A31694-7
113619

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

CASE NO. 82,743

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.
_____/

RESPONDENT WILLIAM J. ROBBINS, M.D.'S ANSWER BRIEF ON THE MERITS

SHELLEY H. LEINICKE
WICKER, SMITH, TUTAN, O'HARA,
McCOY, GRAHAM & LANE, P.A.
Attorneys for William J. Robbins, M.D.
P. O. Box 14460
One East Broward Blvd., 5th Floor
Fort Lauderdale, FL 33302
(305) 467-6405

TABLE OF CONTENTS

TABLE OF CITATIONS

PAGE

TABLE OF CITATIONS (Continued)

PAGE

STATEMENT OF THE CASE AND FACTS *

This is an appeal from a dismissal with prejudice which the trial court entered after determining that R. J. and P.J. had no basis for suit under any view of the facts and law. (R. 77-79, 99-101)

Mr. R. J. is employed as a laboratory technician for Humana-Lucerne Hospital. His job responsibilities included lab testing and drawing blood. On March 19,1989, R. J. withdrew blood from a patient in the emergency room at Humana. After withdrawing the blood, R. J. disposed of the used needle in a used needle box container. As he placed the needle into the container, it "flipped up" and stuck him in the right index finger. After reporting the needle prick to his supervisor, two tubes of R. J.'s blood were withdrawn for mandatory testing. (R. 70-76) The Second Amended Complaint alleged that the withdrawal of the blood was done by an agent or employee of Humana Lucerne Hospital on this same day. (R. 70-76)

After the blood was withdrawn, it was sent to Smithkline Beecham Clinical Laboratories, Inc. for testing. (R. 70-76) Smithkline reported to Humana-Lucerne that the blood was positive for the HIV virus. (R. 70-76) Based upon the blood test results, R. J. was referred to Dr. Robbins for care and treatment on April 6, 1989. (R. 70-76) Dr. Robbins had no contact with R. J. prior to this initial visit.

---

*The symbol "R" refers to the Index to the Record on Appeal filed in the captioned matter.

(R. 70-76) Dr. Robbins was not a participant in the withdrawal of R. J.'s blood for the testing, nor was he involved in either the blood testing itself, or the advice to R. J. that the blood test showed the presence of the HIV virus. The Second Amended Complaint simply alleges that Dr. Robbins "accepted as valid blood test results which indicated that R. J. was infected with the HIV virus and . . . [failed] to retest him for the HIV virus until the plaintiff himself requested it in November 1990." (R. 70-76)

R. J. claimed, *inter alia*, that he suffered from hypertension, pain and suffering, and mental anguish as a result of believing that he was infected with the HIV virus. (R. 70-76).

In November, 1990, R. J. underwent a retest which showed that he was not infected with the HIV virus. (R. 70-76) R. J. and his wife, Mrs. P. J., sued Humana, Smithkline, and Dr. Robbins alleging negligent infliction of emotional distress. (R. 1-7) The complaint was repeatedly amended in an attempt to allege the essential elements for a cause of action. (R. 9-15, 34-40, 70-76) The lack of immediate, physical trauma was raised as part of the motion to dismiss this claim. After the third amendment, the trial court dismissed the complaint with prejudice as to all parties. (R. 77-79) The trial court stated in the hearing that the case law "will not allow defendants to be guardians of the sensibilities of the public at large unless there is some nexus between an emotional injury and some tort or some wrong by the defendant. People who are gentile (sic) and delicate, simply, if

that's their status, have no right of recovery absent some type of contact." (R. 100)

The Fifth District affirmed the dismissal because "under the 'impact' doctrine, no recovery is allowed for injuries caused by a defendant's negligence in the absence of physical impact to the claimant." The court then certified the following question:

> DOES THE IMPACT RULE APPLY TO A CLAIM FOR DAMAGES FROM A NEGLIGENT HIV DIAGNOSIS?

ISSUE

WHETHER THE IMPACT RULE APPLIES IN A CLAIM BY A PERSON WHO WAS MISTAKENLY TOLD THAT HIS BLOOD TESTED POSITIVE FOR HIV.

