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CLERK, SUPREME COURT.

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IN THE SUPREME COURT
OF THE STATE OF FLORIDA

R.J. and P.J.,

Petitioners

vs.

Case No. 82,743

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.

**DISCRETIONARY PROCEEDINGS
TO REVIEW A DECISION OF THE DISTRICT
COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT**

PETITIONERS' BRIEF ON MERITS

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TABLE OF CONTENTS

| | |
|---|-----|
| Table of Authorities | ii |
| Statement of Case | 1 |
| Statement of Facts | 2 |
| Summary of Argument | 3 |
| Argument | |
| I. THE IMPACT DOCTRINE SHOULD NOT BE APPLIED TO A CLAIM FOR DAMAGES FROM A NEGLIGENT HIV DIAGNOSIS AS A MATTER OF PUBLIC POLICY. | |
| | 4 |
| II. THE IMPACT DOCTRINE SHOULD BE MODIFIED OR ABOLISHED SO THAT IT DOES NOT BAR THIS ACTION. | |
| | 8 |
| III. THIS ACTION MEETS THE REQUIREMENTS OF THE IMPACT DOCTRINE AND SHOULD NOT HAVE BEEN DISMISSED. | |
| | 9 |
| Conclusion | 10 |
| Certificate of Service | .11 |

TABLE OF AUTHORITIES

| | |
|--|-------|
| <i>Deutsch v. Schein</i> , 597 S. W. 2d141 (Ky 1980)..... | 9 |
| <i>Dulieu v. White & Sons</i> , 2 K. B. 669 (1901)..... | 8 |
| <i>Eagle - Pilcher Industries, Inc. v. Cox</i> 481 So. 2d 517 (Fla. 3d DCA 1985)..... | 9 |
| <i>Gilliam v. Stewart</i> , 291 So. 2d 593 (Fla. 1974)..... | 5 |
| <i>Hambrook v. Stokes Brothers</i> , 1 K. B. 141 (1925)..... | 8 |
| <i>Kush v. Lloyd</i> , (Fla. 1992)..... | 3,5,7 |
| <i>Rasmussen v. South Florida Blood Service</i> , 500 So. 2d 533 (Fla. 1987)..... | 7 |
| <i>R.J. v. Humana</i> , 18 FLW D 2232 (Fla. 5th DCA 1993)..... | 1 |
| <i>Swain v. Curry</i> , 595 So. 2d 551 (Fla. 1st DCA 1992)..... | 6-7 |
| <i>Victorian Railways Commissioner v. Coultas</i> 13 App. CAS. 405 (P.C. 1888)..... | 8 |

Miscellaneous Authorities

Books

Slavin, *Damages in Tort Actions* (1992).....8

Law Review Articles

Bell, "The Bell Tolls: Towards full Tort Recovery for
Psychic Injury," 36 *U. Fla. L. Rev* 333 (1984).....8

Davies, "Direct Action for Emotional Harm: Is Compromise
Possible?" 67 *Wash L. Rev* 1 (1992).....8

Greenburg, "Negligent Infliction of Emotional Distress: A
*Proposal for a Consistent Thory of Tort Recovery for Bystanders
and Direct Victims*," 19 *Pepperdine L. Law* 1283 (1992).....8

STATEMENT OF CASE

On November 4, 1991 Petitioners, R.J. and P.J., brought an action in the Ninth Judicial Circuit in and for Orange County, Florida against Respondents, Humana of Florida, Inc., d/b/a Humana Hospital-Lucerne, Smithkline Beecham Clinical Laboratories, Inc., f/k/a Smithkline Bio-Science Laboratories, Ltd., Inc. and William J. Robbins, M.D. This Complaint was amended. [R. 34-40, 70-76]

Respondents moved to dismiss the Complaint and all amendments. [R. 17-19, 28-31, 43-45 46-49, 84-86] Respondents contended that there was no allegation of physical impact and therefore no action could be maintained. On September 9, 1992 the trial court dismissed Petitioners' action with prejudice as to all Respondents. [R. 77-79]

Petitioners appealed the dismissal to the Fifth District Court of Appeal. On October 15, 1993 the Fifth District issued its opinion which reluctantly affirmed the dismissal, but certified the following question to this Court as one of great public importance:

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

R.J. v. Humana, 18 FLW D2232 (Fla. 5th DCA 1993)

On November 18, 1993 Petitioners filed their Notice to Invoke the Discretionary Jurisdiction of this Honorable Court on the basis of the certified question. This Court postponed its decision on jurisdiction and ordered the filing of briefs on the merits.

