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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

RESPONDENT'S ANSWER BRIEF ON MERITS

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SUMMARY OF ARGUMENT

The Florida Supreme Court has not abolished the impact doctrine. Florida courts have consistently held that in order to recover for emotional damages, the plaintiff must first suffer an impact. Petitioners have amended their Complaint to allege that the medical malpractice caused R.J. "bodily injury, including hypertension". Despite this amendment to their Complaint, R.J. still has not sustained an impact as a result of the negligence of Respondent as required by Florida law.

Petitioners' cause of action does not fall within the limited exceptions to the impact doctrine. Since the inception of the impact doctrine, Florida courts have only carved two very limited exceptions to this long-standing rule. Petitioners' cause of action does not contain those special facts and circumstances that this Court relied upon when it carved its limited exceptions to the impact doctrine.

Petitioners' cause of action is exactly the type of purely subjective, undefinable, and unmeasurable psychic claim that this Court was trying to protect the public against when it placed its boundaries on the impact doctrine. If this Court were to rule that the impact doctrine, as a matter of law and public policy, should not be applied or carve another exception to this action, it would send a shiver through the medical community and those seeking medical care. Respondent believes that such a ruling would seriously impede the giving of medical advice because of the

potential exposure to purely subjective, speculative, undefinable, and unreasonable damages.

There are no compelling public policy arguments that would require this Court abolishing or carving another limited exception to the impact doctrine based on the particular facts of this case. Petitioners' medical malpractice action was properly dismissed with prejudice for the alleged negligent diagnosis of the presence of the HIV virus because Petitioners' claim does not fall within the express limited modifications of the impact doctrine, nor does it contain the necessary special facts and circumstances which warrant another exception.

Petitioners have not sustained an impact as a result of Respondent's alleged negligence, and therefore, the Fifth District Court of Appeal properly affirmed the trial court's dismissal of Petitioners' Complaint with prejudice.

QUESTION CERTIFIED

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

ARGUMENT

I. THE FLORIDA SUPREME COURT HAS NOT ABOLISHED THE IMPACT DOCTRINE AND THIS CASE FITS SQUARELY WITHIN THE DOCTRINE

The Florida Supreme Court has consistently held that in order to recover in negligence for damages, the plaintiff must first have suffered an impact. Gilliam v. Stewart, 291 So. 2d 593 (Fla. 1974) and Brown v. Cadillac Motor Car Division, 468 So. 2d 903 (Fla. 1985). The Fifth District Court of Appeal, consistent with their decisions, affirmed the trial court's dismissal of Petitioners' medical malpractice cause of action with prejudice for failure to satisfy the requirements of the impact doctrine. R.J. v. Humana of Florida, Inc., 18 FLW D2232 (Fla. 5th DCA, 10/15/93). Petitioners' Complaint for medical negligence sought to recover damages because Petitioner was told (apparently incorrectly) by Respondent that his blood sample tested positive for HIV. Pursuant to prevailing Florida law, in order to recover damages for any negligence of this type, the plaintiff must first have suffered a negligently caused impact. Petitioners have not suffered an impact as a result of being told of the HIV test of R.J., and therefore their Complaint was properly dismissed by the trial court with prejudice.

In Gilliam v. Stewart, 291 So. 2d 593 (Fla. 1974), the Florida Supreme Court held that the impact doctrine precludes recovery for injuries caused by a defendant's negligence in the absence of impact. In Gilliam, the plaintiff suffered a heart attack after seeing a car crash into her home, and this Court denied recovery for damages because the plaintiff had not suffered an impact. Id.

The impact doctrine is a long-standing rule that a party must first suffer an impact before recovering for injuries caused by the negligence of another. Id. See also Reynolds v. State Farm Mutual Automobile Ins. Co., 611 So. 2d 1294 (Fla. 4th DCA 1992), and Eagle-Picher Industries, Inc. v. Cox, 481 So. 2d 517 (Fla. 3d DCA 1985).

