32

047

THE SUPREME COURT OF FLORIDA

JESUS GONZALEZ and ZOILA GONZALEZ,

Petitioners,

vs.

METROPOLITAN DADE COUNTY PUBLIC HEALTH TRUST,

Respondent.
_____/

CASE NO. 82,838

DISTRICT COURT OF APPEAL
THIRD DISTRICT - NO. 92-1462

BRIEF OF RESPONDENT PUBLIC HEALTH TRUST

ROBERT A. GINSBURG
Dade County Attorney
Stephen P. Clark Center
Suite 2810
111 N.W. 1st Street
Miami, Florida 33128-1993
(305) 375-5151

By

Ronald J. Bernstein
Assistant County Attorney
Florida Bar #267694

James J. Allen
Assistant County Attorney
Florida Bar #317861

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS
(cont'd)

TABLE OF CITATIONS
(cont'd)

TABLE OF CITATIONS
(cont'd)

STATEMENT OF THE FACTS

The essential facts are not in dispute, and were well articulated by the Third District in its opinion affirming the circuit court's order granting final summary judgment in favor of the Trust and against Petitioners. (R. at 1046-1048, 1049-1057).

The newborn daughter of Jesus and Zoila Gonzalez [hereinafter referred to collectively as Petitioners] died at Jackson Memorial Hospital [hereinafter referred to as "Jackson" or the "Trust"] on November 7, 1988. In accordance with the parents' contract with Rivero Funeral Home, Inc. [hereinafter referred to as "Rivero"], funeral services and a burial were performed on November 9. Two months later, the Petitioners were notified that the child funeralized and buried in November was not their child. The body of their daughter was still in a refrigerated drawer at the Jackson morgue. After a second funeral and a proper burial of their daughter, the Petitioners commenced this action.

The Trust otherwise adopts Petitioners' statement of the facts.

STATEMENT OF THE CASE

The claim of Petitioners against the Trust is based on the Trust's alleged failure to deliver the body of their infant daughter to Rivero in a timely fashion. (R. at 31-44). Petitioners proceeded against the Trust and Rivero on theories of simple negligence, seeking compensatory and punitive damages for tortious interference with a dead body and compensatory damages for the infliction of emotional distress. (R. at 31-44).

Petitioners made no claim for physical injury, nor did they adduce any evidence of any impact or physical injury; they claimed damages solely for emotional distress, also known as psychic damages. (R. at 31-44).

Summary judgment was granted for the Trust on the grounds that there can be no recovery for mental pain and suffering or emotional distress, unconnected with physical injury, in an action for tortious interference with a dead body and/or the infliction of emotional distress, based upon simple negligence. (R. at 1046-1048).

In affirming, the Third District found that "a long line of cases, never overruled, have held that there can be no recovery for mental anguish, in an action based on negligent mishandling of a corpse, where the claimant has suffered no physical impact." Gonzalez v. Metropolitan Dade County Public Health Trust, 626 So.2d 1030, 1031 (Fla. 3d DCA 1993) [hereinafter Gonzalez]; (R. at 1052). The court also noted

that "[i]t is conceded that the plaintiffs suffered no physical impact and that the defendant's acts were not willful." Id.; (R. at 1050).

The opinion reflected that even if the acts of the Trust's employees had been sufficiently willful, wanton, and malicious to meet the test under Florida law for intentional interference with a dead body, section 768.28(9), Florida Statutes, immunizes the Trust for the very conduct Petitioners must allege and prove in order to state a cause of action against a non-governmental defendant. Id.; (R. at 1050). Petitioners do not contest this point on appeal.

The circuit court found that reasonable minds could only conclude that the facts do not rise to a level higher than simple negligence. The Third District noted that negligence was not disputed; again, Petitioners do not contest this point on the present appeal. Gonzalez at 1031; (R. at 1053).

While taking no position on whether the law should be changed, The Third District certified the following question:

> Whether Florida should adopt section 868 Restatement (Second) of Torts, receding from the holding in Donahue [Dunahool v. Bess, 146 Fla. 182, 200 So. 541 (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.

Id. at 1033; (R. at 1056).

The Trust otherwise adopts Petitioners' statement of the case.

