IN THE SUPREME COURT OF FLORIDA

SAMUEL ZELL, Trustee under Trust Agreement dated April 3, 1972, and known as Trust Number 853, not individually, but solely as Trustee; and FIRST PROPERTY MANAGEMENT CORP., an Illinois corporation,

Petitioners,

v. CASE NO.: 83,806

GAYLYNN SUE MEEK and BARRY M. MEEK,

Respondents.
_____/

INITIAL BRIEF OF *AMICUS CURIAE* FLORIDA DEFENSE LAWYERS ASSOCIATION

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PRELIMINARY STATEMENT

In this brief, the parties will generally be referred to by name in order to be consistent with the petitioners' Initial Brief. The *amicus curiae*, the Florida Defense Lawyers Association, will be referred to as "FDLA" and is appearing to support the position of the defendants in the trial court and petitioners in this court.

FDLA's Initial Brief will be addressed solely to the issue of whether or not Meek failed to demonstrate a significant discernible physical injury occurring within a short time of the psychic injury, thereby meeting the requirements of *Champion v. Gray*, 478 So.2d 17 (Fla. 1985). That was the issue certified by the First District Court of Appeal as being a question of great public importance.[1]

STATEMENT OF THE CASE

FDLA adopts and relies upon the petitioners' statement of the case.

STATEMENT OF THE FACTS

FDLA likewise adopts and relies upon the petitioners' statement of the facts.

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[1]The actual question certified was: "Is the interval of time between a psychic trauma and the manifestation of physical trauma merely one issue for the trier of fact's consideration in deciding whether the cause of action recognized in *Champion v. Gray* has been established; or is there some arbitrary period after which the manifestation of physical impairment will be conclusively presumed not to have been caused by the psychic trauma?"

SUMMARY OF THE ARGUMENT

This court held in *Champion v. Gray*, that in order to state a cause of action for negligent infliction of emotional distress, the psychic trauma must be accompanied by significant discernible physical injuries. Accompany means that the significant discernible physical injuries must occur simultaneously with the psychic trauma.

The phrase that the First District hung its hat on "or within a short time" must be read in conjunction with the word accompany. If so read, logic dictates that physical injuries, even if they could be described as significant discernible physical injuries, that occur nine months after the psychic trauma is not occurring within a short time of the psychic injury.

Even assuming *arguendo* that Meek's significant discernible injuries occurred within a short time of the psychic injury, the psychic injury alleged by Meek does not rise to the level of severe and debilitating mental distress that would allow her recovery. What Meek suffered as mental distress does not go beyond what a disinterested witness would suffer upon seeing Meek's father immediately after a bomb explosion had killed him. What Meek suffered would be normal under the circumstances.

Additionally, First Property's alleged negligence was not the cause-in-fact of Meek's alleged injuries. The person who placed the bomb was the cause-in-fact of Meek's injuries and that person is the one liable for negligent infliction of emotional distress if a cause of action in fact were alleged, which one was not.

ARGUMENT

POINT ON APPEAL

MEEK FAILED TO DEMONSTRATE A SIGNIFICANT DISCERNIBLE PHYSICAL INJURY OCCURRING WITHIN A SHORT TIME OF THE PSYCHIC INJURY, AND HENCE CANNOT MEET THE REQUIREMENTS OF *CHAMPION V. GRAY*

(Petitioners' Point II)

A. Background of the Tort of Negligent Infliction of Emotional Distress.

The tort of negligent infliction of emotional distress apparently has a long and winding history in every state. Many scholarly articles have attempted to collect and analyze state and national trends.[2] Many states apply one of three prerequisite "tests" to claims for negligent infliction of emotional distress, or one of several variance on those basic tests.