Petitioners did amend their Complaint to allege that the medical malpractice caused R.J. "bodily injury, including hypertension". (R. 73, 74, 75.) Despite this amendment to their Complaint, R.J. still has not been able to allege an impact as a result of the negligence of Respondent as required by Florida law.

In Sguros v. Biscayne Recreational Dev. Co., 528 So. 2d 376 (Fla. 3d DCA 1987), the Court held that the impact doctrine barred recovery from a company providing security service at a marina in a wrongful death action brought by a wife of the decedent who suffered a heart attack when he discovered intruders on his boat. The Court reasoned that even though the decedent suffered a severe permanent injury (a fatal heart attack), he still was not entitled to recover any damages because he had not suffered an impact. Likewise, while R.J. can allege that he has suffered "bodily injury, including hypertension", R.J. has not sustained any alleged injuries from an impact negligently caused by Respondent.

In cases involving actual physical injuries, Florida courts have consistently held that there must be an impact in order to recover damages. Gilliam v. Stewart, 291 So. 2d 593 (Fla. 1974); Brown v. Cadillac Motorcar Division, 468 So. 2d 908 (Fla. 1985); Doyle v. Pillsbury Co., 476 So. 2d 1271 (Fla. 1985); Sguros v.

Biscayne Recreational Dev. Co., 528 So. 2d 377 (Fla. 3d DCA 1987); and Davis v. Sun First Nat'l Bank of Orlando, 408 So. 2d 608 (Fla. 5th DCA 1981). Petitioners have not sustained an impact as a result of Respondent's alleged negligence, and therefore, the Fifth District Court of Appeal properly affirmed the trial court's dismissal of their Complaint with prejudice.

II. PETITIONERS' CAUSE OF ACTION DOES NOT FALL WITHIN THE LIMITED EXCEPTIONS TO THE IMPACT DOCTRINE

Over the years, this Court has carved two limited exceptions to the impact doctrine. Petitioners' cause of action does not fall within these exceptions. In Champion v. Gray, 478 So. 2d 17 (Fla. 1985), the Florida Supreme Court first modified the impact doctrine to a very limited extent. In Champion, 478 So. 2d at 18-19, the Court allowed, within express limits, recovery for the physical consequences resulting from the mental and emotional stress the defendant's negligence caused even though the plaintiff experienced no impact. Champion involved a cause of action brought by the personal representative of a mother's estate against the driver and others for recovery of damages from the death of the mother occurring when she was overcome with shock and grief at the sight and death of her daughter, who had been struck by a car. Id. It should be noted that in Champion, there was in fact an impact; however, the impact was to the plaintiff's child who was hit by the defendant's car. The Florida Supreme Court stated:

> [w]e now conclude, however, that the price of death or significant discernable physical injury, when caused by psychological trauma resulting from a negligent injury imposed upon a **close family member** within the **sensory**

> **perception** of the physically injured person, is too great a harm to require direct, physical contact before a cause of action exists. Id. at 18-19 (emphasis added)

Champion has been interpreted as requiring the existence of a familial relationship between the plaintiff and the injured party before the plaintiff can recover any damages resulting from the negligent injury (i.e. impact) of that person by another. See Reynolds v. State Farm Mutual Auto Ins. Co., 611 So. 2d 1294 (Fla. 4th DCA 1992).

The second exception to the doctrine appears in Kush v. Lloyd, 616 So. 2d 415 (Fla. 1992), which was a suit for wrongful birth and wrongful life for the birth of plaintiff's deformed son. Id. Among other causes of action, plaintiff sought damages for mental anguish experienced by the family which was caused by the birth of a deformed child as a result of the defendant's negligence. Id. In Kush, the court held that the family was entitled to recover damages due to the birth of their deformed son. The Court stated:

> [t]here 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 other similar defamation . . . 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.** Id. (emphasis added)

Petitioners' diagnosis of HIV, unlike the Plaintiff in Kush, is a reversible situation.

