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' REPLY BRIEF

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STATEMENT OF CASE AND FACTS

Plaintiffs object to the Statement of Case and Facts contained in the brief of Defendant, William J. Robbins, M.D. and the repeated references to facts in the argument section unsupported by the record. [See Robbins Brief at pp. 1, 8-11, 15] Defendant Robbins makes repeated references to a self-inflicted needle stick and the allegation that Plaintiff R.J. is healthy. [See Robbins Brief at pp. 1, 8-11, 15] These allegations are unsupported by the record.

This case is an appeal from a trial court order which dismissed Plaintiffs' Complaint for failure to state a cause of action. This Defendant's Statement of Facts and Brief is replete with "allegations of fact" which cite for record support to Plaintiffs Second Amended Complaint. However, these "allegations of fact" are not contained within Plaintiffs Second Amended Complaint and many statements are inaccurate. [R. 70-76] Therefore, Plaintiffs respectfully object to Defendant Robbins Statement of Facts and these portions of the Brief which make reference to this inaccurate and improper Statement of Facts.

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.

Defendant SmithKline maintains that Plaintiff's claim is not unique and that there is no public policy which would support the maintenance of Plaintiffs claim. [Defendant SmithKline's Brief at p. 19] However, none of the Defendants including SmithKline, point to any case in this state or nation which is similar to the case at bar.

There is one court which has been presented with a similar situation and that is the Supreme Court of Appeals of West Virginia. On November 23, 1993 that court issued its decision in ***Bramer v. Dotson*** , Case No. 21661 (West Virginia 1993) (decision is attached to this brief as Appendix A)

It is interesting to note that Defendant SmithKline is also a Defendant in that case. SmithKline tested Mr. Bramer's blood, and as with patient R.J., SmithKline negligently concluded and reported that Mr. Bramer's blood tested positive for the HIV virus. However, unlike the situation at bar, Mr. Bramer lived with this death sentence for only a few months before retesting established that the first test was incorrect.

Nevertheless, the West Virginia Supreme Court found that Mr. Bramer had a cause of action, and stated as follows:

> *"This case involves a person erroneously diagnosed with AIDS. Given the well-known fact that AIDS has replaced cancer as the most feared disease in America and, as*

> *defendant SmithKline candidly acknowledges, a diagnosis of AIDS is a death sentence, conventional wisdom mandates that fear of AIDS triggers genuine - not spurious - claims of emotional distress."*
> [***Bramer v. Dotson*** at p. 3 -- See Appendix; Note that West Virginia has held that a person may recover for the negligent infliction of emotional distress in the absence of an accompanying physical injury upon a showing that the claim for emotional damages is not spurious in ***Ricottilli v. Summersville Memorial Hospital***, 425 S.E. 2d 629 (W. Va. 1992)]

Defendant SmithKline maintains that ***Swain v. Curry***, 595 So. 2d 168 (Fla. 1st DCA 1992) is 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 parts of her body and a substantially increased risk of cancer."*
> [Defendant SmithKline's Brief at p. 32]

But, is that so? Dr. Curry did not cause Mrs. Swain's cancer or the removal of her breast. And the cancer had not spread to other parts of her body. Rather, the graveman of Mrs. Swain's claim was that due to the medical negligence of Dr. Curry her chances of 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.

So, where's the impact? Unless negligent medical care and treatment constitute an impact, Mrs. Swain's action was allowed to proceed without the application of the impact doctrine. And why? Because like ***Kush*** and the case at bar, Mrs. Swain's action was for the freestanding tort of medical malpractice.

Defendant SmithKline also maintains that ***Kush v. Lloyd***, 616 So. 2d 415 (Fla. 1992) is not applicable to the case at bar because ***Kush*** involved an irreversible physical injury. While it is true that the genetic deformity to the ***Kush*** baby is irreversible, that fact is not the basis for the ***Kush*** decision. Rather, this Court expressly relied upon other situations which do not involve irreversible physical injuries, i.e. defamation and invasion of privacy. [616 So. 2d at p. 422-423] Rather, the basis for ***Kush*** was the freestanding tort of medical malpractice and the lack of doubt regarding emotional injury. Those elements are equally present in the case at bar.

Finally, Defendant SmithKline concludes by noting that the primary purpose of the impact doctrine is to guarantee the genuiness of recoverable mental distress and that we all must absorb some level of harm as a price for living in organized society. [Defendant SmithKline's Brief at pp. 15, 19] Indeed, this is the basis for the impact doctrine and it has absolutely no application to the situation before this Court.

As the West Virginia Supreme Court held in ***Bramer***, *supra*, fear of AIDS triggers "genuine - not spurious - claims of emotional distress." And as this Court itself recognized in ***Rasmussen v. South Florida Blood Service***, 500 So. 2d 533, 537 (Fla. 1987), society treats HIV positive persons as modern day lepers. There is no doubt that an HIV diagnosis brings severe mental anguish to any person who receives it. Living for eighteen months with the AIDS death sentence and the AIDS leper label due to the negligence of medical health professionals is a wrong for which justice demands a remedy. The basis for application of the "impact" doctrine to the case

at bar does not exist. Accordingly, public policy demands that this doctrine be rejected as a basis for the dismissal of this action.