Some states require that the act causing the emotional distress be accompanied by some physical impact to the plaintiff as a prerequisite to a valid claim for negligent infliction of

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[2]*See, e.g.*, Comment, *Negligent Infliction of Mental Distress: A Jurisdictional Survey of Existing Limitation Devices and Proposal Based on an Analysis of Objective Versus Subjective Indices of Distress*, 33 Vill.L.Rev. 781 (1988); *Prosser and Keeton on the Law of Torts* § 54 (5th ed. 1984); Byrd, *Recovery For Mental Anguish In North Carolina*, 58 N.C.L.Rev. 435 (1980); Annot. "Relationship Between Victim And Plaintiff-Witness As Affecting Right To Recover Damages In Negligence For Shock Or Mental Anguish At Witnessing Victim's Injury Or Death," 94 A.L.R.3d 486 (1979); Annot. "Right To Recover Damages In Negligence For Fear Of Injury To Another, Or Shock Or Mental Anguish At Witnessing Such Injury," 29 A.L.R.3d 1337 (1970); Annot. "Right to recover for emotional disturbance or its physical consequences, in the absence of impact or other actionable wrong," 64 A.L.R.2d 100 (1959). *See also* Restatement (Second) of Torts §§ 313, 436-36A (1965), and cases collected therein. *Pearson, Liability to Bystanders for Negligently Inflicted Emotional Harm - A Comment on the Nature of Arbitrary Rules*, 34 U.Fla.L.Rev. 477 (1982).

emotional distress. That is referred to as having a "physical impact" requirement. *See, e.g.*, Comment, *Negligent Infliction of Mental Distress: A Jurisdictional Survey of Existing Limitation Devices And Proposal Based on An Analysis of Objective Versus Subjective Indices of Distress*, 33 Vill.L.Rev. 781, 782-94 (1988).

Other states have abandoned the physical impact requirement, adopting instead a requirement that the plaintiff must have been placed in imminent danger of physical harm by the defendant's action and must have suffered a subsequent physical manifestation of the emotional distress. The requirements required by those states are known as the "zone of danger" and "physical manifestation" requirements. A defendant's liability pursuant to that test does not extend to those individuals who are foreseeably psychologically affected, but rather is limited to those who are placed in imminent apprehension of physical harm at the time of the act.

Some states allow plaintiffs within the "zone of danger" to recover, even though his or her emotional distress was caused by a concern for the safety of another person, instead of by concern for personal safety. *See id.* at 799. Other states retain the "zone of danger" requirement, but do not require any physical manifestation of the emotional distress. *See id.* at 796-98, 798 n. 92, 802 n. 119.

Several other states have abandoned the "zone of danger" requirement, adopting various versions of what is often called a "*Dillon* test" or a "foreseeable plaintiff" test. This court in

Champion v. Gray, 478 So.2d 17 (Fla. 1985), declared that the pure foreseeability test could lead to claims that this court was unwilling to embrace in emotional trauma cases. *Champion's* adopted test will be set forth more specifically under subsection B.

The "*Dillon* test" places various emphasis on three main factors: (1) the proximity of the plaintiff to the physical site of the alleged negligent act; (2) whether the plaintiff's emotional distress was caused by observing the negligent act, as opposed to distress caused by learning of the act via some intermediary; and (3) the relationship between the plaintiff and the victim. *Dillon v. Legg*, 68 Cal.2d 728, 740-41, 441 P.2d 912, 920, 69 Cal.Rptr. 72, 80 (1968).[3]

Historically, emotional distress has been recognized as a constituent element of damages only recoverable along with other damages in tort actions for assault, battery, false imprisonment, malicious prosecution, seduction, and wrongful death. The existence of an independent and legally protectable interest in emotional tranquility or legally enforceable duty not to interfere with that interest, however, has not been historically recognized. Annot., 38 A.L.R. 4th 1998 (1985); Prosser, *Intentional Infliction of Mental Suffering, a New Tort*, 37 Mich.L.Rev. (1939).

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[3]The factors announced in *Dillon*, as well as the mechanistic application of those factors, have been extensively and soundly criticized. *See, e.g.*, Bell, *The Bell Tolls: Toward Full Tort Recovery For Psychic Injury*, 36 U.Fla.L.Rev. 333, 338-39 (1984); Diamond, *Dillon v. Legg Revisited: Toward a Unified Theory of Compensating Bystanders and Relatives for Intangible Injuries*, 35 Hastings L.J. 477, 483-96 (1984); Comment, *Duty, Foreseeability, and the negligent Infliction of Emotional Distress*, 33 Me.L.Rev. 303, 316 (1981).