SUMMARY OF ARGUMENT

This court should not accept Petitioners' invitation to jettison its unswerving reliance for fifty-four years on what is still the majority position in this country on the issue of when courts should permit causes of action for psychic harm in the absence of physical injury.

In Florida and in the greater number of states, liability for mental or emotional damages only, unconnected with physical impact or injury, requires the allegation and proof of conduct so culpable as to constitute willful, wanton, or malicious misconduct. Sound public policy reasons and the doctrine of stare decisis militate in favor of retaining the outrage test in psychic harm cases. The wisdom of the current test is that it focuses on conduct - not the presence or absence of a corpse - as a sufficient marker of real damages, not imagined ones.

No compelling or changed circumstances merit revisiting a doctrine so well reasoned and so firmly established in the law of our state. The Restatement (Second) position goes too far in eviscerating the impact rule, invites fraudulent claims concerning remote and highly speculative damages, and awards a priority position to claims involving dead bodies over those claims without them, where recovery would still be denied.

In their argument to both the trial court and the Third District, Petitioners wrongly contended that current Florida law allows recovery for psychic damages without physical impact or injury. That argument, correctly rejected by the

Third District, was founded on a total misreading of Eagle-Picher Indus. v. Cox, 481 So.2d 517 (Fla. 3d DCA 1985). rev. denied, 492 So. 2d 1331 (Fla. 1986). Petitioners have now repeated that argument, and coupled it with an equally wrong-headed attempt to convince this court to abandon its long-standing adherence to current law disclaiming that test in favor of one of outrage. (R. at 31-44, 891-917.)

Petitioners' second point on appeal is that material issues of fact as to whether the Trust was negligent should have precluded entry of summary judgment. This argument is completely unnecessary, because the lower court found and the Trust concedes that there were sufficient facts from which a jury could find both defendants acted negligently. (R. at 963, 1047.) However, the lower court found the conduct complained of "clearly does not approach any willful, intentional conduct; it does not approach any gross misconduct on the part of either agencies or their employees or servants." (R. at 963, 1046, 1048.) The Petitioners did not contend on appeal below that the record contained a material issue as to whether the Trust's conduct met the outrage test, nor do they so argue here. Even if the facts in the light most favorable to Petitioners satisfied the outrage test, the Third District recognized the Trust would be immune from suit. Section 768.28(9); Gonzalez at 1031, n.1; (R. at 1050). Their second point on appeal is therefore a complete non-issue.

In light of the validity of Florida's consistent and fair limitations on the recovery of purely emotional damages, the

Trust respectfully requests this court to continue to adhere to Dunahoo v. Bess, 146 Fla. 182, 200 So. 541 (1941), and require both allegation and proof of either physical impact or conduct that is extreme and outrageous before permitting recovery in the speculative area of psychic harm cases.

ARGUMENT

FLORIDA SHOULD ADHERE TO THIS COURT'S HOLDING IN DUNAHOO V. BESS, 146 FLA 182, 200 SO. 541 (1941), THAT THE LAW OF FLORIDA WILL NOT SUSTAIN AN ACTION FOR MENTAL ANGUISH, IN THE ABSENCE OF PHYSICAL INJURY, WITHOUT PLEADING AND PROOF OF CONDUCT THAT IS EXTREME AND OUTRAGEOUS, SO AS TO IMPLY MALICE AND JUSTIFY THE IMPOSITION OF PUNITIVE DAMAGES.

This cause is before this Court on petition pursuant to Fla. R. App. P. 9.030(a)(2)(A)(v).[1/] That certified question asks this Court to cast aside decades of consistent and fair

---

1/ The Third District certified the following question:

> Whether Florida should adopt section 868 Restatement (Second) of Torts, receding from the holding in Donahue [Dunahoo] v. Bess, 146 Fla. 182, 200 So. 541 (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.