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

Defendant SmithKline writes eloquently and cites to extensive praise for the doctrine of ***stare decisis***. [Defendant SmithKline's Brief at p. 11] And certainly there is a significant role in our judicial system for the doctrine of precedents and uniformity. However, there is also a most vital and critical role to be played by the need for reassessment and the need to change outmoded concepts. Without reassessment and change we would never progress as a society.

The "impact" doctrine was created in England. It lasted there for only a few years. Unfortunately, it has plagued this country for almost a century. Neither the Plaintiffs nor the Amicus advocate an opening of our courts for redress of all injuries to the psychic well-being which we all suffer in our day-to-day lives, e.g. name-calling etc.

The cry of all Defendants regarding the catastrophic consequences of such a decision is simply a strategic maneuver to camouflage the truth, i.e. there is a need to change and clarify the rules for bringing a claim for emotional distress caused by negligent action and this change can be accomplished without opening the floodgates of litigation. Defendants ignore the fact that almost all legal scholars agree on this point.

Defendant SmithKline claims that there is no workable solution to the "impact" dilemma. In support of this position it notes the California decision of ***Thing v. La Chusa***, 771 P. 2d 814 (Cal. 1989) which discusses the morass of confusing and contradictory decisions and the weakness of a pure forseeability test. [Defendant SmithKline's Brief at pp. 21-22] Indeed, the California Supreme Court noted the need for change. But, it certainly did not initiate or support the closed door policy we have in Florida. Indeed, Plaintiff R.J. would have a cause of action in California, and indeed, in many states.

Florida's closed door policy to direct victims of the negligent infliction of severe emotional distress needs revision. Neither plaintiffs nor Amicus suggest the adoption of a pure forseeability test. Several legal commentators have suggested a more middle ground -- one that would accommodate serious emotional harm, and at the same time, would limit claims which place too great a toll on defendants, society and the judicial system. [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)] It is time to reform Florida's closed door policy on direct victims of severe emotional distress. Society will benefit, not suffer, from a more enlightened approach to claims of emotional distress.

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

Defendants Robbins and SmithKline each acknowledge that an impact occurs when a plaintiff suffers direct physical injury which gives rise to mental distress. [Defendant Robbins' Brief at p. 6; Defendant SmithKline's Brief at p. 6] But, that is exactly what Plaintiff R.J. has alleged. [R. 73-75] And Plaintiff P.J. simply alleges a loss of consortium action as a result of Plaintiff's R.J.'s injuries. [R. 73-75]

Defendants struggle mightily to avoid the truth. Defendant SmithKline contends that this argument comes too late because it was asserted for the first time on appeal. In support of this proposition, Defendant SmithKline cites the case, ***Jones v. Neibergall***, 47 So. 2d 605 , 606 (Fla. 1950). [Defendant SmithKline's Brief at p. 26]

Jones stands for the proposition that an appellant cannot raise an **issue** for the first time on appeal. The issue in this case is simply whether the complaint states a cause of action. Obviously, if a complaint is dismissed for failure to comply with the impact doctrine, the issue of whether the Complaint alleges an impact is inherent in the issue of whether the complaint states as cause of action.

In addition, Defendants attempt to minimize the allegations of the Plaintiffs by discussing only a "touching" and "needle stick". However, none of the Defendants discuss the true nature of the impact Plaintiffs allege, i.e. the subjection of Plaintiff R.J. to **eighteen** months of ***unneeded*** medical care and treatment.

This action was dismissed on the pleadings. So who knows what such unneeded "care" entailed. It probably contained at the minimum invasive touching to Plaintiff's body, and it also probably contained the administration of medicaton. It might also include the harmful effects on Plaintifff R.J. caused by the ingestion of uneeded medication. Why doesn't this unneeded medical "care" satisfy the requirement of "impact"? It is quite telling that none of the Defendants confront this contention.

Finally, Defendant SmithKline claims no responsibility for any physical impact because it did not take part in any subsequent medical care and treatment. Rather, as Defendant SmithKline would view the situation, it was simply a messenger, a conveyor of information. [Defendant SmithKline's Brief at p. 27]

The role of Defendant SmithKline in this medical fiasco cannot be viewed with the rose-colored glasses with which SmithKline asks that we wear. But for the action of Defendant SmithKline in negligently testing the blood of Plaintiff R.J., R.J. would never have been told he was HIV positive, he would not have suffered for **eighteen** months with the AIDS death sentence and the AIDS label of leper, and none of us would be before this Court today. Defendant SmithKline is directly responsible for the unneeded medical care and treatment suffered by Plaintiff R.J. It was error to dismiss this action on the pleadings and reversal is mandated!

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 7th day of February, 1994.

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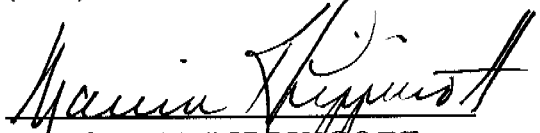

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CERTIFICATE OF SERVICE

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