bulk of the amicus brief submitted in support of plaintiffs' position does nothing more than reassert and rehash exactly the same arguments for overturning Florida's impact rule that were advanced to this Court and roundly rejected in Gilliam and Champion. (Compare Am. Br. 7-14 to Champion, 478 So. 2d at 18-20 and Gilliam, 291 So. 2d at 595).

For instance, in its seminal decision in Gilliam, this Court specifically considered the view of the Fourth District that

Florida should align itself with those jurisdictions which had abandoned the impact rule.[11/] Id. at 595. After careful deliberation, however, this Court refused to do so, stating "[w]e do not agree that . . . there is any valid justification to recede from the long standing decisions of this Court in this area." Id. This Court has continued since that time to reject arguments such as plaintiffs now assert. See, e.g., Champion, 478 So. 2d at 18-20; Brown, 468 So. 2d at 904.

Manifestly, if this Court believed the impact rule "outmoded," as plaintiffs and their amicus contend, it would have rejected the rule in its December 1992 decision in Kush. Instead, the Court was careful to limit its holding there to "wrongful birth" cases. Kush, 616 So. 2d at 423. No reason exists for this Court to now abandon this long-settled rule, just a little more than one year later.

b. There is no policy justification for creating the exception sought by plaintiffs.

Relying heavily upon the limited "wrongful birth" exception adopted in Kush, plaintiffs argue that the impact rule should likewise not be applied to their case "as a matter of public policy." (P. Br. 5). They argue that, like the action for wrongful birth in Kush, theirs is a "freestanding tort" action

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[11/] This view had also been expressed by the Second District in Herlong Aviation, Inc. v. Johnson, 271 So. 2d 226, 227 (Fla. 2d DCA 1972). This Court reversed that decision on the same day as Gilliam. Johnson, 291 So. 2d at 604 (Fla. 1974).

for "medical malpractice" to which the impact rule should not be applied. Their contention is utterly without merit.

In point of fact, there is nothing "unique" about plaintiffs' claim that requires or justifies a special exception to the impact rule. This case is unlike Champion, where the Court said that the "price of death" was "too great a harm" to apply the impact rule. Champion, 478 So. 2d at 18. Nor is this case like Kush, where parents gave birth to a "severally impaired child," a harm which the parents had sought to avoid by seeking the defendant doctor's medical advice. Kush, 616 So. 2d at 733. While both Champion and Kush involved catastrophic and irreversible physical injuries sustained as a result of the defendants' negligence, this case involves no such injury, since plaintiff R.J. did not develop AIDS as a result of some negligent act of this defendant.[12/] To the contrary, plaintiffs' negligence claim against Smithkline is precisely the type of situation this Court was talking about when it observed that "[t]here must be some level of harm which one should absorb without recompense as the price he pays for living in an organized society." Champion, 478 So. 2d at 595.

[12/] Plaintiffs cite Rasmussen v. South Florida Blood Service, Inc., 500 So. 2d 533 (Fla. 1987), a case involving a discovery request for the names of blood donors, as supposed support for their claim that they feared being treated as "modern day lepers." (See P. Br. 7). The fact is, however, that plaintiff R.J. did not develop AIDS and thus did not have an irreversible physical injury giving rise to the Champion exception.

Plaintiffs have produced no principled justification for creating an exception to the impact rule for claims such as theirs, and none exists. There is simply no rational basis for applying the impact rule to all negligence actions except those where the alleged negligence involves the rendering of some type of medical service. To the contrary, creating such an exception would subvert the impact rule and invite every plaintiff suing for negligence to assert a claim for mental distress in the hopes of eroding, and eventually gutting, the impact rule.

Moreover, if an exception were appropriate in the case of an HIV misdiagnosis, why not extend the exception further to the misdiagnosis of any life-threatening illness, such as cancer? Indeed, what principled reason could exist for stopping there? Why not an exception for the misdiagnosis of a sexually transmitted disease? What about a misdiagnosis that a fetus is severely deformed? Isn't the mental distress a person experiences upon being wrongly advised about these types of matters just as sharply felt? It obviously is, and the reason the impact rule limits the recovery of mental distress damages as it does is to insulate society from the tremendous costs such expansive and indefinite liability would impose.