B. Significant Discernible Physical Injury.

A majority of jurisdictions follows the Restatement Second Torts § 436A (1965)[4] and requires bodily harm to recover for negligent infliction of emotional distress. Prosser & Keaton on Torts, § 54 (5th ed. 1984); *see Payton v. Abbott Labs*, 386 Mass. 540, 437 N.E.2d 171 (1982).

The bodily harm essential to sustain a claim for relief for negligent infliction of emotional distress is defined in Restatement Second Torts § 15 (1965) as "any physical impairment of the condition of another's body, or physical pain or illness." Bodily harm may be caused not only by impact or trauma, but also by emotional stress. *Payton v. Abbott Labs, supra*, 386 Mass. 540, 437 N.E.2d 171 n. 5; Restatement 2d Torts § 436(2) (1965).

Comment c. of the Restatement Second Torts § 436A (1965) further explains the nature of the requisite "bodily harm":

> The rule stated in this Section applies to all forms of emotional disturbance, including temporary fright, nervous shock, nausea, grief, rage, and humiliation. The fact that these are accompanied by transitory, non-recurring physical phenomena, harmless in themselves, such as dizziness, vomiting, and the like, does not make the actor liable where such phenomena are in themselves inconsequential and do not amount to any substantial bodily harm. On the other hand, long continued nausea or headaches may amount to physical illness, which is bodily harm; and even long continued mental disturbance, as for example in the case of repeated hysterical attacks, or mental aberration, may be classified by the courts as illness, notwithstanding their mental character. The becomes a medical or psychiatric problem, rather than one of law.

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[4]Section 436A provides: "If the actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another, and it results in such emotional disturbance alone, without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance."

(Emphasis added.)

The minority of jurisdictions which have dispensed with the bodily harm requirement for negligent infliction of emotional distress nonetheless require "serious" or "severe" emotional distress in place of bodily harm. *Rodrigues v. State*, 52 Hawaii 156, 472 P.2d 509 (1970) (severe emotional distress); *Bass v. Nooney Co.*, 646 S.W.2d 765 (Mo. 1983) (emotional distress or mental injury must be medically diagnosable and must be of sufficient severity so as to be medically significant); *Schultz v. Barberton Glass Co.*, 4 Ohio St. 3d 131, 447 N.E.2d 109 (1983) (serious emotional distress); *Johnson v. Supersave Markets, Inc.*, 211 Mont. 465, 686 P.2d 209 (1984) (in determining whether distress is compensable, look at whether tortious conduct results in substantial invasion of a legally protected interest and causes a significant impact upon plaintiff).

In order to recover for mental anguish damages, certain restrictions are placed: (1) a claimant must either view the accident or injury-causing event or come upon the accident scene soon thereafter and before substantial change has occurred in the victim's condition; (2) the direct victim of the traumatic injury must suffer such harm that it can reasonably be expected that one in the plaintiff's position would suffer serious mental anguish from the experience; (3) the emotional distress sustained must be both serious and reasonably foreseeable to allow recovery, a non-exhaustive list of examples of serious emotional distress includes neuroses, psychoses, chronic depression, phobia and shock; (4) the

relationship between the claimant and the victim must be such as to make the causal connection between the defendant's conduct and the harm suffered understandable. *Lejeune v. Rayne Branch Hospital*, 556 So.2d 559 (La. 1990).

The *Lejeune* court declared that there must be "severe and debilitating" emotional injury described as follows:

> For instance, *Paugh v. Hanks*, 6 Ohio St.3d 72, 451 N.E.2d 759, 765 (1983), held that 'serious emotional distress may be found where a reasonable person, normally constituted, would be unable to cope adequately with the mental distress engendered by the circumstances of the case.' A non-exhaustive list of examples of serious emotional distress includes neuroses, psychoses, chronic depression, phobia and shock.