STATEMENT OF FACTS

On March 19, 1989, blood was extracted from R.J. by agents or employees of Humana Hospital-Lucerne. The blood was forwarded to Smithkline Beecham Clinical Laboratories, Inc., f/k/a Smithkline Bio-Science Laboratories, Ltd., Inc., for testing and analysis. [R. 71, 73]

On March 30, 1989 Humana told R.J. that he was infected with the HIV virus and referred him to William J. Robbins, M.D., for medical care and treatment. [R. 71] Dr. Robbins began to care and treat R.J. in April of 1989. Dr. Robbins accepted the validity of the Humana/Smithkline HIV test and did not retest R.J. to confirm the presence of the virus. [R. 72, 75]

In November of 1990 R.J. requested to be retested. This further testing revealed that R.J. was *not* infected with the virus. [R. 72, 75] As a result of the negligent diagnosis and failure to retest, R.J. was caused to suffer:

"... bodily injury including hypertension, pain and suffering, mental anguish, the loss of capacity for the enjoyment of life, and the reasonable expenses of medical care and attention. These losses are continuing or permanent in nature."

[R. 73, 74, 75]

In addition, R.J.'s wife, P.J., as a result of her husband's pain, suffering and mental anguish, suffered a loss of his companionship, society, services and consortium and incurred expenses for medical care and treatment. [R. 73, 74, 75]

SUMMARY OF ARGUMENT

R.J. was diagnosed and treated by the Respondent health care providers as a person infected with the HIV virus for approximately nineteen months. This diagnosis was incorrect and made as a result of negligence. R.J. and his wife, P.J., instituted a medical malpractice action against the responsible medical health professionals. This action was dismissed on the pleadings due to the application of the "impact" doctrine.

The "impact" doctrine was never intended to apply to freestanding torts, such as claims for medical malpractice. In addition, the diagnosis of HIV positive is a medical death sentence with no possibility for survival. It also brands a patient as a modern day leper. This diagnosis would cause anyone to experience severe emotional trauma. Public policy demands a remedy for this wrong, just as it does in the case of a wrongful birth. [*Kush v. Lloyd*, 616 So. 2d 415 (Fla. 1992)]

Most legal commentators agree that the "impact" doctrine and its progeny should be abolished or, at least, changed and clarified. There is no legitimate reason or public policy which is served by denying Petitioners a remedy for the emotional injuries they have sustained. It is time for Florida to reconsider this doctrine.

Finally, this action alleges both an "impact", i.e., unneeded medical care and treatment, and a physical injury, i.e., bodily injury. Therefore, the complaint meets the requirements of the "impact" doctrine and should not have been dismissed.

Living for nineteen months with a medical death sentence and as a modern day leper due to the negligence of medical health professionals is a wrong for which justice demands court access. Whether the "impact" rule is abolished, modified, found inapplicable to this action, or the requirements of the rule are found to have been satisfied, the dismissal of this action must be reversed.

ARGUMENT

I. THE IMPACT DOCTRINE SHOULD NOT BE APPLIED TO A CLAIM FOR DAMAGES FROM A NEGLIGENT HIV DIAGNOSIS AS A MATTER OF PUBLIC POLICY.