There is no reason for this Court to take the first steps down that slippery slope in this case. Instead, this Court should reject plaintiffs' urgings to abandon the impact rule or create a "medical malpractice" exception to the rule in this case. By doing so, the Court will uphold the values served by

stare decisis: it will provide clear guidelines upon which individuals may base the conduct of their affairs, it will insure a fair and expeditious resolution of disputes, and it will maintain public confidence in the integrity of the judiciary.

c. Abandonment or erosion of the impact rule would have serious implications.

The implications attendant to the abandonment or erosion of the impact rule, as plaintiffs and their amicus urge, are truly staggering. That is all the more reason for this Court to follow its long-settled precedent.

As this Court has previously recognized, absent the impact rule, no workable legal limitation will exist on a defendant's liability for "indefinable and unmeasurable psychic claims." Champion, 478 So. 2d at 20. Other states have tried to provide broader, more sweeping rules of decision in mental distress cases or have tried to examine each case as sui generis and carve out exception after exception in particular settings. The experience of these states demonstrate that such a course ultimately creates a morass of confusing and contradictory decisions. Thing v. La Chusa, 771 P.2d 814, 823-825 (Cal. 1989).[13/] In California, for example, one of the torch-bearers in liberal recovery for mental

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[13/] See Julie A. Greenberg, Negligent Infliction of Emotional Distress: A Proposal for a Consistent Theory of Tort Recovery for Bystanders and Direct Victims, 19 Pepperdine L. Rev. 1283 (1992) (discussing California's experience).

distress claims,[14] courts have labeled the law in this area an "'amorphous nether realm.'" Thing, 771 P.2d at 823 (quoting Newton v. Kaiser Found. Hosps., 228 Cal. Rptr. 890, 893 (Cal. Ct. App. 1986)).

Further, what is to replace the impact rule if this Court elects to abandon or recede from it -- pure foreseeability? This Court has expressly rejected such a test as wholly inadequate:

> The pure foreseeability test, espoused by some, might lead to claims that we are unwilling to embrace in emotional trauma cases. We perceive that the public policy of this state is to compensate for physical injuries . . . and physical and mental suffering that flow from the consequences of the physical injuries. For this purpose we are willing to modify the impact rule, but are unwilling to expand it to purely subjective and speculative damages for psychic trauma alone.

Champion, 478 So. 2d at 20.

Even California courts have recognized that foreseeability alone is not a "useful 'guideline' or a meaningful restriction on the scope of an action for negligently inflicted emotional distress." Thing, 771 P.2d at 826. As California's Supreme Court noted, foreseeability "is endless because foreseeability, like light, travels indefinitely in a vacuum." Id. at 823 (quoting Newton, 228 Cal. Rptr. at 893)). Although foreseeability may set meaningful limits for most types of physical injury, "'it provides virtually no limit on liability

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[14] For example, California allows recovery for mental distress damages to both husband and wife where one is negligently diagnosed with a sexually transmitted disease. Molien v. Kaiser Found. Hosps., 616 P.2d 813 (Cal. 1980).

for nonphysical harm.'" Id. at 826 (citation omitted). In the negligent HIV diagnosis context alone, not only every patient, but every family member, sexual partner, or close friend of a patient could "foreseeably" suffer mental distress in such a case, potentially giving rise to a multitude of claims for mental distress surrounding any misdiagnosis.[15/]

This Court should not open the flood-gates to such litigation.[16/] There is a societal need for continued adherence to the impact rule to avoid uncertainty in the law so that private actors may govern their conduct accordingly. While any such rule necessarily engenders some arbitrariness in its operation, this Court has recognized that this is "necessary to curb the potential of fraudulent claims, and to place some boundaries on the indefinable and unmeasurable psychic claims." Champion, 478 So. 2d at 20.