Gonzalez at 1033; (R. at ___). To more completely address both of Petitioners' theories, viz., tortious interference with a dead body, and negligent infliction of emotional distress, the Trust respectfully suggests that the question be rephrased as follows:

> Whether Florida should adhere to this Court's holding in Dunahoo v. Bess, 146 Fla. 182, 200 So. 541 (1941), that an claim for mental anguish, in the absence of physical impact or injury, must allege and prove conduct that is extreme and outrageous, so as to imply malice and justify the imposition of punitive damages.

common law.[2/] This Court does not treat lightly its obligation to adhere to precedent and the doctrine of stare decisis. It has held that only "when grave doubt exists of a true common law doctrine . . . we may . . . exercise a 'broad discretion' taking 'into account the changes in our social and economic customs and present day conceptions of right and justice.'" Duval v. Thomas, 114 So. 2d 791, 795 (Fla. 1959)(emphasis supplied). More recently, in Hoffman v. Jones, 280 So. 2d 431, 435 (Fla. 1973), this court recognized that a change in the common law may be justified "where great social upheaval dictates." This cautious approach reflects Cardozo's recognition that no judicial system could do society's work if it eyed each issue afresh in every case that raised it. B. Cardozo, The Nature of the Judicial Process 149 (1921). The United States Supreme Court has framed the question similarly:

> [W]e may ask whether the rule has proved to be intolerable simply in defying practical workability; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or whether facts have so changed or come to be seen so differently, as to

---

2/ Inasmuch as certification vests this Court with discretionary, not mandatory, jurisdiction, the Trust respectfully suggests that in light of the argument infra, this Court decline to exercise its jurisdiction. Because the arguments against exercising jurisdiction are identical to the Trust's arguments on the merits of the question, they are not repeated.

> have robbed the old rule of significant application or justification.

Planned Parenthood v. Casey, 112 S.Ct. 2791 (1992) (citations omitted).

Florida has a remarkably consistent and fair common law with respect to causes of action involving dead bodies. The Third District Court of Appeal thoroughly presented the history of this state's longtime reliance on the impact rule and concurrent test of outrage for recovery of emotional or psychic damages, in the absence of physical injury. Gonzalez at 1031; (R. at 1049-1057). Much of the following discussion is based on their recounting of the judicial history of this issue.

Beginning with Dunahoo v. Bess, 146 Fla. 182, 200 So. 541 (1941), this court held that under Florida law, a surviving spouse has a property right in the remains of the deceased spouse. However, the court refused to award damages for mental anguish caused by a negligent interference with that right, reasoning that such damages were too remote and speculative. Id. at 543.

Dunahoo was followed by Kirksey v. Jernigan, 45 So. 2d 188 (Fla. 1950), wherein this court reaffirmed the rule that damages are not recoverable for emotional distress, unconnected with physical injury, where the distress was caused by a negligent interference with a dead body. Id. at

189. Such damages are only recoverable, on a tort theory, where "the wrongful act is such as to reasonably imply malice, or where, from the entire want of care of attention to duty, or great indifference to the persons, property, or rights of others, such malice will be imputed as would justify the assessment of exemplary or punitive damages." Id.

The Third District proceeded to delineate Florida's consistent history in addressing this issue:

> Thereafter, a long line of Florida cases, never overruled, have held that there can be no recovery for mental anguish, in an action based on negligent mishandling of a corpse, where the claimant has suffered no physical impact. E.g., Baker v. Florida Nat'l Bank, 559 So. 2d 284 (Fla. 4th DCA), rev. denied 570 So. 2d 1303 (Fla. 1990); Kirker v. Orange County, 519 So. 2d 682 (Fla. 5th DCA 1988); Ingaglio v. Kraeer Funeral Home, Inc., 515 So. 2d 428 (Fla. 4th DCA 1987); Smith v. Telophase Nat'l Cremation Soc'y, Inc., 471 So. 2d 163 (Fla. 2d DCA 1985); Ponton v. Scarfone, 468 So. 2d 1009 (Fla. 2d DCA), rev. denied 478 So. 2d 54 (Fla. 1985); Sherer v. Rubin Mem. Chapel, Ltd., 452 So. 2d 574 (Fla. 4th DCA 1984); Scheuer v. Wille, 385 So. 2d 1076 (Fla. 4th DCA 1980); Trueba v. Pershing Indus., Inc., 374 So. 2d 47 (Fla. 3d DCA 1979); Estate of Harper v. Orlando Funeral Home, Inc., 366 So. 2d 126 (Fla. 1st DCA 1979); Brooks v. South Broward Hosp. Dist., 325 So. 2d 479 (Fla. 4th DCA 1975), cert. denied, 341 So. 2d 290 (Fla. 1976); Jackson v. Rupp, 228 So. 2d 916 (Fla. 4th DCA 1969), approved, 238 So. 2d 86 (Fla. 1970).