In Kush, this Court applied the holding in Champion, which extends the impact doctrine to situations involving close familial relationships when there has been an impact to a close family

member. Id. at 423. Kush involved the close familial relationship of a family and their son. There have been absolutely no Florida cases which have extended the impact doctrine to a factual situation not involving close family members within the sensory perception when there has not been an impact. See Ferretti v. Weber, 513 So. 2d 1333 (Fla. 4th DCA 1987). Petitioners' cause of action does not fall within the express, limited exceptions to the impact doctrine because there has not been an impact to a close family member nor has there been a physical injury to a family member within the sensory perception as required by Florida law.

Additionally, Petitioners cite the cases of Swain v. Curry, 595 So. 2d 168 (Fla. 1st DCA 1992) and Kush v. Lloyd, 616 So. 2d 415 (Fla. 1992) for the proposition that the impact doctrine should not apply because a medical malpractice claim is a free-standing tort. (See Petitioners' Brief, p. 6.) The essence of the impact doctrine is to preclude recovery for emotional damages when there has been no impact as a result of the negligence of the defendant. Gilliam v. Stewart, 291 So. 2d 593 (Fla. 1974); Brown v. Cadillac Motorcar Division, 468 So. 2d 908 (Fla. 1985); Doyle v. Pillsbury Co., 476 So. 2d 1271 (Fla. 1985); Sguros v. Biscayne Recreational Dev. Co., 528 So. 2d 377 (Fla. 3d DCA 1987); and Davis v. Sun First Nat'l Bank of Orlando, 408 So. 2d 608 (Fla. 5th DCA 1981). It does not matter if plaintiff's cause of action is labeled a medical malpractice case, or any other type of negligence case; the impact doctrine requires that a plaintiff must first suffer an impact before recovering emotional damages.

Petitioners' medical malpractice action was properly dismissed with prejudice for the alleged negligent diagnosis of the presence of the HIV virus because Plaintiff has not sustained an impact as a result of the negligence of Defendant and Petitioners' claim does not fall within the express limited exceptions to the impact doctrine.

III. PETITIONERS' CAUSE OF ACTION DOES NOT CONTAIN THOSE SPECIAL FACTS AND CIRCUMSTANCES THAT THIS COURT RELIED UPON WHEN IT CARVED ITS EXCEPTIONS TO THE IMPACT DOCTRINE

Since the inception of the impact doctrine, the Florida Supreme Court has only carved two very limited exceptions to this long-standing doctrine. In order for Petitioners to proceed with their case, this Court must carve another factually specific exception to the impact doctrine. To determine if this case warrants its own exception, we must first see if Petitioners' cause of action contains those special facts and circumstances that this Court relied upon in its decisions in Champion and Kush.

In Champion and Kush, this Court relied upon the following special facts and circumstances to carve its exceptions to the impact doctrine:

1. injury imposed upon a close family member (third party) within the sensory perception; and
2. the injury caused by the negligence was fatal or irreversible.

When these special facts and circumstances are present in a case, this Court has reasoned that a plaintiff will more likely than not suffer emotional damages as a result of negligence even though the

plaintiff has not suffered an impact. Champion, 478 So. 2d at 18-19; Kush, 616 So. 2d at 423. Presented with these special facts and circumstances, this Court has been willing to allow a plaintiff to pursue a claim for emotional damages even though the plaintiff has not suffered an impact. Id.

Petitioners' cause of action does not contain any of the necessary special facts and circumstances relied upon by this Court in carving its two prior exceptions. First, Petitioners' cause of action does not involve an injury to a close family member (third party) within the sensory perception. R.J. (First Party Plaintiff) claims that he was injured as a result of the negligence of Respondent. However, there are no Florida cases where a first party plaintiff has been allowed to recover damages when the first party plaintiff has not suffered an impact. Gilliam v. Stewart, 291 So. 2d 593 (Fla. 1974); Brown v. Cadillac Motor Car Division, 468 So. 2d 908 (Fla. 1985); and Sguros v. Biscayne Recreational Dev. Co., 528 So. 2d 377 (Fla. 3d DCA 1987). P.J.'s (Third Party Plaintiff) claim does not involve the necessary special facts and circumstances because she was not within the sensory perception at the time of the alleged negligence, nor is it alleged that P.J. suffered any physical injury. In Champion, this Court discussed when a third party plaintiff could recover for emotional damages when there was no impact. In Champion, the Court stated:

> Mental distress, when unaccompanied by such physical consequences, on the other hand, should still be inadequate to support a claim; nonphysical injuries must accompany and flow from direct trauma before recovery can be claimed for them in a negligence action.