It is an essential adjunct of organized society that much of the mental distress we endure is not compensable. A legal

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[15/] As a practical matter, a decision declaring the impact rule inapplicable in cases of allegedly negligent HIV testing could well diminish the number of clinical laboratories willing to perform such tests, since it is impossible to rule out the possibility of a false positive result. This at a time when such testing is recognized as critical to minimizing the proliferation of the virus. At the very least, such a decision would necessarily increase the cost of such procedures, at a time when we are all critically aware of the desperate need to contain this state's and this country's already spiralling health care costs.

[16/] Significantly, among the reasons this Court reaffirmed the impact rule in Gilliam was a fear of "opening the flood gates" to an avalanche of mental distress claims. This concern is even more heightened today, given the nature and extent of lawyer advertising through sophisticated mass media techniques.

guarantee of psychic tranquility for all individuals, while it might "acknowledge man's involvement in mankind"[17] and vindicate ours as a "loving society" attuned to "the scars of the heart,"[18] is simply beyond society's ability to afford. Thus, the impact rule does not, as the Academy complains, reflect a view that mental distress is not real. (Am. Br. 10). Rather, in recognition of the special subjective nature of psychic injuries, the need to avoid unlimited liability for negligence, and societal limitations, this rule simply seeks to limit recovery for this particular type of injury.

Simply put, Florida has determined that the law will protect individuals from emotional distress where that distress results from intentional misconduct or from malicious conduct justifying punitive damages,[19] but not from negligently inflicted mental injuries unaccompanied by the requisite physical impact. This reflects a considered policy choice that, while tort law may indeed vindicate some societal interest in preserving psychic well-being, this interest is far more threatened by intentional or malicious misconduct than by negligent conduct.

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[17] Peter A. Bell, The Bell Tolls: Toward Full Tort Recovery for Psychic Injury, 36 Fla. L. Rev. 333, 335 (1984) (cited at P. Br. 8).

[18] Am. Br. at 10.

[19] See Slocum v. Food Fair Stores of Florida, Inc., 100 So. 2d 396 (Fla. 1958); Kirksey v. Jernigan, 45 So. 2d 188 (Fla. 1950); Williams v. City of Minneola, 575 So. 2d 683 (Fla. 5th DCA), review denied, 589 So. 2d 289 (Fla. 1991). Plaintiffs' claims were founded solely on allegations of negligence and there was no allegation of any intentional or malicious wrongdoing by any of the defendants.

Ultimately, the question underlying every liability determination in these circumstances is whether society is willing to impose a duty upon a negligent defendant to protect the plaintiff from emotional harm. The answer to this question must ultimately be determined based upon an analysis of the competing policy concerns set forth above. See Champion, 478 So. 2d at 18-20. With regard to negligence, this Court has answered that policy question affirmatively in discrete circumstances not presented here; first, where there is physical impact, and second, where the special circumstances presented in Champion and Kush are present. This Court should adhere to its prior precedent and reject plaintiffs' invitation to begin carving out exceptions to the impact rule for every "hard case" such as theirs.

POINT TWO

Plaintiffs' Claims for Emotional Distress Do Not Satisfy the Impact Rule As a Matter of Law.

Plaintiffs' Second Amended Complaint did not allege that any of the defendants inflicted a direct and immediate physical trauma on either of the plaintiffs. Further, plaintiffs did not allege that their emotional distress resulted in a contemporaneous, significant, and objectively discernible physical injury. As a result, their complaint did not satisfy either the impact rule or the requirements of the exception to the rule set forth in Champion.