Gonzalez at 1031; (R. at 1052).

This common law is perfectly consistent with Florida's law on recovery for emotional distress generally. That law starts with the impact rule, which simply states that a

plaintiff must suffer a physical impact before recovering for emotional distress caused by the negligence of another. Gilliam v. Stewart, 291 So. 2d 593 (Fla. 1974).

There are exceptions to the impact rule, such as where someone negligently injures another, plaintiff's involvement in the event and relationship to the injured party make the injury foreseeable, and plaintiff suffers a significant, discernible, physical injury caused by the psychic trauma. Champion v. Gray, 478 So. 2d 17 (Fla. 1985). In Champion, this court expressly emphasized "the requirement that a causally connected clearly discernible physical impairment must accompany or occur within a short time of the psychic injury." Id. at 18-19. The court reiterated in an accompanying footnote, "Mental distress 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." Id. at 19, n. 1; see also Id. at 20, n. 4 ("We reiterate that a claim for psychic trauma unaccompanied by discernible bodily injury, when caused by injuries to another and not otherwise specifically provided for by statute, remains nonexistent.") and Id. at 22 ("In this case we have emphasized that a psychically traumatized person must manifest a discernible physical injury . . . . A separate and distinct physical injury is required. We have specifically rejected purely emotional distress claims.").

In Champion, plaintiffs urged and this court rejected a mere foreseeability test for psychic damages, such as that announced in Dillon v. Legg, 441 P.2d 912 (Cal. 1968). This court recognized that such a test "might lead to claims that we are unwilling to embrace in emotional trauma cases." Champion at 20. The court stated 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." (emphasis supplied). Id. The court therefore concluded that although it was willing to modify the impact rule, it was "unwilling to expand it to purely subjective and speculative damages for psychic trauma alone." Id. As justification, the court acknowledged that the "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." Id. This modification to the impact rule allowed plaintiff to state a cause of action in a case where a mother heard a car crash, came immediately to the scene and died from shock at seeing her daughter, who had been killed in the crash. Because of the acknowledged absence of physical injury in this case, as well as the dissimilarity of facts, the Champion rule does not apply herein, nor do Petitioners argue it should.

Another exception to the impact rule - not the impact rule itself, as Petitioners argue - is where a plaintiff claims damages solely for emotional distress due to the

intentional infliction of emotional distress or because of tortious interference with a dead body. Kirksey v. Jernigan 45 So. 2d 188 (Fla. 1950). However, since there is no impact to serve as an index of reliability that the claim is not specious or fraudulent, a higher standard of proof than simple negligence is and has always been required in Florida. In these instances, the burden of proof is well established, even in the cases cited by Petitioners in their disavowal of the proper test: it is a test of outrage, not of simple negligence.

Specifically, "[u]nder Florida law, damages for pain, suffering and mental anguish cannot be recovered absent some impact or physical injury unless willful, wanton or malicious behavior is shown". Kirksey v. Jernigan, 45 So. 2d 188 (Fla. 1950); Ingaglio v. Kraeer Funeral Home, 515 So. 2d 428-429 (4th DCA 1987). In order to state a cause of action for the tort of tortious interference with a dead body, plaintiffs must allege facts which, if established, could justify a recovery of punitive damages. Kirksey. Florida law does not recognize an action strictly for emotional distress based on simple negligence. Kirksey v. Jernigan, 45 So. 2d 188 (Fla. 1950); Kirker v. Orange County, 519 So. 2d 682 (5th DCA 1988). Similarly, in order to assert an action for the intentional infliction of emotional distress in Florida, the court must objectively determine, as a matter of law, whether the behavior complained of its "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds

of decency", and whether it is "atrocious and utterly intolerant in a civilized community." Ponton v. Scarfone, 468 So. 2d 1009 (Fla. 2d DCA 1985), citing Metropolitan Life Insurance Co. v. McCarson, 467 So. 2d 277 (Fla. 1985). This tort, often identified as the tort of outrage, requires evidence of conduct which is at the very least, malicious. Metropolitan Life.