ARGUMENT SUMMARY

The impact doctrine was properly applied to bar the instant claim against Dr.Robbins. R. J.'s blood was drawn for testing and he was told of the result before he ever sought care from Dr. Robbins. Because there was no impact by Dr. Robbins and R. J. did not sustain any immediate, discernable physical injury, no cause of action can be stated. Public policy requires application of the impact doctrine under the facts of this case.

ARGUMENT

THE IMPACT RULE APPLIES IN A CLAIM BY A PERSON WHO WAS MISTAKENLY TOLD THAT HIS BLOOD TESTED POSITIVE FOR HIV.

R. J.'s claim against Dr. Robbins is for emotional distress rather than for medical negligence. A medical negligence claim arises from negligent or improper diagnosis and treatment by a health care provider which exacerbates a physical condition. A medical negligence claim may be pursued where a surgeon negligently performs a procedure. A claim for medical negligence is alleged where a physician causes physical harm by the improper prescription of medication, or fails to diagnose the existence of a disease such as cancer so that more drastic and traumatic treatment is required, or the disease becomes incurable. In all of these situations, direct physical injury is shown. A medical negligence claim is not stated by a plaintiff who complains of worry and anxiety because he mistakenly thought he had a disease. The trial court and district court correctly ruled that such allegations are, at most, an attempt to state a claim for emotional distress. *Huff v. Goldcoast Jet Ski Rentals, Inc.*, 515 So. 2d 1349 (Fla. 4th DCA 1987) ("While the complaint uses the buzz words, the requisite factual allegations do not support the correlation.")

The prerequisites for making a claim of negligent infliction of emotional distress depend on whether a plaintiff has suffered a physical impact from an external force. *Eagle-Picher Indus., Inc. v. Cox*, 481 So. 2d 517 (Fla. 3d DCA

1985), *rev. denied*, 492 So. 2d 1331. Where a plaintiff has suffered an impact, emotional distress stemming from the incident may be claimed. *See Gilliam v. Stewart*, 291 So. 2d 593 (Fla. 1954). If no impact has occurred, the alleged mental distress must be "manifested by physical injury . . . within a short time" of the incident. *Eagle-Picher, supra*; *Champion v. Gray*, 478 So. 2d 17 (Fla. 1985). Under Florida law, R. J. cannot state a claim for negligent infliction of emotional distress against Dr. Robbins because of the absence of any impact by Dr. Robbins as well as the absence of immediate, discernable physical injury.

A. Neither plaintiff has suffered an impact.

Claims in Florida for negligent infliction of emotional distress have traditionally been governed by the impact rule. *Gilliam v. Stewart, supra.* It is well settled in Florida that negligence unconnected with physical injury will not provide the basis for mental or emotional injuries. *See: Zamora v. Columbia Broadcasting System*, 480 F. Supp. 199 (1979); *Kirksey v. Jernigan*, 45 So. 2d 188 (Fla. 1950); *Saric v. Miami Caribe Investments Ins.*, 512 So. 2d 1013 (Fla. 5th DCA 1975); *Ellington v. United States*, 404 F. Supp. 1165 (N.D.Fla. 1975) ("One may not recover for personal injuries caused by the simple negligence of another, unless such negligence proximately caused physical impact to the person of the claimant"); *Sguros v. Biscayne Recreation Development Co.*, 528 So. 2d 376 (Fla. 3d DCA 1987). However, in the case of *Champion v. Gray, supra*, the Supreme Court stated that "to a limited extent we modify our previous holdings on the

impact doctrine and recognize a cause of action within the factual context of this claim." *Champion*, 478 So. 2d at 18. The *Champion* court granted a personal representative of a mother's estate a cause of action against a drunken driver who had negligently killed the mother's daughter. When the mother rushed out of her home she found her daughter dead, and as a consequence, collapsed and died on the spot.