On appeal, plaintiffs asserted for the first time that the requisite "impact" may be found in the purported "bodily injury" plaintiff R.J. suffered from the "touching" of his person during the medical treatment Dr. Robbins subsequently provided to him for HIV.[20/] The Academy, similarly straining to find some hint of physical impact, further argues that "impact" may be found in the "penetration of the needle" and drawing of blood performed by "respondents" for plaintiff R.J.'s initial blood testing. These contentions are not only belated,[21/] they do not satisfy the

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[20/] Plaintiffs have never contended, and do not now contend, that any of the defendants inflicted any "bodily injury" or physical trauma upon plaintiff P.J. which could constitute "impact." Thus, her claim falls even under plaintiffs' argument on appeal.

[21/] Neither contention was asserted before the trial court and it cannot be raised for the first time on appeal. Jones v. Neibergall, 47 So. 2d 605, 606 (Fla. 1950) ("We will not divine issues from the ether nor attempt to adjudicate those not

(continued...)

requirement of physical impact under the binding precedent of this Court as a matter of law.

1. Defendant Smithkline did not perform any of the acts which supposedly constituted an "impact" upon plaintiff R.J.

As a preliminary matter, it must be emphasized that the plaintiffs' and the Academy's asserted "impacts" both fail as to this defendant, because Smithkline did not participate in drawing plaintiff R.J.'s blood or in providing his subsequent medical treatment. Smithkline merely tested the blood sample that was provided to it by Humana and reported the test results to Humana as one tool, along with physical symptoms and other indicia of HIV, for Dr. Robbins to use in making a diagnosis of plaintiff R.J.'s medical condition. That is all Smithkline did -- nothing more and nothing less, and it did not itself have any direct contact or involvement with plaintiff R.J. Thus, even under its newly asserted arguments, plaintiffs cannot demonstrate any

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[21]/(...continued)
presented by the pleadings or ruled on by the trial court.").
Moreover, as the record makes clear, plaintiffs did not seek an opportunity from the trial court to plead the essential element of "impact" more specifically. Instead, after having received several opportunities to amend their complaint, plaintiffs chose to stand on their Second Amended Complaint, and they must accordingly stand on it before this Court. Davis v. Sun First Nat'l Bank of Orlando, 408 So. 2d 608, 610 (Fla. 5th DCA 1981), review denied, 413 So. 2d 875 (Fla. 1982) ("[A]ppellant contends that the trial court erred in dismissing her complaint without leave to amend . . . . [T]he record fails to show that appellant sought leave of court to amend or that she moved for a rehearing requesting leave to amend. Thus, she is precluded from asserting this issue for the first time on appeal.").

physical impact or trauma that Smithkline directly inflicted on plaintiff R.J.'s person.

2. The complained of acts do not in any event satisfy the impact rule.

Even assuming that Smithkline had drawn blood from or provided any medical treatment to plaintiff R.J., those actions would not have met the requirements of Florida's impact rule. To satisfy the impact rule, the defendant's negligent act must have directly and immediately inflicted an injurious physical trauma on the plaintiff's person. See Champion, 478 So. 2d at 19 n.1, 20; Brown, 468 So. 2d at 904; Gilliam, 291 So. 2d at 594-95; Reynolds, 611 So. 2d at 1296. Absent such a direct physical trauma, the impact rule applies to bar a party's claim for emotional distress, even if some significant -- but derivative -- physical injury ultimately results from the negligently inflicted emotional distress. See Gilliam, 291 So. 2d at 594-95.

The acts suggested by plaintiffs and the Academy do not satisfy the impact rule's requirements. First, neither the initial drawing of blood nor the "touching" involved in the medical treatment that plaintiff R.J. subsequently received is the kind of physical trauma or injury required to satisfy the impact rule. Under the teachings of this Court, something more than mere "touching" is necessary to provide the requisite impact. See Champion, 478 So. 2d at 19 n.1 (psychic "injuries must accompany and flow from direct [physical] trauma before recovery can be claimed for them in a negligence action"); Brown,

468 So. 2d at 904 ("a discernible and demonstrable physical injury must flow from the accident before a cause of action exists"); Reynolds, 611 So. 2d at 1296 (impact rule requires emotional distress arising directly from "physical injuries" sustained in an impact). There was no physical injury or trauma to plaintiff R.J. sufficient to constitute an "impact" under the rule.