556 So.2d at 570. *Accord, Blair v. Tynes*, 610 So.2d 956, 963 (La.App. 1st Cir. 1992); *Martin v. Francis*, 600 So.2d 1382, 1385 (La.App. 1st Cir. 1992).

In the instant case, the mental distress that accompanied the fatal injury to her father was described by Meek as insomnia and depression (for both of which she took prescribed medication), trouble with her short-term memory, a strong reaction to loud noises, bad dreams, and an inability to stop reliving the events. FDLA submits that, even if Florida was one of those states that did not require bodily injury, such "conditions" do not rise to the level of severe and debilitating emotional injury.

FDLA further submits that it is important to note that Meek did not claim any type of neurosis, psychoses, chronic depression, phobia or shock. *Accord, Muchow v. Lyndbald*, 435 N.W.2d 918, 922 (N.D. 1989) (allegation that plaintiff suffered severe emotional anxiety and concomitant physical impact, including loss of sleep

and loss of weight are transitory and inconsequential and therefore not "bodily harm"). The emotional distress must be beyond that which would be anticipated in a disinterested witness. *Thing v. La Chusa*, 48 Cal.3d 644, 257 Cal.Rptr. 865, 771 P.2d 814 (1989). The allegations of suffering alleged by Meek are reactions that would be anticipated in a disinterested witness and which are not an abnormal response to the circumstances. Anyone who had witnessed the immediate aftermath of the bombing that killed Meek's father would have likewise suffered from insomnia and depression, trouble with short-term memory, a strong reaction to loud noises, bad dreams, and an inability to stop reliving the events. Those are normal responses to the circumstances of the case.

This court, however, adopted the test that requires that the mental and emotional harm must be ***accompanied*** by physical consequences. *Champion v. Gray*, *supra*, 478 So.2d at 19, 20 n. 4. The Rhode Island supreme court has likewise adopted that test that a claim for physic trauma be accompanied by discernible bodily harm. *Reilly v. United States*, 547 A.2d 894 (R.I. 1988).

The *Reilly* court discussed the reasons for the physical symptomatology requirement. The *Reilly* court cited to its prior decision in *D'Ambra v. United States*, 114 R.I. 643, 338 A.2d 524 (1975), wherein the court discussed the concept that there must be a physical manifestation of an emotional injury in order to recover damages for the negligent infliction of emotional distress. "Despite the admitted artificiality of linking recovery for mental distress to the possibility of physical injury, this limitation

does reflect the core notion of some reasonable relation or nexus between the negligent conduct and the injury sued upon. Moreover, being a rule that is relatively easy to administer, it has the virtue of predictable application." *Id.* at 656, 338 A.2d at 530-31.

The *Reilly* court noted that it was evident that the *D'Ambra* court held as an essential prerequisite for bystander recovery the fact that the plaintiff's mental and emotional harm must be ***accompanied*** by physical symptoms.

The physical symptoms requirement is to ferret out the claims most amenable to fraud. *D'Ambra v. United States*, 354 F.Supp. 810, 818 (D.R.I. 1973). It must be noted that the *Reilly* court was answering two (2) questions certified to that court from the United States District Court for the District of Rhode Island. The District Court declared that it was the objective manifestation of the injury which was crucial, not whether the injury was, in conventional terms, physical or mental. *D'Ambra v. United States*, 396 F.Supp. 1180, 1183 (D.R.I. 1973).

The *Reilly* court likewise based its adherence to the physical symptomatology requirement on two of the explanations listed in comment b to Restatement (Second) Torts § 436A (1965). *Reilly v. United States*, *supra*, 547 A.2d at 897. The court declared that first, "in the absence of the guarantee of genuineness provided by resulting bodily harm, such emotional disturbance may be too easily feigned, depending, as it must, very largely upon the subjective testimony of the plaintiff; and that to allow recovery for it might

open too wide a door for false claimants who have suffered no real harm at all." Second, "is that where the defendant has been merely negligent, without any element of intent to do harm, his fault is not so great that he should be required to make good a purely mental disturbance."