> As the law presently stands [in Florida] a plaintiff must satisfy one of two conditions in order to recover: (1) plaintiff must show a direct physical injury . . . or (2) plaintiff must demonstrate that a claim exists for damages flowing from a significant discernible physical injury when such injury is caused by a psychic trauma resulting from negligent injury imposed on another who, because of his relationship to the injured party and his involvement in the event causing that injury, is foreseeably injured.

Geller v. Delta Air Lines, Inc., 717 F. Supp. 213 (S.D.N.Y. 1989) at 217 (quoting *Brown v. Cadillac Motor Car Division*, 468 So. 2d 903, 904 (Fla. 1985) and *Champion v. Gray*, 478 So. 2d 17, 18-19 (Fla. 1985).

R. J. did not suffer an "impact" as required by the case law. His self-inflicted injury with the needle does not constitute an "impact". *Ellington, Saric, supra.* This needle stick was the product of R. J.'s own negligence and is unrelated to his allegation that Dr. Robbins should be responsible for R. J.'s resulting distress because Dr. Robbins did not immediately re-test Mr. R. J. for AIDS. Dr. Robbins did not cause any "impact". The claim is merely an attempt to bootstrap a self-inflicted impact into a complaint for emotional distress.

Even if one was to accept the withdrawal of R. J.'s blood for testing as an "impact", this event occurred eighteen days before R. J. first visited Dr. Robbins office. There are no allegations that Dr. Robbins had any part in either the performance or analysis of this blood test, or that he participated in the advice to R. J. about the test results. R. J. complains only that Dr. Robbins accepted the validity of this test and then accepted R. J. as a patient.

B. Neither plaintiff has suffered any discernable physical injury.

It must be emphasized that R. J. does not allege any injuries or damages arising from the actual withdrawal of his blood for testing. R. J. did not develop any infection at the site where the blood was withdrawn, nor did he require any care or treatment related directly to the routine withdrawal of blood for laboratory analysis. Rather, his claim alleges emotional reactions by himself and others as a result of what he was told after the blood was analyzed.

R. J. does not suffer from any debilitating physical trauma. Rather, R. J.'s alleged symptoms all relate to worry or concern about his alleged HIV-positive status. In *Brown v. Cadillac Motor Car Division*, supra, the Florida Supreme Court stated that "to be actionable, the psychological trauma suffered must produce a demonstrable physical injury such as death, paralysis, muscular impairment, or similarly objective discernible physical impairment." *Id.* at 904. When the elements of negligent infliction of emotional distress are applied to the instant case, R. J.'s alleged injuries do not meet the requirements of *Brown*. R. J.'s allegations

of a strained relationship with his family, hypertension, and emotional distress simply do not rise to the level of objectively discernable physical impairment as set forth by this court's decisions.

A "fear of" claim does not constitute an identifiable physical injury. *Burk v., Sage Products, Inc.*, 747 F. Supp. 285 (E.D. Pa. 1990). In *Ledford v. Delta Air Lines, Inc.*, 658 F. Supp. 540 (S.D.Fla., N.Div. 1987) the trial court granted defendant's motion for summary judgment after concluding that the plaintiff had not adequately pled or proven the occurrence of either significant or objectively discernable physical injury. The *Ledford* plaintiff complained of elevated blood pressure, crying episodes, panic attacks and fear of a heart attack. R. J.'s only claim of bodily injury is the development of hypertension. This condition does not meet the test of *Brown* and *Champion, supra*, because it neither accompanies nor occurs within a short time of the alleged psychic injury.

C. These plaintiffs cannot meet the requirement of immediacy of alleged injury.

There are no allegations in the Second Amended Complaint (or, indeed, the discovery which has taken place) that R. J. suffered from physical symptoms immediately after the initial blood test and diagnosis. R. J. stuck himself with a needle approximately eighteen days before he first saw Dr. Robbins. Standing alone, this fact is sufficient to defeat a claim for negligent infliction of emotional distress because of the absence of immediacy. *Brown, Champion, supra.* R. J.

cannot comply with the case law which requires that a "causally connected discernible physical impairment must accompany or occur within a short time of the psychic injury." *Id.* at 19.

