THE SUPREME COURT OF FLORIDA

CASE NO.: 82,838

Third District Case No.: 92-1462

JESUS GONZALEZ, et ux.,

Petitioners,

vs.

METROPOLITAN DADE COUNTY
PUBLIC HEALTH TRUST,

Respondent.
_____/

AMICUS CURIAE BRIEF OF RIVERO FUNERAL HOME, INC.

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INTRODUCTION

The Petitioners, JESUS GONZALEZ and ZOILA GONZALEZ, were the Plaintiffs in the trial court and the Appellants in the Third District Court of Appeal. The Respondent, METROPOLITAN DADE COUNTY PUBLIC HEALTH TRUST, was a Defendant in the trial court and the Appellee in the Third District Court of Appeal. Amicus Curiae, RIVERO FUNERAL HOME, INC., was also a Defendant in the trial court and this Court has granted it leave to file an Amicus Curiae Brief in support of the Respondent's position.

All emphasis is supplied by this writer unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Amicus Curiae hereby adopts and incorporates by reference the Statement of the Case and Statement of the Facts prepared by Respondent.

QUESTION PRESENTED

WHETHER FLORIDA SHOULD ADOPT SECTION 868, RESTATEMENT (SECOND) OF TORTS, RECEDING FROM THE HOLDING IN DONAHOO V. BESS, 200 SO. 541 (FLA. 1941), THAT THE LAW OF FLORIDA WILL NOT SUSTAIN AN ACTION FOR MENTAL ANGUISH CAUSED BY NEGLIGENT HANDLING OF A DEAD BODY IN THE ABSENCE OF PHYSICAL INJURY.

SUMMARY OF THE ARGUMENT

This Court should continue to adhere to its holding in Donahoo v. Bess, 200 So. 541 (Fla. 1941), and Champion v. Gray, 478 So. 2d 17 (Fla. 1985), and refuse to adopt Section 868, Restatement (Second) of Torts. There are no social or economic reasons which justify a change in the law regarding the recovery of emotional distress damages in cases involving negligent interference with a dead body. Emotional distress damages in that situation, as in any other situation, should remain recoverable only if the result of physical impact or if accompanied by significant physical injury or consequences.

Otherwise, permitting recovery for emotional distress in negligent handling of dead body cases absent impact or physical consequences would increase the risk of fraudulent claims. That risk is currently virtually eliminated by the impact or physical consequences requirement which verifies the genuineness of the alleged emotional distress.

Furthermore, applying a less stringent standard of recovery in dead body cases would ascribe greater emotional impact and significance to injury to a corpse than injury to a live human being. That is incomprehensible and unfounded because a person observing injury to a living relative knows that that relative is suffering and enduring pain while the same cannot be said when a corpse is involved. As a result of the undisputed pain sustained by an injured live human being, receding from the impact and physical consequences requirement in negligent handling of dead body cases would necessarily open the flood gates for

litigation of emotional distress damages in **all** negligence cases. This Court should therefore decline to adopt Section 868, Restatement (Second) of Torts.

ARGUMENT

FLORIDA SHOULD NOT ADOPT SECTION 868, RESTATEMENT (SECOND) OF TORTS, AND FLORIDA SHOULD NOT RECEDE FROM THE HOLDING IN EITHER DONAHOO V. BESS, 200 SO. 541 (FLA. 1941), OR CHAMPION V. GRAY, 478 SO. 2D 17 (FLA. 1985).

The law in Florida regarding the recovery of damages for emotional distress caused by negligent interference with a dead body requires a showing of either a "physical injury" to the claimant, Donahoo v. Bess, 200 So. 541 (Fla. 1941), or outrageous and malicious conduct by the defendant, Kirksey v. Jernigan, 45 So. 2d 188 (Fla. 1950). Emotional distress damages caused by negligence are also recoverable if the distress is "manifested by physical injury," the plaintiff is "involved" in the incident, and the plaintiff and directly injured person "have an especially close emotional attachment." Champion v. Gray, 478 So. 2d 17, 19-20 (Fla. 1985). The Petitioners urge this Court, however, to recede from the "impact rule" in interference with a corpse cases and to adopt § 868, Restatement (Second) of Torts (1979). While § 868 permits the recovery of emotional distress damages caused by the negligent handling of a dead body in the absence of physical consequences, § 868 is the minority view and this Court should decline to follow it.[1] Burgess v. Perdue, 721 P.2d 239, 245 (Kan. 1986) ("The present Restatement