Champion, 478 So. 2d at 19, fn. 1. P.J.'s claim does not flow from a direct trauma (impact).

Second, the injury allegedly caused by the negligence of Respondent was not fatal and certainly is not irreversible. In fact, R.J. is a healthy man who has the rest of his life in front of him. It would be arbitrary for this Court to carve another exception to the impact doctrine when Petitioners' claim does not contain any of the special facts and circumstances relied upon by this Court in Champion and Kush.

In Champion, 478 So. 2d at 20, this Court reasoned that they:

> are willing to modify the impact rule, but are unwilling to expand it to purely subjective and speculative damages for **psychic trauma alone** . . . but in our view, it is necessary to curb the potential of fraudulent claims, and to place some boundaries on the undefinable and unmeasurable psychic claims. (emphasis added)

Petitioners' claim is exactly the type of purely subjective, undefinable, and unmeasurable psychic claim that this Court was trying to protect the public against when it placed its boundaries on the impact doctrine. As Judge Reed stated in his dissent:

> I take it that there is more underlying the impact doctrine than simple problems of proof, fraudulent claims, and excessive litigation. The impact doctrine 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 1992).

If this Court were to rule that the impact doctrine, as a matter of law and public policy, should not be applied or carve a

new exception for this action, it would send a shiver through the medical community and those seeking medical care. Respondent believes that such a ruling would seriously impede the giving of medical advice because of the potential exposure to purely subjective, speculative, undefinable, and unreasonable damages. See Kush v. Lloyd, 616 S. 2d 415 (Fla. 1992) (J. McDonald; concurring in part, dissenting in part). Additionally, if the impact doctrine is not applied to this case, there would be absolutely no boundaries on the undefinable and unmeasurable psychic claims of plaintiffs. Such a decision would lead to a plethora of cases for purely subjective emotional damages when the plaintiff has not suffered an impact whatsoever.

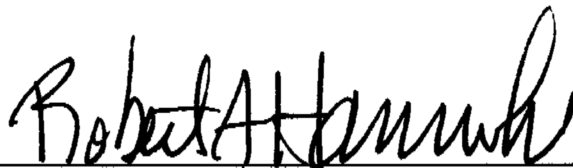
There are no compelling public policy arguments that would require this Court abolishing or carving another limited exception to the impact doctrine based on the particular facts of this case. Petitioners' medical malpractice action was properly dismissed with prejudice for the alleged negligent diagnosis of the presence of the HIV virus because Petitioners' cause of action does not contain those special facts and circumstances relied upon when this Court carved its limited exceptions to the impact doctrine.

CONCLUSION

For the reasons stated herein, Respondent respectfully requests that this Court affirm the trial court's dismissal of this action with prejudice.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail this 3rd day of January, 1994, to Marcia K. Lippincott, 1235 N. Orange Avenue, Suite 201, Orlando, FL 32804; to Gerald B. Taylor, Jr., 719 Vassar Street, Orlando, FL 32804, to Shelley H. Leinicke, P.O. Box 14460, Ft. Lauderdale, FL 33302, to A. Broaddus Livingston, P.O. Box 3239, Tampa, FL 33601, to Carl A. Cascio, Law Offices of Scott Mager, P.A., 7th Floor - Barnett Bank Tower, One East Broward Boulevard, Fort Lauderdale, FL 33301, and to Scott Mager, Law Offices of Scott Mager, P.A., 7th Floor - Barnett Bank Tower, One East Broward Boulevard, Fort Lauderdale, FL 33301.



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