D. The trial court properly dismissed Mrs. P. J.'s emotional distress claim because she has not suffered an objectively discernable physical injury, nor was she involved in the event by seeing, hearing, or arriving on the scene as a traumatizing event occurred.

Mrs. P. J.'s claim for mental distress is wholly derivative to her husband's. Because R. J. has not pled and cannot prove a *prima facie* claim for negligent infliction of emotional distress, the trial court correctly concluded that his wife's claim must necessarily fail.

The allegations of the complaint establish that Mrs. P. J. was not present either when her husband stuck himself with the needle or when he received the blood test results. There was an eighteen day delay before Mr. R. J. sought treatment from Dr. Robbins. These facts preclude her claim for emotional distress. *Champion, Brown, supra.*

In the case of *M.M. v. M.P.S. and B.S.*, 556 So. 2d 1140 (Fla. 3d DCA 1989), the parents brought an action for emotional distress against the individual who told them that he had sexually abused their daughter and that his wife had supplied the child with illegal drugs from the time she was eight until she was twenty-three years old. The court stated that no claim for emotional distress existed because neither parent was present when the alleged mistreatment took place.

Disclosure of the earlier mistreatment was insufficient to form the basis for an emotional distress claim. The court said that if it was "to allow relatives of tort victims compensation for the distress they suffer when they receive bad news about family members when there is no attendant intentional or reckless conduct directed toward them, an avalanche of litigation would ensue. . . . It is not lack of compassion, but necessity, that restricts relief to the immediate victim." *Id.* at 1141.

In the case of *Jacobs v. Horton Memorial Hospital*, 515 N.Y. Supp. 2d 281 (A.D. 2d Dep't 1987), a defendant doctor allegedly misdiagnosed pancreatic cancer. The doctor then communicated the incorrect diagnosis to the wife and stated that her husband had only six months to live. The wife sued the physician for mental distress arising from the misdiagnosis. The trial court dismissed the wife's claim. The appellate court affirmed and noted that permitting recovery in such an instance would open courts to an inundation of claims for emotional injuries that extend far afield "like the ripplings of the waters without end". *Id.* at 282.

E. Public policy requires that Florida leave the requirements for a claim of negligent infliction of emotional distress as they currently stand.

This court has stated repeatedly that public policy requires the immediate presence of physical injury as an essential element of a claim for negligent infliction of emotional distress. R. J. urges the court to abandon or

modify the physical manifestation requirement of *Champion*. R. J. states that the single policy underlying this requirement is to "protect society from trivial and untrustworthy claims of emotional distress." (Petitioner's brief p. 7) This court stated:

> We perceive that the public policy of this state is to compensate for physical injuries, with attendant lost wages, and physical and mental suffering which flows 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. We recognize that any limitation is somewhat arbitrary, but in our view is necessary to curb the potential of fraudulent claims, and to place some boundaries on the indefinable and immeasurable psychic claims."

Champion at 20.

The curbing of fraudulent claims was but one of the policies considered by this court. Another policy is to place boundaries on immeasurable psychic claims such as R. J.'s. The trial court properly declined to accept R. J.'s invitation to "speculate" about R. J.'s "subjective" claims. The strict requirement of an objectively discernable physical impairment must be observed because the Florida courts could not absorb the number of claims that would clog the court system if plaintiffs could pursue a claim merely for emotional distress. *Eagle-Picher Industries, Inc. v. Cox, supra*, citing *Brown v. Cadillac Motor Division, supra.*

Currently, Florida is suffering from a medical crisis and lack of quality medical services. *McGibony v. Florida Birth Related Compensation Plan,* 564 So.

2d 177 (Fla. 1st DCA 1990). That is why the legislature passed the Comprehensive Medical Malpractice Reform Act. Florida Statute §766.201(1)(a)(c)(1989) states: "The average cost of defending a medical malpractice claim has escalated in the past decade to the point where it has become imperative to control such costs in the interests of the public need for quality medical services." Continued strict adherence to these legal elements is essential to keep the flood gates closed and prevent exposing the judicial system to an unlimited number of claims from persons subject to the fear of a disease but who have not manifested any physical symptoms. *Eagle-Picher, supra*, at 529.