[1]It must be noted that the Petitioners have misconstrued and taken the Reporter's Note on the Restatement (Second) of Torts, § 868, p. 76 (1982), out of context. The "recent" trend referred to in the Reporter's Note was that of allowing recovery for emotional distress when the alleged negligent interference with a dead body amounted to an **intentional** interference. In fact, **all** of the decisions cited in support of and following that particular Reporter's Note predate the 1979 amendment to the Restatement which broadened the scope of § 868 by including

position represents the minority view."); Chisum v. Behrens, 283 N.W.2d 235, 239 (S.D. 1979) ("The present Restatement represents the minority view which we are not inclined to follow.").

This Court has recognized that the common law may be changed only "where great social upheaval dictates." Hoffman v. Jones, 280 So. 2d 431, 435 (Fla. 1973).

> We are . . . of the opinion that we do have the power and authority to re-examine the position we have taken . . . and to alter the rule we have adopted previously in light of current 'social and economic customs' and modern 'conceptions of right and justice.'

280 So.2d at 436. While this Court has in the past modified the common law, it has done so only "with hesitation" and "in justified instances." Id., at 435. In fact, this Court has stated that its reluctance to change the common law "is as it should be." Id.

Petitioners fail to point out any societal or economic upheaval or valid reason which would justify a change in the current, long-standing law and the adoption of the minority rule.[2] Accordingly, this Court should refuse to change

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negligent and reckless conduct.

[2]Contrary to Petitioners' contention, recent Florida decisions have **not** exempted an action for negligent interference with a dead body from the "impact rule." The decisions cited by Petitioners, Williams v. City of Minneaola, 575 So. 2d 683 (Fla. 5th DCA), rev. den'd, 589 So. 2d 289 (Fla. 1991); Mallock v. Southern Memorial Park, Inc. , 561 So. 2d 330 (Fla. 3d DCA 1990); and Halpin v. Kraeer Funeral Homes, Inc., 547 So. 2d 973 (Fla. 4th DCA 1989), rev. den'd, 557 So. 2d 35 (Fla. 1990), all involved claims for outrageous and malicious acts by the defendant, which fall under the rule set forth in Kirksey, supra. Similarly, the plaintiffs were permitted to pursue actions for emotional distress stemming from the mishandling of a corpse in Smith v. Telophase National Cremation Society,

the law regarding the recovery of emotional distress damages in the negligent interference with a dead body setting. The current "social and economic customs" concerning the handling of dead bodies are the same customs in existence when Donahoo was decided. The surviving spouse or next of kin has always had the right to possession of the deceased person's body for the purpose of burial, sepulture or other lawful disposition. Donahoo v. Bess, 200 So. at 542. See Kirksey v. Jernigan, 45 So. 2d at 189.

Moreover, "conceptions of right and justice" have not changed with regard to recoverable damages once the right to possession of a dead body is abridged. Emotional distress resulting from the negligent interference with that right remains, in a majority of jurisdictions, "too remote and speculative" to warrant an award of damages absent physical impact or manifestation by physical injury. See William L. Prosser & W. Page Keeton, Torts, § 54, n. 27 at 36 (5th ed. 1984) (Florida's position "is said to be the majority rule."); see also Falzone v. Busch, 45 N.J. 559, 214 A.2d 12, 17 (1965) (fright without substantial bodily injury is "too lacking in seriousness and too speculative to warrant the imposition of liability."). In fact, the views expressed by Judge Reed in his dissenting opinion in Stewart v. Gilliam, 271 So. 2d 466, 477 (Fla. 4th DCA 1973), which were adopted by this Court in Gilliam v. Stewart, 291 So. 2d 593, 595 (Fla. 1974),

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Inc., 471 So. 2d 163 (Fla. 2d DCA 1985); Sherer v. Rubin Memorial Chapel, Ltd., 452 So. 2d 574 (Fla. 4th DCA 1984); Scheuer v. Wille, 385 So. 2d 1076 (Fla. 4th DCA 1980); and Jackson v. Rupp, 228 So. 2d 916 (Fla. 4th DCA 1969), approved, 238 So. 2d 86 (Fla. 1970), because the defendant's actions raised a jury question regarding their outrageousness.

continue to be the views of this Court when psychic or emotional injury is not the result of physical impact and is not accompanied by significant discernible physical injury.