The *Reilly* court continued that the first explanation deals with the essential problem concerning claims for emotional distress: the inherent difficulty of proof. "Emotional distress is an injury with vague and ambiguous symptoms. The evidence of the illness is in the subjective control of the sufferer." *Id.* Although the court recognized that a mental injury may not be less genuine absent physical symptomatology, the court believed that because of the nature of the illness it was too difficult to substantiate absent objective physical symptomatology.

The court agreed with the observation made by the late Justice Samuel Roberts of the Pennsylvania Supreme Court in his dissenting opinion in *Sinn v. Burd*, 486 Pa. 146, 177-78, 404 A.2d 672, 688 (1979):

> If there is no reasonable measure of plaintiff's pain, then any recovery will be essentially speculative. Then, too, the nature of our society requires of each of us a remarkable degree of emotional fortitude. It is not unreasonable to draw the line between that degree which is required and that which is not by reference to that emotional distress which causes serious physical injury or harm. And it cannot be denied that if not the genuineness, then at least the intensity and thus the nature of the injury, may be difficult to assess where it causes no physical injury.

The *Reilly* court declared that in requiring physical symptomatology as an element of a claim for negligent infliction of

emotional distress, the court focused their attention and their concern on the subjectivity inherent in a claim for purely emotional distress. Accordingly, the court adopted the reasoning applied by the Supreme Judicial Court of Massachusetts when faced with the same problem. It stated:

> The task of determining whether a plaintiff has suffered purely emotional distress, however, does not fall conveniently into the traditional categories separating the responsibilities of the judge from those of the jury. A plaintiff may be genuinely, though wrongly, convinced that a defendant's negligence has caused her to suffer emotional distress. If such a plaintiff's testimony is believed, and there is no requirement of objective corroboration of the emotional distress alleged, a defendant would be held liable unjustifiably. It is in recognition of the tricks that the human mind can play upon itself, as much as of the deception that people are capable of perpetrating upon one another, that we continue to rely upon traditional indicia of harm to provide objective evidence that a plaintiff actually has suffered emotional distress.

Id., *citing to Payton v. Abbott Labs*, *supra*, 386 Mass. 540 at 547, 437 N.E.2d at 175.

The *Reilly* court further declared that the second reason for denying recovery for negligent infliction of emotional distress absent physical symptomatology was that when a defendant's actions had been negligent, as opposed to intentional, his or her fault is not so great that he or she should be held responsible for purely mental disturbance. "We are focusing 'not on the nature of the plaintiff's loss, but on the source and scope of the defendant's liability.' *Norwest v. Presbyterian Inter-community Hospital*, 293 Or. 543, 558, 652 P.2d 318, 327 (1982). We are reluctant to impose potentially unlimited and undeserved liability upon a defendant who is guilty of unintentional conduct." *Id.* at 897-898.

FDLA submits that this court has already answered the question certified to this court by the First District as to the interval of time between a psychic trauma and manifestation of physical trauma in both footnotes 1 and 4 in its opinion in *Champion v. Gray*, *supra*, 478 So.2d at 19, 20. Footnote 1 declares: "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."

Footnote 4 declares: "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." "Accompany" is defined as to go with as an associate or companion. Merriam Webster's Collegiate Dictionary, p.7 (10th ed. 1993). Logic dictates that one cannot go with as a companion unless the "one" and the "companion" go simultaneous with each other. Consequently, the mental distress and significant discernible physical injury must occur simultaneously. FDLA submits that the accompany requirement is to prevent cases such as the instant case. The physical symptomatology did not accompany the mental distress.

An excellent example of the physical symptomatology accompanying the mental distress was that as presented in *Champion*. A mother heard the impact that occurred when a drunken driver struck and killed her daughter, came immediately to the accident scene, saw her daughter's body, and was so overcome with shock and

grief that she collapsed and died on the spot. That factual scenario is far removed from someone who suffers insomnia, has strong reactions to loud noises, bad dreams, trouble with short-term memory, and an inability to stop reliving the events not followed by any physical symptomatology until some nine months later when the bystander developed severe pains in the upper area of her stomach. However, even severe pains in the upper area of her stomach does not rise to the level of significant discernible physical injury.