The Third District Court of Appeal and other district courts statewide have adhered to this standard ever since. See Kirker v. Orange County, 519 So. 2d 682, 683 (Fla. 5th DCA 1988) ("It has long been the law in this state that as a general rule, there can be no recovery for mental pain and anguish (emotional distress) unconnected with physical injury, where the action is based on simple negligence."); Przybyszewski v. Metropolitan Dade County, 363 So. 2d 389 (Fla. 3rd DCA 1978), cert. denied, 373 So. 2d 460 (1979); Brooks v. South Broward Hospital, 325 So. 2d 479 (4th DCA 1975). Rather, recovery for emotional distress unconnected with impact would only be permitted under limited circumstances:

> Where the wrongful act is such as to reasonably imply malice, or where, from the entire wont of care and attention to duty, or great indifference to the persons, property, right of others, such malice will be imputed as would justify the assessment of exemplary or punitive damages. The right to recover, in such cases, is especially appropriate to tortious interference with rights involving dead bodies. . . .

Kirker at 683 (citations omitted).

The flawed premise upon which Petitioners' case impermissibly rests is that one can prosecute a claim for emotional distress only based upon simple negligence. The long-standing law in the state of Florida, followed by the lower court in its order granting summary judgment herein, and affirmed at the district court level, is directly to the contrary.

Petitioners have consistently misstated the "impact rule" and its application to the present facts to mistakenly imply that Florida recognizes a tort for negligent infliction of emotional distress or negligently provoked emotional damages in conjunction with dead bodies. Petitioners argue that "recent Florida case law demonstrates that cases involving the tortious interference with a dead body are excluded said [sic] the impact rule," citing Williams v. City of Minneola, 575 So. 2d 683 (Fla. 5th DCA 1991), rev. denied, 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. denied 557 So. 2d 35 (Fla. 1990). (Pet'rs' Initial Br. at 11.) It is true that all these cases, involving dead bodies, are exceptions to the impact rule. But Petitioners miss the mark in arguing that by being outside the umbrella of the impact rule, merely negligent conduct suffices. As the Third District noted in its opinion in the instant case,

> [Halpin, Williams, and Mallock] are easily distinguishable from the instant case because they involve claims for outrageous

> and malicious acts by the defendant. As such, those cases fall under the rule set forth by Kirksey v. Jernigan which excludes the impact requirement where malicious conduct is shown.

Gonzalez at 1032; (R. at 1053).

Petitioners also wrongly state that "Florida courts have recognized [the torts of tortious negligent interference with a dead body, and negligent infliction of emotional distress] where negligence is the underlying conduct." (Pet'rs' Initial Br. at 10.) In a 37-page brief,[3/] Petitioners cite no cases in support of such an incorrect statement, and can only feebly imply that but one case supports them: Eagle-Pitcher Industries v. Cox, 481 So. 2d 517 (Fla. 3rd DCA 1985), rev. denied, 492 So.2d 1331 (Fla. 1986). In so doing, petitioners misstate the holding in that case by 180 degrees. In Eagle-Pitcher, the plaintiff, a victim of asbestosis, sued the defendant asbestos company for mental distress concerning his fear of getting cancer as a consequence of asbestosis. Applying the impact rule, the court ruled that plaintiff's inhalation of fumes from defendant's asbestos constituted an

---

3/ Less than eight pages are devoted to the certified question before the court. More than double that space is devoted to an argument which is completely unnecessary: whether a material issue of fact exists as to whether the Trust was negligent. Not only did the Trust concede as much in the trial court, but the Third District so held. Gonzalez at 1031; (R. at 1051). Conversely, Petitioners tacitly concede by their silence in both the Third District and here that the Trust's conduct did not rise to the level of outrage necessary to sustain a cause of action under Florida law. Because Petitioners' second argument is such a non-issue, the Trust devotes no further argument to it.

impact. "The essence of impact, then, it seems, is that the outside force or substance, no matter how large or small, visible or invisible, and no matter that the effects are not immediately deleterious, touch or enter into the plaintiff's body." Id. at 527 (footnote omitted). Accordingly, a cause of action could be brought based on simple negligence. Thus, rather than signifying a rejection of the standard followed in all the decisions in this state dealing with exceptions to the impact rule and a malice standard since Kirksey in 1950, Eagle-Pitcher is merely an application of the impact rule.