The "impact" doctrine prohibits recovery for injuries caused by negligence in the absence of a physical impact to the claimant. [*Gilliam v. Stewart*, 291 So. 2d 593 (Fla. 1974)] However, there are some situations where the doctrine does not apply. For example, this Court recently explained in *Kush v. Lloyd*, 616 So. 2d 415, 422, 423, (Fla. 1992) that:

"...we are not certain that the impact doctrine ever was intended to be applied to a tort such as wrongful birth. Prosser and Keaton state that the impact doctrine should not be applied where emotional damages are an additional 'parasitic' consequence of conduct that itself is a freestanding tort apart from any emotional injury...."

Obviously, the Lloyds have a claim for wrongful birth even if no emotional injuries had been alleged.

Similarly, the impact doctrine also generally is inapplicable to recognized torts in which damages often are predominantly emotional, such as defamation or invasion of privacy... This conclusion is entirely consistent with existing Florida law. For example, it is well settled that mental suffering constitutes recoverable damages in cases of negligent defamation... If emotional damages are ascertainable in these contexts, then they also are ascertainable here.

There can be little doubt that emotional injury is more likely to occur when negligent medical advice leads parents to give birth to a severely impaired child than if

someone wrongfully calls them liars, accuses them of unchastity, or subjects them to any singular defamation. A defamation may have little effect, may not be believed, might be ignored, or could be reversed by trial publicity. But the fact of a child's serious congenital deformity may have a profound effect, cannot be ignored, and at least in this case is irreversible. Indeed, these parents went to considerable lengths to avoid the precise injury they now have suffered. We conclude that public policy requires the impact doctrine not be applied within the context of wrongful birth claims..."

The same policy should prohibit the application of the impact doctrine to this action for a negligent HIV diagnosis. Like *Kush*, this is an action for medical malpractice, which is a freestanding tort.

Although the "impact" doctrine was not discussed, the case of *Swain v. Curry*, 595 So. 2d 551, (Fla. 1st DCA 1992) is worthy of note. *Swain* is a medical malpractice action against a physician for a negligent delay in diagnosing breast cancer. At the time of suit Mrs. Swain had been successfully treated and there had been no reoccurrence of the cancer. However, her chances for cancer reoccurrence were placed at 65%. If there had been no delay in diagnosis and treatment, her chances for cancer reoccurrence would have been much less.

The First District Court of Appeal reversed a summary judgment for the defendant doctor, ruling as follows:

...we further hold that the trial court erred by finding that Mrs. Swain has no present cause of action for increased risk of cancer, for a decreased chance of survival or for reduction of life expectancy. The nomenclature utilized in the order under review is simply incorrect. The three matters addressed by the trial court do not encompass "causes of action", but rather describe elements of damage. "[595 So. 2d at p. 172]

Unless negligent medical care and treatment constitute an "impact" (see the discussion *infra* at p. 9), Mrs. Swain's action for medical malpractice was allowed to proceed without the application of the impact doctrine. Like *Swain* and *Kush*, the action here is the freestanding tort of medical malpractice. Therefore, the "impact" doctrine should not be applied.

In addition, as in *Kush*, there can be no doubt that serious emotional injury will occur when anyone is diagnosed as HIV positive. HIV infection is viewed as an automatic death sentence with no possibility for survival. Society treats HIV positive persons as modern day lepers. [*Rasmussen v. South Florida Blood Service*, 500 So. 2d 533, 537 (Fla. 1987)]

Fear of the HIV virus has caused small children to be excluded from school or placed in glass boxes to attend school; it has caused employers, neighbors, friends and even family members to turn their backs on HIV positive persons; and it has led to distrust, hate and violence. Even famous and adulated persons, such as Magic Johnson, cannot totally escape from the consequences of this fear.

The purpose of the "impact" doctrine is to protect society from emotional distress claims which are trivial or untrustworthy. The doctrine does not apply to actions for wrongful birth because such an occurrence would cause severe emotional distress to anyone. Similarly, a diagnosis of HIV positive would cause severe emotional distress to anyone. A negligent HIV diagnosis is a wrong for which justice demands a remedy. Public policy requires the rejection of the "impact" doctrine as a basis for dismissal of this action.