> 'I take it that there is more underlying the impact doctrine than simply 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.'

Champion v. Gray, 478 So. 2d 17, 18 (1985) (*quoting* Stewart v. Gilliam, 271 So. 2d 466, 477 (Fla. 4th DCA 1973) (J. Reed, dissenting)).

Admittedly, the strict requirement of impact in negligence cases resulting in emotional distress, as originally set forth in International Ocean Telegraph Co. v. Saunders, 14 So. 148 (Fla. 1893), has gradually eroded over the past century. For example, this Court in Kirksey v. Jernigan , 45 So. 2d 188 (Fla. 1950), a case involving the mishandling of a dead body, refused to extend the "impact rule" to a case founded purely in tort where the wrongful act was such as to imply malice. Thirty-five years later, this Court in Champion v. Gray, 478 So. 2d 17 (Fla. 1985), stated that death or significant discernible physical injury was too great a price to pay to require direct physical contact before a negligence action seeking to recover damages for emotional distress could be maintained. As a result, the Court held:

> [A] claim exists for damages flowing from a significant discernible physical injury when such injury is caused by 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.

478 So. 2d at 20. The Champion court thus concluded that the personal representative stated a cause of action to recover damages for the death of a mother overcome with shock and grief at the sight and death of her daughter who had been struck by a car.

This Court in Champion nevertheless reaffirmed the rule that "[m]ental distress unaccompanied by such physical consequences . . . [is] still inadequate to support a claim," 478 So. 2d at 19 n. 1 (emphasis added), and reasoned as follows:

> 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 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. 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 unmeasurable psychic claims. (emphasis added)

478 So. 2d at 20.[3] See Brown v. Cadillac Motor Car Division, 468 So. 2d 903, 904 (Fla. 1985) (no cause of action for psychological trauma alone when resulting from simple negligence); Eagle-Picher Industries, Inc. v. Cox, 481 So. 2d 517, 526

[3]Florida's public policy thus does **not**, as Petitioners suggest, require a vehicle for the recovery of mental damages stemming from the negligent handling of a dead body in **all** cases.

(Fla. 3d DCA 1985) (damages recoverable for negligent infliction of emotional distress only if plaintiff suffered physical impact or complained-of mental distress resulted in physical injury).

Consequently, contrary to Petitioners' contention, the current state of the law in Florida does **not** deny emotional distress damages in all cases involving the negligent handling of a dead body where there is no physical impact. Claimants satisfying the criteria enunciated by this Court in Champion, including discernible physical injury resulting from the emotional distress, are entitled to recover damages for the negligent infliction of emotional distress. See Champion, supra; Eagle-Picher Industries, supra. In fact, the Second District in Crenshaw v. Sarasota County Public Hospital Board, 466 So. 2d 427 (Fla. 2d DCA 1985), recognized that if the mother of a stillborn child, whose body was mutilated after being inadvertently placed in the hospital's laundry, would have alleged the requirements of Champion, she would have been entitled to pursue an action for mental and emotional distress in the absence of physical impact upon her. See also Corrigal v. Ball and Dodd Funeral Home, Inc., 577 P.2d 580 (Wa. 1978) (mother of decedent whose remains were mishandled by funeral home stated cause of action for negligent infliction of emotional distress where she alleged resulting physical consequences); Vogelaar v. United States, 665 F. Supp. 1295 (E.D. Mich. 1987) (mother of serviceman killed in Vietnam stated cause of action for negligent infliction of emotional distress caused by government's negligent delivery of her

son's remains where she alleged mental and physical injury but no physical impact).