Just as Petitioners' Initial Brief is bereft of any authority in Florida for their proposition that a negligence test exists for the emotional damages they seek, it is also devoid of any sound policy reasons for this court to discard over fifty years of reliance on what is still the majority rule in this country.

This case satisfies none of the criteria for departing from existing law, as set forth by this court and the United States Supreme Court. There has been no significant change in our social and economic customs, Duval v. Thomas, 114 So. 2d 791 (Fla. 1959), nor has there been any great social upheaval, Hoffman v. Jones, 280 So.2d 431 (Fla. 1973). The present rule has not proved to be intolerable in workability, and facts have not so changed or come to be seen so differently as to have robbed the current rule of significant application. Planned Parenthood v. Casey, 112 S.Ct. 2791 (1992). Certainly

related principles of law have not so far developed as to leave the current rule an antique remnant. Id.

Indeed, as the Third District noted in finding the current rule "consistent with Florida law concerning damages for mental anguish in general," Gonzalez at 1033; (R. at 1055), this court less than ten years ago in Champion reaffirmed many of the fundamental principles upon which the current law is based. This court there recognized and repeatedly emphasized that recovery should not be had for "purely subjective and speculative" mental distress unaccompanied by physical consequences. Id. at 20.

Other jurisdictions as well continue to adhere to the long-established rule of law followed by Florida. As the Third District noted,

> Florida's position regarding damages for mental anguish resulting from negligent interference with a corpse is consistent with the view of the majority of states. Burgess v. Perdue, 239 Kan. 473, 721 P.2d 239 (1986)("The present Restatement position represents the minority view."); William L. Prosser & W. Page Keeton, Torts section 54, n.27 at 362 (5th ed. 1984)(Florida's position "is said to be the majority rule."); John D. Hodson, Annotation, Civil Liability of Undertaker in Connection with Transportation, Burial, or Safeguarding of Body, 53 A.L.R.4th 360 (1987); Robert A. Brazener, Annotation, Liability for Withholding Corpse from Relatives, 48 A.L.R.3rd 240 (1972).

Gonzalez at 1033; (R. at 1055). Some have expressly rejected adoption of the Restatement (Second) of Torts Section 868. In Kimelman v. City of Colorado Springs, 775 P.2d 51 (Col Ct. App. 1989), for example, the court declined to adopt the

Restatement (Second), because it could not distinguish a claim arising out of the handling of a dead body as being so unusual to justify carving out an exception to Colorado's general law on psychic damages. The court rejected the argument, also made by Petitioners herein, that the emotional distress resulting from a mishandled funeral is uniquely foreseeable. In Burgess v. Perdue, 721 P.2d 239, 245 (Kan. 1986), the Kansas Supreme Court also rejected the Restatement (Second), choosing instead to continue adherence to "the majority rule . . . that, for an individual to be liable for emotional distress for interfering with a dead body, the act must be intentional or malicious, as opposed to negligent . . . " In Sackett v. St. Mary's Church Soc., 464 N.E.2d 956, 958 (Mass. App. Ct. 1984), the court considered and rejected the Restatement (Second), noting that "[t]he courts recognizing the more limited bases of recovery reflect the present state of development of general Massachusetts tort law . . . ." Finally, in Chisum v. Behrens, 283 N.W.2d 235 (S.D. 1979), the court concluded that the "present Restatement represents the minority view which we are not inclined to follow."

Many other states have continued to adhere to the same traditional limitations on recovery without expressly addressing the Second Restatement.[4/] See, e.g., Fuller v.