II. THE IMPACT DOCTRINE SHOULD BE MODIFIED OR ABOLISHED SO THAT IT DOES NOT BAR THIS ACTION.

The "impact" doctrine is a nineteenth century creation of English law. [*Victorian Railways Commissioner v. Coultas*, 13 App. Cas. 405 (P.C. 1888)] In England, the doctrine existed for only a few years. [*Dulieu v. White & Sons*, 2 K. B. 669, 695, (1901); *Hambrook v. Stokes Brothers*, 1 K. B. 141 (1925)]. However, the doctrine has been embraced in the United States and still persists in some states. It has spawned an intense debate among courts and commentators and has created a continually changing morass of contradictory and confusing rules. [*Slavin, Damages in Tort Actions*, Chapter 5, "Negligent Infliction of Emotional Distress" (1992)]

Most commentators acknowledge that change is needed. The reasons for limiting court access for emotional injuries are either non-existent in today's world or can be accommodated with less drastic measures. Some commentators like Professor Peter Bell, recommend the removal of all restrictions. [Bell, "The Bell Tolls: Toward Full Tort Recovery for Psychic Injury," 36 *U. Fla. L. Rev.* 333 (1984)] Others suggest a more limited approach. [Davies, "Direct Actions for Emotional Harm: Is Compromise Possible?" 67 *Wash L. Rev.* 1 (1992); Greenburg, "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)] But, most commentators agree that there is a need for both change and clarity.

There is no legitimate reason or public policy which is served by denying Petitioners a remedy for the emotional injuries they have sustained. Accordingly, the "impact" doctrine should be modified or abolished so that it does not bar this action.

III. THIS ACTION MEETS THE REQUIREMENTS OF THE IMPACT DOCTRINE AND SHOULD NOT HAVE BEEN DISMISSED.

What is an "impact"? The Third District Court of Appeal in *Eagle - Pilcher Industries, Inc. v. Cox*, 481 So. 2d 517, 526 (Fla. 3d DCA 1985) has found that the inhalation of asbestos constitutes an "impact". The Kentucky Supreme Court has found that exposure to x-rays constitutes an "impact". [*Deutsch v. Schein*, 597 S.W. 2d 141 (Ky 1980)]

Petitioners allege that R.J. was subjected to unneeded medical care and treatment as a result of the negligent diagnosis. [R. 70-76] R.J.'s body was certainly touched in the course of this unneeded treatment, i.e., by the gloved hands of medical care professionals and by a variety of medical instruments. In addition, drugs were probably administered both orally, by pill, and intravenously, by shot. This contact should more than satisfy the "impact" requirement.

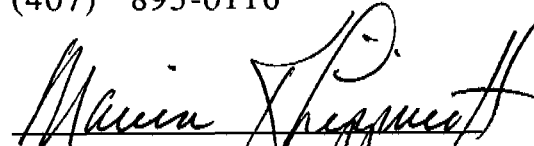
Alternatively, if a physical injury is required, that allegation has also been made. [R. 73, 74, 75] The Complaint specifically alleges a bodily injury. What more is required at the pleading stage of a proceeding? The dismissal of this action was in error.

CONCLUSION

For the reasons stated herein, Petitioners respectfully request this Honorable Court to answer the certified question in the negative, reverse the dismissal of this action, and remand for further proceedings.

RESPECTFULLY SUBMITTED this 13th day of December, 1993.

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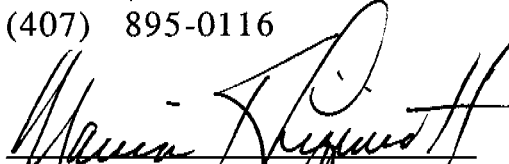
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the Appellants' Initial Brief and Appendix has been furnished by U.S. Mail this 13th day of December, 1993 to: A. BROADDUS LIVINGSTON, ESQUIRE, P.O. Box 3239, Tampa, FL 33601, SHELLEY H. LEINICKE, ESQUIRE, P.O. Box 14460, Ft. Lauderdale, FL 33302 and to ROBERT A. HANNAH, ESQUIRE, P.O. Box 536487, Orlando, FL 32853.

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