Adopting § 868 of the Restatement (Second) of Torts would effectively overrule both Donahoo and Champion in the negligent handling of a dead body context. Section 868 permits the recovery of damages for the negligent infliction of emotional distress in the absence of **either** physical impact or physical consequences. While this Court in Champion modified the impact requirement in a very limited factual context, this Court should **not** further recede from and essentially abrogate the impact doctrine by, in effect, nullifying the "manifested by physical injury" and other criteria set forth in Champion. To do so would heighten the risk of fraudulent claims. That danger has, until now, been mitigated by requiring that emotional distress manifest itself in some observable and significant physical injury in the absence of physical impact. See Champion v. Gray, 478 So. 2d at 20; Gilliam v. Stewart, 291 So. 2d 593, 602 (Fla. 1974) (Justice Adkins, dissenting).

Furthermore, if emotional distress damages arising from witnessing injury to one's living relative must meet the Champion test, there is no legitimate or reasonable justification for applying a less stringent standard to a claim for emotional distress arising from the mishandling of a loved one's corpse. Permitting a more lenient standard of recovery in dead body cases would implicitly ascribe greater emotional impact and significance to injury to a corpse than injury to a live human being. That is incomprehensible and unfounded

because a person observing injury to a living relative knows that that relative is suffering and enduring pain while the same cannot be said when a corpse is involved.

Conversely, if this Court recedes from Champion in negligent handling of dead body cases, Champion will be subject to attack in **all** other negligence cases. Astute plaintiff's attorneys will argue that emotional distress damages should be recoverable in cases involving injury to a live human being, absent physical impact or physical consequences to the claimant, because the claimant knows that the directly injured person suffered and endured pain, whereas a mishandled corpse does not. The flood gates will invariably be opened for litigation of claims for emotional distress damages in **all** negligence settings. Those gates will remain closed only if this Court refuses to adopt § 868 and continues to adhere to its holdings in Donahoo and Champion.

Finally, Petitioners' argument that the emotional distress produced by the negligent handling of a corpse is, somehow, more genuine than that produced by negligently injuring a live human being[4] should be rejected by this Court for the reasons discussed in the preceding paragraphs. As the court in Kimelman v. City of Colorado Springs, 775 P.2d 51 (Colo. App. 1988), stated when it rejected a similar argument and declined to adopt § 868:

> [W]e do not recognize that situation as being so unusual as to justify carving an exception to the zone-of-danger requirement. The same dilemma exists in setting

[4]See also William L. Prosser & W. Page Keeton, Tort § 54, p. 362, and cases cited therein.

> manageable limitations to recovery to bystanders at funerals as exists in other contexts where injury to a loved one is observed. (emphasis added)

775 P.2d at 52. The negligent handling of a corpse does not adequately assure the genuineness of the alleged resulting emotional distress. The only guarantee that the emotional distress is genuine, in the absence of physical impact or outrageous conduct, is the manifestation of physical injury as a result thereof. This Court should therefore decline to adopt § 868, Restatement (Second) of Torts.[5]

[5]Other courts which have either explicitly or implicitly refused to adopt § 868 include: Burgess v. Perdue, 721 P.2d 239 (Kan. 1986); Chisum v. Behrens, 283 N.W.2d 235 (S.D. 1979); Kearney v. City of Philadelphia, 616 A.2d 72 (Pa. Commw. Ct. 1992); Kimelman v. City of Colorado Springs, 775 P.2d 51 (Colo. App. 1988); Hackett v. United Airlines, 528 A.2d 971 (Pa. Super. 1987); Courtney v. St. Joseph Hospital, 500 N.E.2d 703 (Ill. App. 1 Dist. 1986); Sackett v. St. Mary's Church Society, 464 N.E.2d 956 (Mass. App. 1984).

CONCLUSION

Based on the foregoing, Amicus Curiae, RIVERO FUNERAL HOME, INC., respectfully submits that this Court should not adopt § 868, Restatement (Second) of Torts, and should not recede from the holding in either Donahoo v. Bess, 200 So. 541 (Fla. 1941), or Champion v. Gray, 478 So. 2d 17 (Fla. 1985).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Amicus Curiae Brief of Rivero Funeral Home, Inc. was served by mail this 9th day March, 1994 to: **Jesus F. Bujan, Esq.**, Fleitas & Bujan, P.A., Ocean Bank Building, 782 North Le Jeune Road, Suite 550, Miami, Florida 33126-5548 and **Ronald J. Bernstein, Esq.**, Metro Dade Center, 111 N.W. First Street, Miami, Florida 33128-1993.

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