4/ In contrast, only three states have expressly adopted the Restatement (Second) Section 868, (Tomasits v. Cochise Memory Gardens, Inc., 721 P.2d 1166, (Ariz. Ct. App. 1986); Brown v.
(Footnote Continued)

Max, 724 F.2d 717 (8th Cir. 1984) (applying Arkansas law); D.C. v. Smith, 436 F.2d 1294 (D.C. App. 1981); Westview Cemetery v. Blanchard, 216 S.E.2d 776 (Ga. 1975); Leonard v. Kurtz, 600 N.E.2d 896 (Ill. App. Ct. 1992); Naughgle v. Feeney-Hornak Shadeland Mortuary, Inc., 498 N.E.2d 1298 (Ind. Ct. App. 1986); Fergerson v. Utilities Elkhorn Coal Co., 313 S.W.2d 395 (Ky. Ct. App. 1958); Daniels v. Adkins Protective Service, Inc., 247 So. 2d 710 (Miss. 1971); Nichols v. Busseu, 503 N.W.2d 173 (Neb. 1993); Barela v. Frank A. Hubbell Co., 355 P.2d 133 (N.M. 1960); Brownlee v. Pratt, 68 N.E. 2d 798 (Ohio Ct. App. 1946); Dean v. Chapman, 556 P.2d 257 (Okl. 1976); Johnson v. Women's Hospital, 527 S.W.2d 133 (Tenn. Ct. App. 1975).

This Court also recognized in Champion that although some other jurisdictions may apply a more expansive version of the impact rule, that version may carry with it additional or different limitations. Id. at 19, n. 3. It is therefore important in determining the state of the law elsewhere to

---

(Footnote Continued)
Matthews Mortuary, Inc., 801 P.2d 37 (Id. 1990); Dennis v. Robbins Funeral Home, 411 N.W.2d 156 (Mich. 1987)). Thus, although the reporter's note to the Restatement (Second) recent cases have allowed recovery for negligence resulting in the type of interference with the body that justifies liability for intentional interference", a vast majority of those "more recent" cases predate 1950 and the Restatement (Second). (The most recent case cited therein, Corso v. Crawford Dog & Cat Hosp., 97 Misc.2d 530 (N.Y. City Ct. 1979), allowed recovery for a casket purporting to hold the body of plaintiff's deceased dog, but in fact holding a dead cat, perhaps demonstrating far more eloquently than any argument the spurious claims that would materialize were the law to be changed.)

understand fully its context. For example, the Dillon rule in California--far more expansive than Florida's--has already been discussed supra at 12. It should come as no surprise that a state with such a liberal general rule on recovery for mental damages alone should also have a liberal rule in the specific context of dealings with dead bodies. See Allen v. Jones, 104 Cal. App. 3d 207 (Cal Ct. App. 1980); see also Hinish v. Meier & Frank Co., 113 P.2d 438 (Or. 1941) (can recover damages generally for mental anguish without physical injury).

Similarly, of those states that have allowed a negligence cause of action without physical injury, some impose other restrictions. See, e.g., Muchow v. Lindblad, 435 N.W.2d 918 (N.D. 1989) (noting that those states which have no bodily harm requirement for negligent infliction of emotional distress still require "severe" or "serious" mental distress).

Thus, the history of this doctrine, both in Florida and elsewhere, sound public policy considerations and deference to stare decisis dictate that this court reject Petitioners' invitation to discard over fifty years of reliance on what is still the majority rule in this country.

The Restatement of Torts (Second), section 868, cited by petitioners for the proposition that simple negligence can serve as the proper test for the recovery of emotional damages, absent impact, is not and has never been the law in Florida. In reviewing the case law in this state, the Third

District did not find one case in which that standard has been either "implicitly or explicitly adopted". (R. at 1053-1055).