FDLA submits, however, that this court should accept jurisdiction because obviously there is confusion over this court's statements that a causally connected clearly discernible physical impairment must accompany or occur within a short time of the psychic injury. *Champion v. Gray*, *supra*, 478 So.2d at 19. The phrase "occur within a short time" should be read in conjunction with or modified the word "accompany." When so read, it cannot be said that nine months is within a short time of the psychic injury. One who goes with a companion can walk a couple of steps behind and still accompany his companion but cannot walk a mile behind and still be said to accompany that companion.

Of interest to this court's ruling in *Champion v. Gray* is the fact that the California supreme court has refined the foreseeability test announced in *Dillon v. Legg*, has been refined to create greater certainty in the area of negligent infliction of emotional distress. *Thing v. La Chusa*, 48 Cal.3d 644, 257 Cal.Rptr. 865, 771 P.2d 814 (1989). The *Thing* court observed that

drawing arbitrary lines was avoidable if the court was to limit liability and establish meaningful rules for applications by litigants in lower courts. The court noted that experience had shown that "there are clear judicial days in which a court can foresee forever and thus determine liability but none on which that foresight alone provides a socially and judicially acceptable limit on recovery of damages for that injury." Such is akin to what has occurred in the instant case.

Although not an issue in the instant case, FDLA would like to draw to this court's attention to *Sims v. General Motors Corp.*, 751 P.2d (Wyo. 1988). In that case, the plaintiffs brought an action against General Motors Corporation for injuries suffered by them when a seatbelt buckle in an automobile manufactured by General Motors allegedly failed to release after the vehicle caught on fire.

The facts were that Marjorie was driving a Chevrolet Chevelle Malibu accompanied by her daughters, Margo and Lara, when she noticed flames coming from the left rear of the vehicle. When the automobile was stopped, Lara unlatched the passenger door but could not exit the automobile because she could not get her seatbelt buckle apart. Marjorie attempted to open Lara's seatbelt buckle but when met with unsuccess, she grasped Lara under the arm and groin and jerked upward and outward, freeing Lara. Marjorie and Lara received serious burns.

As relates to the instant case, the plaintiffs alleged that the trial court erred when it issued a directed verdict to General

Motors regarding Margo Sims' claims of negligence and negligent infliction of emotional distress. In holding that the trial court did not err, the *Sims* court quoted from *Gates v. Richardson*, 719 P.2d 193 (Wyo. 1986), wherein the court recognized that the claim of negligent infliction of emotional distress was actionable in the state of Wyoming. The *Gates* court stated that once certain conditions were satisfied, the case could go forward under normal negligent principles. "The defendant must have been negligent and his negligence must be the proximate cause of the plaintiff's mental injuries." *Id.* at 200-01.

The *Sims* court held that Margo failed to meet her burden of proof in showing that her emotional injuries were proximately caused by any negligence on the part of General Motors. "In order for a plaintiff to recover on a claim of negligent infliction of emotional distress, that plaintiff must show that the emotional distress resulted from death or serious physical injury to persons within a specified group *as a result of the defendant's negligence*." In the instant case, FDLA submits that First Property was not the cause-in-fact of Meek's alleged injuries. The mystery bomber was the cause-in-fact of Meek's alleged injuries. Consequently, it is questionable whether or not Meek can allege a negligent infliction of emotional distress against First Property because of the lack of proximate causation.

CONCLUSION

FDLA respectfully requests that this Honorable Court accept jurisdiction and quash the opinion of the First District.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Arnold R. Ginsberg, Esq., 410 Concord Building, 66 W. Flagler Street, Miami, Florida 33130, Christopher C. Hazelip, Esq., 1301 Gulf Life Drive, Suite 1500, Jacksonville, Florida 32207 and Jack Shaw, Jr., Esq., Suite 1400, 225 Water Street, Jacksonville, Florida 32202-5147, this 19th day of July, 1994.

SHARON LEE STEDMAN, Attorney at Law