In the case of *Frame v. Kothari*, 528 A. 2d 86 (N.J. 1987), the plaintiffs claimed negligent infliction of emotional distress where the parents, alleging malpractice, sued following the death of a ten month old child. The court held that the doctor's failure to properly diagnose and treat the minor child did not satisfy the required showing of an "incident". The court continued by noting that if recovery for mental distress was allowed in every circumstance involving alleged malpractice, an entire family will sue in every medical negligence claim which ends in serious physical consequences. The court stated that limits must be set on liability and that this function is served in emotional distress claims by requiring the witnessing of an incident by a qualified plaintiff. This rationale is particularly applicable in the instant case, where there is a complete absence of serious physical injury.

The instant case is wholly unlike the facts presented in the case of *Kush v. Lloyd*, 616 So., 2d 415 (Fla. 1992). The public policy arguments that were raised in *Kush* are inapplicable here. The plaintiffs in *Kush* gave birth to a severely impaired child as a result of the negligent advice and treatment of their doctor. Had appropriate medical advice been given, the parents would not have conceived or given birth to the congenitally deformed child. In contrast, R. J. had already received the information about the blood test results before he ever saw Dr. Robbins, and, Dr. Robbins did not give any advice to R. J. that differed from what he had already been told. Further, R. J. is healthy.

The case of *Swain v. Curry*, 595 So.2d 551 (Fla. 1st DCA 1992) is readily distinguishable because it involved a case of negligent delay in diagnosing breast cancer. This delay led to a spread of the cancer, and increased the plaintiff's risk of reoccurrence. The negligent failure to timely diagnose the existence of a disease such as cancer has immediate, objective physical consequences. The court properly stated that claims for increased risk of cancer, decreased chance of survival and reduction of life expectancy are proper elements of damage which flow from the negligent misdiagnosis and the spread of the disease. No similar situation is presented in the instant case. R. J. did not develop an increased risk of infection, a decreased chance of survival, or a reduced life expectancy because he was told a blood test was positive for HIV when in fact he was totally healthy, and disease

free. R. J.'s claims are all emotional and unrelated to any immediate, discernable physical injury.

CONCLUSION

For the reasons set forth herein, it is respectfully submitted that this Honorable Court should answer the certified question in the negative and should, in all other respects, affirm the decision of the District Court and the trial court.

Respectfully submitted,

WICKER, SMITH, TUTAN, O'HARA,
McCOY, GRAHAM & LANE, P.A.
Attorneys for William J. Robbins, M.D.
P. O. Box 14460
One East Broward Blvd., 5th Floor
Fort Lauderdale, FL 33302
(305) 467-6405

By: 
SHELLEY H. LEINICKE
Florida Bar No. 230170

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 21 day of January, 1994 to: Marcia K. Lippincott, Esq., 1235 North Orange Avenue, Suite 201, Orlando, FL 32804, Attorneys for Appellants; Roy Dalton, Esq., Martinez & Dalton, P.A., 719 Vassar Street, Orlando, FL 32804, Attorneys for Plaintiffs/Appellants; A. Broaddus Livingston, Esq., P. O. Box 3239, Tampa, FL 33601, Attorneys for SmithKline; Robert A. Hannah, Esq., P. O. Box 536487, Orlando, FL 32853, Attorneys for Humana; and Carl A. Cascio, Esq. and Scott Mager, Esq., Law Offices of Scott Mager, P.A., 7th Floor - Barnett Bank Tower, One East Broward Blvd., Fort Lauderdale, FL 33301, Attorneys for Amicus Curiae Academy of Florida Trial Lawyers.

WICKER, SMITH, TUTAN, O'HARA,
McCOY, GRAHAM & LANE, P.A.
Attorneys for William J. Robbins, M.D.
P. O. Box 14460
One East Broward Blvd., 5th Floor
Fort Lauderdale, FL 33302
(305) 467-6405

By: _____
SHELLEY H. LEINICKE
Florida Bar No. 230170