Nothing has changed which mandates revisiting this sound rule. This state's reliance on the impact rule has been resoundingly supported by the progeny of Dunahoo and Kirksey. No conflict exists in the district courts of this state. The Third district followed the outrage test in Przybyszewski v. Dade County 363 So. 2d 388 (Fla. 3rd DCA 1978) and in the instant case. No other district court has seen fit to certify a similar question, and even in the present case only one member of the panel expressly recommended adoption of the Restatement. Gonzalez at 1033 (Cope, J. concurring); (R. at 1057). Adherence to the outrage test was reaffirmed as recently as 1993 in Williams v. City of Minneola 619 So. 2d 983 (Fla. 5th DCA 1993), wherein the court, on remand, reversed its prior holding in Williams v. City of Minneola 575 So. 2d 683 (Fla. 5th DCA), rev. denied, 589 So. 2d 289 (Fla. 1991), reiterated the outrage test, and held a municipality immune from the torts alleged herein, based on section 768.28(9), Florida Statutes. The only conclusion one can reach from the judicial record in this state on this issue since 1940 is that there has been neither reluctance by the district courts to apply the rule nor clamor for its change or dispatch.

A strong policy reason in favor of keeping the current outrage test for emotional damages in the absence of physical injury is that, as the Third District noted, "it is consistent

with Florida law concerning damages for mental anguish in general [citing Champion and Eagle-Picher Indus.]." Gonzalez at 1033; (R.at 1055). To recede from an outrage test involving dead bodies invites similar backtracking from the requirement of outrage in other psychic injury claims, undermining the impact rule and inviting lawsuits for any imagined slight, with no indices of reliability to protect the courts - and prospective defendants - from frivolous and fraudulent claims.

Any change to Florida law regarding dead bodies necessarily invites inquiry into permitting recovery for the negligent infliction of emotional distress in Florida, where the law does not currently permit such recovery. This court can be guided by the strength of its logic in Champion: "We are willing to modify the impact rule, but are unwilling to expand it to purely subjective and speculative damages for psychic trauma alone". Id. at 20. Changes in the law with respect to dead bodies would be inconsistent with that logic.

Adoption of the Restatement (Second) position would create an ill advised bias in favor of emotional harm predicated on acts to a corpse over negligent acts perpetrated on live people. For example, recovery is not and would not be permitted under Florida law if one suffered psychic damages while witnessing the death of a loved one. However, if the Restatement (Second) view is adopted, recovery for psychic damages for negligence concerning the corpse of that same person would be recoverable. With all due respect to the

recognized rights one may have in a corpse of a relative, this bias would unwisely favor the dead over the living.

As between the three major current standards nationwide, Florida takes both the most cogent and best balanced position. In permitting recovery only where there is impact or the facts support the outrage test, it rejects the opposite extreme tests of requiring an impact or allowing recovery based on a test of simple negligence.

Courts of this state have long recognized that psychic damage claims are easily manipulated and difficult to quantify, an area ripe for abuse. Variously extreme alternative tests, such as the simple negligence standard urged by petitioners, have been consistently rejected by Florida in favor of a better reasoned and more widely employed test, one with far less potential for abuse. There is no reason to discard settled law without a compelling justification to do so, and no new factors to consider now that have not already been considered and rejected by this court.

CONCLUSION

For all of the reasons stated above, the Trust respectfully requests that this court decline to accept jurisdiction of this certified question and let the affirmance of the Third District Court of appeal stand. Alternatively, The Trust moves this court to AFFIRM the judgment below.

Respectfully submitted,

ROBERT A. GINSBURG
Dade County Attorney
Stephen P. Clark Center
Suite 2810
111 N.W. 1st Street
Miami, Florida 33128-1993
(305) 375-5151

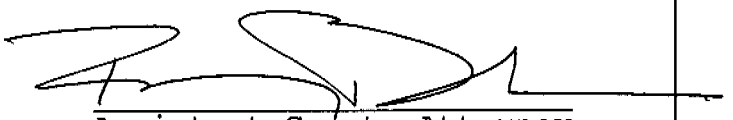
By: _____
Ronald J. Bernstein
Assistant County Attorney
Florida Bar #267694

and

_____
James J. Allen
Assistant County Attorney
Florida Bar #317861

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was this 9th day of March, 1994, mailed to: Jesus F. Bujan, Esquire, Fleites & Bujan, 782 N.W. Le Jeune Road, Miami, Florida; Manuel Morales, Esquire, 19 West Flagler Street, #711, Miami, Florida 33130; and Esther Galicia, George, Hartz and Lundeen, 4800 Le Jeune Boulevard, Coral Gables, Florida 33146.



Assistant County Attorney