Second, as noted above, Smithkline did not participate in either the drawing of plaintiff R.J.'s blood or his subsequent medical treatment. Thus, even if these events were physical traumas sufficient to constitute "impacts," neither were direct and immediate physical impacts inflicted by Smithkline.[22/] Rather, any such "impacts" were plainly indirect, derivative physical injuries as to any conduct of Smithkline, and could not as a matter of law satisfy the impact rule.

Third, the impact rule only allows a plaintiff to recover for emotional distress which results from the direct physical injury constituting the "impact." Reynolds, 611 So. 2d at 1296; Ellington, 404 F. Supp. at 1167. Here, plaintiffs did not allege any emotional distress flowing from the "touching" involved in either the drawing of plaintiff R.J.'s blood or his subsequent medical treatment. On the contrary, as their complaint clearly indicated, plaintiffs' emotional distress resulted not from these purported "impacts," but rather from plaintiff R.J. being

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[22/] Indeed, the drawing of plaintiff R.J.'s blood occurred before any action on the part of Smithkline, so its alleged negligence could not possibly have inflicted this "impact."

diagnosed as HIV infected.[23/] As such, plaintiffs alleged no emotional distress "accompanying and flowing from the direct physical trauma" which they now suggest was an "impact" upon plaintiff R.J.'s person.[24/]

These flaws in plaintiffs' argument are demonstrated by the very cases upon which they rely. For example, in Eagle-Picher Industries, Inc. v. Cox, 481 So. 2d 517, 526 (Fla. 3d DCA), review denied, 492 So. 2d 1331 (Fla. 1986), the court explicitly required the plaintiff to demonstrate a physical injury stemming from his inhalation of asbestos, holding that such a requirement was necessary to prevent a flood of "fear of" cancer claims and insure that permitted claims were only the most genuine. Id. at 527-29. The court reasoned that the physical injury requirement

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[23/] For this same reason, the allegation that plaintiff R.J. suffered "bodily injury including hypertension" is also legally insufficient to satisfy the rule. It is clear that, if there was in fact a causal relationship, this injury resulted from the mental distress he allegedly experienced upon being diagnosed as HIV infected, not from the actions he now points to as physical "impacts."

[24/] Plaintiff P.J.'s claim is doubly barred because the impact rule mandates that she may only recover for that mental distress resulting from the direct physical impact to herself, not generally for the distress caused by any impact to her husband. Reynolds, 611 So. 2d at 1296; Ellington, 404 F. Supp. at 1167. The only exception to this rule is that contained in Champion, and plaintiff P.J.'s claims clearly do not satisfy the requirements of that exception. (See pgs. 35-37, infra).

furthered the same rationale that support the impact rule.[25/] Id. at 529.

The plaintiff in Eagle-Picher had in fact developed asbestosis, and the court therefore allowed his claim for damages arising from the fear of later contracting cancer to stand. Id.; Compare Landry v. Florida Power & Light Corp., 799 F. Supp. 94, 96-97 (S.D. Fla. 1992) (holding plaintiff's loss of sleep, excessive intestinal gas, anxiety, and depression as a result of his inhalation of radioactive particles was uncompensable without a demonstrated physical injury from the particles), aff'd, 988 F.2d 1021 (11th Cir. 1993). Moreover, unlike this case, the emotional distress claimed by the plaintiff in Eagle-Picher arose directly from his negligent impact and resulting physical injury, thus satisfying the impact rule.

Likewise, plaintiffs' reliance on Swain v. Curry, 595 So. 2d 168 (Fla. 1st DCA), review denied, 601 So. 2d 551 (Fla. 1992) is entirely misplaced. Significantly, there is no mention whatsoever of the impact rule in Swain, and the reason why is patent: Swain is a classic example of the first scenario in which mental distress damages have long been recoverable -- i.e., the defendant's negligent act inflicted direct personal injury on

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[25/] In addition, Eagle-Picher, as well as the out-of-state cases relied upon by that court in finding an impact, all dealt with the defendants' alleged liability either for negligently producing harmful substances with potentially deadly properties or for directly exposing the plaintiff to these substances. Smithkline has neither manufactured nor directly exposed plaintiffs to any harmful substance causing a physical injury to them.

the plaintiff, with resulting pain and suffering. (See p. 7, supra). That is not, of course, the situation here.

In Swain, the plaintiff sought medical assistance from the defendant-doctor regarding a lump in her breast. Based on the negative results of a mammogram, the doctor diagnosed the plaintiff's lump as a fibroid cyst. The lump was subsequently discovered to be malignant and a modified radical mastectomy was performed. Plaintiff sued the doctor, alleging that he negligently failed to diagnose her breast cancer and that the delay in treatment resulted in the spread of the cancer, requiring far more invasive treatment and disfigurement of her body, and significantly increasing her future likelihood of having a recurrence. Id. at 170-71.

As can be readily seen, then, Swain was simply a garden-variety medical malpractice case in which the doctor's negligence caused a direct physical injury to the patient: the removal of her breast, the spread of cancer to other areas of her body, and a substantially increased risk of further cancer. Unlike this case, then, the patient in Swain suffered a significant, ongoing, objectively discernible physical injury. In addition, unlike these plaintiffs, the plaintiff in Swain sought recovery for the distress directly caused by her physical impact -- the spread of her cancer and the resulting increased risk of future cancer. This case is nothing like Swain and no such "disease impact" is present here.

Under the teachings of this Court, the impact rule is not satisfied unless plaintiffs suffered an injurious physical trauma directly and immediately inflicted by the negligent conduct of Smithkline. The fact that courts of some other states have broadened the concept of impact so as to make it a virtual nonrequirement does not compel this Court to travel down that path. Indeed, the ramifications of expanding the definition of "impact" are almost as great as those which would result in eliminating the impact rule altogether. The impact rule hinges on an objectively and readily discernible evaluation. Contrary to the Academy's assertion, it cannot be gainsaid that it is even easier to manufacture mental distress than physical impact, and hence this objective requirement furthers the policies espoused by this Court in both Gilliam and Champion.

There are compelling policy reasons, quite apart from stare decisis, why this precedent should be adhered to here. "Impact" traditionally occurs where the defendant's negligent conduct directly inflicts a harmful physical contact between the defendant and plaintiff or the imminent threat thereof. Thus, physical injuries or trauma incurred as the result of that harmful contact, or an attempt to avoid such a contact, are considered foreseeable consequences of the negligent act, and the law allows recovery of attendant mental distress damages.

In contrast, Smithkline inflicted no harmful physical contact or trauma upon either of the plaintiffs. What allegedly occurred here was akin to a negligent misrepresentation. Rather

than creating an emergency situation involving physical harm, Smithkline simply provided defendant Humana with one piece of information which Dr. Robbins would have available to diagnose plaintiff R.J.'s medical condition. Upon learning of Dr. Robbins' diagnosis that plaintiff R.J. was HIV infected, plaintiffs had a comparatively lengthy time in which to contemplate their possible responses. Any number of courses of action might "foreseeably" result from receiving such information, ranging from seeking retesting in light of the possibility of a false positive: to waiting to see if the physical symptoms of an HIV infection were experienced during the incubation period; to extreme, perhaps dangerous, emotional distress. Holding Smithkline liable for such an unpredictable range of consequences under these circumstances is both unjust and unfair, exposing it to potential liability far in excess of its culpability.

Finally, it is critical to recognize that, if either the physical "touching" of a patient by a doctor attempting to diagnose or treat a patient's condition or the treatment itself is a sufficient impact to satisfy the rule, this would effectively allow claims for emotional distress in virtually all negligence actions involving the provision of any type of medical service, regardless of the existence of any actual injury. Any time a person received a misdiagnosis, that person would have suffered a sufficient "impact" (from the medical examination or testing) to sustain a claim for mental distress damages.

In sum, this Court should retain its requirement that a plaintiff may only recover for mental distress where that plaintiff demonstrates an injurious physical trauma constituting "impact." The expansion of "impact" to include the types of "touching" suggested by the plaintiffs and their amicus would emasculate the rule and undercut the sound policies which the impact rule was designed to serve. That should not be allowed. Instead, since there is no physical trauma or injury to either of the plaintiffs from an impact inflicted by Smithkline, this Court should apply the impact rule to bar plaintiffs' claims for emotional distress against this defendant.

3. Plaintiffs alleged no contemporaneous, significant, and objectively discernible physical injuries resulting from their emotional distress.

Having failed to satisfy the impact rule, plaintiffs could only recover damages for the negligent infliction of emotional distress if their claims satisfied the exception to the rule created by this Court in Champion. To do so, however, plaintiffs would have to demonstrate that their mental distress contemporaneously manifested itself as a "significant discernible physical injury." Champion, 478 So. 2d at 18, 20; see also Brown, 468 So. 2d at 904. As this Court declared in Brown, the mental trauma must have caused "demonstrable physical injury such as death, paralysis, muscular impairment, or similar objectively discernible physical impairment" before a cause of action would

exist. Brown, 468 So. 2d at 904. No such injury was alleged here.[26/]

First and foremost, there is no claim that plaintiffs suffered any "bodily injury" directly and immediately from the emotional distress purportedly caused by Smithkline's allegedly negligent test report to plaintiff R.J.'s physician. In announcing the Champion exception to the "impact" rule, the Florida Supreme Court stated that "[w]e emphasize the requirement that a causally connected clearly discernible physical impairment must accompany or occur within a short time of the psychic injury." Champion, 478 So. 2d at 19. But, unlike Champion, where the mother suffered a fatal heart attack at the accident scene itself, the alleged negligence of defendant Smithkline did not result in any such contemporaneous, clearly discernible "bodily injury" to the plaintiffs.

Furthermore, as the Court makes clear in Brown, it is not enough to merely assert some "bodily injury" derived from emotional distress -- it must be a substantial injury, such as "death, paralysis, muscular impairment." Indeed, the Champion Court placed great weight upon the fact that the psychic trauma there had resulted in death. Champion, 478 So. 2d at 18. Manifestly, plaintiff R.J.'s allegations of "hypertension, pain and suffering, mental anguish, [and] loss of capacity for the enjoyment of life" (R. 70-76), even if they were causally related

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[26/] Indeed, no allegation was made of any "bodily injury" at all with respect to plaintiff P.J.

to the alleged "impacts," certainly did not amount to a "significant discernible physical injury" that would satisfy this test. See Landry, 799 F. Supp. at 96-97 (holding that plaintiff's loss of sleep, excessive intestinal gas, anxiety, and depression as a result of his inhalation of radioactive particles was uncompensable without a demonstrated physical injury from the particles).

Thus, plaintiffs' claims fail to satisfy the requirements set forth in the Champion exception to the impact rule.[27/] Hence, their claims are insufficient as a matter of law and were properly dismissed under this Court's long-settled precedent.

[27/] Further, plaintiffs claims do not satisfy the specific factual requirements of the Champion exception: plaintiffs' psychic trauma must stem from their direct involvement in a catastrophic event inflicting serious injury on a close family member. Champion, 478 So. 2d at 18, 20. Neither of the plaintiffs can allege that their claims meet these factual prerequisites to recovery. (See pgs. 35-37, supra; see also Answer Brief of Respondent, Dr. Robbins, at 11-12 (addressing the insufficiency of plaintiff P.J.'s claims under Champion)).

CONCLUSION

For the reasons set forth herein, this Court should answer the certified question in the negative and should, in all other respects, affirm the decision of the Fifth District in this case.

Respectfully submitted,

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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 **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 C. 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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